1904

A DIGEST OF ADJUDGED CASES IN THE Court of King's Bench, FROM THE REVOLUTION TO THE PRESENT PERIOD,

Alphabetically arranged under the different Heads of Practice.

COMPREHENDING

All the approved Determinations during the Time that the Lord Chief Justices

HOLT, PARKER, PRATT, RAYMOND,	HARDWICKE, LEE, AND RYDER,

Preſided on that Bench; and alſo thoſe of the preſent Lord Chief Justice.

By a GENTLEMAN of Lincoln's Inn.

LONDON,
Printed by W. STRAHAN, and M. WOODFALL, Law-Printers to the King's Moſt Excellent Majeſty;
For G. KEARSLY, at No. 46, in Fleet-street; and G. ROBINSON, in Pater-Noster Row.
M.DCC.LXXV.

THE

PREFACE.

THE various improvements made of late years in every branch of learning, are preſumed a ſufficient reaſon for the preſent attempt to facilitate the ſtudy and practice of the law.

Adjudications unanimouſly given on right principles, are of ſo great authority, that the direct point once determined becomes a ſtanding rule for poſterity, and eſtabliſhes certainty in practice; conſequently, the moſt perſpicuous method of teaching the law is by means of reports.

But thoſe of the Court of KING'S BENCH alone, as they now lie ſcattered in a vaſt number of different volumes, are ſo voluminous and expenſive, as to exceed the ability of the younger part of the profeſſion to purchaſe; and to ſearch and examine a variety of books for a particular caſe, requires more time and attention than the practitioner can ſpare, without neglecting the neceſſary duties of his office.

The ſubſtance of ſuch a MULTIPLICITY OF REPORTERS, comprized in a narrow compaſs, therefore cannot fail of being equally acceptable and uſeful to the profeſſion in general, and, particularly, to gentlemen in any practical branch of the law; there being no caſe, however immaterial or inſignificant it may appear at firſt ſight, which ſome time or other may not convey neceſſary inſtruction: And as the utility of this performance greatly depends upon the facility with which it enables the STUDENT or PRACTITIONER to find any particular matter that may be wanted, the utmoſt care has been taken to ſtate with accuracy, collect in one point of view, and arrange in alphabetical order, under the different HEADS OF PRACTICE, every thing at preſent diſperſed in the numerous collection of reports in this court.

Convinced

The PREFACE.

Convinced of the neceſſity of ſuch a DIGEST, and encouraged by ſeveral ſhining characters, men of diſtinguiſhed judgment in matters of this nature, the Author chearfully undertook the taſk, unawed by the many difficulties which perhaps have prevented others from an undertaking of this kind; from the conſideration, that though his labours ſhould not immediately conduce to his own emolument, they would eſſentially contribute to the ſervice and eaſe of his brethren.

Such were his inducements to this publication; wherein nothing is omitted that is to be found in any of the KING'S BENCH REPORTERS of authority, that have appeared ſince the revolution, with the addition of many valuable Manuſcript Caſes hitherto unpubliſhed.

The improvement and eaſe of the reader is not alone conſidered, but his pecuniary advantage alſo. This Work is therefore printed in ſuch a manner, though on a proper ſized type, that a few ſheets only contain as much as has uſually been given in a folio volume of Reports. And hence the purchaſer, at the trifling expence of two guineas, is enabled to become maſter of what is at preſent ſold for almoſt thirty pounds.

This Work was originally publiſhed by ſubſcription in numbers, and was received (if we may judge from the extenſiveneſs of the ſale) with the general approbation of the gentlemen of the law.

As its evident utility has induced the candid and judicious to give a favourable reception to this firſt attempt, the Author is encouraged to complete his original plan, and publiſh the adjudged Caſes in the other Courts at WESTMINSTER, during the above period, digeſted in the ſame manner.

LINCOLN'S INN,
June 1ſt, 1775.

A
DIGEST
OF
ADJUDGED CASES
IN THE
Court of King's Bench.

Abatement

To the Writ, and to the Action.

Michaelmas, 7 *W*. 3. *Bowyer* v. *Cooke*.

IN debt againſt the defendant, as executrix: ſhe pleaded that her huſband died inteſtate, and that letters of adminiſtration had been granted to her by the Archbiſhop of *Canterbury*, by means whereof ſhe adminiſtered to the goods and chattels of *John Cooke* her huſband, *wherefore ſhe prays judgment*, not being compelled to anſwer. On demurrer to this plea, the queſtion was, Whether ſhe ſhould not have traverſed that ſhe was executrix, or ever adminiſtered as executrix? *Chief Juſtice*. Every plea muſt have its proper concluſion; now *reſpondere non debet*, is proper to the juriſdiction, which, 'tis true, is in conſequence in *abatement*; but they are two diſtinct things, and you muſt begin and conclude the plea properly. There ought not to be a traverſe, and the plea is much better without it: Let the defendant anſwer over for the other faults. *Vid. Mod. Rep. vol.* 5. *p.* 145.

Hilary, 8 *W*. 3. *Jones* v. *Bodeenor*.

Defendant, an attorney of the Common Pleas, was ſued by *J. S.* in *B. R.* gave bail, and was declared againſt as in cuſtody: the ſame term *Jones* delivered a declaration by the bye againſt him, to which he pleaded his privilege: to the plaintiff's replication, that the defendant was *in cuſtod. mareſc.* at the ſuit of *J. S.* and delivered out to bail, and that pending the above ſuit, he exhibited his bill *ſecund. curſ. curiæ*; the defendant demurred. The council on behalf of the plaintiff inſiſted, that by giving bail the defendant had acknowledged the juriſdiction of the court, and waived his privilege. It was the opinion of the court, that the defendant might plead his privilege to the firſt action, becauſe he comes here by coercion, and had no opportunity of pleading it before. 27 *H*. 6. *c*. 7. Though a man be *in cuſtodia mareſc.* he may claim conuſance, *pari ratione*, may plead his privilege, and it is abſurd that the defendant ſhould be in a worſe condition with reſpect to *Jones* than he was to the firſt plaintiff, when the ſecond ſuit is topped on the action of the firſt plaintiff. Yet the court held, that if his privilege had been waived as to the firſt action, it would have been waived as to the ſecond alſo. *Vid. Raym. vol.* 1. *p*135.

Hilary, 8 *W*. 3. *Rex* v. *Biſhop of Cheſter*, *Pierce and Cooke*. Error.

In this cauſe the court gave judgment for the plaintiff on a writ of error brought to remove a writ of *quare impedit*, for the variance between the pleading and the letters patent; the defendant having ſet forth a grant made to *William Feekſtone*, *tunc armigero poſtea militi*, when on *oyer* of the letters patent they appeared to be granted to *William Feekſtone*, *militi*; on this principle, that he could not be a knight and an eſquire at the ſame time; *knight* being a word of dignity, and part of his name, but *eſquire* not, according to all the old authorities. *Vid. Mod. Rep. vol.* 5. *p.* 302.

Michaelmas, 8 *W*. 3. *Duncombe* v. *Church*, *Warden of the Fleet*.

The defendant *ſalvis ſibi omnibus adv. ad bill.* &c. pleaded, that he was an officer of the court of *C. B.* and that no officer of that court could be ſued except before the juſtices of the *Common Pleas*. The plaintiff replies, that *temp. exhibit. bill.* the defendant was in cuſtody of the Marſhal of the *Marſhalſea in quodam placito debiti ad ſect. A. B.* On demurrer the court was of opinion, 1. That the want of a *prout patet* is only matter of form, and helped by a general demurrer, becauſe without ſuch concluſion if a record is pleaded, the other party may reply *nul tiel record*. 1 *Saund.* 98. This is no plea after imparlance.

2. That the warden may plead his privilege though a bill is filed againſt him as in cuſtody; the difference according to Chief Juſtice *Holt* being, that where a perſon is in actual cuſtody, he is liable to all actions; but if he is in court on bail, he may plead his privilege, as the ſheriff cannot take notice of it, ſo that he muſt give bail. Beſides, this is no plea to the bill, but to the juriſdiction; and the clauſe of *ſalvis omnibus, &c.* ought to be to the juriſdiction as well as to the bill. *Vide Salk. vol.* 1. *caſe* 1.

Michaelmas, 8 *W.* 3. *Peaſe* v. *Parſons.*

The defendant pleaded that he was *unus attornatus cur. Dom. Regis de Banco*, without ſaying *tempore impetrationis brevis:* a *reſpondeas ouſter* awarded. *Vid. Salk. vol.* 1. *caſe* 2.

Eaſter, 10 *W.* 3. *Vid. Rol. K. B.* 9 *W.* 3. *Bonner* v. *Hall.*

On an *indebitatus aſſumpſit* the defendant pleads in abatement, another action depending in the *C. B.* for the ſame cauſe; the plaintiff replies, that no action was depending for the ſame cauſe, and therefore *petit judicium de debito & damnis*, on which the defendant demurs, the plaintiff joins in demurrer, and concludes rightly. *Per* J. C. *Holt.* This caſe differs from that of *Biſſe* and *Harcourt*, the plea there being good; and when the plaintiff replied new matter to maintain his writ, he ſhould have made his replication accordingly; where the plaintiff traverſes the defendant's plea in his replication, and offers an iſſue, he may pray judgment *de debito & damnis*, becauſe if the matter is tried, peremptory judgment ought to be given; but in this caſe the firſt fault is in the defendant, the plea being ill, and therefore the defendant was ordered to anſwer further. *Vid. Raymond, vol.* 1. *page* 339.

Trinity, 10 *W.* 3. *Owen* v. *Butler.*

In debt on bond on *oyer* craved, the condition appeared to be that the defendant ſhould pay three ſums of money at three ſeveral days. The defendant pleads in abatement that he has paid the money due at the two firſt days, and that the third day of payment is not yet come. On demurrer, it was adjudged that the defendant anſwer over. *Vid. Raymond, vol.* 1. *page* 344.

Trinity, 10 *W.* 3. *Williams* v. *Drury.*

On an *aſſumpſit*, the defendant pleaded a miſnomer in abatement, to which the plaintiff demurred, becauſe the defendant had laid no *venue.* Held by the the court unneceſſary, becauſe pleas concerning the perſon muſt be tried only where the action is laid. *Vid. Mod. Rep. vol.* 12. *p.* 195.

Michaelmas, 10 *W.* 3. *Clarke* v. *Butler.*

In *aſſault* the defendant pleaded *defendit vim et injuriam quando, &c.* and would afterwards have pleaded a miſnomer; it was objected on behalf of the plaintiff, that the defendant could not plead a miſnomer, or to the juriſdiction of the court, after having pleaded as aforeſaid, becauſe he had admitted his identity by that name. *Vid. Mod. Rep. vol.* 12. *p.* 235.

Trinity, 11 *W.* 3. *Lacy* v. *Williams.* Error.

In error on a judgment in *C. B.* the *general errors* were aſſigned, and the ſame point argued here as in that court, *viz.* whether a recovery in which there was no tenant to the *precipe* before the writ of ſummons iſſued, and then a tenant was made to the *precipe* pending the writ, and before the return thereof, and the recovery paſſed, Whether this common recovery was good? The judgment was affirmed *niſi*; and on the laſt day of term, on further argument, the court continuing of their former opinion, the rule was made abſolute. *Vid. Raym. vol.* 1. *p.* 475.

Hilary, 11 *W.* 3. *Cremer* v. *Wickett.*

In an action on the *caſe* for falſe impriſonment, the defendant pleaded a miſnomer in abatement by attorney; the plaintiff demurred, and excepted to the plea, becauſe miſnomer cannot be pleaded by attorney, for the defendant having filed his warrant of attorney in the name by which he has been declared againſt, he ſhall be eſtopped by his warrant, to ſay afterwards that he is known by another name. C. J. *Holt* was of opinion that this was good cauſe to refuſe the plea, but if received, no cauſe of demurrer; and as to the eſtoppel that the entry of the warrant of attorney on the roll was only a memorandum, and on a conference with his brethren, judgment was given *quod billa caſſetur. Vid. Mod. Rep. vol.* 12. *page* 273. *Raymond, vol.* 1. *page* 509.

Michaelmas, 11 *W.* 3. *Newton* v. *Rowland.*

On an *indeb. aſſumpſit* for 100 *l.* againſt an executor; the defendant pleaded in abatement he was an attorney of the *Common Pleas*, and prayed his privilege, but was ruled to anſwer over, his privilege extending only to actions brought againſt him in his own right. *Vide Raymond, vol.* 1. *p.* 533.

Eaſter, 12 *W.* 3. *Cremer* v. *Wickett.*

In an action of *aſſault*, the defendant pleaded in abatement, another action for the ſame aſſault depending in this court; the plaintiff replied *nul tiel record*, and entry was made *quia curia domini regis hic ſe adviſare vult ſuper inſpectione & examinatione recordi, &c. dies datus eſt, &c.* The defendant filed his demurrer, and refuſed to pay for entering his plea, on which account plaintiff ſigned final judgment. The queſtion before the court was, Whether the demurrer was regular? The judgment was ſet aſide, and the plea ſtood as of the laſt term, and a day was given to inſpect the record as of this term. *Vid. Raymond, vol.* 1. *page* 550.

Eaſter, 12 *W.* 3. *Roſiere* v. *Sawkins.*

In treſpaſs againſt a maſter for beating of his ſervant *per quod ſervitium, &c.* the defendant pleaded *actio non*, becauſe it did not appear that the plaintiff was his ſervant at the time of ſuch aſſault, concluding his plea with a *petit judicium de billa et quod billa caſſetur:* the point taken up by the court, was, whether the concluſion made this a plea in abatement. *Per Holt: Billa* and *narratio* are the ſame in this court, wherefore judgment may be demanded of the bill, and inſufficiency alledged in the declaration, and though ſuch a plea as this ought not to be received, yet as it has been accepted, let a *reſpondeas ouſter* be awarded; for the defendant cannot aſſign it for error, becauſe advantageous to him, and we are juſtified in giving final judgment; a rule was accordingly made. *Vid. Mod. Rep. vol.* 12. *page* 399, and *Raymond, vol.* 1. *page* 593. *Medina* v. *Stoughton.*

Eaſter, 13 *W.* 3. *Veſey* v. *Smith.*

In *debt* for goods ſold and delivered againſt a woman, who pleaded in abatement *coverture* at the time the action was brought; the plaintiff replied, that the defendant was *ſole* and not *covert*, and concludes to the country; it was objected by the defendant, that the replication was ill, for that it ſhould have been taken with an *abſque hoc*, that ſhe was *covert*, and not as in the replication *and not covert.* Lord Chief Juſtice *Holt* ſaid ſuch a plea to a writ needs no *venue*, but may be tried where the writ is brought, but if pleaded in *bar*, there muſt be a replication, and that muſt ſhew the place of the party's birth in *England*, from whence a *venue* may ariſe; and though there are precedents both ways, yet this is a true difference, and the defendant muſt ſhew and prove the *coverture*; and ſaying in the replication that ſhe was *ſole*, implies the negative of a marriage, as much as that ſhe was not *covert.* If the plea had been in *bar*, the marriage muſt have been laid at a certain time and place; but being in *abatement* it is good, tho' laid generally, but the huſband's name ought to be ſhewn, that the plaintiff may know againſt whom to have his writ. *Vid. Mod. Rep. vol.* 12. *page* 564.

Eaſter, 1 *Ann.* *Brookes* v. *Stroud.*

Two executors ſued, and ſet forth to be executors, and that they themſelves proved the will; but by the probate, it appeared that only one proved the will: the defendant pleaded this in abatement; but a *reſpondeas ouſter* awarded, for both executors have the right in them, and he that did not prove may come in when he pleaſes, but cannot refuſe during the life of him that has proved, *Vide Salk. vol.* 1. *caſe* 6.

Trinity, 1 *Ann.* *Smith* v. *Villars.*

The defendant was arreſted as *J. Villars Armiger*, and pretended himſelf to be Earl of *Buckingham*; on a motion the queſtion was, how he ſhould put in bail ſo as not to eſtop him. *Per cur.* He need not join in the recognizance, and then there is nothing to eſtop him: in civil actions it is not abſolutely neceſſary for the defendant to be joined in recognizance, as in criminal; and even there on motion the Earl of *Banbury*, upon an indictment, was allowed to find others who gave bail for him, by the name of *G. Knowles*, Eſq; as their act could not conclude him. *Vide Salk. vol.* 1. *caſe* 7.

Michaelmas, 1 *Ann.* *Anonymous.*

On a *reſpondeas ouſter*, the defendant pleaded the general iſſue; the court awarded, that the plaintiff may ſign judgment, if the defendant's attorney on re-delivering back a copy of the iſſue will not pay for it; the old courſe was, to deliver in a copy of the whole record, *viz.* the declaration, plea in abatement, &c. and iſſue; but the court made a rule, that for the future a copy of the *narr.* and iſſue ſhould only be paid for. *Vid. Salk. caſe* 2.

Michaelmas, 1 *Ann.* *Fiſh* v. *Horner.*

In an action of debt on a judgment in the *Common Bench*, pending a writ of error, ſuch writ being pleaded in abatement, in ſupport of ſuch plea, the caſe of *Cremer* v. *Wickett* was cited. *Powell* Juſtice ſaid this plea had often been attempted, but without effect, and it had been ſo reſolved by all the judges on mature conſideration; and further, that the court would diſcountenance ſuch proceedings, and therefore refuſed to hold the party to bail. *Vide Mod. Rep. vol.* 7. *page* 62.

Michaelmas, 1 *Ann.* *Ode* v. *Nortcliffe.*

Defendant pleaded that he was an attorney *de C. B.* and ought not to be ſued *alibi abſque conſenſu*; plaintiff replied, he did conſent, but laid not a *venue* where, the replication therefore was adjndged bad. *Vide Salk. caſe* 8.

Michaelmas, 1 *Ann.* *Haywood* v. *Davies* & *al.*

In treſpaſs againſt *A.* and *B.* for taking water out of the plaintiff's well; *A.* and *B.* pleaded in abatement that *B.* was tenant in common with the plaintiff of the ſaid well; the plaintiff replied he was ſole ſeiſed, *abſque hcc*, that he was tenant in common with the defendant *B. et de hoc ponit ſe ſuper patriam.* To this it was demurred, and a *reſpondeas ouſter* awarded; the point in diſpute was, whether the plaintiff ſhould not have concluded his *abſque hoc* with an averment: and the court ſeemed to think that where an *abſque hoc* comprizes the whole matter generally, as *abſque tali cauſa*, it may conclude & *de hoc ponit ſe ſuper patriam*; but where it only traverſes a particular matter, as *abſque tali warranto*, &c. it ought to be averred; but the chief juſtice held this not ſuch a particular matter as need be averred, becauſe 'tis to maintain his writ. *Vide Salk. vol.* 1. *caſe* 10.

Michaelmas, 2 *Ann.* Earl of *Banbury* v. *Wood.*

In a *homine replegiando* the defendant appeared and pleaded in abatement, that there was no addition of place, vill, or hamlet: the plaintiff demurred; for replevin is not *vi* & *armis*, and in actions *vi* & *armis* proceſs of outlawry lay only, and no addition is neceſſary where ſuch proceſs does not lie: and the 25 *E.* 3. *c.* 17. does not extend to replevin. *Opinion of the court.* Proceſs of outlawry lies in replevin, and the King may have a fine. *See* 25 *H.* 6. *c.* 6. 2 *Ro.* 805. *n. ſ.* 1 *Inſt.* 128. *b. Plo.* 228. *N. Br.* 220. *H.* But this is not by common law nor upon the original; but the ſtatute of *E.* 3. gives the exigent, which iſſues on the *pluries* returned; for the original is *vicontiel*, and is determined: the words of the ſtatute of *H.* 5. are, *in every original in actions perſonal wherein proceſs of exigent lies*, &c. That ſtatute is conſtrued ſtrictly. And an aſſize of *novel diſſeiſin* is not within it, though the King ſhall have a fine; and *exigent* lies becauſe it is a mixed action; ſo here it muſt be ſuch an original as the court can proceed on, not an original that is determined. In this caſe the original *replevin* is *vicontiel*, and the court proceeds on the *pluries*, therefore the firſt *replevin* needs no addition within the ſtatute; and where the firſt writ is without addition, it cannot be neceſſary in the ſecond, nay, the inſerting ſuch an addition would vitiate the ſecond writ, becauſe where any writ or proceſs is founded on a former, it muſt not vary from ſuch firſt writ. *Vide Salk. vol.* 1. *caſe* 13. *Mod. caſes* 115, 198.

Hilary, 2 *Ann.* *Croſs* v. *Bilſon.*

In *replevin* the plaintiff declared for taking his mare *in quodam loco vocat.* the King's highway; the defendant *venit* & *defendit vim* & *injur.* &c. *Et ut ballivus*, &c. *bene cognoſcit captionem equæ præd. in quodam loco voc.* the King's highway, & *juſte*, &c. *quia* it was the freehold of my Lord *Lemſter*, &c. *abſque hoc*, that he took the mare in the place called the King's highway; & *hoc* &c. *unde pet. judicium* & *retorn.* &c. plaintiff replies *juſt. cognoſcere non debet quia dic. quod cepit equam præd. in loco vocat.* the King's highway, & *hoc pet. quod inquiratur per patriam*; defendant demurs, and concludes, *Unde ut prius pet. judic.* & *quod narr. præd. caſſetur.* the plaintiff joins in demurrer, final judgment awarded in the *C. B.* for the plaintiff, and affirmed here on error brought. *Vid. Mod. Rep. vol.* 6. *page* 102. *Raymond, vol.* 2. *page* 1016.

Trinity, 2 *Ann.* *Preſgrave* v. *Saunders.*

In *replevin* for ſeveral goods taken in a chamber in *Devereux-Court*; defendant pleaded *actio non quia dic. quoad* ſuch and ſuch, *proprietas eorum fuit ipſi def. abſque hoc*, that the property of them was in the plaintiff, & *hoc paratus eſt verificare*; & *quoad* others *dicit quod proprietas eorum fuit in quodam Richardo Frith, abſque hoc, quod querenti*, & *hoc paratus eſt verificare. Unde pet. judic. ſi fuit præd. quer. actionem ſuam habere debeat*, &c. *pet. etiam retorn. bonorum*, &c. *cum damnis*, &c. On demurrer it was objected, that property in a ſtranger ought to be pleaded in abatement, and not in bar. The court thought differently, and ſaid, that it had been adjudged otherwiſe, and the law is otherwiſe, for it utterly deſtroys the plaintiff's action, and may be pleaded either in bar or abatement, for whether the defendant or a ſtranger have the property, 'tis all one to the plaintiff as he has none himſelf. *Vide Raymond, vol.* 2. *page* 984.

Trinity, 2 *Ann.* *The Counteſs of Banbury* v. *Knolls* and *Wood.*

In a *homine replegiando* on oyer of the writ which was a *pluries*; the defendant pleaded in abatement the following variance from the regiſter, that the words *ad ipſorum* (*præfatæ Mariæ Comitiſſæ* Banbury & Caroli Knolls, &c.) *damnum non modicum* & *gravamen* were omitted, to which the plaintiff demurred. *Per curiam.* The *pluries* complaining of the delay done to the plaintiff in not executing the firſt writ and the *alias*, theſe words *ad ipſorum damnum*, &c. are a material

terial part of the writ, though not of the *alias*, and therefore the writ varying from the regiſter in a material point, the writ muſt be abated. *Vide Raymond, vol.* 2. *page* 903.

Michaelmas, 2 *Ann.* *Lord Banbury* v. *Wood.*

On a *homine replegiando*, want of addition to the *pluries* was pleaded in abatement, and on demurrer the queſtion was, whether this was within the ſtatute of addition, 1 *H.* 5. *cap.* 5. On a ſecond argument all the judges were of opinion, that addition is needful to a writ *vicontiel*, and awarded a *reſpondeas ouſter*. *Vide Mod. Rep. vol.* 6. *page* 84.

Hilary, 2 *Ann.* *Walden* v. *Holman.*

The defendant being ſued by the name of *Benjamin*, pleaded in abatement that he was baptiſed and always known by the name of *John*, *abſque hoc*, that he the ſaid *John* was ever called or known by the name of *Benjamin*. The plaintiff replied, that he was known by the name of *Benjamin* from the time of his baptiſm. On demurrer it was inſiſted that the traverſe was needleſs and frivolous, the matter precedent being the ſubſtance of the plea, and that a man could have no other name than that he was baptiſed by. Judge *Powel* was at firſt of this opinion; but at laſt the court unanimouſly awarded a *reſpondeas ouſter*; Chief Juſtice *Holt* obſerving, that a perſon may have a name and ſurname, who never was baptiſed, as in fact numbers have; and that a man or woman may be baptiſed by one name, and be confirmed by another, an inſtance of which he mentioned, though he ſaid he was not ſatisfied that the firſt name ceaſed in ſuch caſe; and ſuppoſing it had been a ſufficient anſwer without more, to have ſaid the defendant was baptiſed by the name of *John*, yet ſaying he was baptiſed, *&c.* was no more than an inducement, which is waived by the traverſe, but in his opinion the traverſe and inducement were both material. *Vide Mod. Rep. vol.* 6. *page* 115. *Salk. vol.* 1. *caſe* 15.

Hilary, 2 *Ann.* *Lett* v. *Mills.*

The defendant pleading in abatement, that *ſuſcepit ordinem militarem et jam miles exiſtit*, on demurrer it was reſolved, that thoſe words were a very proper way of expreſſing that he had received the order of knighthood, that *miles*, without addition, is to be underſtood of a knight batchelor, which is part of a man's name, that whatever concerns the condition of the perſon ſhall be tried where the *venue* is laid, and that if a knight be ſued without his addition, it is a good plea in abatement. *Vide Mod. Rep. vol.* 6. *page* 105.

Michaelmas, 2 *Ann.* *Batterſby* v. *Marſh.*

The plaintiff in his bill ſtiles himſelf a gentleman, the defendant pleaded in abatement, that he was no gentleman, to which the plaintiff having demurred, the court held the plea good, being confeſſed by the demurrer; but it being after a general imparlance, the defendant was obliged to anſwer over. *Vide Mod. Rep. vol.* 6. *page* 80.

Michaelmas, 2 *Ann.* *Longvill* v. *Hundred of Thiſtleworth.*

There are two ſorts of pleas to abate the writ; firſt, to the action of it; ſecondly, that though it be right as to the action thereof, yet it may be defective in its frame for want of form, or from its not agreeing with the regiſter. *Vide Mod. Rep. vol.* 1. *p.* 27.

Trinity, 2 *Ann.* *Staples* v. *Heydon.*

In treſpaſs for breaking plaintiff's wharf and cutting down his fences, he declares againſt two defendants for two treſpaſſes done at different times; one of the defendants pleads *not guilty* as to the whole; the other pleads a ſpecial juſtificiation to both treſpaſſes, *viz.* that one *Gray* was poſſeſſed of this wharf and a timber yard adjoining for 90 years, and had and uſed a way from this yard over this wharf to the *Thames*, and being ſo poſſeſſed, did demiſe ſuch yard to *Heydon* for an under term; and that the plaintiff erected this fence, and thereby took away his right of paſſage, which the defendant had cut down; and in the leaſe was contained a grant of all *ways and paſſages*, *&c.* and *avers* that he had no other way to the river *Thames*. To this plea the plaintiff demurred, and to the other treſpaſs the defendant pleaded the ſame juſtification, and the plaintiff replied, that he had another way; on which iſſue was taken, and on the trial at *niſi prius* the defendant made default, and the inqueſt was taken by default, and a verdict for the defendant and 6 *d.* conditional damages on the demurrer; and the other defendant was found guilty of the firſt treſpaſs, and not guilty of the ſecond; the defendant moved for a repleader on the immaterial iſſue; but the court held that they could not award a repleader in this caſe, the defendant being by his default at the trial out of court, and therefore there could be no repleading. Chief Juſtice *Holt* ſaid, if the defendant had made out his title to the way in his plea, and then made an impertinent averment to which the plaintiff had replied and taken iſſue, a repleader would have been unneceſſary, for the verdict would have been aided by the ſtatute of *Jeofails*. *Powel*, J. ſaid it would have been aided by the ſtatute, but that there muſt have been a repleader if there had been no default, and in this caſe, he held it neceſſary to ſhew a title to the way; he made a difference between this and an action on the caſe for ſtopping a way, ſuch action being againſt a wrong doer, it is ſufficient to ſhew the poſſeſſion; but otherwiſe, where a man means to juſtify a treſpaſs by it. The court held that both the pleas were naught. *Holt*, Chief Juſtice, obſerved it was ill to plead the term of years, without ſhewing the commencement of the term, it being a kind of preſcription that could not be in a tenant for years; *ſaid*, had they pleaded that ſuch a one was ſeiſed in fee of both, that there was always a way uſed, *&c.* and that he had demiſed to *Gray*, and he to the defendant *prout*, it had been a good title, for then the ſame paſſed by the demiſe of *Gray* as *appurtenant*; or if he had ſaid that ſuch a one was ſeiſed in fee of both, and demiſed to *Gray*, and he made the way, and then demiſed, it would then have paſſed as *appurtenant*. *Powell*, Juſtice, ſaid, the ſame might have been pleaded by way of grant from the *termor*. Plaintiff's council in reply ſaid, the defendant having by his plea confeſſed the treſpaſs, and offered nothing to juſtify the ſame, the plaintiff ought to have judgment, however the iſſue was, and cited 3 *Cro.* 214, and 1 *Leon.* 68. in ſupport of his arguments, which were anſwered. Over-ruled by the court.

On this caſe being brought before the court again, they were of opinion, that the party could not be let in again to replead to abate the writ, on which plaintiff's council moved for judgment on the demurrer, becauſe the plea was bad: the court ſeemed to doubt how to give judgment, as the caſe ſtood, *Powell*, Juſtice, was of opinion, as the caſe was, the writ might be abated for the laſt treſpaſs, and judgment given for the plaintiff for the firſt, but the court adjourned the ſame.

On this matter being again brought before the court, the caſe appeared to be contrary, and the defendant that pleaded not guilty *generally* was found guilty of the firſt, and not guilty of the ſecond; the difficulty with the court then was, how they ſhould give judgment, for they agreed they could not give judgment for part only, but muſt give judgment on the whole record, for the whole as to both defendants; and on the immaterial iſſue, the judgment muſt be, that the bill be abated, and that a bill might be abated as to part of the treſpaſs, and ſtand good for the reſt; but they never knew it abated as to one defendant, and ſtand good againſt the other. This matter was adjourned. *Vid. Raym. vol.* 2. *p.* 922.

Trinity, 3. *Ann.* *Adams* v. *Tertenants of Savage.*

On a plea in abatement of a *ſcire facias*, that *J. S.* was a tertenant not ſummoned, the court made this diſtinction between the writ in general, and when it names the tertenants particularly, and omits one, *viz.* that in the latter caſe the writ may be abated, becauſe the party may have a better writ, one naming them all; but in the firſt caſe he cannot, therefore the writ ſhall not be quaſhed, but only the defendant ſhall not be compelled to anſwer till the other tertenant be ſummoned. *Vid. Mod. Rep. vol.* 6. *page* 199.

Trinity, 3 *Ann.* *Docmanny* v. *Davenant.*

The defendant demurring in abatement, the plaintiff joined in bar, final judgment was given for the plaintiff, the court being of opinion that there could be no demurrer in abatement, for if the cauſe was apparent, they would abate the writ, or otherwiſe it ought to be pleaded. *Vid. Mod. Rep. vol.* 6. *p.* 198.

Michaelmas, 3 *Ann.* *Clerk* v. *Withers.*

F. D. as adminiſtrator of *J. D.* recovered 303 *l.* againſt *C.* due on a bond to his inteſtate, on a judgment by default in the *C. B.* and ſued out execution thereon, directed to the ſheriffs of *London*, returnable *Tres Mich.* which was accordingly delivered to the ſaid ſheriffs the firſt of *Auguſt* the ſame year, who the ſame day levied goods to the value. *F. D.* died the 9th of *September* following; the ſheriff returns the ſeizure to the value, but that the goods remain in his cuſtody for want of purchaſers; 29th *September* the ſheriff is removed and another choſen. The plaintiff, *Clerk*, now ſues out a *ſci. fa.* againſt the then ſheriff for reſtitution of his goods, and on demurrer, judgment was given againſt the plaintiff in *C. B.* and a writ of error brought in this court; after two arguments thereon, the court affirmed the judgment, on this ground, that executions are favoured in law, and the levy veſts the property in the ſheriff, and the ſelling is but a formal part of the execution, wherefore the execution being executed in *F. D.* the firſt executor's life-time, his death does not abate the writ, and as the ſheriff ſeized the goods in the plaintiff's right as adminiſtrator, and thereby became reſponſible to him as adminiſtrator for the value he has returned, that right now devolves to the adminiſtrator *de bonis non*, who, when the execution is compleatly executed, may take the money out of court. *Vid. Mod. Rep. vol.* 6. *p.* 290.

Michaelmas, 3 *Ann.* *Linch* v. *Hooke.*

The defendant, a *feme covert*, being arreſted by her maiden name, gave a bail bond to the ſheriff by that name. *Per curiam.* If a perſon is arreſted by a wrong name, and brought into court, he may plead a miſnomer; and whatever a bail bond may do in other caſes, it cannot ſtop a *feme covert* from pleading; for ſhe may plead a *non eſt factum.* The ſame term it was ſaid by the court, that if a perſon binds himſelf in a bond by a wrong name, he is eſtopped to ſay it is not his name. *Vid. Salk. vol.* 1. *caſe* 17.

Hilary, 3 *Ann.* *Seers* v. *Turner.*

In an action of treſpaſs, the plaintiff declared for an aſſault, battery, and wounding, on the 6th of *June*, and an aſſault, battery, or wounding, and falſe impriſonment, on the 1ſt of *Auguſt* after, *ad damnum* 30 *l.* the defendant pleads in *abatement* a plaint for the ſame cauſe in the *Marſhalſea* court, and removed into this court by *habeas corpus*, where it is ſtill depending. On demurrer, it was reſolved unanimouſly by the court, that the *defendant ſhould anſwer over.* For this declaration may be in purſuance of the firſt *habeas corpus*, and the plaintiff may declare on an impriſonment, and when the defendant is in cuſtody, the plaintiff may declare againſt him for any matter, and the variance of the damages is allowable, and is the practice of the court: but, indeed, in ſuch caſe, the bail cannot be charged. There is a great deal of difference between a *recordari* or a *certiorari*, and a *habeas corpus*; in the two former, the proceedings are on thoſe writs which are entered upon the roll, the return whereof is the plaint, and the plaintiff declares on that. The *habeas corpus* does not remove the plaint, but it is only certified, and the proceedings below by this writ ſuſpended; there is no proceeding in this court on that plaint, but the plaintiff declares *de novo* againſt the defendant as a privileged perſon in cuſtody of the marſhal, and there is no day given to the plaintiff on the return of the *habeas corpus*, as in caſe of a *recordari* or *pone*, ſo that the plaintiff is not in court. *Vid. Raym. vol.* 2. *p.* 1102.

Michaelmas, 4 *Ann.* *Hackett* v. *Tilly.*

An adminiſtrator brought an action of debt on bond, to which the defendant pleaded in abatement, that adminiſtration was granted to another. On plaintiff's demurrer to this plea, it was inſiſted for the defendant, that though this is a matter in bar, yet it might be pleaded in abatement, as in the caſe of *outlawry* and *property*, which may be pleaded either in *bar* or *abatement.*

The court over-ruled the defendant's plea, and ordered that he ſhould anſwer over, obſerving that matter in *bar* could not be pleaded in *abatement.* *Vid. Salk. vol.* 3. *Caſe* 1. *Raym. vol.* 2. *p.* 1207.

Trinity, 4 *Ann.* *Warner* v. *Sir Edward Irby.*

In two actions brought againſt the defendant, by the name of Sir *Edward Irby*, baronet; the defendant pleads in one thus, *Et prædictus Edwardus Irby armiger in propria perſona ſua venit et dicit*, that he is not a baronet; and to the other he pleaded the ſame matter, with this difference, that he ſaid only *prædictus Edwardus venit, &c.* The plaintiff demurred to thoſe pleas, and his council took exception, that it was ſaid *prædictus Edwardus*, which was admitting himſelf to be right named; and after that he is eſtopped to plead any *miſnomer*, for that he ought to have pleaded that *Edwardus Irby armiger qui per nomen Edwardi Irby baronetti*, is ſued, *venit in propria perſona ſua*, &c. *et dicit, &c.* The defendant's council inſiſted, that there was a difference where *miſnomer* of the ſurname or addition is pleaded in abatement, and where *miſnomer* of the *chriſtian* name; there you may ſay *prædictus*, the *chriſtian* name, where it is the *miſnomer* of the ſurname, is pleaded, or *prædictus*, the *chriſtian* and *ſurname*, where it is only the *miſnomer* of the addition, but otherwiſe, if *miſnomer* of the *chriſtian* be pleaded, and cited. 1 *Edw.* 4. *cap.* 3. and ſaid further, that all the books were ſo.

Holt ſeemed to doubt the difference, but ſaid, that if it were ſo, yet the plea was naught, for want of ſhewing what he is; for if a defendant would abate the plaintiff's writ, he muſt give him a better. It is not enough for the defendant to ſay, he is not a baronet, without ſhewing what he is. In this caſe he obſerved, that one of the pleas was not within the defendant's own rule, for he ought, according to that, to have ſaid only *predictus Edwardus*, or *prædictus Edwardus* Irby, and not *prædictus Edwardus* Irby *armiger*; but the ſafeſt way of pleading it would have been, to have ſaid *venit Edwardus* Irby *armiger*, who is ſued *per nomen Edwardi* Irby *baronetti*, *et dicit* that he is an *eſquire* and not a *baronet.* The court gave judgment, that the defendant *reſpondeat ulterius* niſi, &c. *Vid. Raym. vol.* 2. *p.* 1178.

Hilary, 4 *Ann.* *Lawrence* v. *Martin*,

The defendant being ſued as adminiſtrator, pleaded in abatement, that he was an attorney of the *Common Pleas*: a *reſpondeas ouſter* awarded. *Per Holt*, C. J. On a *reſpondeas ouſter* notice thereof need not be given, the defendant being ſuppoſed to be attending on his cauſe in the paper to maintain his plea. *Vide Salk. vol.* 1. *caſe* 18.

Eaſter, 5 *Ann.* *Facquire* v. *Kynaſton.*

In an action on ſeveral *promiſes*, the defendant pleaded in abatement, that the promiſes in the declaration were *tiel jour*, which was after the action brought and traverſed, that they were made before, to which the plaintiff demurred, and the defendant's council in ſupport of the plea urged, that though this matter was pleadable in *bar*, yet many things that might be pleaded in bar might alſo be pleaded in *abatement*, as property in a ſtranger, or *pris en auter lien*, which may be pleaded either in *bar* or *abatement* in *replevin*. The Chief Juſtice agreed to thoſe caſes, but ſaid they differed from this; firſt, becauſe theſe matters could not be given in evidence on a *non cepit*, the general iſſue in replevin, as this might on *non aſſumpſit*, that had there been any fact to ſupport this plea, the defendant would have pleaded the general iſſue; ſecondly, that the matter of the plea is new matter, and out of the ſcope of the plaintiff's action. The court ordered the defendant to anſwer over. *Vid. Raym. vol.* 2. *p.* 1249.

Michaelmas, 6 *Ann.* *Stroud* v. *Lady Gerrard.*

On an action of *aſſumpſit*, the defendant pleads a *miſnomer* in abatement, *viz.* that her name was *Honoria* and not *Elizabeth*, the plaintiff replies that ſhe had filed common bail by the name of *Elizabeth*, and prays judgment if defendant ſhall ſay her name is not *Elizabeth*. *Determined*, that filing bail is the act of the court, and not of the party, and therefore no *eſtoppel*; but the defendant appearing by that name may *eſtop* himſelf, and bail is an *appearance* as well as *bail*; but if the plaintiff means to uſe it as an *eſtoppel*, it ſhould be pleaded as an *appearance*. In debt on a bail bond, a defendant who has filed *common bail* cannot plead that he has done ſo, but muſt plead *comperuit ad diem*, *pleading*, being governed by the operation things have in law. *Vide Salk. vol.* 1. *caſe* 19.

Michaelmas, 6 *Ann.* *Hetherington* v. *Reynolds.*

The defendant being ſued in the *Marſhalſea* court as a *feme ſole*, after having appeared and pleaded to the action, married, and the caſe was then removed by *habeas corpus* into *K. B.* The plaintiff declares againſt her in *K. B.* as in cuſtody of the *Marſhal*; the defendant pleaded in abatement that ſhe was married when the *habeas* iſſued, *adjudged* a good plea, becauſe the proceedings in this court are *de novo*, and the court takes no notice of what was done in the inferior court, or of any matter *prior* to the *habeas*; but the practice in ſuch caſes is on the return of the *habeas* on motion to grant a *procedendo*. *Vid. Salk. vol.* 1. *caſe* 20.

Trinity, 6 *Ann.* *Prince* v. *Maſon.*

On a *ſcire facias*, the firſt writ was demurred to, becauſe it was made returnable on *Monday in three weeks of the Holy Trinity*.

The court were of opinion the writ was void, there being no ſuch day as the laſt day of the three weeks was *Sunday*, and therefore was not to be helped by the ſtatute of *Jeofails*. *Vid. Mod. Rep. vol.* 11. *p.* 120.

Trinity, 8 *Ann.* *Dillingham* v. *Gately.*

On an action on the caſe brought on a promiſſory note on demurrer for falſe latin in the *original*, *viz.* *locarent ad competum* inſtead of *locaret*, *&c.* the court declared that the original ſhould ſtate the whole matter in an action on the caſe, ſo that the original agrees with the bill, for which reaſon falſe latin does not vitiate it; but falſe latin in a writ for which there is an exact form in the regiſter is ill, and accordingly the defendant was ordered to anſwer over. *Vide Mod. Rep. vol.* 11. *page* 237.

Eaſter, 8 *Ann.* *Smith* v. *Bowen.*

On an appeal for murder lodged by an infant in his own perſon; the council for the appellant moved, that he might be admitted by his guardian, which the court refuſed, becauſe the appeal ought to have been commenced by guardian in the firſt inſtance, and a motion then made to admit him by his guardian, and ſaid, that if the defendant pleaded this in abatement the appellant might commence a new appeal by bill, an abatement not being peremptory.

The appellee being afterwards brought to the bar, the appellant's council would have abated the writ, and brought a new appeal by bill; but the court would not allow it at a future day, the council for the appellee refuſing to plead the infancy in abatement, with a view of taking advantage of it after trial; the court on inſpection of the appellant, abated the firſt appeal *ex officio*, and *Holt* ſaid, if the appellant had not been preſent, a writ muſt have iſſued to have brought him into court for the purpoſe of inſpection. *Vide Mod. Rep. vol.* 11. *page* 216.

Michaelmas, 8 *Ann.* *Gately* v. *Gillingham.*

Interlocutory judgment having been ſigned in an action on the caſe by original, and a writ of inquiry awarded, which was *teſted* 8th of *November*, returnable *Octavis Martini*, it was moved in arreſt of judgment, that 15 days did not intervene between the *teſte* and return of the writ; whereas in all judicial writs where you proceed by original, there muſt be 15 days between the *teſte* and return both in the writ and all ſubſequent proceſs. The court inclined to think the writ ill, but the matter was adjourned. *Vide Mod. Rep. vol.* 11. *page* 260.

Hilary, 9 *Ann.* *Goodwin* v. *Godwin.* Error.

The matter in queſtion before the court was, whether debt on a judgment in *K. B.* would lie pending a writ of error in the *Exchequer* chamber.

The point was given up on account of the number of caſes in point, that an action of debt would lie, but *ſtat.* 27 *Eliz. cap.* 8. was ſtrongly inſiſted on to prove, that the record itſelf in law was removed by the writ of error, and that therefore the declaration was ill.

The court obſerved, that neither *Hales* or *Holt* ever favoured theſe actions, that to diſcourage them bail was never allowed, that the authorities alone prevented their rejecting them; and though they conſidered the writ of error no plea in *bar*, yet doubted whether it might not be admitted as a plea in *abatement*. The matter touching the record was adjourned. *Vide Mod. Rep. vol.* 10. *page* 17.

Trinity, 12 *Ann.* *Grovenor* v. *Stephens.* Error.

On a writ of error brought, an error in *fact* being aſſigned, *viz.* that the plaintiff was a *feme covert*, when the action was commenced, the writ was diſallowed, becauſe the fact might have been pleaded in abatement; it being the eſtabliſhed practice of the court not to allow any matter to be aſſigned for error in fact, that might have been pleaded in abatement. *Vid. Mod. Rep. vol.* 10. *p.* 166.

Hilary, 12 *Ann.* *The Univerſity of Cambridge* v. *The Archbiſhop of York.* Error.

This was a writ of error from *C. B.* on a writ of *quare impedit* brought by the chancellor and ſcholars of the univerſity of *Cambridge* againſt the archbiſhop, *&c.* grounded on *ſtat.* 3 *Jac. c.* 5. which diſables popiſh recuſants convict from preſenting, and veſts ſuch preſentations in the chancellor and ſcholars of the two univerſities reſpectively. The queſtions ariſing on this caſe were, 1ſt, whether the defendant's plea in abatement, that the univerſity of *Cambridge* was incorporated by the name of chancellor, maſter, and ſcholars, *&c.* and that therefore the univerſity had ſued by a wrong name, was a good plea? Becauſe if it was, the court of *C. B.* erred in awarding a *reſpondeas ouſter*. 2dly, That the univerſity of *Cambridge* had not ſufficiently pleaded the conviction for want of *ideo convictus eſt*.

The plaintiff in errror's council maintained that ſuch plea was good, and cited 4 *Edw.* 4. *cap.* 7. 22 *Edw.* 4. *cap.* 34. and 13 *Hen.* 7. *cap.* 14. in ſupport thereof.

For the defendant in error it was argued that a corporation might have one name by which they are impowered to take, and another by which they are intitled to ſue; and quoted 1 *Rolls abridged*, 513. and that therefore it did not follow, that becauſe the univerſity was incorporated by this name, they could not be ſued or ſue by another; and that the *ſtat.* veſting this right in them by the name of chancellor and ſcholars, was an incorporation *quoad* this particular purpoſe; which could be done by letters patent 2 *H.* 7, 13. 4 *Leon.* 190. *a fortiori* by act of parliament; and this being the caſe, the very ſtat. falſifies the plea. He cited *Co. Lit.* 303. A plea in abatement muſt be certain to every intent, and ſaid likewiſe that there was another rule reſpecting pleas in abatement; that the defendant muſt never ſet aſide the writ of the plaintiff, without ſhewing a better; and that the variance was not a material one, becauſe a perſon does not ceaſe to be a ſcholar by becoming maſter.

It was offered for the plaintiff in error, by way of reply, that if the univerſity of *Cambridge* had one name to take, and another to ſue by, it ſhould have been ſhewn by the defendant in error: that as to the act, it could only operate as a *deſcriptio perſonæ*, and not by way of incorporating them; and that if the act did incorporate them by the deſcription aforeſaid, yet their acceptance of a new charter by another name, compelled them to ſue by ſuch name.

The court were of opinion, that the declaration ſetting forth the act of parliament as an authority to ſue by that name, rendered it incumbent on the defendant to ſhew ſome ſpecial matter to avoid it; as the acceptance of another charter by another name, ſubſequent to the act; and that chancellor and ſcholars is ſuch a deſcription as comprehends the whole univerſity, including both head and members; and that it does not follow that what will be ſufficient to amount to a *deſcriptio perſonae* to enable a perſon to take, will be ſufficient for him to ſue in. The ſecond queſtion depended on *ſtat.* 1 *William* and *Mary*, *c.* 26. and the court inclined to think the record of the default a conviction of itſelf, and therefore the ſpecial concluſion of *ideo convictus eſt*, ſuperfluous and unneceſſary. *Adjourned. Vid. Modern Reports. vol.* 10. *page* 208.

Michaelmas, 12 *Ann. Johnſon* v. *Altham.* Error.

In *error* on a judgment in *C. B.* it was inſiſted on as cauſe of error, that inſtead of final judgment a *reſpondeas ouſter* only ought to have been awarded; the defendant in error, on the contrary, maintained that the concluſion of the plea alone rendered it either a plea in *bar* or in *abatement*, and that in the preſent caſe the plea was concluded with a *petit judicium de narratione*, which was always the concluſion of a plea in bar, and therefore the judgment was rightly given. This caſe being adjourned, in *Hilary* term following, the court affirmed the judgment given in the court of *Common Pleas. Vid. Mod. Rep. vol.* 10. *page* 192, 211.

Trinity, 12 & 13 *Ann. Miles* v. *Williams.*

In *debt* on a bond entered into by wife when ſole, brought againſt huſband and wife; they plead in abatement the bankruptcy of the huſband, and conclude ſuch plea *hoc parati ſunt verificare.* On ſpecial demurrer had, the court were of opinion that the bond was diſcharged by the bankruptcy of the huſband; but being alſo of opinion that they ought to have concluded their plea to the country, and this being one of the cauſes aſſigned for demurrer, judgment was given for the plaintiff. In the courſe of the pleadings it was obſerved, that where a perſon covenants not to ſue huſband and wife on a bond of the wife's when ſingle, during the life of the huſband, and, notwithſtanding, ſues for the ſame, ſuch covenant muſt be pleaded in *abatement*, and not in *bar. Vid. Mod. Rep vol.* 10. *page* 160, 243.

Hilary, 1 *Geo. Aylworth* v. *Woolley.* Error.

On an action being brought in *C. B.* on three ſeveral promiſes; the firſt for 55 *l.* the ſecond for 65 *l.* and the third for 65 *l.* the defendant pleaded as to part *non aſſumpſit*, and as to part in abatement; *viz. quoad* 50 *l.* of the firſt promiſe, 60 *l.* of the ſecond, and 60 *l.* of the third; that the writ may be quaſhed, there being three actions depending in the court of *Exchequer* for the ſame ſums. To this action judgment of *reſpondeas ouſter* was given.

On error brought in this court, the judgment in the *C. B.* was affirmed; becauſe a plea in abatement muſt go to the whole, and not to part, and the three ſuits depending in the *Exchequer* might have been pleaded in bar of the whole. *Vid. Mod. Rep. vol.* 10. *p.* 286.

Hilary, 8 *Geo. Gilbert* v. *Bath.*

It was held by the court, according to 1 *Saund.* 291. that where the defendant in debt on bond was deſirous of taking advantage of another perſon's being jointly bound, he muſt plead the ſame in abatement, and cannot demur on *oyer*; for if he does, the court will preſume the other did not ſeal it.

In this caſe there was a demurrer, and judgment was given for the plaintiff. *Vide Strange, vol.* 1. *page* 503.

Trinity, 8 *Geo. Maſon* v. *Buſhell or Ruſſell.*

The defendant pleading in abatement that he was a horner, *abſque hoc* that he was a yeoman; on demurrer it was argued and determined, that yeoman was a good addition within *Stat.* 1 *Hen.* 5. as the defendant if not a gentleman muſt be a yeoman, and a horner being a mechanic muſt be of the degree of yeoman, and therefore the plaintiff has his election to name the defendant, by his degree or by his trade; and this plea being in abatement, the defendant ought to have given the plaintiff a better writ, and directly in the ſame ſpecies of addition oppoſite to that of yeoman, which the defendant ought to have pleaded; for which reaſon the plea was quaſhed. *Vide Mod. Rep. vol.* 8. *page* 52.

N. B. Lord Chief Juſtice *Pratt* doubted whether it was neceſſary for the writ to be in the ſame ſpecies of addition.

Trinity, 9 *Geo. Gray* v. *Mendez.*

In an action by original againſt the defendant, the defendant was deſcribed as of ſuch a place *yeoman*, to which he pleaded in abatement that he was a *lime merchant*, and not a *yeoman*; on demurrer it was held by the court an ill plea, and a *reſpondeas ouſter* was awarded on this ground, *viz.* that every man, be he a trader or not, has a degree by which he may be known, and having ſuch (if he has a trade alſo) the the plaintiff has his election to ſue him by which he pleaſes; if by his degree, it is not enough for the defendant to ſay he is of ſuch a trade, becauſe he does not thereby give the plaintiff a bettter writ: the defendant ſhould have ſhewn himſelf to be of a degree higher than a *yeoman*, which would have abated the plaintiff's writ, and given him a better. This caſe was determined on the authority of *Maſon* v. *Buſhell* or *Ruſſell. Mod. Rep. vol.* 8. *page* 52. where a man was ſued as a *yeoman*, and he pleaded he was a *horner*; on which the court awarded a *reſpondeas ouſter. Vide Stra. vol.* 1. *page* 556.

Hilary, 9 *Geo. Atwood* v. *Beach.*

On a judgment being had againſt the principal, and a *ſci. fa.* brought againſt the bail of *J. K.* whoſe real name was *T. K.* after two *nihils* returned, the bail were taken in execution: on motion they were diſcharged. *Sed per curiam*, if the *ſci. fa.* had been returned *ſci. feci* they could not be diſcharged, becauſe this matter they might have pleaded in abatement. *Vid. Mod. Rep. vol.* 8. *page* 114.

Trinity, 10 *Geo. Addiſon* v. *Paterſon.*

On a *ſci. fa.* brought againſt bail, both principal and bail pleaded the *miſnomer* of the principal in abatement; on demurrer it was determined that the bail could not plead ſuch *miſnomer* in abatement, but the principal might. *Vid. Mod. Rep. vol.* 8. *page* 290. *Vid. page* 114. *of the ſame vol. of Reports.*

Michaelmas, 11 *Geo.* *Cowper* v. *Ginger.* Error.

On a writ of error brought by one on a judgment in the *C. B.* againſt two, which writ was quaſhed; the plaintiff in error having brought another writ of error *coram vobis, &c.* the defendant in error moved for coſts, as if judgment had been affirmed; and it being objected that the defendant in error was not entitled to coſts, unleſs the ſecond writ was alſo quaſhed; it was argued that a writ of error *coram vobis, &c.* would not lie in this caſe, becauſe the record was not removed by the firſt writ; the diſtinction being, that where the firſt writ of error abates or is diſcontinued, the record is removed, and error *coram vobis &c.* will lie; but that where the ſtile of the court is varied, or the parties not ſufficiently deſcribed, the writ of error muſt be quaſhed; in which caſe the record is not removed, becauſe it varies from the writ, and of courſe a writ of errror *coram vobis &c.* will not lie. The court were unanimouſly of opinion, that the defendant in error ſhould have coſts as if the judgment had been affirmed, though the firſt writ was quaſhed; and with reſpect to the writ of error *coram vobis &c.* on ſearching precedents, three of the judges afterwards were of opinion that ſuch writ did lie; grounding their opinion on the caſe reported in 5 *Mod. Rep. pages* 16, 69. *Walker* v. *Stokoe* or *Stalkoe*. *Vid. Mod. Rep. vol.* 8. *page* 318.

Michaelmas, 12 *Geo.* *Hughes* v. *Alvarez.*

To this action the defendant pleaded in abatement, after having had *oyer* of the orginal that the ſame was not returned, and that the plaintiff had not found pledges: on motion this plea was ſet aſide, it being filed without an *affidavit* in ſupport of the truth of ſuch plea. The council for the defendant ſaid this appeared by the writ on the *oyer*, and where a matter is pleaded in abatement which appears on the record *(as variances)* there is no need of an *affidavit*, by the act for the amendment of the law. Yet the court held that this did not appear on the *oyer* of the writ, for nothing appears by ſuch ſight but the writ itſelf, but this is a fact which ought to be verified by affidavit. *Vid. Raymond, vol.* 2. *page* 1409.

Michaelmas, 12 *Geo.* *Sherman* v. *Alvarez.*

In an action by original, in this court, the defendant after *oyer* had pleaded in abatement that the writ was never returned; it was moved by the plaintiff's council to ſet the plea aſide, it not being verified by affidavit; the intent of the act being, that the plaintiff ſhould not be delayed by being obliged to take iſſue, unleſs when the plea came in there was ſome cauſe to believe the truth of it. The council for the defendant replied, that the act did not confine the affirmance of the plea to the oath of the party, but to *any other probable cauſe*, and what can ſhew the ſame more ſtrongly that this writ was never returned, than when the plaintiff, in giving *oyer* of ſuch writ, has not ſet out the return?

Per curiam, when the party demands *oyer*, it is only *oyer* of the writ whether it be returned or not is a matter of fact, wherein the plea not being verified by *affidavit* it muſt be ſet aſide. *Vid. Str. vol.* 1. *page* 639.

Hilary, 13 *Geo.* *Stiles* v. *Mead.*

The defendant pleaded his privilege as a ſerjeant at law, with the writ annexed; but for want of an affidavit that he had buſineſs there, and there only, the court ſet his plea aſide. *Vide Strange, vol* 2. *page* 738.

Michaelmas, 2 *Geo.* 2. *Legliſe* v. *Champante.*

On an action of treſpaſs againſt the defendant, a cuſtom-houſe officer, for ſeizing ſeveral caſks of *French* wine, on pretence of their being lees, which ſeizure, on an hearing in the *Exchequer*, had been determined againſt the officer, it was held that in theſe caſes the officer ſeizes at his peril, and that a probable cauſe is no defence. In the courſe of the evidence it appeared that the plaintiff had a partner in theſe wines, who was not a party to the action. Held by the court, that in an *aſſumpſit* this circumſtance might be taken advantage of at a trial, but that in *treſpaſs* it muſt be pleaded in abatement. *Vide Strange, vol.* 2. *page* 820.

Michaelmas, 2 *Geo.* 2. *Smith* v. *Maſon.*

In caſe, on a promiſſory note, the defendant was ſued by the addition of *gentleman*; to which he pleaded in abatement that he was a *merchant*, and not a *gentleman*. On plaintiff's demurring to this plea, a *reſpondeas ouſter* was awarded. The plaintiff had his election to ſue him, either by a name of *degree* or *myſtery*. The plea in abatement ſhould give the plaintiff a better writ, as to the addition on which he chuſes to proceed. This caſe is alſo to be found in *Raymond, page* 1541. *Vid. Stra. vol.* 2. *page* 816.

Trinity, 2 *Geo.* 2. *King and Wife* v. *Jones.* Error.

The plaintiff in error, on a judgment recovered againſt his wife, aſſigns for error that ſhe has appeared and pleaded as a *feme ſole*, whereas ſhe was married to him the ſaid *Edward King* at the time of her appearance and plea. *Jones*, the defendant in error, pleads that the ſaid *Edward King* and one *John Kitſon* bailed her as a *feme ſole*; and, by way of eſtoppel, prays they may not be admitted to aver in contradiction to the record: whereto *King* and wife demur. The judgment was affirmed; the court obſerving that plaintiffs would be badly off, if women, after an arreſt, were permitted to quaſh their proceedings by a marriage pending the ſuit. *Vide Strange, vol.* 2. *p.* 111.

Trinity, 9 *Geo.* 2. *Smith* qui tam v. *Gibſon.*

Where a perſon has two cauſes of action, and, by his own ſhewing, has no other remedy for one of them, the ſuit ſhall abate only ſo far as the writ is abateable; but if he may have another writ for the whole, it ſhall abate entirely. *Vid. Caſes Temp. Lord Hardwicke, page* 271.

Michaelmas, 10 *Geo.* 2. *Middleton* and Wife v. *Croft.* Prohibition.

The plaintiff on a prohibition, in his declaration, ſays, that by *ſtat.* 7 and 8 *W.* 3. *cap.* 35. a penalty of 10*l.* is laid on every man who marries without licence or banns; notwithſtanding which he and his wife had been cited into the ſpiritual court, for having been married without licence or banns before eight in the morning, contrary to the *canon*: and that he and his wife are lay perſons, not bound by the ſaid canon. The defendant pleads not guilty as to the contempt, and demurs.

After ſeveral arguments at the bar, Lord *Hardwicke*, this term, delivered the reſolution of the court, as follows: The three queſtions in this caſe are, whether by the canons of 1603. lay perſons are puniſhable for a clandeſtine marriage? if not, whether by the ancient canon law the ſpiritual court is impowered to proceed againſt a perſon for ſuch marriage? and if the ſpiritual court poſſeſſes ſuch a power, either way, whether that juriſdiction is taken away or not by *ſtat.* 7 & 8 *W.* 3. *cap.* 35?

Upon the whole, we are of opinion, that a conſultation ought to be had on all the points of the ſuit below, except one; *viz.* the hour when the marriage ceremony was performed. Now, as the canonical hours is only a regulation introduced by the canons of 1603, which in our judgment do not bind in this caſe, the *Spiritual Court* ought to be reſtrained from making that any ground of their proceedings; in this reſpect therefore the prohibition muſt ſtand, and a conſultation be had concerning the other points.

The plaintiff having prevailed in one point, moved for coſts, *ſtat.* 8 and 9 *W.* 3. *cap.* 11. § 3. giving coſts in all ſuits on prohibitions to the plaintiff obtaining judgment or any award of execution, and coſts were accordingly awarded by the court, the words of the act being expreſs. No rule was however made for coſts, it being objected that the ſuit was abated by the death of the huſband before judgment. The matter was reſumed and ſpoke to, being a nice point, the following *Michaelmas* term; when it was held by the court, that the ſuit was not abated at common law; or if it was, yet it was helped by *ſtat.* 8 and 9 *W.* 3. *cap.* 11. and a rule accordingly made for taxing coſts for the plaintiff. *Vide Strange, vol.* 2. *page* 1056. *Caſes Temp. Ld. Hardwicke, page* 395.

Trinity, 13 *Geo.* 2. *The King* v. *The Archbiſhop of Armagh*, and *Nathaniel Whaley Clerk.*

Entered *Trin.* 13 *Geo.* 1. *Roll* 143. Error.

A writ of error was brought to reverſe a judgment in *B. R.* in *Ireland*, on a *quare impedit* againſt the defendants.

The caſe was as follows: *Michael Boyle*, late Archbiſhop of *Armagh*, was ſeiſed in fee, in right of his archbiſhoprick, of the advowſon of the church of *Armagh*, and collated one *Vigors*, who was afterwards promoted to the biſhoprick of *Leghlin* and *Fernes* by *William* and *Mary*, whereby the crown had a right to preſent on ſuch promotion: during the time the advowſon was vacant, their majeſties *William* and *Mary*, and *Ann*, died; and thus the preſentation devolved to King *George* 1. who was obſtructed therein by the archbiſhop and *Whaley*.

The archbiſhop having prayed *oyer* of the writ, pleads that it is true that *Michael Boyle* was ſeiſed in right of his archbiſhoprick, and that the church became vacant by the promotion of *Vigors*, whence the right of preſentation was veſted in the crown for that turn: but then he ſays, that *William* and *Mary*, by letters patent dated *February* 23, in the third year of their reign, granted to *Peter Drelincourt* the deanery of *Armagh* with all it's appurtenances, *&c.* by virtue whereof the ſaid *Peter* was poſſeſſed of the church of *Armagh* as a member of the deanery, and enjoyed the ſame to his death: that *Boyle* died, and was ſucceeded by *Narciſſus Marſh*, upon whoſe death the advowſon came to *Thomas Lindeſay*, in whoſe time *Vigors* died: that *Drelincourt* is ſince dead; whereby the right of preſentation was in *Lindeſay*, who, on the 5th of *May* 1722, preſented *Whaley* the preſent incumbent.

Whaley having likewiſe craved *oyer* of the writ, pleads that he is parſon imparſonee, collated by the late archbiſhop; that the church became vacant by the promotion of *Vigors*; and that *Drelincourt* was preſented to the living by the crown, admitted, inſtituted, and inducted: he then deduces the title from *Boyle* to *Lindeſay*; ſhews the death of *Vigors*; that *Drelincourt* died on the 8th *March* 1721; and that *Lindeſay* preſented him on the 5th of *May* following, on which he was inducted into the living before the king's writ iſſued: and concludes with a traverſe that the church is ſtill vacant, as alledged in the declaration.

The attorney general demurs to the archbiſhop's plea, becauſe therein it is not averred that the church of *Armagh* was a member of the deanery, or enjoyed as ſuch by *Vigors*, or preſented to as ſuch by King *William* and Queen *Mary*. And the archbiſhop joins in demurrer.

The attorney general replies to *Whaley's* plea, that K. *William* and Q. *Mary* did not preſent *Drelincourt* to the church of *Armagh*; and concludes to the country.

Whaley demurs generally to this replication; and after a joinder in demurrer, and ſeveral continuances, the Court of *King's Bench* in *Ireland* adjudged the archbiſhop's plea a good bar, and the attorney general's replication to *Whaley*'s plea inſufficient.

A writ of error is brought here on this judgment, the general errors aſſigned, and *in nullo eſt erratum* pleaded.

In behalf of the king it was argued, that the Court of *K. B.* in *Ireland* had erred in both inſtances.

The court was of opinion that the primate's plea could not poſſibly be maintained, it neither ſhewing a preſentation, nor that the church was a member of the deanery; and therefore that the facts alledged therein are not to be taken into conſideration, not being admitted by the demurrer, becauſe ill pleaded; and that *Whaley's* plea is a full confeſſion and avoidance without the traverſe; for that reaſon immaterial, and may be paſſed over as ſuch.

With reſpect to the length of time, without doubt *tempus occurrit Regi*, had there been a preſentation: but on this record we muſt take it that the king comes before any preſentation has been made, and no caſe is cited to prove the king limited in point of time. If the preſentation muſt be made during the life of the promotee, a declaration to be good ought to aver his life, which has not been done. In caſe of *ſimony*, the crown was not barred by any number of preſentations before *ſtat. W. & M. cap.* 16. and ſhould the grantee of the next avoidance come 100 years after the death of the incumbent, he is entitled to his turn, provided there has been no preſentation in the interim. Had a common perſon preſented *Drelincourt*, on his death the crown would have loſt it's turn; but without a preſentation it can be no *plenarty* againſt the perſon who has the right, which in the preſent inſtance is veſted in the crown, though the advowſon is in another, which cannot alter the caſe.

The court of *K. B.* in *Ireland* having therefore erred in both inſtances, the judgment muſt be reverſed *in toto*, and a writ awarded to admit his majeſty's clerk.

On *error in parliament*, the lords were of opinion, that this being a civil ſuit of the crown, the writ of error was abated by the death of the king; and on this ground reverſed the judgment of reverſal of this court. A new writ of error being brought, and the ſame record returned, Serjeant *Bootle* earneſtly requeſted to be heard as to a new point, and objected that the traverſe at the end of *Whaley's* plea was material; becauſe what preceded could not at all events be a turn, as it does not appear that the preſentee ſubſcribed the articles; and cited 5. *Co. Windſor's Caſe. Winch.* 13. 2 *Cro.* 650. *Yelv.* 115. But the court, in anſwer, ſaid, "Then you cannot be admitted to diſpute this point, not having alledged a ſubſcription of the articles in your plea, where it is as neceſſary as in the declaration, though in fact it has been alledged in neither." And abiding by their former opinions, they a ſecond time reverſed the judgment of the lower court.

On a *ſecond* writ of error in parliament, all the judges attended and unanimouſly agreed with the *K. B.* in opinion; yet, notwithſtanding, the houſe of lords affirmed the judgment of the court of *King's Bench* in *Ireland. Vide Strange, vol.* 2. *page* 837. *Fitz-Gibbons. page* 30.

Hilary, 33 *Geo.* 2. *Johnſon & al' Aſſignees &c. of H. a Bankrupt* v. *Smith, Widow, Executrix, &c.*

On an action on the *caſe* brought by the aſſignees of *H.* a bankrupt againſt the defendant, for goods ſold and delivered by the bankrupt (before he became ſo) to defendant's teſtator in his life-time.

The declaration was a common declaration for goods ſold and delivered, with ſeveral counts; to which action the defendant by leave of court pleaded three ſeveral pleas.

1ſt, That defendant's teſtator did not in his life-time undertake, *&c.* in form, *&c.*

On this plea iſſue is joined.

2d Plea ſays, that *T. S.* defendant's teſtator did not promiſe or undertake in manner, *&c.* as the plaintiffs have above complained againſt her, at any time within ſix years next before the day of exhibiting the aforeſaid bill of the ſaid plaintiffs.

3d Plea, and as to the two firſt promiſes mentioned in the plaintiffs declaration, the defendant pleads a ſet-off.

Replication. The plaintiffs, in reply to the defendant's ſecond plea in bar, ſay, that after making the ſeveral promiſes in the bill, and after the ſaid *H.* became a bankrupt, and alſo after the death of *T. S.* and within ſix years next after making the ſaid promiſes, *to wit*, 28th *November*, 32 *Geo.* 2. they ſued out a writ of *latitat* for recovery of their damages, *&c.*

againſt the ſaid defendant, returnable on *Tueſday* next, after the *Octave* of St. *Hilary*; on the return of which writ, the ſaid defendant appeared by her attorney thereto; and on her appearing, they the ſame term exhibited their bill againſt the ſaid defendant, as executrix as aforeſaid: and the ſaid plaintiffs further ſay, *T. S.* in his life-time, and within ſix years next before the ſuing out the ſaid writ, did undertake, *&c.* and this, *&c.*

To the laſt plea in bar to the two firſt counts, plaintiffs in reply ſay, that *H.* the bankrupt was not indebted in manner, *&c.* as defendant has in that plea alledged; on which iſſue is joined.

Rejoinder. The defendant in rejoinder to plaintiff's replication ſays, that by the courſe and cuſtom of this court, a writ of *latitat* ſued out after the end of any term, is ſuppoſed to have iſſued within the term then preceding; and the ſaid defendant further ſays, that the ſaid writ of *latitat* in the plaintiff's replication mentioned, was *really and truly* ſued out by the ſaid plaintiffs, after the ſaid 28th day of *November*, being the laſt day of *Michaelmas* term, 32 *Geo.* 2. *viz.* on *the 8th day of December* in the ſame year; and that the writ was ſigned on the ſame day and year, according to the form of the ſtatute; and that the ſaid *T. S.* did not promiſe or undertake in manner, *&c.* as the ſaid plaintiffs have above complained, at any time within ſix years next before the ſaid *8th day of December*, on which day the ſaid writ was *really* and *in truth* ſued out as aforeſaid. And prays, *&c.*

The plaintiffs demur *generally* to defendant's *rejoinder*, and the defendant joins in demurrer.

On arguing this demurrer, the queſtion was, if the truth of the fact could in this caſe be averred contrary to the fiction of law?

The plaintiff's council raiſed two objections to defendant's rejoinder, *viz.*

1. It is an averment againſt the record, for the *teſte* of the writ is a matter of record.

2. It is contrary to, and deſtructive of the practice of this court, and tends to deſtroy the writ of *latitat* itſelf, for the writ would be a nullity if teſted in vacation.

In ſupport of theſe objections, plaintiff's council cited many caſes.

The defendant's council anſwered theſe objections, and in ſupport of his client's defence, quoted many authorities, to which the plaintiff's council replied.

Per curiam, we are all moſt clearly of opinion, that the averment in the defendant's rejoinder, ought by law to be admitted: the demurrer was therefore over-ruled, and judgment for the defendant. *Vide Bur. vol.* 2. *p.* 950.

Trinity, 3 *Geo.* 3. *Combe* v. *Pitt*.

This was an action of *debt* for 1500 *l.* brought by the plaintiff againſt the defendant, for unlawfully corrupting three ſeveral voters, *&c.* *Note*, The declaration was of *Michaelmas* term, 3 *Geo.* 3. with a memorandum to *Saturday* next after the *Morrow of All Souls*.

To this action the defendant pleads in *abatement*, *viz.*

That in the ſame term came one *G. L.* and exhibited his bill againſt the ſaid defendant of a plea of debt for 4000 *l.* for the ſame cauſe of action, and for the very ſame offences.

The plaintiff replies, That after the committing the offences in the bill mentioned, and long before the exhibiting of the ſame, and before the day of exhibiting *G. L.'s* bill, *viz.* on the 30th *June*, 2 *Geo.* 3. the plaintiff ſued forth a writ of *latitat* againſt the defendant, returnable on *Saturday next after the Morrow of All Souls*; and that the defendant before the return of ſuch writ, *to wit*, on the 29th *July* following, was duly ſerved with a copy thereof; and that the defendant afterwards, at the return thereof, being on *Saturday next after the Morrow of All Souls*, appeared thereto; and therefore the ſaid plaintiff, in *Michaelmas* term, *viz.* *on Saturday next after the Morrow of All Souls*, exhibited his bill againſt the ſaid defendant for recovery of the ſaid debt, and this, *&c.* wherefore, *&c.*

The defendant rejoins, That after the committing of the ſaid ſuppoſed offences in plaintiff's bill mentioned, and long before the day of exhibiting the reſpective bills of the ſaid plaintiff and *G. L.* *viz.* on the 30th *June* 2 *Geo.* 3. the ſaid *G. L.* ſued out a *latitat* againſt the ſaid defendant, returnable on *Saturday next after the Morrow of All Souls*, and that afterwards, and before the return of the ſaid writ, and before the defendant was ſerved with a copy of the writ, at the ſuit of the above plaintiff, or knew any thing thereof, *viz.* on the 7th *July*, 2 *Geo.* 3. he was ſerved with a copy of a writ at the ſuit of the ſaid *G: L.* and in obedience thereto, the ſaid defendant on *Saturday next after the Morrow of All Souls*, appeared to the writ of the ſaid *G. L.* and thereupon in *Michaelmas* term, *to wit*, on *Saturday next after the Morrow of All Souls* laſt paſt, the ſaid *G. L.* exhibited his bill againſt the ſaid defendant, for the recovery of the ſuppoſed debt, by him demanded as aforeſaid. And this, *&c.* wherefore, *&c.*

The plaintiff ſurrejoins, That by the practice of the court *latitats* ſued out after the end of any term are *teſted* of the term preceding; avers, that the writ of *latitat* alledged to have been ſued out by the ſaid *G. L.* though *teſted* 30th *June*, 2 *Geo.* 3. being the laſt day of *Trinity* term, was *really and in fact* ſued out on the 3d day of *July* in the ſame year, and not before; and that the writ of *latitat* of the ſaid plaintiff, teſted 30th *June* aforeſaid, was *really and in fact* ſued out by the ſaid plaintiff againſt the ſaid defendant, for the cauſe aforeſaid, long before the writ of *latitat*, in the ſaid rejoinder mentioned, was really and truly ſued out by the ſaid *G. L.* *to wit*, on the 1ſt day of *July*, 2 *Geo.* 3. *to wit*, at *Ivelcheſter*; and that the ſaid plaintiff the ſame day and year in the replication mentioned, did ſerve a copy of his ſaid writ on the ſaid defendant, and on his appearance thereto, exhibited his bill, and declared againſt him as aforeſaid. And this, *&c.* wherefore, *&c.*

To this ſurrejoinder, the defendant demurred ſpecially, and ſhewed for cauſe,

1. That the ſurrejoinder does not ſupport the plaintiff's replication; but it is a departure therefrom, *to wit*, that by the ſaid replication, the plaintiff, in order to maintain a priority of ſuit, pleaded, that he ſued out a writ of *latitat* againſt the defendant, on the 30th *June*, 3 *Geo.* 3. yet by his ſurrejoinder, he inſiſted that the writ of *latitat* was ſued out at a different time, *viz.* 1ſt *July*, 2 *Geo.* 3. and alſo that the plaintiff has not traverſed or denied the ſervice of the writ ſued out by the ſaid *G. L.* to be before the ſervice of the writ ſued out by the ſaid plaintiff, as the ſaid defendant has in his rejoinder alledged, and the ſaid ſurrejoinder, *&c.*

The plaintiff joins in demurrer; and on arguing the pleadings by the plaintiff's and defendant's council, in which they cited many caſes in ſupport of their argument,

Per curiam, we think the plea bad, on the authority of the two caſes in *Levintz* and *Strange*; and therefore there is no need to go into any of the ſubſequent pleadings, let the defendant anſwer over. *Vide Bur. vol.* 3. *page* 1423.

The caſes on which the court grounded the above opinion.

Hutchinſon v. *Thomas*.

On an information for uſury, the memorandum was of *Michaelmas* term. The defendant pleaded, that *ante exhibitionem informationis*, *ſcilicet* the ſame term, another perſon exhibited an information alſo againſt him for the ſame uſury, and obtained judgment againſt him; on which the informer demurred, and obtained judgment. 2 *Lev.* 141.

Jackſon qui tam, *&c.* v. *Giſling*.

In *debt* on *ſtat.* 15, *Car.* 2. for ſelling fat lambs alive; the defendant pleaded, that another perſon had informed againſt him, and recovered in the ſame term. On demurrer, it was held ill, according to 2 *Lev.* 141. becauſe the defendant did not ſet out the days on which each bill was exhibited, that ſo the court might judge of the *priority*. *Strange vol.* 2. *p.* 1169.

To

To the count or declaration.

Michaelmas, 7 *W.* 3. *Lee* v. *Barnes*.

Adjudged that the defendant may plead in abatement of a declaration where it is by original, becauſe the pleas are different; but if the action is by bill, he can only plead in abatement of the bill, becauſe both declaration and bill are the ſame thing. *Vide Mod. Rep. vol.* 5. *p.* 144.

Trinity, 3 *Ann.* *Lepiot* v. *Browne*.

Browne being removed by *habeas* into *cuſtod. mareſchalli*, was declared againſt by the name of *J. B.* of *&c. in cuſtod. mareſchalli*, and pleaded in abatement for want of diſtinguiſhing him from his father, whoſe name was *J.* alſo, and lived in the ſame town. It was urged, that tho' this action was by bill, and therefore not within the ſtatute of additions, yet by the common law, there ought to be an addition to diſtinguiſh father and ſon, *viz.* ſenior and junior; and if the ſon is ſued there ought to be an addition, otherwiſe if the father. Chief Juſtice *Holt* obſerved, that if father and ſon are both called *J. S.* a deviſe to *J. S. prima facie* is to be underſtood to intend the father; but if it appears that the deviſor knew not the father, the ſon ſhall take the deviſe: and ſuppoſe a perſon deals with the ſon, and knows nothing of the father, muſt he bring the action againſt *J. S.* with the addition of junior? If this was an original, and the father and ſon lived in different counties, the addition of junior would have been unneceſſary; but this being an action *v. J. B. in cuſtod. mareſchalli*, you ſhould have ſhewn, that the father was *in cuſtod. mareſc.* alſo; and therefore let it go over. *Vide Mod. Rep. vol.* 6. *p.* 199.

Michaelmas, 7 *Ann.* *Biſhop* v. *Eagle*.

On a writ of *accompt* brought by the churchwardens of St. *Bartholomew* in *London* againſt the defendant, on a motion in arreſt of judgment; the court abated the declaration in part, for uncertainty of the charge, and gave judgment *quod computet* for the reſidue. *Vide Mod. Rep. vol.* 11. *p.* 186.

Hilary, 11 *Ann.* *Skinner* v. *Newton*. Error.

On an action of treſpaſs brought in an inferior court, the plaintiff declares, that defendant *vi & armis tres pecias terræ fregit*, &c. *ipſius* the plaintiff, containing ſo many acres in ſuch a place; defendant juſtified to this action, by ſhewing a right to the way by preſcription; on which iſſue was joined, and a verdict for the plaintiff, and judgment in conſequence.

On a writ of error being brought on this judgment, it was maintained, that the declaration ſhould have been worded *clauſ. terræ*, inſtead of *pecias*; treſpaſs being a formed action; and in theſe actions where a form of words is provided by law, the plaintiff cannot alter ſuch form of words, but muſt follow thoſe appropriated by law, and none others.

The defendant in error in his reply inſiſted, that though *clauſum* was the word uſed in the regiſter, it was but a matter of form, and therefore pleadable in abatement only, and not aſſignable as a matter of error after verdict and judgment, and quoted, *Moor*, 422, where *pecias terræ* was held good in ejectment.

Parker, Chief Juſtice, and Judge *Powell*, were of opinion, that there was no want of certainty in the declaration, and after verdict and judgment, it was hard to reverſe a judgment for mere form, but held, that *real actions* being *formed actions*, the party muſt ſtrictly comply with the *form* ſettled in the regiſter, though it was not neceſſary in *perſonal actions*.

Judge *Eyre* joined in opinion with the former judges, and ſaid further, that error does not remove the writ nor plaint, but only the proceedings, that the plaintiff in error could not be let in to make this objection, but from one or the other, that if the plaint was removed, it could not appear therein, it being only *in placito tranſgreſſionis ſuper caſum*, without ſhewing the matter further.

On this, Judge *Powell* gave his further opinion, that he thought this reaſon of his brother *Eyre* of no weight, for that a writ of error in a judgment given in a ſuperior court, does not remove the record or plaint, but only the proceedings; that in the court *diminution* may be alledged, but yet was of opinion, that writs of error on judgments in an inferior court removes the whole, as there was no alledging of *diminution* in ſuch inferior court. This matter was adjourned by the court, and in *Trinity* term, 12 *Ann*, was ſpoken to again, when Judge *Eyre* was of opinion, that the defendant, after pleading to this defect in declaration, could not take advantage of it in error, though notwithſtanding in *Trinity* term, 13 *Ann.* Judgment was reverſed *niſi*. *Vide Mod. Rep. vol.* 10. *p.* 140, 169.

Hilary, 11 *Ann.* *Parker* v. *Langley*.

In an action on the *caſe* for a malicious proſecution, the defendant demurred *ſpecially*, and ſhewed for cauſe, that the plaintiff had not ſhewn in his declaration what became of this malicious proſecution. The matter, after argument, being adjourned, in *Hilary* term following, the court gave judgment, that the declaration was naught, for the reaſon alledged in the demurrer. *Vide Mod. Rep. vol.* 10. *p.* 145. 210.

To the perſon of the plaintiff or defendant.

Eaſter, 1 *Ann.* *Weſt* v. *Sutton*.

A *ſci. fa.* being brought on a judgment in aſſize, for the office of marſhal; the defendant pleaded in abatement, that the plaintiff was an alien enemy; *& hoc, &c.* the plaintiff replied he was a ſubject born, *ſc.* at ——— in *England*, *et hoc paratus eſt verificare*. On demurrer. *Holt*, C. J. ſaid, 1ſt, the plaintiff ſhould have concluded to the country; for alien born, when pleaded in abatement, is triable where the writ is brought; for which reaſon the replication muſt conclude to the country; otherwiſe, where alien born is pleaded in bar, in which caſe the replication muſt conclude, *et hoc paratus eſt verificare*.

2dly, This cannot be pleaded in abatement to the *ſci. fa.* becauſe it was pleadable in abatement to the action. The defendant ſhall not diſable the plaintiff from having execution, ſince he admitted him able to have judgment: *ideo conſiderat. eſt quod reſpondeat*. *Vide Raym. vol.* 2. *p.* 853.

Hilary, 2 *Ann.* *Nutt* v. *Mills*.

On an action of *debt*, the defendant pleaded in abatement, *quod ante exhibitionem billae querens ſuſcepit ſuper ſe ordinem militarem et jam miles exiſtit*. To which plea the plaintiff demurred, and offered in demurrer, that the plea is uncertain, inaſmuch as it did not appear what ſort of knight the plaintiff was created, he might be a knight of the garter, or a knight of *Malta*, &c. *per curiam*, *ordo militaris* is certain enough. It was then ſaid, that there was no *venue* laid where the plaintiff *ſuſcepit ordinem*. *Holt*, Chief Juſtice, ſaid, there need none, becauſe the plea going to the perſon, it ſhall be tried where the action is laid. By the demurrer, the plaintiff has confeſſed himſelf a knight. *Vide Raym. vol.* 2. *page* 1014.

Hilary, 4 *Ann.* *Pie* v. *Cooper*.

In an action on the *caſe*, the defendant pleads in abatement, that the plaintiff was an alien enemy, and laid no *venue*. On demurrer, the plea was held good, and that the plaintiff might have replied, that he was born in *England*, generally. But if ſuch a matter is pleaded in *bar*, it muſt be pleaded with a *venue*, and the plaintiff muſt reply, that he was born in ſuch a particular place in *England*: and accordingly, judgment was given, *quod billa caſſetur*. *Vide Raym. vol.* 2. *page* 1243.

Trinity, 4 *Geo.* *George* v. *Powell*.

In debt on *aſſumpſit* for money lent and received to plaintiff's uſe, and on an *inſimul computaſſet*, the defendant pleaded, that the plaintiff was an *alien* born in

France, a ſubject of *Lewis* 14, *King of France*, and an enemy to the King of *England*, and that his parents were native ſubjects of that Prince, and not under the obedience of the *King of England*, and that he was at the time of filing the bill, and now is, a ſubject to the King of *France*, an enemy to the King. It was replied on the part of the plaintiff, that he was at the time of the promiſes made by the defendant, and now remains, in this kingdom, by licence and protection of the King, *viz. apud* ſuch a place. On demurrer, judgment was given for the plaintiff.

Per curiam. This is a good replication; where the plea is in abatement to the writ, and relates to the perſon, it muſt be tried where the writ is brought, and if an *alien enemy* is pleaded in ſuch caſe, ſuch plea muſt conclude to the country; but if an *alien enemy* is pleaded in *bar*, the plaintiff muſt reply, that he was born in ſuch a place in *England*, and this he is ready to verify. This reconciles the difference in the books concerning this plea. A plea of an *alien enemy* to a *ſci. fa.* on a judgment in *aſſize*, has been held a bad plea after a judgment in freehold, if recovery in freehold, but it is a good plea to the original action. *VideForteſcue, page* 221.

Eaſter, 8 *Geo.* *Curvwin or Colin* v. *Fletcher.*

In *debt on bond*; the defendant after a *general imparlance*, pleaded *ſtat.* 1 *Geo. cap.* 13. *ſect.* 23. and *recuſancy* in diſability of the perſon of the plaintiff. On demurrer, it being objected, that this plea ought not to be allowed after imparlance, in ſupport whereof, *Co. Lit.* 128. *Mod. Rep.* 14. *Lev.* 343. *Vent.* 76. 135. and ſeveral *other* authorities were quoted; the defendant's council in reply obſerved, that the caſes cited were all on pleas in abatement to the writ, and when it is abated, the plaintiff is intitled to a new writ; but that this plea is in diſability of the plaintiff's having any writ at all during his recuſancy. Several other objections to this plea were offered by the plaintiff, for that it concluded a *prout patet de recordo*, whereas it ought to have been immediately pleaded with a *profert hic in curia ſub pede ſigilli*, and that *ſtat.* 3 *Jac. cap.* 4. gives the ſeſſions power to make proclamation againſt recuſants to render themſelves, *&c.* and if they do not, and ſuch default is recorded, it ſhall be as ſufficient a conviction as a trial by verdict; whereas the defendant has not pleaded any ſuch default recorded at the ſeſſions. Fourthly, that the plea was ill concluded, it being, that the defendant *eat inde ſine die*, when it ought to have been *ideo loquela prædict. remaneat ſine die quouſque*, diſability being only temporary till conformity; *and*, laſtly, it was obſerved, that the defendant did not ſet forth that the plaintiff had not taken the oaths ſince the King's acceſſion to the crown; becauſe, had he taken them ſince ſuch acceſſion, the ſtatute did not extend to him. The matter was adjourned: in *Trinity*, 11 *Geo.* the court granted a *reſpondeas ouſter agard* without further debate, ſaying ſuch plea could never be ſupported after an imparlance. *Vide Mod. Rep. vol.* 8. *page* 44. *Stra. vol.* 1. *page* 521.

By demiſe of the crown, and death of parties.

Eaſter, 11 *W.* 3. *Wicket and Foot* v. *Cremer.*

A. and *B.* ſued *C.* and recovered judgment, *C.* brings his writ of error, pending which *B.* dies, *A.* ſued out two *ſci. fa's.* againſt *C.* and on two *nihils* returned, took out execution againſt *C.* and executed the writ. On motion to ſet aſide the execution, *quia erronice emanavit*, the writ of error not abating by the death of the defendant in error, and of courſe the execution of the judgment ſuſpended thereby, the court were of the ſame opinion. *Vide Raym. vol.* 1. *page* 439.

Michaelmas, 5 *Ann.* *Falmouth* v. *Strode.*

In *ejectment*, the defendant died the day before the aſſizes, yet the cauſe was tried, and after a long defence, judgment given for the plaintiff; on motion in arreſt thereof, it was objected, that this being matter of fact, and not aſſignable after verdict, the repreſentative of the defendant ought to bring a writ of error.

Chief Juſtice *Holt* obſerved, that if the defendant had died the day the aſſizes began, though the cauſe had been tried after, ſuch trial had been good, though he had died at one of the clock in the morning, for that the law knew of no fraction of a day, and cited *Shelley's* caſe. 1 *Co.* The matter was *adjourned*. *Vide Mod. Rep. vol.* 11. *page* 137.

Michaelmas, 6 *Ann.* *B. R.*

On an *ejectment* brought in *Devonſhire*, the defendant died the day before the aſſizes began at *Exeter*, and upon a trial on full evidence, a verdict was given for the plaintiff; on motion in arreſt of judgment, the court adjudged that the death of either party before the aſſizes is not remedied by the ſtatute: but if the party dies after the aſſizes begins, though the trial be after his death, that is within the remedy of the ſtatute; for the aſſizes is but one day in law; and this is a remedial law, and to be conſtrued favourably. 2. The court held that in this caſe it was in their diſcretion, on motion to arreſt judgment, or oblige the party to ſeek his remedy by a writ of error: accordingly on their refuſal to arreſt the judgment, the party brought his writ of error, that the point might be tried by a jury. *Vide Salk. vol.* 1. *caſe* 21.

Hilary, 9 *Geo.* *Lowther and wife* v. *Kelly.*

In an action of *covenant* brought on an indenture of leaſe, ſigned by one *W. R.* whom the plaintiff had impowered by letter of attorney, to demiſe his eſtates in *Barbadoes*, in which leaſe the defendant covenanted with the plaintiffs to pay the reſerved rent, the defendant pleaded in abatement the death of Mrs. *Lowther* ſince the laſt continuance. It was inſiſted for the plaintiff, that by *ſtat.* 8th and 9th *W.* 3. the action ſurvives by ſuggeſting the death of the party on the roll, and therefore that defendant's plea in abatement ought to be quaſhed. But the court would not quaſh the plea on a motion, wherefore the plaintiff ſuggeſted ſuch death on the roll according to the ſtatute, and proceeded in his action. *Vide Mod. Rep. vol.* 8. *page* 116.

Michaelmas, 1 *Geo.* 2. *The King* v. *Powell.*

The court held that proceedings on an information in nature of a *quo warranto* do not abate by the demiſe of the crown. *Vide Strange, vol.* 2. *page* 782.

Acceptance.

Of rent, or any other thing in ſatisfaction.

Hilary, 2 *W. & Mary.* *Symonds* v. *Cudmore.*

In *ejectment* for one meſſuage, *&c.* in the pariſh of St. *P.* in the city of *E.* on the demiſe of *N. M. &c.*

To this ſuit the defendant pleaded *not guilty*, and the jury found a ſpecial verdict, *viz.*

Sir *N. M.* tenant for life, remainder in tail to *W.* his eldeſt ſon, and he being impowered to make leaſes for 21 years or three lives, reſerving the antient rent, did demiſe the ſame to *C. W.* for 99 years, if *R.* and *N. W.* ſhould ſo long live at 8 *l.* 10 *s. per ann.*

Sir *N. M.* died, leaving a ſon and heir, *viz. W. M.* who being ſeiſed of the remainder in tail, and of the reverſion in fee, expectant on the determination of the eſtate to *C. W.* did by indenture releaſe the ſaid rent before the determination of ſuch eſtate, and did demiſe the ſaid premiſes to *E. W.* for 99 years, if *G.* and *W. W.* ſhould ſo long live, to take effect after the determination of the eſtate to *C. W.* as aforeſaid.

W. M. died, leaving a ſon and heir, *viz. N. M.* and he being iſſue in tail, levied a fine for the uſe of *himſelf and his heirs.*

On the determination of the firſt leaſe, *N. M.* entered and demiſed the ſaid premiſes to the plaintiff, on which the defendant being *aſſignee* of the ſecond leaſe entered.

The queſtion before the court was, whether *the defendant's entry was lawful?*

The plaintiff's council urged, that the eſtate tail was in being, and if it was barred by the fine, yet it was not extinct; that the leaſe was not void, but voidable by the iſſue in tail; that the *cognizee* to the fine might avoid it, as the iſſue in tail might have done, had no fine paſſed; that at *common law* all eſtates of inheritance were *fee ſimple*, and before *ſtat. de donis, &c.* the donee had a fee ſimple conditional in this eſtate, and might by fine have barred his iſſue; that this ſtatute altered the *common law*, being made for the benefit of iſſue, by preventing a tenant in tail before or after iſſue born to change the eſtate.

If a feoffment with livery had been made, the ſame would have worked a diſcontinuance of ſuch tail, becauſe the party had a *fee ſimple* in ſuch eſtate, and then the iſſue in tail muſt have brought his real action.

By *ſtat. 4 Hen. 7. cap.* 24. & 32 *Hen. 8. cap.* 34. a power is given to a tenant in tail to bar his iſſue by fine.

That if the leaſe was not voidable, it muſt remain good while any of the iſſue in tail were living, though that reaſoning could not hold, for the books expreſsly ſay, that alienations made for the benefit of iſſue in tail are binding, or if it was voidable by the iſſue in tail, the cognizee to the fine muſt have the ſame power as the iſſue in tail had before the fine paſſed, and cited 1 *Inſt.* 466, and ſeveral others.

The defendant's council urged, that the leaſe for years was not to be voided by the iſſue in tail, the ſame ariſing out of the eſtate tail, and alſo out of the reverſion; that the ſame might be a good leaſe, though the tail might be barred by the fine, for the leaſe was made by *W. M.* when tenant in tail, and therefore could not be voided againſt his iſſue; the iſſue having levied a fine, the eſtate tail becomes extinct, and the cognizee cannot come in privity of this act, he being a meer ſtranger, and therefore this act cannot void the leaſe, and ſupported his arguments by the authority of ſeveral caſes.

The court in *Hilary* term, 4th and 5th *W.* and *Mary* gave judgment on this caſe for the defendant, and that the cognizee of the fine could not void the leaſe made by *W. M.* and gave the following reaſons for ſuch their opinion, *viz.*

That it was an intereſt derived out of the eſtate tail, and charged the reverſion in fee; that after the determination of the leaſe, made by Sir *N. M.* his ſon, who had the remainder in tail, might by recovery have barred the eſtate tail.

That if the leaſe was not void, but voidable only by the iſſue in tail, yet after he had paſſed a fine, the *cognizee* could never void it, becauſe not in privity to the eſtate tail, which is extinguiſhed by the fine, and the *cognizor* having once diveſted himſelf of the power he had to avoid the leaſe, can never after transfer it to the *cognizee.*

By *ſtat.* 32 *Hen.* 8. the eſtate tail is barred, the words of the ſtatute being, *that a fine levied of lands entailed on the cognizor, or any of his anceſtors, ſhall be a* bar *againſt the perſon and his anceſtors claiming by force of ſuch tail.*

The court have often determined on this *ſtatute*, that a fine levied by a remainder man in tail during the eſtate of a tenant for life, was an extinguiſhment of the entail; and on this principle that otherwiſe there would be two fee ſimples in one and the ſame perſon, *viz. a qualified fee* determinable on the death of a tenant in tail dying without iſſue, and an *abſolute fee* out of the reverſion.

The acceptance or refuſal of rent cannot operate either to affirm or avoid the leaſe, for unleſs the iſſue in tail doth enter, the leaſe ſhall not be avoided.

The court gave it as their opinion, that *W. M.* the tenant in tail, having alſo the reverſion in fee, the leaſe made by him iſſues out of both the eſtates, and the iſſue in tail hath extinguiſhed the eſtate tail, by levying the fine, ſo that the cognizee muſt be in of the reverſion in fee. *Vide Mod. Rep. vol.* 4. *page* 1.

Hilary, 3 *W and Mary.* *Pitcher* v. *Tovy.* Error.

On error brought to reverſe a judgment in *C. B.* on an action of *covenant*, the plaintiff declared that ſhe was poſſeſſed of certain houſes in *St. Martin's Lane* for a certain term of years, and that ſhe demiſed the ſame to *R. G.* for twenty-one years, under a certain rent, which by ſuch demiſe he covenanted to pay,

That before a leaſe of the ſaid premiſes was ſealed, an indorſement was made thereon, that *R. G.* ſhould pay every year to the defendant, the leſſee, twelve bottles of *Canary* wine. The leſſee entered, *&c.* and made his will, and appointed *S. G.* ſole executrix thereof, and ſoon after died.

The executrix proved the ſaid will, and took poſſeſſion of the ſaid premiſes, and afterwards aſſigned the ſaid term to *Pitcher*, the defendant at law, who entered and was poſſeſſed, *&c.* That he the ſaid *Pitcher* had not performed the covenants, and aſſigned the breach in non-payment of twenty-four bottles of *ſack* due for two years, and for arrears of rent, after the aſſignment made to him.

The defendant *T. P.* pleaded, that before the ſaid wine and rent became due, he aſſigned his intereſt to *J. M.* but did not plead notice given to the plaintiff; or that ſhe had accepted the rent.

On demurrer, judgment was given in the *C. B.* for the plaintiff, on which a writ of error was brought in this court, and the *common errors aſſigned.*

The queſtion before the court was,

1. Whether the defendant *P.* ought to have pleaded, that he had given the plaintiff *T.* notice?

2. If ſuch notice was neceſſary, yet whether this action would lie againſt the defendant after this aſſignment made by him to *Mott*, &c.

To the *firſt point*, the plaintiff's council urged, that the defendant was ſtill liable, notwithſtanding the aſſignment, without he had pleaded notice thereof, for otherwiſe the plaintiff could not know againſt whom to bring his action, or where to ſeek his remedy, and cited the caſe of *Kighly* v. *Bulkly. Sid.* 338. in ſupport of his argument.

The *privity of eſtate* is transferred by this aſſignment, ſo that nothing remains on which notice can be fixed, which is a *bar* to the action; the plaintiff ought to have taken notice at her peril; for when an aſſignment is made, it is publicly known to whom, and the perſon in poſſeſſion is always taken to be the *aſſignee.*

To the *ſecond point*; that it was neceſſary on the part of the defendant to plead that he gave notice of ſuch aſſignment, yet the plaintiff cannot have judgment againſt this defendant, becauſe no action will lie, for to ſupport ſuch action, either a *privity* of contract or *eſtate*, muſt be proved. In this caſe, no *privity* of contract is pretended to between them, the defendant being only an *aſſignee* of an executrix of a term; and as to *privity in law*, that can only remain ſo long as the eſtate exiſts, and no longer. In ſupport of this point, the caſe of *Overton* v. *Sydall's, Cro. Eliz. page* 555. was cited as a caſe in point.

An objection aroſe, that as the action was brought as well on the *covenant* for the bottles of wine, as for the *rent*, and entire damages were given thereon, ſuch verdict is naught, becauſe the wine begets an action of *covenant*, it being a *reſervation*, and not a *rent*, and therefore cannot be aſſigned to the defendant, who from the nature of the tranſaction, muſt be a ſtranger to ſuch covenant.

The plaintiff's council agreed, that on this particular objection there was no *privity* of contract, tho' there was a *privity* of eſtate remaining, notwithſtanding the *aſſignment*, which was not compleated till notice given, and *argued*, that if the law was otherwiſe, great miſchief would ariſe, the leſſor having no perſon to bring his action againſt; for if he brought it againſt the under-tenant, unleſs he could prove the aſſignment to him, he muſt be *nonſuited*, and therefore in idea of law, the privity muſt continue, though in *rei veritate* the eſtate is aſſigned.

That as to the *laſt objection*, that by the indorſement, the payment of the wine is no rent, but a reſervation, *&c.* the plaintiff's council anſwered, That it was not material whether it was conſidered as a *reſervation* or not, it being a *duty* which aroſe by means of the thing demiſed, and muſt attend the ſame, and cited 1 *Inſt. p.* 385. in ſupport of his argument.

After two arguments, in *Eaſter* term following, judgment was given for the defendant in the *original* action, and the judgment in *C. B.* reverſed. The court being of opinion, that the *aſſignee* was chargeable, by reaſon of the land; and that when he had parted with his eſtate, it was not reaſonable he ſhould be any longer liable, becauſe the executor of the leſſee is ſtill bound to perform the covenants in the leaſe, ſo long as ſhe has *aſſets*. *Vid. Mod. Rep. vol.* 5. *page* 71.

Adjudications of the court on ſeveral points relative to

Acceptance.

No one is bound to accept a thing by parcels, to which he has a right in Groſs.

Adjudged, that where a perſon is intitled to a thing *in groſs*, he is not obliged to accept it *by parcels*; thus for example, if *A.* is bound to deliver ten pipes of wine to *B.* and tenders him a part thereof only, *B.* is not compelled to accept it.

The leſſor is not bound to accept part of the rent due.

Thus where the leſſor *diſtrains for rent in arrear*, and the leſſee *tenders part of it*, the leſſor is not bound to accept ſuch part; but if he diſtrains for arrears due at *ſeveral days*, on which the rent ought to be paid, and the leſſee tenders the arrears due on ſuch a day, the leſſor is bound to accept it. The caſe is the ſame if the leſſor *brings an action of debt inſtead of diſtraining* for rent due on ſeveral days, but if there is no tender of any part, and the leſſor obtains judgment for the whole, it then becomes an entire duty, and if upon execution ſued out the leſſee tenders any part of the rent, the leſſor is not bound to accept it.

Neither is the plaintiff in detinue *obliged to accept part.*

Thus in *detinue* for divers parcels of goods, if the plaintiff obtains judgment for the whole, and after execution ſued out the defendant tenders a part to the plaintiff, he is not bound to accept it.

There can be no entry for a forfeiture after acceptance of the rent.

A leaſe was granted for a term of years, rendering rent, the ſame to be forfeited if the leſſee aliened or aſſigned to another; the leſſee *aliened*, and the executor of the *alienee* paid the rent to the leſſor, and though it was not alledged, that he did know the leaſe was *aliened*, *viz.* by aſſignment to another, but only that he (the leſſor) knowing the other to be the executor of the aſſignee, had accepted the rent of him; it was *adjudged* that the leſſor ſhould not enter for a forfeiture againſt his own *acceptance*, for it ſhall be intended he had notice of the aſſignment, if the contrary does not appear. See *Witchcot's caſe* 2. *Cro.* 398.

A covenant to repair, binds the aſſignee of the leſſee.

Thus if the leſſee covenants for him and his aſſigns to repair, the aſſignee of the leſſee by his accepting ſuch aſſignment is liable, for this is a covenant which runs with the land.

Where acceptance of the rent affirms the leaſe.

A huſband and wife made leaſe of the lands of the wife, the huſband afterwards died, and the wife married again, and the ſecond huſband accepted the rent. *Adjudged*, that by ſuch acceptance he had affirmed the leaſe, even *quoad* the wife herſelf, becauſe ſhe had reſigned her election to her ſecond huſband, and he by his acceptance of the rent had affirmed the leaſe. *Dyer* 195.

A *leaſe* was granted to *W. R.* for life, rendering rent at *Michaelmas*, with a clauſe of re-entry for non-payment, the rent was in arrear, and afterwards the leſſor brought an action for the rent. *Adjudged*, that notwithſtanding this action he (the leſſor) might ſtill enter for a breach of the condition, the action for the rent not affirming the leaſe, becauſe it ſhall be intended to be brought as for a duty due upon the contract; but if he had *diſtrained* for the rent not being paid on the day, then he could never afterwards have entered for a breach of the condition, the *diſtreſs* affirming the continuance of the leaſe. 2 *Inſt.* 211.

Where acceptance of the rent does not affirm the leaſe.

A gift was made to the huſband and wife, and to the heirs of their bodies; they afterwards made a leaſe of the lands, reſerving rent on ſuch a day, with a clauſe of re-entry; the huſband died, and the rent being in arrear, the iſſue in tail accepted the arrears of rent due. *Adjudged*, that this was no affirmance of the leaſe as to himſelf, becauſe the rent was not due to him whilſt his mother was living; but it would have been an affirmance if he had accepted it after her death. 3 *Rep.* 64.

Acceptance of rent after the day of payment is no bar to a right of entry.

Adjudged, that an acceptance of a collateral matter is no bar to the title of a freehold, and that an acceptance of rent after the day of payment does not bar a right of entry veſted by non-payment, becauſe the rent being a duty, and owing, the party might well accept it; but it is otherwiſe after a *diſtreſs* taken, or the rent is accepted at another day ſubſequent, for either of them affirms the continuance of the leaſe. *Vide Salk. vol.* 3. *p.* 3, 4.

Anonymous.

A leaſe for years, on condition to be void if the leſſee aſſigns over the term: the leſſee afterwards made an aſſignment, and the leſſor knowing of ſuch aſſignment, accepted the rent. *Adjudged*, this will not make the leaſe good, becauſe it was abſolutely void before the acceptance. *Vid. Salk. vol.* 3. *page* 4.

Smith v. Arnold.

By *ſtat.* 32 *Hen.* 8. a grantee of a reverſion is enabled to enter land, *&c.* for a condition broken, and to bring an action of covenant, *&c. Caſe.* A leſſee for years, covenants for himſelf, his executors, *&c.* to build an outhouſe on the lands of the leſſor, and afterwards the leſſee for life aſſigns his eſtate to *T. S.* The queſtion before the court was, Whether ſuch aſſignee might be charged in an action of *covenant* if the outhouſe was not built? It was inſiſted that he could not, becauſe the aſſignor had covenanted only for himſelf, his executors and adminiſtrators; leaving out the word *aſſigns*. *Adjudged*, that the *aſſignee*, by the *acceptance* of the poſſeſſion of the lands, had made himſelf ſubject to all the covenants which run with the land, of which repairing is one, and building is another, and to ſuch he is bound, without being named by that ſpecial word *aſſigns*, but not to any *collateral* covenants. *Vide Salk. vol.* 3. *page* 4.

Wallis v. Wood.

A leaſe for years was made to *T. S.* rendering rent, which being in arrear, the leſſee died inteſtate, and adminiſtration was granted to the defendant; on an action of debt being brought for the rent, he pleaded that the inteſtate had aſſigned the term, and after ſuch aſſignment, the leſſor had accepted rent of the aſſignee. The parties were at iſſue on the acceptance of the rent, and the plaintiff obtained a verdict; but becauſe part of the rent became due pending the action, the plaintiff could never obtain judgment. *Vide Salk. vol.* 3. *page* 4.

Parker

Parker v. *Webb.*

A leſſor being ſeiſed in fee, demiſed the lands for a term of years to the defendant, rendering rent at *Michaelmas* and *Lady-day*; in ſuch leaſe the defendant covenanted to pay the rent, *&c.* the leſſor afterwards granted the reverſion to the plaintiff; to which grant the defendant attorned, and on an action of covenant brought againſt him for non-payment of the rent, the defendant pleaded, that he had aſſigned his term to *D. D.* before the reverſion was granted to the plaintiff, and on demurrer,

Per Chief Juſtice *Holt*, This plea is ill, for the defendant ought to have ſet forth, that the plaintiff had accepted rent from the aſſignee, or that he had notice of the aſſignment; but if this had been pleaded, the plaintiff ſhould ſtill have judgment, becauſe he being grantee of the reverſion, may maintain this action againſt the leſſee even after the aſſignment of the term, and though he had accepted the rent after ſuch aſſignment; and this he might do on the expreſs covenant of the leſſee to pay it, which is a covenant that runs with the land. *Vide Salk. vol.* 3. *page* 5.

Michaelmas, 7 *W.* 3. *Taylor* v. *Baker.*

In an action on the caſe on a *quantum meruit pro opere et ſervitio,* and an *inſimul computaſſet*, for 5 *l. ſolvend.* whenever required, *&c.*

The defendant pleaded that it was agreed between him and the plaintiff, that the defendant ſhould give, and the plaintiff ſhould accept a bill of 5 *l.* in ſatisfaction of what was due to him, and that he did accept ſuch bill according to the ſaid agreement. The plaintiff replied *proteſtando,* that he made no ſuch agreement *proteſta do etiam*, that there was no ſuch bill given, *pro placito dicit,* that it was under ſeal. On demurrer to this replication, it was held good. *Vide Mod. Rep. vol.* 5. *page* 136.

Michaelmas, 7 *W.* 3. *See Roll* 78 *Eaſter,* 7 *W.*
Young v. *Rudd.*

In an action on the *caſe* on an *indebitatus aſſumpſit,* and a *quantum meruit* laid in the declaration, the defendant pleaded in *bar*, that he gave the plaintiff a beaver hat, which he accepted in diſcharge of the debt.

The plaintiff replied by *proteſtation,* that the defendant did not give the hat in ſatisfaction, and traverſed, that he did accept the hat in ſatisfaction.

On demurrer, defendant's council objected that the traverſe was immaterial, for the *giving* is the directing the matter, which ought to have been traverſed, and not anſwered by *proteſtation,* and cited *Pynell's* caſe, 5 *Mod. Rep. p.* 117. 677, 678. in ſupport of his arguments.

The council for the plaintiff replied, that either the *giving* or the *acceptance* of what is given in ſatisfaction may be traverſed.

Per curiam. Where a thing is pleaded by way of *concord* it is iſſuable, but if the concord is not executed by *giving* and *receiving*, it cannot be pleaded in bar to the action; the beſt way of pleading it is, by ſetting forth that the thing was given and received in full ſatisfaction. The plaintiff therefore had judgment. *Vide Mod Rep. vol.* 5. *p.* 86. *vol.* 12. *p.* 85. *Raym. vol.* 1. *p.* 60.

Michaelmas, 2 *Ann.* *Williams* v. *Farrow.*

In *debt on bond* brought in *London*, a feoffment of land in a different county, and an acceptance of the ſame in the above *vill* in ſatisfaction of the bond, was pleaded in bar; on ſpecial demurrer, becauſe the acceptance was not laid in *London, Per curiam.* The acceptance muſt be laid where the feoffment was, it being local; but had it been a tranſitory matter, the defendant's plea ſhould not have made it foreign, and ſuch plea when local ought not to be accepted without an affidavit of the truth thereof: accordingly the plaintiff was permitted to diſcontinue, on payment of coſts. *Vid. Mod. Rep. vol.* 6. *page* 82.

Eaſter, 5 *Geo.* 3. *Pillan and Roſe* v. *Van Mierop and Hopkins.*

The acceptance of a bill of exchange is an obligation on the acceptor to pay the ſame; the end of their inſtitution, their currency, proves it, and requires that it ſhould be ſo. It is on this principle bills of exchange are conſidered and declared on as *ſpecial* contracts, though *legally* but *ſimple* contracts.

An agreement to honour a bill is *virtually* an acceptance of ſuch bill. The acceptance need not be on the bill, it may be by collateral writing.

A promiſe *to accept* is the ſame as an actual acceptance; it will bind, though the acceptor has no effects in hand, and without conſideration. *Vide Bur. vol.* 3. *page* 1674. *and Stra. vol.* 1. *p.* 648.

Accord.

Eaſter, 4 *W.* & *Mary.* *Adams* v. *Tapling.*

On an action of *covenant*, the breaches aſſigned were;

That the houſes were not in repair, that the locks were taken away, that the hedges were broken down, and the ditches unſcoured.

To this action the defendant pleaded an agreement made between him and plaintiff, *viz.* that he ſhould employ a workman three or four days in and about the repairing of the houſe, which was to be a ſufficient ſatisfaction, and that he had employed ſuch workman, *&c.*

On this plea iſſue was joined, and a verdict was given for the defendant.

The plaintiff moved in arreſt of judgment, and offered the following exceptions.

1. Where an *accord and ſatisfaction* is pleaded, it muſt be *real*; in this caſe, it was no more than the defendant was obliged to do.

2. That he had aſſigned ſeveral breaches, and the defendant had only anſwered to the repairs of the houſe, which is a diſcontinuance in pleading, and not aided by a verdict.

3. That the ſatisfaction is uncertain, *viz.* to employ a man to work three or four days; and for theſe reaſons judgment was ſtayed.

Per curiam. In *covenant* where the damages are uncertain, and to be recovered as in this caſe, a leſſer thing may be done in ſatisfaction, and then *accord and ſatisfaction* is a good plea.

In debt on *bond* where the ſum to be paid is certain, there a leſſer ſum cannot be paid in ſatisfaction of a greater. *Vide Mod. Rep. vol.* 4. *page* 88.

Eaſter, 7 *Geo.* *Rol.* 173. *Trin.* 5 *Geo.* *Cumber* v. *Wane.* Error.

On a writ of error from the *C. B.* in an *indebitatus aſſumpſit* for 15 *l.* the defendant pleads that he gave plaintiff a note of hand for 5 *l.* in ſatisfaction, which the plaintiff accepted in ſatisfaction. To this plea the plaintiff put in an immaterial replication, to which the defendant demurred.

After judgment given for the plaintiff, it was objected on the writ of error, that the defendant's plea was ill, it appearing that the note for 5 *l.* could not be an equivalent for 15 *l.* and that the doctrine of law is that where one contract is to be pleaded in ſatisfaction of another, the ſame ought to be of a higher nature, and cited the following caſes in ſupport thereof, *viz. Hob.* 68. 2 *Keb.* 804. 1 *Mod.* 225. 2 *Keb.* 857. 5 *Co.* 117. & 1 *Leon.* 19.

The plaintiff in error's council argued, that the plaintiff at law's demand was only damages, and therefore it was for his advantage to have the ſame reduced to a certainty, and the ſecurity given for the ſame made negociable; and cited ſeveral caſes from 4 *Mod.* 43. 1 *Mod.* 261. 1 *Rol. Abr.* 122. *Raym.* 450. & *Salk.* 76. in ſupport of his arguments.

Per Pratt Chief Juſtice. We are all of opinion, that the defendant's plea is not good, and judgment muſt be affirmed; the plaintiff at law having had a good cauſe of action, the ſame can be extinguiſhed only by a ſatisfaction which he agrees to accept. The agreement alone is not ſufficient, it muſt be made appear to the court, that the ſame was a reaſonable ſatisfaction, and not the reverſe, an unreaſonable one, as in this caſe, if 5 *l.* be not ſatisfaction for 15 *l.* a ſimple contract to pay that ſum cannot be a ſatisfaction for another ſimple contract of three times the value. On bond another ſatisfaction has never been allowed to be pleaded in ſatisfaction, unleſs the ſame put the plaintiff in a better ſtate, as by ſhortening the time of payment, *&c.* Indeed the putting the plaintiff in a better ſituation only is not ſufficient; as for example, a *bond* with *ſureties* is better than a *ſimple bond*, and yet that will not be a ſatisfaction. *Vide* 1 *Brownl.* 47. 71. 2 *Rol. Abr.* 470. The judgment therefore muſt be affirmed. *Vide Str. vol.* 1. *page* 426.

Michaelmas, 10 *Geo.* *Paine* v. *Maſters.*

On an action on the caſe, on a promiſſory note, the defendant pleads the delivery of twenty hogſheads of claret in ſatisfaction, and which he the aforeſaid defendant (inſtead of the plaintiff) received in ſatisfaction.

On a general demurrer, it was objected, that the averring the delivery of the wine to the plaintiff was not ſufficient without ſhewing his acceptance of it, which was wanting in this caſe, by the defendant's name being put inſtead of the plaintiff's, and cited *Salk.* 629. and the caſe of *Hawkſhaw* v. *Rawlings in K. B. Hilary*, 3 *Geo.* in which caſes the court held, that the bare pleading he gave the thing in ſatisfaction, without ſhewing that the plaintiff received and accepted it as ſuch, would be inſufficient.

Per curiam. Judgment for the plaintiff. *Vide Stra. vol.* 1. *page* 573.

Michaelmas, 11 *Geo.* *Wyvil* v. *Stapleton.* Error.
Shelburne v. *Eundem.*

On a writ of error brought on a judgment in *C. B. in debt*, where the plaintiff had declared, that by a writing between him and the defendant, it was agreed that the plaintiff on *payment* or *tender* of a certain ſum of money by defendant on or before the day of ſhutting up of the books, ſhould transfer to him 200 *l. South Sea* ſtock, for which conſideration the defendant agreed, that he would on or before the ſhutting of the ſaid books accept ſuch ſtock, and would at *that time* pay for the ſame. In this agreement there was a *proviſo* to enable the plaintiff to ſell out ſuch ſtock, if the defendant did not accept it as aforeſaid. The plaintiff *avers*, that he was at the *South Sea* houſe on the day of ſhutting the books, and then offered to transfer ſuch ſtock, but defendant never appeared, on which he ſold the ſame, and brought his action for the deficiency.

The defendant pleaded a *feoffment* in ſatisfaction. On demurrer judgment was given in *C. B.* that the plea was good: *Ideo querens nil capiat per billam.*

It was held that ſuch plea was bad, and that the reaſons on which the court below grounded their judgment were not right; yet whether on the whole record ſuch judgment was warranted, was the queſtion that came before the court.

On *error* it was objected by the council on behalf of the defendant at law, that the plaintiff in his declaration had not ſhewn any cauſe of action, for that the covenant to pay was only an acceptance, and in this caſe there was only a tender inſufficiently alledged, but no acceptance. The defendant covenants to accept on or before the ſhutting the books, and *then* on ſuch acceptance to pay.

The council on behalf of the plaintiff at law inſiſted, that in the agreement there were mutual covenants, or if there had not, the plea of a feoffment in ſatisfaction admits every thing neceſſary to entitle his client to be ſatisfied, and cited *Cro. Car.* 384. 1 *Vent.* 126. *Hob.* 233. 198. 2 *Saund.* 180. 1 *Sid.* 466. *Show.* 114, 213.

Pratt, Chief Juſtice. I think the judgment in *C. B.* ought to be reverſed. The explanation put on this covenant by the defendant is a ſtrange one, for it is no leſs than to diſcharge himſelf of one covenant by the breach of the other. He acknowledges he did not accept the ſtock as he ought, and yet ſays, I am diſcharged from the payment of the money: this is ſo harſh, that if any fairer meaning can be put on it, I am ſure it ought. The natural import of the words appear to me to be, that *then* ſhould not relate to the actual acceptance, but only to the time when he covenants to accept: if ſo, theſe being mutual covenants, the breach is well alledged in non-payment of the money; if the plaintiff has failed on his part, ſuch failure will be no excuſe in this court, as the defendant has his action to do himſelf juſtice. *Powys J. Accord.*

Eyre, Juſtice. This being an action for a deficiency of the ſtock, I am of opinion that the mutual remedy is loſt; if ſo, a *tender* and *refuſal* are neceſſary to be averred to entitle the plaintiff to ſell the ſtock. The tender is not ſufficient either as to time or place; as to the time, if nothing is ſhewn to the contrary, the laſt part of the day is what the law appoints, and the plaintiff is deficient in that; as to the place, the plaintiff ſhould have averred, that the *South Sea houſe* is the proper place, for we cannot take notice of it. *Vid. Salk.* 623. *Lutw.* 516.

Forteſcue, Juſtice. If it be neceſſary to *aver* a tender, the plea muſt be naught. In this I am not clear. I think that payment is ſo far from being to be ſubſequent to, or on acceptance, that the very firſt act which ought to be done according to this contract is, that the plaintiff ſhall on paying *transfer*, and the *adtunc* refers to that time. *Per cur' ulterius council.*

This caſe was moved again, and arguments offered by the council on both ſides, when the court gave the following determination:

Per curiam. The objection is, that the plaintiff ſhould have done the firſt act by transferring or tendering at leaſt, or elſe how could the defendant *adtunc accipere et ſolvere proinde.* This matter depends on the wording of the indenture, and the intent of the parties. It never could be their intention to make the payment depend on the defendant's acceptance; *adtunc* refers to the time mentioned for the transfer, and not to the act of transferring. It would be unreaſonable to oblige the plaintiff to part with his ſtock firſt, ſince it is notorious ſuch a ſtep is not the nature of theſe agreements. The money is not paid as the conſideration of the transfer, but of the covenant to transfer. We are all of opinion, that theſe are mutual covenants, and though there is no tender ſufficiently alledged in the declaration, yet it is well enough. The judgment below being for the defendant, when it ought to have been for the plaintiff, is erroneous, and ought to be reverſed: we accordingly reverſe the ſame, and give judgment for the plaintiff. *Vide Stra. vol.* 1. *page* 615.

Account.

Hilary, 2 *W. & M.* *Wilkin* v. *Wilkin.*

On *aſſumpſit*, the plaintiff declares that the defendant propoſing to go abroad, he delivered to him a box and goods, which the defendant promiſed to diſpoſe of for him, and to give him an account thereof at his return. The defendant pleaded in abatement, he was the plaintiff's bailiff, and merchandized the ſaid goods, and that the plaintiff ought to bring an action of *account*, and not an action on the *caſe*: this plea not allowed; for the action being grounded on an expreſs promiſe, *aſſumpſit* lies as well as *account*, and the plaintiff has his election. *Note*; the objection was, that in *account* againſt the defendant as bailiff, he would have allowances, *&c.* *Per Holt.* There is ſome inconvenience in giving a long vague account in evidence to a jury: but wherever a perſon acts as bailiff, he promiſes to render account. Judgment therefore was awarded for the plaintiff. *Vide Salk. vol.* 1. *page* 9.

Lent aſſizes at Eaſt Grinſtead in Suſſex, 11 *W.* 3.

In *indebitatus aſſumpſit*, on an *inſimul computaſſet*, it appeared on the evidence that the debt for which the action was brought, was in right of *A.* to whom the plaintiff was executor. *Holt*, Chief Juſtice, was of opinion, that the matter was againſt the plaintiff; but ordered the caſe to be reſerved for his further conſideration, and that in the interim the plaintiff ſhould have a verdict ſubject to his opinion. *Vide Raym. vol.* 1. *p.* 733.

Eaſter, 13 *W.* 3. *May* v. *King.*

On an *indebitatus aſſumpſit* for 50 *l.* the defendant pleaded that he and the plaintiff came to an account together, and on ſuch account the plaintiff was found in arrear to him in the ſum of 5 *s.* and on the ſettlement thereof, it was agreed between them, that the one ſhould be quit againſt the other, except the 5 *s.*

The plaintiff demurred, and exception was taken thereto, that the ſame amounted to the general iſſue.

Per Holt, this ought not to be pleaded ſpecially, but amounts to the general iſſue, and might have been given in evidence afterwards; the plea was waived by conſent, and the defendant pleaded to iſſue. *Vide Raym. vol.* 1. *page* 680.

Eaſter, 13 *W.* 3. *At Niſi Prius at Guildhall.*

In *account*, it appeared on evidence that *A.* gave a note on *C.* to *B.* to receive the money for the uſe of *A. B.* being indebted to *C. C.* accepts his own note from *B.* in diſcharge of *B.'s* debt.

Per Holt, if *A.* is intruſted with money by *B.* to be laid out, and *A.* lends it to another then in apparent credit, and takes a proper ſecurity for the ſame, as a bond, &c. and the borrower afterwards becomes inſolvent, *A.* ſhall not be chargeable with ſuch money. *Vide Mod. Rep. vol.* 12. *page* 509.

Eaſter, 13 *W.* 3. *Spurraway* v. *Rogers.*

In an action *on the caſe* on a ſpecial promiſe to account, the plaintiff had given goods to a certain value, and a ſum of money to the defendant a Captain of an *Eaſt Indiaman*, who promiſed to return him the value of ſuch goods in *India* produce, on his return from his next voyage.

Per Holt, if *A.* receives goods from *B.* to account for ſuch goods, if the parties come to account, though *A.* gives not a true account, yet if *B.* has accepted ſuch account, the ſame is good; and if one perſon receives goods of another, and expreſsly promiſes to be accountable for them, or to render an account of ſuch goods, an action on the caſe will lie, if he will not account on that promiſe. On a general *bailment of goods* without a particular promiſe to account, the ſole remedy is by action of account. If one covenant or promiſe ſpecially on receipt of goods, to be accountable for ſuch goods, if he refuſes to account, an action on the *covenant* or *promiſe* will lie, and an action of account lies on the general receipt.

Thus if *A.* buys any thing of *B.* and gives him a goldſmith's bill in payment, which *vendee* accepts without any objection thereto, if the goldſmith were worth nothing when his bill was given, and *A.* was unacquainted therewith, yet it is a good payment, but otherwiſe if *A.* knew the goldſmith to be in a failing condition. *Vide Mod. Rep. vol.* 12. *page* 517.

Trinity. 3 *Ann. The King* v. *Criſp.*

The defendant being indicted for that there was an account ſtated between him and *A.* by which *account* he appeared to be indebted to the ſaid *A.* in ſuch a ſum of money which ſaid account the defendant ſigned, and afterward got the ſame into his hands by falſe pretences, and *vi & armis* tore it *contra pacem*, &c.

The defendant's council moved to quaſh the indictment for the following reaſons:

1. Becauſe it was a private offence not indictable.
2. Becauſe it did not ſhew whoſe the property of the papers was.

The court denied the motion, alledging that it was a treſpaſs *ab initio*. The property is his who was intitled to the debt on the account; and directed the defendant to try it, or demur at his peril. *Vide Mod. Rep. vol.* 6. *page* 175.

Trinity, 5 *Ann. Poulter* vs *Cornwall.*

On an *indebit. aſſumpſit* for money received to account for, a verdict was given for the plaintiff; it was moved in arreſt of judgment, that this action did not lie, but *account*: for if a perſon receives money to a ſpecial purpoſe, as to account, or to merchandize, it is not to be demanded of the party as a duty, until he has neglected, or refuſed to apply it according to the truſt under which he received it: and the declaration muſt ſhew a miſapplication, or breach of truſt. *Per cur.* The verdict has aided the declaration, for it muſt be intended there was proof to the jury, that the defendant refuſed to account, or had done ſomewhat elſe that rendered him an abſolute debtor. *Vide Salk. vol.* 1. *page* 9.

Eaſter, 10 *Ann. Biſhop* v. *Eagle.*

In an action of *account* brought by the preſent churchwardens againſt the former ones, they plead that the plaintiffs were no churchwardens, on which iſſue was joined, and a verdict given for the plaintiffs, and judgment *quod computent*.

The defendants before the auditors plead, that they received ſuch a ſum of money as churchwardens through a miſtake, when none was really due to the pariſh, and perceiving the miſtake, they repaid the money. To this plea the plaintiffs demur.

The council for the plaintiffs ſaid, that no plea that had been a good *bar* of the action could be pleaded before the *auditors*; they could not plead *ne unques receiver*, becauſe they did receive, and for the uſe of the pariſh; that they might have pleaded this matter ſpecially, and ſo ſhewn that they were not accountable at the time of the bringing the action.

The defendants council admitted that no plea which would have been a good one to the action could be pleaded before *auditors*; that in this caſe *ne unques receiver* could be no plea, as they did receive, and for the uſe of the pariſh, for had they been robbed, or not repaid the money, they muſt have remained accountable.

Powell Juſtice was of opinion, that this matter might have been pleaded *ſpecially*, though it could not be pleaded generally.

Chief Juſtice *Parker* was of opinion, that admitting this plea of the defendants to be good before auditors, it will be neceſſary for them to plead ſuch plea as ſhews them to be honeſt men, *viz.* that they not only received the money by miſtake, but alſo that they repaid the ſame. *Whereas* if it was taken the other way, and to be a good plea in bar, a receipt by miſtake will be no receipt at all, and it will not be neceſſary to ſhew the repayment, but only that the money did not belong the pariſh, therefore he was inclined to ſupport the defendants plea as far as poſſible. Had the defendants paid the money to the pariſh before the knowledge of the miſtake, the pariſh would have been chargeable with the money; becauſe the repayment was in that caſe an act done in diſcharge of the pariſh, and in conſequence a proper plea before the auditors.

The doubt then was, whether the churchwardens after payment of the money to the pariſh, the uſe for which they received it, and this before the miſtake was known, could have been charged in an *indebitatus aſſumpſit* for the money. *Powell* and *Parker* differed in opinion; the former thought they might, the latter that they could not. *Vide Mod. Rep. vol.* 10. *page* 23.

Eaſter, 9 *Geo.* *Spackman* v. *Huſſey.*

The plaintiff declared in the *Marſhal's* court, on an *inſimul computaſſet infra juriſdictionem*, &c. and obtained judgment.

On a motion to ſet the ſaid judgment aſide, it was inſiſted on behalf of the plaintiff, that the *account* doth not alter the duty, for that may ariſe in *York*, and no other conſideration being laid to entitle the court to any juriſdiction, the judgment ought not to ſtand. *Adjudged*, that the account was ſufficient to give the court a juriſdiction. *Vide Mod. Rep. vol.* 8. *p.* 77.

Trinity, 10 *Geo.* *Page* v. *Barns.*

By *ſtat.* 4. & 5 *Ann, cap.* 16. for the amendment of the law, *it is enacted*, that actions of *account* may be brought againſt a bailiff or receiver for receiving more than his juſt ſhare; and an action of *account* being brought on this ſtatute againſt the defendant as bailiff *ad mercandizandum*, who waged his law, on demurrer it was objected, that wager of law would not lie in *account* againſt a bailiff *ad mercandizandum*; but if it had been brought againſt a *receiver*, and the plaintiff had not ſhewn by *whoſe hands*, in that caſe wager of law would lie; and it was ſo adjudged in this caſe for the plaintiff. *Vide Mod. Rep. vol.* 8. *p.* 303.

Hilary, 12 *Geo.* *Goſwell* v. *Dunkley.*

In an action of *account* for a watch, &c. delivered to the defendant to *merchandize*; he pleaded that he carried the goods abroad, and in order to ſecure them till he had an opportunity to ſell them, he had put them into a warehouſe, which was broke open, and the goods ſtolen therefrom. On demurrer,

The plaintiff's council objected that this plea was no good diſcharge, for the goods were delivered to the defendant under a ſpecial and particular truſt, and therefore it was not a good defence againſt the plaintiff's demand to ſhew that he lodged them in a warehouſe, which was committing ſuch goods to the care of a third perſon, and therefore he was anſwerable for the loſs, and cited 1 *Roll. Abr.* 124, 125. *Yelv.* 202. 1 *Bulſt.* 101.

The defendant's council anſwered theſe objections, *viz.* That though this is a perſonal truſt, yet the defendant is not bound to keep them always about him. If he was robbed of them himſelf, it is a diſcharge, and cited 1 *Ven.* 122. 2 *Lev.* 5. 524. 4. *c.* 9. *e.* 40.

Per curiam. This is *prima facie* a good *account*, if the warehouſe was not a place of ſafe cuſtody, that ſhould have been offered in reply; a robbery there is the ſame as if from his perſon; for a bailiff *ad mercandizandum* is not obliged to keep the goods always about him. *Vide Stra. vol.* 1. *page* 680.

Hilary, 2 *Geo.* 2. *Anonymous.* Error.

On a writ of error brought on a judgment had in an inferior court in *aſſumpſit*; the plaintiff declared that there having been an account between him and the defendant and the defendant having become indebted to him in ſeveral ſums within the juriſdiction of the court, they at ſuch a time *inſimul comput.* and that on the account ſtated, it appeared that the defendant was indebted to the plaintiff in ſuch a ſum, which he promiſed to the plaintiff for *value received*, &c.

The *error* inſiſted on was, that the cauſe of action aroſe where the conſideration, to wit, the *valore recepto* was received, and in this caſe the ſame not being laid to be *infra juriſdictionem curiæ*, the judgment is erroneous, for nothing ſhall be intended to be within the juriſdiction of an inferior court but what is ſpecially alledged, and laid ſo to be; wherefore this contract not being laid to be made *infra juriſdictonem curiæ*, the judgment ought to be reverſed.

The defendant's council argued, that it was not neceſſary to lay a *venue* for the *valore recepto*, and therefore it need not be laid *infra juriſdict.* In the preſent caſe, the promiſe was for ſeveral ſums of money which became due within the juriſdiction of the inferior court, and which were aſcertained by ſtating the account between the plaintiff and the defendant, and a *venue* is laid for the defendant within the juriſdiction of the inferior court, where the action was brought.

Per curiam. If the *valore recepto*, which aroſe on ſtating the account, extinguiſhes the mutual demands on the account, here is a new cauſe of action ariſing, which ſhould have been laid *infra juriſdiction'.* &c. but it does not, and therefore the promiſe was brought for the original debt, which is laid to ariſe within the juriſdiction of the court: and therefore the judgment muſt be affirmed. *Vide Fitzgib. p.* 44.

Trinity, 10 *and* 11 *Geo.* 2. *Hughes* v. *Burgeſs.*

In an action on *account*, on a motion, that the *fieri fac.* executed in the cauſe, and the money levied thereon might be reſtored; it being an action of *account* to which the defendant had pleaded that he had fully accounted, and on iſſue being joined thereon, a verdict had been found for the plaintiff, and judgment entered, and execution awarded; *whereas* on this verdict judgment ought to have been only *quod computet*, and then the parties ſhould have entered into an account before the auditors, and the final judgment ſhould not have been ſigned till this ſtep had been taken.

The plaintiff's council offered in ſupport of their judgment, that ſuppoſing the ſame was wrong, yet the execution ſhould not be ſet aſide on motion, but a writ of error ſhould be brought.

Per curiam. The judgment is wrong, for it ought to be only *quod computet*, and we will take this to be an irregular judgment, and like a final judgment ſigned before any interlocutory judgment. As the judgment appears to be irregular, we muſt ſet that aſide as well as the execution; for we cannot ſet aſide the execution while the judgment ſtands as a warrant for it.

Let a rule be made, that the judgment and execution be ſet aſide, and let the money levied be reſtored, and the plaintiff pay the coſts of this motion. *Vide caſes Temp. Lord Hardw. page* 394.

Actions

On the caſe.

Hilary, 2 *W.* & *Mary.* *Cudlip* v. *Randall.*

In an action on the caſe, the plaintiff declared, that on the 20th *May*, 36 *Car.* 2. he was poſſeſſed of a term for years in a houſe, and that on the ſame day he let the premiſes to the defendant for ſeven years by indenture, by means whereof the defendant entered, and afterwards the defendant ſo *negligently kept his fire*, that the houſe was burned.

The defendant pleaded *non dimiſit per indenturam prædictam modo et forma prout*, &c. on this plea iſſue was joined, and a ſpecial verdict found as follows:

That the plaintiff was poſſeſſed of the premiſes, and that by indenture dated 25th *May*, made between the plaintiff and defendant, the plaintiff demiſed the ſame to the defendant and his aſſigns for ſeven years, *excepting thereout to the plaintiff, his executors and adminiſtrators, the houſe commonly called the* New Houſe, *for the uſe of the plaintiff and his father, and of his and their family, if he or they pleaſe to dwell therein, but not to be let to any other perſon, and at all other times when they do not live there, then to the uſe of the defendant and his aſſigns.*

The jury find, that there was a new houſe, and an old houſe, and that a fire happened in a room of the new houſe, then occupied by the defendant, and burnt the ſaid houſe down, and therefore if this was a demiſe *modo et forma*, they find for the plaintiff; if not, then they find for the defendant.

Two points aroſe on this caſe, which were argued by the council, 1ſt, As to the declaration itſelf, whether an action would lie by the leſſee for years againſt his under leſſee? and held it would, becauſe the plaintiff is chargeable to his leſſee by reaſon of conſequential damages.

2dly, Whether on this iſſue *non dimiſit*, *modo et forma* is not a variance between the demiſe and the finding by the jury, and held it was not.

The plaintiff declared, that he was poſſeſſed of a houſe, and that he demiſed the ſame, *&c.* which the defendant denied *modo et forma.* The jury find that the plaintiff did demiſe the houſe, *except* the *New Houſe*. The words *modo et forma* are here no part of the iſſue, it being ſtill a demiſe of the houſe, and the legal intereſt is in the leſſee, the leſſor had only a priviledge to live in part of ſuch houſe, and if refuſed ſo to do, he had no remedy but by action of *covenant*, it not creating ſuch an intereſt as will ſupport a ſuit in *ejectment*.

If a jury find more than they ought, yet judgment ſhall be given for the plaintiff; to ſupport this doctrine, there are many authorities.

This caſe depends on the conſtruction of the words in the exception to the leaſe, in which, if the ſubſequent words qualify thoſe which go before, then an intereſt paſſes to the defendant.

The exception, as it ſtands by itſelf, ſeems to make againſt the plaintiff, but the ſubſequent words make the ſentence plain, that a liberty only is reſerved for the plaintiff to uſe the *New Houſe*.

Another reaſon urged for the plaintiff was, that this exception is void, becauſe contrary to the demiſe; and two caſes were cited in ſupport thereof, *Dyer*, 264, and *Benl.* 181.

As to the firſt point, it was urged, that this action would not lie by a leſſee for years againſt his under leſſee, for the *exception* made him only tenant at will in the *New Houſe*.

This exception does not go to the whole term demiſed, but only to the time when the plaintiff ſhall reſide there, it imports no more than an agreement, when one doth not uſe the houſe the other ſhall, and therefore no intereſt paſſes thereby: if ſo, this cannot be a demiſe for ſeven years, *modo et forma*; no, it is only a leaſe at will, and the caſe *Nornby* v. *Clifton*, 1 *And.* 52. is in point.

In *Hilary* term, 4 *W.* the court gave judgment on this caſe, *viz.* that the defendant was a *tenant at will*, and no more; that this could not be a leaſe for ſeven years, as it was at the pleaſure of the leſſor, when and how long the defendant ſhould enjoy the ſame; and therefore the court held, that the *New Houſe* was abſolutely excepted out of the leaſe, and in ſuch a manner as not to be qualified by any ſubſequent words.

As to the action, the court held, that the perſon who has the inheritance cannot have an action againſt a *tenant at will*, though the leſſee for years may; in this caſe, the eſtate is not the queſtion before the court, but conſequential damages, and that the finding of the jury was out of the iſſue. Judgment was given for the defendant. *Vide Mod. Rep. vol.* 4. *p.* 9.

Hilary, 2 *W.* & *Mary.* *Baugh* v. *Killingworth.*

The plaintiff being indebted to the defendant for the rent of a houſe and lands in the country, on coming to *London* was arreſted by the defendant, on a plaint out of the ſheriff's court of *London*, for which he brought his action on the *caſe*; on iſſue joined, a verdict was given for the plaintiff.

The defendant's council moved in arreſt of judgment, and offered to the court, that there was no reaſon to ground an action on the *caſe*, for though the ſheriff's court had not an original juriſdiction of the cauſe, it being for rent due for a houſe and lands in the country, yet the plaintiff being in the city when he was taken on the plaint, the ſheriff's court had thereby a juriſdiction over his perſon; the plaintiff, if he had thought proper, might have pleaded to the *juriſdiction* of the action brought againſt him in the ſheriff's court; as the plaintiff has not taken this ſtep, nor alledged in his declaration that he was held to unreaſonable bail, there cannot be a pretence for this action; the court were of the ſame opinion, and therefore ſtayed the judgment obtained. *Vide Mod. Rep. vol.* 4. *page* 13.

Hilary, 2 *W.* & *M.* *Baugh* v. *Killingworth.*

Adjudged by the court, that if a ſuit ſhould be commenced for which there is but a *probable cauſe* of action, the defendant in ſuch ſuit ſhall not be intitled to another againſt the plaintiff. *Vide Mod. Rep. vol.* 4. *page* 14.

Hilary, 2 *W.* & *Mary.* *Baugh* v. *Killingworth.*

Adjudged by the court, that if a plaintiff obtain judgment againſt a defendant for *debt and damages*, and before execution the money is paid to the plaintiff, who on ſuch payment releaſes the defendant, and afterwards takes him in execution within the year, he ſhall not have an action for this vexation, but muſt bring a writ of *audita querela*; and if he takes him in execution after the year, ſuch taking is erroneous, but an action will not lie, he muſt ſeek his remedy by writ of error. *Vide Mod. Rep. vol.* 4. *page* 14.

Trinity, 3 *W.* 3. *Payne* v. *Partridge.* & *al.* *Entered Eaſter*, 2 *W.* & *M. Roll* 43.

The declaration ſtated, that *Littleport* is an ancient vill, and there has been time out of mind a ferry there, over the river, which was a common paſſage for all the king's ſubjects, on paying toll, and that the inhabitants of *Littleport* living in the ancient meſſuages or cottages there, were intitled to paſſage toll-free; and that the defendant was owner of the ferry, and ſuffered it to run to decay, and that the defendant refuſed to let the plaintiff go over the ferry, though requeſted ſo to do. Defendant pleaded he had built a bridge in the room of it, *&c.* On demurrer, the court held, the owner could not put down the ferry and build a bridge without licence and an *ad quod damnum*; and that the cuſtom was good in the nature of an eaſement, but that the cuſtom conſiſted not in the right to paſs, for that was common to all the King's ſubjects, but in the right to paſs toll-free. That therefore the plaintiff could not maintain an action, for not paſſing; for then any other ſubject might bring an action, which would occaſion endleſs litigation. *Aliter*, if toll had been exacted, and paid by him; that had been a ſpecial damage, but without ſpecial damage, a perſon can only indict or bring an information. *Vide Salk. vol.* 1, *p.* 12.

Michaelmas, 3 *W.* & *M.* *Jefferies* v. *John Legendra.*

On an action *on the caſe* brought by the plaintiff againſt the defendant on a policy of aſſurance of goods from *London* to *Naples.* The adventure was to begin at the time of lading the ſhip at *London*, and ſeven guineas premium was to be given for every 100 *l.* inſured, the danger of the ſea only excepted; at the bottom of ſuch policy, theſe words were ſuſcribed,

Warranted to depart with convoy.

The plaintiff in his declaration *averred*, that the ſhip did depart with convoy, was taken by the enemy, and the defendant had notice thereof, but did not pay the inſurance money, *&c.*

To this action the defendant pleaded *non aſſumpſit*, on which iſſue was joined, and the jury found a ſpecial verdict, *viz.*

They find the policy of inſurance, and that the defendant ſubſcribed the ſame; that the ſhip departed out of the river under convoy of a man of war; that about the *Iſle of Wight* ſhe was ſeparated from the convoy through bad weather, and put into *Torbay*, and was there detained by contrary winds; that the maſter of the ſhip expecting to meet ſuch convoy again, departed out of the harbour, but could not meet with it, being hindered by diſtreſs of weather; that the ſhip was taken by the *French*, and ſo loſt, *&c.*

The queſtion that aroſe on this ſtate of the caſe was, what the true meaning of thoſe words are, *viz.* *warranted to depart with convoy?*

The plaintiff's council *urged*, that no more was intended than a departure with *convoy* at firſt ſetting out, which being provided by the *inſurers*, and found by the verdict, the plaintiffs had fulfilled their warranty, and therefore ought to recover.

That the ſteps taken by the maſter in coming out of the harbour, *&c.* ought not to prejudice the plaintiff, the maſter being in the nature of a common carrier to convey goods from one part to another; the jury having found, that the maſter did not miſbehave himſelf, but came forth to meet his convoy, and did endeavour ſo to do, but was hindered by diſtreſs of weather.

That the above *warranty* implies a *mutual covenant*, becauſe the words come in the concluſion of the *policy*. If it was a *condition precedent*, the plaintiff has performed all he was bound to do, the jury having expreſsly found that the ſhip did depart with convoy.

On the part of the defendant it was *argued*, by the foregoing words, the ſhip ought to go *all the way* with convoy, and not only out of the mouth of the *river* where there is no danger, and that ſhe ſhould not be left at ſea where there is, without convoy.

That a *policy of inſurance* is but a *parol contract*, and muſt be conſtrued according to the minds of the parties, and not according to the *ſtrict ſenſe* of the words, and cited *Styl.* 132. & 1 *Roll. Abr.* 450. in ſupport thereof.

That by the jury it was found that the maſter of the ſhip departed out of the harbour, expecting to meet his convoy, which muſt be to ſail with her, and protect her during the reſt of the voyage, or otherwiſe a convoy can be of little uſe.

In this caſe there was a ſeverance by bad weather. Now the ſhip might have come up to the convoy, or the convoy to the ſhip, inſtead of which ſhe did not ſtir out of *Torbay* till the ſhip was taken; therefore the *inſurers* being to provide a convoy, here is a breach of the agreement on their ſide, which will hinder them from bringing this action, eſpecially, ſince it is an *entire* agreement and no *precedent* condition.

Per curiam. If the *inſured* have acted *contrary to the agreement*, the policy fails as much as if there had been a *deviation*.

The word *depart* is only *terminus a quo*, if the ſhip had departed from *London*, and came back again by fraud, that had been no departure within the intention of this agreement.

On this departure (as it is found by the jury) the voyage was begun with *convoy*. They were afterwards ſeparated by diſtreſs of weather, and both endeavoured to ſave themſelves, and afterwards to find out each other, ſo that no fraud appeared in the maſter. Judgment was given for the plaintiff, tho' the court obſerved that it might have been otherwiſe if the *convoy* had run from the ſhip, and by that means had been taken. *Vide Mod. Rep. vol.* 4. *page* 58.

Eaſter, 3 *W.* & *Mary.* *Temple* v. *Killingworth.*

Per Holt Chief Juſtice, an action on the *caſe* will lie for a proſecution in an inferior court, where ſuch inferior court has not juriſdiction. *Vide Mod. Rep. vol.* 12. *page* 4.

Eaſter, 3 *W.* & *Mary.* *Edwards* v. *Dickenſon.*

On an action on the *caſe* againſt the poſtmaſter of *Briſtol*, for not delivering a letter ſent by the poſt on requeſt. On demurrer, it was held by the court, that the action was well maintained, on requeſt and refuſal, without any particular damage accrued, becauſe the miſcarriage of a letter is damage. If the defendant had tendered the letter, and plaintiff had refuſed to pay the poſtage, the defendant was not obliged to deliver the letter, but in that caſe the defendant ſhould have ſhewn the ſame. Judgment for the plaintiff. *Vide Mod. Rep. vol.* 12. *page* 6.

Trinity, 4 *W.* & *M.* *Rogers*, v. *Cook.*

H. brought an action as adminiſtrator to *A.* and declared againſt the defendant on an *indebitatus aſſumpſit* to *A.* and alſo on an *inſimul computaſſet* between him and the defendant. On demurrer the declaration was held ill; for the plaintiff in one action cannot proſecute his own right and that of another's at the ſame time; becauſe the coſts to be recovered are entire, and and if ſo the plaintiff can never diſtinguiſh how much he is to have as adminiſtrator, and how much he is to hold as his own. *Vide Salk. vol.* 1. *p.* 10.

Hilary, 5 *W.* & *Mary.* *Hibbord* v. *Coulthrop.* Error.

In an action on the *caſe* on promiſe, and error brought by the defendant, the error aſſigned was, that the plaintiff declared for work and labour done, without ſhewing what ſuch work and labour was; but not allowed; for the court held that it was enough to ſhew that it was on a ſimple contract, on which this *aſſumpſit* can ariſe, and the court will not intend it to be an illegal conſideration. *Vide Mod. Rep. vol.* 12. *page* 50.

Michaelmas, 5 *W.* & *Mary.* *Pearſon* v. *Garrett.*

On an action on the *caſe* brought by the plaintiff againſt the defendant, on his note of hand for 60 guineas which he was to pay to the plaintiff when he married a particular perſon mentioned between them, as the ground of ſuch note, the plaintiff declared as on a bill of exchange. The defendant demurred, and the plaintiff joined in demurrer.

The plaintiff in his declaration declares as on a bill of exchange, ſetting forth the cuſtom of merchants, *&c.*

The defendant's council took the following exceptions to the declaration, *viz.*

That the plaintiff in his declaration does not *aver* that he was a merchant, or that the note was made according to the cuſtom of merchants, neither has he laid any conſideration for the making ſuch note.

This is not ſuch a cuſtom among merchants as this court is compelled to take notice of as part of the *law of the land*, for in fact there is no ſuch cuſtom, it is only an agreement founded on a *brokage*, and cannot be within the cuſtom of merchants, there never yet having been any *precedents* to pay money on ſuch a collateral contingency.

The *note* is no more than a *voluntary note* given with a preſent conſideration, and if it was to be allowed to be within the cuſtom of merchants, every thing given without a conſideration, might as well be within the *cuſtom*, which would quite change the law.

The plaintiff's council *argued*, that the queſtion was, whether this cuſtom is good or not?

It is ſufficiently alledged in the declaration, it is not laid therein to be *inter mercatores* only, but *inter alias perſonas reſidentes*, *&c.* and if ſuch a cuſtom can be good, then the ſame is admitted by the demurrer.

No reaſon can be offered why ſuch a note ſhould not bind as well as a bond, ſince the conſideration for which it was given was very juſt, for it is lawful for one man to help another to a wife.

Per curiam, if the note had been given by way of commerce, it had been good; but to pay money on ſuch a contingency, cannot be called *trading*, and therefore not within the cuſtom of merchants; judgment was therefore given for the defendant. *Vide Mod. Rep. vol.* 4. *page* 242.

Eaſter, 7 *W.* 3. *entered Eaſter*, 6 *W.* 3.
Williams v. *Carey.*

Williams the executor of *J. S.* brought an action on the *caſe* againſt *Carey* the ſheriff, for that his teſtator having recovered judgment in debt againſt *A.* ſued out a *fieri facias*, whereon the defendant returned, he had levied 19 *l.* 5 *s.* 4 *s.* and that he had taken other goods to the value of 40 *s.* which remained in his hands for want of buyers, and that *A.* had no other goods, when in fact the ſheriff had levied the whole debt, and averred that afterwards *A.* became poor, and unable to ſatisfy the reſidue of his debt. Verdict for the plaintiff. It was objected in arreſt of judgment, that this was a perſonal tort, and not within 4 *E.* 3. *c.* 7. But *per curiam.* There is a great difference between meſne proceſs, as the caſe in *Jones* 173. *Noy* 87. *Latch* 167. *Poph.* 187. and this caſe, which is a proceſs in execution; for by levying of the goods a right was veſted in the teſtator. Judgment for the plaintiff. *Vide Salk. vol.* 1. *p.* 12.

Hilary, 7 *W.* 3. *Hicks* v. *Downling.*

The plaintiff declares he was poſſeſſed of a meſſuage for a term of years, *adtunc* and *adhuc venturo*, and being poſſeſſed, did demiſe the ſame to the defendant for three years, by virtue thereof defendant entered, and being poſſeſſed, *reverſione inde eidem quer. ſpectan.* ſo careleſsly kept his fire, that the houſe was burnt; a verdict was given for the plaintiff. On motion in arreſt of judgment it was alledged on behalf of the defendant, that though the plaintiff had a term *adtunc & adhuc venturum*, yet ſuch term might not be ſo long as the term of the under leſſee for three years, and the preſent action will not lie without a reſiduary intereſt, which makes the defendant liable over to him that is intitled to the inheritance. The court allowed this reaſoning; but thought it appeared here was a reſiduary intereſt, it being laid in the declaration to be an under leaſe, and not an aſſignment, with theſe words, *reverſione inde eidem quer. ſpectan. Mod. Rep. vol.* 12. *p.* 100. *Salk. vol.* 1. *p.* 13.

Hilary, 7 *W.* 3. *Littleton* v. *Cole.*

An action on the *caſe* was brought for negligently keeping his fire, by reaſon whereof the plaintiff's houſe was burned, *viz. in parietibus, in partitionibus, feneſtris, in operibus, ferrariis, & ornamentis ejuſdem domus.*

On demurrer this exception was taken to the declaration, that it was too general and uncertain, for damages could not be given for the *walls and ornaments of the houſe.*

As where treſpaſs was brought for taking *diverſa genera apparatuum*, or *trover* for goods with other implements and neceſſaries, the not ſhewing what they are, was held by the court ill after verdict, becauſe they could not give judgment thereon for uncertainty.

Plaintiff's council *argued*, that the action would have been well brought without the *videlicet*, for enumerating the particulars, is but a matter of *aggravation* and *inference*, and this being an action wherein damages are to be recovered, they may be divided, and the plaintiff ought to recover for ſuch part as is well laid in the declaration, *viz.* for *negligently keeping his fire.* The plaintiff therefore had judgment. *Vide Mod. Rep. vol.* 5. *page* 181.

Trinity, 7 *W.* 3. *Kirkham* v. *Wheeley.*

On a *qui tam* action for continuing ſheriff longer than a year, the defendant pleaded *that he was an attorney of the* C. B. *and that attornies of that court time immemorial have not been ſuable elſewhere*; the plaintiff's council demurred to this plea. 1. Becauſe the plea is negative, and no juriſdiction given to any other court. 2. Becauſe there is no full defence, but he *comes and ſays, &c.* 3. Becauſe the King is a party, and may ſue where he pleaſes.

Per curiam. The negative is well enough in this caſe, the priviledge being not triable *per pais*, nor traverſable, but a matter of law, and we take notice that the court of *C. B.* has a juriſdiction. *He comes and ſays*, is ſufficient without defence. An informer cannot ſue where he pleaſes, tho' the King may, and this is the ſuit of the informer; becauſe in caſe of his death the ſuit falls to the ground, and the King is not intitled until recovery.

Proſecutors on *qui tam* actions are conſidered as common informers, and are liable to pay coſts by by *ſtat.* 18 *Eliz.* but where a ſtatute gives a penalty to the party aggrieved, he is not deemed a common informer, nor ſubject to pay coſts within the above ſtatute. 1 *And.* 116. 3 *Cro.* 177. *Vide Salk. vol.* 1. *p.* 30.

Trinity, 7 *W.* 3. *Dalſton* v. *Janſon.*

In an action on the *caſe*, brought againſt a common carrier on the cuſtom of the realm, and alſo a *trover* laid in the ſame declaration, on *not guilty* pleaded, a verdict was given for the plaintiff.

On motion to arreſt judgment, it was alledged, that theſe being different actions, ought not to be joined in one and the ſame declaration, becauſe one is grounded on a contract in law, to which *non aſſumpſit* is the proper plea, and the other on a *tort*; and for the ſame reaſon a *trover*, and an *indebitatus aſſumpſit* ought not to be joined, nor an *ejectment*, and an action on the *caſe* for ſcandalous words, though the ſame iſſue ariſes from both.

Antiently the defendant pleaded ſpecially to the neglect and misfeaſance *not guilty*, therefore is not the proper iſſue to this action.

This action beyond contradiction is founded on the contract, as is evident from the caſe of *Boſen* and *Sandford.*

An ejectment and an action for an aſſault and battery were joined, and a verdict was given for the plaintiff; but this being the firſt precedent, and the actions ſevering in damages, the court adviſed thereon, and Juſtice *Wynch* was of opinion that the verdict was not good.

In anſwer it was argued, that in the very caſe cited, Lord *Hobart* was of opinion that the declaration was good after a verdict; and that of late *trover* had been joined in all actions brought againſt common carriers.

An action on the *caſe* for over-riding and not delivering an horſe according to a contract, and alſo for a converſion to the defendant's uſe were joined together. On *not guilty* pleaded, judgment was awarded for the plaintiff, though he might have demurred to the declaration, it being double; but by pleading the general iſſue, that being found againſt him, it made the declaration good.

So *treſpaſs* for beating the plaintiff's ſervant *per quod ſervitium amiſit*, and an action on the *caſe* for keeping a dog that bit ſheep, were joined in the ſame declaration, and the plaintiff had judgment, tho' it may be a queſtion, whether *treſpaſs* will lie for the laſt cauſe or not, to let the dog looſe, being only a careleſs action, for which treſpaſs will not lie.

The *contract* is not what entitles the plaintiff in this caſe, it being an action grounded on a *tort*, and the iſſue and judgment are the ſame in both.

It is true, there was the like declaration, iſſue, and verdict, in *Matthew Hopkin's* caſe, and the judgment was arreſted; not for the reaſon now offered, but becauſe the plaintiff had alledged that the defendant was a carrier on the 10th of *May*, and that he was poſſeſſed of the goods on the 8th of *May*, on which day he delivered them, ſo that it did not appear he was a carrier on the day of the delivery.

Theſe not being actions of different natures, may be joined; thus, *debt on bond* and *detinue* have been joined, ſo alſo *debt* on a *penal ſtatute*, and an *indebitatus aſſumpſit* generally for tithes, and *non aſiumpſit* pleaded to both actions, which was a diſcontinuance as to the penalty, but Juſtice *Twiſden* declared that it might have extended to both, if the iſſue had been *not guilty.*

The diſtinction taken in *Buckmere's* caſe, that in actions real, founded on a *tort*, the plaintiff ſhall have but one writ to recover lands, to which he has ſeveral titles; but that in perſonal actions, ſeveral *torts* may be comprehended in one declaration, is agreeable to this doctrine.

Since the ſtatute *de bonis aſportatis in vita teſtatoris*, an action will inconteſtably lie againſt the executors of a carrier.

Per curiam. A plaintiff cannot join two actions which require ſeveral iſſues; ſo that the preſent queſtion is, Whether actions may be joined where the ſame plea will ſerve for both?

In ſuch caſes, the defendant formerly pleaded particularly to the neglect, but it has lately been determined that *not guilty* is a good plea.

But it ſeems ſtrange that *debt* and *detinue* ſhould be joined, becauſe thoſe actions have different judgments.

The court on the firſt debate of this caſe inclined for the plaintiff, but afterwards Juſtice *Rokeby* being preſent in *Michaelmas* term following, were unanimouſly of opinion that theſe were diſtinct actions;

an action againſt a common carrier on the cuſtom of the realm, not being ſo much on a *tort* as on a *contract*; for by receiving the goods, and accepting a reward for the carriage, the defendant implicitely undertakes to deliver them ſafely, and therefore the law implies a contract to anſwer the value.

The caſe cited of *Mathews* and *Hopkins* was on the common cuſtom of the realm, for negligently carrying a bag of wool, wherein was contained 50 *l.* and in the ſame declaration was a *trover* for the ſaid money; and it was held, that theſe were different points, and ought not to be joined, which is a caſe in point; judgment therefore was given for the defendant. *Vide Mod. Rep. vol.* 5. *page* 92.

Hilary, 8 *W.* 3. *Hard's Caſe.*

An *indebitatus aſſumpſit* will lie in no caſe, but where *debt* lies; it will not lie on a wager, nor on a mutual promiſe, nor againſt the acceptor of a bill of exchange, for his acceptance is but a collateral engagement; it will lie againſt a drawer himſelf, for he was really a debtor by the receipt of the money, and debt would would lie againſt him. *Vide Salk. vol.* 1. *page* 23.

Eaſter, 8 *W.* 3. *Richards* v. *Hill.*

In an action on the *caſe* for diverting a water courſe, the plaintiff declared, that he was ſeiſed of a water mill *to* him and his heirs *ſecundum cons. decanatus de Woolverhampton*, and ſo preſcribed for a water courſe, &c. and that the defendant intending to deprive him of the profits of the ſaid mill, did divert the water from its ancient courſe, *for that* he could not *molare* ſo faſt. There was a verdict for the plaintiff.

The defendant moved in arreſt of judgment, that a copyholder cannot preſcribe in a *que eſtate*, and the court could not take notice of any other eſtate the plaintiff had by his declaration, he ſhould have left out *ſecundum cons. decanatus*, for how can he be ſo ſeiſed without ſhewing what that cuſtom was?

2. He doth not ſay that he diverted the water from the mill, but only from its ancient courſe *per quod, &c.*

3. The matter of his damages is laid inſenſibly, for the *giſt* of the action is, that the plaintiff had a mill, out of which he had profit by grinding; now the word *molare* is inſenſible, and there is a more proper word for *grinding*.

The firſt of theſe objections the court over-ruled, for if the plaintiff was ſeiſed of an eſtate in *Burrough Engliſh* that had been a cuſtomary eſtate, becauſe he hath the ſame by the cuſtom of the manor, and in ſuch cuſtom he may preſcribe.

To the ſecond objection the court held, that the word *molare* being inſenſible, no damages could be given, and that the declaration had been good if the word *molare* had been left out. Plaintiff therefore had judgment. *Vide Mod. Rep. vol.* 5. *page* 206.

Michaelmas, 8 *W.* 3. *Gatehouſe* v. *Row.* Error.

On a writ of error brought on a judgment in the *C. B.* in an action on the *caſe* on an *indebitatus aſſumpſit*, and a *quantum meruit* brought by the plaintiff for meat, &c. which the defendant had when he ſtood candidate for *Stockbridge*; plaintiff declared on three ſeveral promiſes, the laſt *count* ran thus, *viz. Cumque etiam prædic.* the defendant in conſideration that the plaintiff at his requeſt had found and provided for the defendant, meat, &c. *ſuper ſe aſſumpſit*, and doth not ſay that the defendant *ſuper ſe aſſumpſit*. This cauſe being tried at the aſſizes at *Winton*, a verdict and entire damages were given for the plaintiff.

The defendant moved in arreſt of judgment, that the laſt promiſe was void, becauſe the plaintiff does not alledge in his declaration, *that the defendant had promiſed*, ſo that a ſtranger might make ſuch promiſe, and if ſo the defendant is not bound thereto.

As the charge is laid in the declaration, it cannot be taken by intendment to be the defendant; becauſe ſuch charge is the very *giſt* of the action, and as the jury have found that the defendant *ſuper ſe aſſumpſit modo & forma*, and have aſſeſſed entire damages by occaſion of the premiſes; and every promiſe being a ſeparate and diſtinct declaration, and one of theſe counts being wrong laid, the ſame is therefore naught: for *example*, in *aſſumpſit*, the plaintiff declared, that in conſideration he would marry the defendant's daughter, *ſuper ſe aſſumpſit*, to pay plaintiff 100 *l.* On defendant's pleading *non aſſumpſit*, the plaintiff had a verdict; but defendant moved in arreſt of judgment, which he carried, becauſe the plaintiff did not alledge in his declaration that the defendant *ſuper ſe aſſumpſit*, which makes this a caſe in point. *Cro. Eliz.* 913. *Noy*, 72.

It would have been good on an *indebitatus aſſumpſit*, becauſe where there is a debt the law preſumes a promiſe in the debtor to pay ſuch debt.

It was anſwered by the plaintiff's council, that if the conſideration be void, then the jury have not given damages for it, for they cannot give a verdict either for no promiſe, or a bad promiſe.

As to the caſe before *cited*, there were three perſons named in the declaration, the defendant's daughter was laſt named, and the words *ſuper ſe aſſumpſit* immediately following, might relate to her, which was the reaſon of that judgment; in this caſe there are but two perſons named, ſo that when the plaintiff declared againſt the defendant, it muſt of neceſſity be intended that the defendant *aſſumpſit*, and no one elſe, becauſe the conſideration ariſes from him, and the words *cumque etiam* in the third promiſe couple that ſentence to the firſt.

If it had been that the plaintiff *aſſumpſit* to pay himſelf, it had been good after a verdict.

And ſo it would if there had been ſeveral conſiderations alledged in one declaration, and one of them is ſufficient, though the others are naught both as to *matter* and *form*, yet notwithſtanding the declaration will be good; and ſo,

Where an *aſſumpſit* was brought againſt an executor on the promiſe of his teſtator, and he pleaded that *he himſelf* made no ſuch promiſe, after a verdict it ſhall be intended to refer to the promiſe of the teſtator.

In *Hilary term* following, the plaintiff had judgment, it being after a verdict. *Vide Mod. Rep. vol.* 5. *page* 305.

Hilary, 9 *W.* 3. *At Niſi Prius at Guildhall.*

On an *indebitatus aſſumpſit* againſt *A.* and *B.* and judgment by default againſt *A. B.* pleaded payment, and the cauſe was brought to iſſue thereon.

Per Lord Chief Juſtice *Holt*, no finding on this iſſue can diſcharge *A.* becauſe he has already confeſſed the whole. *Vide Salk. vol.* 1. *p.* 23.

Michaelmas, 9 *W.* 3. *Turbervil* v. *Stamp. Entered Trinity*, 9 *W.* 3. *Rol.* 359.

In an action on the *caſe* on the cuſtom of the realm, *for negligently keeping his fire in his cloſe, whereby it burnt the corn in the cloſe of the plaintiff*, after a verdict for the plaintiff, it was objected in arreſt of judgment, that the cuſtom extends only to fire in a man's houſe, or curtilage, (goods of gueſts,) which are in his poſſeſſion. *Not allowed*, the fire in a man's field being his fire as well as that in his houſe; he made it, and muſt take care that it does no harm, and anſwer the damage if it does; and every man muſt uſe his own ſo as not to hurt another; but had a ſudden ſtorm aroſe, which it was out of his power to ſtop, it was matter of evidence, and ought to have been ſhewn. *Holt*, *Rokeſby* and *Eyre* againſt the opinion of *Turton*, made a diſtinction between fire in an houſe which is in a man's cuſtody and power, and fire in a field which is not properly ſo; and thought it would diſcourage huſbandry, as it was cuſtomary for farmers to burn ſtubble, &c. Judgment was however given for the plaintiff. *Vide Salk. vol.* 1. *p.* 13. *Mod. Rep. vol.* 12. *p.* 151.

Hilary, 10 *W.* 3. *Heyling* v. *Haſtings.*

On an *indebitatus aſſumpſit* brought by an executor for a debt due to the teſtator, and *non aſſumpſit infra ſex annos* pleaded, it appeared on evidence that the goods were ſold above ſix years ago, and that the defendant, after the ſix years, being requeſted to pay, denied that he bought the goods; but further ſaid, *prove it, and I will pay you.* It was inſiſted that this promiſe, though conditional, brings it back within the ſtatute of limitations, the defendant waiving the benefit of the act as much as by an expreſs promiſe.

This caſe being reſerved for argument, ten of the judges afterwards gave it as their opinion, *that if the executor proved the delivery of the goods at any time, the above promiſe was ſufficient to bring the caſe out of the ſtatute of limitations*, and the delivery having been proved in this caſe, judgment was given for the plaintiff. *Vide Raym. vol.* 1. *p.* 38. 421.

Eaſter, 10 *W.* 3. *Savage* v. *Robury.*

In an action on the *caſe* brought by the plaintiff, a tradeſman, for ſcandalous words ſpoken of him by the defendant, viz. *you are a cheat, and I will prove you a cheat for many years*; a verdict was given for the plaintiff; but judgment arreſted, becauſe the above were words ſpoken in a paſſion, and not actionable, it not having been alledged that the *cheat* any ways concerned the plaintiff's trade. *Vide Mod. Rep. vol.* 5. *p.* 398.

Michaelmas, 10 *W.* 3. *Savil* v. *Roberts.* *Entered Trinity* 9 *W.* 3. *Roll.* 724. Error.

In an action on the *caſe* for *maliciouſly cauſing the plaintiff to be indicted for a riot*, brought in the *C. B.* after an acquittal by verdict; on not guilty pleaded, the plaintiff obtained a verdict, and the judgment being now affirmed in this court, it was objected that this would diſcourage proſecutions, as at this rate the proſecutor whenever he miſcarries will be liable to an action.

Per curiam. 1. A civil action differs very widely from an indictment. In that the defendant has his coſts, and at common law the plaintiff was amerced *for ſlander*, for the eſtreats of which amerciaments, warrants were conſtantly delivered to the coroners, who by a jury affeered them according to the malice, or injury done the plaintiff. Alſo in civil actions the plaintiff aſſerts a right, or complains of an injury, and therefore the court held, that to ſay *A. is a baſtard, and I am the heir*, is not actionable; becauſe the perſon who ſpeaks the words is a party concerned and aſſerts a right. *Otherwiſe*, if he had not added, *and I am the heir.* See 4 *Co.* So to bring an action, though there be no good ground, is not actionable, becauſe it is a claim of right, and the plaintiff has found pledges, is amerciable *for ſlander*, and is liable to coſts; but yet if a perſon has a cauſe of action for a ſmall ſum, and takes out a *latitat* for a very large ſum, or has no cauſe of action at all, and yet maliciouſly ſues the plaintiff on purpoſe to impriſon him for want of bail, or do him ſome ſpecial prejudice, an action on the *caſe* lies; but then it is not enough to declare generally, that he brought an action againſt the now plaintiff *out of malice and without juſt cauſe, whereby* he put him to great charge, *&c.* but he muſt ſhew the grievance ſpecially, as in 1 *Sid.* 424. *viz.* that whereas he owed the defendant 100 *l.* he the ſaid defendant ſued him for 500 *l.* and to prevent his being bailed affirmed to the ſheriff 500 *l.* was due, *whereby* he the ſaid plaintiff was impriſoned for want of bail; or 1 *Saund.* 228. for that the defendant intending to procure his impriſonment, without any cauſe of action, ſued him in an action for 300 *l.* whereon he was arreſted and impriſoned, *&c.* and yet if a perſon not concerned, as a ſtranger, procures another to ſue me without cauſe, I may maintain an action againſt him generally.

2. If a man is falſely and maliciouſly indicted of any crime that may prejudice his fame and reputation, he may bring his action, becauſe he is falſely ſcandalized by the malice of the proſecutor, which is a damage for which the law gives an action. 1 *Sid. Yel.* 46. *Lut.* 122. Thus, if a man is falſely and maliciouſly indicted of a crime that ſubjects him to peril of life or liberty, and for which he may be puniſhed, he may bring his action, becauſe he is endangered in this reſpect, and receives a damage, for which the law gives an action. Or if a man is falſely and maliciouſly indicted, though it neither affect his character nor liberty; becauſe it is injurious to his property by putting him to a needleſs expence, and a damage to a man's property will maintain an action as well as a damage to his fame or perſon.

3. Where a man is falſely and maliciouſly indicted of a crime, which hurts his reputation, and is ſcandalous, though the indictment prove inſufficient, or an *ignoramus* is found, an action lies for the ſlander; becauſe the miſchief intended thereby is effected. The ſame alſo if it endangered his liberty, and he was actually impriſoned. *Otherwiſe* where it only concerns his property, for a man cannot ſuffer in either of the above caſes.

But though the action lies, yet it ought not to be favoured, wherefore if the indictment is found by the grand jury, the defendant ſhall not be obliged to ſhew a probable cauſe; but it ſhall lie on the plaintiff's ſide to prove an expreſs rancour and malice. If an *ignoramus* is returned, where the indictment contains no ſcandal, or the party has not been impriſoned, no action lies; and if it contains ſcandal, or the party has been impriſoned, there muſt be evidence of expreſs rancour and malice; innocence alone is not ſufficient. We therefore affirm the judgment. *Vide Salk. vol.* 1. *p.* 14. *Mod. Rep. vol.* 12, *p.* 208.

Michaelmas, 10 *W.* 3. *Harriſon* v. *Cage & Ux.*

In an action on the *caſe* brought by the plaintiff againſt the defendant, the plaintiff declared, that in conſideration that he promiſed the defendant's wife to marry her, ſhe being then *ſole*, ſhe promiſed the plaintiff to marry him, and though the plaintiff was ready, and often offered to marry the defendant's wife, yet ſhe refuſed, *&c.* The defendants to this action pleaded *non aſſumpſit*, and a verdict was given for the plaintiff with 400 *l. damages.* The defendants moved in arreſt of judgment, 1. That the action would not lie for want of a conſideration, for though a woman may have an action againſt a man on this ground, becauſe marriage is an advancement to the woman, yet it being no advancement to the man, therefore the conſideration which is the ground of the action fails. *Vide Hobs* 10. 1 *Roll. Abr.* 22. *Carter* 233, *&c.*

2. *Exception*, That there is no time prefixed, and he does not ſhew in his declaration a requeſt with a parſon. The court did not regard this exception, becauſe to the *time* it ſhould be in convenient time, and as to the *requeſt* with a parſon, the caſe of *Dickenſon* v. *Holcroft* determined on writ of error brought in this court ſettles that point, beſides in the preſent caſe the defendant has diſabled herſelf from performing her promiſe.

As to the firſt exception *per Holt* Chief Juſtice, there is the ſame conſideration in the caſe of the promiſe of a woman as in that of a man, for the ground whereon the woman brings the action, is the woman's promiſe, for this being an action grounded on *mutual promiſes*, if the woman's promiſes are void, the man's promiſe will be *nudum pactum.*

Rokeby Juſtice took time to conſider this point, and afterwards delivered his opinion for the plaintiff, becauſe marriage is an act as much to the advancement of the man as the woman, and relied on the caſes in 1 *Roll. Rep.* 79. 2 *Bulſt.* 276. 3 *Bulſt.* 48. 2 *Cro.* 323. 1 *Cro.* 269. On theſe grounds judgment was given for the plaintiff. *Vide Raym. vol.* 1. *page* 386.

Michaelmas, 10 *W.* 3. *Turner* v. *Brent.*

A. ſells goods to *B.* to which he has no title, if *A.* knows he has no good title to them, an action on the *caſe* lies againſt him for the *deceit*, if the owner recovers ſuch goods againſt *B.*; but otherwiſe, if *A.* does not know but his title to ſuch goods is good. *Vide Mod. Rep. vol.* 12. *page* 245.

Michaelmas, 10 *W.* 3. *Roſwell* v. *Prior.*

In an action on the *caſe*, plaintiff declared that he was poſſeſſed of a certain houſe for a term of years which was unexpired, in which houſe were 21 windows, whereby the light *inferri conſuevit & debuit* into the houſe, and that defendant erected a building near the ſaid houſe, whereby the light was obſtructed. Verdict for the plaintiff.

The defendant moved in arreſt of judgment, that there was no preſcription made to the light, and it was not ſo much as alledged that it was an ancient meſſuage.

Per curiam, this being after verdict, the declaration is good, it muſt be intended, that the plaintiff was to prove it to be an *ancient houſe*, and unleſs it had been ſo and light, the jury could not have found for the plaintiff. On demurrer this ſhort way of pleading had not been good. *Vide Mod. Rep. vol.* 12. *p.* 215.

Trinity, 11. *W.* 3. *Iveſon* v. *Moore. Entered Hilary* 9 *W.* 3. *Roll.* 437.

In an action on the *caſe* for ſtopping up a highway leading to the plaintiff's colliery, with intent to deprive him of the profit thereof, whereby he loſt his profit, and his coals dug up, were ſpoiled for want of buyers, on *not guilty* pleaded, and a verdict given for the plaintiff:

The court unanimouſly agreed, that where an action ariſes from a public nuiſance, there muſt be a ſpecial damage, becauſe the perſon who did the nuiſance is puniſhable at the ſuit of the public; and to allow all private perſons their actions without ſpecial damage, would create endleſs ſuits.

Per Turton and *Gould:* Here is a ſpecial damage and well enough ſet forth; for all have not coal-pits, and the matter ſubſequent to the *per quod* is not traverſable. *Vide* 1 *Rol.* 89. *Goldſb.* 146. 1 *Leon.* 236. 1 *Rol.* 63. *pl.* 31. 1 *Co.* 51. 2 *Jo.* 146. 156. a ſtrong caſe. To ſhew a ſpecial damage, it is ſufficient to ſay, *whereby he loſt his ſervice* for ſuch a time, *Hob.* 284. erected a building which was a nuiſance to his freehold tenement. 9 *Co.* 53. *whereby he could not have his free right of common.* And the damage does not conſiſt in a ſingle inſtance, as *whereby ſhe loſt her marriage*, which may be ſhewn; but *in caſu principali* it would be infinite.

J. Rokeſby and *Holt* Chief Juſtice, *contra.* The plaintiff's near ſituation yields him a convenience, but no right; for it is the King's highway, for the equal uſe and benefit of all his ſubjects; and the plaintiff has no more, nor no better right than any other perſon. And a man cannot have a particular action without a particular injury, or a particular right, which are the grounds upon which all actions are founded, and to which they muſt conform. *See* 2 *Saund.* 115. 3 *Cro.* 664. This plaintiff had neither a particular right in this way, nor a particular injury. For the ſtoppage is common to every one as well as to him; and an indictment would lay it *to the prejudice of all ſubjects paſſing that way.* And the caſes cited on the other ſide were founded on a particular right; as in *caſe* for a ſtoppage where one has a way, a water courſe, or common to his houſe, mill, or tenement, where the action is founded on a particular right, and lies without the *whereby.*

Now ſuppoſing here was a particular injury by ſpecial damage, that ſpecial damage is not ſufficiently ſet forth; for it is not ſufficient to ſay, he loſt cuſtomers, or buyers could not come, without ſhewing buyers were coming, and were hindered. *Vide* 2 *Lev.* 214. 223. and the caſe in 1 *Rol.* 63. has been often denied, and is not law; for the damage muſt be ſpecially ſhewn, where the words themſelves are not actionable. 1 *Rol.* 58. *n.* 1. 1 *Cro.* 140. 1 *Rol.* 34, 35, 36. plaintiff muſt ſhew who refuſed. And Chief Juſtice *Holt* cited the caſe of *Paine* v. *Partridge*, 2 *W. & M.* in this court. In *caſe* for not keeping of a ferry-boat, which was for all the King's ſubjects on paying a toll, but *gratis* for the inhabitants of a particular village, of which the plaintiff was one. In this caſe the court held the cuſtom to be good, but that the action did not lie; for though the plaintiff has a particular right, yet that conſiſts in being exempt from toll, and not in paſſing, which is common to every body. So that the not keeping the ferry is a public nuiſance, for which the plaintiff cannot maintain an action in preference to any other perſon; but the defendant muſt be indicted.

The court being thus divided, and there being a former rule to ſtay judgment, no judgment could be entered.

Per Curiam. If the court had been divided on the firſt motion, the plaintiff might have entered judgment: but now this rule muſt ſtand or be diſcharged, and it cannot be diſcharged, the court being equally divided.

Afterwards, by conſent of the Chief Juſtice, this caſe was argued before all the Judges at *Serjeant's Inn*, who were of opinion that the action did lie. *Vide Raym. vol.* 1. *page* 486.

Michaelmas, 11 *W.* 3. *Lane* v. *Cotton, Poſtmaſter General.*

The plaintiff brought an action againſt the defendant, wherein he declares he ſent a letter by the poſt, *&c.* in which was incloſed an *exchequer bill*, and that the letter and bill were loſt, *&c.*

The defendant pleaded the *general iſſue*, on which a ſpecial verdict was found, *viz.*

That the letter and bill were delivered to ſuch a poſtmaſter, and that afterwards the mail was robbed, and the letter and bill taken away, *&c.*

On this caſe being argued, the court ſeemed of opinion, that the action was well brought againſt the defendant.

Chief Juſtice. It would be very hard on the ſubject if this action would not lie. The crown has a revenue of 100000 *l. per ann.* for the management of this office, therefore care ought to be taken that letters be ſafely conveyed, and that the ſubjects ſhould be ſecured in their properties. He compared this caſe with a *common carrier*, who muſt anſwer for jewels or other valuable things he loſes.

Judgment was afterwards given for the defendant, diſſent. C. J. *Holt. Vide Mod. Rep. vol.* 5. *p.* 455.

Michaelmas, 11 *W.* 3. *Robins* v. *Robins. Entered Trin.* 10 *W.* 3. *Roll.* 162.

In an action on the *caſe*, for that the defendant under pretence of a certain proceſs in law, cauſed the plaintiff to be arreſted, and though he offered a common appearance, held him to bail, where by law no bail was required, to which action *not guilty* being pleaded, a verdict was given for the plaintiff.

Per Holt, Chief Juſtice. This is a tender action. You muſt ſhew that the plaintiff being indebted to the defendant in a certain ſum, the defendant took out ſuch a writ for ſuch a large ſum, on purpoſe to hold him to bail; how elſe can it appear to the court, whether and how far the preſent plaintiff might be held to bail in that action, or whether the defendant might not be only the bailiff who executed the writ, againſt whom the action will not lie? And as to the objection, that the writ was ſeldom returned, and therefore could not be procured to give in evidence, and therefore it would be inconvenient to ſet it out ſpecially in the declaration; he anſwered, the officer might be ruled to return his writ. *Vide* 1 *Saund.* 228. And this action lies not till the original action is determined. Therefore judgment was ordered to ſtay until, *&c. Vide Salk. vol.* 1. *p.* 15. *Raym. vol. p.* 503.

Michaelmas, 11 *W.* 3. *Anonymous.*

In an action on the *caſe* for a falſe return *to a mandamus*, againſt the Mayor, *&c.* of *Norwich*; it was objected that it was not alleged in the declaration, that it belonged to them to obey the writ.

Per Curiam. By their alledging a reaſon why they could not obey the writ, they admit that. *Vide Mod. Rep. vol.* 12. *page* 322.

Michaelmas, 11 *W*. 3. *King* v. *Town of Andover*.

Five members of the corporation being turned out, ſued out a joint *Mandamus*, and afterwards had the ſame quaſhed on their own motion, becauſe they could not join, the wrong done to the one being no wrong to the other, *per curiam*. *Vide Mod. Rep. vol.* 12. *page* 232.

Eaſter, 12 *W*. 3. *Butler & Lewin*, v. ——

The plaintiffs brought a joint action on the *caſe* for a falſe return to a *mandamus* to ſwear them in as churchwardens of the pariſh of *N*. After a verdict, it was moved in arreſt of judgment, that they had miſconceived the action, by making it joint for the damages, *viz.* the loſs of fees are ſeveral; this exception weighed much with the court, on which this matter was compromiſed.

Per curiam. Here, though motion be made in arreſt of judgment, yet if there be no rule to ſtay, plaintiff may ſign his judgment of courſe. *Vide Mod. Rep. vol.* 12. *p.* 371.

Eaſter, 12 *W*. 3. *Pitts* v. *Gainee & Foreſight*.

In an action on the *caſe* brought by the plaintiff againſt the defendants, he declared that the 1ſt of *October*, he was maſter of ſuch a ſhip, which then lay in *Ipſwich* haven, laden with corn, *&c.* and that the defendants entered and ſeized the ſhip, and detained her ſo long that the plaintiff was obſtructed and hindered from proſecuting his voyage, to his damage, *&c.*

The defendants pleaded a juſtification of the ſeizure as bailiffs to the corporation for toll, *&c.* which was over-ruled for the following defects. 1. That a preſcription was laid in the corporation to have toll, *&c.* and it was not ſhewn that this was a corporation, time whereof, *&c.* 2. They ſaid that they detained the ſhip until they were paid the toll and charges, and a title is made only to diſtrain for the toll.

Defendants council did not attempt to maintain the plea, but took exception to the plaintiff's action, that the ſame would not lie, for that plaintiff ought to have brought a general action of treſpaſs, and cited *ſtat.* 41 *Ed.* 3. *cap.* 24. *Palmer* 47. *ſtat.* 13 *H.* 7. *Lane* 65, *&c.*

The plaintiff's council ſaid, that in the caſes cited, the property was in the plaintiff, but in the preſent inſtance the ſhip did not belong to the plaintiff, and he had no damage but the loſs of his voyage.

Holt Chief Juſtice. The plaintiff here might have had his action of *treſpaſs*, and declared thereon that he was poſſeſſed of a ſhip, and founded his action on ſuch poſſeſſion; but when he brings the action as maſter, he cannot have *treſpaſs*, but *Caſe*; a *Baillee* may maintain an action of *treſpaſs*, but then he muſt declare on his poſſeſſion; ſo the maſter might have done in this caſe, and the defendants could not ſay that the ſhip was not his. If he ſues as maſter, he he can recover only as officer, and therefore this action is more proper.

The defendants council took exception to the plaintiff's declaration, that it is not ſaid plaintiff had an intent to proſecute his voyage, for it may be if he had not been detained by the defendants, he would not have made ſuch voyage.

Per Holt Chief Juſtice, it is ſufficient for the plaintiff to ſay, that he had his cargo on board, and bound to ſuch a place, for he had no need to ſay that the wind was fair. Judgment for the plaintiff. *Vide Raym. vol.* 1. *page* 558.

Eaſter, 12 *W*. 3. *Mikes* v. *Caly*.

In an action on the *caſe*, plaintiff declared that he was poſſeſſed of a ſhip ready for a voyage to *America*, lying in the harbour of *B.* to ſail the firſt fair wind, that defendant entered on his poſſeſſion, and diſtrained the corn with which the ſhip was freighted, whereby he loſt his voyage to his damage, *&c.*

The defendant pleaded that *B.* is an *ancient borough* for ſeveral hundred years by ſuch a name, and afterwards incorporated by letters patent by another name. That time out of mind there was an ancient court in the borough for adminiſtration of juſtice, *&c.* that the corporation, time whereof, *&c.* uſed to repair and maintain the court houſe at their charge, and in conſideration thereof, they had time, *&c.* ſo much a ſack for all corn that was ſold in that borough (in the name of *toll*) by any perſon not an inhabitant or free of the corporation.

That the corn in the plaintiff's ſhip was bought by perſons not inhabitants, *&c.* and put on board without paying toll, and a preſcription for diſtraining in caſe of refuſal was laid; that the defendant was a bailiff, appointed by the town as their bailiff for the purpoſes of collecting ſuch toll, by writing under their common ſeal, and on demand and refuſal diſtrained the corn for the uſe of the corporation.

This plea was agreed to be bad, chiefly for that it was not laid that it was a corporation time out of mind.

It was *argued* by the defendant's council, that as the charge was laid in the declaration, the fact done was a *treſpaſs*, and therefore the plaintiff had miſconceived his action, for that *general treſpaſs*, and *treſpaſs on the caſe* are different formed actions, grounded on different ſpecies of offences, and cited *ſtat.* 4 *Ed.* 3. *cap.* 24. 2 *Roll. Rep.* 149. *Palmer* 47. and *ſtat.* 13 *H.* 8. *cap.* 26. and others in ſupport thereof.

The defendant's council further *argued*, that this action did not lie for the maſter, 1. For the ſame reaſon it would lie for every one of the mariners, for they alſo have loſt their voyage, and ſo it would likewiſe for each of the owners.

2. It were in effect to maintain an action for conſequential damages, with which a ſtranger may diſpenſe; as for example, if *J.* covenants with *A.* to build a houſe on his ground, and *B.* ouſts him, by which I am hindered of performing my covenant, I cannot have an action on the *caſe* againſt *B.* becauſe *A.* by his releaſe may make the hinderance lawful; and ſo may the owners do here, and if any damage was, the action ought to have been brought by the owner, and the maſter have his remedy againſt him.

Per curiam, the plaintiff had judgment, and *Holt* Chief Juſtice ſaid, that the *maſter* of a ſhip is in many reſpects ſueable, and may ſue in things concerning the ſhip as well as the *owner*, and the defendant might have a title to the goods by ſale or conſignment by the owners; but if ſo, it ought to have been pleaded, and what the maſter recovers in ſuch action, is for the uſe of the owners; a maſter may bring an action againſt any merchant concerned for *freight* in his own name, but as maſter he cannot bring *trover* for the ſhip, but may have his action on the *caſe*, if by a ſeizure of the ſhip he be hindered of his voyage, as in this caſe, and what is taken from him in relation to the ſhip, he ſhall have *caſe* or *treſpaſs* for the ſame, at his election, with this diſtinction, that if he brings *treſpaſs* he muſt declare on his poſſeſſion, and he ſhall have *treſpaſs* for a diſturbance of him in his office. By the whole court judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 12. *page* 381.

Eaſter, 13 *W*. 3. *Holm* v. *Hunter*.

In an action of *treſpaſs* for taking goods, the defendant juſtified ſuch taking by a judgment in a *court baron*, and that the goods were taken by a *levari*, and delivered to him, being plaintiff, in execution. On demurrer, judgment was given for the plaintiff; for that the goods ſo taken in execution cannot be delivered in execution, though the parties might ſell ſuch goods, and ſo raiſe the money, or have the ſame appraiſed. Another doubt aroſe, Whether a *diſtringas* and not a *levari* was not the proper proceſs in this caſe? 3dly, Whether a manor as a manor has a court baron to hold pleas; it has *eo nomine* a court baron to have ſuit, but the court doubted whether it could hold plea without preſcription. *Vide Mod. Rep. vol.* 12. *p.* 494.

Eaſter, 13 *W.* 3. *Palmer* v. *Stavely.*

On an *indebitatus aſſumpſit* for money had and received by the defendant for the plaintiff, *for the uſe of the defendant*, and a verdict given for the plaintiff; on motion in arreſt of judgment, the court held, that theſe words, *for the uſe of the defendant*, ought to be rejected, becauſe ſenſeleſs and contradictory, and then the promiſe being for money had and received by the defendant for the plaintiff is well. *Vide Sid.* 306. 1 *Mod.* 42. *Salk. vol.* 1. *p.* 24.

Eaſter, 13 *W.* 3. *Pantam* v. *Iſham.*

In an action on the *caſe*, the jury found that the plaintiff being ſeiſed in fee of ſix ſtables, let one on parole agreement to the defendant, and the reſt to other perſons for a term of years ſtill ſubſiſting; that the defendant kept his fire ſo careleſsly, that it burnt the ſtable in the plaintiff's own poſſeſſion, that which he had let to the defendant, and the five other ſtables.

It was agreed, that if a perſon ſeiſed of an houſe in fee makes a leaſe at will, and the leſſee negligently burns the houſe, no action lies; becauſe the landlord might have ſecured himſelf by a covenant. *Otherwiſe*, if a leſſee for years makes a leaſe at will, for though he might ſecure himſelf by covenant alſo, yet becauſe he is anſwerable over to his leſſor, he is entitled to an action on the *caſe*.

The court alſo held, that no action laid againſt the defendant for the ſtable which he rented, had the fire ſtopped there; but as it ſpread further, and burnt the ſtables of his neighbours, who had it not in their power to oblige him to covenant to be careful, they are entitled to an action for their damages ſuſtained thereby.

And laſtly, that the leſſor might bring actions againſt the other leſſees, and they againſt the leſſee at will; and that as the leſſor had a right to ſue the other tenants, and they a right to ſue the tenant at will, the leſſor may make his election. *Vide Salk. vol.* 1. *p.* 19.

Trinity, 13 *W.* 3. *Anonymous.*

In an action on the *caſe* for a malicious proſecution for felony, brought after acquittal, it was agreed that the declaration muſt agree with the indictment in ſubſtance; the indictment was for ſtealing *unum ſintinculum Anglice*, a callico quilt, and the declaration calls it *unum ſinituncułum*. This was *adjudged* a material variance, but the declaration being laid *generally*, that he charged the plaintiff with felony before a juſtice of peace, it was held ſufficient to maintain the action, and likewiſe that it was neceſſary for the defendant here to prove a felony committed, and alſo a probable cauſe of ſuſpicion. *Vide Mod. Rep. vol.* 12. *p.* 555.

Michaelmas, 13 *W.* 3. *Paulhill.* v. *Powell.*

In an action on the *caſe* brought by the plaintiff againſt the defendant *for not ſhewing him a copy of his commitment* within ſix hours after committed, according to the directions of the *habeas corpus* act. On motion, Chief Juſtice *Holt* obſerved, that one may on that ſtatute plead *nihil debet*, and give the ſpecial matter in evidence in an action of *debt* on this ſtatute. The plaintiff being a perſon committed by the Houſe of Commons for an affront offered to them, he ſaid the Commons never commit but by *vote* or a *warrant* under the hand of the Speaker, and whether the *habeas corpus* act extended to commitments by either Houſe of Parliament would be examined afterwards. He *obſerved*, that an officer might *apprehend* without a warrant, but not *commit* without a warrant; and the difference between *apprehending* and *committing*, that the one is in order to the other, the *apprehending* is in order to carry before a magiſtrate, who has power to *commit*. *Vide Mod. Rep. vol.* 12. *page* 606.

W. 3. *Butcher* v. *Andrews.*

In *aſſumpſit*, for that the defendant in conſideration that the plaintiff at his requeſt would lend the defendant's ſon any ſum of money, and let him have any goods, ſo as ſuch money and goods ſold exceeded not the ſum of 5 *l.* which the defendant promiſed to pay the plaintiff. The plaintiff *avers*, that he lent the defendant's ſon 5 *l.* in money, and ſold him goods on credit as aforeſaid, to the value of 5 *l.* and further, that the defendant was indebted to the plaintiff in other 5 *l.* for ſo much money lent and advanced to the ſon at the defendant's requeſt, *&c.* On *non aſſumpſit* pleaded, iſſue was joined, and a verdict given for the plaintiff, and 3 *l.* damages. On motion in arreſt of judgment, it was allowed by the court, that the defendant could not be indebted for more than 5 *l.* becauſe he engaged to the plaintiff for no more, ſo that if the jury had given more, ſuch verdict had been bad. In this caſe, the jury having given leſs, it was alledged by the plaintiff's council, that it had helped the declaration, but *not allowed*: For firſt, it does not appear to the court that the defendant has not paid 5 *l.* already, and that this is not claimed over and above. 2dly, That the declaration was bad, for the money being lent to *J. S.* the defendant cannot be obliged to pay the ſame on an *indebitatus*, but on ſpecial *aſſumpſit*, as being only collaterally bound by his promiſe; for the ſame money cannot be lent to two: *N. B. Otherwiſe*, had the money been only delivered to the ſon at the father's requeſt, or only had and received by the ſon at the father's requeſt, as then the loan had been to the father. *Vide Salk. vol.* 1. *page* 23.

Hilary, 1 *Ann.* *Cutting* v. *Williams.* Error.

On an *aſſumpſit*, and two ſeveral counts laid; one was on a promiſſory note, and the plaintiff declared thereon as on a bill of exchange, on the cuſtom of merchants. On *non aſſumpſit* pleaded, entire damages were given, and judgment accordingly for the plaintiff. A writ of error being brought in this court it was held, that the plaintiff could not declare upon the promiſſory note as upon a bill of exchange: and as there could be no ſuch count or action, of courſe there could be no ſuch damages; that the judgment could not be reverſed in part, *i. e.* reverſed as to the one count, and affirmed as to the other; the court denied *Jacob* and *Mills*'s caſe, *Hob.* 6. and made this diſtinction, *viz.* where the judgment is partly by the common law, and partly by ſtatute, it may be reverſed in part, becauſe that which was a judgment at common law, will remain a judgment, and be complete without the other. *Vide Salk. vol.* 1. *page* 24.

Eaſter, 1 *Ann.* *Meredith* v. *Chute.*

The plaintiff on an *aſſumpſit* declares, that whereas at the requeſt of the defendant, he delivered to the defendant a note given him by *J. H.* a third perſon, for 100 *l.* the defendant in conſideration thereof promiſed to pay him 100 *l.* after a verdict for the plaintiff, it was moved in arreſt of judgment, that it was not a gift but a delivery; and that the note was uſeleſs, and of no value, becauſe it does not appear to be for a conſideration.

Per Holt, Chief Juſtice, the delivery ſhall be intended abſolute and indefinite, and it is evidence of a debt, and therefore the parting with it is a good conſideration; and though the conſideration of this note was proved at the trial, yet in my opinion it was not neceſſary. *Vide Raym. vol.* 2. *p.* 759.

Eaſter, 1 *Ann.* *Sir George Tuke's caſe.*

In an action on *aſſumpſit*, the plaintiff declared that he was poſſeſſed of a note of the defendant's, by which he promiſed to pay him the ſaid plaintiff a certain ſum of money; that the defendant, in conſideration the plaintiff would deliver him the ſaid note, promiſed to pay him the money, and that he the ſaid plaintiff thereon delivered him the note. After verdict it was moved in arreſt of judgment, that here was no conſideration, becauſe it did not appear what the conſideration of the note was; and if no conſideration was given for the note, the delivery of it up cannot be one. See *Salk.* 171. *Saund.* 136.

Per curiam. The delivery of the note being ſaid indefinitely, ſhall be intended a delivery for ever; and though a note for the payment of money does not carry a conſideration in itſelf, yet it is evidence of a debt, and conſequently a means whereby the creditor may recover his money; and the parting with it is a conſideration which the defendant has admitted, by demanding the delivery thereof. And had the caſe been, that this was the note of *J. S.* for payment of a ſum of money to *J. N.* and *J. D.* in conſideration that *J. N.* would deliver the note to him, had promiſed to pay him, it would have been a good conſideration, becauſe it is not neceſſary the matter of the conſideration ſhould be of advanage to the defendant, if it is any trouble or diſadvantage to the plaintiff. Judgment for the plaintiff. *Vide Mod. Rep. vol. 7. p.* 13.

Trinity, 1 *Ann.* *Gay* v. *Croſs.*

An action on the *caſe* being brought for a falſe return to a *mandamus* to ſwear the plaintiff *common council-man* for the borough of *Totneſs,* which had a charter from Queen *Elizabeth,* directing the manner of electing ſuch officers, a uſage was given in evidence to a jury at the bar, that the election had gone quite contrary, which uſage was allowed good evidence of a bye-law on which it was founded: wherefore the council on both ſides conſented to have the matter found ſpecial, and to leave it to the determination of the court, whether ſuch a bye-law and a long uſage in purſuance thereof, could alter the direction, or rather annilihate the direction of the charter. And the jury having given their verdict in private over night, ſaid that they had found the matter ſpecially, and the next day in court delivered their verdict for the defendant generally, and would neither aſſign a reaſon for, nor alter ſuch verdict. On a motion for a new trial, the caſe of *Wood* and *Gunſton* in *Stiles,* and the caſe of the *Welſh* drovers were cited as inſtances of new trials, after a trial at bar. And though the court were highly diſſatisfied with the jury, and Lord Chief Juſtice *Holt* declared he had never known the like; and that as the judges publickly declare the reaſons on which they have formed their opinion, for the ſatisfaction of the publick, and thereby ſubmit their conduct to the cenſure of all able lawyers, though not obliged ſo to do by law; ſo the jury ought to declare their reaſons for their verdict, when required by the court: Yet it being a trial at bar, the court refuſed to grant a new trial. *Vide Mod. Rep. vol. 7. page* 37.

Michaelmas, 1 *Ann.* *Gould* v. *Johnſon.* Error.

On a writ of error brought on a judgment of the *C. B.* in *aſſumpſit,* when the plaintiff declared that the defendant, in conſideration that ſhe would receive *A.* and *B.* into her houſe *as gueſts,* and provide for them meat, drink, *&c.* aſſumed and promiſed to pay her ſo much as ſhe ſhould deſerve, and then *averred* that ſhe received the ſaid *A.* and *B.* into her houſe, but did not ſay *as gueſts,* and provided meat, drink, *&c.* The defendant pleaded that *he had not aſſumed within ſix years.* And on demurrer, judgment was given in *C. B.* for the plaintiff, the plea being ill, as the defendant ſhould have pleaded *the cauſe of action has not accrued within ſix years,* becauſe, provided the cauſe of action has accrued within ſix years, it does not ſignify when the promiſe was made, but in an *indebitatus aſſumpſit,* the plea would have been good.

The council for the plaintiff in error aſſigned two faults in the declaration; 1. That it appears on the declaration, that the cauſe of action accrued above ſix years before, *&c.* and therefore it is not neceſſary to plead the ſtatute, and *Cro. Car.* 115. was cited as a caſe in point: *but not allowed,* the ſtatute ought to be pleaded, becauſe the original perhaps was ſued out within ſix years, that the plaintiff may have an opportunity to reply.

Another exception was taken to the declaration, that it is not averred that the plaintiff received *A.* and *B. as gueſts,* and there is a difference between receiving a perſon generally, and *as a gueſt;* and in a caſe of this kind, a preciſe performance of the conſideration ought to be ſhewn to entitle the plaintiff to an action, and *Cro. Jac.* 45. *W. Jones,* 441, 2 *Leon.* 55. *Cro. Jac.* 246. *Yelv.* 175. were cited in ſupport of the above objection, but were fully anſwered by the Chief Juſtice, who was of opinion that they did not come up to the caſe in queſtion, and affirmed the judgment of the *C. B.* *Vide Raym. vol.* 2. *p.* 841.

Michaelmas, 1 *Ann.* *Yoxon* v. *Burnet.* Error.

On a writ of error brought of a judgment affirmed in the court of *Cheſter* on a writ of error of a judgment awarded in the corporation court of that city, in an action on the *caſe* for a libel, the declaration ſet forth, that the plaintiff was an alderman of the city of *Cheſter,* a juſtice of the peace, and by trade a grocer, and that the defendant did maliciouſly, *&c.* publiſh a libel of him, which he cauſed to be fixed up in ſeveral parts of the town. The words of the libel were theſe: *Theſe are to adviſe all good perſons to ſhew me where I may ſee Alderman* Yoxon, *to receive my money of him.* On a demurrer to this declaration, and judgment for the plaintiff in the Mayor's court, which was affirmed in the Chief Juſtices's court; the errors aſſigned in *K. B.* were, that on the plaint levied in the inferior court, the writ to bring the defendant into court was directed to, and executed by the ſerjeant at mace; and after an interlocutory judgment on the demurrer, a precept was directed to the ſheriff of the county to ſummon a jury, and execute a writ of enquiry: and it was inſiſted that the inferior courts had no power to charge the ſheriff; but that the ſame officer who executed the *meſne proceſs* ought alſo to have executed the *judicial one,* and that theſe proceedings could not be juſtified by preſcription, becauſe till the 21ſt of *Hen.* 7. the city was part of the county, and had no other ſheriff than the ſheriff for the county, and therefore the ſheriff could not be an officer of the Mayor's court, which is by preſcription.

2dly, That on an interlocutory judgment in an inferior court, the ſerjeants at mace ought to ſummon a jury to appear in court, and make enquiry of the damages in court; the judge of an inferior court being never ſuffered to direct his precept to another officer to make enquiry of damages, as to ſend to the ſheriff to enquire of damages, is the particular prerogative of the courts at *Weſtminſter.*

3dly, That the original was an attachment of the body, which is only in treſpaſs *vi & armis,* and not in *caſe;* the original proceſs in the latter being an attachment of the goods only.

4thly, That the joinder in demurrer is *petit judicium pro damnis occaſione trangreſſ. predict.* whereas it ought to have been *tranſgreſſ. prædict. ſuper caſum.*

Serjeant *Cheſhire* replied, That it is ſaid before to be *tranſgreſſ. ſuper caſum,* wherefore *tranſgreſſ. prædict.* muſt be *ſuper caſum.* That the city of *Cheſter* was an ancient county, and had had ſheriffs time immemorial, and proceſs directed to them, of which there were many precedents, and *ſtat.* 21 *Hen.* 7. was only a confirmation of its priviledges; and that it appeared from all the precedents, that the ſerjeant at mace executed the meſne proceſs, and the ſheriff's judicial proceſs; and that ſuch a matter might be good by grant, and therefore of courſe might have been by preſcription; and that by law the ſame perſon might be judge and officer. See 1 *Cro.* 138. *Jones,* 198. 12 *Hen.* 7. 3. and for the ſame reaſon, ſeveral may diſcharge the office of one. See *Mod. Rep.* 598. *Noy,* 64. The uſual practice of the court is the law thereof, and need not be ſhewn ſpecially in pleading, but the courts above are to be ſatisfied of it by precedents, and certificates of the judges of the court, 2 *Co. Wiſcot's* caſe: and there is a difference in the manner of taking bail in this court and the Common Pleas; and ſo formerly of the return of a *ſci. fa.* this court always required two *ſci. fa's.* returned, but one was ſufficient in the Common Pleas.

Lord Chief Juſtice *Holt.* Though the firſt proceſs to the ſerjeant at mace were wrong, it has been cured by appearance and pleading, becauſe where a man has a day on the roll, he may appear at that day if he pleaſes, though there is no return of the writ, and precedents of this manner of proceeding are ſhewn as far back as 5 *Eliz.*

J. *Powell* ſaid, the court could not take judicial knowledge, whether the city of *Cheſter* had a ſheriff only by *ſtat.* 21 *Hen.* 7. that ſtat. only ſaying, that it was then made a county; and *ſtat.* 43. *Eliz. c.* 15. directs that the officer of an inferior court ſhall not ſwear a jury to enquire of damages before him; but the practice is for them to ſummon a jury for that purpoſe, and to ſwear them in court before the ſteward or judge: and precedents have been ſhewn here of writs formerly directed to the ſheriff of *Cheſter*, and that a court is held there by preſcription, called the *Sheriff's Court.* And an officer called a *Sheriff* might have been without a county, and ſo known time immemorial; and a ſubſequent act of parliament making *Cheſter* a county, does not alter the preſcription. But he obſerved this could not be juſtified but by preſcription, as the ſame officer ought to execute all proceſſes; and therefore if on exception to the ſheriff a proceſs is directed to the coroner, it can never after go to the ſheriff, though the exception is afterwards removed; and though there are no precedents of theſe proceedings prior to the reign of *Hen.* 7. yet as they all run ſo ſince that period, we ought rather to follow them than reverſe all the judgments ſince given.

The judgment was accordingly affirmed. *Vide Mod. Rep. vol.* 7. *p.* 91.

Hilary, 2 *Ann.* *Ogden* v. *Turner.*

An action on the *caſe* being brought for theſe words: *there goes* Ogden, *who is one of thoſe who ſtole Lord* S.'*s deer*; it was offered againſt the action, that words ſpoke are not like words in deeds, they being in deeds *fortius verſus proferentem*, but otherwiſe in caſe of an action for them. *Hob.* 77. 1 *Roll. Abr.* 70. *No.* 50. 54. Held not actionable to ſay, that a man ſtole a deer, without alledging that he knew it to be a tame one. And in the preſent caſe it is not averred as it ought, that a deer was ſtolen from Lord *S.* for if it is ſaid that *A.* poiſoned *B.* without averring that *B.* is dead, an action does not lie.

On the part of the plaintiff it was urged, that this expreſſion muſt be underſtood of a tame deer, of which felony may be commited, and then beyond diſpute is actionable; or it will be underſtood of a deer in a park or place where deer are kept, and then it comes within the meaning of *ſtat.* 3 & 4 *W.* & *M. c.* 10. againſt deer ſtealers, whereby they are to be fined 30 *l.* and be impriſoned, or be ſet in the pillory and impriſoned, therefore the action will lie both ways. And the caſe in 4 *Co.* was inſiſted on, that to ſay of a woman that ſhe has a baſtard is actionable, becauſe it brings her within the penalty of *ſtat.* 18 *Eliz.* *Vide* 3 *Sid.* 7. 21. *Palmer* 298. 1 *Roll. Abr.* 34. 37. 38. 1 *Cro.* 436. and if the defendant had indicted the plaintiff here, after acquittal he might maintain an action for it.

Per curiam. Words that are of themſelves actionable without regard to the perſon or foreign aid, muſt either endanger the life of the party, or ſubject him to ſome infamous puniſhment; and it is not enough that the party may be fined and impriſoned, becauſe if a perſon is found guilty of any common treſpaſs, he ſhall be fined and impriſoned; yet no body will venture to aſſert that to ſay a particular man has committed a treſpaſs is actionable; or at leaſt the matter charged muſt in itſelf be ſcandalous; and the preſent words are *that he ſtole a deer*, which is a wild animal naturally, therefore not ſcandalous. To ſay that *A.* burnt a barn without ſaying that it was part of a dwelling houſe, or contained corn, is not actionable; and the caſe of Sir *Lionel Walden* in 2 *Vent.* was carried too far, and the affair happened at a time when the kingdom in general were furiouſly enraged againſt popery. The words were Sir *L. W. is a papiſt and goes to maſs.* And the penalty by the ſtatute is a pecuniary one, and the pillory is only for want of money, therefore not the direct penalty inflicted by the ſtatute. Moreover Lord Chief Juſtice *Holt* obſerved, that the being ſet in the pillory on this account did not render the perſon infamous, but he was ſtill a good witneſs in law. And to ſay that a perſon has hunted in a park without the owner's leave, and killed a deer there, which ſubjects him to the penalty of the ſtatute *de malefactoribus in parcis*, or to call a man a papiſt ſimply, was not actionable. And that to ſay of a young woman that ſhe had had a baſtard is a very great ſcandal, but not actionable, becauſe a defamation puniſhable in the ſpiritual court. And the ſame to call a man an heretic, and denied the firſt reaſon given in the caſe of *Ann Davis.* 4 *Co.* 17. The plaintiff was accordingly nonſuited. *Mod. Rep. vol.* 6. *page* 104.

Hilary, 2 *Ann.* *Smith* v. *Ary.*

In this action the plaintiff declared, that in conſideration that he had agreed and promiſed the defendant to play at a particular game, and to pay what he loſt, the defendant promiſed to play, *&c.* and to pay, *&c.* and ſets forth in his declaration, that they played, *&c.* and that the defendant loſt, which he had not paid; *cumque etiam*, he (the plaintiff had won ſo much money *at the aforeſaid game*, the defendant in conſideration thereof promiſed to pay, *&c.* On a demurrer, it was inſiſted for the plaintiff, that the mutual promiſes in the firſt count muſt be underſtood as if repeated in the ſecond, *viz.* that the playing was upon the ſame agreement, being alledged to be won *at the aforeſaid game.*

Per curiam. The ſecond count is not mended by the firſt, for they are ſeparate and diſtinct, ſo that the agreement laid in the firſt will not go to the ſecond; and an *indebitatus aſſumpſit* will not lie for money won *at play*, ſo that there was nothing but mutual promiſes, and debt will not lie on a promiſe, nor conſequently an *indebitatus*, for there muſt be a conſideration, or a *quid pro quo*, *&c.* *Vide Salk. vol.* 3. *p.* 14. *Raym. vol.* 2. *p.* 1034.

Eaſter, 2 *Ann.* *Crowther* v. *Oldfield.* Error.

In an action on the *caſe* for diſturbing the plaintiff of his right of common, in which he had declared, that he was ſeiſed of a meſſuage, *&c.* parcel of the manor of *W. held by copy of court roll of the ſame manor*, and that he and all tenants of the ſaid manor held time out of mind *common* on the waſtes of the ſaid manor, for all beaſts *levant and couchant* on their copyholds. The declaration was *adjudged* ill, after it was found by verdict to be *parcel of the manor*, as the plaintiff had ſet forth in his declaration, becauſe the words *at the will of the lord* being left out, it doth not appear to be *copyhold*; ſo that taking it to be *freehold* and not *copyhold*, then the *preſcription* ſhould have been by a *que eſtate* at *common law*, in his own name, and not in the name of the lord. On this point being argued, *Holt*, Chief Juſtice, ſaid, that a copyholder has right of common, either as *belonging to his eſtate*, or to his *land*; that where it belonged to his *eſtate*, and as ſuch he claims common in the lord's waſte there, if the copyhold is infranchiſed, the common is loſt and extinguiſhed, for that continues when the *eſtate* is gone: the other *common* is as *belonging to his land*, *viz.* where a copyholder has common in the waſtes of another manor, in that caſe the common is not loſt by an infranciſement of the copyhold, becauſe though the *eſtate* is gone, the land ſtill continues. It was urged on behalf of the plaintiff in the *original action*, that this title ſet forth in his declaration (admitting it to be bad) ought to be conſidered as unneceſſary and ſurpluſage, and the rather, becauſe there was no occaſion for him to ſtate his title; he had the *poſſeſſion*, and that is ſufficient againſt the defendant, who was a ſtranger, and wrong-doer. *Holt* replied, it was very true; but if the plaintiff will ſet forth a title, as he has done in this caſe, and that title is inconſiſtent in itſelf, a verdict will not help it; now here he could have none as a *copyhold*, becauſe it does not appear that he held *at the will of the lord*, and he could have none as a *freeholder*, becauſe he had preſcribed *in the manor*, ſo that his title being abſurd and inconſiſtent, the declaration muſt be ill; for which reaſon the judgment in *C. B.* was confirmed, and judgment given in this court for the defendant in error. *Vide Salk. vol.* 3. *page* 13. *Raym. vol.* 2. *page* 1225.

Trinity, 2 *Ann. Herbert* v. *Borſtow.*

In an action on the *caſe*, the plaintiff declared, that in conſideration that he had paid and delivered to the defendant twenty pieces of hammered money, being twenty old ſhillings, at his requeſt, he the ſaid defendant promiſed to pay him twenty ſhillings new money. It was objected, the property is not altered; *not allowed by the court*, becauſe a delivery, in conſideration of being paid the value, is a ſale. *Vide* 2 *Raymond, vol.* 2. *page* 895.

Trinity, 2 *Ann. Coggs* v. *Bernard. Entered Hil.* 1 *Ann. Ro.* 435.

In an action on the *caſe*, the plaintiff declared that whereas the defendant *aſſumpſit* to take up a hogſhead of brandy in a cellar in *D.* and ſafely to lay it down in another cellar, and that he *ſo careleſsly* laid and put it down in another cellar, that for want of care the caſk was ſtaved, and the brandy was loſt. It was objected in arreſt of judgment, that there is no conſideration; for the defendant is not to have a reward, and it does not appear he is a common carrier, or porter, ſo as to be intitled to a reward; he is only to have his labour for his pains, wherefore this is a *nudum pactum*.

Per Holt, Chief Juſtice, if the agreement had been only executory, as that he aſſumed to carry it, and did not, no action would have lain. But here he was actually entered upon the thing according to his promiſe, and therefore having miſcarried, he is liable to an action, becauſe it is a deceit on the plaintiff who truſted him. The court unanimouſly gave judgment for the plaintiff. *Vide* 2 *Raym. vol.* 2. *p.* 909.

Trinity, 2 *Ann. Shore* v. *Brown.* Error.

On an *indebitatus aſſumpſit*, the plaintiff declares, that the defendant being indebted to him in 20 *l.* for goods ſold, *in conſideration thereof, ſuper ſe aſſumpſit, &c.* after judgment by default, a writ of error was brought, and this exception taken, that it is not ſaid the defendant promiſed, ſo it might be a ſtranger.

Per curiam, it cannot be ſuppoſed a ſtranger promiſed, or that the plaintiff promiſed himſelf, there is no body to promiſe upon this record except the defendant; *otherwiſe perhaps*, if three perſons had been mentioned in the record, for it might be then uncertain to which the promiſe was applicable.

Gould Juſtice, there is alſo a difference between a collateral promiſe and a promiſe by operation of law; in the latter caſe, the law which raiſes the promiſe applies it. 3 *Cro.* 9 3. *Noy* 50. 1 *Lev.* 164. *Vide Salk. vol.* 1. *p.* 27.

Michaelmas, 2 *Ann. Aſhby* v. *White & al.*

In an action on the *caſe* brought by the plaintiff a burgeſs of *Ayleſbury*, in the county of *Bucks*, againſt the conſtables of that borough, for refuſing to receive his vote in an election of members of parliament. On not guilty pleaded, and a verdict for plaintiff; a motion being made in arreſt of judgment,

Gould Juſtice was of opinion, that the action was not maintainable becauſe the conſtable acted as a judge, and not as an officer, and that in a parliamentary matter. Alſo becauſe the hindering of a vote is *damnum abſque injuria*. 9 *H.* 6. 60. 2 *Lev.* 114. 19 *H.* 6. 44 *Hob.* 267. And would beget multiplicity of actions, (*Vid* 5 *Co. Williams's* caſe) and that the preſent action was out of time. It ought not to precede the adjudication of the Houſe of Commons. 2 *Cro.* 368. The reaſon of *Stirling's* caſe was, becauſe the refuſal of a poll occaſioned him the loſs of the place of bridge-maſter, which was a real profit: and the caſe of an action by a freeman for refuſing to admit his voice in the election of a Lord Mayor was, becauſe he had no other remedy but this action; but this caſe differs. 2 *Lev.* 50. 250. 2 *Vent.* 50.

Powys Juſtice was of opinion that the defendant, though not properly a judge, is *quaſi* a judge; that when the matter comes before the Houſe of Commons, the plaintiff's vote will be allowed; and therefore he does not loſe his privilege; it being a law maxim that *the law does not regard trifles*, and this injury, if it is one, comes within that rule; and he mentioned ſtatute 7 & 8 *W.* 3. which gives an action for a double return, to the candidate; and that before ſtat. 23 *Hen.* 6. the candidate had no action for a falſe return; and that in 1641, there were ſeventy double returns, and yet no action brought, or act made; and from thoſe ſtatutes giving new actions in thoſe caſes, he inferred no action lay for the voter at common law: beſides a judgment here will not bind the Houſe of Commons, nor be evidence there; they not being bound by our determinations; and, laſtly, *all innovations occaſion more miſchief by their novelty, than good from their utility*: 1 *Bul.* 138.

Powell Juſtice ſaid, the defendant muſt be a judge or not a judge, there being no medium; here he is an officer; as ſuch he is to execute the King's writ, and has only a miniſterial power. In other matters he agreed with *Gould* and *Powys*, inſiſting that the right of election of members muſt depend on the right of the electors; and that the former was to be determined by the parliament, and that the plaintiff might petition the parliament for that purpoſe, and afterwards might have his action, but not before; and therefore was not without remedy.

Holt, Chief Juſtice, *contra*, was of opinion, that the plaintiff had a right to vote, that a freeholder has a right to vote by reaſon of his freehold, and it is a real right; and the value of his freehold not material, till 8 *H.* 6. *c.* 7. which requires it ſhould be 40 *s. per annum*; that in boroughs perſons have a right to vote *by reaſon of their burgage*; and that in cities and corporations, it is a perſonal inheritance, and veſted in the whole corporation, but to be uſed and exerciſed by the particular members. *Hob.* 4. 12 *Co.* 120. *Mo.* 8 2. And this is not a *trifle in law*, but a noble privilege, which intitles the ſubject to a ſhare in the government and legiſlature: no laws can be made to affect him or his property but by his own conſent, given in perſon if he is choſen member, or by his repreſentative if he is a voter; that if the plaintiff has a right, he muſt in conſequence have a remedy to vindicate that right; want of right and want of remedy being the ſame thing. If a ſtatute gives a right, the common law gives a remedy to maintain that right; *a fortiori* where the common law gives a right, it gives a remedy to aſſert it. This is an injury, and every injury imports a damage. Where parliamentary matters come before us, as incident to a cauſe of action on the property of the ſubject, which we in duty muſt determine, though the incident matter be parliamentary, we are bound by our oaths to determine it: there can be no ſuch method by petition as my brother *Powell* ſpeaks of; nor can the parliament judge of this injury, or give damages to the plaintiff for it. Judgment notwithſtanding was given for the defendant.

This judgment was afterwards reverſed in the Houſe of Lords. *Trevor*, Chief Juſtice, Juſtice *Price*, and ſixteen Lords concurred with the three Judges of *B. R.* The other Judges and fifty Lords coincided with *Holt*, Chief Juſtice.

In the cauſe of *Barnardiſton* v. *Soame*, Chief Juſtice *Hale* ſaid, That this matter, though it related to the parliament, was an injury precedaneous to the parliament. *Vide Salk. vol.* 1. *p.* 21. *Raym. vol.* 2. *p.* 938.

Michaelmas, 2 *Ann. The Mayor of Wincheſter* v. *Wilks.*

In an action on the *caſe* againſt the defendant for uſing the trade of a woollen-draper within the corporation, againſt the cuſtom thereof; which cuſtom was, that none who had not ſerved ſeven years to a trade, or had been free of the guild of merchants ſhould uſe it within the corporation.

Note. This cuſtom was not grounded on a *bye law*, or for any penalty.

On iſſue being joined, a verdict was given for the plaintiff; and on motion in arreſt of judgment, that ſuch action would not lie, and *Cro. Eliz.* 803. and the caſe of the *Totneſs* corporation cited as in point, the *poſtea* not being come in the court, delayed giving judgment, and directed this caſe to be ſolemnly argued.

Holt, Chief Juſtice, ſaid it was a point not determined, whether ſuch a cuſtom was good, though many corporations did pretend to ſuch cuſtom; that ſome corporations pretended to a right by cuſtom to exclude foreigners, but he thought the ſame could not be ſupported.

In *Eaſter term*, 4 *Ann*, Judgment was ſtayed in this caſe, on faults in the declaration, and the court declined ſaying any thing on the merits, which they ſaid was a queſtion of great conſequence. *Vide Mod. Rep. vol.* 6. *page* 22.

Michaelmas, 2 *Ann*. *Crowder* v. *Oldfield*.

In an action on the *caſe* againſt a perſon for diſturbing another in an office which he held; to which office the plaintiff ſhewed a ſpecial title, and the jury found the title variant, the court gave judgment for the plaintiff, becauſe they held that in this caſe the title was not material. 2 *Jo*. 227. 1 *Lev*. 277. 3 *Cro*. 335. *Vide Mod. Rep. vol*. 6. *p*. 19.

Michaelmas, 2 *Ann*. *Crowder* v. *Oldfield*.

In an action on the *caſe* for diſturbing a man in his ſeat in the church, without ſaying it was an *ancient* ſeat. The exception taken thereto was over-ruled, becauſe againſt a wrong doer on the poſſeſſion. 2 *Lev*. *page* 193. *Vide Mod. Rep. vol*. 6. *page* 19.

Michaelmas, 2 *Ann*.

Where a bond for payment of money has lain dormant twenty years, on an action brought thereon, if the defendant pleads *ſolvit ad diem*, it is a good plea in the opinion of Lord Chief Juſtice *Holt*; for where no demand has been made, nor an action brought thereon in ſuch a length of time, it affords a ſtrong preſumption that the bond has been ſatisfied. *Vide Mod. Rep. vol*. 6. *page* 22.

Michaelmas, 2 *Ann*. *Baker* v. *Preice*.

This caſe was grounded on theſe words, viz. *You ſtole my box-wood*, and I will prove it.

The defendant's council moved in arreſt of judgment, that the words were not actionable, ſaying, *You ſtole my wood, and you ſtole my timber*, were the ſame; *You are a thief, and ſtole my timber*; *you are a thief, and ſtole my corn, hops*, &c. are not actionable, for the general maxim of law is, that where words charge a perſon either with *treſpaſs* or *felony*, if there be not other words, that ſhew the charge to be *felony*, the beſt ſenſe ſhall be taken. *Vide Hob*. 331. *Hutton*, 38.

Holt, Chief Juſtice, condemned theſe authorities, and ſaid, that in this caſe it was not what the party meant, but the neceſſary import of the words that are to be conſidered.

The plaintiff's council replied, *You have ſtolen my timber*, is actionable, for the ſame muſt be felled and and ſevered from the ſtock before it is timber. *Yelv*. 152. *Noy*, 114. The words, *Thou haſt ſtolen my wood, and I will charge you with felony*. *Vide March*. 211. 2 *Cro*. 116. and *Hob* 77. *Thou art a thief, and thou haſt ſtolen a tree*, not actionable, for a difference is taken by the court between a *tree*, for that is underſtood as ſtanding, but if it be felled it is *wood*. *Style* 9. *Præcipe* doth lie of *boſcum*, but it cannot be ſaid *one ſtole an acre of wood*, for if it were not a thing of which *felony* could have been committed, we could not have a verdict. 2 *Cro*. *Jar*. 116.

Chief Juſtice *Holt*. The verdict cited in *Cro. Jac*. ſignifies nothing in the preſent caſe, there being contemporary authorities that differ from that caſe, ſuppoſe he had ſaid, *He has ſtolen my underwood*.

Powell, Juſtice. Underwood and coppicewood will be taken for wood ſtanding.

Chief Juſtice *Holt* obſerved, that the opinions of latter times have been in many inſtances different from thoſe of former days in relation to words; formerly there was a difference taken between ſaying, *Thou art a thief, for thou haſt ſtolen my wood*, and *thou art a thief, for thou haſt ſtolen my wood*, and judgments have been given both ways; the latter opinions make no difference, if the words be ſpoke at the ſame time, and theſe are ſcrambling things, that have gone backwards and forwards, and idle people in the country that privately act and carry away coppicewood, are in common conſtruction called *wood ſtealers*. He obſerved, that he had heard Lord *Hale* and Juſtice *Twiſden* ſay, that they knew no ſet rule for actions for words, but that all words ſtood on their own feet. To ſay, *a man has the pox*, is not actionable; but to ſay, *he has got it, and got it by a yellow-haired wench in Moorfields*, has been adjudged actionable, though the latter words do not carry a violent *intendment*, that the ſpeaker meant the *French pox*, though the ſenſe leads more that way than the other. He remarked, that ſtealing, and feloniouſly ſtealing, was not the ſame; for in common *conſtruction*, ſtealing did not always import felony; for example, to cut and carry away furze is a ſtealing, but not a felonious taking.

Powell, Juſtice, obſerved, that he always took it *ex vi termini*; ſtealing did import felony, and ſaid, the diſtinction put by the *Chief Juſtice* was properly *treſpaſs*, and not ſtealing.

Afterwards, the whole court give judgment in this caſe for the plaintiff, being of opinion that all the latter authorities ran clearly in his favour, and *Holt*, Chief Juſtice, ſaid, that for his part, wherever words did tend to take away a man's reputation, he would encourage actions for ſuch words, becauſe in ſo doing it would contribute much to the preſervation of the peace. *Vide Mod. Rep. vol*. 6. *page* 23.

Michaelmas, 2 *Ann*. *The Queen* v. *the Mayor of Thetford*.

Per curiam. If a perſon *be* ever *ſo* innocent, yet if there were a probable cauſe of proſecution, an action for a malicious proſecution will not lie. The ground muſt be a direct malice, without any colour of cauſe that will juſtify ſuch action. 1 *Vent*. 86. *Car*. 416. 5 *Mod. Rep*. 394. *and* 405. *Vide Mod. Rep. vol*. 8. *page* 25.

Michaelmas, 2 *Ann*. *The College of Phyſicians* v. *Roſe*.

In an action on the *caſe* brought for practiſing phyſic within ſeven miles of *London*, without licence, a ſpecial verdict was found, *viz*.

That the defendant being an apothecary by trade, was ſent to by one *J. S.* then ſick of a certain diſtemper; and that having ſeen, and been informed of the ſaid diſtemper, he did, without preſcription or advice of a doctor, and without any fee, compound and ſend the ſaid *J. S.* ſeveral parcels of phyſic as proper for his ſaid diſtemper, only taking the price of his drugs for the ſame: whether this was ſuch a practiſing of phyſic as was prohibited by the ſtatute, was the queſtion before the court: after many arguments, the court at laſt unanimouſly agreed, that the practiſing of phyſic within this ſtatute conſiſts,

1ſt, In judging of the diſeaſe, and its nature, conſtitution of the patient, and many other circumſtances.

2dly, In judging of the fitteſt and propereſt remedy for the diſeaſe; and,

3dly, In directing or ordering the application of the remedy to the diſeaſed perſon, and that the proper buſineſs of an apothecary is to make and compound, or prepare the preſcriptions of the doctor purſuant to his directions.

4thly, It was agreed, that the defendant's taking on himſelf to ſend phyſic to a patient as proper for his diſtemper, without taking any thing for his pains, is plainly a taking on himſelf to judge of the diſeaſe and fitneſs of the remedy, as alſo the executive or directing part. The whole court gave judgment for the plaintiff. *Vide Mod. Rep. vol*. 6. *page* 44.

Hilary, 3 *Ann.* *Green, Executor of* —— v. *Crane.*

In an action on the *caſe* brought by *Green* on *ſeveral promiſes laid in the declaration to have been made to the teſtator by the defendant*, who pleads the ſtatute of limitations, on which iſſue was joined: In the courſe of the evidence it appeared, that the teſtator had been dead ſeven years before the action was brought, but the executor proved a promiſe made to himſelf within a year before the commencement of the action. A verdict was given for the plaintiff.

Per curiam, Though the acknowledging of the debt is a continuation of it, and removes all preſumption of its having been ever paid, and conſequently brings it out of the ſtatute, yet this verdict does not maintain the iſſue; it was accordingly ſet aſide, becauſe the promiſe being made to the executor, could not be made to the teſtator *within ſix years*. *Vide Mod. Rep. vol.* 11. *page* 37. *Salk. vol.* 1. *p.* 28. *Raym. vol.* 2. *page* 1101. *Forteſcue* 180.

Eaſter, 3 *Ann.* *Hutton* v. *Manſelle*

In an action on the *caſe*, brought by a *feme ſole*, ſhe declared *that ſhe* had agreed and promiſed to marry the defendant; and that he in conſideration thereof promiſed to marry her. On *non aſſumpſit* pleaded, the cauſe was tried, and the promiſe of the man proved, but no effectual promiſe on the woman's ſide. *Adjudged*, that there was ſufficient evidence to prove that the woman likewiſe promiſed, becauſe ſhe behaved as if ſhe conſented to, and approved of, the promiſe of the man. *Vide Salk. vol.* 3. *p.* 16.

Eaſter, 3 *Ann.* *Graves* v. *Blanchett.*

In an action on the *caſe* for words, the plaintiff declared for words ſpoken at ſeveral times: the firſt words were, *ſhe is a whore and has had a baſtard by her father's apprentice*; alledging a *colloquium*: the other, *thou art a whore and hadſt a baſtard by your father's apprentice*; *in conſequence of which and other expreſſions of the like kind*, a perſon who courted her, and was ready to marry her, deſerted her, and refuſed to fulfil his engagement: a verdict and entire damages being given for the plaintiff, it was moved in arreſt of judgment that the firſt words were not actionable, the ſpecial damages being confined to the latter words, *viz.* the word *other*.

Per curiam, if it was a new caſe, it would be reaſonable to make the firſt words actionable, beeauſe no greater misfortune can befal a young woman, whoſe well doing depends on her having a good huſband, than to be a reputed whore; but the authorities are too numerous and great for us to run counter to them; the reaſon on which they are founded is, that fornication is a ſpiritual offence, not puniſhable at common law; and an action ſhall not lie for charging a perſon with an offence of which the law takes no notice, without ſpecial damages. Judgment was therefore arreſted. *Vide Mod. Rep. vol.* 6. *p.* 148.

Trinity, 3 *Ann.* *Walſmely* v. *Ruſſell.*

In an action on the *caſe* brought by the plaintiff againſt the defendant; the plaintiff declared, that whereas he is a man of reputation, free from all perjury, and ſubornation of perjury, and that for ſix months before the words ſpoke, was a juſtice of the peace, and is, and for ſeveral years before was Chancellor of the Conſiſtory Court of the Biſhop of *Coventry* and *Litchfield*, and that writs did iſſue ſuch a year for calling a parliament, and that ſuch a day in that year was appointed for the election of burgeſſes for *Litchfield* to ſerve in the ſaid parliament: that the plaintiff intended to ſtand as a candidate, and thereof gave public notice; that the defendant knowing the premiſes, to hurt the plaintiff in his credit and reputation, and to bring him under the penalty of perjnry, and ſubornation of perjury, at ſuch a time and place, in the hearing of ſeveral of the Queen's ſubjects, and in the plaintiff's preſence, ſpoke of him the plaintiff theſe falſe and ſcandalous words; *there goes your rare Chancellor*, *innuendo*, the plaintiff *to ſuborn witneſſes to ſwear againſt the parſon*; whereas the plaintiff was not guilty thereof. On iſſue being joined, a verdict and damages were given for the plaintiff.

Gould Juſtice. The action lies. If the words were ſimple and abſtractedly ſpoken without reference to any public employment or office of the plaintiff, the caſe would have been more doubtful; but here they are ſpoken in reference to his office of Chancellor, and of a perſon then in commiſſion of the peace, and who ſtood candidate for a member of parliament, and therefore the words are as reproachful as can be, they wound his reputation, and craftily obſtruct his election.

Objection, They are not ſpoken with reference to his office.

Anſwer, They are, becauſe they are ſpoken of one in an office of truſt, and having adminiſtration of juſtice, and ſpoken expreſsly in that capacity, *there goes your rare Chancellor*; for it cannot be taken here that the word *Chancellor* was only meant as a deſcription of the perſon, but rather an indication of the capacity, in which he did ſuborn the witneſſes; and it is not material to ſhew that any woman did ſwear againſt a parſon before him, for if not, then the greater falſity and ſcandal, and the word *ſubornation* is always taken in an ill ſenſe. 3 *Inſt.* 167. 1 *Roll. Abr.* 51. *Yelv.* 72, *&c.*

Powys Juſtice, doubted how it would be if the words had no relation to his office, or ſpoke of a man not in office, but held them actionable here, for two reaſons, *viz.* becauſe ſpoke of a public officer, and in reference to his office; for he held the word *Chancellor* was not a deſcription of his perſon, or as his name as Parſon or Dean is, but an *innuendo* of his corruption *quatenus* ſuch *i. e. quatenus* a Chancellor, and denied the authority of the caſe in 1 *Roll. Abr.* 79. but agreed to the caſe in 2 *Cro.* 190. *Thou art forſworn in Collet court*; *and to that in* 2 *Cro. p.* 436. *Thou art perjured, for thou art forſworn in the Biſhop of* G.'s *court*, not to be actionable, and would diſtinguiſh theſe caſes from this, becauſe ſpoken here of an officer, and with relation to his office; *ſubornation* is a known term in law, and is the word of art for corrupting one to commit perjury. 3 *Inſt.* 167. The *ſtat.* 32 *H.* 8. *cap.* 9. ſpeaks of ſubornation of witneſſes. *Stat.* 5 *Eliz. cap.* 9. ſubornation of falſe procurement of a witneſs. *Vide* 1 *Lev.* 118. *Hard.* 501. *Mod.* 243.

Per Anderſon. A private man cannot be ſlandered but by particular words, but general words ſuffice to ſlander a magiſtrate, and concluded for the plaintiff.

Powell contra, 1. He allowed the phraſe of expreſſion was as direct as if the defendant had really ſaid, that the plaintiff had ſuborned witneſſes to ſwear againſt the parſon. I cannot well find whether my brothers think the words actionable in themſelves, if ſpoken of any perſon whatſoever, or by reaſon of a relation to his office, or other circumſtances of the plaintiff on the declaration, but I hold them not actionable on any account.

2. A man cannot without a relation to his office, be a ſuborner of perjury, without there is a perjury committed; one may indeed ſuborn to ſwear, and yet no oath taken, or an oath may be taken, and yet the ſame be no perjury, for if it does not appear to be in any court of juſtice; the caſe in 3 *Cro.* is not like this, for here is neither court or cauſe mentioned where the ſwearing was; he allowed the caſe in *Cro. Jac.* 158, for in that caſe there was a perjury ſaid to have been committed, and as to *Hard* 501, a perjury is likewiſe charged. It is not actionable to ſay, that one did forſwear himſelf; *à fortiori*, how can the ſuborning one to forſwear himſelf be ſlander to bear an action; and ſubornation *ex vi termini* does not import a ſubornation of perjury; the caſe in 1 *Roll.* 79, is much ſtronger than this; ſubornation indeed is never taken in a good ſenſe, no more than forſwearing, yet no action lies for ſaying a man did forſwear himſelf.

Then as to the relation of theſe words to his office, or that he alledges himſelf to be a juſtice of the peace, and a candidate for parliament, I agree, words ſpoke of a magiſtrate will be actionable, that would not be ſo if ſpoke of another perſon; but they muſt for that purpoſe affect him in his office. If there had been a caſe in which a parſon had been a party before the plaintiff, and women had been ſworn in ſuch cauſe, and the ſame had been ſet forth, then theſe words might be applied by *innuendo* to that, and the ſame actionable. *Vide Cro. Jac.* 30. *Yelv.* 220, 221. The word *Chancellor* does not neceſſarily import that this was charged on him in his office of Chancellor, and words muſt be either actionable in their nature, and bear an action if ſpoke of any body, or ſcandalize him in office, *&c.* to bear an action.

Holt Chief Juſtice, my brothers are not well agreed, whether the words be actionable in themſelves, but rather incline not; I think they have great reaſon for that opinion, becauſe here is not charge on the plaintiff of any ſubornation of perjury, or that he did ſuborn witneſſes to forſwear themſelves, and ſuppoſe it were the firſt, and no *colloquium* of any cauſe or court where there had been an oath, it would not be actionable, nor is there any precedent for it; and there is reaſon there ſhould not, for to ſay a man has forſworn himſelf, is not actionable, *ideo* not to ſuborn witneſſes to forſwear: but the words are not ſo ſtrong in this caſe, for they are, that he did ſuborn witneſſes to ſwear; ſure the ſuborning witneſſes to ſwear is no crime, and ſuborning *ex vi termini* is not a crime, otherwiſe than as it relates to perjury, and ſuborning witneſſes to ſwear, does not imply that they do ſwear, and in the caſe in 1 *Roll.* 79, a *colloquium* is laid of a ſuit in *Chancery*, and witneſſes ſworn there. So one would think here was a ſubornation of perjury; and the words go farther, and ſay, that he would ſue in the *Star Chamber* for it, a proper court to puniſh perjury in, yet held not actionable. Then how do theſe words touch him in his office? for if a *Chancellor* will ſuborn witneſſes to ſwear, does this relate to his office? If he does it in another than the *ſpiritual court*, it cannot, if it be in a *ſpiritual court*, it may not be before himſelf; in ſhort it does not appear to have been before himſelf, and we muſt not *intend* it to maintain an action, and the naming him *chancellor*, is no more, and ſo commonly underſtood, than a deſcription of the perſon as Mr. *Chancellor*. To make words actionable in themſelves, it is neceſſary to charge ſome ſcandalous crime committed by them. If a communication had been laid concerning an oath which a man had taken in a court of juſtice, and that the man did forſwear himſelf, that had been charging him with perjury, and therefore actionable: but barely to ſay, that a man did forſwear himſelf or ſuborn another ſo to do, is not charging an offence puniſhable, and therefore not ſufficient to ground an action, and concluded for the defendant.

The court being thus divided, the queſtion was about the judgment. If a rule be for a cauſe to ſtay till the court be further moved, and the court is divided, there needs no new rule from the court, and the plaintiff without more ado may enter judgment on the verdict; but if the caſe be ruled to be put in the paper for argument, or the laſt rule be a *cur' adv' vult*, and the court be divided, there can be no judgment, and the caſe of *Iveſon* and *Moore* ſtands on that point to this day. *Vide Mod. Rep. vol.* 6. *page* 200.

Trinity, 3 *Ann. Johnſon* & *Ux.* v. *Browning.*

In an action on the *caſe* for maliciouſly indicting and proſecuting the plaintiff's wife for felony, of which ſhe was acquitted, the declaration recited the indictment *continent. materiam ſequentem*; and in the recital of the goods ſuppoſed to be ſtolen, it was *valoris* of ſo much, whereas the indictment ran *valentiæ* of ſo much: it was objected that this was a variance from the indictment, but over-ruled, for it was the ſame in ſubſtance, but had the plaintiff undertaken to ſet forth the indictment *in hæc verba*, it would have been a fatal exception.

Per Holt Chief Juſtice, the plaintiff ought to have proved a copy of the bill exhibited, and that it was found on the oath or procurement of the defendant; but their names on the back of the bill is ſufficient evidence of their being ſworn to the bill, though the writing on the back is no part of the record: it may be proved that the defendant was a witneſs without having the bill; but it is the beſt and cleareſt method to have the bill: and the firſt part of the defendant's defence in this caſe, muſt be to prove a felony committed; for without that it is impoſſible he could have a probable cauſe of proſecution; and here becauſe nobody was by at the time of the ſuppoſed felony committed, but the defendant's wife, who could not in this caſe be a witneſs to prove the felony committed, her oath which ſhe made at the trial of the indictment was allowed to be given in evidence to prove a felony committed; for otherwiſe one that ſhould be robbed, *&c.* would be under an intolerable miſchief; for if he proſecuted for ſuch robbery, *&c.* and the party ſhould at any rate be acquitted, the proſecutor would be liable to an action for malicious proſecution, without a poſſibility of making a good defence, though the cauſe of proſecution were ever ſo pregnant.

To which Serjeant *Darnell* for the plaintiff ſaid, if oath had been made ſoon after the fact committed, that oath might be admitted as evidence of it; *otherwiſe* not; but here it appeared a warrant was taken out immediately, but nothing done thereon till the defendant had a ſubſequent falling out with the plaintiff.

Holt Chief Juſtice obſerved alſo, that people ought to adviſe well before they brought actions of this kind; and gave as inſtances *Pigot's* caſe in 1 *Cro. Car.* 383. where a ſon-in-law indicted his ſtep-mother for poiſoning her huſband, his father; and ſhe being acquitted, brought an action for a malicious proſecution againſt him, and recovered damages; and he to requite her kindneſs, brought an appeal of murder, on which ſhe was tried, convicted at the *King's Bench* bar, and executed: And another caſe that happened lately, where a fellow brought an action againſt a man for ſaying of him *he was an highwayman*; and it appearing on evidence that he was ſo, he was apprehended in court, convicted, and hanged the following ſeſſions. *Vide Mod. Rep. vol.* 6. *page* 216.

Trinity, 3 *Ann. Wilſon* v. *Gary.*

In an action on the *caſe* againſt the defendant for reſcuing a perſon arreſted on meſne proceſs at the plaintiff's ſuit.

At *niſi prius* before *Holt*, Chief Juſtice; the firſt point of evidence was the original cauſe of action.

2. The writ and warrant, by producing copies of them ſworn to be examined, and true.

3. The arreſt ſhewing the manner of it, that it might appear to the court to have been legal, for otherwiſe there could be no *reſcous*; and in point of damage they proved the loſs of their debt, for that the priſoner became inſolvent, or could not be had.

Holt, Chief Juſtice. In caſe of reſcous, you ſhall have no favour, becauſe guilty of a violence againſt the proceſs of the law, and therefore not like the caſe of a negligent eſcape.

The *caſe* on evidence appeared to be as follows: The bailiff ſtayed below at the ſtreet door, and ſent his follower diſguiſed, with the warrant, up three pair of ſtairs, who there touched the priſoner, and acquainted him that he arreſted him: the priſoner, with the aſſiſtance of ſome women, got from him, and ran down to the firſt floor; and the defendant being below in his ſhop, and hearing the noiſe, ran up ſtairs before the bailiff opened the door, let the priſoner into the room, and would not ſuffer the bailiff to enter and take him.

Holt, Chief Juſtice ſeemed to doubt whether this was a good arreſt, being made only by the bailiff's folower, or even if it had been done in the preſence of the bailiff; however, he gave the jury a general charge, who found for the plaintiff. But he ordered the *poſtea* to be ſtayed till marked by him.

In this caſe the party reſcued appeared, and was ſworn as a witneſs in behalf of the defendant, not having been made a party to the action; which *Holt*, Chief Juſtice, allowed, by reaſon that he ſwore to charge himſelf, if by his evidence he diſcharged the defendant; but ſaid, he had never ſeen a like inſtance, and that if the defendant was guilty of the reſcous, he muſt be a partaker in the crime. *Vid. Mod. Rep. vol.* 6. *p.* 221.

Eaſter, 3 *Ann.* *Muriel* v. *Tracy*, *Jenkins*, *Chamberlain*, *and Cornwall.*

In an action on the *caſe* for a conſpiracy, the plaintiff declared, that the defendants *conſpiring to vex and oppreſs the plaintiff* did *(under pretence of a certain warrant)* from Sir S. *Lovel*, Recorder of *London*, wherein the plaintiff was charged by the oath of one *Aſhby* with having aſſaulted him on the highway with intent to rob and murder him) arreſt him the plaintiff, and carry him before *Chamberlain*, a juſtice of the peace, who, *by the perſuaſion of* Tracy, refuſed to bail him, though ſufficient bail were offered, and committed him to the *Gatehouſe priſon*, where ſuch and ſuch ſums of money were extorted from him; but the words *without probable cauſe* were omitted in the declaration.

On evidence it appeared, that eight years before, the plaintiff, a gentleman's ſervant, being riding on horſeback on the road, quarrelled with *Aſhby*, and being in liquor, was ſoundly thraſhed by him; notwithſtanding which, *Aſhby* immediately took out a warrant againſt the plaintiff for an aſſault and battery, but nothing more was done in the affair. Six years afterwards, ſome diſpute ariſing between the plaintiff, *Tracy*, and *Jenkins*, in *London*; *Jenkins* goes down to *Suffolk*, and at the perſuaſion of *Cornwall*, prevails with *Aſhby* to come up to *London*, and make the oath abovementioned, (whereon the warrant was granted againſt the plaintiff *Muriel*) before the Recorder, for which *Aſhby* had a guinea from *Jenkins*. A twelvemonth afterwards, *Tracy* being himſelf a juſtice of peace, employs the under-keeper of the *Gatehouſe*, and others, to apprehend the plaintiff *Muriel*, and carry him before Juſtice *Chamberlain*, and to ſend him word as ſoon as they had apprehended him, which they accordingly did: and *Tracy* informed *Chamberlain*, that he had conſulted the Recorder, and ſome other council, about the offence with which *Muriel* was charged, who were of opinion that it was not bailable; whereas in fact he had never aſked the queſtion: on which *Chamberlain* refuſed bail, and committed the priſoner. *Tracy* follows him to the *Gatehouſe*, and directs the goaler to treat him with ſeverity, and to put him in irons.

Holt, Chief Juſtice. *Chamberlain* was to blame for his ignorance; but there is no reaſon to find him guilty on this evidence; as to the reſt, the circumſtances of the evidence ſhew it to be one continued chain of malice, and if the declaration was good, the evidence would be ſufficient to maintain it.

The exceptions taken to the declaration were, 1ſt, That it recited a warrant variant from that on which the plaintiff was arreſted, the recital being abſolute and poſitive, that the oath was, that the plaintiff had aſſaulted *Aſhby* with intent to rob and kill him, as he believes. No great regard was paid to this objection; but the Chief Juſtice ſaid it ſhould be ſaved to them.

2dly, That the declaration ſuppoſed the arreſt to be made without a legal warrant; the words being *pretextu cujuſdam warranti*, *(under pretence, or colour, of a certain warrant)* and *pretextu* and *colore* are words of the ſame meaning; this expreſſion muſt therefore be taken in the ſame ſenſe as if there had been no warrant. But this objection was over-ruled, becauſe an ill uſe having been made of the warrant, though a legal one, that certainly was *pretextu (under pretence or colour)* of a warrant.

3dly, Suppoſing the warrant a legal one, there can be no conſpiracy in apprehending a perſon by a legal warrant, eſpecially as it is not laid in the declaration, that the warrant was taken out *without probable cauſe*.

Holt, Chief Juſtice, in conſequence of this laſt exception, directed a juror to be withdrawn, with the conſent of both parties, the declaration being in his opinion ill, for not alledging that the warrant was taken out *without probable cauſe*.

The Chief Juſtice obſerved in the courſe of the trial, that this action being *on the caſe, in nature of a conſpiracy*, all the defendants might be acquitted except one, and he be found guilty; and in ſupport thereof, cited *N. B.* 277. *A.* 278. *K.* 2. *Saund.* 230. 1 *Vent.* 12. 18. 23. *and* 1 *Cro.* 239. *Vide Mod. Rep. vol.* 6. *p.* 169.

Eaſter, 3 *Ann.* *The Queen* v. *Beſt & al.*

The defendants were indicted for conſpiring to extort money from *A.* and to effect that wicked purpoſe, to charge him *falſo* with being the father of a certain baſtard child, *&c.* and that in purſuance of ſuch conſpiracy, they did *falſely* charge and affirm him to be the father of it. An exception was taken that the indictment did not *aver* that he was the father of it.

Per curiam. The giſt is the *falſo*, conſpiring to charge falſely; and it is further ſaid, that they did falſely charge, *&c.* and an indictment lies for the falſehood before the party is acquitted thereof; but an action on the *caſe* does not lie till acquittal: and this being a frequent offence, the court refuſed to quaſh the indictment on motion. *Vide Mod. Rep. vol.* 6. *page* 137.

Eaſter, 3 *Ann.* *Holmes* v. *Hall.*

On an *indebitatus aſſumpſit* brought by an executor for ſo much money of the teſtator's, received by the defendant to the uſe of the executor.

The evidence offered to the court was, that ſome writings belonging to the teſtator, came to the defendant's hands, which he would not deliver up to the executor, who, to get the writings, gave him ſo much money, wherefore he promiſed to give up the writings, but afterwards refuſed.

The defendant's council *urged*, that the plaintiff had miſtook his action, for he ſhould have brought an action on the *caſe* on the ſpecial agreement for the non-delivery of the writings.

Holt, Chief Juſtice, obſerved, if *A.* gives money to *B.* to pay *C.* on *C.*'s giving up writings, *&c.* and *C.* will not do it; *indebitatus*, *&c.* will lie for *A.* againſt *B.* for ſo much money received to his uſe; and many ſuch actions have been maintained for earneſts in bargains, when the bargainor would not perform; and for *premiums* for inſurance when the ſhip, *&c.* did not go the voyage; but it has been held it would not lie for money paid on an uſurious contract, becauſe there it was not intended it ſhould be repaid, or any thing done for it. Indeed, theſe caſes have been carried too far, *viz. Indebitatus*, *&c.* for money received to uſe, and no body would more willingly check them than I would, therefore it ſhall be ſaved you if you will, but I will not *nonſuit* the plaintiff. It appeared on the evidence, that the defendant pretended to the money as due from the teſtator, and therefore would not deliver the writings without payment, and that the money was given in ſatisfaction of the debt, ſo it was clear againſt the plaintiff, and he was *nonſuited*.

The defendant's council cited a caſe in ſupport of the defence, where he ſaid one had undertaken to obtain a pardon for another, and to that end, got ſeveral ſums of money from him, but had not procured the pardon; and on an *indebitatus*, *&c.* brought for the money had and received to the plaintiff's uſe, yet the plaintiff had been *nonſuited* before Chief Juſtice *Holt*, which the *C. J.* utterly denied. *Vide Mod. Rep. vol.* 6. *page* 161.

Michaelmas, 3 *Ann.* *Birkmyr* v. *Darnell.* *Entered Eaſter* 3 *Ann. Ro.* 64.

In an action on the *caſe*, the plaintiff declared, that in conſideration the plaintiff would deliver his gelding to *A.* the defendant promiſed that *A.* ſhould re-deliver him ſafe; it appeared in evidence that the defendant undertook that *A.* ſhould re-deliver him ſafe.

This was held a collateral undertaking for another; for where the undertaker comes in aid only to procure a credit to the party, in that caſe there is a remedy againſt both, and both are anſwerable according to their diſtinct engagements; but where the whole credit is given to the undertaker, ſo that the other party is but as his ſervant, and there is no remedy againſt him, this is not a collateral undertaking; but it is otherwiſe in the principal caſe, for the plaintiff may maintain *detinue* upon the bailment againſt the original hirer, as well as an *aſſumpſit* upon the promiſe againſt the defendant. This was upon a caſe ſtated at the trial for the opinion of the court; and judgment accordingly given for the defendant, becauſe the plaintiff may maintain *detinue* on the bailment againſt the original hirer, as well as *aſſumpſit* on the promiſe againſt this defendant.

Per curiam. If two perſons come to a ſhop, and one buys, and the other, to procure him credit, promiſes the ſeller, *if he does not pay you, I will*, this is a collateral undertaking, and void without writing, by the ſtatute of frauds: but if he ſays, *let him have the goods, I will be your pay-maſter*, or *I will ſee you paid*, this is an undertaking as for himſelf, and he ſhall be intended to be the real buyer, and the other to act only as his ſervant. *Vide Salk. vol.* 1. *page* 27.

Michaelmas, 3 *Ann.* *Goddard* v. *Smith.*

In an action on the *caſe* for indicting the plaintiff of barretry, *&c.* in his declaration he ſet forth, that he was *debito modo inde exonerat*, i. e. was lawfully acquitted, and to prove the declaration on the trial, produced a *nole ulterius proſequi* by the Attorney General.

The Chief Juſtice, inclining to think that this evidence did not maintain the declaration, reſerved it for the opinion of the court, and ſaid, that the entering a *non proſ.* was only putting the defendant *ſine die*, and did not diſcharge any further proſecution on the very ſame indictment, and it would be hard to allow a man who gets off by *non proſ.* to maintain an action for a malicious proſecution. Indeed, if the perſon indicted had pleaded *not guilty*, and the Attorney General had confeſſed it, that would have done; but the perſon who gets off on a *non proſ.* is not at all acquitted on the merits of the cauſe; and to maintain a conſpiracy, it is neceſſary to lay and prove an acquittal. Thus, in an action for ſuing for a large ſum, in order to hold to extravagant bail, the plaintiff muſt ſhew what became of that cauſe, in order to maintain his action; and ſo is *Hob.*; but the preſent caſe is not ſo much as a nonſuit, as the indictment ſtands ſtill in force. Indeed, he remembered a cauſe, about twenty years before, in which Juſtice *Wyndham* directed for the plaintiff on the ſame point, but thought it hard even at that time.

It was urged in behalf of the plaintiff, that the word *inde* referred to the fact charged: but *per curiam.* At moſt it can go only to that indictment, and cannot be pleaded to a new indictment for the ſame offence, or a *nole proſequi* would amount to a pardon.

Powell, Juſtice: In all caſes of conſpiracy, the *inde acquietat.* goes to the fact charged, and not to the indictment; becauſe if it referred to the indictment, if the ſame was vicious, *conſpiracy* would lie; but that is not the caſe, and a colourable proof would deſtroy this action: now the plaintiff, by procuring this *nole proſequi*, bars the defendant from giving ſuch proof, and this action cannot be maintained but on acquittal of the fact charged, by verdict, confeſſion, *&c.* He doubted of the effect of a *nole proſequi* on an indictment, whether it diſcharged the indictment or not.

Holt, Chief Juſtice, ſaid, he had known it thought very hard, that the Attorney General ſhould enter a *nole proſequi* on indictments, and that it was firſt practiſed in the latter end of the reign of *Charles* 2. but that it had frequently been done on information, and ordered ſearch to be made, whether there were any precedents in the time of Mr. Attorney *Palmer*, or *Nottingham.*

Harcourt, Maſter of the Office. There never has been any procedings after a *nole proſequi*: and *by the whole bench*; in caſe of barretry, the defendant on motion may have a rule to have articles delivered to him of the inſtances, and the proſecutor cannot give evidence of any particular omitted in the articles delivered; and if the proſecutor gives no articles, he ſhall give no evidence.

On a future day, *Holt*, Chief Juſtice, declared, there was no precedent of a *nole proſequi* on an indictment during the whole reign of *Charle* 1. and the court all ſeemed clear, that the action did *not* lie, but no rule was made. *Vide Mod. Rep. vol.* 6. *page* 261.

Michaelmas, 3 *Ann.* *Strong* v. *Courtney.*

On a ſpecial *aſſumpſit* ſtating, that whereas *J. T.* had a rent charge iſſuing out of the defendant's land, the defendant, in conſideration the plaintiff would indemnify and ſave him harmleſs againſt all diſtreſſes to be taken by *J. T.* out, of, or on the premiſes, promiſed to pay him ſuch a ſum. On *non aſſumpſit* pleaded, and a verdict for the plaintiff; it was moved in arreſt of judgment, that no right of diſtraining appeared for the ſaid *J. ideo* i. e. *therefore* no conſideration for the promiſe.

The court were of this opinion, though it was after verdict, which they obſerved would not cure the want of conſideration; *ſecus* i. e. *otherwiſe* if it had appeared that the rent had been aſſigned to *J. Vide Mod. Rep. vol.* 6. *page* 265.

Michaelmas, 3 *Ann.* *Thornborough* v. *Whitacre.*

On an *aſſumpſit* brought, plaintiff declared, that in conſideration of half a crown by the plaintiff in hand paid to the defendant, he promiſed to pay two grains of rye on *Monday* the 29th of *March* in ſuch a year, four grains the next *Monday* after, and ſo on by progreſſional *arithmetic*, every *Monday* for a year. On *non aſſumpſit* pleaded.

Per curiam on motion, let the parties go to trial, and though this would amount to a vaſt quantity, yet the jury will conſider of the folly of the defendant, and give but reaſonable damages againſt the defendant. *Vide Mod. Rep. vol.* 6. *page* 305.

Michaelmas, 3 *Ann.* *The Queen* v. *Hannon.*

The priſoner was indicted for that being a *communis deceptor*, i. e. a *common cheat* of the Queen's people, he came to the wife of *B.* and made her believe he had ſold part of a ſhip to her huſband, and on that account got ſeveral ſums of money from her.

Per curiam. *Communis deceptor* is too general, and ſo is *communis oppreſſor*, *perturbator*, *&c.* and ſo are all other appellations (except *barrator* and *ſcold*) without ſhewing particular inſtances, and the particular inſtance alledged here is of a private nature. If he had made uſe of any falſe token, it would be otherwiſe. The court quaſhed the indictment. *Vide Mod. Rep. vol.* 6. *page* 311.

Michaelmas, 3 *Ann.* *Tenant* v. *Golding.*

In an action on the *caſe* brought by the plaintiff againſt the defendant, the plaintiff declared, that on ſuch a day and year he was poſſeſſed, and is ſtill poſſeſſed, of a meſſuage, ſituate, *&c.* for a certain number of years, which were unexpired, and alſo of a cellar, parcel of the ſaid premiſes, which lies together with the aforeſaid meſſuage, contiguous to the meſſuage of the ſaid defendant, in the pariſh aforeſaid, and to a vault, parcel of the ſaid defendant's premiſes, which was uſed to be ſeparated by a ſtrong thick wall, which alſo belonged to the ſaid defendant's premiſes, and which ought to be repaired by him for all the term aforeſaid; but that the defendant *machinans*, *i. e.* contriving, *&c.* though often requeſted to repair the ſaid wall, ſo negligently kept it in repair, that for default of care in his repairing the ſame, the filth of the ſaid vault, by the decay and breach of the ſaid wall, did flow into the cellar, and fill the ſame for ſuch a time, *&c.* by which the plaintiff loſt the uſe thereof, *&c.*

The queſtion was, Whether the declaration was ſufficient to entitle the plaintiff to this action? It being objected, that it thereby put a charge on the defendant which could not be but by *preſcriptions*, and none being laid, nor was it laid, that the meſſuage was an ancient meſſuage, capable of *preſcription*. In ſupport of the declaration, that it was well laid, being for a *tort* to his poſſeſſion, the following authorities were cited, 1 *Cro.* 575. 3 *Lev.* 266, *&c.*

The defendant's council, in ſupport of the objection raiſed to the declaration, cited the following caſes, 1 *Vent.* 274. and *Cro. Jac.* 43.

Holt, Chief Juſtice, obſerved, that the caſe of *Sands* v. *Trefuſis* was not like this; for the there the *ſolebat*, i. e.

was uſed, goes to the word *currere*, i. e. *to run*, which is the thing complained of, and *ſolebat* is a word of an uncertain ſignification, and properly goes to the repeated acts, and it is ſaid that the wall *ſolebat reparari*, i. e. *was uſed to be repaired*, and yet the ſame is a permanent thing, and therefore it is very improper to ſay, a permanent thing *ſolebat*. He allowed, that formerly, and even now, there is a difference between charging a wrong doer, and the tenant of the land, *for* to charge the tertenant, one muſt ſhew a title by grant or preſcription, but the ſame need not be done againſt a wrong doer: formerly it was thought neceſſary, in order to maintain an action on the *caſe* againſt tertenants for ſtopping a way, to ſet forth the title, but the contrary opinion has been ſince held. *Vide Brit* v. *Stroud*. 4 *Mod*. 418. as well on demurrer as after verdict. I know no caſe where one puts a charge on another, except the ſame be of common right, but he ought to ſhew his title, as in the caſe of repairing one's houſe: but if I have a houſe of office in my ground walled, and there is no cellar contiguous thereto, and another perſon digs a cellar cloſe to my wall, which is perfectly ſound and ſtrong till ſuch cellar has been dug; it ſeems hard to bring a greater charge on me by his digging his cellar contiguous to my wall, whereby the foundation thereof is become weakened. Suppoſe one man has a houſe, and a cellar contiguous thereto, and one wall ſerves for both, and he ſells the other, the queſtion is, who ſhall repair the wall? Or ſuppoſe the cellar was made after the vault and the wall thereof, the one party's making a wall ſhall not take away the owner of the contiguous ſoil's liberty of digging a cellar, though ſuch digging did not ſubject the other perſon to a greater expence.

Gould, Juſtice. There are certainly a great many caſes, wherein if a man declares that he ought to have common, &c. if the ſame be againſt a tertenant or owner of the ſoil, there ought to be a title made. *Vide* 1 *Vent*. 319. 356. but latter caſes have turned otherwiſe. *Vide Matthew's and Baker's caſe, and Plottney and Slaughter's caſe, Hilary*, 4 *W*. & *Mary, Roll*. 1771. In the declaration it is ſaid he ought to repair, and the word *ought* will bring the matter in evidence, and the difference is between a declaration and a plea in bar. 2 *Vent*. 185.

Afterwards the whole court gave it as their opinion, that the declaration was good, for there was a ſufficient cauſe of action appearing in ſuch declaration, but not on the *ſolebat*, i. e. *was uſed*; ſaid, if the defendant has a houſe of office, incloſed with a wall, which belongs to him, he is of common right bound to uſe it ſo as not to annoy another. There is a great diverſity between a preſcription to put a charge on a man to repair his fence, and to excuſe one from a treſpaſs for ſuch charge, becauſe the ſame muſt be by preſcription; the reaſon is, that one muſt uſe his own ſo as thereby not to hurt another; and as of common right, one is bound to keep his cattle from treſpaſſing on his neighbour, ſo he is bound to uſe any thing that is his, ſo as not to hurt another by ſuch *uſer*. If a man has two houſes, one thereof having a houſe of office that is kept in by the wall of the ſame houſe from a cellar in the other, and he ſells the houſe to which the houſe of office belongs, the buyer is bound to keep ſuch houſe of office in good repair, ſo as not to prejudice the *vendor's* houſe, he being to uſe the ſame ſo as not to hurt another.

If one perſon ſells a piece of paſture lying open to another piece of paſture, which the vendor has, vendee is bound to keep his cattle from running into the vendor's piece, ſo of dung, or any thing elſe.

If a man erects a houſe of office, to which there is adjoining a vacant piece of ground, which is his, and by which the houſe of office is kept in; in that caſe, if he ſells the vacant ground, and the vendee digs a cellar in it, as he may do, he muſt ſecure his cellar againſt the houſe of office.

If a man erects a houſe next to a vacant piece of ground of his own, and then ſells ſuch houſe, keeping the ground in his own hands, he cannot build on the waſte ground ſo as to ſtop the lights of the houſe; for by the ſale of the houſe, all the lights, and all neceſſaries to make the ſame uſeful *paſs*; he cannot build to the prejudice of the new houſe ſo ſold, nor can the vendee of the vacant ground do it. If he had ſold the vacant ground without reſerving the benefit of the lights, the court doubted whether the vendee might build ſo as to ſtop the lights of the vendor, becauſe he parted with the ground without reſerving the benefit of the lights. They ſaid there was a writ in the *Nat. Brev. p*. 127. directed to a mayor, to command him that has the lower rooms to repair the foundation, and him that has a garret to repair the roof; but that is grounded on a cuſtom, and the declaration would be better to ſay only that the wall and the houſe of office are the defendant's, and that through the default of him the filth ran into the cellar. The whole court gave judgment for the plaintiff. *Vide Mod. Rep. vol*. 6. *p*. 311.

Hilary, 4 *Ann*. *Lewis* v. *Jones*.

In an action of *treſpaſs on the caſe*, the defendant being found guilty of the treſpaſs *prædict*. i. e. *aforeſaid*, Sir *James Montague* excepted againſt that expreſſion, becauſe it was a variance, the treſpaſs *prædict*. i. e. *aforeſaid*, being *treſpaſs in general*. But was anſwered by *Letchmere*, that this was helped by a verdict; which was granted. Sir *James* then took another exception, *viz*. that it appeared by the record that damages were aſſeſſed by the court, which would have been fatal, had it not appeared by the entry of the judgment, that the judgment mentioned the damages and coſts aſſeſſed by the jury; and then it went on *by the court aforeſaid, in manner and form aforeſaid*, which the court obſerved was idle and mere ſurpluſage. *Vide Mod. Rep. vol*. 11. *p*. 68.

Eaſter, 4 *Ann*. *Smith* v. ——.

In an action on the *caſe*, the plaintiff declared on a ſpecial promiſe, that defendant would pay a certain ſum of money in conſideration that the ſaid plaintiff would deliver up the bond of *C*. and averred that he did deliver up the ſaid bond. It was objected, that it was not ſet forth in the declaration, that he gave notice to the defendant, nor to whom the bond was to be delivered; in ſupport of the above objections *Cro. Car*. 577. 77. *Cro. Eliz*. 229. were cited. The plaintiff's council, in oppoſition thereto, cited 1 *Lev. Price* v. *Evans, Cro. Eliz*. 97.

Per Chief Juſtice *Holt*, where a general promiſe to pay money when a bond is delivered up, it muſt be intended to be delivered up to the obligor, though he is a third perſon; and the defendant ought to take notice of the delivery, becauſe he might have applied to the obligor to have had notice; for where either party might have had notice by their own enquiry, notice is not neceſſary. *Vide Mod. Rep. vol*. 11. *page* 48.

Trinity, 4 *Ann*. *Anonymous*.

In an action of *aſſault*, it appeared, that the defendant came *forcibly and violently* to reſcue a diſtreſs from the plaintiff; and that the plaintiff had not time to requeſt him to forbear.

Per curiam. The aſſault is well juſtified. 2 *Rol. Abr*. 549. *Vide Mod. Rep. vol*. 11. *page* 64.

Michaelmas, 4 *Ann*. *Knight* v. *Barker*.

In an action of *trover*, the charge in the declaration ran for *quingentis piecus inteſtinarum*, i. e. *five hundred ends of deal boards*; Sir *James Montague* moved the court in arreſt of judgment, inſiſting that *pieciis* i. e. *pieces* is a word of a very uncertain ſignification; that they might be middle pieces, or ſide pieces, and of very uncertain dimenſions, and cited *Palmer* 393. *Latch* 216. *Styles* 247. 3 *Keb*. 153. 1 *Keb*. 124. 176. Serjeant *Darnel*, on the other ſide, argued, that *trover* will lie for a ſtudy of books; and the law does not require ſo preciſe a form in this action, as it did in the infancy of it; and if it was according to the common acceptation, it would be very well.

Powell, Juſtice. Workmen, in general, call all ſhort pieces, not fit for wainſcoting, flooring, &c. ends; and this being a particular term of art amongſt houſe joiners, and generally underſtood by workmen, is a proper denomination for all ſhort pieces: had it been for *pieciis extremis*, or *exterioribus*, i. e. *end pieces*, or *outſide pieces*, it would not have been ſo well; becauſe theſe words would not comprehend the middle part. Adjudged good, Chief Juſtice *Holt* not being preſent: but afterwards the court gave a further day, when judgment was affirmed by Chief Juſtice *Holt*, &c. *Vide Mod. Rep. vol.* 11. *page* 66.

Eaſter, 5 *Ann.* *Keeble* v. *Hickringill.*

In an action on the *caſe* for ſhooting at, diſturbing, and ſcaring wild ducks from coming to the plaintiff's decoy pond, without coming on his ſoil, the queſtion aroſe, whether this was ſuch a damage as to ſupport this action? The matter was adjourned till the next term, when a verdict was given for the plaintiff on the following grounds.

A decoy is a benefit to the poſſeſſor, and in nature of a trade, and there is the ſame reaſon a perſon ſhould be repaired in damages for his decoy as for any other trade. 'Tis true, there may be a *damage without injury*, as where a man ſets up the ſame trade as mine in the ſame town. But diſturbing the wild ducks coming to the plaintiff's decoy, is the ſame as diſturbing him in the exerciſe of his trade; and it was unneceſſary for him to ſet forth the exact number of ducks, which was the exception taken at the bar, becauſe it was impoſſible. *Stat.* 25 *H.* 8. *c.* 17. enumerates what is to be deemed wild fowl, ſo that the law takes notice of wild fowl. The preſent caſe differs from that of franchiſes; and from that in 5 *Co.* about taking fiſhes out of a pond; for in that it was *treſpaſs* to recover damage for the thing ſtolen, and it was neceſſary to ſet out the preciſe number, and of what kind; but this action is a treſpaſs *on the caſe* to receive a recompenſe for a conſequential damage or injury; and is for hindering the plaintiff from exerciſing his private right. *Vide Mod. Rep. vol.* 11. *page* 73. 31.

Eaſter, 5 *Ann.* *Love's Caſe.*

In an *aſſumpſit* againſt a perſon who promiſed in conſideration the officer would reſtore goods taken on a *fi. fa.* that he would pay the debt. On demurrer it was held by the court a good conſideration. *Vide Salk. vol.* 1. *page* 28.

Michaelmas, 5 *Ann.* *Anonymous.*

An action on the *caſe* was brought for diſperſing a paper accuſing a gentleman of having ſaid, *he could ſee no probability of the war terminating with* France, *till the* little gentleman *on the other ſide of the water was reſtored to his right*, meaning *the Prince of* Wales.

Per Chief Juſtice *Holt*. A perſon may juſtify in an action on the *caſe* for words, or for a libel; *otherwiſe* on an indictment. The *innuendo* will not make an action on the *caſe* for a libel good, if the precedent matter is not certain, or imports ſcandal, &c. to the damage of the party. If a man is in treaty with a woman about marriage, and a perſon tells him ſhe is under a precontract, this does not import a ſcandal; yet provided it is falſe an action will lie. In *caſe* on a libel, it is ſufficient if the matter is reflecting; as to paint *a man playing at cudgels with his wiſe*. The court were unanimouſly of opinion, that the charge ſtated in the declaration was certain enough without *the innuendo*. *Vide Mod. Rep. vol.* 11. *page* 99.

Hilary, 6 *Ann.* *Haſſer* v. *Wallis.*

The plaintiff being a *feme ſole*, married the defendant, who was already married to another woman. He granted a leaſe of the plaintiff's lands, reſerving rent, and received the rents from the tenants as her huſband. The plaintiff at length diſcovering his former marriage, brought an *indebitatus aſſumpſit* againſt him for ſuch a ſum of money received for her uſe. After a verdict on *non aſſumpſit* pleaded, it was objected, that *Wallis*, having no right to receive, the tenant was not diſcharged, and therefore an action lay againſt the tenant, who has his remedy againſt *Wallis*.

Per curiam. The defendant was viſibly a huſband, and the tenant diſcharged; at leaſt the recovery againſt the defendant in this action diſcharges the tenant, becauſe a ſatisfaction to the leſſor. *Vide Salk. vol.* 1. *p.* 28.

Eaſter, 6 *Ann.* *Kendal* v. *John.*

In an action on the *caſe* for a falſe return of a member of parliament, the plaintiff having been adjudged duly elected by the Houſe of Commons, after iſſue joined, and a verdict for the plaintiff, a motion was made in arreſt of judgment on two points: firſt that the action did not lie at common law; ſecondly, that it did not lie on any act of parliament whatever.

This term Chief Juſtice *Holt* delivered the opinion of the court. Judgment muſt be arreſted; for the action does not lie. The Houſe of Commons has given judgment for the plaintiff, ſo that the action cannot be for a falſe return; the proper remedy is in the Houſe, and we cannot intermeddle with it; but they can cauſe returns to be altered, and then they become the ſame as if the perſon was originally returned. To maintain this action is againſt the record itſelf; the record is ſet right, and is returned by the proper officer, and every body is eſtopped to ſay he was not returned, becauſe it is now good *ab initio* i. e. *from the beginning*. *Soams* v. *Barnardiſton* is a caſe in point. There judgment was for the plaintiff, but a writ of error was brought, and the queſtion there was, Whether an action *on the caſe* would lie againſt a ſheriff for making a double return on a writ to elect a member of parliament? The plaintiff declared *falſely and maliciouſly to his damage* of 1000 *l.* and 800 *l.* damages were given; and this was moved in arreſt of judgment, and argued before all the judges of *C. B.* and the barons of the *Exchequer*; and the judgment given here was reverſed: they went on the reaſon of the caſe, and that no ſuch action ever lay. If the ſheriff made a double return in any other caſe, it is no return in parliament, which by order of parliament may be altered, and then it is legal *ab initio* i. e. from the beginning. To ſay it is true to one purpoſe, and falſe to another, is ridiculous, and a contradiction: nor is this any action on the ſtatute; you ſay *in a plea of treſpaſs on the caſe*, which is very different from an action on a ſtatute. It cannot well be both an action on the *caſe*, and an action on a *ſtatute* too; the ſtatute need not be recited if it is a public law, provided you bring yourſelf within the act; and if you do not conclude *againſt the form of the ſtatute*, &c. you muſt ſhew it at leaſt by concluding *in a plea of treſpaſs*, &c.

Juſtice *Powell*. That does not appear on this record; my reaſon for being of the ſame opinion, is the caſe of *Soams* v. *Barnardiſton*, while that caſe is law I muſt judge ſo, was it out of the way, I might be of another opinion.

Juſtice *Powis*. *Soams* v. *Barnardiſton* is in point, beſides if the plaintiff can have this action, any other perſon may bring the action, and then the defendant will be doubly puniſhed for the ſame crime.

Juſtice *Gould*. *Soams* v. *Barnardiſton* is in point, it cannot be an action on the *caſe*, and on the *ſtatute* too. *Vide Forteſcue page* 104.

Trinity, 6 *Ann.* *Savage* v. *Walthew.*

In an action on the *caſe* by a carrier againſt his ſervant for loſing goods, &c. exception was taken, that this action does not lie unleſs it appears that the carrier had been ſued; this action lying only in reſpect of the damage ſuſtained by the maſter. See *Cro. Eliz.* 53, 461. *Cro. Car.* 187. *contra*: and further, if this action lies, the defendant might be charged twice, by his maſter, and by the owner.

Per Chief Juſtice *Holt*. Not unleſs there is an actual converſion; for in that caſe only, the owner of the goods is entitled to an action againſt the ſervant. The maſter has a ſpecial property in the goods, and may maintain *trover*; and is liable to the owner, becauſe he was the perſon intruſted by him; beſides, a negligence muſt be ſhewn in the ſervant to make him liable to this action. Judgment *niſi* unleſs cauſe ſhewn within three days. *Vide Mod. Rep. vol.* 11. *page* 135.

Trinity, 7 *Ann.* *Bourden* v. *Alloway.*

A motion was made to arreſt judgment in an action on the *caſe*, for cauſing the plaintiff to be arreſted and carried to priſon without a cauſe.

The exception was, that this action ought to have been *treſpaſs* and not *caſe*, and that a perſon cannot change the nature of the action by laying it with a *per quod*, i. e. *whereby*.

It was inſiſted by Serjeant *Wynn*, againſt this exception, that a juſtice of peace is impowered by warrant to arreſt a man; and (if he does it wrongfully) this action lies againſt the perſon who maliciouſly cauſes this to be done.

Mr. *Barnes* explained the difference between *treſpaſs* and *caſe*; he ſaid he had heard from the court, that there was but little difference between them, and that almoſt all *treſpaſſes* might be converted into actions on the *caſe*, at the election of the plaintiff; but that the true difference between the two was, that *treſpaſs* lies where there is an immediate injury; *caſe*, where the injury is collateral.

Mr. *Eyre* obſerved, that it did not appear that the plaintiff was arreſted by any authority, and therefore a plain treſpaſs. *Pengelly* ſaid, where the damage is immediate, the conſequential damage thereon will not alter it from an action of *treſpaſs* to an action on the *caſe*.

Per Powell, Juſtice. We muſt keep up the difference of actions; and it will be hard to maintain this. But where a man, by being impriſoned, ſuffers a ſpecial damage, as forfeiting a recognizance, or is prevented from appearing on a particular day, *whereby* he was damnified, *&c.* there the action muſt be *caſe*. Juſtice *Powis* thought the ſame. Juſtice *Gould* ſaid, this is coupled with ſpecial matter, and is laid to be done maliciouſly; *therefore caſe* lay. *Pengelly*—You may as well ſay, a man may maliciouſly aſſault and wound, and therefore *caſe* lies. The matter was adjourned.

N. B. In another cauſe this term, *Powell* Juſtice, declared, there was a great difference between *treſpaſs* and *trover*, as to the action being local, *&c.* thus, *treſpaſs* is local, but *trover* is tranſitory; *trover* lies for trees where they are cut down, becauſe then they are chattels; but while ſtanding they participate of the nature of the land, and *treſpaſs* lies. But ſuppoſe after a perſon has cut down a tree, he carries it away, may he not be indicted for felony? *Holt*, Chief Juſtice. No; *trover* lies for carrying it away, becauſe it is a chattel as ſoon as it is ſevered from the freehold; and for the ſevering thereof *treſpaſs* lies. *Vide Mod. Rep. vol.* 11. *page* 180.

Michaelmas, 7 *Ann.* *Tate* v. *Whiting.* Error.

On a writ of error brought in this court, on an *aſſumpſit*, on ſeveral promiſes, brought in *C. B.* by an adminiſtrator, *with the letters of adminiſtration annexed*; two of which were made to the inteſtate, and the third laid as follows: Whereas the defendant *Tate* was indebted to the inteſtate, and letters of adminiſtration were granted to the plaintiff: he the ſaid defendant, in conſideration that the plaintiff would forbear to ſue him, promiſed to pay, *&c.*

It was inſiſted for the plaintiff in error, that theſe promiſes could not be joined, becauſe the laſt promiſe is made to the adminiſtrator himſelf, and it is a queſtion whether the *remittit damna*, i. e. he *remits damages*, which was entered after verdict, will help it; and *Shower* 366 was cited in favour of this opinion.

Per Chief Juſtice *Holt*. That book I cannot allow as an authority; yet I admit that theſe promiſes could not be joined, and on a demurrer it would have been ill; but now it has been cured by the *remiſſion of damages*: for if huſband and wife join in an action of battery for the beating of both, if the defendant is found *not guilty* as to the huſband, and *guilty* as to the wife, and a *remittit damna*, i. e. he *remits* the *damages*, iſentered as to the huſband, it is good, though *prima facie*, i. e. *at the firſt view of the matter*, it ſeems as if they could not join; and the ſame in the preſent caſe. Judgment was therefore affirmed. *Vide Mod. Rep. vol.* 11. *page* 196.

Hilary, 8 *Ann.* *Leuknor* v. *Plant.*

In an action on the *caſe*, the plaintiff declares, that the defendant, *Sarah Plant*, being a common carrier, and uſing to carry goods *for hire* between *Worceſter* and *Litchfield*, ſhe delivered to her a guinea to carry and deliver to her ſon *T.* and that the defendant, in conſideration of ſo much money for carriage, promiſed the plaintiff *that ſhe the ſaid* Sarah *would ſafely carry and deliver the aforeſaid money to the ſaid* T. *whenever ſhe ſhould afterwards be requeſted ſo to do, yet notwithſtanding ſhe the aforeſaid* Sarah *had not as yet delivered the ſame, although often times requeſted ſo to do by the ſaid* Alice, *but refuſes, and ſtill doth wholly refuſe to deliver the ſame to the ſaid* Alice, *&c.* After a verdict in favour of the plaintiff, on a motion in arreſt of judgment, it was objected that the declaration ſets forth no breach of promiſe, there being no requeſt to pay to *T.* to whom the money was to be delivered; and if no breach, then no cauſe of action.

Per curiam, Chief Juſtice *Holt* being abſent, through ſickneſs. It being ſaid generally, that ſhe requeſted the defendant to deliver, though not mentioned to whom, and it being after verdict, the declaration is well. Let judgment therefore go for the plaintiff. *Vide Mod. Rep. vol.* 11. *page* 273.

Eaſter, 8 *Ann.* *At Guildhall.* *Garnet* v. *Clarke.*

On an *aſſumpſit* brought on a promiſory note of hand, whereby the defendant promiſed to pay a certain ſum on account of his mother; it being objected that there was no conſideration given for it,

Chief Juſtice *Holt* declared, that to promiſe to pay to *A. B.* is good; but to promiſe to pay *A. B.* on account of *C. D.* is not good, not being within the words or meaning of the act; the conſideration implied in the act is, that when the party promiſes on his own account, it muſt be preſumed that he is indebted, or elſe he would not have promiſed to pay. *Otherwiſe* where the promiſe is to pay on account of a third perſon; and in this caſe directed a verdict for the plaintiff, but under controul, and ordered the *poſtea* to be ſtaid. *Vide Mod. Rep. vol.* 11. *page* 226.

Eaſter, 8 *Ann.* *Tutty* v. *Alewin.*

In an action on the *caſe* for words brought by an apothecary; the words charged in the declaration were: *it is a world of blood he has to anſwer for in this town, through his ignorance; he did kill a woman and two children of* Southampton; *he did kill* John Prior *at* Petersfield, (and in another place the defendant ſaid, *he was at the death of* John Prior) *he has killed his patients with phyſic*; when in fact, *they died of the viſitation of God.* Adjudged that the action lies. The caſes cited were *Cro. Eliz.* 620. 2 *And.* 268. *Sutor & Emmet.* 2 *Roll. Rep. Cro. Jac.* 206. *Hetley* 69. 1 *Cro.* 370. Sir *Thomas Jones* 141. *Vide Mod. Rep. vol.* 11. *page* 221.

Eaſter, 8 *Ann.* *Anonymous.*

In an action on the *caſe* for words ſpoke of a perſon who travelled about the country to collect charity for a loſs by fire; the words for which the action was brought, were, *he fired his houſe* (*innuendo* i. e. *implying*) voluntarily *he was brought up to rook and cheat the country, and ſince he has fired his houſe he has cheated it more and more*; *whereby* the plaintiff loſt much charity, which he otherwiſe would have had; after a verdict for the plaintiff, it was moved in arreſt of judgment, that the action did not lie.

Per curiam. The *innuendo* does not ſupply the place of *voluntarily*, which muſt be proved to make the defendant criminal; and even ſuppoſing it had been ſaid voluntarily, yet the action would not lie; for the matter charged is not felony, unleſs it be done with an intent to burn his neighbour's houſe; and though the words are taken in *an ill ſenſe*, yet they are not actionable. Juſtice *Powell* ſaid it was unlawful for people to go about the country and collect charity, without letters patent And Chief Juſtice *Holt* held, that to ſay, a man is *an errant knave*,

knave, rogue, or raſcal, is not actionable. Judgment arreſted. *Vide Mod. Rep. vol.* 11. *page* 220.

Trinity, 8 *Ann.* *Crifford* v. *Berry.*

Wages being due to *A.* from the *Eaſt India Company,* he orders *B.* to receive the money, and pay the ſame to *C.* one of his creditors ; an *indebitatus aſſumpſit* is brought in conſequence thereof againſt *B.* by *C.*

Per Chief Juſtice *Holt.* The action cannot be maintained by *C.* the plaintiff therefore was nonſuited. *Vide Mod. Rep. vol.* 11. *page* 241.

Trinity, 8 *Ann.* *Young* v. *Slaughterford.*

At a trial at bar in an appeal of murder, the defendant's council after verdict, moved in arreſt of judgment for the following reaſons.

1. That there are two places mentioned in the appeal, *viz.* that he was reſiding at *Shalford,* and that the fact was done at *Compton,* afterwards the indictment ſays, *on the day, year, hour, and place aforeſaid,* he *percuſſit,* i. e. *ſtruck or aſſaulted* the ſaid *Jane Young.*

2. There is no *venue* laid to the aſſault.

Holt Chief Juſtice was of opinion, that neither of theſe exceptions were material ; as to the firſt, when one place is the man's addition, and the other the place where the fact was done, the day, year, hour, and place aforeſaid, muſt certainly refer to the place of the fact ; the other exception is not material, for the aſſault is not neceſſary, *percuſſit* is a ſufficient aſſault, the word implying an aſſault. *Vide Mod. Rep. vol.* 11. *page* 228.

Michaelmas, 8 *Ann.* *Jones* v. *Wilſon.*

In an action on the *caſe,* brought by an adminiſtrator, he declares on *two counts,* one on a promiſe to the inteſtate in his life-time, the other on a promiſe to the plaintiff himſelf, and names himſelf adminiſtrator in both. On the trial the plaintiff was nonſuited, and the queſtion was, whether he ſhould pay coſts.

Powell, Juſtice, in the abſence of *Holt,* held, that theſe two counts could not be joined ; and if final judgment had been given, it ought to have been arreſted. But it is a doubt whether it might not have been made good by taking judgment on one count only : but as the caſe ſtands at preſent, the plaintiff muſt pay coſts, becauſe the nonſuit extends to the whole ; and a rule was given accordingly. *Vide Mod. Rep. vol.* 11. *p.* 256.

Michaelmas, 8 *Ann.* *Leveridge* v. *Hoſkins.*

In an action on the *caſe,* the plaintiff declares, that he was poſſeſſed of a farm and a river at *D.* in the county of *Devon,* and that the defendant, to damage the plaintiff's farm and river, did, at a place called *Davis's Cloſe* in the county of *Dorſet,* dig two ditches, and diverted the platntiff's water out of the river, and damaged the meadows ; but does not ſay *per quod,* i. e. *whereby.*

It was objected in arreſt of judgment, that this declaration was ill ; it not ſhewing that the diverſion of the water was in conſequence of the digging of the ditches, which is the *giſt* of the action, ſo that this is no more than treſpaſs.

Per curiam. After verdict it ſhall be intended that it was proved to be conſequential.

Another exception was taken, that the action is brought in a wrong county ; it ought to have been brought in the county where the ditches were dug.

Per curiam. It is good ; becauſe in this caſe cauſe of action ariſes in both counties, and the action may be brought in either ; and if there is a conſpiracy in one county, and an indictment in another, the action may be brought in either : but if a nuiſance is erected in one county to the damage of a perſon who reſides in another, the aſſiſe muſt be brought *in confinio comitatuum,* i. e. in *the confines or borders of the two counties.*

A third exception was made, that the offence was not laid with a *continuando,* i. e. *a continuance* ; but that the ditches were dug ſuch a day, and his cloſe damaged, *&c. diverſis diebus et vicibus,* i. e. *on different days and at different times,* between ſuch particular ſtated times ; and *Hambleton* v. *Vere.* 1 *Lev.* 299. 2 *Saund.* 196. was cited in ſupport thereof ; but Chief Juſtice *Holt* held it not like the preſent caſe. *Vide Mod. Rep. vol.* 11. *page* 257.

Eaſter, 10 *Ann.* *Templeman* v. *Caſe.*

In an action on the *caſe* for entering the plaintiff's houſe, and taking his goods in the ſaid houſe ; the defendant pleaded in *bar,* that he entered the ſaid houſe in aid of a bailiff, who had a writ of execution, and took the goods of another, and not of the plaintiff. To this plea the plaintiff demurred, and offered the following cauſes of demurrer.

1. That this plea amounted to no more than the general iſſue.

2. That this plea was naught for want of ſhewing how the goods came there, whether wrongfully or rightfully.

3. It was naught, becauſe it ſaid in *aſſiſtance* and not by *command* of the bailiff.

Per curiam. The bar is good notwithſtanding theſe exceptions ; for as to the firſt a poſſeſſory right is ſufficient to maintain an action of *treſpaſs* or *caſe,* though not a *replevin* ; and on *not guilty* pleaded, it being given in evidence that they took another man's goods, and not the goods of the plaintiff, would not have maintained ſuch a general plea, becauſe though the goods ſhould not in reality be the plaintiff's, yet being in his houſe or poſſeſſion, they are ſo far his as to maintain this action.

As to the ſecond, it is impoſſible for the defendant to ſhew how.

As to the third, the command or deſire of the bailiff is not neceſſary to be ſhewn, for every one not only may, but is by law bound to give their aſſiſtance to officers in the execution of juſtice. *Vide Mod. Rep. vol.* 10. *p.* 25.

Hilary, 11 *Ann.* *Parker* v. *Langly.*

In an action on the *caſe* for a malicious proſecution, the plaintiff declared, that the defendant arreſted him for the ſum of 100 *l.* on purpoſe to hold him to ſpecial bail, where not one penny was due ; the defendant to this declaration demurred *ſpecially,* and ſhewed for cauſe of demurrer, that the plaintiff had not in his declaration ſhewn what became of this malicious proſecution.

The defendant's council acknowledged, that after a verdict, judgment could not have been arreſted for this defect in the declaration, becauſe it could not be intended that the plaintiff could have had ſuch a verdict, unleſs it had appeared that the proſecution was malicious.

On a ſpecial demurrer it was inſiſted on as a good exception,

That no action will lie for a malicious indictment, without ſhewing what became of that indictment.

The plaintiff's council *urged,* that this action was founded on malice, and brought for holding the plaintiff to exceſſive bail, which was collateral to the proſecution, and therefore not to wait the event of *that,* which if he did, the ſtatute of limitations might poſſibly bar him. *Styles* 451. 3 *Lev.* 210.

It was *urged,* that there was a difference between an action on the *caſe* for a malicious proſecution, and an action for a *conſpiracy,* that in the latter the plaintiff muſt indeed ſhew the former action to be determined, but then it appears from the regiſter *p.* 134, that this does not proceed from the nature of the action, but the frame of the writ, and this held to be the reaſon, 1 *Vent.* 12. 1 *Jones* 93. 9 *Co. Poulter's Caſe. Cro. Jac.* 130.

The court inclined in favour of the defendant ; but adjourned the further conſideration of this caſe.

Hilary term, 12 *Ann.* This matter coming on again ; *Parker* Chief Juſtice delivered the reſolution of the court to be, that the declaration was naught for want of ſhewing what became of the former action, whereas it ought to have been ſhewn that that was falſe and hopeleſs.

As the declaration now ſtands, the firſt ſuit may either, 1ſt. Be determined ; or 2dly, It may be deſerted ; or 3dly. It may be ſtill regularly going on, *&* *non conſtat,*

i. e. *and it does not appear* which of theſe three is the matter of fact.

If the firſt, it does not appear whether determined for or againſt the plaintiff, if for the plaintiff, then there is no colour for this action.

If the ſecond, were the matter of fact, deſertion is an indication of its being falſe and hopeleſs, and then indeed this action would be maintainable, and for this purpoſe there is a very ſtrong caſe in *Jones* 93.

If the third, be the matter of fact, then the action is brought too ſoon. *Vide Dyer* 285. *Hobart* 267.

No man can ſay of an action ſtill depending, that the ſame is falſe or malicious. The ſame doctrine holds in criminal caſes. *Vide Yelv.* 116. *Sidſ.* 15. 1 *Saund.* 228. 2 *Keb.* 476. In an action for a malicious indictment, the plaintiff muſt, in his declaration, ſhew what became of the indictment.

A *verdict* or a plea in *bar*, admitting and confeſſing the firſt action to be falſe and hopeleſs, may cure this defect in a declaration. *Raym.* 418. 2 *Keb.* 456. 753. 3 *Keb.* 781.

The admitting this declaration to be good notwithſtanding this omiſſion would introduce great abſurdities, *viz.* inconſiſtent and incongruous verdicts in different verdicts in different actions.

Indeed, if the firſt action goes off by nonſuit, it may be ſaid that in another action brought for the ſame cauſe, there may be a verdict given inconſiſtent with the verdict given in the preſent cauſe, this may be but the poſſibility of ſuch a verdict in future, and the non-exiſting action ſhall not hinder a man from bringing ſuch an action as this. The entries ſupport this opinion. *Aſhton* 40. *Brownlow Rediv.* 61. *Robinſon* 91. Judgment was given for the defendant.

Held otherwiſe by the Chief Juſtice in this reſolution, that where the title is of one ſort of action, there the declaration can never change it to another, but it may make a fatal variance between the writ and the declaration. 1 *Vent.* 19. 2 *Rolle's Rep.* 49. *Vide Mod. Rep. vol.* 10. *page* 145 & *page* 210.

Hilary, 12 *Ann. Jones* v. *Gwyn.*

In an action on the *caſe* brought by the plaintiff againſt the defendant, wherein the plaintiff declares that he had always maintained a good and honeſt character among his neighbours, and that he got his livelihood by exerciſing *legitimo modo*, i. e. in a *legal manner*; the faculty of a badger of corn or grain: that the defendant, not ignorant of the premiſes, but maliciouſly intending, *&c.* cauſed the plaintiff to be indicted for exerciſing the trade of a badger without a licence, contrary to the form of the ſtatute.

To this declaration there was a joinder in demurrer, and *Parker*, Chief Juſtice, delivered the reſolution of the court, that judgment ſhould be given for the plaintiff.

There were four exceptions taken to the declaration; the firſt and moſt material one was, that the indictment was declared only to be brought falſely and maliciouſly, but not *abſque rationabili et probabili cauſa*, i. e. *without a reaſonable and probable cauſe*.

Anſwer. To this I ſay, this action cannot indeed be ſupported, unleſs the indictment was groundleſs, and without a probable cauſe; yet no one authority cited to prove the very words neceſſary to be uſed, though many authorities wherein they are wanting. *Cro. Jac.* 193. 1 *Roll. Abr.* 113, *&c.*

If the *averment* of the plaintiff's honeſty, *&c.* and that the defendant, *not ignorant of the premiſes*, will import theſe words, then here they are.

But the true anſwer to this objection is, that the word *maliciouſly* implies it to be without a reaſonable and probable cauſe, and a great deal more.

Malice is derived from the word *malus*, i. e. *evil*, which imports what is wicked, and can admit of no poſſibility of excuſe.

Thus it is uſed in the civil law, and thus in ours, what we call *malice implied*, is murder attended with ſuch circumſtances as can admit of no excuſe.

My Lord *Coke*, in his expoſition of *ſtat. Weſtminſter*, 2 *cap.* 12, ſays, that an appeal brought *per maliciam*, i. e. *out of malice*, is an appeal that wants a foundation, and is groundleſs.

In *conſpiracy* theſe words are uſed. *Stampf. Pl. Coro. caſe*, 172. *b.*

Indicting of a man for what a civil action might have been brought, imports malice. 2 *Mod.* 306.

The 2d *Exception* to the declaration was, that the plaintiff had not averred that he was licenſed to exerciſe the trade.

Anſwer. This had been neither neceſſary nor proper, but he has ſaid enough, *viz.* that in a legal manner he exerciſed the trade of a badger.

The 3d *Exception* to the declaration was, that it was not ſaid that he was acquitted by verdict.

The anſwer is, that the word *acquietatus* imports acquittal by verdict.

The 4th *Exception* to the declaration was, that the proſecution of this indictment could not be a malicious one, becauſe the plaintiff in his very replication has confeſſed *that* which was a probable cauſe for it, *viz.* the uſing the trade of a badger.

To this it may be anſwered, that this is no probable cauſe; for it is not exerciſing the trade, but doing it without a licence that conſtitutes the crime.

As to the matter of law, *viz.* that the exerciſing the trade of a badger, not being *&c.* is not an offence indictable, and if ſo, it is ſaid the action is not maintainable.

The force and ſtrength of this objection may be reſolved into the ſix following points:

1ſt, Acquittal on an inſufficient indictment will not entitle a man to the plea of a former acquittal to another indictment for the ſame offence.

2dly, That *conſpiracy* lies not where the indictment was inſufficient.

3dly, That *conſpiracy* lies not but for ſuch an indictment on which the defendant was ſo acquitted as that he may plead his acquittal in bar of another indictment.

4thly, By a parity of reaſon, it may be inferred, that an action on the *caſe* will not lie likewiſe on an indictment for a matter not indictable, and on which conſequently there could not be ſuch an acquittal as could be pleaded in bar of another indictment.

5thly, Where the matter of the indictment, though it be not indictable, is infamous and ſcandalous, an action on the *caſe* will lie: *on the other hand*, where the indictment contains matter neither indictable nor ſcandalous, it will not lie.

6thly, This action lies not becauſe on this indictment the party was never in danger, for judgment could not poſſibly be given againſt him.

1ſt, That to the ſupporting of this action, it is hot at all material whether the indictment was ſufficient or inſufficient.

2dly, That there can be no argument drawn from a parity of reaſon between actions of *conſpiracy* and actions on the *caſe*.

3dly, That there is no foundation for ſuch a diſtinction as where the matter of the indictment is ſcandalous, and where it is not.

4thly, That the party's being in danger, or not in danger, on the indictment, is not at all material.

As to the firſt point, *viz.* that the ſufficiency or inſufficiency of the indictment is not at all material to ſupporting this action.

It is to be conſidered what the grounds of this action are.

On the plaintiff's ſide *innocence.*

On the defendant's ſide *malice.*

The damage a perſon may ſuſtain by an indictment may relate either to his *perſon*, his *reputation*, or his *property*, and each of theſe has been reſolved to be a juſt ground of this action in the caſe of *Savil* v. *Roberts*, and damage in the laſt reſpect, *viz. property*, there looked on as ſtrong as any.

It is true, that in *Raym.* 135. *Chamberlain* v. *Preſcot*, there is a reſolution not ſo agreeable to that of *Savil* v. *Roberts*, *Mod. Rep. vol.* 12. *p.* 208. where *Holt*, Chief Juſtice, in his arguments on that caſe, gives the reſolution of the court, and ſeems unwilling to deny that to be law, which he might have done.

I own my opinion to have been at firſt, that where the indictment was neither ſcandalous nor ſufficient, this action would not lie, but on further conſideration I have changed my mind.

For *impriſonment*, *vexation*, or *expence*, the ſame on a groundleſs and inſufficient indictment as on a good one.

For quaſhing an indictment is not always in a man's power, demurring is hazardous, and what a man in prudence would not do, when he is ſure of being cleared by a verdict; and if on a demurrer there be any difficulty, it is equally expenſive with an acquittal on verdict.

But it is the expence, not *the amount* of the expence, which is material. 1 *Cro.* 191. 3 *Hob.* 19.

And as the plaintiff is equally damnified by an inſufficient as a ſufficient indictment, ſo the malice of the defendant is not at all leſs, becauſe the matter was not indictable, nay, it is rather an aggravation. 1 *Roll. Abr.* 112.

The only *hinderance* to thoſe actions is, the fear of diſcouraging juſt proſecutions; but to this *malice* is a full and ſufficient anſwer, 3 *Cro.* 563. *Raym.* 135.

It is certainly not reaſonable, that more favour ſhould be ſhewn to a bad indictment than to a good one.

It ought to be conſidered, that a ſmall ſlip vitiates an indictment; and if that ſhall protect a man from an action, a way is opened for the malicious to ruin the innocent; for how eaſily may a ſlip be made on purpoſe.

To the caſes cited in maintenance of the objection, I anſwer, that one is 9 *Edw.* 4. *cap* 12. an action of conſpiracy, and in that caſe I allow the law to be ſo: the other is 1 *Roll. Abr.* 110. which is indeed a caſe in point, but then the foundation of the reſolution is built on the parity of reaſon that was ſuppoſed to be between conſpiracy and this action.

Second point, viz. to ſhew that there is no arguing from one ſort of actions to the other.

Actions of *conſpiracy* are the worſt ſort of actions in the world to be argued, from more contrariety and repugnancy of opinions in them, than in any other ſpecies of actions whatever.

I admit, that unleſs the indictment be either determined or deſerted, this action is not maintainable. *Yelv. p.* 116.

Conſpiracy lies not without acquittal on this principle of law, that it is a *formed action*, and the form of the writ is ſo in the regiſter, 17 *Edw.* 2. 509. *Regiſter*, 134. *b.* 9 *Rep.* 56. *b.* 2 *Cro.* 130. 1 *Roll. Abr.* 114. *Jones*, 94. 1 *Cro.* 15. *and* 1 *Roll. Abr.* 112.

There is no arguing from an action which is a formed one, and for which there is a formal writ in the *Regiſter*, to an action on the *caſe*, that is tied down to no form at all.

If an action on the *caſe* be brought on an indictment, where the jury find the bill *ignoramus*, i. e. *a falſe bill*, there is no poſſibility that there can be an acquittal. 2 *Cro.* 190. 1 *Roll. Abr.* 114. 3. 2 *Cro.* 490. *Palmer*, 44. *Styles*, 10. *Raym.* 180. where *likewiſe* an indictment *is not before* the court. *Styles*, 372, 378. where *likewiſe* an indictment is inſufficient, and goes off on that account. 2 *Cro.* 32. *Yelv.* 46. *Styles*, 372. 157. 2 *Keb.* 141.

The *third propoſition* was, that there was no ground for making a difference, when the matter of the indictment is ſcandalous, and when not.

The caſes before mentioned ſpeak not a word of this difference, and if ſcandal is mentioned, it is only in the nature of *damages*. *Jones*, 93. *Styles*, 378.

The *fourth propoſition* was, that the danger of the party was not material.

1ſt, It is not the danger, but expence, that is the ground of *damage*.

2dly, All the danger in the preſent caſe, if the indictment had been good, would only have been incurring a fine, and *before ſhewing*, the amount of the damage not material.

3dly, When on an indictment a *falſe bill* is returned, or when the indictment *is not before the court*, the party is in no danger at all, yet this action lies. The court gave judgment for the plaintiff. *Vide Mod. Rep. vol.* 10. *page* 214.

Trinity, 13 *Ann.* *Walter* v. *Laughton.*

This was a *qui tam* action, and the objection taken was, that the concluſion ran, *and therefore he brings his ſuit* generally, and not *as well for our ſovereign lady the Queen as for himſelf*.

The court were of opinion that it muſt be ſo underſtood, there being precedents both ways, and gave judgment *reſpondeas ouſter*, i. e. *let the defendant anſwer over*. *Vide Mod. Rep. vol.* 10. *page* 253.

Michaelmas, 5 *Geo.* *Lewis* v. *Farrel.*

In an action on the *caſe* brought by the plaintiff againſt the defendant for a malicious proſecution *by indictment*; the defendant demurred to the plaintiff's declaration, and obtained judgment, becauſe the plaintiff had not ſhewn by his declaration how the indictment was determined agreeable to the caſe of *Parker* v. *Langley*, &c. *Vide Strange vol.* 1. *page* 114.

Eaſter, 11 *Geo.* *Entered Eaſter* 8 *Geo.* *Phillibrown* v. *Ryland and others.*

In an action on the *caſe* brought by the plaintiff againſt the defendants for hindering him as an inhabitant and veſtryman, to meet the veſtry of the pariſh in a houſe where the veſtry was met, &c. To the plaintiff's declaration the defendant demurred, and ſhewed the following cauſes of demurrer, *viz.*

That it did not appear by the declaration, that the plaintiff *was damnified in any manner*, and that the declaration *was uncertain, doubtful, and wanted form.*

The defendant's council inſiſted, that this action could not be maintained, becauſe veſtries are voluntary meetings of pariſhioners only, and conſidered in law as ſuch, and therefore it was neither an injury or damage to the plaintiff to keep him out of ſuch a meeting. In the next place, if ſhutting the door and keeping the plaintiff out was a damage, it was no more than a public damage, for which no action on the caſe would lie; for to ſupport ſuch an action, a particular damage ought to be proved; for example, if a highway is ſtopped, every perſon who goes that way receives a damage by the obſtruction, yet it being a damage in common to all perſons paſſing that way, no one can maintain an action on the caſe for it, unleſs he ſuffers ſome particular damage to himſelf. 5 *Co.* 73. *William's caſe*. *Co. Lit.* 56. *Cro. Jac.* 446. *Fowler* v. *Saunders*, &c.

The plaintiff's council *argued*, that the inhabitants of a pariſh paying *ſcot* and *lot* might aſſemble in veſtry, and make rates; and every ſuch inhabitant had a right to be preſent at ſuch meeting, and give his vote. *Vide* 5 *Co.* 63. 44 *Edw.* 3. *cap.* 19. 1 *Mod.* 194. 2 *Mod.* 8. 5 *Co.* 67. 1 *Mod.* 236. 2 *Mod.* 222.

2dly, As to the excepion to the declaration, the plaintiff's council argued, that the ſame was well enough, becauſe it was laid therein that the room was the uſual place where ſuch aſſembles were *held*, &c. and that the pariſhioners were then there aſſembled, and if it was the defendant's room, yet if he had let it out for the pariſhioners to hold their veſtry in, he could not ſhut the door againſt any of them, and that there was no occaſion to lay an expreſs cuſtom for all the pariſhioners; for if their veſtry was a ſelect veſtry, *(if by law there can be any ſuch)* the defendant ought to have pleaded the ſame. Whether the action would lie or not, if the declaration had been good, the court gave no opinion.

Forteſcue, Juſtice, was ſtrongly of opinion that the preſent action would not lie.

Per curiam. The declaration is ill, becauſe it is not ſhewn that the pariſhioners had a right to hold their veſtry in this room; for in actions of this nature, the plaintiff muſt ſhew a right in the thing claimed, and then that he was diſturbed therein. Judgment was given for the defendant. *Vide Raym. vol.* 2. *page* 1388.

Trinity, 11 *Geo.* *Reynolds* v. *Clarke.*

In an action of *treſpaſs* brought by the plaintiff againſt the defendant for entering his yard, and fixing a ſpout there, *whereby* the water came into the yard, and injured the walls of the plaintiff's houſe.

To this action the defendant *juſtifies*, that before the *treſpaſs* one *J. F.* was ſeiſed in fee of the plaintiff's premiſes, and two other houſes adjoining, and demiſed the plaintiff's premiſes to one *Tyler*, *except the free* *uſe of the yard, and privy, for the tenants of the other two houſes, jointly with the tenant of the plaintiff's houſe.* He then ſhews how his premiſes, which was one of the two houſes, came to him, and that he entered the yard, and fixed the ſpout for his neceſſary uſe, to carry off the rain, *as he lawfully might.*

The defendant's council *inſiſted*, that this exception amounted to a licence of the party, and that a diſtinction has always been taken between a licence in *law*, as to go into a tavern ; and the licence of the *party* ; and that this being of the latter ſort, an action of *treſpaſs* will not lie, but if the ſpout be a prejudice, the plaintiff might redreſs himſelf by an action on the *caſe*. 11 *Co.* This is an action of treſpaſs brought for a nuiſance on our own poſſeſſion.

Chief Juſtice. Though the defendant had a right to enter into the yard, yet it is a matter to be conſidered, whether, if he abuſes that right to the detriment of another, he is not in the ſame caſe with every other treſpaſſer.

Forteſcue, Juſtice. *Treſpaſs* is a poſſeſſory action, and how does this invade the plaintiff's poſſeſſion? The difference between *treſpaſs* and *caſe* is, that in *treſpaſs*, the plaintiff complains of an immediate wrong, and in *caſe*, of a wrong that is the conſequence of another act.

Raymond, Juſtice. That diſtinction is perfectly right. I remember a caſe in this court, viz. *Courtney* v. *Collet*, which was brought for the defendant's diverting his own water-courſe in his own land, *whereby* the plaintiff's land was overflowed. After a verdict for the plaintiff, it was often debated, whether this was an action of *treſpaſs* or on the *caſe*, and at laſt judgment was given for the plaintiff, who had brought *treſpaſs* only.

The court took further time to conſider this caſe, being nice ; and on a ſecond argument, to the effect of the former, the court delivered their opinion as follows :

Chief Juſtice *Raymond.* We muſt keep up the boundaries of actions, otherwiſe we ſhall introduce the utmoſt confuſion ; if the act in the firſt inſtance be unlawful, *treſpaſs* will lie ; but if the act is *on the firſt view* lawful, (as it was in this caſe) and the prejudice to another is not *immediate*, but *conſequential*, it muſt be an action on the *caſe* ; and this is the true diſtinction. The caſe I mentioned on the laſt argument, *viz. Courtney* v. *Collet*, was a plain treſpaſs, and the account I then gave of it, from my memory, was miſtaken ; it was *Hilary*, 9 *W.* 3. in this court, *treſpaſs* for taking fiſh, *as well as for that* he broke down the bank of the river, whereby the water iſſued, and other fiſhes went away. After a verdict for the plaintiff, it was moved in arreſt of judgment, that the latter part was *caſe*, and not joinable with *treſpaſs* ; but the court held that was a treſpaſs, and what came under the *whereby* was only matter of aggravation. There was another caſe in this court in *Hilary*, 9 *Ann. viz. Leveridge* v. *Hoſkins* : that was an action for digging trenches, whereby the water was drawn away from the plaintiff's river. In this caſe it was moved in arreſt of judgment, that it was a *treſpaſs*, but the court ſaid, that it not being laid to be a digging on the plaintiff's ground, the action on the *caſe* was the moſt proper; and I take *that* and *this* to be the ſame caſe. The defendant having a right to enter the yard, and do the firſt act which is here complained of. I think this ſhould have been an action on the *caſe*, and that *treſpaſs* will not lie.

Powys, Juſtice, *agreed. Forteſcue*, Juſtice, ſaid, *treſpaſs* will not lie for procuring another to beat me ; if a man throws a log into the highway, and in that act it hits me, I may maintain *treſpaſs* againſt him for it, becauſe it is an immediate wrong, but if it lies there, and I tumble over it, and receive an injury, I muſt bring an action on the *caſe* for it, becauſe it is only prejudicial in its conſequence, and for which originally I could have no action at all.

Reynolds, Juſtice. The diſtinction is certainly right ; this is only injurious in its conſequence, for it is not pretended by the plaintiff, that the bare fixing a ſpout was a cauſe of action, without the falling of any water ; the right of action did not accrue till the water actually deſcended, and therefore this ſhould have been an action on the *caſe*.

Per curiam. Judgment for the defendant. *Vide Stra. vol.* 1. *page* 634.

Hilary, 12 *Geo. Chambers* v. *Robinſon.*

In an action brought by the plaintiff againſt the defendant, for a malicious proſecution of an indictment for *perjury*.

In this action the court allowed the plaintiff to give in evidence an advertiſement put into the papers by the defendant, of the finding the indictment, with other ſcandalous matter, notwithſtanding an information had been granted for ſuch ſcandal as a libel, not (as the Chief Juſtice obſerved) that the jury were to conſider it in damages, but only as a circumſtance of *malice*.

On the trial it appeared, that the *perjury* was ill aſſigned in the indictment, ſo that the plaintiff in this action could not have been convicted, and that the judge who tried the ſame took exception thereto, and he was acquitted without examining any witneſſes. The *Chief Juſtice* was of opinion, the action would lie, though the indictment was faulty, relying on the caſe of *Jones* v. *Gwyn*, where the diſtinction in *Salk.* 15. was denied, and held by the court that the action would lie, though the indictment was bad ; a bad indictment ſerving all the purpoſes of *malice*, by putting the party to expence, and expoſing him, but it ſerves no purpoſe of juſtice in bringing the party to puniſhment if he be guilty.

Whereupon the jury gave the plaintiff 1000 *l.* damages, and the next term the defendant moved the court for their judgment on this point, (which was ſaved at *niſi prius*) and for leave to move for a new trial, after the court had given their opinion on the point reſerved, which was granted.

As to the point reſerved for the judgment of the court, the court agreed with the caſe of *Jones* v. *Gwyn*, and the council for the defendant did not ſeem to think the authority of that caſe was to be ſhaken.

On defendant's council moving for a new trial, on account of the exceſſive damages given in this caſe, the court thought it was but reaſonable that the defendant ſhould try another jury before he was abſolutely charged with damages, on which a new trial was granted, on payment of coſts.

A new trial being had, the ſame damages were given by the jury on ſuch trial as before, and on the defendant's applying again to the court for a third trial, the court refuſed the ſame, ſaying it was not in their power ſo to do, and cited the caſe of *Clerk* v. *Udal*, *Salk.* 649. in ſupport of their opinion. *Vide Strange, vol.* 1. *page* 691.

Hilary, 2 *Geo.* 2. *Lewis* v. *Lewis.* Error.

The plaintiff brought an action on the *caſe* againſt the defendant in the court of *S.* for that in ſuch a trial between the plaintiff and the defendant, the defendant laboured the jury to the plaintiff's damage, *&c.* The plaintiff had a verdict and judgment for him, on which a writ of error being brought, *Hawkins* Serjeant, argued for the plaintiff, that this being a matter meerly criminal, ſhould be puniſhed by indictment, *&c.* and it is a mere *embracery* ; for the plaintiff in the action did not *aver*, that by means of this labouring by the defendant, the jury did give a falſe verdict ; ſo that it does not appear he had any ſpecial damage, wherefore no action on the caſe can lie. 1 *Ro. Ab.* 812. *pl.* 8. 115. *pl.* 7. *Raſtal Precedents* 505, 506. And this being an offence, and a high contempt, the action ſhould have been laid *in contempt of our ſovereign Lord the King*, which the plaintiff may aſſign for error, though it be an advantage to him that it was not laid ſo.

The defendant's council inſtanced the caſe of a nuiſance indictable, *&c.* for which alſo upon ſpecial damage, the party ſhall have an action on the *caſe*; he urged, the declaration in the point of the averment was mended by the verdict, which found for the plaintiff in the action : the court inclined to think, that notwithſtanding the verdict found for the plaintiff, ſtill the declaration was faulty in ſubſtance, becauſe no ſpecial damage was laid. *Adjourned.*

In *Michaelmas* term, 3 *Geo.* 2. For the plaintiff in error it was inſiſted, that it appears on the face of the declaration, that the cauſe of action, *viz.* the embracing of a jury, is a crime of a public nature; and ſo not puniſhable by a civil action: but admitting that for ſuch a *tort* an action at common law may lie, upon a ſpecial injury laid to ariſe to the party; ſtill it cannot lie in the preſent caſe, it being not averred, that by means of ſuch *embracery* a verdict was given againſt evidence, or otherwiſe, that the party received a ſpecial damage: no ſuch action was ever brought. *Chappell,* Serjeant *contra,* cited to the firſt point, 39 *E.* 3. 13. *N. B.* 95. 11 *Co.* 87. *Cro. El.* 90. *Long.* 5 *E.* 4. 126. 4 *Co.* 18. *Hob.* 267. *Cro. El.* 167. *F. N. B.* 172. 47 *E.* 3. 9. *Merch.* 81. 2 *Ro. Rep.* 199. 1 *Ro. Ab.* 100.

Per curiam. Theſe caſes are only where there are formed writs upon particular acts of parliament; but here is no ſpecial damage laid, which is fatal: *and per Reynolds*, Juſtice, if the party has a damage, he may have an action, which is not to be founded on the crime, but on the loſs he ſuſtains, which is conſequent to, and reſulting from the crime; and the whole court were determined to reverſe the judgment; but at the importunity of Serjeant *Chappel*, agreed it ſhould ſtand over to be ſpoke to again. And accordingly,

In *Michaelmas* term, 4 *Geo.* 2. The matter was again ſpoke to, and *Fazakerly* argued for the plaintiff in error, that actions do not ordinarily lie for a proceeding in a court of juſtice; becauſe if the party is aggrieved thereby, he may have redreſs there. *Cro. Jac.* 601. *Eyres* v. *Sedgewick. Hutt.* 11. It does not appear but the court have ſet aſide this verdict, or at leaſt the matter is ſtill open, and they may do it; for it does not appear that judgment is yet given upon that verdict. If the verdict be wrong, the plaintiff might have an attaint, to which judgment in this action will be no bar, and then he will be doubly recompenſed. He relied on *Cro. Jac.* 601. as an authority in point.

The council on the other ſide ſaid, it is averred the defendant tampered with ſome of the jurors, *by reaſon whereof*, he had a verdict and damages; now if the verdict was by means of the *embracery*, then, without it the verdict would have been the other way. *Haughton* Juſtice was for the action, in 2 *Cro.* 5 *E.* 4. 126. 4 *Co.* 18. 6. *Caſe* lies for putting a forged bond in ſuit, and for a falſe affidavit of a ſummons. 12 *Co.* 128. Perjury held actionable, if the party receives a ſpecial damage by it.

Fazakerly. I underſtood that the court, upon the laſt argument, took the averment to be ſufficient.

Raymond Chief Juſtice. The queſtion made was, whether after verdict, the action is maintainable? Then *Fazakerly* proceeded, that the caſe of a forged bond does not relate to any thing done in a court of juſtice; but the damage there ariſes from the very publication of the bond; and the action 12 *Co.* is grounded upon the falſe ſummons; but not one caſe is cited to maintain this kind of action: in anſwer to which *Philmer* cited *Hutt.* 125. *Ro. Ab.* 93. 13. 102. 6. *Cro. El.* 793, 794. Where an action was held maintainable for entering a judgment by *nil dicit* i. e. *he ſays nothing*, by deceit, and without the privity of the party, though that matter might be ſet right upon application made to the court where the judgment was entered. It is not material whether the defendant had the benefit of the verdict, for a poſſibility of having a damage by it, will maintain the action. 2 *Vent.* 25. 41. *E.* 3. 24.

Raymond Chief Juſtice. The caſe of the judgment ſeems to be a ſtrong caſe, though the court might ſet the thing right. The queſtion is, whether here is not a ſpecial damage? The *ratione cujus*, i. e. *by reaſon whereof*, is an averment; and I greatly rely upon its being after a verdict.

Page, Juſtice. I think the action will lie from the verdict's hanging over the plaintiff's head. The *quantum* of the damage ſuſtained is not now in queſtion; for if he had the leaſt damage it is enough to maintain the action, though the plaintiff in the firſt ſuit ſhould never recover the damages given him by the verdict.

Probyn, Juſtice. The party may have a double remedy.

Lee, Juſtice. It was but of late that malicious proſecutions were held actionable; and now I believe it will not be an anſwer, that the act was judicial, if a ſpecial damage reſults to the party, which ſeems to be ſufficiently averred in the preſent caſe. *Adjourned. Vide Fitzgibbons, page* 43. 98. 173.

Hilary, 3 *Geo.* 2. *Harman* v. *Delany*.

In an action on the *caſe*; the plaintiff declares, that he being a gunſmith, and it having been advertiſed at ———, in one of the public news-papers, that he could make guns of two feet ſix inches in length, that ſhould kill as far as guns ſix inches longer, made by any other of that trade; and that the defendant falſly and maliciouſly, and with an intent to ſcandalize the plaintiff in his art and profeſſion, did at ſuch a time, in ſuch a public paper, *among other things*, publiſh and advertiſe of the plaintiff, concerning his ſaid art and profeſſion, "That the plaintiff could not make guns to ſhoot in the manner he pretended, unleſs they were leather guns, and that gentlemen ſhould be cautious of him, for he dares not engage with any artiſt in town, as any one may be further ſatisfied at the *Croſs Guns* in *Long Acre*," being the defendant's ſhop, by which the plaintiff loſt ſeveral cuſtomers, to his damage; upon not guilty pleaded, the defendant was found guilty, and that the jury gave fifty pounds damages: And it was now moved in arreſt of judgment, that this is no libel, for it tends only to contradict what had been publiſhed of the plaintiff, which in effect was, that he was the firſt of his profeſſion; and to deny that, or publiſh the contrary, is not actionable; now the damage found for the plaintiff cannot make this a libel; for the finding of damages is only a conſequence of the defendant's being found guilty, ſince this matter could not have been taken advantage of upon the trial: Indeed, if a ſpecial damage had been laid, as that the plaintiff had thereby loſt *J. S.* and *J. K.* who were his cuſtomers, it muſt be admitted, that the action would have lain, though the advertiſement were of itſelf no libel: To ſupport the action were cited 2 *And.* 40. *Hall* and *Giddy*, 1 *Roll. Ab.* 63. 1 *Mod.* 19. And it was urged that this advertiſement was of itſelf a libel, for the latter words of it, "That the plaintiff dares not engage with any artiſt in town," make him the laſt of his profeſſion.

Raymond, Chief Juſtice. If a ſpecial damage were laid and found, the action would lie, whether it were a libel, or not; but this conſequential damage found by the jury will not make it a libel, if it be not ſo of itſelf, ſo that the queſtion will be, how the latter words are to be taken, whether abſolutely and by themſelves, or whether they are not be conſidered as qualified and explained by the former words. *Adjourned.*

In *Eaſter* 4 *Geo.* 2. this matter coming on again; it was inſiſted for the plaintiff, that words not otherwiſe actionable, become ſo, when applied to a man's trade or profeſſion. 1 *Mod.* 19. 1 *Roll. Ab.* 63. *pl.* 48. 50. *Cro. Eliz.* 343. *Hetl.* 71. And likewiſe that words publiſhed in writing are actionable, which would not be ſo from a bare ſpeaking of the ſame words, becauſe a libel diſperſes and perpetuates the ſcandal, 5 *Co.* 125. *Hardr.* 470, 471. 1 *Keb.* 393. 1 *Roll. Ab.* 37. *pl.* 15. *Skinn.* 123. *Mod.* 627. which is the reaſon that the party ſhall not be admitted to juſtify a libel: That the matter publiſhed in this caſe, reflects upon the plaintiff in his trade; for it charges him with the want of ſkill, and that all men ſhould be cautious in their dealing with him, *for he dares not engage with any artiſt in town; nor did he ever make the ſaid experiment, except with a leather gun.* The whole court held, that the defendant, or any other of the trade, might counter-advertiſe what was publiſhed of the plaintiff, *viz.* that he could do more than any other man of the trade; but that ought to have been done without any general reflection upon the plaintiff in the way of his buſineſs; that the defendant has not confined himſelf within theſe bounds, but hath charged the plaintiff with being the laſt of his trade; for the words, *not daring to engage*, &c. ſtand independent of the words next following, *nor did he ever make the ſaid experiment*, &c. ſo that he is charged generally with the want of ſkill; and where the defendant deſires gentlemen to be cautious, &c. this has a plain tendency to diſcourage people from dealing with the plaintiff. That this is the natural import of this advertiſement, and that the rule to take words *in mitiori ſenſu* i. e. *in the moſt favourable ſenſe* has been long exploded; for the ſenſe in which the generality of mankind will underſtand ſuch words, is now the rule of conſtruction.

They agreed to the diſtinction, *viz.* that words concerning a man's trade, are actionable, though otherwiſe importing no ſcandal; in ſupport whereof, Mr. Juſtice *Lee* cited, *Hutt.* 125. And likewiſe that words publiſhed in writing will be actionable, though not ſo when barely ſpoken; and the plaintiff had judgment. *Vide Fitz-Gibbons. p.* 121, 253.

Eaſter, 3 *Geo.* 2. *Hoare* v. *Dickinſon.* Error.

On a ſpecial action on the *caſe*, brought by the plaintiff againſt the defendant for damaging the plaintiff's premiſes, by turning a water-courſe ſo as to injure the foundation of the ſame, &c. To this action the defendant pleaded the general iſſue *not guilty*, on which iſſue was joined, and a verdict given for the plaintiff for 203 *l.* damages, and 25 *l.* 10 *s.* coſts in the *C. B.*

On this judgment the defendant brought a writ of error in this court, and aſſigned the *general errors*.

The council for the plaintiff in error *inſiſted*, That this action was not maintainable againſt his client, becauſe the defendant was not to be compared to a *tertenant*, who may be obliged to keep his fences, &c. in repair, as ruled in the caſe of *Tenant* v. *Goulding*, 1 *Salk.* 360. but had only an eaſement in having this water come to his brew houſe, and it is not alledged in the declaration that the pipes were his, or that he laid them there; and therefore he was not obliged to repair them, and of courſe not anſwerable for any damage that might accrue to the defendant in *error*, by reaſon of the pipes being out of repair. *In the next place*, if the plaintiff in *error* was to be looked on as owner of the pipes; (which is not alledged in the declaration) then the plaintiff's declaration muſt *be ill*, becauſe the defendant in *error*, has not ſet out a good title to the premiſes, but has only alledged that he was *lawfully poſſeſſed*, which though it might be good againſt a *tort feaſor*, yet would not be good againſt a tertenant. *Star* v. *Rookeby*, 1 *Salk.* 335.

The court were of opinion, that the action well lay, for it is alledged in the declaration, that the plaintiff *contriving, and maliciouſly intending to injure and oppreſs the ſaid* John *in this reſpect*, &c. *the water-courſe*, &c. *has continued, and the ſame has cauſed to run* near the foundation of the premiſes of the defendant in *error*, &c. whereby, &c. ſo that he is plainly a wrong doer, and has by his continuing, and cauſing the water to run near, &c. damaged the defendant in *error*, which the jury have by their verdict found. Therefore the judgment in *C. B.* was affirmed in this court. *Vide Raym. vol.* 2. *p.* 1568.

Eaſter. 4 *Geo.* 2. *Cooke* v. *Champneſs*.

J. S. was outlawed upon a meſne proceſs at the ſuit of the plaintiff, and taken on a *capias utlegatum*, but ſuffered to eſcape by the defendant; whereupon the plaintiff brought a *qui tam* action, for the ſaid eſcape: Whether the action lay, was the point ſaved at the trial.

For the defendant, it was argued, that where the outlawry is upon meſne proceſs, the party outlawed is in cuſtody meerly at the ſuit of the King, and that the plaintiff has no intereſt in his body; but where the outlawry is after judgment, the party is in execution for the plaintiff. *Cro. Eliz.* 706, 707. By the outlawry upon meſne proceſs, the plaintiff is at the end of his ſuit, he cannot declare againſt the defendant, but muſt bring a new original. 13 *H.* 1. Nor is the nature of the debt changed by the outlawry; all which the court admitted: And therefore the defendant's council inſiſted that the plaintiff, could have no loſs by the eſcape.

The declaration was alſo excepted againſt, *viz.* that the exigent was awarded by a foreign county, and then by ſtatute, 6 *H.* 8. *cap.* 4. Proclamation ſhould have been made in the county of which the defendant then was; and that not being ſo, the outlawry is utterly void by the expreſs proviſion of the ſtatute; and the ſheriff ſhall not be charged where the proceſs is void. To this the Chief Juſtice ſaid, that the ſtatute is to be underſtood, that the outlawry muſt be avoided by plea to maintain the action, *Cro. Eliz.* 652. 2 *Cro.* 360. 1 *Lut.* 122. *Mod.* 834. 2 *Bulſt.* 236. 1 *Roll. Rep.* 47. were cited: That it is enough there may be a poſſibility of damage to the plaintiff; and that the party outlawed cannot have his outlawry reverſed, without ſecurity firſt given to appear to a new original: And therefore the plaintiff is delayed in the recovery of his debt, which is a damage; and the court being of this opinion gave judgment for the plaintiff. *Vide Fitz-Gibbons, p.* 265.

Trinity, 7. *Geo.* 2. *Clerke* v. *Comer*. Error.

On an action of *debt* on *articles* in *C. B.* for that the plaintiff taught the defendant his trade, on condition that he would not ſet up within the bills of mortality, under the penalty of 44 *l.* and judgment on demurrer given for the plaintiff. The judgment of that court was affirmed here on writ of errror, brought on the authority of the caſe of *Cheſman* v. *Manby*, affirmed in the Houſe of Lords with coſts, *Hill.* 13 *Geo.* 1. on the foundation of the caſe of *Mitchell* v. *Reynolds*; in both which caſes it was adjudged that an action would lie for breach of ſuch articles. *Vide Forteſcue, p.* 296, 297. *Caſes Temp. Lord Hardwicke, p.* 53.

Trinity, 7 *Geo.* 2. *Smith* v. *Hickſon*.

Caſe. The plaintiff brought an action againſt the defendant for a malicious proſecution, in indicting him and his wife for receiving goods knowing them to be ſtolen. In his declaration he ſtated that the bill preferred againſt them was found *ignoramus* i. e. *a falſe bill*, and that he had thereby ſuffered great damage in his reputation and trade, and had been at great charge and coſts in defending himſelf, and likewiſe at great coſt and expence in defending his wife in this proſecution. To this action the defendant pleaded *not guilty*. The verdict found by the jury was as follows:

As to the proſecution againſt the plaintiff, for the *defendant*.

As to the proſecution brought againſt the wife, for the *plaintiff*.

The defendant's council moved in arreſt of judgment on the following grounds:

1. That a man cannot ſue alone for damages done to his wife, but both *Baron* and *Feme* muſt join in the action, and therefore the finding for the plaintiff *only* as to that part of the declaration which concerns the wife is, if any thing, a finding for the defendant, and conſequently they ought to have found coſts for him. *Cro. Eliz.* 147, 557. 884. 1 *Leon.* 299. 2 *And.* 48.

2. That as there was but one iſſue, the verdict was ill, as finding one part for the plaintiff, and part for the defendant.

The plaintiff's council *argued*, that had this been an action on a contract, the whole declaration muſt have been proved, and the jury muſt have found wholly for the *plaintiff*, or for the *defendant*, the iſſues being joint; but that in actions on *torts*, the iſſues are ſeveral; and it is ſufficient to prove any one charge in the declaration, and the jury may find part for one, and part for the other. *Cro. Eliz.* 884. In an action on the *caſe*, the plaintiff declared, that the defendant ſold to the plaintiff two oxen, warranting them to be ſound, when in fact they were not ſo. The defendant to this action pleaded *not guilty*, and a verdict was found by the jury for the *plaintiff* as to one of the oxen, and for the *defendant* as to the other. On a motion in arreſt of judgment, the court were of opinion, that as it was not on the *contract* but on the *tort*,

tort, the action was good. 1 *Sid.* 5. On an action of *debt* againſt the ſheriff for an eſcape, the declaration charged, that the huſband and wife were taken in execution and eſcaped; the jury found by their verdict that the *huſband* did eſcape, but that the *wife* was not taken into cuſtody, nor had eſcaped. *Per curiam.* It was the ſame thing as if no mention had been made in the declaration about the eſcape of the wife, and the verdict is good.

2. That as the huſband had here ſuſtained ſpecial damage on account of the proſecution againſt his wife, he might bring his action to be repaired in theſe damages without her joining with him.

Cro. Car. 553. An action was brought by *Baron* and *Feme* for a malicious proſecution, and on a writ of *error* it was inſiſted, that they could not join in that action; there does not appear any judgment reported in *Cro.* but in *Jones* 440. *March.* 47. it is ſaid to be determined that they could not join in ſuch an action where the huſband had ſuſtained the whole damage, indeed where the wife had an intereſt they might.

Hardwicke, Chief Juſtice. The general diſtinction taken between *torts* and *contracts* is right: in contracts, it is neceſſary to prove all the charges in the declaration exactly in the manner they are laid; but in *torts* they are ſeveral, and if you prove one of them, you ſufficiently prove your caſe.

In the caſe of *Saville* v. *Roberts*, reported in *Salk.* 13. *Holt*, Chief Juſtice, determined, that an action for a malicious proſecution where the bill is found *ignoramus* i. e. *a falſe bill*, will lie only where the proſecution imported matter ſcandalous and infamous to the party, and not where it had only put him to expence; but this matter coming on again to be conſidered by the court, when Lord *Macclesfield* was Chief Juſtice, in the caſe of *Jones* v. *Gwynn*, *Salk.* 15. *Trin.* 11 *Ann.* relating to badgers and chapmen. In this caſe there was no pretence that it tended to the infamy of the party, but only that it had put him to expence; and it was there reſolved, that there was no ground for the diſtinction made in the caſe of *Saville* v. *Roberts*; but that though the indictment was inſufficient, or found *ignoramus*, an action on a malicious proſecution might as well be ſuſtained, where the party was put to an expence only, without infamy, as where the matter of the proſecution was infamous and ſcandalous.

Had the law now ſtood on the opinion of *Holt*, Chief Juſtice, the verdict would have been bad; but, as it now ſtands on the laſt determination, the plaintiff might alone maintain the action, by reaſon of the ſpecial particular damage he ſuſtained in defending his wife, as in the caſe of an action by the huſband alone for an aſſault and battery of his wife, *per quod conſortium amiſit*, i. e. *whereby he loſt her company*. The plaintiff had judgment. *Vide Caſes temp. Lord Hardwicke, page* 54.

Michaelmas, 7 *Geo.* 2. *Horton* v. *Kilmore*. Error.

A verdict and judgment having been given for the plaintiff in *C. B.* and a writ of error brought thereon in this court, the error aſſigned was, that the proceedings were in *latin*, and by ſtat. 5 *Geo.* 2. *c.* 27. all judicial proceedings are directed to be in the *Engliſh* language, where the cauſe of action ſhould not amount to 10 *l.* or upwards, in any ſuperior court; or to 40 *s.* or upwards, in any inferior court.

Hardwicke, Chief Juſtice. Several caſes depend on this judgment, being all on the ſame point. In the preſent caſe the damages in the declaration are 40 *l.* and the verdict only for 1 *s.* and on this the queſtion is, what ought to be the meaſure of the damages?

We are unanimouſly of opinion, that the cauſe of action ought to be taken from the ſum laid in the declaration, becauſe in actions that ſound in damages, the plaintiff cannot foreſee what damages may be given; ſtat. 5 *Geo.* 2. *c.* 27. recites ſtat. 12 *Geo.* 2. *c.* 29. is connected with it, and in the clauſe relating to ſpecial writs in ſect. 5. of ſtat. 5 *Geo.* 2. the plaintiff's demand is plainly underſtood to be the cauſe of action, for otherwiſe it would make the attorney an offender.

Thus in pleading the ſtatute of limitations, in executory promiſes, the cauſe of action is taken to be the plaintiff's demand; as alſo by ſtat. of *Glouceſter* c. 8. wherein it is enacted that none ſhall have writs of treſpaſs before Juſtices, unleſs he ſwears by his faith his plaint is true, and that the goods taken away were worth 40 *s.* at leaſt. In 2 *Inſt.* 311, the reaſon why theſe affidavits are foreborne, is ſaid to be their inconvenience, and the defendant is left to take ſuch exceptions as the common law gave him.

The *ſtat.* of *Glouceſter*, is likewiſe to direct the juriſdiction of inferior courts; and in *fol.* 312. 2 *Inſt.* the ſtat. is ſaid to have received this conſtruction, that in the county courts the cauſe of action or demand muſt appear in the plaintiff's declaration to be under 40 *s.* it not being ſufficient that it appears by verdict that it is ſo; for example, if the plaintiff's declaration be to the damage of 40 *s.* and the jury find the damages under 40 *s.* yet the plaintiff ſhall have no judgment, though the cauſe really belonged to the inferior courts. *Margaret Cooke's* caſe, 19 *H.* 8. abridged by *Bro.* title *Juriſdiction*, *pl.* 40. was fiſhing in her fiſhery to the damage of 41 *s.* ſhe obtained a verdict with 8 *d.* damages, and it was objected in arreſt of judgment, that the court could not hold plea of leſs than 40 *s.* but over-ruled, and held, that if a perſon lay ſhis damages in the declaration to be 40 *s.* or upwards, and obtains a verdict for 1 *s.* he ſhall recover. If in an action in a court baron for 39 *s.* the jury gives 40 *s.* or upwards, the plaintiff may omit the overplus; we would not be thought to lay this down as a rule in all caſes, but for another reaſon we are more clear in this caſe; ſtat. 6 *Geo.* 2. *c.* 6. made to explain ſtat. 12 *Geo.* 1. to prevent frivolous arreſts, recites this act 5 *Geo.* 2. and extends it to judicial proceedings in *Wales*, and in that proviſion the cauſe of action is plainly intended to be the ſum declared for.

We conſider this as a parliamentary conſtruction, and as the legiſlature have expounded their meaning, we think ourſelves bound, and that therefore judgment ſhould be for the plaintiff; ſo likewiſe in the two other caſes, *viz. Holloway* v. *King*; and *Thurſton* v. *Harris*. There are two caſes that are contrary to theſe, *viz. Oſborne* v. *Mayo*; and *Charlton* v. *Tothill*.

In theſe caſes the proceedings are in *Engliſh*, and the damages laid in the declaration are 25 *l.* and the verdict for 9 *l.* 15 *s.* but becauſe we take the ſum demanded in the declaration to be the cauſe of action, we think this not within the ſtatute; and then, as *ſtat. Edw.* 3. is expreſs that all judicial proceedings ſhall be in *Latin*, we are of opinion the judgment in theſe caſes ſhould be reverſed. It is indeed incumbent on the court, as far as they can, to aid the remedy of the plaintiff, ſo as for him to keep his judgment. But we conſider ourſelves bound by *ſtat. Edw.* 3. and cannot find that proceedings in *Engliſh* have ever been aided by the ſtatutes of *Jeofails*. For theſe reaſons, we think that the judgments in theſe caſes ſhould be reverſed, and that in the former caſes the judgment ſhould be affirmed. *Vide caſes Temp. Lord Hardwicke, page.*

Michaelmas, 7 *Geo.* 2. *Thomas* v. *Biſhop*.

A bill of exchange was drawn in this manner; "At thirty days ſight pay to *John Somerville* or order, 200 *l.* and place the ſame to the account of the *York Buildings Company*; value received by yours, *Charles Mildmay*." Directed to Mr. *H. Biſhop*, caſhier of the *York Buildings Company*, in *Wincheſter-ſtreet*, and was accepted by *Biſhop* in this manner; "Accepted, *H. Biſhop*, 13th *June*, 1732." This bill was indorſed to the plaintiff, who brought an action thereon againſt the acceptor. At the trial, a letter of advice was proved, which was directed to the governor and company of the *York Buildings*, wherein notice was taken of this, amongſt others, in the following words: "*John Somerville*, thirty days ſight, 200 *l.*" But according to the direction of the judge, the jury found for the plaintiff. And now,

On motion for a new trial, the council for the defendant urged, that the defendant in his own right is not liable for this 200 *l.* but only the Company; that this is the caſe of the caſhier of the bank, who never accepts bills in any other manner; and that the acceptance by the ſervants of bankers is always ſo, and binds their maſters, though it be not ſpecified to be on their account; that it ought to be left to the jury to ſee if he did it for himſelf or the company; obſerves that this is not only drawn on a ſervant of the company, but by a ſervant of the company likewiſe: Admits that if it had been directed to *Biſhop* without any addition, ſuch a general acceptance as he had made would bind him only.

For the plaintiff it was inſiſted, that the leaving it in ſuch a manner to a jury would be throwing things into the utmoſt uncertainty. He ought to be charged according to his acceptance. If a bill is drawn on *John a Stiles*, any body may accept it, and become charged thereby. *Stat. W.* 3. *c.* 17. concerning inland bills, does indeed direct, that where a ſervant has uſed to accept, his acceptance ſhall bind; but how? why, according to the acceptance, and no otherwiſe. Cannot a ſervant accept for himſelf? Yes, certainly; an acceptance is a contract, and a perſonal contract too.

Strange, in reply, allows that a ſtranger may accept a bill, but then it muſt be declared on the face of the bill, that he does it for the honour of the drawer.

York, Chief Juſtice. A bill of exchange is a contract of a very particular nature, depending on the cuſtom of merchants, and muſt be in writing; the drawer contracts that he will pay, if the drawee does not, and ſo does the acceptor, and ſo do the indorſors. There may be caſes where a writing may have all the forms of a bill of exchange, and yet not be ſo; but then it is where the money is made payable out of a particular fund, as were the caſes *Jocelyn* v. *Laſerre*, *Trinity*, 12 *Ann.* 10 *Mod.* 294. 316. *Forteſcue*, *p.* 281. *Stra.* 24. 219. 2 *Stra.* 762. 2 *Raym.* 1362, 1481. and *Jenny* v. *Herle*, *Eaſter*, 10 *Ann.* 8 *Mod.* 265. *Stra.* 591. 2 *Raym.* 1361. and if this was within the reaſon of thoſe caſes, I ſhould not be for charging the defendant but as a ſervant; but this caſe is a plain bill of exchange; the words, *place it to the account of the York Buildings Company*, and not to the account of the drawer, is an uncommon direction, and ſhews that it is a bill drawn in favour of the company; but they do not alter the bill with reſpect to the indorſee; it is the ſame to him as if they were not there, and then this general acceptance of the defendant is a contract to pay the *tenor of the bill*; but then, does the letter of advice vary the caſe? No; not with reſpect to the indorſee, for that is always a private tranſaction, and the perſon to whom the bill is payable is never conuſant of it; but even that letter is in very general terms; you ſay it was proved at the trial, that the governor and company directed the defendant to accept this bill, but are we to take notice of a tranſaction that paſt between the drawee and a ſtranger? No. If any other evidence was to be allowed to be given to a jury than what ariſes on the face of the note, it muſt have very bad conſequences with reſpect to trade; therefore we can take notice of nothing but what appears on the face of the bill. There is a caſe of *Evans* v. *Carlington* reported in 2 *Vent.* 307. *Carth.* 5. *Show. Rep.* 42. *Show. Rep.* 509. *Pl.* 473. *Skin.* 264. where more appeared on the face of the bill in favour of the defendant than does here, and yet judgment was given for the plaintiff. The circumſtances here are equitable circumſtances between the company and *Biſhop*; I do not apprehend that in this caſe the preſent plaintiff can charge the company.

Probyn, Juſtice. No doubt but a general acceptance by a banker's ſervant of a bill drawn on his maſter will charge the banker only, but here the bill is drawn on the ſervant.

Lee, Juſtice. In conſidering bills of exchange, we ſhould not allow a liberty of going into extrinſic circumſtances; for the action brought on ſuch bills is not an *indebitatus aſſumpſit*, but an action brought ſpecially on the *cuſtom*; which cuſtom ariſes from the terms of the bill, and the acceptance is an acceptance according to the tenor of the bill, ſo that the defendant here has accepted it as the bill imports, that is as a direction to him to pay ſo much money.

Page, Juſtice. When an action is brought by an indorſee, if we were to allow evidence to be given *without* the note, there would be an end of bills of exchange; for if the bill itſelf is not to be an evidence of the contract to him, how ſhould he know what is?

The court would not grant a new trial. *Vide Caſes temp. Lord Hardwicke, page* 1.

Trinity, 9 *Geo.* 2. *Morgan* v. *Luckup.*

In popular actions the defendant cannot plead ſeveral pleas. *Vide Caſes temp.* Lord *Hardwicke*, *Strange vol.* 2. *page* 1044.

Trinity, 9 *Geo.* 2. *Stoughton* v. *Reynolds.*

In an action on the *caſe* brought by the plaintiff againſt the defendant, the plaintiff declares, that he was choſen churchwarden of the pariſh of *All Saints* in *Northampton*, and therefore ought to be admitted and ſworn into that office by the defendant; and for that purpoſe offered himſelf to the defendant, who refuſed to admit him; and the declaration ſets forth, that the plaintiff obtained a writ of *mandamus* to compel the defendant to ſwear him to be church-warden of that pariſh, which the defendant refuſed to do, but made a return to the writ, "that the plaintiff was not choſen churchwarden of the ſaid pariſh," which the plaintiff avers is a falſe return; whereupon iſſue being joined, a ſpecial verdict was found to this effect; that the ſaid pariſh is an ancient pariſh, of which two of the pariſhioners have uſed always to be churchwardens, and that by the cuſtom of the pariſh, one of the churchwardens is to be named by the Vicar, and the other to be elected by the pariſhioners. That in *Eaſter* week in the year 1734, the Vicar named his churchwarden, and the pariſhioners elected the plaintiff to be the other, who were both admitted and ſworn into the office, and continued in the ſame untill *Eaſter* week 1735, and then a new election came on, which is the election in queſtion; and at an aſſembly holden for that purpoſe, there were preſent, the vicar, and the two churchwardens, and many other pariſhioners. They further find, that one *Chapman* was then named by the Vicar to be his churchwarden for the year then enſuing; after which nomination the plaintiff and one *Farrin* were candidates for being the other churchwarden, that thereupon a poll was taken, and ſeveral of the pariſhioners polled for the plaintiff; and others polled for *Farrin*; that before all the pariſhioners polled, the Vicar being in the chair, did with the conſent of the ſaid *Chapman* adjourn the aſſembly until the next day, which adjournment was oppoſed in behalf of the plaintiff by ſome of the pariſhioners, and upon the adjournment, ſeveral pariſhioners in the intereſt of the other candidate *Farrin*, went away, and ſeveral others remained and continued the poll, and took ſeveral votes, and at the cloſe of the poll that day, the plaintiff had a majority of votes, that, upon the next day, the Vicar went on with the poll, and then *Farrin* had a majority, but whether, &c.

The plaintiff's council admitted, that by the 89th *Canon* in 1603, the churchwarden is to be choſen by the miniſter and pariſhioners, or one by the miniſter, and the other by the pariſhioners, &c. but that *Canon* has been determined not to bind the cuſtom of any pariſh. *Cro. Jac.* 532. *Warner's Caſe.* 2 *Roll. Abr.* 287. *Pl.* 50. *Cro. Car.* 581. *Evelyn's Caſe.* *Hardies* 378. *Dawſon* v. *Fowle.*

Lord *Hardwicke.* You need not cite caſes, that point is very well ſettled, that *Canon* cannot controul the cuſtom.

Abney. Of common right, the choice of churchwardens is in the pariſhioners, and if the incumbent chuſes one in any place, it is but uſage. *Carth.* 118. That a man though he lives out of the pariſh, in reſpect of lands in the pariſh, may vote for churchwardens. *Jeffrey's Caſe.* 5 *Co.* 66. That the majority of the pariſhioners, after a ſummons of the pariſhioners, may bind the reſt even in making a rate. 1 *Mod.* 194. 236. 2 *Mod.* 222.

The defendant's council *argued*, that the plaintiff's election depends on the Vicar's having, or not having a right to adjourn the aſſembly, now as to that it is found, that there was an aſſembly, and that the *Vicar* was in the chair, which is a finding that he preſided at the aſſembly according to the common meaning of the word, and conſequently the power of adjournment muſt be in him, or at leaſt in him or in the other churchwarden, ſince the plaintiff by applying for a *mandamus*, is concluded to ſay, he was churchwarden at that time, but ſuppoſing that the plaintiff was duly elected, yet here it appears he had no cauſe of action, for he has received no damage, for there was no occaſion for a *mandamus*, he being in poſſeſſion of his office without it, and conſequently the return to it, though a *falſe* one, can be no ground for an action, as his election in 1734, was until another ſhould be admitted and ſworn, and he continued till then in his office; for example, as when a mayor is choſen to continue for a year, and until another is choſen, he continues in office even after a new election, if that election is void; that before the *Canon* in 1603, a cuſtom for churchwardens to continue two years in office, was good, as appears by the *Year Book* of the 25 *Hen.* 8. *fo.* 5. *pl.* 25. The rule laid down in *Hob.* 267, is, that to give a cauſe of action, there muſt be ſome damage already happened, or elſe *inevitable*; in this caſe, which is an action for damages, the only damage that can ariſe, muſt be either for the with-holding the plaintiff from the profits of his office, or for the expence he was at in procuring the *mandamus*; now as to the expence, there is nothing of that laid in the declaration, but it only charges that the plaintiff had not the poſſeſſion and privileges of the office, and no damage can be intended more than is laid; as to the profits of the office, he was in poſſeſſion, as I obſerved, even without a *mandamus*, and beſides, this is not an office of profit. 3 *Lev.* 362. *Ward* v. *Bramſton*, he cites alſo a caſe of *Lewis* v. *Lewis. Hil.* 2 *Geo.* 2. Where, in an action on the caſe for labouring a jury, after a verdict on the writ of error, the queſtion was, whether there was any cauſe of action, becauſe the words *ratione inde*, i. e. *by reaſon whereof*, *viz.* of the labouring the jury, the party had obtained a verdict, was a ſufficient allegation of the damage ſuſtained.

Lord *Hardwicke*. The doubt referred to the court by the jury, is, whether the defendant is guilty or not of a *falſe* return, that depends on the plaintiff's election being good or not ſo, and depends on the adjournment of the aſſembly, whether being made by the Vicar and one churchwarden, it be a good adjournment; there is nothing to be found relating to this matter in the books, and I hear no reaſon given that ſatisfies me, that it was a good adjournment; whether it was ſo or not, depends on a previous queſtion, in whom the power of adjournment was; and that was ſaid to be in the *Vicar* and one of the churchwardens, that muſt be, if it be ſo, either by cuſtom, (but in this caſe no ſuch cuſtom is found) or by ſome rule of common law; but I do not find any reſolution, or even opinion, that ſuch cuſtom is veſted in the *Vicar* or *Churchwarden*, or even to give the Vicar a right of preſiding; there is indeed a notion that he has a right to preſide, but that has taken its riſe from ſpecial veſtries, and in that caſe, the cuſtom, or the act of parliament which eſtabliſhes ſuch veſtries, generally nominates him to preſide; is the right then in the churchwarden? I find no authority that ſays it is, and if it were, it is not to be imagined to be in one alone, why then, what is the conſequence? It is that the right is in the aſſembly itſelf, for if they be an aſſembly all conſiſting of equals, and there be no cuſtom nor rule of law to direct the adjournment, the right muſt be in the perſons which conſtitute the aſſembly; it is true, inconveniencies may ariſe from this, for it will require as much time and ceremony to ſettle whether the aſſembly ſhall be adjourned, as for any other queſtion; and therefore the law, where it has intermeddled at all, has provided a remedy for that inconvenience, as in elections for *Knights* of the *Shire*, the ſheriff might adjourn by common law, for there is no act of parliament that gives him that power, though there are acts to reſtrain it; and yet the ſuitors are the judges of that court, and not the ſheriff; there might be an inconvenience on the other ſide in this caſe, to ſay, the power is lodged in the *Vicar*, for he might uſe ſuch power to influence which of the churchwardens he thought fit againſt the ſenſe of the majority of the pariſhioners. As to the want of a cauſe of action; I think in this caſe there is plainly a cauſe of action; for tho' to every action on the *caſe*, there muſt be *injuria* & *damnum* i. e. *an injury and damage*; here it is not found that the cuſtom is to continue till another choſen, only *generally* a cuſtom to chooſe at *Eaſter*, and afterwards in finding that the plaintiff was elected, they ſay he was to continue until another choſen according to the cuſtom aforeſaid, which is not the cuſtom; and whatever the jury find beſide the cuſtom may be rejected, but that is not material; for a mayor elected the ſecond year again, may have an action for a *falſe* return on a *mandamus* without doubt, for it leaves his office to be diſpoſed, and in this caſe it is found, that there was another candidate who actually did diſpute the office with the plaintiff, and though the mayor might continue if there was no new choice, yet if there is a new choice of himſelf, he is not in by the old choice, but muſt go on the new one.

Probyn, Juſtice. The *parſon* is not a conſtituent part of the aſſembly, but it may be very well held without him, and the majority muſt determine all queſtions.

Lee, Juſtice. If this was not a legal adjournment, they did right in compleating the election; and if he was choſen, he had a right to a *mandamus*, and if he had a right to be admitted on his election, the denial thereof is an injury, and therefore muſt be a damage; there is no difference as to the precedency of the *parſon* in voting above the reſt of the pariſhioners, only this diſtinction, that the pariſhioners vote in reſpect of their *aſſeſſments*, and the parſon votes in reſpect of his *freehold*; and therefore it has been ſaid he may vote though he pays no aſſeſſments. *Hackwell's Modus tenendi Parl. fo.* 23. which is a book of good authority, ſays, that in all councils and elections, the majority binds, for which he cites 15 *E.* 4. *fo.* 2. I think this was not a good adjournment. The whole court gave judgment for the plaintiff. *Vide Caſes temp.* Lord *Hardwicke*, *page* 274.

Trinity, 9 *Geo* 2. *Smith* qui tam v. *Gibſon*.

In an action on the *caſe* brought by the plaintiff againſt the defendant for double damages on the ſtatutes 13 *Rich.* 2. *cap.* 5. 15 *Rich.* 2. *cap.* 3. and 2 *Hen.* 4. *cap.* 11. The declaration *ſtated* thoſe ſtatutes, and that the plaintiff had in his poſſeſſion a certain ſhip, and was part owner of the greateſt part thereof, within the body of a county, *viz.* at *London*. The defendant pretended a right to a thirty-ſecond part thereof, by virtue of a bill of ſale, pretended to be made on the high-ſeas, when in fact it was not made there, but within the body of the county, *viz.* at *London*; and that the ſaid defendant did implead the ſaid plaintiff in the court of admiralty concerning the ſame, and cauſe the ſaid thirty-ſecond part, by virtue of a proceſs proſecuted out of the ſaid court againſt the ſaid ſhip, to be arreſted in the river *Thames*; and by colour of the ſaid proceſs, did cauſe the ſaid ſhip to be detained there for a long time, whereby the plaintiff loſt the benefit of the ſaid ſhip, and ſuſtained great expence, to his damage of 1000 *l.* To this action the defendant pleaded in *abatement*, that at the time of the ſaid *treſpaſs* and *contempt*, and until the time the plaintiff brought his action, one *T. B.* was, and is part-owner with the plaintiff in the ſaid ſhip, as *tenant in common*. To this plea the plaintiff demurred, the defendant joined in demurrer, and the matter came on to be argued before the court.

The plaintiff's council *urged*, that it is immaterial in this action who is owner of the ſhip, for the *gift* of the action is the ſuing in the *admiralty*, which is perſonal to the plaintiff, and the detention of the ſhip is no part of the *gift* of the action, but only laid as conſequential damages, and may be given in evidence, as in the caſe of *Child* v. *Sands*, *Carth.* 296. that on this declaration it appears the plaintiff was more than part-owner, for it is laid, that he had the occupation of the ſhip, of which he might be maſter; that where the action is grounded on a *tort*, which is joint and ſeveral in its nature, it is no abatement; the ſame doctrine is held in *Carth.* 295. In this caſe the action is joint and ſeveral with regard to the ſhip, that if the court ſhould be of opinion, that for the detention all the parties ſhould have joined, then they will take that to be only laid in aggravation of damages. See *Salk.* 119.

The defendant's council in ſupport of his client's defence, cited the caſe of *Child* v. *Sands*, 1 *Salk.* 31. 4 *Mod.* 181. 3 *Lev.* 351. *Skinner*, 334, and *Carth.* 294. which caſe was a ſuit on the foregoing ſtatutes, and objected that all the proprietors being joint owners, ſhould have been joined in the action, but held well, being after a verdict; but reſolved by the court, that if it had been pleaded in abatement it would have been well alſo; they admitted that *Carth.* reports to the contrary, that though a *tenant in common* cannot plead his tenancy in *common* in abatement, a ſtranger may. 1 *Salk.* 4. *Fareſley*, 104. that joint tenancy may be pleaded in abatement in *trover*, *Salk.* 290. *Skinner* 12. 640. ſo likewiſe in *treſpaſs*, *Cro. Eliz.* 554. In ſupport of this point were alſo cited 1 *Sid.* 224. 1 *Lev.* 3. 2 *Lev.* 20. *Lutch.* 152. *Sir W. Jones*, 142. The defendant's council further *urged*, that the detention of the ſhip, as laid in the declaration, was a *diſtinct* charge of damage to the plaintiff's *property*; in which property others having a joint intereſt, ought to be joined.

Lord *Hardwicke.* In this caſe there are three queſtions, 1ſt. Whether the ſuing by the defendant in the *court of admiralty* be the cauſe of action in this caſe? 2dly. Whether the detention of the ſhip be the cauſe of action? 3dly. Whether both of them are two diſtinct cauſes of action?

I think the cauſe of action is the ſuing in the *court of admiralty*, and that the detention of the ſhip is not the cauſe of action, but only a *conſequence* of the ſuit in that court; and if ſo, then this action is right, and well brought, and there is no ground to *abate* the bill, and that being the ground of the action, there is no colour for any other perſon joining with the plaintiff, for the conteſt was about the thirty-ſecond part of the ſhip, and the defendant took out a citation againſt the preſent plaintiff only, therefore it is he only that is aggrieved by that ſuit, and conſequently he alone has cauſe of action, according to the ſtatute, and it is this point that diſtinguiſhes this caſe from that of *Child* v. *Sands*; for properly in that caſe there was no ſuit in the *court of admiralty*, and it was that that made one great queſtion in that caſe, whether an action would lie at all for that proceeding, as for a ſuit within the ſtatute, for there the ſhip was arreſted without any ſuit inſtituted, and for that reaſon there being no ſuit, but only an arreſt of the ſhip, the court ſaid, that all the owners ought to have been parties: in this caſe it is expreſsly alledged, that the defendant impleaded the plaintiff in the *court of admiralty*, and the arreſt of the ſhip is only by way of proceſs in that ſuit, and the nature of the thing itſelf ſhews the detention to have been *conſequential*, and then this caſe comes to what is ſaid in the caſe of *Child* v. *Sands*; that the laying *conſequential* damage is but matter *ex abundanti*, i. e. *of ſuperfluity*, and will not hurt, and it might be given in evidence: if the *ſuing* be the cauſe of action, then that is ſuch a cauſe of action as the other owners cannot join in, for they were not ſued; if the *detention* were another cauſe of action, then the rule is as laid down in *Godfrey's caſe*, 11 *Co.* 45. *b.* that where a man has two cauſes of action in his *writ*, and by his own ſhewing it appears that for one of them he can have no other remedy, the ſuit ſhall abate only ſo far as it is abateable, and he may proſecute his ſuit for the reſt; which is on this principle, becauſe if no other writ lies, it is conſidered as if it had never been part of the demand, and entirely *nugatory*: if it appears that for one of the matters the writ will not lie, but that he may have another writ in another form, in that caſe, the writ ſhall abate entirely, and ſhall not ſtand for that part which is good. I think in the preſent caſe the *detention* is not the cauſe of action, but only *conſequential* damages.

Lee, Juſtice. If the detention was the cauſe of action in the preſent caſe, I ſhould think the defendant's a good plea in *abatement*; though it is ſaid in *Carth.* 295. that an action founded on a *tort* is not abateable on ſuch a plea: that is a miſtake, as appears by the opinion of the court in that caſe, as reported in all the other books; and ſo the *old* law held, as appears by the *Digeſt* of *Writs*, *fol.* 46. *b.* *Joint-tenants* muſt join in *treſpaſs*, and if they do not, the ſame is pleadable in abatement; but now this caſe muſt depend on how the matter is ſtated in the declaration. The firſt part of the declaration contains a complaint that is merely perſonal to the plaintiff, for it ſtates that he himſelf was perſonally ſued, and conſequently was the perſon aggrieved, and therefore he alone might on that ground maintain an action. On the other part of the declaration, the queſtion is, Whether it anſwers to ſuch a charge of a detention as that all the proprietors ought to join, if that was the *giſt* of the action? I ſhould think they ought, but I do not think that to be the *giſt* of the action, but alledged merely as conſequent to the arreſt of the ſhip, and was neceſſary to be ſhewn, neither was the plaintiff in this action entitled to damages for the detention of the whole ſhip, but only for a thirty-ſecond part, ſo that the allegation of a detention is but *ex abundanti*, i. e. *a matter of ſuperfluity*. The court gave judgment that the defendant ſhould anſwer over. See *Stra. vol.* 2. *page* 1045. *Vide Caſes temp. Lord Hardwicke*, *page* 271.

Michaelmas, 10 *Geo.* 2. *Carpenter* v. *Tarrant*.

In an action on the *caſe* for ſpeaking theſe words, "*Robert Carpenter was in* Wincheſter *gaol, and tried for his life, and would have been hanged, had it not been for* Leggat, *for breaking open the granary of farmer* A. *and ſtealing his bacon*; after a verdict for the plaintiff, on motion in arreſt of judgment, it was objected, that theſe words were *not actionable*; in ſupport of the objection were cited the following caſes, 4 *Co.* 16. *Cro. Eliz.* 371. *Hobart*, 77. *Hut.* 2. *Noy* 24. *Cro. Eliz.* 279. and 184. and it was further objected, that to make theſe words actionable, the plaintiff ought to have *averred* that he never was in gaol and tried for his life, agreeable to *Hob.* 219. *Brownl.* 13. 1 *Roll. Abr. page* 64. *pl.* 6. 1 *Lev.* 82.

The plaintiff's council, in anſwer to the firſt objection, cited *Cro. Jac.* 154. 247. 2 *Roll. Rep.* 141. *Palmer*, 68. *Cro. Eliz.* 509. 786. 904. and the caſe of *Button* v. *Heyward*, & *Ux. Hil.* 7 *Geo.* 8 *Mod. Rep. p.* 24. where theſe words were held actionable: *He is the man that has killed my huſband*; and in which caſe the court ſaid, that formerly actions for words were diſcouraged, but now they are encouraged, and are to be underſtood by the court according to their common acceptation. And to the ſecond objection, cited 1 *Vent.* 117. 1 *Sid.* 277. and 1 *Lev.* 297.

Lord *Hardwicke.* As to the firſt queſtion, this is one of thoſe caſes that are frequent, in which the difference betwixt the old rules and modern ones come in queſtion; and I think, that according to all the rules laid down of late years, theſe words are actionable, for they import a ſcandal; the very charging a man of having been in goal is a reproach, and muſt be a very ſtrong intendment to have them underſtood only that he was acquitted by *Leggat.* The caſe of *Cardan* is a very ſtrong one for the defendant; but if theſe words were to come in queſtion now, they would be held actionable; yet there is a very ſtrong caſe on the other ſide, though not a modern caſe, *viz.* *Halley* v. *Stanton. Cro. Car.* 268. where the words were, *he was arraigned for ſtealing twelve hogs, and if he had not made good friends it had gone hard with him*; which words are very like the preſent words, and were held actionable. Indeed, in that caſe, there was *an averment*, that he never was arraigned, and the court ſaid the ſpeech was the more malicious, as it appeared by the averment to be falſe; and ſeveral caſes are here cited to ſupport that reſolution. So that according to that caſe, an action is maintainable for the words now in queſtion, they being as ſtrong as thoſe in that caſe.

As to the ſecond objection, I take it there are many caſes where *averments* were anciently thought neceſſary, but are not ſo of late times; and I take it that the words being here laid to be ſpoken *falſely and maliciouſly* are *an averment* that the words are falſe; for if they were ſpoken falſely, the words could not be true; and if they were true, it lies on the defendant to ſhew that in mitigation of damages, for I believe there are caſes that it may be given in evidence for that purpoſe, however, that is not the caſe here; if therefore the modern authorities are that an *averment* is not neceſſary, then the caſe of *Halley* v. *Stanton* is in point, for there *without an averment* the words were held actionable; ſo that I think the declaration good.

Lee, Juſtice. This declaration can be no hurt to the defendant, for if theſe words had been only a narrative of what paſſed at the trial, he might have pleaded it ſo, and juſtified, though at the trial it could only have been given in evidence, in mitigation of damages; the true *giſt* of the action, with reſpect to the defendant being, whether he ſpoke the words *falſely and maliciouſly*.

The rule was accordingly diſcharged. *Vide Caſes temp*, Lord *Hardwicke p.* 339.

Hilary, 20 *Geo.* 2. *Smith* v. *Pelah.*

The Chief Juſtice ruled, that if a dog has once bit a man, and the owner having notice thereof, keeps the dog, and lets him go about, or lie at his door, an action will lie againſt him at the ſuit of a perſon who is bit, though it happened by ſuch perſons treading on the dog's toes, for it was occaſioned by his not hanging the dog on the firſt notice, and the ſafety of the King's ſubjects ought not afterwards to be endangered. The *ſcienter* i. e. *knowingly*, is the *giſt* of this action. *Vide Strange vol.* 2. *page* 1264.

Eaſter, 23 *Geo.* 2. *Moſes* v. *Macfarlan.*

In this cauſe a caſe being left for the opinion of the court, whether the plaintiff could recover againſt the defendant *in the preſent form of action*, (an action on the *caſe* for *money had and received to the plaintiff's uſe)* or whether he ſhould be obliged to bring a *ſpecial action on the contract and agreement* between them, the Chief Juſtice delivered the opinion of the court thereon.

This was an action on the *caſe*, brought in this court by the now plaintiff againſt the now defendant, (who was before plaintiff in the *court of conſcience* againſt the preſent plaintiff) *for money had and received to the uſe of the now plaintiff*.

The caſe appeared on evidence as follows:

It was proved that the plaintiff had indorſed to the defendant four ſeveral promiſory notes made to himſelf by one *C. J.* for 30 *s.* each, for value received, dated 7 *November* 1758, which was done *in order* to enable the defendant to recover the money in his own name againſt the ſaid *C. J.* but previous thereto, the defendant aſſured him, that ſuch his indorſement ſhould be of no prejudice to him; there was likewiſe an agreement ſigned by the defendant, whereby (among other things) *it was expreſsly agreed*, that the plaintiff ſhould not be liable to the *payment of the money*, or any part of it, and that he ſhould *not be prejudiced* or be *put to any coſts, or any way* ſuffer by reaſon of his ſaid indorſements. Notwithſtanding the ſaid agreement, and contrary thereto, the defendant ſummoned the plaintiff into the *court of conſcience*, on each of theſe four notes, as the indorſer thereof reſpectively, by four ſeparate ſummonſes; whereon the plaintiff (by his ſolicitor) tendered the ſaid *indemnity to the court of conſcience* on the firſt of the ſaid four cauſes, and *offered to give evidence of the ſame, and of the ſaid agreement*, by way of defence for the ſaid plaintiff, in the ſaid court, but the court of conſcience *rejected* this defence, and refuſed to receive any evidence in ſupport of the ſaid agreement of *indemnity*, ſuppoſing they had no power to take cognizance of the ſame, and gave judgment againſt the ſaid plaintiff on the ground of this *indorſement*, (which the plaintiff did not diſpute) without hearing any witneſſes againſt the *agreement*, that he ſhould not be liable; for the commiſſioners held this agreement to be no ſufficient bar to the ſuit in the court of *conſcience*, and therefore decreed for the plaintiff in that court on the undiſputed *indorſement made by the plaintiff*. The decree, was actually pronounced in only one of the four cauſes there depending; but the plaintiff's agent finding the commiſſioners to be of the forementioned opinion, paid the money into court on all the four notes, and it was *taken out of court* by the defendant, by order of the ſaid commiſſioners.

Theſe matters appearing on evidence before Lord *Mansfield* at *Guildhall*, at *niſi prius*, it was not doubted but that the plaintiff was entitled to the money on the *merits*, and a verdict was found for the plaintiff for 6 *l.* (being the ſum paid into the *court of conſcience)* ſubject to the opinion of the court on this queſtion, *viz.*

Whether the money could be recovered in the preſent form of *action*? Or whether it muſt be recovered by *an action brought on the ſpecial agreement* only?

The defendant's council moved to ſet aſide the verdict, and to have leave to enter up judgment againſt the plaintiff as for a *nonſuit*, and urged to the court as an inducement thereto, that the action was not *maintainable* in its *preſent form*; that an *indebitatus aſſumpſit* will not lie but where *debt* will lie; that it will not lie on a *wager*, nor on a *mutual aſſumpſit*, nor againſt the acceptor of a *bill of exchange*, nor for money won at play, for this action will never lie but where *debt* will lie, and can never be brought on mutual promiſes. 1 *Salk.* 28. *Hard's caſe*, and 6 *Mod.* 128. *Smith* v. *Airy*.

To maintain *debt*, there muſt be either an *expreſs* or *implied* contract broken; here there is no contract either *expreſs* or *implied*.

An indorſement of a promiſory note is a juſt cauſe of action, and the defendant recovered this money of the plaintiff the indorſer, by the judgment of a court of juſtice.

This action for money had and received to his uſe, is not the proper way of ſetting right the *judgment of a court of juſtice*.

The agreement between the plaintiff and defendant could not *binder* the action before the *court of conſcience*, it was only the ground of an action to be brought on *itſelf*. See *Cro. Jac.* 218. 1 *Bulſt.* 152.

The plaintiff's council *argued*, that they had not miſconceived their action, that they were not *confined* to bring an action on the ſpecial agreement; but were *at liberty* to bring this action, *viz.* "for money had and received to their uſe," to recover ſuch money ſo *unfairly received* by the defendant.

And would not agree to the aſſertion of the defendant's council, that *aſſumpſit* will *not* lie, but *where debt* will lie.

In the caſe of *Aſtley* v. *Reynolds*, *Strange vol.* 2. *page* 915. This principle of law was ſettled, that *wherever* a perſon has *wrongfully paid money*, he may have it back again by *this action* for money had and received to his uſe, and yet in that very caſe there was *another remedy*.

The ſame doctrine holds for *money paid on a contract* which contract is never performed, and ſo it will on a *wager* (on a horſe-race) againſt the perſon who holds the ſtakes after ſuch race has been run.

In the preſent caſe no inconvenience can ariſe to the parties, every thing being done and finiſhed; nor can a writ of *error* lie to the *court of conſcience*, nor the judgment of ſuch court be impeached.

The court after having heard council on both ſides, took time to conſider this caſe, when Lord *Mansfield* delivered their opinion in favour of the *preſent* action.

There was no doubt at the trial, but that on the *merits* the plaintiff was entitled to the money, and the jury accordingly found a verdict for 6 *l.* ſubject to the opinion of the court, on this queſtion, whether the money might be recovered by *this* form of action, or by an *action on the ſpecial agreement only*.

1ſt. *Objection*, That an action of debt would not lie in this caſe, and that no *aſſumpſit* will lie where an action of debt may not be brought.

Anſwer, Where *debt lies* an action on the *caſe* ought not to be brought, this was the point relied on in *Slade's Caſe* 4. *Co.* 92. The rule then ſettled, and which has ever ſince been followed, is, That an action of *aſſumpſit* will lie in many caſes where *debt lies*, and in many where that action does not lie. The principal inducement of the court in encouraging actions of *aſſumpſit* was, *to remove the wager of law*.

2d. *Objection*, That no *aſſumpſit* lies, but on an *expreſs* or *implied* contract. In this caſe it is impoſſible to preſume any agreement to refund money recovered by the defendant in an adverſe ſuit.

Anſwer, If the defendant be under an *obligation* from the ties of *natural juſtice* to *refund* the money, the law *implies a debt*, and *gives this action* founded on the equity of the plaintiff's caſe, as if it were on a *contract*.

Aſſumpſit, "for money had and received to the plaintiff's uſe," lies in numberleſs inſtances for money the defendant has received from a *third* perſon which he claims a right to in oppoſition to the plaintiff's right, and which he had by law a right to receive from ſuch third perſon.

3d. *Objection*, Where money has been recovered by the judgment of a court *having competent juriſdiction*, the matter can never be brought over again by a new action.

Anſwer, It is clear that the *merits of a judgment* can *never be overhauled* by an *original* ſuit, either at law or in equity, till the judgment is ſet aſide, or reverſed, on which it is grounded, it being *concluſive* as to the *ſubject matter* of it, to all intents and purpoſes.

The ground of this action is *conſiſtent* with the judgment of the *court of conſcience*, it allows the commiſſioners acted rightly; they founded their judgment on the *indorſement of the notes* by the plaintiff, which *indorſement* is now diſputed. The principle on which this action proceeds was no defence againſt the ſentence of the *court of conſcience*.

We are ſatisfied that the commiſſioners adjudged, "They had no *cognizance* of ſuch *collateral* matter," this court cannot correct an error in their proceedings, and therefore ought to ſuppoſe what is done by a final juriſdiction to be *right*. We think the commiſſioners did right in refuſing to go into ſuch collateral matter, or otherwiſe by way of defence againſt a promiſſory note for 30 *s.* that court might go into agreements and tranſactions of a great value, if they decreed payment of the note, their judgment might *indirectly* conclude the balance of a large account.

This action is not grounded on, whether *that the judgment was wrong*, but that the defendant ought not in juſtice to *keep* the money.

Money may be recovered by a right and legal judgment, and yet the iniquity of *keeping* that money may be manifeſt on grounds which could not be uſed by way of *defence againſt the* judgment.

The admiſſion *that unqueſtionably an action might be brought on the agreement*, is a deciſive anſwer to any objection from the judgment, for it is the ſame thing as to the force and validity of the judgment, and it is equally affected by the action, whether the plaintiff brings ſuch action on the *equity* of his caſe ariſing out of the agreement, that the defendant may refund the *money* he received, or on the *agreement itſelf*, that *beſides* refunding the money, he may pay the *coſts* and *expences* the plaintiff ſuſtained.

The queſtion ſaved at *niſi prius*, *viz.* whether the plaintiff may elect to ſue by this form of action for the *money only*, or muſt be turned round to bring an action on the judgment.

One benefit reſulting to ſuitors from the nature of this action is, that the plaintiff need not ſtate the ſpecial circumſtances from which he concludes, "that from the *equity and juſtice of the caſe*, the money received by the defendant ought to be conſidered as belonging to him." He may *declare generally*, "that the money was received to his uſe," and ſo make out his caſe at the trial of the cauſe.

This mode of procedure is equally beneficial to the *defendant*. It is the moſt favourable way in which he can be ſued, he can be ſubject to no more than the money he has received, and againſt that may go into every equitable defence on the *general iſſue*; he may claim every *equitable* allowance; he may prove a releaſe without pleading the ſame; in ſhort, he may defend himſelf by every thing which ſhews that the plaintiff *from the equity and juſtice of the caſe* is not entitled to the whole of his demand, or to any part of it.

If the plaintiff makes choice of this manner of proceeding, it is a *bar* to his bringing another action *on the agreement*, though he might recover more on the agreement than he can by this form of action, and therefore if the queſtion was open to be argued on principles at large, there ſeems to be no *reaſon or utility* in confining the plaintiff to an action on the ſpecial agreement.

This point has been long ſettled, and there have been many precedents in ſupport thereof, particularly the caſe of *Dutch* v. *Warren*. *Michaelmas*, 7 *Geo.* 1. *C. B.* being an action on the caſe for money had and received to the plaintiff's uſe.

This kind of equitable action to recover back money which ought not in juſtice to be kept, is *very beneficial*, and therefore *much encouraged*; it lies *only* for money which *from the equity and juſtice of the caſe* the defendant ought to refund; it does *not lie* for money paid by the plaintiff, which is claimed of him as *payable in point of honour and honeſty*, although it *could not have been recovered* from him by any courſe of law, as in payment of a debt *barred by the ſtatute of limitations*, *or contracted during his infancy*, or to the extent of principal and legal intereſt on an uſurious contract, or for money fairly loſt at play, becauſe in thoſe ſeveral caſes the defendant may *retain it with a ſafe conſcience*, though by *poſitive* law he was *barred* from recovering; it lies for money paid by *miſtake*, or on a conſideration which happens to fail, or for money got through *impoſition*, (expreſs or implied) *extortion* or *oppreſſion*, or an *undue advantage* taken of the plaintiff's ſituation, contrary to the laws made for the protection of perſons under thoſe circumſtances.

The *giſt* of this kind of action is, that the defendant, on the circumſtances of the caſe, is obliged by the ties of natural juſtice and equity to refund the money.

The court were all of opinion, that the plaintiff *might* elect to wave any demand on the *foot of the indemnity* for the *coſts* he had been put to, and *bring this action* to recover the 6 *l.* which the defendant *got and kept* from him *iniquitouſly*, and directed a rule for the *poſtea* to be delivered to the plaintiff. *Vide Bur. vol.* 2. *page* 1006.

Trinity, 30 & 31 *Geo.* 2. *Harris* v. *Huntback*.

On a *caſe* reſerved for the opinion of the court, on an action on a general *indebitatus aſſumpſit*; the defendant in his declaration laid two counts, *viz.* for money *lent and advanced* by plaintiff to the defendant at his requeſt, and for money *laid out and expended* by the ſaid plaintiff for the ſaid defendant, at his requeſt.

The queſtion before the court on this *caſe* was, if the *evidence ſupported the declaration*?

The *caſe* ſtated the defendant's note of hand, and produced as evidence in this cauſe by the plaintiff, *viz.*

December 3, 1751. then received of Mr. *H.* the ſum of 19 *l.* on behalf of my grandſon, which I promiſe to be *accountable* for on demand. Witneſs my hand, *S. H.* This note was produced by the plaintiff in ſupport of the *firſt count* in his declaration.

The evidence offered by the plaintiff in ſupport of the *ſecond count* was, that one *D.* called on the plaintiff at the requeſt of the defendant, for money to pay the workmen, which the plaintiff refuſed to pay, unleſs the defendant would ſign a receipt to him for ſuch money ſo to be advanced to the defendant as aforeſaid, which he did in the following words, *viz.*

"Mr. *H.* at the earneſt requeſt of the gardener, the workmen wanting money greatly for the work at the *Woodhouſes*, this is to certify, that it is my requeſt, that you pay to Mr. *D.* on account of Mr. *H.* for the workmen's uſe, the ſum of 15 *l.* as witneſs my hand, *S. H.*"

Note. D. the gardener gave the plaintiff a receipt for the 15 *l.*

On the trial of this cauſe a verdict was given for the plaintiff; and the point reſerved thereon for the opinion of the court was,

Whether the *evidence* offered by the plaintiff on the trial was *ſufficient* to ſupport the verdict?

The plaintiff's council *argued*, that the firſt count was for *money lent and advanced* by the plaintiff at the defendant's requeſt; and to this a note is produced by the plaintiff, under the defendant's acknowledging the receipt of the money, and promiſing to be accountable for ſuch money, which is *tantamount* to a promiſe to pay the ſame; the words, *on behalf of my grandſon*, in the body of the note, make no alteration in the ſame, there being in law no remedy againſt the infant, and therefore it is an *original*, and not a *collateral* undertaking given by the defendant to the plaintiff; and cited the following caſes in ſupport of his argument, *viz. Birkmire* v. *Darnell.* 2 *Raym. page* 1085, and *Reid* v. *Naſh*, *Michaelmas*, 24 *Geo.* 2. and *Trinity*, 24 and 25 *Geo.* 2.

To the *ſecond queſtion*, whether the other evidence offered by the plaintiff at the trial was ſufficient to ſupport the *ſecond count*.

The plaintiff's council argued, that his client could not have maintained an action againſt the infant for this money, no more than for the former, and that he refuſed to advance ſuch money till the defendant had wrote the foregoing *requeſt*, and therefore this is an *original* undertaking, that the defendant ſhall pay the ſame, it being advanced on the *account* and *credit* of the defendant.

The defendant's council *urged*, that the queſtion before the court was, how far a general *indebitatus aſſumpſit* will lie on theſe facts, and the evidence offered to ſupport the ſame, that the preſent caſe was a general *indebitatus aſſumpſit*, and that the ſame does not lie but where an action of debt will lie. See 1 *Salk.* 23. 2 *Raym.* 1034, 1035. 1 *Stra.* 680. It will not lie on a promiſſory note, nor will it on a *collateral* undertaking: in the preſent caſe the *count* is not a proper one, if the evidence given would ſupport the ſame; becauſe it cannot be conſidered as money *lent*; it is no more than evidence of a *collateral* promiſe; why will not an action lie againſt the *infant*, I think it will; if ſo, it comes exactly within the caſes of *Birkmire* v. *Darnell*, and *Reid* v. *Naſh*, before cited by the plaintiff's council.

As to the *ſecond count*, the note given by the defendant only imports a *certificate* that the money was proper to be paid, and no general *indebitatus aſſumpſit* will lie thereon, and here is no evidence given by the plaintiff of money *lent*.

The plaintiff's council, in *reply*, ſaid, a note of hand acknowledging the receipt, and promiſing to be accountable, is evidence of money lent; that it was the common practice to give notes of hand in *evidence*, on a general *indebitatus aſſumpſit*, and that the words, "on behalf of my grandſon," inſerted in the note, could make no alteration in the note. See *Thomas* v. *Biſhop. Stra. vol.* 2. *page* 955. there being no privity between Mr. *H.* and the infant, no action can be brought againſt him.

This is not a promiſe *in aid*, or as a *collateral* undertaking, but a *ſole abſolute original* promiſe, and therefore the *poſtea* ought to be delivered to the plaintiff.

Chief Juſtice *Mansfield*. The queſtion before us is, Whether there be *evidence* of a debt contracted by the defendant payable to the plaintiff?

The plaintiff's declaration contains two *counts* for different debts, and there cannot be a clearer evidence given, than that the firſt note is for the former debt: as to the *ſecond count*; here is a manſion-houſe belonging to an infant, which has a garden belonging to the ſame; it might not be *neceſſary*, (from the circumſtances of the infant) to ſupport this garden, (as it might be a *pleaſure garden)* and no action will lie againſt an infant *but* for *neceſſaries*. Here it don't appear at all, that the plaintiff could have any remedy againſt the infant.

The plaintiff might bring an *indebitatus aſſumpſit* for the debt, and give the note of hand in *evidence*, which certainly would ſupport the declaration.

This is ſaid to be a *collateral* undertaking only, but the reaſoning, about *original* or *collateral* undertakings. depends merely on want of ſufficiently defining thoſe *terms*, otherwiſe there can be no doubt about their meaning. In the preſent caſe it is clearly an *original* undertaking; the jury have *found* thoſe notes to be *ſufficient evidence* of the debt, and indeed the ſame is rather a matter of *fact* than of law.

Deniſon, Juſtice, concurred.

Surely the note is an *evidence* of money *lent*; as between the plaintiff and defendant, the ſame is certainly an *original* undertaking, and the money was paid at the defendant's *requeſt*. There appears to be no privity between the plaintiff and the infant on this tranſaction. The caſe of *Reid* v. *Naſh*, before *cited*, is in ſome reſpects like this; here is nothing like a *collateral* requeſt or promiſe, it is an original undertaking.

Foſter, Juſtice, likewiſe concurred.

The *infant* was *not liable*, and therefore it *could not* be a *collateral* undertaking. It was an *original* undertaking of the defendant's to pay the plaintiff the money.

Per curiam. Let the *poſtea* be delivered to the plaintiff. *Vide Bur. vol.* 1. 373.

Trinity, 32 & 33 *Geo.* 2. *Aſtley, Bart.* v. *Young, Eſq;*

In an action on the *caſe* brought by the plaintiff againſt the defendant for ſpeaking certain *libellous* and *defamatory* words, in an affidavit which the defendant made concerning the plaintiff: the defendant, by leave of court, pleaded double to the plaintiff's declation, *viz. not guilty* to the whole declaration, and a juſtification to the ſecond count; the plaintiff demurred generally to the defendant's plea to the *ſecond count*, and the defendant joined in demurrer.

On this demurrer being argued by council, the court were clearly of opinion, that a matter given *in evidence in a court of juſtice*, cannot be proſecuted in a *civil* action as *a libel*, though the court before whom ſuch *evidence* is given, may cenſure it.

Per curiam, unanimouſly and clearly. Judgment for the defendant. *Vide Bur. vol.* 2. *page* 807.

Michaelmas, 3 *Geo.* 3. *Bird* v. *Randal.*

On an action of treſpaſs on the *caſe*, brought by the plaintiff againſt the defendant, a verdict was given for the plaintiff, and 20 *l.* damages, *aſſeſſed*, ſubject to the opinion of the court, on the following caſe.

Case. The plaintiff and one *M. H.* were ſilkdreſſers and partners in trade, and articles of agreement were entered into between the plaintiff and one *B.* dated 25 *Auguſt*, 1760, *whereby* the ſaid *B.* covenanted with the plaintiff to ſerve him and the ſaid *M. H.* and the ſurvivor of them as a journeyman in their trade of a ſilk-dreſſer, for five years, from the date of the ſaid articles, to work at the uſual and cuſtomary hours daily, and not to diſcover the myſteries of the trade, or the ſecrets of the plaintiff and his ſaid partner: and the ſaid plaintiff covenanted to pay the ſaid *B.* weekly 20 *s.* for his work; and for the true performances of the covenants, *&c.* in the ſaid articles, each party bound himſelf to the other in the penalty of 100 *l.*

It further *ſtates*, that the ſaid *B.* accordingly entered into the ſaid ſervice under the aforeſaid articles, and continued therein till 19th *September* 1761, when the defendant knowing of the ſaid articles, *perſuaded*, *procured*, and *enticed the ſaid* B. *to leave the ſame*, which he accordingly did, and never returned again.

It further *ſtates*, that the plaintiff, in *Trinity* vacation 1761, and before the commencement of this action againſt the defendant, brought an action of debt againſt the ſaid *B.* for the penalty of the articles, *for departing*, *&c.* and obtained a verdict and judgment againſt the ſaid *B.* in the ſaid action, and recovered the ſaid penalty, with coſts; but the ſaid debt and coſts ſo recovered were not *actually paid* to the plaintiff by the ſaid *B.* till the 29th *March* 1762, which was after the preſent action was *commenced*, but before the ſame came on to be tried.

The preſent action is brought by the ſame plaintiff againſt the preſent defendant for the *enticing* and *ſeducing* the ſaid *B.* out of the plaintiff's ſervice, and the queſtion to be conſidered by the court was,

"Whether the preſent action be maintainable
"or not under the preſent circumſtances of this
"caſe?"

The plaintiff's council obſerved, that the queſtion is, Whether the plaintiff, who has already recovered the penalty againſt the *ſervant*, can bring this action againſt the *ſeducer*? He allowed, that if the plaintiff had once received a *full* ſatisfaction for the *ſame* thing, he could not recover a ſecond; and alſo, that a recovery of a penalty on a deed is a full *bar* to any action to be brought on the ſaid deed; but ſaid it muſt be allowed to him, that the party to whom the deed is made may bring either *covenant* or *debt* at his election; and that a jury, in an action of *covenant*, even on ſuch a deed where there is a penalty, are not *confined* to give damages *within* the penalty, but may go beyond it.

He repeated his obſervation, that a perſon who has recovered a *full* and *compleat* ſatisfaction from one man ſhall not recover the ſame again againſt *another* for the *ſame* thing, as on *indorſed notes*, or on *treſpaſſes* committed by ſeveral perſons, or on a *reſcue* and *eſcape*, or the penalty on breach of a *covenant* in a leaſe, or in an action of *waſte*.

The council denied that in this caſe there had been *full* ſatisfaction or recompence for the ſame thing.

The ſeducing of a covenant ſervant is undoubtedly a good cauſe of action againſt the *ſeducer*, and it ariſes *ex delicto*, *ex maleficio* i. e. *from the offence*, *from the evil doing*, but the ground of action againſt the ſervant himſelf ariſes *ex contractu* i. e. *from the contract*.

Therefore a recovery in an action for a breach of *contract* againſt one perſon cannot be a *bar* to an action againſt another for a *tort*.

Bars muſt be reciprocal, the ſervant in a ſubſequent action againſt him could not have made uſe of a recovery againſt the *ſeducer*, neither ought the *ſeducer* to bring this action againſt the ſervant. It is not a full ſatisfaction according to the circumſtances of the caſe.

If an offender in *perjury* be puniſhed, that ſhall not hinder the *ſuborner* from being puniſhed too.

The action againſt the ſervant, and that againſt the ſeducer are *on a different ground*, and the recovery in one action cannot be a *bar* to the other.

At the time of bringing this action, there was *no actual ſatisfaction* had, for though there was a judgment, yet there was no execution taken out thereon, and therefore that *matter* ought to have been pleaded; what has ariſen ſince the commencement of the action could not be given in evidence in *bar* of ſuch action, though it might in *mitigation of damages*, and they have had the benefit of it in *mitigation* of damages.

It has been obſerved, that this was *a damage with an injury*, which I deny, for *damages* were here proved, and if they had not, the law would *imply* an injury, whether it could have been directly proved or not.

It was ſaid, that the ſervant was *only liable to the penalty of* 100 *l.* which when paid, any man might hire him. To which I anſwer he could not, while ſuch ſervant was under the unexpired contract with a former maſter.

The defendant's council *argued*, that the recovery againſt *B.* the ſervant was a *full* and *complete* ſatisfaction for the injury done to the plaintiff, and he has made his election to bring his action againſt *B.* for the penalty, which is the ſtipulated *amount* of the damages for the breach of the contract, and cannot be exceeded. It is like a *nomine pœnæ* i. e. *in the name of a penalty* for plowing up *ſwerd* land, and *B.* could not have been relieved againſt the penalty recovered, neither could the plaintiff have any further ſatisfaction, he having already received the ſatisfaction ſtipulated, and cannot ſhew any further damage, and cited the following authorities in ſupport thereof. *Hob.* 66. *Cocke* v. *Jennor*, *Cro. Eliz.* 237, and *Hutton* 98.

On the reaſons offered by the plaintiff's council, the plaintiff might recover againſt ſeveral perſons who might ſucceſſively have employed *B.*

It was not neceſſary to plead to this action; any thing may be given in evidence, which ſhews that there is no cauſe of action in the plaintiff.

The plaintiff's council in reply agreed, that as between *maſter* and *ſervant*, the plaintiff has received ſatisfaction from his ſervant, and ſaid, he ſuppoſed that the maſter could not proceed further againſt him on the covenant at large, after having made his election to take the penalty, but this is not ſatisfaction for the wrong done to the maſter by the defendant.

He denied the caſe of *Cocke* v. *Jennor*, cited by the defendant's council, and ſaid in the preſent caſe there was *no actual* ſatisfaction received at the time when this action was commenced, and the *mere recovery* is not alone and of itſelf a *bar* to this action.

The preſent caſe differs eſſentially from all thoſe where the *ſame thing* has been recovered, which is the caſe of *joint torts* and *joint contracts*; there it is the ſame individual injury, the very ſame thing for which the damages are recovered. The plaintiff therefore ought not to recover twice, tho' he proceed by a different *ſpecies* of action; in this caſe it is the *ſeduction itſelf* that is the *giſt* of the action, and not the conſequence of the *ſeduction*, the *damage* ariſes out of the *nature* of the action, the circumſtance of the caſe *implies* a damage, though perhaps no damage can poſſibly be proved, or even though the ſervant was a very bad one; the conſequential damages may be more or leſs according to the circumſtances of the caſe, but *ſome* damages there *muſt* be, however ſmall.

As to the objection made by the plaintiff's council, *viz.* "That on the principles above laid down on behalf of the plaintiff, the plaintiff might receive *ſeveral* ſatisfactions from ſeveral perſons who might employ the ſervant during the unexpired term." The ready anſwer is, that future employers of the ſervant would not be liable, becauſe they would not take ſuch ſervant out of the plaintiff's *ſervice*, but out of *another perſon's*, but *this* defendant ſeduced him out of the plaintiff's actual ſervice.

The plaintiff's council did not deny the *principle* and *doctrine* of the caſes cited by the defendant's council from *Hutton* and *Cro. Eliz.* but ſaid they were not applicable to the preſent matter.

In this caſe there was a good cauſe of action at the time when the action was commenced, the plaintiff having not then received *any thing* from the ſervant; and the *mere recovery* could not be given in evidence on the *general iſſue*.

The court took time to conſider this caſe, when their opinion was delivered by the Chief Juſtice.

Lord *Mansfield.* It does not appear on the caſe as ſtated, that the plaintiff would be under any difficulty of receiving the money recovered from *B.*

This matter turned on two points.

1ſt. Whether the plaintiff could have maintained this action againſt the defendant for ſeducing his ſervant, if the 100 *l. penalty* before recovered by him againſt the ſervant himſelf, had been *actually received* by him before the commencement of the preſent action againſt the ſeducer.

2dly. If it could not, then whether his *having received it ſubſequent to* the commencement of the preſent action, be ſuch an act as will vary the caſe, ſo as to enable him to *maintain* his preſent action, which he could not have done if the actual receipt had been *prior* to the commencement of ſuch action.

In the firſt place we ſhall conſider the nature of *theſe articles*, and of all others with *penalties* annexed to the breach thereof.

In every caſe of articles *with a penalty*, the party who ſuſtains damage may, if he thinks proper, have an *equitable* relief, ſo often and ſo far as he ſuſtains an injury: he may recover *partial* damages on *partial* breaches, proportionable to the reſpective injuries done him, as often as the ſame were repeated. The maſter in the preſent caſe might have done the ſame to the ſervant; had he left his ſervice at different times, for a week, a fortnight, &c. at each going away, and had every time returned again to his ſervice, he might on this *equitable* remedy have recovered *partial* damages againſt ſuch ſervant, for each breach of the agreement, in proportion to its degree, but *not beyond it*. For *civil* injuries, a man ought not, in point of juſtice, to recover more than in proportion to what he has *actually* ſuffered.

There is a further election given to the party injured, *viz.* to proceed by the *ſummum jus*, i. e. by a *rigorous* remedy *for the penalty*, which remedy may be taken for a very *ſlight* breach, and includes the idea of *more* than the damage actually ſuſtained, certainly not of *leſs*.

This *remedy* cannot be *repeated*, for the penalty extends to the utmoſt farthing that can ever be recovered for *all* and *every* of the breaches, and when once the party has got ſatisfaction, there is an *end* of the *articles*, and conſequently of the remedy thereon.

On the action brought by the maſter againſt his ſervant, it was agreed by the plaintiff's council, “ that after the penalty had been ſo recovered againſt the ſervant, the *ſervant himſelf* was entirely at liberty to go into whoſe ſervice he pleaſed, and the maſter was freed from the articles with reſpect to his ſervant, there being an end of the contract as between them two.”

As to the *ſeducer*, it is an *actual injury* done to the maſter, that gives him his action againſt the *ſeducer*, the attempt to *ſeduce* without an attendant damage, would not be an injury, and conſequently would not be ſufficient to bring an action.

In this caſe there is no injury done the maſter, for he has *recovered* and *received* a *compleat* ſatisfaction and more, and therefore the ground of action is at an end.

A *penalty* in its ſignification includes more than the real damages actually ſuſtained; if the ſeducer, or ſecond maſter who employs the ſervant, after the ſervant has paid the penalty, were to be ſubject to damages in an action brought by the firſt maſter, this would ultimately *fall on the ſervant*, and be in effect an addition to the penalty; for the ſecond will pay the ſervant for his ſervice, no more than he eſtimates the ſame to be worth to him; and if he muſt pay any given ſum to the firſt maſter for damages, for entertaining his ſervant, he will make his bargain with the ſervant accordingly.

There is no pretence for the plaintiff to maintain his action on the *firſt point*, *viz.* on a ſuppoſition of his having *actually received the penalty* of the ſervant *before* the commencement of this action againſt the ſecond maſter, as the ſeducer of his ſervant.

Second point, Taking this matter as it really was, *viz.* that the plaintiff had not actually received the *penalty* of the ſervant till after the commencement of the preſent action, how will that vary the caſe.

The argument offered by the defendant's council from caſes on *joint treſpaſſes* and *joint contracts*, have been ſufficiently anſwered by the plaintiff's council; there the recovery is againſt them all for the ſame thing, and there is no analogy between thoſe caſes and this, beſides there is an eſſential difference between caſes on *torts*, and actions on the *caſe*. Theſe are actions *ſtricti juris* i. e. *of ſtrict right*, and here ſuch former recovery, releaſe, or ſatisfaction cannot be given in evidence, but muſt be *pleaded*. An action on the *caſe* is founded on the mere juſtice and conſcience of the plaintiff's caſe, and is in nature of a bill in equity, and in effect really is ſo; ſo that a former recovery, releaſe or ſatisfaction need not be pleaded, but may be given in evidence, for what will in equity and conſcience according to the circumſtances of the caſe *bar* the plaintiff's recovery, may in an action on the *caſe* be given in *evidence* for the defendant, for the plaintiff muſt recover on the juſtice and conſcience of his caſe, and on that only.

In this caſe the penalty recovered by the plaintiff from his ſervant, was *actually* received by him before the preſent action was tried; the plaintiff might have received it when he would, if he choſe to lie by till he had commenced his action againſt a third perſon, who would not otherwiſe have been liable to any action, and then receives the penalty of the firſt defendant, and proceeds in his action to recover it againſt the ſecond, this is *againſt conſcience*. In ſuch an action as this (an action of equity and not a formed action *ſtricti juris*) it is ſufficient if it appears on *evidence* that the plaintiff ought, not in conſcience to recover it.

If he had actually recovered it thro' the ignorance of the defendant, that the firſt penalty was paid, an action on the *caſe* would lie againſt him *for money had and received*, as in the caſe of *Moſes* v. *Macfarlan*, *page* 1005.

The plaintiff has received from the ſervant already, more than *ample* ſatisfaction for the injury done him. He cannot therefore afterwards proceed againſt *any other* perſon for a *further* ſatisfaction.

Per curiam. Let the *poſtea* be delivered to the defendant. *Vide Bur. vol.* 3. *page* 1345.

Michaelmas, 3 Geo 3. *Price* v. *Neale*.

In an action on the *caſe* brought by the plaintiff againſt the defendant, whereby the plaintiff declares, that the defendant was indebted to him in 80 *l.* for money had and received to his uſe, and laid his damage to 100 *l.* the defendant pleaded the *general iſſue*, and iſſue was joined thereon.

It was proved on the trial, that a bill was drawn as follows:

“ *Leiceſter*, 22 *November*, 1760, Sir, ſix weeks
“ after date, pay to Mr. *R. Ruding*, or order,
“ 40 *l.* value received for *T. Ploughfor*; as ad-
“ ſed by Sir, yours, *&c. B. Button.* Di-
“ rected to Mr. *T. Price* in *Buſh-lane*, *Cannon-*
“ *ſtreet*, *London.*
“ This bill was indorſed, *R. Ruding*, *A. Top-*
“ *ham*, *Hammond* and *Laroche*. Received the
“ contents, *J. Watſon*, and ſon. Witneſs,
“ *E. Neale.*”

That the bill was indorſed to the defendant for a *valuable conſideration*, and notice of the bill was left at the plaintiff's houſe on the day the ſame became due, on which the plaintiff ſent his ſervant to the defendant to pay him the money, and take up the ſame, which was done.

That another bill was drawn as follows:

“ *Leiceſter*, 1 *February*, 1761, *Sir*, ſix weeks after
“ date, pay to Mr. *R. Ruding* or order, 40 *l.*
“ value received for Mr. *T. Ploughfor*; as ad-
“ viſed by Sir, yours, *&c. B. Button.* Directed
“ to Mr. *J. Price*, *Buſh-lane*, *Cannon-ſtreet*,
“ *London.*”
“ This bill was indorſed, *R. Ruding*, *J. Watſon*
“ and ſon. Witneſs, *Smith*, *Wright* and Co.”

That the plaintiff accepted this bill by writing on it *accepted J. Price*, and the plaintiff wrote on the back of ſuch bill, Meſſrs. *Freame* and *Barclay*, pray pay 40 *l.* for *J. Price*.

That this bill being ſo accepted, was indorſed to the defendant for a valuable conſideration, and left at his bankers for payment, and was paid by the plaintiff's order.

Thoſe bills were forged by one *Lee*, who has been ſince hanged for forgery.

The defendant acted innocently, and *bona fide*, without the leaſt privity or ſuſpicion of the ſaid forgeries, or of either of them, and paid the whole value thereof.

The jury found a verdict for the plaintiff, and aſſeſſed damages 80 *l.* and coſts 40 *s.* ſubject to the opinion of the court on this queſtion,

“ Whether the plaintiff, under the circumſtances
“ of this caſe, can *recover back* from the defen-
“ dant the money he had paid on the ſaid bills, or ei-
“ ther of them?”

The plaintiff's council *argued*, that he ought to recover back the money in this action, as it was paid by him through *miſtake*, on a ſuppoſition that thoſe were genuine bills; and as he could never recover it againſt the *drawer*, becauſe in reality no drawer exiſted; nor againſt the perſon who forged the bill, becauſe he is hanged.

He ſaid, that the forgery of the bill was not a matter of belief only, but had been actually proved, and that the perſon who forged the ſame had been executed for the crime.

Thus the caſe ſtood on the accepted bill, but that his client's caſe was much ſtronger on the other bill, which was not accepted, for it did not ſtate that the bill was accepted before it was negociated; on the contrary, the conſideration for it was paid by the defendant before the plaintiff had ſeen it, ſo that the defendant took it on the credit of the indorſers, and not on the credit of the plaintiff; and therefore the caſe of *Jenys* v. *Fowler* at *Guildhall* before Lord *Raymond*, *viz.* that actual proof of the forgery would be no excuſe, will not hold in this caſe.

The defendants's council *argued*, that the plaintiff ought not to recover back the money from the defendant, for he denied it to be a payment by *miſtake*, and inſiſted that it was owing to the negligence of the plaintiff, who ſhould have been ſatisfied whether the bill was really drawn on him by *Sutton*; that in this caſe there was no fraud in the defendant, who has acted *innocently*, and *bona fide*, without the leaſt privity or ſuſpicion of the forgery, and appears to have paid the whole value for the bills.

Lord *Mansfield* obſerved that this was one of thoſe caſes that could not be made plainer by argument.

He ſaid it was an action on the *caſe* for money had and received to the plaintiff's uſe, in which the plaintiff cannot recover the money, unleſs it be *againſt conſcience* in the defendant to retain it, for that theſe actions are always conſtrued *liberally*.

It can never be conſidered *unconſcientious* in the defendant to retain this money, when he has once received it on a bill of exchange, indorſed to him for a fair and valuable conſideration, which he had *bona fide* paid without the leaſt privity or *ſuſpicion* of a forgery.

In this caſe there was no *fraud*, no *wrong*. It was incumbent on the plaintiff to be ſatisfied that the bill drawn on him was the drawer's hand before he accepted or paid it, but it was not incumbent on the defendant to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn on him, he ſends his ſervant to pay it, and take it up: the other bill he actually accepts; after which acceptance the defendant innocently and *bona fide* diſcounts the ſame. The plaintiff lies by for a conſiderable time after he had paid theſe bills, and then found out that they were forged, and the perſon who forged the ſame was hanged: he made no objection to them at the time of payment; if there was any neglect it was on the ſide of the plaintiff. The defendant had actually encouragement from the plaintiff himſelf for negociating the ſecond bill, from the plaintiff's having without any ſcruple paid the firſt; and he paid the whole value *bona fide*. This is a misfortune which has happened without the defendant's *fault*. If there was no *neglect* in the plaintiff, yet there is no reaſon to transfer the loſs from one *innocent man* to another. In the preſent caſe, if the fault was any where, it certainly was in the plaintiff, and not in the defendant.

Per curiam. Let the *poſtea* be delivered to the defendant. *Vide Bur. vol.* 3. *page* 1354.

Addition.

Hilary, 8 *W*. 3. *The King* v. *Biſhop of Cheſter*, *&* *al'*.

On a writ of *error* brought from *C. B.* to remove a record of *quare impedit* againſt the defendants, for hindering the plaintiff to preſent to the church of *Bedall*, two of the judges of this court were of opinion againſt the judgment in the *C. B.* for the variance between the pleading and the letters patents; the defendant having ſet forth a grant made to *William Theekſtone, then Eſquire, afterwards Knight*; and on *oyer* of the letters patent, it appeared to be made to *William Theakſtone Knight*.

Now, he could not be a Knight and an Eſquire at the ſame time; Knight is a word of dignity, and part of his name, but Eſquire is not; and ſo are all the old authorities.

A biſhop entered into a bond; the obligee was then an Eſquire; but afterwards knighted. An action of debt being brought againſt the biſhop by the executor of the obligee, as executor of ſuch a one, Eſquire, deceaſed, which was according to the bond. *Rickhill*, Chief Juſtice of the Common Pleas, gave judgment, that the writ ſhould abate, becauſe he was not named Knight. *Caſes in Law and Equity*, 207, 208.

So, where the heir apparent of the Earl of *Shrewſbury* brought an action by the name of *John Talbot*, Knight, his father dying pending the ſuit. The queſtion was, Whether the writ ſhould abate, becauſe the plaintiff was then an Earl? Held, that it ſhould not, for this reaſon, *viz.* becauſe his dignity deſcended to him by the act of God; but if it had come to him by the act of the King, it had been otherwiſe. *Bro. tit. Noſme*, 61.

It is the ſame where there is an addition of Knight, when the perſon is not knighted; and where it is omitted, when he is really ſo: for in both caſes it is void in pleading grants, though not in a conveyance, becauſe Knight being made part of the name of the grantee, when in truth he was not ſo, he cannot be intended to be the ſame perſon mentioned in the grant. *Bro. Grants*, 50.

As to Lord *Eure's* caſe, who had a grant made to him by the name of *Ralph Eure*, Knight, Lord *Eure*; when he was not at that time a Knight; it is true, it was held good, becauſe *the perſon is ſufficiently aſcertained* by the addition of Lord *Eure*, there being but one Lord of that name in *England*: and therefore the addition of Knight, though falſe, ſhall not vitiate the true deſcription of the perſon. 2 *Rol. Abr.* 198.

So if a grant ſhould be made to *John*, Biſhop of *Wincheſter*, when his name is *Peter*, the grant is good; becauſe there is but one Biſhop of *Wincheſter*, and therefore he is ſufficiently deſcribed by that addition. *Idem. Vide Mod. Rep. vol.* 5. *page* 302.

Trinity, 10 *W*. 3. *The King* v. *Robert Fielding*.

Robert F. being attainted by outlawry for high treaſon, by the name of *R. F.* Eſq; in term had his pardon allowed, and now brought a writ of *error*; and aſſigned for error, that at the time, and before, and after the finding of the indictment, he was known by the name of *Robert F.* yeoman, and not eſquire, as deſcribed in the indictment. *Holt* ſaid, it would have been a better aſſignment to have recited the *ſtat.* 1 *H.* 5. *c.* 15. but however, it may be ſufficient, that being a general law, and concerning the King, the court would take notice of it. But the doubt was, whether he had not *eſtopped* himſelf from taking advantage of that miſtake, by his manner of coming in and aſſigning it, which was, *the aforeſaid* R. F. *comes and ſays, that he is the perſon mentioned in the record of the indictment*; query therefore whether the aforeſaid did not admit the addition as in the indictment. The plaintiff in error's council ſaid, that it admitted no more than the identity of the perſon, and not the truth of the addition, the *falſity* of which, as well as the *omiſſion*, is *error*.

Holt, Chief Juſtice. The true anſwer is, that there could be no *eſtoppel*; for the outlawry was returned *Hilary*, 1 *W. & M.* at which time he ſtood indicted by a wrong addition; but not rendering himſelf till long after, he had no opportunity to plead it, but could only uſe the King's pardon, or ſay he was not the perſon mentioned in the indictment, eſpecially it being confeſſed by the Attorney General. *Vide Mod. Rep. vol.* 12. *p.* 199.

Trinity, 10 *W.* 3. *The King* v. *Sir Henry Bond*, *Bart.* Error.

Sir *H. Bond* brought a writ of *error* to reverſe an outlawry for high treaſon, and aſſigned for error, that whereas the ſtatute 1 *H.* 5. *c.* 5. enacts, that in every indictment, *&c.* the true addition of the party's profeſſion, faculty, myſtery, eſtate, degree, and place of abode ſhould be mentioned, wherefore in the indictment he not being named baronet, nor having other ſufficient addition, *in hoc eſt erratum*, i. e. *is an error in this point*, and the ſame as to the place of his abode; he aſſigned alſo another error in the proceſs of outlawry, *viz.* the want of a *capias*, which the Attorney General confeſſed; whereon his outlawry was reverſed; and being arraigned on the indictment, *Holt* ſaid, that Sir *H. B.* had his election, either to take advantage of the exception to the indictment, for want of addition, or to wave it, and plead the King's pardon; for the indictment is not to be quaſhed by the ſtatute, except the priſoner takes advantage of it; and accordingly he waved his exception, and pleaded his pardon. *Vide Mod. Rep. vol.* 12. *page* 198.

Michaelmas, 10 *W.* 3. *Martin* v. *Gell*.

In an action on the *caſe* for goods ſold, the defendant pleaded that he was not an *Eſquire*, as called in the declaration, but ſimply a *merchant*. On demurrer, judgment was given for the defendant to anſwer over; becauſe the ſtatute of *additions* extends only to proceſs where outlawry lies, and outlawry does not lie on a bill of *Middleſex*. *Vide Mod. Rep. vol.* 12. *page* 211.

Michaelmas, 10 *W*. 3. *White* v. *Mullony.*

A profeſſor of mathematics being offered as bail, by the deſcription of *gentleman*, Chief Juſtice *Holt* held him to be *a gentleman* by his profeſſion. *Vide Mod. Rep. vol.* 12. *page* 248.

Michaelmas, 1 *Ann.* *Bennet* v. *Purcell.*

In an action on the *caſe* on ſeveral promiſes brought againſt the defendant by the name of *Tobias Purcell, Eſquire*; it was pleaded in abatement, that the *Tobias Purcell, againſt whom the bill is exhibited*, is a *gentleman*, and not an eſquire. On demurrer, the council for the defendant urged, that the plaintiff ought to have replied poſitively that the defendant was an *eſquire*, and not a gentleman; and that the alledging it with a *habitus et reputatus fuit*, i. e. *accounted and reputed*, was not good, becauſe the *addition* ought to be *a true* addition: And *Powell*, Juſtice, inclined to that opinion. But Chief Juſtice *Holt* held, that in theſe caſes the *addition* was only a deſcription of the perſon; and common reputation was ſufficient for it, the ſuit being by bill: but it would have been otherwiſe on an original, on which proceſs of outlawry lies; the *ſtat.* 1 *H*. 5. requiring an addition in ſuch caſes: accordingly the defendant was adjudged to anſwer over. *Vide Raym. vol.* 11. *page* 849.

Eaſter, 2 *Ann.* *Lapeyre* v. *Sir John Germain, Knight and Baronet, and the Dutcheſs of Norfolk.*

For this caſe ſee Amendment.

Trinity, 2 *Ann.* *Naſh* v. *Batterſby.*

In *debt* on bond, the plaintiff declared by the name of *Edward Naſh, gentleman*; it was pleaded in abatement that the plaintiff is no gentleman; to which the plaintiff demurred, which is ill, becauſe it amounts to a confeſſion that he is no gentleman, and then not the ſame perſon named in the declaration; he ought to have replied, that he is a gentleman. *Adjudged*, that the writ ſhould abate. *Vide Raym. vol.* 2. *p.* 986.

Michaelmas, 2 *Ann.* *The Queen* v. *Hoſkins.*

A ſervant being indicted for a treſpaſs committed by him, by his maſter's command, by the name of *A. B.* ſervant to *J. S.* exception was taken, that the word *ſervant* was no addition.

Per Chief Juſtice *Holt*. *Servant to J. S.* is a good addition, and as certain as *gentleman. Vide Mod. Rep. vol.* 6. *page* 58.

Michaelmas, 2 *Ann.* *Lord Banbury* v. *Wood.*

In a writ of *replevin*, want of addition to the *pluries* being pleaded in abatement, it was adjudged by the court, that an addition is unneceſſary to any *viſcontiel* writ. *Vide Mod. Rep. vol.* 6. *page* 85.

Trinity, 4 *Ann.* *The Queen* v. *Franklin.*

The defendant being indicted for uſing the trade of a ſempſtreſs, not having ſerved an apprenticeſhip to it, *&c.* Judge *Powell*, took an exception to the indictment, that the defendant was called *labourer*, which he ſaid was not a *good addition* for a woman. *Vide Raym. vol.* 11. *p.* 1179.

Hilary, 1 *Geo.* *Nutton* v. *Crow.* Error.

The *writ of error* being directed to *Thomas Lord Trevor, Chief Juſtice of our Bench*; and the return, *the anſwer of Sir Thomas Trevor, Knight, Chief Juſtice, &c. pleas inrolled before* Sir *Thomas Trevor*, Knight, *&c.* the court was moved to quaſh the writ:

Becauſe Sir *Thomas Trevor*, Knight, who returned the record, could not poſſibly be the ſame perſon with *Thomas* Lord *Trevor*, to whom the writ was directed; and in ſupport of this objection, *Yelv.* 211. *Cro. Car.* 371. *Dyer*, 300. and 2 *Cro.* 341. were cited; and the defendant in error's council obſerved, if it be objected that there is but one Chief Juſtice of *C. B.* that a *writ of error*, cannot be directed to the Chief Juſtice by his name of office, but by his natural name: becauſe, if no return is made to the writ of error, an *alias* iſſues, then a *pluries*, and afterwards an attachment, which muſt be directed to him by his natural name; and the caſe is ſtronger here, becauſe the goods only, and not the perſon, of a peer, are liable to an attachment.

The council for the plaintiff in error, in oppoſition to the objection, cited *Latch.* 161. where a commiſſion of *niſi prius* being directed to *Francis Harvey, Eſq; one of the juſtices of the Lord the King, of the Bench*; the return was, that the trial was heard before Sir *Francis Harvey, Knight*, one of the juſtices, *&c.* yet held well, 1ſt. Becauſe he might be an *Eſquire* at the time when the commiſſion iſſued, and a *Knight* at the time of the trial. 2dly. Becauſe otherwiſe, all the trials of the circuit would be overturned; and inſiſted that Lord *Delaware's* caſe, *Dyer*, 300. was entirely determined on the pleading. He allowed that knight and eſquire, and knight and baronet, could not be one and the ſame perſon, as determined 38 *H*. 6. and 1 *W. Jones*, 346. but that *B. knight* and *B. lord* might be one and the ſame perſon; he cited the regiſter, 287. *b.* where the ſame perſon in the ſame writ is called in the beginning of the writ *knight*, and in the latter end thereof *baron*; and alſo *Savill's* caſe, *Cro. Car.* 205.

Per curiam. The *writ of error* muſt be quaſhed; names are for the diſtinguiſhing of perſons; ſuch a one *knight*, and ſuch a one *lord*, are two different names, and therefore to be intended different perſons. In records, and legal proceedings, the whole name muſt be ſet forth, and therefore Sir *Thomas Trevor* knight, here in the *pleas*, muſt be intended a Sir *Thomas Trevor* knight, who was no lord.

As to the caſes cited, the true diſtinction is, that where this alteration has been made in the addition, and held good, both the additions have become conſiſtent, from the difference of the times, ſince the perſon who was an *eſquire* at the time the writ was directed might be a *knight* at the return; and thus all thoſe *caſes* may remain good authorities.

The *regiſter* is nothing to the purpoſe; for the writ is only a direction that the perſon who, at the commencement of the action, was a *knight*, has now become a *peer*, and that the proceſs ſhould hereafter be againſt him as a peer; it does not import that the ſame perſon was at the ſame time both peer and knight, (though that be true.)

In anſwer to the objection, that the office aſcertains the perſon; there being but one Chief Juſtice of *C. B.* we muſt not judge by our own knowledge, or that of any other perſon, but by the record; beſides, the caſe of *Fleming* is a full anſwer to this argument.

The caſe of *Rider* v. *Broderick* being of a ſimilar nature, was adjudged in the ſame manner: and afterwards in this ſame term two other writs of *error*, *viz. Fuller* v. *Davis*, and *Alexander* v. *Symonds*, were quaſhed for the very ſame reaſon. *Vide Mod. Rep. vol.* 10. *page* 284.

Michaelmas, 2 *Geo.* 2. *Smith* v. *Maſon.*

The defendant was ſued by the addition of *gentleman*; and pleaded in abatement that he was a merchant, and not a gentleman. On demurrer, the court ordered the defendant *to anſwer over*; for the plaintiff has his election to ſue him either by his name of degree or myſtery, and this writ being brought by the addition of his degree he ought to have ſhewn what degree he was of, that the plaintiff might have a better writ. The like point was determined in *Trin.* 8 *Geo. Maſon* v. *Ruſſel*, where the defendant being ſued as a *yeoman*, he pleaded that he was a *horner*, and traverſed that he was a *yeoman*, and the ſame judgment given. Juſtice *Eyre* was of opinion, the defendant ought to have given the plaintiff a better writ in the *ſame ſpecies of addition*, but *Pratt*, C. J. doubted whether it was neceſſary to be in the *ſame* ſpecies. *Mod. Rep. vol.* 8. *p.* 11. The ſame point adjudged *Trin.* 9 *Geo. Horſepoole* v. *Harriſon. Vide Raym. vol.* 11 *p.* 1541.

Hilary, 5 *Geo.* 2. *Cortiſos* v. *Munoz.*

The defendant was ſued by *original* with the addition of *late of London, merchant*, to which original the defendant pleaded that for four years before he was reſident at *Whitechapel*, in *Middleſex*; and traverſed that at the time of the writ, *or then late, or ſoon after* he was of *London*, and made an affidavit that the contents of his plea were true, and *Theloal's* Digeſt *lib.* 6. was cited in maintenance of it.

On motion this plea was ſet aſide for by ſtat. 1 *H.* 5. *cap.* 5. the plaintiff has his election to name him of the place he was reſident in. *Vide Strange, vol.* 2. *p.* 924.

The following old caſes are cited by Salk. vol. 3. *p.* 20.

An addition after the *alias dictus* i. e. *otherwiſe called*, is ill; as for inſtance, where the indictment was againſt *W. R. otherwiſe called W. R. of H.* this being deemed no addition. 1 *Bulſt.* 296.

Thus where the precipe was directed to *Richard Joyner, citizen and baker, otherwiſe called Richard Joyner, of London, Eſq*; it was adjudged, that without the *alias dictus*, there was no addition of the vill; and that if the party is not ſufficiently named in the firſt part of the writ, the *alias* cannot aid or help it, becauſe it is only to make the writ agree with the deed, but is not material, being neither anſwerable, traverſable, or iſſuable. 2 *Cro.* 183.

And *per Holt*, Chief Juſtice, if *W. R.* of *Wilts*, commits felony at *Weſtminſter*, he is always indicted the name of *W. R.* of *Weſtminſter*, and the practice being always ſo, this may be properly ſaid to be his addition. *Vide Noy* 32. An action on *debt* was brought againſt *W. R.* yeoman, otherwiſe called *W. R.* of *H.* ſon and heir of *R. R.* and thus charged him as his heir, adjudged ill, becauſe the writ doth not name him *heir* in the premiſes, but in the *alias dictus.* 2 *Leon.* 183.

In *treſpaſs* againſt *W. R.* of *H.* chandler, the defendant pleaded in abatement, that he was a gentleman; on a demurrer to this plea, it was adjudged ill, becauſe he did not deny that he was a *chandler*; and if a gentleman exerciſes a trade, he may be called by the name of his trade, though he is a gentleman. *Cro. Eliz.* 334.

Amendment.

Hilary, 2 *W.* & *M.* *Chettle* v. *Lees.*

The plaintiff obtained a verdict, and the judgment was entered with a *miſericordia*, i. e. *in mercy*, inſtead of a *capiatur*, i. e. *may be taken.* The defendant's council moved to arreſt this judgment, becauſe it was an error not amendable by *ſtat.* 8 *Hen.* 6. for that only helps the miſpriſion of clerks in entries of judgments; but this is the fault of the court in giving judgment, and therefore in an *aſſumpſit*, where judgment was againſt the defendant; the entry was, that the plaintiff ſhould recover 100 *l.* aſſeſſed by the jury, and 5 *l.* *adjudged for his increaſe of coſts by the jury*, when it ſhould have been *by the court.* This was held not amendable.

So in *debt* againſt an executor, the word *taken* was entered inſtead of *mercy*, and the ſame was held not amendable.

The plaintiff's council *argued*, that in former times the courts were ſtrict in amending, but now, ſince there are ſo many ſtatutes of *jeofailes*, the judges have thought fit to amend any thing that may help and ſupport a judgment fairly obtained; the judgments being their own acts.

If a judgment be for the defendant on a demurrer, and the entry is, that on ſuch a day *the aforeſaid plaintiff being ſolemnly called, came not, &c.* which is the entry of a judgment on a *nonſuit*, and not on a demurrer; yet this is amendable.

So where judgment againſt the plaintiff, and there were ſeveral defendants, the entry was, that the plaintiff *take nothing by his writ*, and *that the defendants go hence without a day*, was wholly left out, but it was amended.

Amendments have been made on this very point, where, on a writ of *error*, on a judgment in *dower*, the record certified was, that the defendant was *in mercy*, who being in that caſe an infant, and appearing by guardian, ought not to be amerced, and therefore it was amended, and made, *and nothing in mercy, becauſe an infant.*

Per curiam. This is now remedied by *ſtat.* 16 and 17 *Car.* 2. *cap.* 8. which *enacts*, that judgment ſhall not be ſtayed after verdict for want of *mercy*, or the word *taken. Vide Mod. Rep. vol.* 4. *p.* 6.

Michaelmas, 4 *W.* & *Mary.* *Hoyle* v. *Pitt.*

On an appeal of murder, it was moved, that the appellee had pleaded a conviction of manſlaughter at the gaol-delivery at the *Old Baily*, and that he was allowed his clergy; but not ſhewing by what authority the court was held, that therefore the plea might be amended; it being before iſſue joined, or demurrer.

The court doubted whether this could be done by law, for the *appellant* could not *amend*, and therefore there was no reaſon why the *appellee* ſhould have that liberty.

In the preſent caſe, if you amend, you make a new roll, it is not like other caſes of amendments, where all is in *paper*, and warranted by the uſage of the court, for this is all on the plea roll.

No ſtatute extends to amendments on either ſide in an *appeal*, and it is not warranted by the courſe of the court. *Vide Mod. Rep. vol.* 4. *page* 158.

Hilary, 4 & 5 *W.* & *M.* *Patiſon* v. *Milton.*

The declaration ran thus: *W. P. complains of* W. M. *in cuſtody of the Marſhal of the* Marſhalſea, &c. *for that to wit, that* W. P. (inſtead of *W. M.*) *was indebted to* W. P. &c.

After verdict for the plaintiff, it was moved that it might be amended, as it was a miſtake of the clerk to make the plaintiff to be indebted to himſelf; and the court ordered that it ſhould be amended accordingly, without the help of the ſtatute; as where an action on the *caſe* was brought againſt an executor on the promiſe of the teſtator, who pleaded thereto *non aſſumpſit*, and ſaid nothing as to any promiſe of the teſtator; this was held to be good after verdict. *Vide Mod. Rep. vol.* 4. *page* 162.

Eaſter, 5 *W.* 3. *Anonymous.*

When a declaration becomes engroſſed on parchment, the court can mend no farther than is allowable by the ſtatutes of amendments, becauſe it is then a record; but while it is in paper the court may amend at pleaſure; being not within the ſtatutes of amendments. *Salk. vol.* 1. *p.* 47.

Michaelmas, 5 *W.* & *M.* *Dighton* v. *Granvil.*

In this cauſe a judgment was obtained in the reign of K. *James* 2d, in an action commenced in the reign of King *Charles* the ſecond, and *debt* was brought on the judgment in this court, after a writ of *error* allowed; which writ was, viz. *in the record and writ, and alſo in the judgment on the complaint, which was in our court*, &c. now the judgment and continuances being in K. *James's* reign, and the writ of error ſuppoſing all to be done in *the time of the then King*; an objection was made that the record was not well removed, for it ought to be, *in giving judgment on the complaint, which was in the court of our late King*, becauſe the *loquela*, i. e. *the complaint*, was begun in the reign of King *James.*

The plaintiff's council inſiſted that this was amendable by *ſtat.* 8 *Hen.* 6. eſpecially ſince the word *loquela* might extend to the whole; and it was amended accordingly.

The defendant pleaded a writ of error depending, and the record certified into the *Exchequer Chamber*, to which plea the plaintiff demurred.

It was now *argued* for the plaintiff, that this was no plea, becauſe *debt* will lie in this court after a writ of *error* brought, and it had been ſo *adjudged*: the reaſon is, becauſe by the writ of error the *tranſcript only*, and not the *record* itſelf, is removed; for if the judgment ſhould be affirmed in the *Exchequer*, the execution muſt be awarded in *K. B.* where the record of the original judgment remains.

It has been an opinion, that if error is brought in *K. B.* on a judgment obtained in the *C. B.* that pending the writ, *debt* will not lie on that judgment in that court, becauſe the record itſelf is removed, and ſo there can be no foundation for an action of *debt* there, but the reaſon is not the ſame in *K. B.* where the *record* is not removed, but the *tranſcript only*.

This opinion is even againſt the *old books*, viz. 4 *Hen.* 6. a writ of *annuity* was brought, and the plaintiff obtained judgment. The defendant brought a writ of *error* in *K. B.* and pending that writ, the plaintiff brought an action of *debt* on the judgment in the *C. B.* for a *nomine pænæ*, i. e. in nature of a *penalty*, for not paying the annuity on a day certain. The defendant pleaded the writ of error depending, but the court directed the defendant to anſwer over.

So in *Eaſter* term 18 *Edw.* 4. an action of treſpaſs was brought in *C. B.* and the parties were at iſſue, whether the plaintiff was the defendant's *villain* or not; and it was found for the plaintiff; on which the defendant brought a writ of *error* in *B. R.* and pending that writ the plaintiff in the original action brought *debt* in the *C. B.* on the judgment, and it was then objected, that ſuch an action would not lie, becauſe there was no record of any ſuch judgment before the court, that being removed by the writ of error; but the judges were of the contrary opinion, for they held that the judgment, though removed, was in force till reverſed.

Per curiam. At common law, before the ſtatute of *Weſtminſter* 2. if execution had not been ſued on a judgment in any perſonal action within a year and a day, the party muſt then have brought an action of debt on that judgment, for he could have no *ſci. fa.* on that judgment, but now that ſtatute applies a proper remedy, by giving the *ſci. fa.* on the judgment after a year and a day; and it has been held, that a *writ of error pending* was a good plea in abatement to ſuch a *ſci. fa.* but of late that maxim has been overruled, though it has been ſaid, that if there is a judgment precedent to a *ſtatute* from the ſame perſon who dies, and afterwards a *writ of error* is brought on the judgment, and pending the writ, the money due on that *ſtatute* is paid, and there is enough remaining to ſatisfy the *judgment creditor*, that the firſt payment to the *cognizee* is good, becauſe by the *writ of error* the execution of the judgment was ſuſpended.

In this caſe the demurrer was held good, and afterwards the defendant was ruled to anſwer over. *Vide Mod. Rep. vol.* 4. *page* 247.

Hilary, 6 *W.* 3. *The King* v. *Harris and others.*

A motion was made to amend an information for perjury, and oppoſed, becauſe the defendant had pleaded.

Per Holt, Chief Juſtice. As to amending after plea pleaded there is no great matter in that; I have known it amended after a record has been ſealed up, even juſt as the cauſe was going to be tried. *Vide Salk. vol.* 1. *p.* 47.

Hilary, 6 *W.* 3. *Cradock* v. *Radford.*

A judgment of twenty years ſtanding came this term to be revived by *ſcire facias* againſt the heir and tertenants, the judgment was, *that the aforeſaid* Thomas *might recover* inſtead of the *aforeſaid* Arthur, and therefore the court was moved that the roll might be brought in and amended, it being only the fault of the clerk.

The like amendment was allowed in the *C. P. Michaelmas*, 33 *Eliz.* where the judgment was *that the ſame* John *be in mercy*, inſtead of *Thomas*.

The ſame where the judgment was, *that the aforeſaid* George *be taken*, when it ſhould have been *Elias*; for where the parties are named right in the record, and where the name of one of them is miſplaced or miſtaken for the other, it is reaſonable, that the record ſhould be amended, to entitle the plaintiff to an *honeſt* debt.

It has been held to be amended in a much ſtronger caſe, *viz.* where the *miſpriſion* of the clerk has been in the very point of the judgment, as in *ejectment*, the plaintiff had a verdict for a meſſuage, ten acres of meadow and thirteen acres of paſture. Here there was *no land* in the verdict, and leſs meadow and paſture than in the judgment, yet it was amended on the *ſtat.* for the verdict is to guide the judgment, and ſo it ought to have been entered accordingly.

The defendant's council *urged*, that it was not amendable, being an error in the judgment, which muſt be conſidered as the act of the court, and not of the clerk, as where a *capiatur* is entered of *miſericordia*; or *it is granted by the court*, inſtead of *it is conſidered*, &c. for theſe are erroneous in point of law, and the very ſame caſe with this was held not to be amendable. *See Eaſter*, 43 *Eliz.*

So where the judgment was, *that the plaintiff ſhould recover* 100 *l. aſſeſſed by the jury. and* 5 *l.* adjudged *by the jury* for his increaſe of coſts, when it ſhould have been *by the court*, it was not amended, becauſe it was the fault of the court in the judgment itſelf.

On the ground of theſe authorities, the court held that theſe amendments might be made, and directed the ſame accordingly. *Vide Mod. Rep. vol.* 4. *p.* 372.

Trinity, 6 *W.* 3. *The King* v. *Knolles.*

On an indictment for murder, the defendant pleaded that he was Earl of *Banbury*, &c. the Attorney General replied, &c. the Earl of *Banbury* moved to amend his plea, and had leave, (*Holt* doubting) becauſe the pleadings were neither perfected nor entered on record: and there having been ſeveral amendments in criminal caſes. *Vide* 2 *Cro.* 529. 2 *Ro. Rep.* 59. *Sid.* 225, 243. *Cro. Car.* 144. *N. B.* The plea was filed, but not entered on the roll; and the court held, that before judgment, while matters were *in fieri* and in agitation, they had a power over all proceedings. *Vide Salk. vol* 1. *p.* 47.

Michaelmas, 6 *W.* & *M.* *Ruſh* v. *Tery.* Error.

In a judgment on a *mutuatus*, the bill appeared to be filed on a certain day, *viz. memorandum, that on* Friday, &c. which day happened to be before the debt became due.

This was aſſigned for error on a writ of *error* brought to reverſe this judgment, and now the court was moved on behalf of the plaintiff to make the *memorandum* of another day, ſo that it might agree with the judgment; but it was denied. *Vide Mod. Rep. vol.* 4. *page* 367.

Hilary, 8 *W.* 3. *The King* v. *Keat.*

A verdict general or ſpecial may be amended by the notes of the clerk of aſſize, in civil, but not in criminal caſes. *Vide* 1 *Roll. Rep.* 82. A ſpecial verdict amended by the notes of the counſel in the cauſe after error brought. *Vide* 3 *Cro.* 149, 150. *Cro. Car.* 145, 338. 4 *C.* 52. 2 *Co.* 185. *Vide Salk. vol.* 1. *p.* 48.

Michaelmas, 8 *W.* 3. *The Biſhop of Worceſter's caſe.*

In ejectment againſt ſeven defendants, who entered into the common rule for confeſſing leaſe, entry, and ouſter, and pleading to iſſue: The plea-roll was right, ſo was the *venire, diſtringas*, and the *jurata*, but the iſſue in the *niſi prius roll* was between the plaintiff and five defendants only, which was tried, and a verdict given for the plaintiff, and an amendment being moved for, it was oppoſed, becauſe intended to alter the verdict, to ſubject the jury to an attaint, to make another iſſue, and to make two defendants guilty who were not tried: *per curiam*, nothing but the title of the leſſor can be enquired into, and the iſſue depends on his title, which is not altered by this amendment. And it muſt be conſidered that all the ſeven entered into the common rule, and that the plea-roll, &c. are all right, and this cannot be intended other than the ſame iſſue, and the amendment is only to rectify a plain miſtake, and make that the iſſue which was apparently intended to be ſo. Accordingly the amendment was granted. *Vide Mod. Rep. vol.* 12. *page* 107. *Salk. vol.* 1. *p.* 48.

Michaelmas, 8 *W* 3. *Walker* v. *Slackoe.* Error.

On a writ of *error* brought in this cauſe, all the parties to the firſt judgment did not join.

Chief Juſtice. The queſtion is, if this writ of error be amendable. It appears here, that the writ of error is not good, for all the parties to the firſt judgment ought to join in error, and it appears they have not done ſo, for it is not ſaying, he, that is omitted, is dead, the writ of error is ill; but ſuppoſing that this is only a miſtake of the *curſitor*, the queſtion is, if the ſame be amendable, and we are of opinion that it is not, becauſe a writ of error is a writ to reverſe a judgment, and the *ſtatutes* were only made to amend writs for the ſupport of the judgment. So is ſtat. 8 *Hen.* 6. *cap.* 12.

If this miſtake was amendable, we think it ought not to be at the motion of the defendant, for no man can pray to amend another's plea or writ; he may take advantage of it, but cannot pray to have it amended, for *every man* may *ſue* or *plead* as he thinks fit; but this would force him to ſue in another manner, and it is not within any of the *ſtatutes of amendment.*

The *ſecond point* is grounded on the reaſon in *Blackmore's caſe*, 8 *Rep.* 158. *b.* they have power of amendment in affirmance of judgments, and in no caſe whatever did the court amend to ſet aſide a judgment, but only to ſupport it, and ſuch was the intention of all the ſtatutes.

Per curiam. Let the writ of error be quaſhed. *Vide Mod. Rep. vol.* 5. *page* 69.

Hilary, 8 *W.* 3. *Sir William Wentworth* v. *the Counteſs of Strafford.*

Caſe. The late Earl of *Strafford*, in 1676, gave a warrant of attorney to confeſs a judgment at the plaintiff's ſuit; the ſame was given to one *Sympſon* an attorney in the country, and ſent to one *Wall* who was his *entering Clerk*, and the judgment was entered accordingly, *that he recover his debt and damages*, and a blank was left in the judgment paper, what ſum ſhould be inſerted for the damages.

Wall, the entering clerk, died ſoon after, and the warrant of attorney and his papers were all loſt, but *Sympſon* who was ſtill living, made an *affidavit* of this fact.

A motion was made by the plaintiff's council for leave to inſert a ſum certain for damages and coſts, which was oppoſed by the defendant's council for the following reaſons.

1ſt. Becauſe nothing appeared on the judgment to direct what ſuch amendment ſhould be, as a declaration, which may be amended by writ, or one roll by another, &c.

2d. If any ſuch thing had appeared in the preſent caſe, yet this judgment could not be amended, becauſe the ſame was of another term, the judgment being now nineteen years old; and though it ſhould be allowed amendable as an act of the court, if in the ſame term wherein the judgment was entered, yet being now ſo many years ſince the act was done, it cannot now be amended.

3d. Neither can it be amended, if it ſhould be conſidered as the *miſpriſion* of the clerk, for at *common law* ſuch a *miſpriſion* in *proceſs* was not amendable in another term, and it is not warranted by *ſtat.* 8 *H.* 6. which extends to *records* as well as to *proceſs*, and alſo to *pleas*, *warrants of attorney*, *original* and *judicial writs*, *pannels*, and *returns*, in all which caſes the negligence of the clerk is to be *examined*, *reformed*, and *amended* in the affirmance of the judgment.

The plaintiff's council *inſiſted*, that the court might put in any ſum to make the judgment perfect, though it was uncertain what ſum they ſhould allow for coſts, becauſe it does not appear what was confeſſed, ſince the *warrant of attorney* was loſt, and this may be done, ſince it appears to be the neglect of the clerk to enter the judgment before coſts were taxed.

The words omitted are the act of the court, who had power at *common law* to amend their own judgments before any *ſtatute of amendments* was made, tho' in another term; *for example*, in 4. *Edw.* 3. 9. *b.* a *precipe quod reddat* was brought, and the defendants were eſſoined to *three weeks of St. Michael*, which was adjourned to *The Morrow of the Purification*, when it ſhould have been *in eight days of the Purification*, but it was amended; now the alteration of the *eſſoign* in that caſe was more than in this.

So where a writ of *error* was brought in this court on a judgment in *replevin* for the defendants, and an error aſſigned in the entry of the judgment, in which theſe words were omitted, *viz.* that the plaintiff *take nothing by his writ, but be in mercy for his falſe charge*, and that the defendants *go hence without a day*; it was amended, and all theſe words were inſerted in another term.

So where judgment *general* was given againſt an executor, and it was not entered *of the goods of the teſtator in the hands of the defendant adminiſtered*, yet that was amended in *Lord Hale's* time, and in the laſt term, in the *C. B.* ſeveral *continuances* were omitted, and on great debate it was amended.

Per curiam. This is amendable, if the court had any thing to amend it by. It is the act of the court, and yet judgment is not given by them as to damages. It might have been amended in the ſame term, for though it is entered on the roll, yet the court hath power to amend any fault in a record the ſame term wherein it was entered. *Vide Mod. Rep. vol.* 5. *page* 147.

Eaſter, 8 *W.* 3. *Martin* v. *Monke.*

It was moved to amend a fault in the *jurata* after verdict found for the plaintiff at the aſſiſes in *Suſſex*. It was *the jury* between the plaintiff and defendant *of a plea*, &c. *is reſpited before our Lord the King, and our Lady the Queen, at* Weſtminſter, &c. *unleſs our Juſtices*, &c. *of aſſiſe ſhall firſt come*, &c. *20th day of* March; it ſhould have been *before our Lord the King* only, and the day of *niſi prius* was miſtaken, for the aſſiſes were the 23d day of *March*. The record was right by which the plaintiff prayed it to be amended; and for authorities, the caſe of *Merchant* v. *Reaſon* was cited, where the record was *of a plea of debt* on the *ſtatute* 2 *Edw.* 6. for not ſetting out tythes, and the *jurata* in the record of *niſi prius* was *of a plea of treſpaſs*. This was amended after a verdict for the plaintiff, becauſe it was only a *miſpriſion* of the clerk.

So where it was on a *niſi prius*, that challenge was made to the ſheriff after iſſue joined, and a *venire facias* awarded to the coroner; but the record was, that the *venire facias* was awarded to the ſheriff, which was not entered at the time of the trial, but is uſually made up afterwards in time of *vacation*; yet this being only a *miſpriſion* of the clerk, ſhall be amended by the record.

On the other ſide it was *inſiſted*, that this was not amendable, for the juſtices of *niſi prius* had no authority to take ſuch a record.

The *miſpriſion* of a clerk in a writ of *niſi prius* is amendable by the *ſtatute* 8 *H.* 6. but then it muſt have ſufficient matter expreſſed, or implied, to give authority to the judge to try the iſſue, for without that writ he cannot try the cauſe. And therefore in *debt* againſt the defendant, a huſbandman, the queſtion was, Whether he was ſo *on the day of iſſuing the writ*? And the writ of *niſi prius*, by which the cauſe was tried, takes notice that the defendant was a huſbandman; but the material part of the iſſue was left out, *to wit*, whether he was ſo *on the day of iſſuing the writ or not*? There was a verdict for the plaintiff; and though the record was right, the court would not ſuffer the writ of *niſi prius* to be amended, becauſe by that writ the judges had no power to try the iſſue in the record.

In all the caſes where the record of *niſi prius* has been amended by the roll, the writ of *diſtringas* has been right, which, together with the *niſi prius*, is a ſufficient authority for the judge to try the cauſe; but here the *diſtringas* was wrong, for it was *William & Mary, by the grace of God*, &c. which could not be, for the Queen died in *December*, and the cauſe was tried the 23d *March* following; for which reaſon the court held this caſe was not amendable. *Vide Mod. Rep. vol.* 5. *page* 211.

Eaſter, 9 *W.* 3. *Puliſton* v. *Warburton* & *al.*

In *ejectment*, the declaration was of *Trinity* term laſt paſt, on the demiſe of *J. L.* and *A.* his wife, for lands in *Blymhill*, *com. Salop*, dated 10th *April*, 1697, and the *ouſter* is laid to be afterwards, to wit, the ſame 10th day of *April*, 1697.

The defendant's attorney entered into the *common rule* to confeſs *leaſe*, *entry*, and *ouſter*, and to try the cauſe at *bar*; and the ſaid cauſe was tried accordingly laſt *Michaelmas* term, which was in the year 1696, and which was half a year before the plaintiff had any title as appeared by the declaration, whereupon the defendant's council moved to ſtay the entry of the judgment obtained; the plaintiff had a verdict the ſame term the cauſe was tried, by reaſon of the miſtake of the year of our Lord in the demiſe, which ſhould have been 1696, inſtead of 1697, and the defendants had a rule accordingly; on the firſt day of the laſt term, the defendants moved it again, and the rule was continued till the plaintiff ſhould move the court, which he did by his council laſt term, to amend the declaration, and make the demiſe to be in the year 1696, inſtead of 1697.

The declaration delivered to the tenant in poſſeſſion was right; and a full defence being made at the trial, the judgment may be well entered, notwithſtanding this miſtake, and this is warranted by the ſtatute of *repleader*, 32 *Hen.* 8. which enacts, *that on all actions after iſſue joined, judgment ſhall be given notwithſtanding any miſpleading, lack of colour, inſufficient pleading, miſcontinuance, diſcontinuance, or miſconveying of proceſs, miſjoining of iſſue,* &c. *or any other default or negligence of any of the parties, their counſellors, or attornies,* which are large and general words, but will not juſtify the amendment in the caſe.

This court has changed the plaintiff in *ejectment*, after a declaration delivered, he being a witneſs to prove a deed in the cauſe. See *Sid.* 24.

They have enlarged the term where the cauſe has been long in agitation, and it was never denied to amend where there is any thing to amend by.

An *ejectment* is an action brought by conſent, and more immediately under the power of this court than any other action, for it is a matter of form ſet out by the court,

Now, the declaration below againſt the caſual *ejector* being right, that being in nature of an *original*, in whoſe room the defendants are to come in by rule of court,

It is plainly the *miſpriſion* of the clerk, and therefore it may be alſo well amended within the *ſtatute* 8 *Hen.* 6. *cap.* 15. eſpecially when the amendment is in affirmance of the judgment.

The council on the other ſide *argued*, that if by theſe general words in the *ſtatute* 8 *Hen.* 6. every thing may be amended, then all motions in arreſt of judgment would be vain, and to no purpoſe, becauſe were there ever ſo many errors either in *title*, *ſubſtance*, or *form*, they may be all amended, but the practice is otherwiſe.

As to the reaſon offered why the court ſhould make an amendment in this caſe, becauſe they have altered a plaintiff in the ſame action, that can be of little force, for it is not material who is plaintiff in *ejectment*, for he is only a nominal perſon, and therefore judgment ſhould be entered againſt him after he is dead, becauſe he is not concerned in intereſt.

This miſtake was ſeen before the trial, and the plaintiff moved the court twice, but they would not alter it, yet the plaintiff proceeded to try the cauſe, and would not have the court make a new record, a new leaſe, and a new *ouſter*, which could not be done without the conſent of both parties.

All amendments extend to forms and miſtakes of clerks, but not to titles and ſubſtance as this is.

That the court ſhould give leave to amend this declaration, becauſe they enlarge the term where the cauſe has been long depending; certainly that can ſignify but little to this purpoſe, becauſe where difficulties ariſe, *the court takes time to conſider the matter* for two or three years together, rather than give a haſty judgment; now, this being the act of the court, and no default of the parties, therefore they may well enlarge the term.

It cannot be ſaid, with any colour of reaſon, that this action is more under the power of this court than any other, for proceedings in *ejectment* are as regular as in any other caſes whatſoever.

In the caſe of *Thompſon* v. *Leach*, an ejectment was brought for ſo many acres *ligni*, i. e. *of wood cut down*, but the court would not amend it, and put in the word *boſci*, i. e. *of wood ſtanding*, and therefore the plaintiff having declared of ſeveral other things, care was taken to ſeparate the damages by the verdict.

Now, this being matter of ſubſtance, it cannot be amended by *ſtatute* 8 *Hen.* 6. becauſe the ſame does not extend to this caſe, for it muſt be *after judgment*, and in *affirmance* of the ſame, and the preſent motion is made in arreſt of judgment.

The later *ſtatutes* do not extend to it, but only matter of form, ſo that it will be difficult for the plaintiff to ſhew any particular proviſion in thoſe acts to ſuit with this caſe.

The court denied to enlarge the term in an *ejectment* in the caſe of *Hutchins* v. *Baſſet*, which was hung up many years by privilege of parliament.

This is not the *miſpriſion* of the clerk, and therefore it cannot now be amended in another term; the law was formerly held to be ſo in an action of *treſpaſs* for breaking the plaintiff's cloſe, and carrying away his goods; which words were left out of the declaration; this was not allowed to be amended in another term, for the plaintiff is to declare at his peril.

The caſe of *Pemble* v. *Stern*, 1 *Sid.* 416. is no authority to direct the preſent caſe, becauſe that was a ſpecial verdict in ejectment; and an exception was taken to the declaration, becauſe it was of a *park*, without ſaying how many acres, and of *pannage*, of which an ejectment would not lie. The court being divided on another point, a rule was made to adjourn the ſame into the *Exchequer Chamber*, and before the record was certified, one of the juſtices againſt the judgment for the plaintiff died, and then there being but three judges in court, a motion was made for judgment according to the opinion of the other two judges; the plaintiff having releaſed the damages for theſe things, without the conſent of the defendant, which could not be done by law, it was oppoſed by the defendant's council, who at laſt conſented, becauſe he found otherwiſe thoſe two judges would give judgment againſt his client. *Vide Mod. Rep. vol.* 5. *page* 332.

Eaſter, 10 *W.* 3. *Addingſon* v. *Oakley*.

The plaintiff had a verdict at the aſſizes at *Oxford*, and a motion was made to ſtay the judgment till he brought in the *poſtea*, for it did not appear to the court on what day the aſſizes was held, for the record of *niſi prius* was, *to wit, unleſs the juſtices of our Lord the King of aſſize in the county aforeſaid, aſſigned to hold pleas,* &c. *on* Thurſday *the* 16*th day of* March, *at* Oxford, &c. The *diſtringas* for the jury to appear was, *if they ſhall firſt come on* Thurſday *the* 26*th day of* March *at* Oxford. So was the *jurata*.

The defendant's council deſired, that it might be referred to the maſter of the office to be examined, but the court would not allow it, for it was to examine matter of fact againſt a record. The court held, that the defendant could not take advantage of this after judgment, for if the clerk of the aſſize will enter judgment for the plaintiff inſtead of the defendant, he has no remedy, but by action. *Vide Mod. Rep. vol.* 5. *page* 398.

Eaſter, 10 *W.* 3. *Dubartine* v. *Chancellor*.

An action was brought againſt the defendant for lying with the plaintiff's wife, he pleaded in abatement, and there being a judgment to anſwer over, iſſue was joined, and the cauſe was tried in the country, and the plaintiff had a verdict.

The defendant moved to ſet aſide the judgment, becauſe the plea in abatement was not entered on the *niſi prius* roll; the *plea roll* is right, but the *niſi prius roll* ſhall not be amended by that, and therefore the court ſet the judgment aſide. *Vide Mod. Rep. vol.* 5. *page* 392.

Michaelmas, 10 *W*. 3. *Johnſon* v. *Nayler*.

This was on a writ of execution, bearing *teſte* in *vacation*, on motion to have the ſame amended, the caſe of *Smith* v. *Harwood*, in *Jones* 41. and *Dyer* 129, were cited, but the court would not grant the motion. *Vide Mod. Rep. vol.* 12. *page* 247.

Michaelmas, 10 *W*. 3. *Broom* v. *Holford*.

On an action on a *penal ſtatute*, and the ſum miſtaken in the dclaration, the court gave leave to amend the ſame, the writ being general. *Vide Mod. Rep. vol.* 12. *page* 248.

Michaelmas, 10 *W*. 3. *The King* v. *Lewis*.

An indictment wanted the words *in com.* i. e. *in the county*, and on motion, the court would not amend the ſame, but *otherwiſe* on an information. *Note*, it is matter of ſubſtance. *Vide Mod. Rep. vol.* 12. *page* 229.

Hilary, 11 *W*. 3. *Harper* v. *Davys*.

On an *aſſumpſit* the plea was entered in *Eaſter term*, the memorandum was of a bill entered in *Hilary term*, on iſſue joined, the cauſe was tried at *niſi prius*, and the verdict ſet aſide, a new trial being granted, and tried this term in *London*; in the new *niſi prius roll*, the *placitas* were of this term, and that the party appeared and pleaded this term, and verdict thereon, and now judgment was arreſted, becauſe the iſſue on the *plea roll* is of *Eaſter term*, and the *new trial* is but a *continuance* of the ſame cauſe, and ſo the record of *niſi prius* differs from the *plea roll*; and thus adjudged in the caſe of *Dubartine* v. *Chancellor*. 5 *Mod. Rep. page* 399. *Vide Mod. Rep. vol.* 12. *page* 274.

Hilary, 11 *W*. 3. *Sir William Lacon Child* v. *Harvey*.

On a *ſci. fa. on recognizance* to pay money at a certain day, the defendant pleaded *ſolvit ad diem*, and iſſue joined, and a verdict given at *niſi prius* for the plaintiff.

The defendant's council moved to ſet ſuch verdict aſide, becauſe the *diſtringas* and *jurata* were returnable *in three weeks from the day of the Holy Trinity, unleſs* John Holt, *&c. ſhall firſt come on the* 27*th of* June; which 27th *June* was the day after *tres Trin.* but the award on the *plea roll* being *tres Mich.* it was moved to amend this miſtake of the clerk, becauſe in all caſes in which there is a record to amend by, and the amendment does not alter the point in iſſue, the court may give leave to amend, here the award on the roll is right, ſo is the iſſue. The judge at *niſi prius* had authority to try the cauſe, by *ſtatute W.* 2 *Cap.* 30. which requires only that a day and place certain be appointed in the *ſhire*, and this is a plain *miſpriſion* of the clerk in writing *tres Trin.* for *tres Mich.* See 1 *Cro.* 595. 2 *Cro.* 353. *Dyer* 260. and the caſe of Sir *R. Barnard*, *Michaelmas*, 8 *W*. 3.

Per Holt, Chief Juſtice. Though the day of return of the *poſtea* ſhould be miſtaken, yet if the cauſe was tried on the right day it would be good; but in this caſe the day of *niſi prius* being an impoſſible day, and the judges authority confined thereto, a trial on another day will be without authority, and therefore not amendable.

If the *diſtringas* and *jurata* had been right, the *niſi prius roll* might have been amended, as it was in *Barnard's* caſe before cited; wherefore here the trial was ſet aſide. *Vide Mod. Rep. vol.* 12. *page* 274.

Hilary, 11 *W*. 3. *Anonymous*.

The clerk of the treaſury of the *C. B.* attended with the record, and it was moved that the tranſcript here might be amended by it, oppoſed till the coſts in *error* allowed.

Per Holt Chief Juſtice, you ſhould have inſiſted for the coſts in *C. B.* before the party had liberty to amend. This way of amending the record here by the record there, is the courſe of the court, and only to ſave a *certiorari*; for if the record be right below, on diminution alledged, the party may have a *certiorari* of common right. Therefore theſe amendments cannot be oppoſed; nor did I ever know it done. *Vide Salk. vol.* 1. *page* 40.

Michaelmas, 11 *W*. 3. *Parry* v. *Villars*. Error.

Two bail had entered into a recognizance in the *C. B.* whereby *they acknowledged themſelves to be indebted* in 2000 *l.* to the plaintiff, on condition that the defendant in an action there, ſhould pay the principal debt, or render his body, *&c.* a *ſci. fa.* was brought after judgment againſt the bail, to which the bail pleaded no *capias* againſt the principal, to which there was a *replication* and *demurrer*, on which judgment was given for the plaintiff, *that he ſhould recover ſeparate ſums* of 2000 *l.* againſt them: on a writ of error brought in this court of ſuch judgment, the defendants aſſigned for *error*, *viz.* that the writ of *ſci. fa.* demanded judgment only of one 2000 *l.* which was all they were bound for, and the judgment was for two ſeveral ſums of 2000 *l.* and ſo a variance, and in ſupport was cited 1 *Sid.* 239.

The court agreed that this was *error*, but doubted whether the writ and judgment being ill entered, this fault in the entry was not amendable; but they agreed this could not be done here, it being a record of *C. B.* which this court muſt take as they find it; but the way to have entered the judgment here, had been to enter it for 2000 *l.* againſt two *ſeparately*. *Palm.* 546. 2 *H.* 4. 13. but the court ſeemed to think that the writ being well, was a good ground for amendment in the *C. B.* *Vide Mod. Rep. vol.* 12. *page* 303.

Michaelmas, 11 *W*. 3. *Trevanion* v. *Tooker*.

A plain miſtake of a clerk in entering up of a judgment was amended by the conſent of the party, for whoſe advantage the miſtake was. *Vide Mod. Rep. vol.* 12. *page* 312.

Hilary, 12 *W*. 3. *Weſt* v. *Weſt*.

Per curiam, on amending a declaration, the plaintiff has his election to pay coſts, or grant an *imparlance*, the defendant may plead *de novo*, for the imparlance ſets aſide his former plea; if he pays coſts, he is let in to plead again, ſo it be ſome new matter, for this reaſon, becauſe it might be the fault which the plaintiff amends that was the occaſion of his pleading that plea; but there he ſhall not have liberty to plead the ſame plea over again, and if he pleads *de novo*, it muſt be a plea to ſtand by, and if he will not plead a new plea, the old one muſt ſtand. After a plea in *bar*, one cannot plead in *abatement*, and the amendment and imparlance will not let one in to do it. *Vide Mod. Rep. vol.* 12. *page* 442.

Eaſter, 12 *W*. 3. *Thonkin* v. *Crocker*. Error.

On motion, the curſitor who had made out a writ of error wrong, contrary to his inſtructions, came and made affidavit that his inſtructions were right, and thereupon he was ruled to amend it *niſi* according to *Blackmore's* caſe.

The writ was to certify a record of a judgment in the time of the King, and the record certified was in the time of the King and Queen, and it was moved to amend the writ. And it was ſaid if this had been an original on a bond, bearing date in the time of the King and Queen, and the officer had made it on a bond in the time of the King only, it would be amended, ſo it ought here, he varying from his inſtructions. It was agreed that want of form in an original is not at all amendable, as *debt* and *detinue*, inſtead of *detinue*, or *vice verſa*; ſo if judgment be againſt five, and one of them dies, and error is brought, and laid *to the damage* of four, without mentioning the fifth, this was not amended, becauſe want of ſkill in the clerk. *See caſe Walker* v. *Stokes*; but theſe are faults in the eſſential part of the writ, whereas this is but a plain miſtake in not following inſtructions, *debt* was againſt an heir, and not ſaid in declaration that he bound his heirs, amended. 1 *Leon.* 134.

The council on the other ſide ſaid, this original is very different from others, it being to reverſe a judgment, and therefore out of the letter and meaning of the *ſtat.* 8 *Hen.* 6. *Cap.* 12. The words of that ſtatute are, *That the judges before whom the record is, ſhall amend writs*, &c. *in affirmance* of judgment, in what ſhall ſeem to them to be miſtakes of *clerks*; ſo their power of amendment is to affirm, not to reverſe judgments, and quoted 1 *Roll. Abr.* 154. *Cro. Jac.* 154. that the record is not removed. *Dyer* 105. *a.* 206. *Roll. Abr.* 754. And this amendment contended for, would indeed make it a new writ, and there is no fault in the writ, but that it commands them to ſend a record, which they have not, and they ſend another. *Vide* 32 *Hen.* 6. *Cap.* 12.

Holt, Chief Juſtice. The deſign of all writs of error is to deſtroy the judgment, and the ſtatute of 8 *Hen*-6. is in oppoſition to that, and this is a good writ, and there is no authority to amend a good writ; and a record in the late reign, is not one in this reign; and if a writ of error of ſuch a judgment ſhould ſay *in our court*, yet there is no inſtance of amending writs of error.

Per curiam. Let the rule be diſcharged. *Vide Mod. Rep. vol.* 12. *page* 369.

Eaſter, 12 *W.* 3. *Hanſford* v. *Mead.*

A judgment for damages was, *that the aforeſaid* A. *recover* inſtead of the *aforeſaid* B. and it was amended on motion.

Gould, Juſtice, cited the caſe of *Cradock* v. *Wills*, where the like fault was amended on his motion, after twenty years time, and that the caſe in *Styles* was then denied to be law.

Per curiam. An act of parliament reciting *R. S.* to be heir, does not make him ſo.

We may adjourn a trial at bar without the conſent of the parties. *Vide Mod. Rep. vol.* 12. *page* 384.

Trinity, 12 *W.* 3. *Grabborn* v. *Railer.*

The warrant of attorney was for confeſſing judgment as executor, and being entered *generally* ſeveral terms ago, it was now amended according to the warrant. *Vide Mod. Rep. vol.* 12. *page* 402.

Trinity, 12. *W.* 3. *Anonymous.*

Sir *Bartholomew Shower* moved to amend an information of forgery in ten places, and though oppoſed, the motion was granted, becauſe it made no alteration of the fact; and that without coſts or imparlance. *Vide Salk. vol.* 1. *page* 50.

Michaelmas, 13 *W.* 3. *Coke* v. *Heathcot.*

A perſon cannot amend after iſſue joined and entered, much leſs after verdict, and the party who diſcontinued muſt pay coſts. *Vide Mod. Rep. vol.* 12. *p.* 598.

Hilary, 1 *Ann.* *Owen* v. *Atkinſon.*

After plea pleaded, a replication and rejoinder to part, and iſſue, notice of trial, with *proviſo* as to the other, and a rule ſerved to make up the iſſue, to carry it down to trial, and the *niſi prius* roll being engroſſed on parchment, but all the proceedings above continuing on paper, the plaintiff had leave to amend, on payment of coſts.

Note. Here the record of *niſi prius* was made up, tho' the record above was not; and that was ſaid to be done frequently, and it is never denied to amend on payment of coſts, while things continue in paper. *Note* alſo, a cauſe cannot be carried down to trial by *proviſo* till the iſſue is made up: and therefore the defendant ought to ſerve a rule on the plaintiff, to make up the iſſue. *Vide Mod. Rep. vol.* 7. *page* 156.

Hilary, 1 *Ann.* *Parker* v. *Collins.*

The *placita* were *Hilary* 13 *W.* 3. and the declaration of *Eaſter* term againſt the defendant *in cuſtody of the Marſhal of the* Marſhalſea *of our Sovereign Lady the Queen.*

Per curiam. Let it be amended, for it is no part of the declaration, but only the ſtyle of the record; and the court further declared, that after demurrer, the party has four days in term to join in demurrer, or waive, and plead the general iſſue. *Vide Mod. Rep. vol.* 7. *page* 123.

Hilary, 1 *Ann.* *Wood* v. *Branford.* Error.

In dower; it appeared on record certified above, this being a *writ of error*, that the defendant being an infant, had appeared by attorney, and this aſſigned for error. And after *in nullo eſt erratum*, i. e. *no error has been committed*, and demurrer thereon; it was ſuggeſted that there was an admittance of a guardian below, and a warrant for receiving of the guardian.

Per curiam. If the caſe be as repreſented, it is good cauſe to amend the record; and as a precedent, the caſe of *Waldegrave* v. *Lane*, 5 *W.* & *M.* was cited. And the court further ſaid, that after a good error in fact alledged, if the party will not join iſſue thereon, but plead *in nullo eſt erratum*, the fact is admitted to be true, and it is a good cauſe of demurrer. *Vide Mod. Rep. vol.* 7. *page* 124.

Trinity, 1 *Ann.* *Poitvin* v. *Tregeagle.*

The plaintiff ſued out a *latitat* againſt the defendant, returnable in *Hilary term*, 13*th W.* 3. and in the ſame term declared againſt the defendant, and alſo delivered a declaration by the *bye* in *aſſumpſit* on ſeveral promiſes, to which laſt declaration the defendant pleaded *non aſſumpſit*: Iſſue being joined, and notice of trial given, the plaintiff found that his *Chriſtian* name was miſtaken, *viz.* *John* where it ſhould be *Peter*.

The cauſe being in the paper, the plaintiff's council moved for leave to amend the declaration, which was granted on payment of coſts; when the plaintiff's attorney came before the maſter to have the coſts taxed, the maſter refuſed to tax the ſame, becauſe in this caſe the plaintiff could not have leave to amend, this being only a declaration by the *bye*.

On this being moved again, the plaintiff's council *urged*, that ſuch amendment might well be granted, though it was a declaration by the *bye*, for ſince the delivery of the declaration was regular, in this manner it would be a declaration to all purpoſes, and therefore would partake of all advantages that other declarations enjoyed, that it was in effect founded on the *latitat* in the other action, and therefore in this matter the name of the plaintiff might be well amended by it, that ſuch amendment would be no prejudice to the defendant, becauſe if he nonſuited *John Poitvin*, yet he could not levy the coſts on *Peter Poitvin*.

Powys and *Gould*, Juſtices, held that ſuch amendment could not be granted, becauſe there is no writ by which the declaration can be amended, and therefore refuſed to give any directions thereon. *Vide Raym. vol.* 2. *page* 771.

Michaelmas, 1 *Ann.* *Le Noyer's Caſe.*

In an inferior court the record was made in the part of iſſuing the proceſs, *preceptum fuit* i. e. *he was commanded*, inſtead of *preceptum eſt*, i. e. *he is comanded*; and as the draught by council, delivered to the clerk, to enter up by, was drawn right, the court was moved for leave to amend the record by it.

Per curiam. There never was an inſtance of an amendment by the draught of a council; becauſe it is a thing of no authority, alterable at pleaſure, and to change it is no offence: the caſe ſtated of a bond is quite different, for a bond is an authentic matter;

and an alteration therein is forgery, and if the party himſelf does it, beſides the forgery, he avoids the whole bond; and the ſtatute is to amend where there is a letter too much or too little, through the miſtake of the clerk. And Chief Juſtice *Holt* ſaid, he would gladly have an action brought againſt an attorney who commits ſuch a fault in entry, contrary to the advice of council; they ſometimes being guilty thereof out of malice, and ſometimes through preſumption: beſides no diminution lies of a record of an inferior court. *Vide Mod. Rep. vol.* 7. 102.

Michaelmas, 1 *Ann. Read* v. *Tregeagle.*

In the above cauſe, Chief Juſtice *Holt* cited the following caſe:

In *aſſumpſit* brought by an adminiſtrator for goods ſold and delivered by his inteſtate, and a promiſe likewiſe to him; the defendant pleaded *non aſſumpſit infra ſex annos* to the plaintiff, i. e. *he had not aſſumed within ſix years*, and iſſue thereon, and a verdict given for the plaintiff. This being moved in arreſt of judgment, it appearing thus on the record of *niſi prius*; the court ſaid, if the paper-book, or copy of the iſſue, is right, we will amend it; and made a queſtion, Whether it be not within the ſtatute of *Oxford? Vide Mod. Rep. vol.* 7. *page* 49.

Michaelmas, 1 *Ann. Sanders* v. *Lentor.* Error.

On a writ of *error* on a judgment in the court at *Northampton*, the record removed, was *preceptum fuit* i. e. *was commanded*, inſtead of *preceptum eſt*, i. e. *is commanded*, and *meſſes* inſtead of *miſſis*, the draught below was right, having been ſettled by council. On a motion to amend the record by the draught, which the clerk makes oath was right below, it was denied, becauſe it was conſidered as no more than a private paper in their own cuſtody, of which the court could not take notice; and if done by contrivance as alledged, the defendant might bring his action. *Vide Salk. vol.* 3. *page* 32.

Eaſter, 2 *Ann. Lapiere* v. *Sir John Germain, Knight and Baronet, and the Dutcheſs of Norfolk.*

In an action on the *caſe*, Sir *John* being ſued only by the title of *baronet*, pleaded in abatement that he was *knight* and *baronet*; the plaintiff replying, that he was *baronet* only, iſſue was joined thereon. On motion to amend on payment of coſts, and to alter the declaration, by inſerting the word *knight*, the proceedings being on paper, it was denied by the court, becauſe there was nothing by which this amendment could be made, the *latitat* not being ſo. The plaintiff's council being then informed, that the *latitat* was *knight* only, prayed leave to make the declaration agreeable to the *latitat*; urging, that the omiſſion of *baronet* in this caſe being a ſuit by bill, was not material, *baronet* not being part of the name, as *knight* is; and ſuits by bill not being within the ſtatute of additions. *Powell*, Juſtice, ſeemed of this opinion, and ſaid, that the books warrant ſuch a difference; and cited 32 *H.* 6. 30. *a.* which ſays, that a baron need only be named as knight or eſquire in a writ; with which caſe, *Holt*, Chief Juſtice, agreed: but obſerved, that the reaſon was, that at that time barons were ſo by tenure, and were ſummoned to parliament by writ, and not created by letters patent as at preſent: but that then the law was otherwiſe of titles of dignity, as of *earl*, which was part of the name: and it is now otherwiſe of *barons*, when they are created by letters patent; it being at preſent a title of dignity, and parcel of the name. The law is the ſame with reſpect to *baronet*, which is made a title of dignity by letters patent, and therefore a *baronet* ought to be named ſo in all judicial proceedings, otherwiſe they will abate: and that it is a new title, is no objection; for ſo is *viſcount* firſt uſed in the reign of *H.* 6. *marquis* in the reign of *Rich.* 2. and *duke* in the reign of *Edw.* 3. The bill was accordingly abated. *Vide Raym. vol.* 2. *page* 859.

Trinity, 2 *Ann. Wyatt* qui tam v. *Eyland.*

In an action on the ſtatute of *uſury*, the *memorandum* was general, of the firſt day of the term, but bail was not put in till the middle of the term, and the court gave leave to the plaintiff to enter up a ſpecial *memorandum*, for the defendant is not in court till bail is filed, and this is only to make the entry, according to the truth, which appears on record; and the court ſaid it was an amendment at the *common law*, and not on the ſtatutes. *Vide Raym. vol.* 2. *p.* 977.

Trinity, 2 *Ann. Annonymous.*

Mr. *Williams* moved to quaſh an indictment for want of an addition; the defendant was indicted by the name of *J. S.* ſervant, which he ſaid is not a good addition within the *ſtatute*.

Per Holt, and the court. It is a good addition, for it is certain. He would have taken ſome exceptions to the *caption*, but it was not allowed, for coming in of this term, ſuch errors are amendable in the ſame term. *Vide Raym. vol.* 2. *p.* 968.

Trinity, 2 *Ann. Sir John Parſons* v. *Gill.* Error.

The defendant gave a warrant of attorney the 2d *April*, 1701, to enter up a judgment againſt him of *Hilary* term before, or any other ſubſequent term, a judgment was entered accordingly, and in entering the ſame up, the memorandum was, that in *Hilary* term, *before our Sovereign Lady the Queen at* Weſtminter, *came the plaintiff, and brought, &c.* and the bill was an *indebitatus aſſumpſit*, on a *mutuatus*, and the *mutuatus* was laid the 2d *April* 1701, the day the warrant of attorney bore date, which was after *Hilary* term, 1700, of which the judgment was entered, and a writ of *error* was brought on this judgment in the *Exchequer Chamber*.

The plaintiff's council moved to amend this record by the judgment-paper on which the *mutuatus* appeared to be right of the 2d of *January* 1700; and it was alſo entered on the bottom of the judgment-paper, *J. S. for the plaintiff*, J. N. *for the defendant*; and alſo, on the top of the roll, the warrants of attorney were entered, *viz. the plaintiff puts in his place* J. S, *&c.* and *the defendant puts in his place* J. N. *&c.* he inſiſted that the court might amend a record by the inſtructions given to the clerk, as in 1 *Cro.* 147.

As to the ſecond thing to be amended, *viz.* to put in by *J. S. his attorney*, he argued, that the warrant of attorney, entered on the top of the *plea-roll*, was ſufficient warrant to amend that by; that the warrants of attorney were never filed in this court, but that formerly the way was, to enter, ſuch a one *puts in his place*, &c. ſuch a one, *&c.* on a *diſtinct roll*; but that in the time of Chief Juſtice *Wright*, that courſe was altered, and it was entered as it is now on the top of the *plea-roll*; and it being now entered on the roll, that the plaintiff has made ſuch a one his attorney, that ſhews plainly to the court that he ſues by attorney, and is a ſufficient warrant for the court to make this amendment by; and that the court had amended warrants of attorney, *Dyer*, 105, 225. *March* 133. that this was leſs than that, for the only doubt here was, Whether the attorney ſhould be intended to continue, when the plaintiff has once made one, till he comes and appears expreſsly in his proper perſon? that on a claim of conuſance, or on a writ of *error*, the attorney continues. *Stat.* 21. *Edw.* 3. *cap.* 61.

Holt denied that the attorney continued on the writ of *error*. And the plaintiff's council ſaid, that the amendment in this caſe ought rather to be favoured, becauſe it was a proceeding by conſent, like the caſe of fines and common recoveries. 5 *Co.* 45. and he ſaid, that the entry of *J. S. for the plaintiff*, at the bottom of the declaration, was a further warrant to amend by.

Holt, Chief Juſtice. As to the firſt miſtake in the time of the *mutuatus*, that is a plain miſtake, the book in the office has often been allowed to be a foundation to amend by, ſo in this caſe, the paper on which the maſter ſigned the judgment is right, and that was the warrant by which the attorney was to make up the roll, and therefore he was clearly of opinion that ought to be amended.

As to the other matter, that it did not appear whether the plaintiff ſued in perſon, or by attorney, and therefore, whether the court ſhould not add, *by J. S.*

his attorney. It is plain the ſuit was to be by attorney, by the warrants, and therefore when it ſtands indifferently on record, whether he ſued by attorney or not, it appearing he had an attorney, we muſt therefore intend he ſued by attorney: for to what end did he make an attorney, if he intended to ſue in perſon? Beſides, it is the practice, if the plaintiff ſues in perſon, to enter at the bottom of the declaration, *the plaintiff in his proper perſon*, or *the defendant in his proper perſon*; and if one ſues in perſon, the other by attorney, *the plaintiff in his proper perſon*, J. N. *for the defendant*, and therefore the judgment paper being *J. S.* for the plaintiff, ſhews that the plaintiff ſued by attorney, and is a ſufficient warrant to amend this, as well as the other fault in the *mutuatus*.

Powys and *Gould*, Juſtices, agreed with *Holt in the whole*. *Powell*, Juſtice, did alſo agree with him as to both amendments, taking the judgment-paper for the reaſon; but he diſagreed as to the ſecond amendment, taking the entry of the warrant of attorney on the *plea-roll* for the foundation only, and putting the judgment-paper out of the caſe, becauſe, tho' that proved the parties had attornies in court, yet, notwithſtanding that, the plaintiff had his election, to ſue either in perſon or by attorney, and that entry did not prove he ſued by attorney, and therefore was no authority to amend by.

Both the amendments were granted, on the defendant in error's paying coſts, and conſenting that the judgment ſhould be affirmed without coſts, becauſe there was a good error at the time of the error brought. *Vide Raym. vol. 2. page* 895.

Michaelmas, 2 *Ann.* *Staple* v. *Heydon.*

When a *repleader* is awarded, the amendment muſt be given where the plea which makes the iſſue bad begins to be faulty; and therefore if one makes himſelf a bad title to his declaration, to which there is a bad *bar*, and thereupon a bad replication, on which there is iſſue, there the repleader muſt be awarded and entered on record, and the plaintiff ſhall declare, *de novo*, *&c.* but if the bar be good, or the plea be good, and the replication bad, and iſſue thereon, there a repleader will be only as to the replication; but if the *bar* and *replication* be both bad, and a repleader is awarded, it muſt be as to both. 3 *Keb.* 664. *Vide Mod. Rep. vol.* 6. *page* 2.

Eaſter, 3 *Ann.* *The Queen* v. *Carter.*

The defendant was indicted for wilful and corrupt perjury, and the indictment reciting the record of the trial, at which it was ſuppoſed the perjury was committed, being a feigned iſſue out of *Chancery*, ſet forth, that there happened a diſcourſe between Lord *W.* and Sir *W. R. R. S. R. R.* and *J. S.* concerning the boundaries of certain lands, and Lord *W.* affirmed *A.* to be a boundary. The ſaid Sir *W. R. R. S. R. R.* and *J. S.* affirmed that *A.* was not the boundary; whereon a wager was laid, and mutual promiſes were made between Lord *W.* and them the ſaid Sir *W. R. R. S. R. R.* and *J. S.*

At the trial of the indictment this variance was aſſigned between the record they took on them to write, and the indictment, that the affirmation that *A.* was not a boundary, was in the record laid to have been by Sir *W. R. R. S. R. R.* and *J. S.* *whereas* the indictment laid it to have been by Sir *W. R. R. S.* and *J. S.* omitting *R. R.* ſo this record now produced in the court was not the record deſcribed in the indictment, and ſeemed a good exception; for by *Holt*, Chief Juſtice, if you bring an *aſſumpſit* againſt two, and give evidence only of an *aſſumpſit* by one, you are gone.

Another variance was, that in one of the denominations of lands, in the record it was *barnap*, and in the indictment *barnep*; another word in the record was *orientati*, and in the indictment *orientali*, and all theſe being in the deſcription of the record, ſeemed fatal.

But another fault yet groſſer was, that the record of the trial, at which the perjury was alledged, was not entered up, ſo it did not appear that ever there was a trial.

Holt, Chief Juſtice, denied the minutes of it for evidence, and quoted a caſe where a rank perjury had gone unpuniſhed for ever, for that omiſſion, for that he ſaid was final, ſo as the party could never be tried thereon again; but in this caſe he ſaid, that by reaſon of the other exceptions, the indictment being inſufficient, they might indict him anew, for an acquittal on a bad indictment would not be a plea to a good one; *whereas* if the indictment had been good, an acquittal on the laſt fault had been peremptory; and here the indictment being brought to trial by the defendant, if he had made it up variant from what it is on the *plea roll*, an acquittal on it will be void; and beſides, the defendant has forfeited his recognizance whereby he was obliged to bring down the indictment to trial: *and whereas* here were two indictments againſt the defendant, and he had brought them down both, and put them into court, he now, to bring which he pleaſed on firſt, withdrew one of them.

He directed him to put it in again, and it was inſiſted on that the Queen had her election to bring on which of her cauſes ſhe pleaſed, and therefore they would bring on that firſt which the defendant would have come on laſt.

It is true, the *Queen* has that election where ſhe brings on her cauſes herſelf, but here the defendant brings it on, and he is to do the firſt act, and therefore has his election; but if you will enter a *non pros* on that which they deſire to bring on, you thereby inforce them to bring on the other: but to *ouſt* all controverſy, the defendant having put in that which he would prefer firſt, it was firſt called.

Another exception was, that the record of the original trial began, Memorandum *that at* Weſtminſter, *before our Lady the Queen, and* John Holt, *Knight, Chief Juſtice* &c. *and his brethren*, &c. whereas there is no court ſo ſtyled but it ought to be *before our Lady the Queen only*. *Vide Mod. Rep. vol.* 6. *p.* 167.

Michaelmas, 3 *Ann.* *The Queen* v. *Tutchin.*

An *information* was exhibited againſt the defendant by the Attorney General in *Eaſter term* laſt, for contriving, compoſing, and publiſhing a certain *ſeditious* libel, intituled *The Obſervator*, the defendant pleaded *not guilty*; in *Trinity term* a *venire fac.* was iſſued out to the ſheriffs of *London*, (the fact being laid there) returnable on *Monday after three weeks of Saint Michael*, and the *diſtringas* was then awarded on the roll in the common form, with the *niſi prius* on *Saturday after the Morrow of All Souls*; but the *diſtringas* through miſtake was teſted the 24th *October*, *viz.* the day after the return of the *ven. fac.* and a verdict for the *Queen*.

The defendant's council moved in arreſt of judgment.

1ſt. That the *venire* and *diſtringas* were made returnable at a day certain; whereas the fact ariſing in another county, it ought to have been at a common day.

Holt, Chief Juſtice. In caſe of information, or other proceedings originally commenced in this court, the proceſs may be at a day certain, though into another county, and ſo it has been lately ſettled here in a caſe where the court took it into conſideration, and ruled it ſo on a certificate of all the clerks; but if an indictment be removed hither by *certiorari*, and after it is carried down to trial, there the proceſs muſt not be returned at a day certain, but at a common day; beſides there is great reaſon it ſhould be ſo here, for the information is exhibited at a day certain, and the defendant's appearance to it is ſo too, and he pleads to it at a day certain, and then why ſhould not the proceſs be ſo too? The plea is *on Monday after the Morrow of the Holy Trinity*, and that is certain, for *the Morrow of the Holy Trinity* without more is certain in the *C. B.* except it be where they proceed to *bill* or in *aſſize*, they muſt go by common days, and in this court in *aſſize*, we may go by a certain day, and where one is ſued here as preſent in court, all muſt be by a day certain; and ſo of proceedings by bill in any county of *England*; and ſince the *Attorney General*, by reaſon of the univerſal juriſdiction of this court, may file a bill here for a crime committed in any county of *England*, he may make the proceſs returnable at a *day certain*, and he has his election of the one or the other. *The court allows the other points*, and the difference is between things originally begun here, and brought hither by *certiorari*.

2d. That though the *diſtringas* was well awarded on the roll on the day of the return of the *venire*, which was the day for both parties in court, yet the iſſuing a *diſtringas* the day after, and *teſted* the day after, was without warrant, as not being according to the award of the court, for by the ſtatute of *niſi prius*, the proceſs of *niſi prius* is to be awarded *in the preſence of the parties*, and it ought to bear *teſte* on the ſame day, or elſe it is a diſcontinuance.

This caſe was afterwards ſolemnly *argued* by the council on both ſides, when the court gave their opinion.

Gould Juſtice. I hold it amendable at *common law*, for otherwiſe what mean all the amendments in indictments and informations quoted in this matter.

Powys, Juſtice, Concurred.

Holt, Chief Juſtice. It is not amendable, 1. This is an omiſſion in a material point, *viz.* in the *teſte* which by law ſhould have been the 23*d* and not the 24*th*, for the 23*d* is the day the defendant has in court on the *ven. fac.* and therefore the writ giving further day ſhould have iſſued on that day. *Powys*, Juſtice, recanted his opinion inſtantly, and *Gould* Juſtice ſeemed doubtful of the opinion he had given. *Vide Mod. Rep. vol.* 6. 268.

Michaelmas, 3 *Ann.* *Buckſome* v. *Hoſkin* Error.

A writ of *error* was brought of a judgment in ejectment in the *C. B.* and the defendant in error ſued out a *ſcire facias quare executionem non*, to compel the plaintiff to aſſign his errors, and there was a variance in the *ſcire facias* from the judgment, for the judgment was of *two meſſuages*, and the *ſcire facias* recited it to be but of one.

The plaintiff's council in error perceiving the variance, pleaded *nul tiel record* of the judgment, and the defendant's council moved that the *ſcire facias* might be amended, becauſe it was but a *miſtake of the clerk* in varying from the record which was his inſtructions, and he cited 2 *Vent.* 49. where an original in *treſpaſs* of treſpaſſes done in two Kings reigns *againſt our peace*, was amended and made *againſt our peace, and againſt the peace of* James *our late King*, by the curſitor's inſtructions.

Holt Chief Juſtice, This is a good *ſcire facias*, but only it does not indeed come up to your caſe. In that caſe in *Ventris* the original was wrong, and therefore it was amended.

Powell, Juſtice, agreed, and that it did not appear to them, but there might be ſuch a judgment as was recited in the *ſcire facias*, and for this reaſon the court refuſed to amend it. *Vide Raym. vol.* 2. *page* 1057.

Michaelmas, 3 *Ann.* *Williams* v. *Hoſkins*.

A judgment in *ejectment* for two meſſuages, and after a year a *ſci. fa.* was taken out, reciting a judgment obtained for one meſſuage only. To this *ſci. fa.* the defendant pleaded *nul tiel record*, and the plaintiff moved to amend the ſame.

Per curiam. This cannot be, for this is a good writ for any thing that appears on the face of it, and provided there were a judgment for one meſſuage, this writ would be a good writ to revive, ſo being good in itſelf, though not appoſite to this purpoſe, to amend would be to make a new writ, or to alter a good writ, and fit it to another purpoſe; and to amend the writ would falſify the defendant's plea, which was good at the time when it was pleaded, and this ought not to be: the caſe of *Napiere* v. *Sir John Germaine* was cited, where after a miſnomer pleaded, the court refuſed to amend, becauſe it would falſify the plea, but if the fault had appeared in the very writ, it might be amended, and there the plaintiff for his expedition took another writ.

Per curiam. That he might do without getting this quaſhed, for if this writ abates, then it is not the ſame cauſe. *Vide Mod. Rep. vol.* 6. *page* 310.

Eaſter, 4 *Ann.* *Bullock* v. *Parſons*.

On iſſue joined in an action of *debt*, there was a verdict for the plaintiff, and the defendant's council moved in arreſt of judgment, becauſe the *diſtringas* was *of a plea* with a blank omitting *debt*; the *venire facias* was right, and the council ſaid that the court would intend this was a *diſtringas* in another cauſe depending between the ſame parties, which *Holt*, Chief Juſtice, denied.

The plaintiff's council inſiſted, that this was a void *diſtringas*, and conſequently aided now after a verdict by the ſtatutes of *Jeofailes*, and if the court would not take it ſo, but to be only an ill *diſtringas*, yet they would amend it by the *venire facias*, and for that cited *Hob.* 246. where in *treſpaſs* the *venire facias* and *habeas corpora* were *a plea of debt*, and after a verdict amended. The defendant's council cited 2 *Cro.* 528, where in an iſſue joined on a *ſcire facias*, the *venire facias* was *in a plea of debt*, and ill. *Holt*, Chief Juſtice, declared, that the caſe in *Hobart* had been held otherwiſe, and the defendant's council ſaid, that the judge had no authority to try the cauſe.

Holt, Chief Juſtice, obſerved, that the judge of *niſi prius's* authority was not by the *diſtringas*, but by the commiſſion of *Aſſize*, for that by the ſtatute of *niſi prius*, 13 *Ed.* 1. *cap.* 30. which gives the trial by *niſi prius*, it is to be before judges of *Aſſize*, and the *diſtringas* is only to bring the jury before them, and at firſt the trials of *niſi prius* were had on the *venire facias*, and the clauſe of *niſi prius* is by that ſtatute expreſsly ordered to be inſerted in the *venire facias*. Then came the *ſtatute* 42 *Ed.* 3. *cap.* 11. and ordered that no *inqueſt* but *aſſizes* and *deliverance of gaols* ſhould be taken by writ of *niſi prius*, nor in other manner, before that the names of all them that ſhall paſs in the ſame inqueſts, be returned into the court; and by reaſon of that ſtatute, trials by *niſi prius* came to be on the *diſtringas*, and the intent of that ſtatute was, that by the jury being returned of record in court, the party might have an opportunity to ſee the panel, and to prepare himſelf to make his challanges.

Powell, Juſtice, agreed with the Chief Juſtice, only he ſaid, that the reaſon of trials being had on the *diſtringas*, was to prevent an inconvenience that was frequent heretofore, for the defendants to caſt an *eſſoign* at *niſi prius* when all things were ready for trial, for the defendants being by the ſtatute of *Marlb. cap.* 13. to have but one *eſſoign* after iſſue joined; and on the return of the *venire facias* when the trial was not had thereon, but that was returned above, the defendant muſt be *eſſoinged* above, and could have no *eſſoign* below on the *diſtringas*, and ſo the miſchief was helped.

As to the fault in the *diſtringas* being aided after a verdict, the court took the difference between no *diſtringas*, and a bad one, in the firſt caſe it is helped, otherwiſe in the laſt; and *Powell* Juſtice ſaid, he knew an ill *diſtringas* dropped once at the *bar*.

The whole court held that the *diſtringas* was amendable, and gave judgment for the plaintiff *niſi*. *Vide Raym. vol.* 2. *page* 1143.

Eaſter, 4 *Ann.* *Stephens* v. *the Bail of Hudſon*.

On a *ſci. fa.* againſt bail, the defendant pleaded payment of the money by the principal, &c. The plaintiff replied *non ſolvit*, &c. *this he prayed might be enquired by the country, and the aforeſaid defendant did ſo likewiſe.* The defendant demurred, and the paper-book was made up without ſtriking out *the defendant did ſo likewiſe*; the record was a record of laſt term, and this term the cauſe came on in the paper, and this *exception* was taken by the defendant's council, and the cauſe ſtood for further *conſideration*, and in the mean time the plaintiff's council came and moved for leave to ſtrike out theſe words *and the aforeſaid defendant does ſo likewiſe.*

The court held that it was a thing of courſe, for the party that takes the iſſue to join the iſſue for the other, on a ſuppoſition that they will join in the iſſue to maintain the fact they have alledged, and therefore if they will not join in the iſſue, but will demur, they ought to ſtrike it out, and the leaving it in is a trick, and therefore the court gave leave to ſtrike it out. *Vide Raym. vol.* 2. *p.* 1137.

Trinity, 5 *Ann. Willmot* v. *the Chancellor of Worceſter.*

The court were of opinion the entry of a ſpecial verdict, though in a criminal proſecution, may be amended, if not entered according to the notes taken; and the roll may be amended. Juſtice *Gould* cited *Raym.* 460, and ſaid, the court frequently amended informations. *Query*, if the court would amend in a caſe in which they had not the minutes there.

Per curiam. If the notes and the verdict vary, the court will amend according to the notes, otherwiſe not. If a jury find for the Queen, and the verdict is entered for the defendant, yet at common law it is amendable; and it was agreed in Dr. *Drake's* caſe. If in a ſpecial verdict, the clerk takes the minutes right, and the verdict is entered up wrong, the court will amend the roll according to the minutes, though in a criminal proſecution. *Vide Mod. Rep. vol.* 11. *page* 84.

Hilary, 6 *Ann. On a Reference from the Houſe of Lords, between Lord Pembroke and Lord Jefferies.*

Lord *Pembroke* petitioned the Houſe of Lords to ſet aſide an amendment made of a fine and common recovery in the grand ſeſſions in *Wales*, whereby he had loſt the benefit of a *writ of error*: and whether the fine and recovery were amendable in the ſaid particulars, and the ſaid amendments warranted by law, was referred by the houſe to the judges. One was, whereas the writ of covenant was teſted ſix months after the *dedimus* for the caption, the court of grand ſeſſions had amended it.

Per Holt, & al. certified, that the writ of covenant being an original, was not amendable either by the common law or by any ſtatute: that neither the 14 *Ed.* 3. nor the 8 *H.* 6. warrant ſuch an amendment: that there is no difference as to this purpoſe between actions amicable and adverſary; for nobody pretends to mend a miſtake in a deed itſelf, and yet *that* ſurely is as much a common aſſurance as a recovery, and that *Gage's* caſe, 5 *Co.* 45. is miſreported, and not law. A bill was accordingly allowed, but thrown out in the Lower Houſe. *Vide Salk. vol.* 1. *page* 53. *Raym. vol.* 2. *page* 1066.

Bold's Caſe.

A verdict general or ſpecial may be amended by the notes in the book of the Clerk of Aſſize, if there be a miſpriſion: but this is to be intended in civil and not in criminal caſes. *Vide Keil.* 1. 3 *Cro.* 149. In *aſſumpſit*, the defendant pleaded payment for part, and *non aſſumpſit* for the reſt, and the jury found for both, *quod non aſſumpſit*, whereas for one it ſhould have been *non ſolvit*; and the record, was delivered to the clerk of the aſſizes to amend, becauſe it was his miſpriſion; it appearing, the jury found both iſſues for the plaintiff. 3 *Cro.* 149. 150. *Cro. Car.* 145, 338. 4 *Co.* 52. 2 *Cro.* 185. A ſpecial verdict has been amended by the notes of council in the entry; and that after a writ of error brought.

Per curiam. It is but what was found, and we may amend here what they might *in C. B. Vide Salk. vol.* 1. *p.* 53.

Michaelmas, 6 *Ann. Tulley* v. *the bail of Vavaſor.* Error.

On motion to amend a *ſci. fa.* againſt bail on a writ of *error* brought on a judgment in *C. B.* where the clerk, who had the judgment before him, had recited in the writ, *that* Randal *had recovered againſt James*, whereas the judgment was, *that* James *had recovered againſt* Randal; which was a variance from the record, the judgment recorded being miſrecited in the writ:

Mr. *Eyres* ſaid there was a judgment recovered againſt *Vavaſor*, and that judgment was affirmed here with coſts, *for delay of execution*; and the only thing they can amend by, muſt be the *writ of error*.

Holt, Chief Juſtice, cited a caſe, where a man can bring a writ of error given for himſelf. 2 *Vent.* 104, 105.

Raymond, who made the motion, inſiſted it was only a mere miſtake of the clerk's, in not purſuing his inſtructions, and that ſuch miſtake may be amended after a writ of error.

Holt, Chief Juſtice. If it be amendable at one time, it is ſo at another; if it may be amended before a writ of *error*, it may be amended after a writ of error brought.

Powell, Juſtice. A man can never bring a writ of *error* to reverſe a judgment awarded in his favour; for there muſt be a damage, an injury recited, which cannot be of a judgment that is given for him. This is a *query.* But on the whole, the court held, that the writ of *ſci. fa.* in this caſe was amendable. *Vide Mod. Rep. vol.* 11. *p.* 139.

Michaelmas, 7 *Ann. Withers* v. *Baker.*

In this caſe, Chief Juſtice *Holt* declared, that by the courſe of the court, a man may amend his declaration the ſecond term; but that when the declaration is amended, new rules for pleading muſt be given The plaintiff the ſecond term may amend, but not change the *venue*, though iſſue be not joined, nor in any caſe afterwards. For in tranſitory actions, the plaintiff has his election to lay his action where he pleaſes, therefore he ſhall not change it, though the defendant may, on cauſe ſhewn. *Vid. Mod. Rep. vol.* 11. *page* 198.

Trinity, 8 *Ann. Smith* v. *Bowen.*

The appellee, *Bowen*, having demurred to the appeal of murder, the following exceptions were taken to it.

1ſt. That the murder is laid to be done *in the afternoon about ten of the clock of the ſame day*, now if the murder be in the night, by *ſtat. Glouceſter*, *c.* 9. it muſt be pleaded, *in the night of the ſame day*; and though in *July* it be not dark at ten, yet it muſt be ſo pleaded.

Holt, Chief Juſtice. In *murder* this is ſufficient; but in an indictment for *burglary* it would have been bad; for there it muſt be ſaid, *in the night*, *&c.* becauſe the crime is not *burglary* unleſs committed in the night.

2dly. It does not ſay the aſſault was by *force and arms*, only *he came with force and arms, and made an aſſault*; and cited *Wilſon* v. *Laws*, 4 *Mod.*

3dly. There is no place ſet forth where the ſtroke was given; for the words are, *on the day, and at the place aforeſaid, made an aſſault*; now, before is mentioned where the pledges lived; and afterwards, *where he came with force and arms*; now the word *aforeſaid* may refer to the place aforementioned, *viz.* where the pledges lived; ſo that no *venue* is laid to the aſſault.

4thly. In the appeal it is wrote *murdum*, for *murdrum*, and *Geore* for *George*. But on examination of the bill that was filed, it was right. Then the appellant's council moved, that the roll might be amended by the bill, which was oppoſed by the council for the appellee, who ſaid that none of the ſtatutes for amendments extend to appeals; and cited *Tuclein's* caſe, and *Hoyle* v. *Pitt.* 6 *Mod.* 164. 268.

Per Chief Juſtice *Holt*. The *with force and arms* extends to all, and not only to the word *came*. See *Co. Entries* 59. And this is not like the caſe of *battery* or *treſpaſs*, for there a fine is due to the Queen.

As to the third exception, *aforeſaid* is good, for the place mentioned where the pledges live, is not part of the appeal.

As to the fourth exception, there needs no amendment; but if there does, it may be amended. Suppoſe in an action of *treſpaſs*, there is an omiſſion of *with force and arms* in the declaration, and the original is right, the declaration may be amended by it. As to the miſtake of *Geore*, for *George*, it is in the freſh ſuit, which, ſince the ſtatute of *Glouceſter*, need not be ſet forth; for if an appeal is proſecuted within a year and a day, it is ſufficient. But he ſaid there was a miſtake in awarding the *venire*, it being by *ceſſet proceſſus*, i. e. *let the proceſs be diſcontinued*, when in his opinion the right way was, by *the ſheriff has not returned the writ.*

As to the amendment, Juſtice *Powell* ſaid, that by the common law the roll might be amended by the bill, and cited 7 *H.* 4. *c.* 27. and *Brook*, title, *amendment*, 101. where an appeal is amended; but the original in appeal is not amendable. 8 *Co.* 156.

Powis and *Gould* were of the ſame opinion; but on the objection ſtated by *Holt*, the matter was put off to the next day; when on a further argument the court delivered their opinion as follows:

Holt, Chief Juſtice, ſaid, that on conſideration they were of opinion, that this is the moſt proper way; for it is in vain to proceed to iſſue until the demurrer be determined, for if the bill abates, there is an end.

As to the amending the appeal by the original bill, it is amendable at common law; but if not, yet it is by ſtat. *Edw.* 3. *c.* 6. and cited *Blackmore's* caſe; for appeals are not excepted out of that ſtatute.

It was doubted whether a plea might be amended after judgment on error, and that was on the word *proceſs*, which was thought not to extend to any plea after judgment on error; to amend which, *ſtat.* 9 *H.* 5. *c.* 4. was made, which it did, by adding the word *record*; and *ſtat.* 4 *H.* 6. *cap.* 3. made that perpetual: in none of which ſtatutes appeals are excepted. *Stat.* 8. *H.* 6. enlarges the power of the judges, but in this appeals are excepted; he cited the caſe of Sir *H. Tufton* v. Sir *John Aſhley*, *Cro. Car.* 144. an amendment in a *quo warranto*, and concluded that it ſhould be amended; for the aforeſaid ſtatutes extend to appeals, where by the record itſelf it appears to be a miſtake of the clerk.

Powell, Juſtice, ſaid, there were very few things amendable at common law; a *miſpriſion* of a clerk was not, if there was nothing to amend it by; but this is amending one part of the roll by the other, *viz.* the recital by the bill; in this caſe the bill is *verbatim* the ſame as the count, but in moſt caſes it is otherwiſe.

As to the ſtatutes, I ſee no reaſon why an appeal, which is a civil proceſs, is not within them, where it is not particularly excepted. But I ground my opinion on the common law.

As to the diſcontinuance, I think one way is as good as the other; without the order of the court it would be a diſcontinuance; but we have power to ſtay the iſſue till after the demurrer; and this appears to be ſo by the entry, *viz. let the proceſs be diſcontinued until the ſaid matter in law be terminated in ſome lawful manner*; and that this way is uſual as well as the other, the precedents cited ſhew. *Powell* and *Gould* coincided in this opinion for the ſame reaſons.

And the court ordered the roll to be amended. *Vide Mod. Rep. vol.* 11. *p.* 230.

Michaelmas, 8 *Ann.* *The Queen* v. *Stedman.*

An information was exhibited againſt the defendant by the addition of *gentleman*; the defendant pleaded in abatement, that he was an *upholſterer*, and not a gentleman; and a rule being obtained at the ſide bar to amend the information, the defendant's council at the time of ſhewing cauſe why it ſhould not be amended, ſaid, that as they had taken advantage of this miſtake by pleading in abatement, the court could not amend it, and cited *Buckſom* v. *Hoſkins*, *Michaelmas*, 3 *Ann*, *in this court*, where after *nul tiel record* pleaded to a *ſcire facias*, which miſrecited a judgment, an amendment was denied, and criminal matters are not within the ſtatutes of amendments.

Another council on behalf of the defendant ſaid, that there was no precedent to warrant an amendment after taking advantage of it by pleading, and all the caſes mentioned of amendments immediately before trial in informations, are only miſpriſions of clerks.

Powell, Juſtice, ſaid, that informations are the ſuggeſtions of the Attorney General, which he may amend any time before trial, but it is a queſtion whether it can be done after advantage taken of it by pleading, as in the preſent caſe. He obſerved, that informations are within the *ſtatute of additions*; but this ought not to be amended to falſify the defendant's plea, though iſſue be not joined; and that a *miſnomer* in an indictment was not amendable, and he ſaw no difference between that and an information. If one be indicted by his right name, and he pleads a *miſnomer* in abatement, and you indict him again, he is eſtopped to ſay that the name he gives himſelf in his plea is not his right name. *Adjourned* to ſearch for precedents. *Vide Raym. vol.* 2. *page* 1307.

Michaelmas, 11 *Ann.* *Ruſh* v. *Spymour.*

Statutes of amendment extend only to pleadings of record; therefore pleadings while in paper are amendable by common law.

Anciently all pleas were *by word of mouth* at the bar; and then, if any error was ſpecified in them, it was preſently amended. Since that cuſtom is changed, the motion to amend, becauſe ill in paper, ſucceeded in the room; and it is a motion that the court cannot refuſe; they may refuſe it, if the party deſiring it refuſes to pay coſts, or the amendment deſired ſhould amount to a new plea. *Vide Mod. Rep. vol.* 10. *page* 88.

Michaelmas, 12 *Ann.* *Walker* qui tam v. *Laughton.*

On a motion to amend the declaration, this being a popular action on the ſtatute of *uſury*, and the defendant having pleaded a plea in abatement, to which the plaintiff had demurred; there were two faults in the declaration; firſt, it ſhould have been, *the action accrued*; the word *action* was omitted, and the *whole reſpecting the charge* was wrong, and different from the ſums mentioned to be forfeited.

Per curiam. All is in paper; this may be amended, but indeed if there had been ſuch an amendment as would alter the action, then we would not a low them to amend, becauſe another perſon might have brought the action, as you would mend it. *Vide Forteſcue*, *page* 277.

Michaelmas, 3 *Geo.* *Garner* v. *Anderſon.*

In a *replevin* out of the county court, the plaintiff declared for taking his cart and four horſes in *Nightingale Lane*, in the pariſh of *Stepney*. The defendant pleads in abatement, that he took the goods in *Nightingale Lane*, in the pariſh of *St. John Wapping*; *abſque hoc*, i. e. *without this*, that he took them in *Nightingale Lane*, in the pariſh of *Stepney*: and ſets forth his title to the goods as a *deodand*.

The plaintiff's council moved to amend the declaration, and alledged the place to be in the pariſh of *St. John Wapping*; for the one ſide of that lane to the cauſe-way is, by act of parliament, in the pariſh of *Stepney*, and the other ſide in the pariſh of *St. John Wapping*, and the goods were taken in that ſide of the lane which is in *Wapping*. The fact was, that a ſervant of the plaintiff's was driving a cart, and by chance run over and killed a child; upon which the defendant ſeiſed the cart and horſes as a *deodand*, and the ſervant was tried for the murder, and found, *by accident*.

The defendant's council inſiſted, that if this ſhould be amended, all pleas in abatement will be ſet aſide. *Eaſter*, 2 *Ann. Lapeyre* v. *Germain*, *an action of aſſumpſit* was brought by bill againſt the defendant, as a knight, he pleads in abatement that he is a knight and baronet; and the court refuſed an amendment. *Hil.* 1 *Geo. Mears* v. *Bowes*, in *C. B.* was a ſimilar caſe, and the court would not grant an amendment. Nothing is removed out of the county court but the plaint only; and therefore if iſſue is joined in the county court, the plaintiff muſt declare *anew*.

Chief Juſtice. In the caſe of *Lapeyre* v. *Germain* there could not be any amendment, becauſe the commencement of the ſuit was wrong, and nothing to amend by. The foundation of amendments by the court, whilſt the proceedings remain in paper before they are recorded, is, that theſe papers, delivered to and fro, ſupply the declaring and pleading *by word of mouth* at the bar, and may be amended as eaſily as if ſpoke at the bar. Theſe faults, ſtiled errors of the clerk, are amendable after the proceedings are recorded.

Afterwards, upon deliberation, the court granted leave to amend, upon payment of coſts. *Vide Strange, vol.* 1. *p.* 11.

Trinity, 5 *Geo.* *The King* v. *Nixon.*

The court refuſed to quaſh an information upon motion, which had been exhibited by rule of court. *Eyre*, Juſtice, obſerving, that ſuch informations are amendable. *Vide Strange vol.* 1. *page* 185.

Michaelmas, 5 *Geo.* *Stratton* v. *Burgis.*

An attorney undertakes to appear for the defendant, an infant.

Per curiam. He is obliged to do it in a proper manner, and having entered it *by his attorney*, when it ſhould have been *by his guardian*, it may be amended. *Vide Strange vol.* 1. *page* 114.

Michaelmas, 5 *Geo.* *entered Trinity* 2 *Geo.* *Philips* v. *Smith.* Error.

In *debt* on 7 & 8 *W.* 3. *c.* 25, againſt an officer who preſided at the election of members of parliament, for refuſing to give a copy of the poll; after judgment for the plaintiff *in B. R.* and error brought in the *Exchequer Chamber*, the plaintiff moved to amend in ſeveral particulars, which he was ordered to give a note of to the other ſide. And now they come to ſhew cauſe againſt their being amended.

The firſt amendment deſired was in the warrant of attorney, where the defendant was ſtiled bailiff *bugi* for *burgi*.

Serjeant *Cheſhyre.* There is nothing to amend this by, as there was in the caſe of *Cooke* v. *The Dutcheſs of Hamilton*, where they produced the common rule in ejectment, and that was the foundation for putting in the attorney's name.

2. To put the word *vic.* into the *diſtringas*. It is *Rex fidei defenſor, &c. Somerſet' Salutem*, omitting *vic.* There is likewiſe nothing to amend this by; no award of it upon the roll, as there is of the *venire facias*. And it does not appear but it might be deſigned to be directed to the coroner.

3. They would amend the *teſte* of the *venire*, which in other words is, to ſolve a diſcontinuance. The award is in fifteen days of *St. Martin*, and they have taken it out *teſted* the firſt day of *Hilary* term, and now they would *teſte* it in *Michaelmas* term.

4. The other amendment they would make, is, to add continuances. Of them they have no need, having a verdict, which cures the want of them.

This is a proceeding on a penal law, and therefore the court will be ſtricter than in common actions. And as the ſtatutes of *jeofails* will not help them, they muſt ſhew it to be amendable at common law. In the caſe of the *Queen* v. *Tutchin*, which was an information for a libel, where the *diſtringas* was *teſted* the day after the return of the *venire*, the court on great debate refuſed an amendment.

The queſtion is, whether this be a penal or popular ſtatute, within the exception of the ſtatutes of *jeofails?* I agree, where a man is intitled to an action at common law, and an act of parliament comes and gives him an encreaſe of damages; that it is not to be taken as a penal ſtatute. 9 *C.* 71. 3 *Bulſt.* 378. But this is not the caſe. Any perſon who demands the poll may have the action if he be refuſed it, and that ſhews it to be a popular ſtatute.

All amendments are either at common law or by ſtatute. Nothing was amendable, at common law, but in the ſame term, 8 *Co. Blackmore's* caſe, *Salk.* 50. By 14 *E.* 3. *c.* 6. and 8 *H.* 6. *c.* 12. ſuch faults only are amendable, as proceed from miſtake, but when a man deſignedly makes it *teſted* of one term, when it ought to be of another, that is matter of judgment. *Show.* 80. The direction of a writ is a more eſſential part than the *teſte* of it, or the return. It cannot be a writ unleſs it be directed to ſomebody, but it may be good without a return, as where it is *vicontiel.* Where there were two ſheriffs, and the writ was directed *vicecomiti*; there indeed it was made *vicecomitibus*, becauſe there was a direction, though an improper one. 2 *Cro.* 188. *Yelv.* 110.

At common law nothing was amendable but the act of the court. If *vic.* is to be put in now, it will be giving an authority after the execution of it. In the caſe of *Sloper* v. *Child*, *in Cro. Jac.* the word *vic.* was put in, but that was becauſe the award of the *venire* warranted it, which the award here does not, for it is of a ſubſequent term, and at a time when the defendant had no day in court. In *Cro. Eliz.* 820. the return of the *venire* was held amendable, but not the *teſte*, becauſe that is never mentioned in the awarding it upon the roll.

The council on the other ſide ſaid, the ſtatutes of amendments do not except popular actions, as the ſtatutes of *jeofails* do. 3 *Lev.* 375. In a *qui tam &c.* on the ſtatute 31 *Eliz.* for 5 *l.* for ſelling a horſe in *Smithfield*, not tolled, there was an amendment. So *Salk.* 324. 1 *Roll. Abr.* 205. *pl.* 3. *Cro. Car.* 275, 278. *Jones* 320. 1 *Roll. Abr.* 202. *pl.* 7. 1 *Brownl.* 156. upon the ſtatute of hue and cry the day of committing the robbery was amended. It appears the writ was intended to be directed to the ſheriff, for there is in it *com' tuo*, and therefore we may put in *vic.* according to *Yelv.* 69. *Cro. Jac. Sloper* v. *Child.* So the *teſte* of writs have been amended. 2 *Cro.* 442. *Yelv.* 64. *Cro. Car.* 38. 2 *Cro.* 64. 2 *Brownlow* 102. *Moor* 599. *Cro. El.* 183. *Moor* 684. *Cro. El.* 203. 2. *Cro.* 162. *Moor* 465. *Cro. El.* 467. *Noy.* 57. 2 *Jones* 41. And we may add the continuances, according to 1 *Roll. Abr.* 200, 205, 206. *pl.* 6.

The crown has no part of this penalty, but the party grieved has it all; and he has an antecedent right before bringing the action, which a common informer has not. He ſhall have coſts. 1 *Roll. Abr.* 516. *pl.* 5. Sir *W. Jones* 447. 1 *Ven.* 133. *Cro. Car.* 539. As to the warrant of attorney, we needed not put in any addition. The other is right, and that is ſomething to amend by. Then as to the *vic'*, this writ is returned by the ſheriff; ſo no colour to ſay it might be intended to go to the coroner. In *C. B.* the laſt term, between *Child* and *Sloper*, the *venire* was to the ſheriff of *Warwickſhire*, and the *habeas corpora* to the ſheriff of *Nottingham*, and this was amended. 3 *Mod.* 78. So 8 *W.* 3. *B. R. Wright* v. *the Inhabitants of Penhurſt*, the *venire* was amended from *de placito huerii et clamoris*, to *de placito tranſgr' et contempt', contra ſtatut' de hue et cry.* As to the *teſte*, *vide Hardreſs* 321. 1 *Roll. Abr.* 205. 2 *Cro.* 211.

The court doubted as to the continuance, but held all the reſt amendable. And *Eyre* J. quoted *Kite* v. *Epiſcopum Worceſter*, *Eaſt.* 7 *W.* 3. where one of the defendant's names was omitted in the *diſtringas*, and it was amended after trial. *Adjourned.* And afterwards, when it came on again, the court declared for all the amendments, except the want of continuances, which they had debated again. And for the amendment the former arguments were inſiſted on; and 1 *Roll. Abr.* 200. *pl.* 27. *Yelv.* 156. 26 *H.* 6. *amendment* 33. were cited. In anſwer to which it was inſiſted, that continuances were the act of the court, and the ſtatute 8 *H.* 6. extends only to the miſpriſions of the clerk. 8 *Co.* 156. *b.* *Stiles* 338. 3 *Lev.* 431. And towards the end of the term the Chief Juſtice delivered the opinion of the court, that the continuances might be entered at any time, as well after as before the judgment; and a diſtinction was taken between miniſterial and judicial acts, the firſt of which were at common law amendable at any time; but the latter not after the ſame term. And as to amendments of judicial acts, a difference was made between amendments which deface and alter the record, and ſuch as are only additional to it, in order to eke it out and compleat it. *Vide Strange, vol.* 1. *p.* 136.

Michaelmas, 5 *Geo.* *Gauld* v. *Coulthurſt.* Error.

The judgment in error was *teſted* in *Hilary* term, of which the judgment was. But the plaintiff did not enter continuances upon it till *Trinity* term, which occaſioned the writ of error to be quaſhed. And now the queſtion was, as to coſts. And all the court agreed, that this not being a fault in the writ of error at the time of bringing it, but being occaſioned by the act of the defendant in error, which the plaintiff could neither foreſee nor prevent; it was not a caſe within 4 & 5 of *Ann. c.* 16. which gives coſts againſt the plaintiff in error, upon quaſhing defective writs of error. Then another queſtion aroſe, whether the plaintiff in error ſhould not have his coſts in this caſe, being defeated of the benefit of this writ of error by the artifice of the defendants in error? And as to this point, the Chief Juſtice, and *Eyre* Juſtice, were againſt giving coſts, and *Powys* and *Forteſcue* Juſtices, were of the contrary opinion: ſo the court being divided, the writ was quaſhed without coſts on either ſide. *Vide Strange, vol.* 1. *p.* 139.

Trinity, 7 *Geo.* *Power* v. *Jones.* Error.

The defendant brought a writ of error, and aſſigned infancy and appearance *by attorney*; *Strange* moved that the attorney might be obliged to ſet it right, and cited *Goodright* v. *Right*, and *Stratton* v. *Burgiſs*: but the court ſaid, they could not do it in this caſe, becauſe here was no expreſs undertaking to appear, as there was in thoſe caſes; if there had, the court would oblige the attorney to do it in a proper manner. *Vide Strange, vol.* 1. *p.* 445.

Michaelmas, 7 *Geo.* *Hillier* v. *Froſt.*

The court at the ſide bar made a rule to amend the return of a *ſcire facias* from *die veneris in craſtino Sancti Martini* to *die Sabbati*, *Friday* being the feaſt of St. *Martin*; and now it was moved to diſcharge it, becauſe not a proper motion for the ſide bar; nor can the court amend the writ, but the proper way would be to quaſh it. I was council in maintenance of the rule, but had little to ſay for it, ſo it was diſcharged; and I moved to quaſh the writ, which was ordered accordingly. *Vide Strange vol.* 1. *page* 401.

Trinity, 8 *Geo.* *Mayhoe* v. *Archer.*

On a ſpecial verdict, the caſe was thus; *(viz.)* the jury found, that *Richard Baxter* rented a farm, for which he paid 300 *l. per annum*; and that he planted potatoes on part of the lands which he farmed, and that he bought great quantities of potatoes to utter and ſell again for profit, and that for ſeveral years paſt he dealt with ſeveral perſons in potatoes, at ſeveral times and places, and had employed warehouſes where he put potatoes, and had ſerved ſeveral markets therewith, and had ſold *great quantities* thereof for profit, and for his living, *&c.*

On this ſpecial verdict there were two points raiſed:

1ſt, If the jury have found enough to make *Baxter* a trader within any of the ſtatutes made againſt *bankrupts*.

2d, Whether *a farmer* who ſells potatoes, though he buys ſeveral great quantities thereof, and gets his living thereby, is within any of the ſaid acts.

In *Trinity* term following, the council for the plaintiff finding the judges differed in opinion, moved for a *new venire*, or that the court would give leave to amend this ſpecial verdict upon the *affidavit* of one of the witneſſes at the trial, that *Baxter* bought potatoes ſeveral years, to the value of five hundred pounds *per annum*; and thereupon a rule was made for the other ſide to ſhew cauſe why the verdict ſhould not be amended; and the cauſe which they ſhewed was, that though this witneſs had ſworn the ſame thing at the trial, yet it was without precedent to have a verdict (which is a record) amended by ſuch an affidavit; for though it was the ſame which was given in evidence before, yet the jury did not believe it; or probably there might be other evidence at the trial to diſprove it.

But the court was of opinion, that a ſpecial verdict might be amended by notes taken by the clerk at the trial, or on proof of the certainty of what was then given in evidence; and the ſame was ruled accordingly, upon payment of coſts. *Vide Mod. Rep. vol.* 8. *p.* 48.

Trinity, 9 *Geo.* *Huxſer* v. *Gapan.*

In *trover for a ring*, the defendant moved for leave to bring it into court, and that it might be ſtruck out of the declaration.

This being an action for damages founded on a ſuppoſed converſion, the motion was denied, but if it had been an action of *detinue*, it would have been granted.

Then the plaintiff moved for leave to amend his declaration, and add more counts to it, having only declared for 15 *s.* damages, and this to give the court juriſdiction; and though this was ſtrongly oppoſed on the other ſide, he had leave to amend.

Per curiam. In *trover* the converſion is the point in iſſue, for which the time and place ſhould certainly be alledged. *Vide Mod. Rep. vol.* 8. *page* 176.

Michaelmas, 9 *Geo.* *Jordan* v. *Twells.*

In an action of *debt* on a covenant contained in an indenture of leaſe, the defendant pleads, that after making the leaſe, and before any rent due and payable, one *K. P.* after making the ſaid indenture, having a prior and better right and title to the premiſſes than had been granted to the defendant, againſt his will entered into the premiſſes, and by due proceſs and courſe of law expelled and evicted the defendant. To this plea the plaintiff demurred, and ſhewed for cauſe that the defendant in his plea had not ſet forth what right or title the ſaid *K. P.* had to the premiſſes, nor by, or from whom ſuch title accrued to her; nor had traverſed or confeſſed the title ſet up by the plaintiff; nor had ſet forth by what proceſs, nor out of what court iſſuing, the ſaid *K. P.* did evict him. And on this demurrer the defendant joined ſo long ago as *Eaſter* term laſt, and the cauſe was made *a concilium*. But ſoon after the cauſe was ſet down in the paper for argument, the council for the defendant moved to amend the plea. The motion was oppoſed, and it was inſiſted that the application was now too late, the plaintiff having been delayed of his trial laſt aſſizes, and the cauſe being now in the paper; and the caſe of *The King* v. *Edwards*, *Michaelmas*, 8th of the preſent King, was cited; where, after the defendant had demurred, and an aſſizes paſt, and he afterwards applied to withdraw his demurrer and plead, the court refuſed, becauſe the trial had been delayed.

Lord *Hardwicke*. The great objection to this motion is, that the plaintiff has loſt his trial, and if this be allowed it will be a certain method of delay. Formerly in all amendments the party was to ſhew that the proceedings were all in paper, though of late that has been got over.

Lee. The caſe of *The King* v. *Edwards* was exactly ſimilar, and the court refuſed it becauſe tending to delay.

Page. Amendments have ſometimes been allowed, even when the cauſe was come down to trial; and I remember, in the caſe of *Dyte* v. *The Biſhop of Worceſter*, in ejectment, after trial had, the plaintiff found he had left out the name of one of the defendants in the *niſi prius* roll, and was allowed to amend it: but I believe all amendments allowed of when the cauſe was ſo far advanced, have been on the motion of the plaintiff.

The court would not allow the amendment to be made. *Vide Caſes Temp. Ld. Hardwicke, p.* 171.

Eaſter, 10 *Geo.* *Ruſſel* v. *Thoyre.*

In *debt* upon a bail-bond, the *memorandum* was of *Trinity* term, and I excepted, that the aſſignment appeared to be in *November* following. Then the plaintiff moved to amend, but I objected there was nothing to amend by.

Per curiam. We cannot amend it, as it now ſtands; but we will give leave to file a new bill as of *Michaelmas* term, with a ſpecial *memorandum*; which the plaintiff afterwards did, and then amended of courſe, on payment of coſts. *Vide Stra. vol.* 1. *p.* 585.

Eaſter, 10 *Geo.* *Wilkinſon* v. *Mayer*.

In an action of *covenant*, judgment having been given for the plaintiff, a writ of *error* was brought in the *Exchequer-Chamber* by the defendant; and in *Trinity* term following, it was moved to amend the *venire facias*, for this being an action of covenant, and the defendant having pleaded ſeveral pleas, and the plaintiff having replied to one, and demurred to the reſt; the *venire facias* was drawn in the uſual form, viz. *as well to try the iſſue as to enquire of the damages*; theſe laſt words, viz. *to enquire of the damages*, ought to be ſtruck out.

To which it was anſwered, that if the court ſhould give leave to amend this record after a writ of error brought, it is but reaſonable that the plaintiff in the original action ſhould pay coſts; for it is probable, that the writ of error was brought by the defendant for this very fault.

Thereupon, the counſel for the defendant in error offered to pay coſts, ſo as the plaintiff would waive his writ of error, for then it will appear, that it was brought for this very fault; but if he would not waive it, the defendant had leave to amend without paying coſts. *Vide Mod. Rep. vol.* 8. *page* 232.

Trinity, 11 *Geo.* *Cowper* v. *Spencer*.

After a verdict for the plaintiff, it was moved in arreſt of judgment, for that no iſſue was joined in the cauſe; it being, *and therefore prays that it may be enquired of by the country*; then theſe words ſhould follow, *and the aforeſaid* (the defendant) *likewiſe*, which were omitted.

On the other ſide it was ſaid, that there is no occaſion for amending the iſſue, becauſe the appearance of the defendant is entered on the *poſtea*; beſides, at the worſt, it is only an *informal iſſue*, and that is amendable.

In indictments for treaſon there is no *ſimiliter*, i. e. *likewiſe*, entered; and this court muſt be guided by precedents, whether it is in this caſe amendable.

And at another day the following caſes were cited, to ſhew that it was amendable; *(viz.)* In *Fitzherbert amendment*, *fo.* 32. an action was brought againſt ſeveral; they all pleaded, and in the replication one only joined in iſſue by a *ſimiliter*, and yet it was held amendable; and in *Dyer* 160. the entry was, *and the aforeſaid likewiſe*, leaving out the words *the defendant*, and it was held amendable; and in the following caſes, *Rol. Rep.* 200. *Cro. El.* 752. *Cro. Car.* 435. miſentries were adjudged to be amendable; and it was Lord *Coke*'s opinion, that the miſpriſion of a clerk in a record may be amended; and in the caſe of *Davis* v. *Acherley*, in an action on three promiſſory notes, the defendant pleaded as to two of them, that the *drawee has not indorſed*, and as to the third *non aſſumpſit* generally, *and the aforeſaid* (the plaintiff) *likewiſe*; and after verdict for the plaintiff, he was allowed to enter his judgment on the firſt iſſue; therefore if any amendment is neceſſary, it muſt be in this caſe, eſpecially ſince it is plain by the *poſtea* that the defendant appeared.

In every material iſſue joined, there muſt be a verdict on one ſide, otherwiſe there can be no judgment; and the plaintiff would now have judgment for damages on a verdict found on *informal iſſue*, as he alledges it to be, but on no *iſſue* joined, as the defendant ſays; now there is a difference between immaterial, and informal iſſue joined, and where there is no iſſue at all joined, and where there is no iſſue at all joined; and the caſes cited in the margin are, where the iſſues were informally joined; as where it is ſaid in the entry, *and the aforeſaid defendant likewiſe*, where it ſhould be *the aforeſaid plaintiff likewiſe*; in which caſe the iſſue is tendered by the defendant; but in the principal caſe the iſſue was tendered by the plaintiff, and never joined by the defendant; ſo there was no iſſue at all, which ſeemed to the court not amendable. *Vide Mod. Rep. vol.* 8. *p.* 377. & *Strange, vol.* 1. *p.* 641.

Michaelmas, 11 *Geo.* *Weldon* v. *Buckler*. Error.

Scire facias againſt the pledges in a *plaint in replevin*, which *plaint* was removed into the court of *Common Pleas*, where the plaintiff declared, &c. and the defendant avowed the taking, &c. as a diſtreſs for rent, and had judgment to have a *return irrepleviable*; and thereupon a writ of *error* was brought in *B. R.* and the judgment was affirmed, and then a precept was directed to the ſheriff to make a return of the goods to the defendant, and he (the ſheriff) returned an *elongata*, i. e. *that he could find no chattels whereof to make deliverance*; whereon the defendant brought a *ſcire facias againſt the pledges*, in which he ſet forth, that he had recovered judgment in the court of *Common Pleas*, *as appears by the record &c. in C. B.* which judgment was affirmed in *error* in the court of *King's Bench*, *as appears*, &c. The defendants plead that the record remains in *C. B.*

On ſpecial demurrer for the plaintiff, it was argued, that a writ of *error* upon a judgment in *C. B.* removes the record itſelf, and not the tranſcript only; for execution is awarded by this court if the judgment is affirmed. A writ of *error* returnable in the *Exchequer-chamber*, is different; for there the tranſcript only is removed.

The defendant's council excepted to the *ſcire facias* for inconſiſtency: it ſhews that judgment was recovered in *C. B.* *as by the record in* C. B. *doth more fully appear*; that *error* was brought in *B. R.* where judgment was affirmed, as by the record, remaining in the *King's Bench*, doth more fully appear.

Per curiam. *Sci. fa.'s* have been often amended; however, let the plaintiff diſcontinue, on payment of coſts. *Vide Mod. Rep. vol.* 8. *p.* 314.

Hilary, 12 *Geo.* *Lady Caſs* v *Title*. Error.

In *error* on a judgment in *C. B.* in *ejectment*, on four demiſes of a different commencement and continuance: verdict for the plaintiff againſt two defendants only as to one third part of twenty-eight acres of meadow; and as to the reſt of the premiſes, and all the other defendants, not guilty: upon which there is judgment, that the plaintiff ſhall recover *his aforeſaid term &c.* againſt the two defendants who are found guilty, and that the acquitted defendants ſhall recover 7 *l.* coſts.

On this judgment, the two defendants, who were found guilty as to part, bring a writ of *error*, and aſſign the general errors. And *Strange*, *for the plaintiff in error*, objected, that the verdict and judgment are uncertain.

1. For that the plaintiff declares on four ſeveral demiſes of a different commencement and continuance, and yet the judgment is only to recover *his term aforeſaid* in the ſingular number, without determining which of the terms he ſhall recover. *Hilary*, 4 *Geo.* B. R. *Hodſon* v. *Backhouſe*: the writ of error was *concerning a certain tranſgreſſion and ejectment of a farm*, inſtead of *farms*, there being two demiſes: and quaſhed.

2. It is impoſſible for the ſheriff, upon this judgment, to know what he is to deliver poſſeſſion of, for there are four demiſes of four different twenty-eight acres of meadow, and whether the plaintiff is to have thoſe which *A.* demiſed, or thoſe which *B.* or *C.* or *D.* demiſed, is uncertain; it ſhould have been, to recover the twenty-eight acres of meadow, which the firſt, ſecond, third, or fourth leſſor demiſed. 1 *Book of Judgments*, 74. 2 *Ditto*, 119. 2 *Roll. Abr.* 694. 1 *Roll. Abr.* 779. By this verdict nobody can ſay which of the leſſors titles is eſtabliſhed, nor can either of them bring an action upon it for the meſne profits.

The council for the defendants *contra*, did not offer to anſwer the objections, but ſaid they would try below, and get it ſet right, at preſent he took an exception to the writ of *error*, that it was only a record of *one* ejectment between the plaintiff and the two defendants who are found guilty; whereas it appears by the record, that there were eleven other indictments to the ſuit: and tho' the writ can be brought only by theſe two, *to the great damage of themſelves*, yet the ſuit muſt be deſcribed as it really was.

Per curiam. So it ſhould, and the caſe of *Cook* and *the Dutcheſs of Hamilton* was cited. Then *Strange* inſiſted that it was amendable by the late act; and of that opinion was the court; and as to the objections to the judgment, it was adjourned, to give the defendant in *error* an opportunity to ſet it right if he could. *Vide Strange. vol.* 1. *p.* 682.

Hilary, 12 *Geo.* *Hughes* v. *Alvarez.*

In an action on the *caſe* upon two promiſes, there was judgment for the plaintiff, as to the firſt promiſe; and as to the ſecond, a *nolle proſ.* A writ of enquiry being taken out to inquire what damages the plaintiff had ſuſtained *by reaſon of the promiſes*, on the return of this it was moved to amend the writ, and make it *by reaſon of the non performance of the aforeſaid firſt promiſe*, and on the authority of *Baker* v. *Campbell*, *Eaſt.* 4 *Ann*, *B. R.* the writ was amended in this caſe; the record of the judgment by default being a warrant to amend by. *Vide Stra. vol.* 1. *p.* 684.

Hilary, 12 *Geo.* *The King* v. *Betts and Others.*

To a *ſcire facias* on the *crown* ſide on a recognizance for keeping the peace, the defendant as to the breach aſſigned, pleaded *not guilty*, but concluded with an averment, inſtead of concluding to the country; and after a demurrer, it was moved to amend the plea: and the court gave leave to amend it accordingly. *Vide Strange, vol.* 1. *page* 686.

Hilary, 13 *Geo.* *The King* v. *Seaward.*

On an information againſt the defendant for giving a challenge; the defendant pleaded in abatement, that he was a *ſurgeon*, and not a *gentleman*, as ſtiled in the information, which the court gave leave to amend on payment of coſts, this being a ſuit not carried on by the crown; and in *Eaſter*, 9 *Ann*, the *Queen* v. *The Town of Malmſbury*, a miſtake in the name of a corporation was amended after a plea in abatement. *Vide Raym. vol.* 2. *page* 1472. *Strange, vol.* 2. *page* 739.

Michaelmas, 13 *Geo.* *Crokat* v. *Jones.*

In an action on the *caſe* on a bill of exchange; the defendant pleaded that the bill was firſt exhibited 23 *October*, 12 *Geo. and that he had not aſſumed on himſelf within ſix years before the exhibiting of the plaintiff's bill*; to which the plaintiff replied, that the action firſt commenced 28 *November*, 11 *Geo.* and that the defendant promiſed within ſix years before that time; to which the defendant demurred. The defendant's council inſiſted, that it was not enough to ſay the action was firſt commenced ſuch a day, without ſhewing the proceſs, and continuing it down to the time of the declaration, *Salk.* 420. The plaintiff's council urged, *Tho. Ent.* 438. which is in the ſame form as this. But the court would not allow that as a ſufficient authority; and *Lutw.* 256. was cited as a caſe in point: whereupon it was adjourned. And at another day, it was moved to amend the replication, by ſetting out the *latitat*, and adding the continuances; and *Winkworth* v. *Clark* was cited, where they were ſent for up after a writ of error; it appearing there (as it did in this caſe) that there were regular continuances, P. 4 *Geo.* and as to its being after a demurrer, cited the caſe of *Ruſſel* v. *Martin*, and *Thorpe*, *Stra. vol.* 1. *page* 583.

The defendant's council, in oppoſition thereto, cited *Hales* v. *Hales*, in *C. B. Paſ.* 11 *Geo.* where they refuſed to let the plaintiff add continuances after a demurrer.

Per curiam. The authorities of our own court warrant it, and therefore let the replication be amended, on payment of coſts.

And afterwards the pleadings being cloſed, it appeared that the plaintiff declared on two bills of exchange, and ſeveral other promiſes; the defendant, as to the two firſt counts on the bills of exchange, pleads, *that the cauſe of action did not accrue within ſix years*; and as to the other accounts, *non aſſumpſit generally*, the plaintiff replies, that on ſuch a day he ſued out a *latitat*, which he continued down to the preſent declaration, and avers, that the cauſe of action aroſe within ſix years before the ſuing out the *latitat*. The defendant rejoins; *proteſtando*, that there was no ſuch writ iſſued as ſet out by the plaintiff; for the plea ſays, that after the ſix years were expired, *viz.* ſuch a day, the plaintiff firſt ſued out a *latitat*, which he ſets forth, and that he appeared to it, and that the plaintiff declared on it as above; and traverſes, that he appeared and put in bail to the writ mentioned in the replication; *et hoc paratus eſt verificare*, i. e. *and this he is ready to verify*. The plaintiff demurred, and ſhewed for cauſe, that this rejoinder is contrary to the record of the appearance, and is a negative pregnant. The defendant joined in demurrer.

The plaintiff's council argued, that the rejoinder was contrary to the record; and this is not a denial of their being ſuch a record, but an offer to put in iſſue the effect of it; and the plaintiff could not take iſſue, and carry it to a jury, to inquire which writ the appearance related to. The only iſſue the defendant could have taken was, whether the cauſe of action accrued within ſix years before the *teſte* of the firſt *latitat*.

Here is a *proteſtando*, that there is no ſuch writ, and then the traverſe admits it, and offers to try whether the defendant's appearance was on that or another.

Second objection. If this were a matter iſſuable, yet there being a negative and an affirmative, the rejoinder is ill in its preſent ſtate, for it ought to have concluded to the country.

The defendant's council did not offer to ſupport the rejoinder, but inſiſted, that the replication was ill; for the plaintiff ſhould have averred, that he actually ſued out and proſecuted ſuch writ, to avoid the ſtatute; but here he only ſays, that the court awarded ſuch a writ, and then ſets forth the continuances on it, which is not ſufficient. *Thom. Ent.* 151. *Brownl.* 104. *Salk.* 420.

The plaintiff ſhould likewiſe have ſhewn, that a bill of *Middleſex* was taken out precedent to the *latitat*, for that is the foundation of a *latitat*, and ought always to iſſue firſt.

The court were of opinion that the rejoinder was ill, and that the writ and continuances were ſufficiently ſet forth.

Raymond, Chief Juſtice, at firſt doubted whether the plaintiff ought not to have ſhewn that a bill of *Middleſex* iſſued before the *latitat*, becauſe the bill is the foundation of the *latitat*; but afterwards he agreed with the reſt of the court, that it was not neceſſary. *Styles*, 156. 1 *Sid.* 53. 60. And judgment was given for the plaintiff. *Vide Stra. vol.* 2. *p.* 734.

Michaelmas, 1 *Geo.* 2. *Turvil* v. *Aynſworth.*

In an action on a *South Sea* contract, the plaintiff declared it was for ſtock in the company trading *ad maria auſtrialia*, *called* the *South Sea* company. It was inſiſted on the trial that *auſtralia* was the proper word without an *i.* and therefore the evidence did not ſupport the declaration, and it was agreed to take a verdict for the plaintiff, and to apply to the court, and after a great debate a new trial was granted, for it was a different corporation, and if the word *auſtrial*' was to be rejected, it would not do, for then it would be a company trading to all ſeas, whereas they trade in the *South Seas* only; and the *Anglice* called the *South Sea* company will not do where there is a proper *Latin* word which is not made uſe of. *James Oſborn's caſe* 10 *Co.* 130.

The plaintiff afterwards had leave to amend his declaration on payment of coſts. *Vide Strange, vol.* 2. *p.* 787.

Eaſter, 2 *Geo.* 2. *Evans* v. *Thomas.*

The roll of the judgment was carried in, in *Trinity* term 1720, and docquetted; but before filed, was miſlaid and loſt. The court was moved for leave to file a new roll, the defendant being dead, and the executrix conſenting: and *King qui tam* v. *Bolton*, *Stra. vol.* 1. *p.* 117. and *Needham* v. *Grano*, were cited, and after a rule to ſhew cauſe, the ſame was made abſolute, for there being a docquet, it could be no deceit upon purchaſers. *Vide Strange, vol.* 2. *page* 833.

Trinity, 2 *Geo.* 2. *Canning* v. *Wright*. *Entered Mich.* 1 *Geo.* 2. Error.

A writ of *error* was brought by *Canning* to reverſe a judgment given againſt him in *C. B.* after a verdict in *ejectment*, wherein he was defendant. The writ of error was *teſted* 23 *October*, 12 *Geo.* 1. and returnable *in eight days of St. Martin*, *Michaelmas*, 12 *Geo.* 1. and by the record certified, the judgment appeared not to be given till *Hilary* term following, 12 *Geo.* 1. whereupon it was held clearly the record was not well removed by this writ of *error*.

The plaintiff's council in *error* moved, that the writ of *error* might be amended by *ſtatute* 5 *Geo.* 1. *cap.* 13. but on reading the *ſtatute* the court were clearly of opinion it could not be done, for it would be to amend the writ contrary to the truth of the caſe, for the judgment, in fact, was not given till *Hilary* term, 12 *Geo.* 1. and therefore this was not ſuch a variance as was intended to be amended by that act. The motion for an amendment was denied. *Vide Raym. vol.* 2. *page* 1531.

Trinity, 2 *Geo.* 2. *Muttit* v. *Denny*.

In *ejectment* againſt two defendants, it was ſaid, that they entered, expelled, and removed. And after verdict for the plaintiff, a motion was made in arreſt of judgment, and the court held it to be ill. But at another day, they ordered it to be amended, though there was nothing to amend by, on the authority of *Cro. Jac.* 306. *Salk.* 48, and then the plaintiff had judgment. *Vide Strange, vol.* 2. *page* 807.

Trinity, 2 *Geo.* 2. *Elkins* v. *Paine*. Error.

Elkins recovered judgment in a *ſcire facias* againſt *Paine*, *Field*, and two others, in the *Marſhalſea*, as bail for one *Croſby*, and *Paine*, and *Field only* brought a writ of *error* which was ill, and the record not removed thereby.

The council for *Paine* and *Field* moved that the writ of *error* might be amended by virtue of the ſtataute of the 5th *Geo.* 1. *cap.* 13. But the court held the writ was not amendable, the other defendants not having joined in the writ of *error*, and the writ was quaſhed. *Vide Raym. vol.* 2. *page* 1532.

Trinity, 2 *Geo.* 2. *Rutter* v. *Redſtone*. Error.

After *error* in the *Exchequer Chamber*, the tranſcript was brought back and amended in *B. R.* by the original record. And it was held neceſſary to make the amendment here, as this differs from the caſe of a writ of *error* from *C. B.* becauſe the *Common Pleas* ſends up the *record*, and the *King's Bench* ſends only a *tranſcript*. *Vide Strange, vol.* 2. *page* 837.

Hilary, 3 *Geo.* 2. *Sir John Forteſcue Aland* v. *Maſon*. Error.

In this cauſe the court gave leave to amend a fault in the writ of *error* brought, being of opinion that the ſtatute does not give coſts on *amending* as it does on *quaſhing*. *Vide Strange, vol.* 2. *page* 863.

Trinity, 3 *Geo.* 2. *The King* v. *Hayes*.

The defendant was indicted for forging a bond, and on the trial there appeared a variance in the addition of the obligor, on which a ſpecial verdict was found; the Chief Juſtice doubting whether it was a variance or not, it being *peroch.* for *paroch*, i. e. *pariſh*; and after the verdict was drawn up, the proſecutor moved for leave to amend the *niſi prius* roll by the record of the indictment, which was right, and alledged that the record of *niſi prius* had been made up by the clerk in court of the defendant, who might be ſuſpected to have made it wrong on purpoſe.

The court ſeemed to think this was amendable at *common law*, there being ſomething to amend by, but they ſaid there was no occaſion to give any opinion on that, ſince they were warranted to amend it, as being a fault committed by the defendant, who ought not to take advantage of it.

The *variance* being thus removed out of the caſe, the cauſe was put into the paper to be argued on the ſpecial verdict, and the defendant's council attempting to ſpeak, it was inſiſted, that the defendant ought to be in court, as on motions in arreſt of judgment; to which it was anſwered, that a motion in arreſt of judgment is after a verdict; *whereas*, till this ſpecial verdict is argued and determined, the defendant is not to be looked on as guilty; and the court thought this a reaſonable diſtinction, and ſuffered the defendant's council to go on.

For the defendant it was argued, that it was an imperfect verdict; the indictment is for three diſtinct facts; 1. For forging a bond. 2. For publiſhing ſuch a bond ſo by him forged; and, 3. For publiſhing a bond knowing it to be forged. To theſe three offences the defendant pleads *not guilty*, and the jury were charged to enquire of the whole, and in their verdict they find, that he forged a bond in the words and figures following, and that he publiſhed the ſame, but they ſay nothing as to the three offences, but conclude, that if on this evidence the court is of opinion he is guilty of the facts charged in the indictment, then they find him guilty; and if the court think him not guilty, they find accordingly.

On this ſtate of the caſe it was inſiſted on, that the jury ought to find all the iſſues with which they are charged; and ſince the evidence extended to two facts only, they ſhould have found him *not guilty* as to the third. 3 *Lev.* 55. In *treſpaſs* for taking a gown and mantua; it was found ſpecially, that the defendant took the gown for a tax, and ſaid nothing as to the mantua, and held a diſcontinuance. *Cro. Eliz.* 133. 2 *Roll. Abr.* 722. *pl.* 19. and 2 *Sid.* 86. It is ſaid that in all ſpecial verdicts, the judges will not adjudge of any matter of fact but that which the jury declare to be true of their own finding. *Trials per pais*, 236. Here the court are ſpecially tied down to ſay, Whether on the evidence laid before them the defendant is guilty of *all* the facts, and that they cannot ſay, becauſe there is no evidence as to *one*. *Co. Litt.* 227. *a.* A verdict that finds part of the iſſue, and nothing as to the reſt, is inſufficient for the whole, as in an information of intruſion into a meſſuage, and one hundred acres of land, if the jury finds as to the land, and nothing as to the houſe, it is void for the whole. *Godb.* 57. 2 *Leon.* 194. *Hard.* 166.

The court held, that as the verdict ſtood, they could not give judgment that the defendant was guilty of all the offences, the evidence only warranting them to adjudge him guilty of the two firſt, the laſt not being confined to the ſame bond; or if it was, yet every publication is a diſtinct offence, but then they thought themſelves not tied up by the ſpecial concluſion, but that the whole evidence being laid before them, they were to do what the jury ought to have done, and therefore they adjudged, that on the matter referred to them by the jury, it appeared to the court that the defendant was guilty of the forgery and firſt publication, and *not guilty* of the reſt.

Judgment not having been ſigned, the court was of opinion the defendant might move any thing in arreſt of judgment; and it having been taken notice of by the council for the King, that the forgery was laid to be *againſt the form of the ſtatute*, and the judgment prayed *on* the ſtatute, it was then objected by the council for the defendant, that all the proceedings againſt him were void; for that the *certiorari*, the *venire*, and *diſtringas* were, as if it had been an indictment at common law, and many precedents were cited, where the proceſs always run, *de quibuſdam tranſgreſſionibus et contemptibus contra formam ſtatuti*, i. e. *concerning certain offences and contempts againſt the form of the ſtatute*, and indeed that diſtinction had been kept up in all theforms of the *Crown-Office*, but the court thought it not neceſſary, for a *certiorari* to remove all indictments, will remove one for forgery on the ſtatute, and the jury are ſummoned to try whether he is guilty of the offence whereof he is indicted, which is a ſufficient warning to appear in the cauſe, and therefore they pronounced the judgment on the ſtatute, and the defendant ſtood in the pillory at *Charing-Croſs*, had one ear cut off, and then was carried to the *King's Bench* to ſuffer a year's impriſonment; during which he moved for the liberty of the rules, which was denied, he being in execution. *Vide Strange, vol.* 2. *page* 843.

Michaelmas, 3 *Geo.* 2. *Hatton* v. *Walker*.

The defendant concluded his plea with, *wherefore he prays judgment, but* (inſtead of *if*) *the plaintiff ought to maintain his action.* On demurrer the plaintiff ſhewed it for cauſe, and the defendant joined in demurrer, and coming after to amend by the draught under the council's hand, it was objected, that the intent of requiring miſtakes in point of form to be ſhewn, for cauſe of demurrer, was to give the party an opportunity to amend before he proceeded any further; but if after notice of his fault, he will be ſo hardy as to join in demurrer, he is not entitled to the favour of amending; and the court ſtrongly inclined againſt giving leave to amend, till at another day, the council for the plaintiff cited *Cro. Car.* 144. and *Hil.* 8 *Ann*, in *B. R. Brownjohn* v. *D'oyley*, where the avowry was amended by the draught under the council's hand, after there had been a demurrer, and the cauſe made a *concilium*; on the authority whereof, the court gave leave to amend in the preſent caſe. *Vide Stra. vol.* 2. *p.* 846.

Hilary, 4 *Geo.* 2. *The Sword Blade Company* v. *Dempſey*. Error.

An *ejectment* was brought againſt the Company, and Mr. *E.*; after a verdict for the plaintiff. Mr. *E.* died, and a writ of *error* is brought, laying the judgment to be *to the great damage* of the Company, and of *Mary E.* the daughter and heir, *and ſhe and* the company jointly aſſign errors.

It was moved to amend the *writ* and *aſſignment*, by ſtriking out her name; and on conſideration the court were of opinion that it was amendable by *ſtat.* 5 *Geo.* 1. *cap.* 13. not only as a *variance* from the original record, which is really no way to the damage of *M. E.* but alſo by virtue of the general words *other defect*. *Vide Strange, vol.* 2. *page* 892.

Hilary, 4 *Geo.* 2. *The Executors of the Duke of Marlborough* v. *Widmore*.

The plaintiffs declare as executors, on a promiſe to their teſtator, and iſſue was joined on a plea of the ſtatute of limitations. Then the plaintiffs moved to amend, by laying the promiſe to have been made to themſelves, and cited 3 *Lev.* 347, where in an action on the ſtatute of *hue and cry*, the allegation of the oath was amended, and ſaid to be by the ſervant inſtead of the maſter.

And, on the authority of this caſe, the court ordered the amendment, on payment of coſts, and liberty for the defendant to plead anew. *Vide Strange, vol.* 2. *page* 890.

Eaſter, 4. *Geo.* 2. *Gardner* v. *Merrott*.

There was a variance between the writ of *error* and the record, and as it ſtood in the paper, the court obſerved it, but neither party would move to amend it for fear of paying coſts, on which the court ſaid the *ſtatute* 5 *Geo.* 1. *cap.* 13. would warrant their amending it, which they did without coſts. *Vide Strange, vol.* 2. *page* 902.

Eaſter, 4 *Geo.* 2. *Entered Hil.* 4 *Geo.* 2. *Gardiner* v. *Merrot*. Error.

On a writ of *error* brought by *Gardiner* to reverſe a judgment given in *C. B.* againſt him in an action of *aſſault and battery* brought againſt him by *Merrot*, the writ of *error* deſcribed the record to be of a *loquela* i. e. a plaint in the *C.* B. by writ, by *Steven Merrott* v. *Giles Gardiner*, and the record removed was between *Stephen Merrot* v. *Giles Gardiner*, and conſequently there was a variance, &c. But this court made a rule that the writ of error ſhould be amended and made agreeable to the record by virtue of the ſtatute of 5 *Geo.* 1. *cap.* 13. intituled *an act for the amendment of writs of error, &c.* and they held they could do it by that act without prayer of either party, the variance appearing to them on the record, and gave no coſts, becauſe the ſtatute has directed no coſts to be given on ſuch amendment. *Vide Raym. vol.* 2. *page* 1587.

Trinity, 4 *Geo.* 2. *The King* v. *Charleſworth*.

On an information for forging a warrant of attorney to acknowledge ſatisfaction on a judgment of *Eaſter* term. After iſſue joined, the record appearing to be of *Hilary* term, the information was amended without coſts (the proſecutor having been admitted a *pauper*) and without giving the defendant leave to plead *anew*. The *Queen* v. *Simmonds*, *Hil.* 10 *Ann* 3 *Lev.* 347, was cited as an authority, where the title of an act ſet forth in an information was amended. *Vide Strange, vol.* 2. *page* 871.

Trinity, 5 *Geo.* 2. *The King* v. *Clendon*.

An information was laid for an aſſault in *Middleſex*, and the court refuſed to amend it by laying it in *London*. *Vide Strange, vol.* 2. *page* 911.

Trinity, 6 *Geo.* 2. *Leehill* v. *Sir Thomas Reynell*.

It was adjudged that the election in amending to pay coſts or give an imparlance, was in the defendant, and not in the plaintiff, and ſaid to be the practice of *C. B.* *Vide Strange, vol. page* 950.

Eaſter, 7 *Geo.* 2. *The King* v. *Ellames*.

On a writ of *quo warranto* againſt the defendant, who claimed to be Mayor of *Cheſter*, the defendant juſtified under a charter and bye-law, by which the Mayor is to be choſen by all his fellow-citizens of the city, and of the ſuburbs and hamlets, inhabiting within the ſame, or a major part of them; and lays his election to be by the majority of the citizens of *Cheſter*. To this there was a demurrer and joinder in demurrer. And when it came into the paper, the defendant's council perceived, that they had left out thoſe citizens who inhabited within the ſuburbs and hamlets, whereupon they moved to amend, and ſhewed by affidavit that the proſecutor had not loſt a trial, and offered to pay coſts, and likewiſe produced an affidavit, that it was not a voluntary miſtake.

After long debate and many caſes cited, the court gave leave to amend, and chiefly for reaſons peculiar to this caſe, 1. Becauſe otherwiſe the office would be loſt without trial of the right. 2. This cannot be made uſe of as a trick to gain time, becauſe of the affidavit made in this caſe. 3. Here has been no trial loſt, ſo that the proſecutor may ſtill try the merits in time. 4. The proſecutor was not driven to demur; for if he had gone to iſſue, and it had been found for the defendant, yet as a defect of title appears in the plea, he would have been intituled to a judgment of *ouſter*. *Vide Strange, vol.* 2. *page* 976.

Michaelmas, 7 *Geo.* 2. *Biſhop* v. *Stacy*.

After a ſpecial demurrer, joinder, and argument, the plaintiff had leave to amend by the bill on the file. *Vide Stra. vol.* 2. *p.* 554.

Hilary, 8 *Geo.* 2. *The King* v. *The Biſhop of Llandaff*. Error.

A writ of *error* was brought of a judgment in favour of his Majeſty in the court of grand ſeſſions in *Wales*, in a *quare impedit* by the *King* againſt *the Biſhop of Llandaff*, and others, for the church of St. *Andrew*, in the county of *Glamorgan*, and the general errors aſſigned.

Per curiam. In this caſe there are three principal points to be conſidered: 1. Whether it is neceſſary to alledge a preſentation? 2. If neceſſary, whether the *commendam* amounts to a preſentation, or excuſes the want of alledging one? And 3d. Whether the verdict which finds that the late Queen was ſeiſed in fee, as of *an advowſon in groſs*, cures ſuch defect? We are unanimouſly of opinion, that it was neceſſary to alledge a preſentation, and the *commendam* will not ſerve the purpoſe; but we are alſo of opinion that the verdict has ſet all right. Accordingly the judgment muſt be affirmed. *Vide Strange, vol.* 2. *page* 1006.

Michaelmas, 8 *Geo.* 2. *Bern* v. *Bern*.

A writ of *Dower* was brought in *C. B.* in *Ireland*, as to part of premiſes in the count, the tenant pleaded *ne unque ſeiſi que dower*; iſſue upon this, and a verdict for the demandant, judgment thereon, and *in mercy*. As to the reſidue of the land contained in the count, the tenant pleaded, that the huſband being an infant at the time of the marriage; there was a diſcourſe berween him and the defendant's father, ſhe being likewiſe an infant, about the marriage, and that it was agreed between them, that when the demandant's huſband ſhould come of age he ſhould ſettle a rent-charge of ſuch a value on the demandant in lieu of her dower; and that when he came of age he made ſuch ſettlement accordingly. To this there was a demurrer; but before judgment given upon it, one *W. S.* came in, according to the *ſtatute* of *Glouceſter*, and is received *pro intereſſe ſuo*, i. e. *for his intereſt therein*; and pleads that the grandfather of the defendant's huſband being ſeiſed in fee of the lands in queſtion, made a leaſe of them to his anceſtor, for the term of ninety-nine years, part of which term is unexpired; and the demandant comes in and confeſſes that this *W. S.* is entitled to the term: then there is judgment for the demandant on the demurrer, *et quod tenens ſit in miſericordia*; i. e. *and that the perſon holding may be in mercy*; on which judgment is given to deliver ſeiſin of the premiſes to the demandant, but that execution ſtay till the expiration of the ſaid term. Upon error in *B. R.* in *Ireland*, the judgment was affirmed. *Error* brought in *B. R.* on both judgments.

The plaintiffs in *error's* council ſaid, that the judgment is erroneous, becauſe, 1ſt. Among others is demanded a meſſuage or work-houſe; now this is equally uncertain as the words *meſſuage* or *tenement*, which has been determined bad; and things ought to be ſet forth with certainty in *dower* as well as in *ejectment*. A ſeiſin is to be given on one as well as poſſeſſion on the other.

That the plea is a good bar, as it is ſaid that a jointure was made in ſatisfaction.

That there is a miſtake in the *ſcire facias* iſſuing out of *B. R.* in *Ireland*, it being made returnable at a day certain; that this is a miſcontinuance, not aided by verdict, according to the ſtatute of *jeofailes*, ſince it is ſubſequent to it, 1 *Inſt.* 335. where one proceſs is awarded inſtead of another, or when a day is given which is not legal, it is a miſcontinuance. *Sid.* 306. 1 *Vent.* 7. that this fault of the *ſcire facias* is not cured by appearance.

That there are two amerciaments of the tenant, whereas he ought not to have been puniſhed the laſt time, it being for no default of his, but on the receipt of tenant for years.

The defendant's council ſaid, that as to the firſt objection, the reaſon why meſſuage or tenement has been held bad is, becauſe of the uncertainty of the laſt word, which takes in corporeal and incorporeal inheritances, and therefore, tythes, &c. which are tenements, cannot be called meſſuages: meſſuage or houſe would be good; and here the laſt word, *work-houſe*, is a more particular deſcription of what was before called a meſſuage.

2d, Objection. This bar cannot be good; 1ſt. Becauſe the original agreement was not in writing, and therefore void by the ſtatute of frauds: and, ſecondly, becauſe the huſband was an infant, and therefore his aſſent not binding to him.

As to the objection to the *ſcire facias*, it is to be underſtood only as a proceſs to bring in the plaintiff to aſſign his errors, and his coming in on it has cured the fault. 1 *Inſt.* 325.

As to the two amerciaments, the ſtat. 16 and 17 *Car.* 2. *c.* 8. enacts, that no judgment after verdict, &c. ſhall be reverſed for want of a *miſericordia*, or *capiatur*; and that all defects of a like nature ſhall be amended in the court where *error* is brought, that in the *laſt* general words this fault is included.

Hardwicke, Chief Juſtice. The court muſt take notice of *C. B.* in *Ireland* proceeding by original: and it is certain that where proceſs in the original action is returnable at a common return day, ſo muſt likewiſe the proceſs on a writ of *error*. But *ſtat.* 32 *H.* 8. *c.* 30. ſays, that no judgment ſhall be ſtaid by reaſon of any diſcontinuances after verdict, which words have been extended in ſome caſes to diſcontinuances made after verdict: that the only doubt is relating to the two amerciaments. At common law, before the *ſtat.* 16 & 17 *Car.* 2. *c.* 8. if an amerciament was entered inſtead of a *capiatur*, though it was for the benefit of the defendant, yet, as it was the judgment of the court, he might aſſign that for error himſelf. Here is a conſideration of law, though we know in fact, that came to nothing.

But at length the court ordered it to be amended upon the ſtatute, and the firſt *miſericordia* to be ſtruck out, as it ſtood upon the paper without requiring a diſtinct motion for that purpoſe.

Judgment affirmed. *Vide caſes Temp. Lord Hardwicke, p.* 72.

Michaelmas, 8 *Geo.* 2. *The Bank of England* v. *Morrice*.

To a plea of ſeveral ſpecialties in an action on *ſimple contract*, the plaintiffs replied *aſſets ultra*, which was found for them, but the verdict ſet aſide. They then moved for leave to alter their replication, and reply *fraud*, and cited 3 *Lev.* 361. but the court ſaid there muſt have been ſome conſent in that caſe, elſe it is an authority for withdrawing all vitious pleadings at any time; and here it might be dangerous, becauſe the defendant on the former iſſue might have paid away aſſets, as knowing that replication could not hurt her: it was therefore denied to amend. *Vide Stra. vol.* 2. *page* 1002.

Hilary, 9 *Geo.* 2. *The King* v. *Pewtreſs* & *al'*

An *aſſault* was laid twenty-one different ways, and on motion to ſtrike ſome of the courts out of the indictment, the court ſaid it could not be done, being the finding of the grand jury, but they thought the clerks in the crown office only ought to draw the indictment, and then the court could puniſh them for the oppreſſion. *Vide Str. vol.* 2. *p.* 1026.

Trinity, 10 *Geo.* 2. *Bean* v. *Elton*.

A writ of *inquiry* was executed in *Trinity* term 1728, and coſts taxed on it, but no final judgment entered up, and now there being occaſion to prove the debt in *Chancery*, the writ of *inquiry* could not be found, and a rule was made for a new writ of *inquiry* and *inquiſition* according to the ſheriff's notes, and that the maſter ſhould indorſe the coſts, which by the commitment book appeared to have been taxed. *Vide Strange, vol.* 2. *page* 1077.

Michaelmas, 10 *Geo.* 2. *Medley* v. *Stokes*. Error.

A motion was made by the council for the plaintiff in *error*, to quaſh a *ſci. fac. quare executionem non*, &c. *nibil*, returned. The command of the writ is, that he have here this writ, and the names of thoſe by whoſe oaths he has ſummoned; and he objects, that this is wrong, becauſe the ſummons is not to be made by oath.

The council for the defendant in *error* ſaid, the word *oath* may be rejected as ſurpluſage; but, however, this is but a proceſs to bring them to aſſign *errors*, and is amendable.

Lord *Hardwicke*. It is true, theſe *ſci. facias*'s are conſidered as proceſs to bring in the party to aſſign *error*; and for that reaſon, if he comes in on it, he can take no advantage of any miſtake in the writ, it being conſidered only as a proceſs to bring him in; but now the queſtion is, Whether before he comes he may not take advantage of a fault in the writ? And I think he may, for he may not afterwards; for he ſhall be taken, then to have waived it, as on appearance to other proceſs; and this is a fault in the writ; the word *oath* cannot be rejected, becauſe there will not be a ſufficient command in the writ then remaining; but however, the court is not in ſtrict juſtice bound to quaſh; but if the party prays it, may order an amendment; the caſe where the return was bad is quite different.

A rule to amend was accordingly granted. *Vide caſes Temp. Lord Hardwicke, p.* 321.

Eaſter, 13 *Geo.* 2. *Blakey* v. *Birmingham.* Error.

After *error* brought, the court amended a judgment which ran that the plaintiff *ſhould* recover inſtead of *do* recover, as the miſpriſion of the clerk. *Vide Strange, vol.* 2. *page* 1132.

Eaſter, 14 *Geo.* 2. *Wilder* v. *Handy.*

In *treſpaſs* for killing a dog, after verdict for the plaintiff, it was moved in arreſt of judgment, that the declaration ran by recital, *Whereas, &c.* But a bill being filed right (the time of filing the court refuſed to enquire into) and on citing the caſe of *Smith* v. *Fuller* in *C. B. Mich.* 8 *W.* 3. and *Cumb.* 4. the court ordered it to be amended, though they were ſenſible that, for want of applying to amend, many judgments had been arreſted. *Vide Strange, vol. p.* 1151.

Trinity, 14 *Geo.* 2. *Slicer* v. *Thompſon.* Error.

On *error* brought here on a judgment in *Ireland*, which ran that the plaintiff *ſhall* recover, it was amended to *do* recover, on the authority of *Blakey* v. *Birmingham, Eaſter*, 13 *Geo.* 2. above cited. *Vide Strange, vol.* 2. *page* 1156.

Trinity, 14 *Geo.* 2. *The King* v. *The Inhabitants of Great Bedwin.*

An order of two juſtices was made without ſaying it was on complaint of the churchwardens and overſeers, nor that one of the juſtices was of the *quorum*, nor that the *pauper* (who was a certificate man) was become actually charged. On appeal to the ſeſſions, they ſet all this right, under 5 *Geo.* 2. *cap.* 19. which impowers them to amend defects in form, and proceed to the merits.

Per curiam. This is going too far, they are to amend defects in form before they go into the merits, whereas here they muſt go into the merits before they can introduce the amendment. It was never deſigned they ſhould inſert new facts, but only amend the informal way of ſetting out the facts which were ſtated. The order therefore for the amendment muſt be quaſhed, and alſo the original order. *Vide Strange, vol.* 2. *page* 1158.

Hilary, 15 *Geo.* 2. *Marſhall* v. *Riggs.*

In *treſpaſs* it was moved in arreſt of judgment, that the declaration was with a *quod cum* i. e. *that when*, but the plaintiff filing a right bill, the court amended the declaration by it, though for want of thinking of this before, many judgments had been arreſted. *Vide Strange, vol.* 2. *page* 1162.

Hilary, 15 *Geo.* 2. *Stroud* v. *Tilly.*

Per curiam. Though a plaintiff cannot regularly move to change the *venue*, yet he may in effect do it, by moving to *amend*; and it was done ſo in this caſe by ſtriking out *Dorſetſhire*, and inſerting *Middleſex. Vide Strange, vol.* 2. *page* 1162.

Hilary, 16 *Geo.* 2. *Hillerſdon* v. *Skildray.* Error.

After *error* brought in the *Exchequer Chamber*, the judgment was amended, by adding the introductory words to the awarding a writ of *inquiry*, viz. *that the plaintiff ought to recover his damages againſt the defendant*, this being only a conſequence of determining that the replication demurred to by the defendant was good. *Vide Stra. vol.* 2. *page* 1182.

Hilary, 17 *Geo.* 2. *Rivet & al.* v. *Cholmondeley & al.*

On the authority of *Stroud* v. *Tilly* the court ſuffered the plaintiff to amend the *venue* after the defendant had changed ſuch *venue*, on the common *affidavit. Vide Strange, vol.* 2. *page* 1202.

Eaſter, 17 *Geo.* 2. *Sale* v. *Crompton.*

A warrant of attorney had been given in 1732, to confeſs a judgment for *Crompton*, but the letter *r* having been left out in the record of the judgment, the name appeared to be *Compton.* The court being moved for leave to amend by the warrant, it was refuſed, out of an apprehenſion that purchaſers might ſuffer inconveniencies thereby. *Vide Strange, vol.* 2. *page* 1209.

Trinity, 17 *Geo.* 2. *Goodtitle* v. *Meymott.*

In the declaration delivered to the tenant in poſſeſſion, *the ſaid James* inſtead of *John*, was ſaid to enter by virtue of the demiſe, and the court refuſed to amend the miſtake, conſidering the declaration as a proceſs. And Mr. Juſtice *Wright* cited a caſe, *Hil.* 15 *Geo.* 2. where the premiſes were laid to lie in *Twickenham* and *Iſleworth*, or *one of them*, and the court refuſed to permit the plaintiff to amend by ſtriking out the diſjunctive word. *Vide Strange, vol.* 2. *page* 1211.

Michaelmas, 17 *Geo.* 2. *Newcombe* v. *Green.*

In an action on a *covenant* broken, the breach aſſigned, was non-payment of 270 *l.* mortgage-money; and on the trial a verdict was obtained for 274 *l.* 11 *s.* damages, and entered ſo in the judge's minutes, but the clerk of the *niſi prius* had only marked 1 *s.* damages on the *diſtringas.*

The court was moved to alter the indorſement, by making it to agree with the minutes of the judge, and the matter appearing to be as above ſtated, the court ordered it to be amended. *Vide Strange, vol.* 2. *page* 1197.

Eaſter 18 *Geo.* 2. *Wynne* v. *Middleton.* Error.

The plaintiff having recovered double damages and coſts, in an action on *ſtat.* 7 & 8 *W.* 3. *c.* 7. againſt the defendant as ſheriff of *Denbighſhire*, for a falſe return on an election for Knight of the ſhire; on which judgment *error* was brought: the plaintiff moved to amend, by adding a continuance, and a *miſericordia*, the want whereof, it was apprehended, would not be aided, if this was deemed a penal ſtatute; for which reaſon the motion was oppoſed, actions on penal ſtatutes being excepted out of the ſtatutes of *jeofails.*

Per curiam. There is nothing excepted out of the ſtatute 8 *Hen.* 6. *c.* 12. (which is properly a ſtatute of amendment) but appeals and indictments of treaſon and felony. And in a caſe of this ſort, *Trinity*, 1 *Geo.* 1. in *B. R. Philips* v. *Smith*, amendments were made. The plaintiff therefore may aſſign *errors anew. Vide Stra. vol.* 2. *p.* 1227.

Michaelmas, 18 *Geo.* 2. *The King* v. *Roberts.*

On a trial at *bar* of a traverſe to an inquiſition of *lunacy*, one of the jury was called by the name of *Henry*, who informed the court that he was chriſtened by the name of *Harry*, but acknowledged that he was the perſon ſummoned. The council for the defendant refuſing to have it altered by conſent, the court directed the amendment to be made *ex officio*, by virtue of the *ſtat.* 8 *H.* 6. *c.* 12. & 15. *Vide Stra. vol.* 2. *page* 1214.

Trinity, 21 *Geo.* 2. *Oates* v. *Shepherd.*

The term in *ejectment* being near expiring, it was amended, without any conſent, from five to ten years. *Vide Stra. vol.* 2. *page* 1272.

Eaſter, 30 *Geo.* 2. *Robinſon* v. *Raley.*

An amendment ſhall not be made after the matter is on record; (as giving leave "to withdraw a demurrer and plead to iſſue" after other iſſues joined in the ſame cauſe have been tried, and verdicts found with contingent damages:) for the whole muſt be ſuppoſed to be ſtill in paper. *Vide Bur. vol.* 1. *page* 322.

Hilary, 32 *Geo.* 2. *Alder* v. *Chip.*

This was on a motion to ſhew cauſe why the plaintiff ſhould not be at liberty to *withdraw his replication*, and *reply de novo*, i. e. *anew*, on whicha rule to ſhew cauſe was obtained, which was afterwards made abſolute.

Lord *Manſfield* ſaid he conſidered this as an *amendment*, and that this mode of application was adopted to prevent the defacing the roll; that of late the court was leſs ſtrict than formerly with reſpect to *amendments*, which was more beneficial to ſuitors; however, the court will always take care that amendments ſhall not injure or delay the oppoſite party. *Vide. Bur. vol.* 2. *page* 756.

Eaſter, 1 *Geo.* 3. *Small, on the Demiſe of Baker* v. *Cole and Skinner.*

In *ejectment* after verdict, the defendants council moved in arreſt of judgment on the following ground: the leaſe declared on, was laid to be made the 33 of *Geo.* 3. to hold from the quarter day then laſt paſt, which was impoſſible, it being then but the firſt year of his preſent Majeſty's reign.

The *error* was, the pleadings were intituled *Hilary* term, 1 *Geo.* 3. and the leaſe was laid to be made 33 *Geo.* 3. to hold as before mentioned, on which a rule was granted to ſhew cauſe. The matter being argued by council on both ſides, the court gave their opinion.

Denniſon, Juſtice. You cannot alter the title if it be defective; in the preſent caſe it is only a title *improperly* ſet out, it cannot be doubted, but a proper title was proved at the trial.

If the demiſe had been laid in the thirty-third year of his late Majeſty, the court would have ſupplied the words King *Geo.* 2.

In the preſent caſe, the deſcription is not *uncertain*, but only a title wrong ſet out by miſtake of the clerk, and this being in ejectment, is a ſtronger reaſon for our over-ruling this nice objection. I think there is no need of any amendment.

Wilmot, Juſtice, was of the ſame opinion.

Per curiam. Let the rule be diſcharged. *Vide Bur. vol.* 2. *page* 1159.

Michaelmas, 1 *Geo.* 3. *Bondfield qui tam* v. *Milner.*

In an action *qui tam* for *uſury* brought by the plaintiff againſt the defendant; the plaintiff moved for leave to amend the declaration, by altering the date of the note, (all being on paper) on which he obtained a rule to ſhew cauſe, which on argument by council on both ſides, was made abſolute.

Lord *Manſfield* ſaid, the rule was, that while matters are in paper, the party may amend. In this caſe the plaintiff has only miſtaken a date. In the *Exchequer* they will amend *penal* informations. He obſerved, that the ſtatutes of amendment do not extend to *penal* actions, yet in the preſent caſe it is an amendment at *common law*.

Denniſon, Juſtice, obſerved, that there was no difference between *civil* and *penal* actions, where the application is as for an amendment at *common law*, and the proceedings are in paper.

Accordingly, the rule was ordered to be made abſolute for the amendment. *Vide Bur. vol.* 2. *p.* 1098, 1099.

Appeal.

Michaelmas, 1 *W. & M. Entered Hilary* 3 *&* 4 *Jac.* 2. *Orbet* v. *Ward.*

On an *appeal of murder* for killing the plaintiff's huſband, brought againſt the defendant, *late of the pariſh of St.* James's, Weſtminſter, *in the county of* Middleſex, *gentleman*, the defendant *in his proper perſon came*, and craved *oyer* of the writ and return, and then *by* A. B. *his attorney*, pleads in *abatement*, that there is a pariſh named St. *James's*, within the liberty of *Weſtminſter*, but no pariſh named St. *James's Weſtminſter* only. To this plea the plaintiff demurred, and this matter being adjourned by the court till the next term, it was *adjudged* for the defendant, becauſe, 1ſt. The demurrer confeſſes the matter pleaded in abatement, to wit, that there is no ſuch pariſh, which is a good plea. 2dly. The plea being brought *by attorney*, ought not to have been received; and though received, yet being wrong, it is void, and in conſequence the cauſe is diſcontinued by the adjournment. *Vide Salk. vol.* 1. *p.* 59.

Eaſter, 4 *W. & M.* *Loowder* v. *Screwdens.*

On an *appeal of murder*, the plaintiff counts at bar *in his own perſon*, but the roll put into court, where the count was entered, was *by attorney*; and an exception was taken, that the appellant was nonſuited; for that he appeared by *attorney*, where he ought to come *in perſon*, and ſuch appearance is void, and he is ſo nonſuited by default; and if not a nonſuit, the appeal is diſcontinued, for he ought to appear *inſtantly*, which he has not done; for at the day of the return of the writ, the appellant ought to have counted *inſtantly*, but his count was by attorney, which is no count; and then the appeal is diſcontinued.

Per curiam. The appellant here ſhall not be nonſuited; for none can be nonſuited who is not demanded, but he was demanded; wherefore appearance by attorney cannot be a nonſuit. 2 *Inſt.* 313. In appeal of *mayhem*, the plaintiff came by attorney, which could not be, and the plaintiff was demanded, and for default, nonſuited; but there it is plain, if he had appeared on demand he could not have been nonſuited: ſo here, if the appellee would nonſuit the appellant, he ought to have demanded him; but here the appellant was preſent, and viewed by the court, and ſhall not be nonſuited, if demanded at a day when he is not demandable at. Then as to the diſcontinuance, that cannot be before imparlance; but the day the court took to adviſe ſhall not make a continuance, but ſhall be intended the firſt day. It is true, the appellant had a day by the roll, and by the writ, and on every one of them is demandable. Now, here he appears on the day given by the writ, and has counted, and that in his proper perſon, as he ought; and though the roll be *by his attorney*, that ſhall be altered; though an appeal cannot be altered at common law, nor by any ſtatute of jeofails, yet it may be altered according to the truth of fact, before it is filed, or becomes a record; whereupon the roll was amended, and the defendant pleaded *not guilty*. And it was ſaid in this caſe, that where a grand jury or inqueſt finds a man guilty, he is *ouſted* of *battel* on appeal. *Vide Mod. Rep. vol.* 12. *p.* 20.

Michaelmas, 4 *W. & M.* *Bennet* v. *Preſton.*

On an *appeal of murder*, the writ concluded, *and have then there this writ.*

The declaration ran, that the deceaſed was at the pariſh of *Clapham*, in the peace of the King, ſuch a day and year, and that *before noon of the ſame day came* prædicti, i. e. *the aforeſaid* W. P. *and*, quidem, D. S. *&c.* meaning *one.*

An exception was taken to the writ on account of the word *then*, which is never uſed in original writs. To this it was anſwered, that the word *then* is mere ſurpluſage, and 1 *Leon.* 73. cited.

Another exception was taken to theſe words of the declaration, *before noon of the ſame day the appellee came*, &c. without mentioning the particular hour; and the ſtatute of *Glouceſter* requires the certainty both of the day and hour, *&c.*

In anſwer to this objection, it was inſiſted, that the year and day are to be accounted from the day of his death, the hour is not material; for if it had been *about eight o'clock* it had been good.

It was further objected to the declaration, that it ſaid, *came*, prædicti, i. e. *the aforeſaid* W. P. *and* *one D. S.* which was nonſenſe, and bad *Latin*, and could not be ſurpluſage in an appeal; for if the word *prædicti* is wholly rejected, it does not appear which of them killed the perſon; and the word *quidem* for *quidam* is alſo falſe *Latin*.

It was anſwered, that falſe *Latin* will not vitiate indictments, neither ſhall it be allowed to vacate declarations in appeals; it may abate an original writ, but ſhall not vitiate any judicial writ, declaration, or pleading, agreeable to the ſecond reſolution in *Oſborn's* caſe, 20 *Rep.* 133. *a.*

It is true, in an *aſſiſe*, the writ ran, that the ſheriff ſhould ſummon the tenants to *appear before the aforeſaid juſtices at* Weſtminſter, and no juſtices were mentioned before; but the writ was not abated for this omiſſion, and the judgment only ſtopped a little while, for it does not appear that it was vacated on that account. *Vide Mod. Rep. vol.* 4. *page* 159.

Michaelmas, 5 *W. & M.* *Banſon* v. *Offley.*

On an *appeal* brought by the wife for the murder of her huſband, the declaration charges, that on ſuch a day and year, one *Offley* did aſſault, and wound her huſband, in the county of *H.* of which wound he afterwards on ſuch a day died, at *R.* in the county of *C.* and that one *Lippon* was aiding the ſaid *Offley*, &c. The cauſe being tried, the jury found that *Lippon gave the wound*, and that *Offley* was aſſiſting him therein. On motion in arreſt of judgment, the appellee's council inſiſted, that the *count* and the verdict in appeals muſt be certain, otherwiſe no judgment could be given againſt the appellee, but in this caſe the verdict found another perſon gave the wound, and not he againſt whom the appellant had declared.

Holt, Chief Juſtice. This is an exception which might as well be made on an indictment as to a *count* in an appeal, for both ought to be equally certain. The preſent appeal is certain enough, for he who gave the ſtroke, and he who was aſſiſting in it, are both equally guilty.

The appellee's council raiſed another objection, *viz.* that the cauſe was tried in a wrong county, for it was by a jury in *C.* when it ought to be by a jury of both counties, ſince the wound was given in one county, and the party died in another.

Per curiam. By the *ſtat.* 2 *&* 3 *Edw.* 6. *it is enacted*, that an indictment found by a jury of that county where the death happens, ſhall be as effectual in *law* as if the wound which was the cauſe of the party's death had been given in the ſame county. *Vide Salk. vol.* 3. *p.* 39.

Trinity, 6 *W. & M.* *Wilſon* v. *Law.*

On an *appeal of murder*, the appellee having craved *oyer* of the writ and declaration, demurred; and as to the felony and murder, pleaded *not guilty*.

The following exceptions were taken to the declaration and return:

1ſt. To the words, *about one o'clock of the ſame day aſſaulted*, as uncertain.

2dly. That there was no direct charge againſt the defendant, the words in the declaration being, *ſtruck*, *ſtabbed*, and *perforated*, &c. when, according to all the precedents, it ſhould have been, *gave a mortal wound*.

3dly. The *venue* is illegal; the fact being alledged to have been committed *in the pariſh*, &c. when ſtat. of *Glouceſter* expreſsly requires it to be laid in ſome vill or town.

4thly. The return is, *I have cauſed to be attached*, when it ought to have been, *I have attached*, like as the writ of *capias*, the return whereof is, *I have taken*, and never, *I have cauſed to be taken*.

Now, it cannot be objected, that this is helped by the appearance of the defendant; it is true, he came in and appeared on the return, but he demurred for this fault, and is now in court to ſhew this inſufficient return. Neither is it an objection to ſay, that the ſheriff's return is not traverſable, as in an appeal of murder, the original was returnable *in eight days of St. Michael*, which was the firſt return of *Michaelmas* term, but was not delivered to the ſheriff till the 6th of *November* following, who returned *tarde*, i. e. *came to my hands too late*, which, though true, it was held the party might traverſe. And the caſe of *Morgan* v. *Egerton*, *Michaelmas*, 8 *James*, was relied on as an authority in point, *viz.* in an *appeal of murder*, the writ was returnable *in eight days of St. Michael*, the old ſheriff returned, *I have taken the body, and have it ready*, &c. and the new ſheriff, before the priſoners were delivered over to him, returned, *that writ was delivered to me, indorſed as above*; on a demurrer, this was held a bad return, becauſe he had returned nothing done by himſelf, nor ſaid any thing about the body of the priſoner, and the declaration being againſt the defendant *in cuſtody of the ſheriff*, it does not appear that the new ſheriff ever had him in his cuſtody, and he ſhall not be intended to be in cuſtody of the old ſheriff, becauſe he is no officer of the court after a new ſheriff is choſen; and though the party then appeared voluntarily, yet it was held that ſuch an appearance will not make good that which was defective before on the return itſelf.

The council for the appellant anſwered only the laſt, as being the moſt material exception, *viz.* that there was no difference between, *I have cauſed to be attached*, and, *I have attached*, where the return was not made by a bailiff of a liberty, and this could not be intended to be a return by a bailiff of a franchiſe, becauſe that is always ſpecial, viz. *I have commanded the bailiff of the liberty*, which is not in this caſe, ſo it muſt be a return by the ſheriff himſelf, and it might have been done by an itinerant bailiff, and it is then the act of the ſheriff himſelf, for what he has cauſed to be done by another, ſhall be taken to be done by him.

In *attachments*, the common return is, *the within named defendant is attached by pledges*, which, being in the preſent tenſe, is ſo uncertain, that it cannot be ſaid by whom he was attached; yet ſuch returns are held good. But the words which follow in this return make it very certain; for after, *I have cauſed to be attached*, the ſheriff ſays, *whoſe body I have ready, as is within commanded me.*

Per curiam. By ſtat. of *Glouceſter*, the time and place where the fact was committed ought to be expreſſed with certainty, or otherwiſe the appeal ſhall be abated; now, *about one o'clock*, is a certain and ſufficient averment of the time, being within the compaſs of an hour; and though in the caſe of *Morgan* v. *Egerton*, three judges were of a contrary opinion, yet even there, *Coke* and *Williams* held that it was certain enough; and their opinion ſeems better warranted by law than that of their brethren, and the authorities ever ſince have been agreeable thereto.

It is true, the fact cannot be alledged to have been done with ſuch a ſeeming uncertainty as, *he gave a mortal wound about the breaſt*, nor with reſpect to the year or day; but the hour need not be aſcertained with preciſion, becauſe there is more difficulty in aſcertaining the very hour than the day or year, which are longer meaſures of time, and therefore more certain. Lord *Coke*, however, was of opinion, that the appellant need not give in evidence the preciſe hour, or even the *day* mentioned in the declaration.

2dly. The charge is direct againſt the defendant, by the word *perforated*, &c. and would have been more uncertain by the word *gave*, &c.

3dly. It ſhall be intended, that the pariſh is a *vill*, unleſs ſhewn to be otherwiſe by the defendant.

4thly. *I have cauſed to be attached, as within it is commanded me*, is a full anſwer to the writ; the uſual return to a *levari facias* is, *I have cauſed to be levied*; ſo in a *ſci. fac.* againſt *K.* the ſheriff returned, *I have given notice to* K. *as is directed by the writ*, without ſaying the within named *K.* yet it was held that thoſe words ſupply that omiſſion.

In *reſcous*, the return was, that the party was reſcued out of the hands of the bailiff; it was objected, that it ſhould have been *out of the hands of the ſheriff*, unleſs the arreſt was by a bailiff of a franchiſe; yet the return was held good: and ſo it was in this caſe. *Vide Mod. Rep. vol.* 4. *page* 290.

See the caſe of *Hoyle* v. *Pitt*, in page 55. of this work, under the head of *Amendment*.

Michaelmas, 6 *W. & M.* *Sutton* v. *Sparrow.*

On an *appeal of murder* for the *death of her huſband*; the appeal was carried down to be tried at *niſi prius* in

Yorkſhire laſt aſſiſes, where both parties appeared, but the appellant did not put in the record to try the iſſue; and now the council for the defendant moved, that the appeal being not tried, it was either a *nonſuit* or a *diſcontinuance*: but *Holt* was of opinion that it was neither, but ordered the appellant to pay coſts, for not going on to trial; it was then moved that the appellant might be called in, which was done; her attorney appearing, it was held ſufficient; the appeal being brought by a woman. *Vide Mod. Rep. vol.* 12. *p.* 65.

Eaſter, 12 *W.* & *M.* *Stout* v. *Marſon* & *Cowper.*

On the day on which an appeal was returnable, a motion was made, that the appellant ſhould be demanded.

Per curiam. There is no writ returned, ſo no appeal pending; and the ſheriff has all this day, while the court ſits, to make a return; but it was agreed, if the writ was returned, the appellees might come and have the appellant demanded, and if he did not come, they ſhould be diſcharged. And a motion for the appellant, that the ſheriff ſhould return his writ, was denied, there being no affidavit that it was delivered to the ſheriff. *Vide Mod. Rep. vol.* 12. *p.* 349.

Michaelmas, 5 *W* 3. *Prince* v. *Bawd.*

On an *appeal for murder*, the appellee pleaded a *former conviction* for the ſame offence; and on *oyer* of the record and conviction being craved, it was moved that the ſame might be entered *in theſe words*, &c.

Per curiam. We will grant *oyer* of the record, but it ſhall not be entered *in theſe words*, becauſe it is a record of the ſame court. On *oyer* given, ſeveral *variances* appeared, ſo that the appellant's council objected, that the defendant had failed of his record, on which the appellee prayed to amend the ſame, being all in paper, but the appellant's council objected, that a *former conviction* was only pleaded for delay, and that it was no *bar* within the meaning of *ſtat.* 3. *Hen.* 7. The court ſaid, that before that *ſtatute*, a *former conviction* or *acquittal* were good pleas in *bar* of an appeal, and that the ſtatute has only the two pleas of a *former acquittal*, or *attaint*, but that a *former conviction* remains as at *common law*. *Vide Salk. vol.* 3. *p.* 38.

Hilary, 8 *W.* 3. *Armſtrong* v. *Liſle.*

The appellee was indicted at the ſeſſions of *Gaol-delivery* for the county of *C.* for the murder of *R. A.* and was thereon tried and convicted of *manſlaughter*. Immediately on ſuch verdict *J. A.* brother of the ſaid *R.* put into court a bill of appeal of *Murder*, and prayed by his counſel that it might be received and filed, and that the defendant might be thereon arraigned. But before the appellee was arraigned, he demanded the benefit of his *clergy*: and then the bill of appeal was by the appellant's counſel read in open court, and the appellee appeared to it and prayed to be bailed, but refuſed to plead; on which he was remanded to gaol until, &c. This whole proceeding was entered upon the record of the indictment, together with the conviction of manſlaughter, and returned into this court on a *certiorari*, and the appeal was alſo returned, but on the record thereof no mention was made of any proceedings. The appellee was alſo brought up to the bar by *habeas corpus*, the return whereof being read, the appellant moved for a copy of it, but the court ſaid, it muſt be firſt filed, for it is not before us till filed, and we can order nothing concerning it till it is properly before us.

After the *habeas* was filed, the appellee prayed his clergy: to hinder which the appellant took exceptions to the indictment, conviction, and trial.

Per curiam. This is the King's record, in which you cannot aſſign *errors*; you are a ſtranger; and perhaps the priſoner has releaſed theſe *errors* to the King; and you have no warrant of attorney filed, and ought not to ſpeak or be heard in the cauſe; ſo the priſoner was not admitted to his clergy then: on which it was moved by his council, that he might be bailed; but the appellant oppoſed it, unleſs he might be permitted to arraign the appeal, or unleſs the appellee would give bail to the appeal; for if he ſhould get at large before the arraignment of their appeal, they could have no proceſs againſt him to bring him in again, and thereby the appeal would be loſt.

Per curiam. An appeal by bill is always againſt a perſon *in cuſtody*, and he muſt be in cuſtody, or elſe you cannot arraign him.

The council for the proſecution urged, he ought not to be bailed, becauſe he was found guilty of *manſlaughter*, and no clergy allowed.

But *per curiam.* Juſtices of *oyer* and *terminer* cannot bail in ſuch caſes, but this court may do it at diſcretion. Accordingly he was bailed generally on the *Crown-ſide* to appear *from day to day*.

Afterwards the *Solicitor General* came and prayed judgment for the King againſt the priſoner on the indictment: and the defendant being aſked, what he had to ſay, why judgment ſhould not paſs againſt him, prayed his *clergy*.

Per curiam. Had the defendant prayed it at the ſeſſion of *Gaol-delivery*, it could not have been denied him there: but here, we cannot give judgment againſt him without aſking what he has to ſay why judgment ſhould not be given: nor can we deny him here, what could not have been denied him there: on which his clergy was allowed him, and he was tried by the Ordinary of ——— who gave him a pſalm to read, whereof he read the firſt verſe: and then the judge aſked the ordinary, *can he read or not?* Who anſwered, *he can read.* Whereon the executioner burnt him without the bar on the brawn of the left hand, and then the appellee prayed to be diſcharged, the court ſaid to the priſoner, you muſt ſtill ſtand upon your *recognizance*, and, if you would diſcharge the appeal, you muſt ſue out a *ſcire facias* againſt the appellant, and if he doth not appear, *nonſuit* him. On which a *ſcire facias* was taken out returnable at a *common day*: and no return being made by the ſheriff, the priſoner moved again to be diſcharged, but the court ſaid the priſoner muſt take a new day, and procure a return, unleſs he can get the appellant to appear *gratis*, as he may if he pleaſes; and accordingly the appellant did appear; when it became a queſtion, whether the appellee ought to be arraigned again on the bill of appeal: but it was the opinion of the court, that the appellant muſt arraign the appellee *de novo*, i. e. *anew*, but is not to make a new *count*; for the arraignment is no commencer but a revivor thereof, like a re-ſummons. *See* 2 *Ro. Rep.* 478. On this the appeal was arraigned by the appellant's counſel, who read the *count*, and the clerk of the crown going to arraign him likewiſe, it was objected by the appellee's counſel, that the appeal being commenced before juſtices of *oyer* and *terminer*, and not by them determined, was therefore diſcontinued, and ſo no appeal depending: and that this objection came in proper time now, leſt they might, by the arraignment being completed, be *eſtopped*.

Per curiam. Though the appeal was *without a day*, yet it was not diſcontinued, and the return of the *certiorari* makes a continuance, and is ſufficient to continue it againſt the priſoner.

Then it being queſtioned, on what ſide the appellee ſhould be arraigned; the court ſaid, a *civil* cauſe is always on the *plda* ſide, unleſs it comes in by attachment, and ſo it was ruled in this caſe; the next doubt was, how the appellant ought to appear and proſecute: the court was of opinion every appeal muſt be commenced in perſon, but may be proſecuted by attorney, unleſs where wager of *battel* lies; in ſuch caſe he muſt commence in perſon and proſecute in perſon alſo. But where there is no wager of *battel*, there it may be proſecuted by *attorney*, for which there muſt be a ſpecial warrant of attorney filed: and if the plaintiff appear by attorney, when he ought not, &c. this is a diſcontinuance.

On the appellee's moving to be bailed, the court ſaid he muſt be firſt committed to the *Marſhal* on the appeal, and the bail muſt be *body for body*: and that the recognizance may be either to the King or to the party, as it was in *Primroſe's* caſe; yet it was held the better courſe to take it to the King; and ſo it was done in this caſe.

At laſt, on the appellee's prayer, he was allowed to ſtand upon the old recognizance till another day, that he might have time to find bail, and to plead, and every thing to be entered as of this day.

At the time appointed the appellee pleaded the indictment and conviction of manſlaughter at the ſeſſions of *gaol-delivery*, which was removed into this court, and that no judgment was thereon given; and that at the time of the conviction he was, and yet is a *clerk*, and then prayed his clergy, and offered to read as a clerk, if the court would have admitted him thereto; and that afterwards, *to wit*, Monday *next after the Morrow of the Purification of the Bleſſed Virgin* Mary laſt, being demanded by this court why judgment ſhould not be given againſt him, he prayed the benefit of clergy; which being allowed, he read as *clerk*, and was burnt in the hand, *as by the record, &c.* with the uſual averments; and as to the felony and murder he pleaded *not guilty*; to which the plaintiff replied, that he demanded the appellee to plead at the ſeſſions of *gaol-delivery*, and that he refuſed, and thereon the appellee demurred.

The *replication* being ill, the queſtion was on the *bar*, *viz.* whether a conviction of manſlaughter on an indictment of murder, and clergy allowed, could be a *bar* to an appeal precedent or concurrent with the indictment, for both being returned of the ſame ſeſſions, which is conſidered but as *one* day in *law*, the appeal was concurrent with the indictment, and precedent to the conviction thereon, the appellee's council inſiſted this was a caſe at *common law*, and not within *ſtat.* 3 *Hen.* 7. *cap.* 1. which extends not to an appeal antecedent, but ſubſequent to the indictment; but the court were of opinion, that *a former conviction or acquitial* was a good *bar* to an appeal, for that no man's life ought to be endangered twice for the ſame offence, which would have been the caſe, had not *ſtat.* 3 *Hen.* 7. altered it, by which an *acquittal* or *conviction* on an indictment is made a *bar* in an appeal, unleſs *clergy* be taken thereon. The words of the ſtatute being general, *viz. in an appeal*, without ſaying *brought, or to be brought*, and therefore extended to all appeals, *ſubſequent*, *antecedent*, or *concurrent*; as to *clergy* it has been *adjudged*, that praying of clergy, is having the ſame within the *ſtatute*, for by praying his clergy, the priſoner has done all that he could, and the default of the court in not granting it, when they ſhould have done ſo, ought not to turn to his prejudice: here was no regular prayer made for *clergy* at the *gaol-delivery*; becauſe the defendant was not called by the court to receive judgment. If the court neglect their duty, it ought not to prejudice the priſoner; and therefore the plea in this caſe was held a good *bar* to the appeal, but the appellee was not diſcharged till the *Michaelmas term* following. *Vide Mod. Rep. vol.* 12. *page* 108, 109. 157. *Salk. vol.* 1. *page* 61.

Michaelmas, 8 *W* 3. *Breedon* v. *Gill*, qui tam, *&c.*

By ſtatute 12 *Car.* 2. *cap.* 23. certain impoſitions are given to the King upon beer, ale, and other liquors, for the increaſing his Majeſty's revenue; and the forfeitures and offences within that act, which are committed within the limits of the *chief office* of exciſe in *London*, are to be determined by the commiſſioners and governors of exciſe appointed by the King, or the major part of them; or in caſe of an appeal, then by the commiſſioners of appeal for regulating that duty.

By ſtat. 15 *Car.* 2. an additional act was made for the better collecting the ſaid duty, and preventing the abuſes therein, by which it was *enacted*, that no common brewer ſhall ſet up, or alter, any brewing veſſels, without notice thereof given to the office of exciſe, or ſhall uſe or keep any private or concealed ſtorehouſe, cellar, or other place for the laying any beer, ale, or worts in caſks, other than thoſe uſed in his common brewhouſe, and which are openly diſcovered or known, upon pain to forfeit 50*l.* for every tun, fat, back, copper, and cooler, ſet up, and made uſe of without ſuch notice given as aforeſaid.

By this ſtatute it is enacted, that before an appeal ſhall be made, the appellant is firſt to lay down the ſingle duty of exciſe in the hands of the commiſſioners, and to give ſecurity to the commiſſioners of appeals for the fine and forfeiture which was *adjudged* againſt him, if the judgment ſhould be affirmed on the appeal, and likewiſe to pay double coſts; but if reverſed, then the informer is to pay *double coſts*.

The plaintiff's council offered for a *prohibition*, that by the laws of *England*, when an iſſue is joined between the parties, it ought to be tried by the evidence of witneſſes *viva voce*, and not by notes or minutes of their teſtimony. That an information was exhibited againſt him before the commiſſioners of the duty of exciſe, *ſtating*, that he was a common brewer, and did keep a private ſtorehouſe, without acquainting the ſaid commiſſioners therewith; whereupon he was found guilty, and that he appealed from their ſentence to the commiſſioners of appeals, before whom the informer did produce, as evidence, the minutes taken before the commiſſioners of exciſe, and that the witneſſes who gave evidence there were ſtill alive; which minutes were allowed as evidence by the commiſſioners of appeals, *&c.* and now the queſtion was, Whether a prohibition ſhould be granted, directed to them not to admit ſuch evidence.

The defendant's council *argued*, that where a juriſdiction is created by act of parliament, which gives *an appeal*, that muſt be the laſt reſort, and in that caſe this court may command them to execute their power, but cannot reform their judgment.

Per curiam. The *common law* does not require that witneſſes ſhall be examined *viva voce*, but where the trial is by jury.

Theſe depoſitions were taken in court, where the evidence is entered, and when that is done, the party has nothing to do but to appeal from an injury, ſuppoſed to be done by an inferior court; and it is very fair to tranſmit that evidence which was given before them, and upon which they gave their judgment.

It is true, they would have the commiſſioners of appeals try the cauſe *de novo*, which is contrary to the very nature of an appeal. This ſtatute directs, *that the commiſſioners ſhall proceed by the oath of witneſſes, or the confeſſion of the party*: and the laſt reſort is in the commiſſioners of appeals, if they do not meddle with what is out of their juriſdiction; which is not the complaint now, but only of the courſe and method of the proceedings.

The caſe of *Shotter* v. *Friend*, which was lately adjudged in this court, comes near this caſe; for there a *prohibition* was granted to the *conſiſtory court* of the biſhop of *Winton*, aftet ſentence, becauſe they refuſed to allow the proof of a payment of a legacy by one witneſs: but a *prohibition* was never yet granted to any *eccleſiaſtical* court for proceeding according to ſuch evidence as is allowed by the *common law*; for which reaſons, nothing was done then; but ſoon after, on further conſideration, a *prohibition* was granted, *for that, &c. Vide Mod. Rep. vol.* 5. *p.* 271.

Eaſter, 12 *W.* 3. *Stout* v. *Towler*.

Spencer Cowper and one *Maſon* and *Rogers* having been indicted and acquitted at *Hertford* aſſizes of the murder of *Sarah Stout*, an *appeal* was brought within the year by an infant twelve years of age, next heir to the deceaſed, but not mentioned in the writ to be an infant, and delivered to the under ſheriff *Towler*'s clerk, in the abſence of *Towler*; the appellant, after *teſte*, and before the return of the writ, choſe the mother of the deceaſed for his guardian, who was accordingly admitted as ſuch before Chief Juſtice *Holt*, at his chambers. After the writ was returnable, the mother of the appellant, at the inſtance of *Cowper*, comes and demands the writ of the ſheriff; who, without any aſſurance that the infant was the appellant, or that the perſon who accompanied him was his mother, delivered the writ to them, which they deſtroyed.

The ſheriff confeſſing the above particulars, and being examined by interrogatories, confeſſing further, that on the receipt of the writ he had ſent a copy thereof to *Cowper*, the brother of the defendant, and likewiſe notice to the defendant himſelf; it was urged in his behalf, that the infant having no guardian when the writ was ſued out, it was not legally obtained. 2dly, That admitting it was properly ſued out, the appellant had a right to demand it of the ſheriff, who could not refuſe to deliver it, without rendering himſelf liable to an action, in caſe of an acquittal, if he executed the ſame after ſuch denial, and thereby ſubjected the appellant to fine and impriſonment. See 3 *Bulſt.* 97. 1 *Rol. Rep.* 240. *Latch* 19. That the ſheriff in that caſe muſt take notice of the plaintiff at his peril, and the appellant's being an infant does not alter the caſe; for the law, if it enables him to ſue out a writ, will enable him to recall or diſcontinue it; thus a *feme covert*, i.e. *a married woman*, levying a fine, may lay the uſes of it. And in 1 *Rol. Abr.* 288. an infant diſcontinued the appeal, againſt the conſent of his guardian. 3dly, This court was not poſſeſſed of the writ till the return, for till then it was not pending; and therefore what has been done in relation thereto cannot be a contempt of the court, or examinable here. 4thly, The exiſtence of a guardian here is not material, becauſe he has nothing to do till the writ is returned; and till ſuch return made, the ſole right is in the infant.

To which it was anſwered, and reſolved by the court, that the uſe of a guardian is to purſue the writ when it is before the court, and not, as here, to complain of the officer for not making a return; and that any body might ſue out the writ for the infant, as well as enter on a diſſeiſor of him; and there is nobody in law whoſe writ it is, before the return, but the infant's. 2dly, A perſon of age may come and recal the writ; but the preſent appellant being an infant, it is otherwiſe, and he could not releaſe this ſuit; and if he, at the return of the writ, had been preſent in court, and the guardian not there, he ſhould have been nonſuited, which puts an end to the appeal. *Latch* 173. And this ſhews that the infant, after admitted by guardian, has nothing more to do with the matter. The court indeed, in their diſcretion, may ſuffer him to diſcharge his guardian, and diſavow the action; but it muſt be done in court, and the court may refuſe to do it if they think fit. And if an infant pending a ſuit in *treſpaſs*, *&c.* comes of age, and judgment is given againſt him, he ſhall be fined. The law in this caſe takes care, that the guardian appointed by the court, ſhall ſue for the infant; and it would be ſtrange, if an infant who can only proſecute by his guardian, ſhould be able to diſcontinue his writ; or by himſelf diſcontinue out of court, what he cannot by himſelf continue in court. As to the third objection, though the court had not poſſeſſion of the writ till it was returned, yet certainly they may bring their officer to an account for what writs he has returnable in this court, and puniſh him for any abuſe in relation thereto; and ſuch miſdemeanor is a contempt of the court; and Chief Juſtice *Holt* cited the caſe of *Starkey*, ſteward of *Windſor* court, where it was adjudged that a miſdemeanor in an inferior court is an offence againſt this court; and alſo the caſe of 28 *H.* 6. 28, where a ſheriff was fined 40 *l.* for refuſing to make a return; and ſaid, if any ſheriff had ſerved him ſo, he would have laid him by the heels. And obſerved, that in this caſe, it would have been better, if the writ had mentioned that the appellant was an infant, though it was well without it: and returning the writ to an infant and a ſtranger here, is the ſame as if he had delivered it to a ſtranger; if we ſuffer this to go unpuniſhed, the King's ſubjects muſt expect little juſtice, as the ſheriffs will then have it in their power to anticipate our juſtice. And this is not a private matter, but the King is concerned; for though the appellants are nonſuited, yet the King may proceed on it, and if the appellee has been acquitted before, he muſt plead it, for we cannot take notice of it.

Accordingly the ſheriff was judged in contempt by Chief Juſtice *Holt*, and Juſtice *Gould*, and fined 200 marks, Juſtice *Turton* diſſenting from their opinion.

Note, In this caſe, the year having expired, a new writ could not be granted of courſe; wherefore the appellants petitioned the Lord Keeper for a new writ, who on conſultation with *Treby*, Chief Juſtice of the *Common Pleas*, Sir *John Trevor*, Maſter of the Rolls, and Juſtice *Powell*, agreed it was a diſcretionary matter, but not proper to be done. Some, *Treby* in particular, alledging, that an *appeal* was an odious revengeful proſecution, and therefore ought not to be encouraged; *Holt*, with great vehemence declared, that he was ſurpriſed that any *Engliſhman* ſhould brand an *appeal* with ſuch a name, that he himſelf conſidered it as a noble proſecution, and a true badge of *Engliſh* liberty, and referred to the ſtat. of *Glouceſt.* and the commentary thereon, in 2 *Inſtit.* *Vide Mod. Rep. vol.* 12. *page* 373.

Michaelmas, 12 *W.* 3. *Wilmott* v. *Tyler.*

The defendant was found guilty of *manſlaughter* on an indictment for murder; and the court at the *Old Bailey* being diſſatisfied with the verdict, ſentenced him to eleven months impriſonment, according to the ſtatute 18 *El. c.* 7. And being thus in the ſheriff's cuſtody, an *appeal* was brought; to which the ſheriff returned *cepi corpus*, i. e. *I have taken the body*, but that he could not bring it without a *habeas corpus*.

Per curiam. The return is not good; for it ſhould have been, *I have taken the body, and have it ready*, and then the appellant may have a *habeas corpus* returnable immediately; and you muſt be well adviſed how you file this return; and the return being amended, a *habeas corpus* taken, and the appellee brought to the bar; and the appellant called, who appeared; after the appellee's arraignment, the council for him demanded *oyer* of the writ, and time to plead.

Per curiam. Of right you ought to plead *inſtantly*; but ſince the defendant has had his *clergy* before on the indictment, and ſo has a ſpecial matter to plead, you ought to have convenient time to plead; but it muſt be as it were *inſtantly*, and as of this day, and no imparlance entered; and the defendant was committed to the cuſtody of the marſhal. *Vide Mod. Rep. vol.* 12, *p.* 416.

Hilary, 13 *W.* 3. *Colt* v. *Smith.*

On an *appeal of murder*, for the death of the appellant's brother, a conviction of *manſlaughter* and *clergy allowed*, was pleaded in *bar*, and held to be good; but it was alſo agreed, that if the indictment on which the defendant was convicted was vitious, or if this plea was ill pleaded, the defendant muſt plead to iſſue. And therefore an exception was taken to the indictment, that the breadth of the wound was not ſet forth; but not allowed, becauſe the depth of the wound, and the place where it was, were aſcertained; and the reaſon why ſuch preciſion is requiſite, is, that the wound may appear to be the ſame identical wound, and a mortal wound; and both theſe ends are anſwered by the deſcription thereof as ſet forth in the indictment. The indictment was alſo excepted againſt, for that it ſet forth, that two other perſons were preſent and abetting, without ſaying in what county. But this exception was alſo not allowed; becauſe, however that might be with reſpect to the abettors, it could be no exception for the preſent defendant, who was charged as *principal*, it being laid in the indictment, where he was.

Holt, Chief Juſtice. The benefit of *clergy*, and *burning in the hand*, is no judgment. And if a man is convicted of *manſlaughter*, and no judgment of death given, *autrefois convict.* i. e. *a former conviction*, is not a good bar of an *appeal*, *but conviction and benefit of clergy* is: and if a perſon is convicted of *manſlaughter* on an *appeal*, the king may pardon the burning in the hand, which proves that it is no judgment, or elſe the king could not pardon it. And *ſtat. H.* 7. has taken away the judgment of delivering over to the clergy, but directs a mark to be put on the party. *Vide Mod. Rep. vol.* 12. *p.* 642.

Eaſter, 13 *W.* 3. *Wilmott* v. *Tyler.*

The defendant being brought into court at another day, put in his ſpecial plea, and was remanded: and on a future day the matter was made a *concilium* in his abſence.

And now it appeared, on *oyer* of the writ, there were not fifteen days between the *teſte* and *return* thereof; ſo the plea was, with a *proteſtando* that the appellee ought not to anſwer the writ, for want of a ſufficient number of days between it's *teſte* and *return*; and in his plea ſets forth the indictment before the grand jury, &c. and a *capias* thereon at large, directed to the ſheriff of *London*, by virtue whereof he was taken, &c. that at the gaol-delivery of *Newgate*, at the *Old Bailey* Juſtice-hall, in the pariſh of &c. before ſuch and ſuch juſtices of aſſize and their aſſociates of gaol-delivery at *Newgate*, the indictment was delivered in: and that he the appellee was by the ſheriff of *London* brought into court, and ſets forth his arraignment, and plea of *not guilty*; that a jury was then and there impanelled, *viz. A. B.* &c. that the jury found him guilty of *manſlaughter*; that he was immediately aſked what he had to ſay, why judgment ſhould not paſs; that he prayed his *clergy*, which was allowed him; that he then and there read as a clerk, and was burnt in the hand, and confined eleven months by the court; and avers identity of perſon, wound, &c. and ſo concludes, that he ought not to be put to anſwer again. To this a demurrer, and joinder in it.

1ſt It was objected, that it appeared that the judges before whom the trial was, were judges of gaol-delivery of *Newgate*; and it does not appear the defendant was in the gaol of *Newgate*.

Anſwer. That objection would deſtroy all proceedings at the gaol-delivery; the indictment is found before juſtices of the peace, and by them ſent to the juſtices of gaol-delivery; and the commiſſion runs for juſtices of gaol-delivery for *London*, and another for *Middleſex*. And the general run of precedents is, that the party came in in cuſtody of the ſheriff, to whoſe cuſtody, for the cauſe aforeſaid, he was committed; and ſince he ſays he was in cuſtody of the ſheriff of *London*, and ſince *Newgate* is the county gaol both of *London* and *Middleſex*, we ſhall intend him in the ſheriff's cuſtody in *Newgate*, as by law he ought to be: and we muſt intend *Newgate* to be the county gaol, for that it does not appear to be a *franchiſe*; and that objection has been frequently over-ruled.

2d *Objection*. The *Old Bailey*, where the court is ſaid to have been kept, is ſaid to be in the pariſh &c. in the ward of *Farringdon without London*, which is nonſenſe.

Anſwer. Ward of *Farringdon extra* is the name of the ward, and *extra* does not denote it to be out of the county of *London*, but it is for oppoſition to *Farringdon* within the city walls.

3d *Objection*. Juſtices of gaol-delivery cannot try any indictment but what is found before themſelves.

Anſwer. It was ſo at common law, but altered by the ſtatute.

4th *Objection*. The verdict, as pleaded, is contradictory; for they ſay he was acquitted of the *felony and murder*, and afterwards that he was found guilty of *manſlaughter*, which is felony.

Anſwer. That might have been expreſſed better; but it muſt be underſtood, that they found him not guilty of the *felony and murder, as ſet forth*, &c. but guilty of *felony and manſlaughter*.

Then it was inſiſted on, that though the writ were naught for want of the due number of days between the *teſte* and *return*, yet now the defendant not having pleaded it in abatement, but taken it by a *proteſtando*, he had waved the advantage of it.

But to that it was anſwered by the other ſide, that ſince it appeared to the court by the *oyer* on record to be vicious, they muſt take notice of it *officially*.

Then it was inſiſted on, that by pleading in *chief* he had admitted the writ good; for if he had pleaded in abatement, he ſhould not plead in *chief*, till the matter in abatement were determined; for by pleading in *chief* at the ſame time, he would have waved the abatement; and for this 7 *Ed.* 4. 15 *a.* was ſtrongly inſiſted on. But *note*; that book only ſays, that where a man pleads ſuch matter in abatement, which denies the appellant's right of appeal, as that he is a baſtard, or that another is his heir, he ought not to plead in *chief*, becauſe ſuch a plea would admit him capable of ſuing contrary to the plea in abatement; but in that very caſe, held by the ſerjeants at bar, he may plead over *in favour of life*. And ſo in this caſe the court held was the conſtant courſe for expedition; and the book of 7 *Ed.* 4. 15. agrees the appellee ought to plead over, where he does not deny the appellant's title to the action, which is not done here.

Objection. This trial was now above a year ago; and they conclude, *as appears by the record in the Old Bailey*, whereas by an act of parliament all the records of gaol-delivery are to be moved into the *Exchequer*, into the cuſtody of the treaſurer; and though a record be not local in itſelf, yet if they plead it in a certain place we may traverſe it.

Holt. Suppoſe they do not remove the record, ſhall that turn to the prejudice of another? And that act of which you ſpeak is grown obſolete, for indeed they do for the moſt part remove them into this court; and if you pleaded *nul tiel record*, a *certiorari* would go to the judge of gaol-delivery; and if he did not certify a record, then it were for your advantage. And he remembered a caſe of *appeal*, where the appellee pleaded a falſe addition in abatement; *viz.* that he was an inhabitant of *A. abſque hoc* that he was an inhabitant of *B.* as it was laid, and he was ordered to anſwer over to the charge; and though he might have pleaded a conviction of manſlaughter, and allowance of *clergy*, yet to lie open to the *appeal*, he pleaded *not guilty*. And it came to trial on both iſſues; and as to the iſſue of *not guilty*, he was found *guilty* of *manſlaughter*; and the other found *ſpecially*, that the appellee was accidentally at *B.* and not otherwiſe an inhabitant there; and ſo the queſtion was, whether he could be ſaid to be an inhabitant at *B.?* but that point never received any determination; and the conſtant practice is, to lay him an inhabitant where the fact is committed. And in favour of life he may plead a ſpecial matter in *bar*, and *not guilty* too; but for expediton's ſake, if he pleads in abatement, the court will make him plead in bar, beſides; and the praying *oyer* of the writ, makes it part of the record. And, *per curiam*, the conviction of *manſlaughter* and *clergy* is a good bar of the appeal, without diſpute; but the only doubt is, whether we ſhall give judgment on the writ, or on the plea in bar; for if we give it on the *bar*, and the *writ* be inſufficient, our judgment will avail nothing, according to *Vaux's* caſe, 4 *Co.* for it will be no more than an acquittal on a bad writ, and then they may arraign him again; and though *Vaux's* caſe be after verdict, and this on a demurrer, that makes no difference.

And at another day,

Per curiam; we all agree that final judgment ought to be given: for though clearly the writ is bad for want of fifteen days between the *teſte* and *return*, ſo as if *non eſt inventus*, i. e. *he is not to be found*, had been returned, and the defendant ſued to an *outlawry*, it had been erroneous; yet ſince he appeared to it, and pleaded in *chief*, he has loſt that advantage; for the reaſon why there ought to be fifteen days between the *teſte* and *return*, appears upon conſideration of *the ſtatute concerning articles on paper*, *c.* 5. 2 *Inſt.* 576. by which ſtatute it is neceſſary there ſhould be fifteen days between the *teſte* and *return* of writs; and thus it was anciently, for it was computed a man might travel twenty miles a day, and therefore fifteen day's journey was held ſufficient to come from any part in *England*; and the reaſon was, that the party might have ſufficient time to appear and prepare an anſwer; and if the proceſs was too ſtreight, it was erroneous; but if the defendant, by appearing and pleading in *chief*, diſpenſes with this favour, he may, and thereby make the writ good. 9 *Ed.* 4. 18. 12 *Ed.* 4. 11. A *ſcire facias* on a fine wanted the due number of days between the *teſte* and *return*, and that writ partakes of the nature of a *real action*; yet if the party appeared, and pleaded to it, it made it good. If a writ of *covenant* to levy a fine want fifteen days between the *teſte* and *return*, yet if the party appear, and a fine be levied, it is good. This indeed has been ſince queſtioned by ſome judges, but was adjudged to be a ſtated doctrine, and needs no new ſettlement; for if the defendant appears and anſwers, without taking advantage of this fault of the writ, as if it were in *aſſize*, and he not attached fifteen days before, the fault of the writ is thereby cured.

And therefore the court gave judgment for the defendant, on the plea in *bar*. The appellant's council, notwithſtanding, moved inſtantly for leave to charge the defendant in cuſtody of the marſhal, the judgment being in *bar* on a bad writ, according to *Vaux's caſe*, 4 *Co.* at which the court was very angry, it being to arraign their judgment to their face, but ſaid they could not help it; and the motion was granted, but the matter was never moved again. *Vide Mod. Rep. vol.* 12. *p.* 448.

Trinity, 13 *W.* 3. *The King* v. *The Inhabitants of the Pariſh of Aicles.*

Per curiam. The *original writ of appeal* ought to be returned *non eſt inventus*, i. e. *he is not to be found*, before a *capias* is awarded. *Vide Mod. Rep. vol.* 12. *p.* 554.

Michaelmas, 3 *Ann.* *Culliford's Caſe.*

He being acquitted on an indictment of *murder* in the country, and an *appeal* brought, and time given by the judge of aſſize, till the next aſſize, to plead; during the interval, the appellant brings a *habeas corpus* and *certiorari* to remove the record, and body of the appellee up hither, and at a judge's chambers, the parties agreed, ſo that the appellee was let go on bail. The agreement being now perfected, and a releaſe given by the appellant, the appellee appearing on his recognizance, his council moved to have him diſcharged, producing the releaſe, and the appellant's council appeared to conſent to the ſame.

Per curiam. The *certiorari* and *habeas corpus* muſt be returned here, and then when we are poſſeſſed of the record, he muſt be arraigned on it, and then plead the releaſe; or if the appellant be not ready at the return to arraign the appellee, and does not appear, the appellee ſhall have a *ſcire facias* to compel him ſo to do, and if he does not appear at the return of ſuch writ, he ſhall be *nonſuited*, but the appellee is not thereby diſcharged, for here being a record againſt him, he ſhall be thereon arraigned at the ſuit of the Queen, and then he may plead a *former acquittal*, for there being a record againſt him, that record muſt be diſcharged. This caſe was compared to that where two indictments are againſt a perſon for *one* fact, as one by the coroner's inqueſt, and another by the grand jury, and he is arraigned, tried, and acquitted on one of them, yet he is not thereby diſcharged, but ſhall be arraigned *anew* on the other, to which he may plead the *former acquittal* on the other, but now the *common courſe* is to try the party on both the indictments at once. *Vide Mod. Rep. vol.* 6. *page* 219.

Hilary, 4 *Ann.* *Brown* v. *Dyer.*

In this caſe it was obſerved, that in an *appeal for murder* brought againſt three perſons, and judgment thereon, they may join in a writ of *error*, though in law they are ſeveral judgments; or they may have ſeveral writs, according to the nature of the caſe; if there are ſeveral judgments on one recognizance, and no joint words, in that caſe it was doubted whether the writ ought to be ſeveral; it was held that the proper way was to have judgment *according to the form* of the recognizance. *Vide Mod. Rep. vol.* 11. *p.* 70.

Eaſter, 8 *Ann.* *Young* v. *Slaughterford.*

The defendant was indicted at *Kingſton* aſſizes for the murder of *J. Y.* and the jury there acquitted him againſt evidence. *Holt*, Chief Juſtice, who tried him, remanded him, and ordered an *appeal* to be brought againſt him, and the appellee being brought up by *habeas corpus*, and committed to the *Marſhalſea*, an *appeal* was accordingly brought, and being ſet to the bar, and arraigned, he pleaded in *abatement*, that the vill in which he was reſident, was *Shauford*, *abſque hoc* that it was *Shalford*.

The appellant's council ſaid, that the appellee's plea was not to be received without an *affidavit* ſince the act for the amendment of the law, it being a *dilatory* plea. At firſt the court ſeemed to think that the plea could not be received without an *affidavit*, criminal cauſes not being excepted out of the act, (the exception of appeals in acts relating only to the preceding clauſe) but the appellee being brought up the next day, the court was of opinion, that the plea might be read without an *affidavit*, becauſe though this plea for the moſt part is *dilatory*, yet it is not ſo in this caſe, for the appellee muſt plead over, and iſſue joined on that, as well as on *not guilty*, and both may be tried at the ſame time; and accordingly the plea was received and read by his council, and both parties immediately joined iſſue. The court ordered that a *venire* ſhould be iſſued out, bearing *teſte* the firſt day of term, and that the appellee ſhould be tried at the bar, on which the appellee was remanded to the cuſtody of the *Marſhal*, becauſe none would be bound body for body for him, the court ſaid there muſt be four bail in an appeal of murder. *Vide Mod. Rep. vol.* 11. *page* 217.

Eaſter, 8 *Ann.* *Smith* v. *Bowen.*

The defendant was indicted for the murder of one *Smith*, and found *guilty*, but obtained the Queen's pardon; the appellant, an infant, as brother and heir to the deceaſed, lodges an *appeal in his proper perſon* againſt the ſaid defendant before the juſtices of *oyer* and *terminer*, and goal delivery; which being removed by *certiorari* into this court, the appellant's council moved that he might be admitted *by guardian* in this court, which they refuſed, as coming too late, for it ought to have been commenced by guardian at firſt, and they ſhould have moved to have had him admitted by guardian in this court. The court ſaid, that if the defendant pleads this in abatement, the appellant might confeſs his plea, and commence a new appeal by bill, for a *nonſuit* is peremptory, but an *abatement* is not.

The appellee being brought to the bar, and the appellant being in court, his council would have abated the writ, and brought a new appeal by bill, but the court would not let them.

Holt, Chief Juſtice, obſerved, that this was not like the caſe of *Watts* v. *Brains*, 3 *Co. Entries*, for there the writ was void.

The appellee being again brought to the bar, his council refuſed to plead *the infancy* in *abatement*, intending to take advantage of it after trial; the court ſaid, that ſince they would not plead the infancy in abatement, the court would abate the firſt appeal *officially*, and ordered it to be entered, that the ſaid appellant being in court, and it appearing on inſpection of him, that he was under age, *therefore*, the court *officially* does abate the appeal.

Holt, Chief Juſtice, ſaid, that if the appellant had not been in court then, there muſt have been a writ to have brought him there for inſpection; on which the appellant brought another appeal *by bill*, and declared againſt him *in cuſtody of the Marſhal*, and the appellee being arraigned, *immediately* demurred to the appeal, and pleaded *not guilty*; the court ordered the *abatement* of the firſt appeal to be entered as the firſt day of the term, and that the pleading to the ſecond, ſhould be entered *immediately*, that the demurrer might be firſt determined, and for that end made it a *conſilium* to be argued in *Trinity* term following. *See page* 64 *of this work under head Amendment.*

The appellee prayed to be admitted to bail, which the court ſaid they could do, on iſſue joined, demurrer, or *where they take time to conſider of a matter*, if he could find four ſufficient bail, who would be bound body for body, but thoſe offered not being approved of, he was remanded to the *Marſhalſea*. *Vide Mod. Rep. vol.* 11. *page* 216.

Eaſter, 11 *Ann.* *Widdrington* v. *Charleton.*

In an *appeal* brought by the wife for the murder of her huſband, on a demurrer, theſe two points were inſiſted on;

1ſt. That in the writ, the *t* in the word appellant, abbreviated, was turned up, and therefore the writ was not ſenſe; and in the eye of the law no writ at all. See 3 *Cro.* 182. 467. *Michaelmas*, 1693. *Ball* v. *Roe*.

2d. *Exception* was, That there was a *diſcontinuance*; for in the *exigent*, the words, *that having murdered her huſband, therefore ſhe appeals againſt him*, were omitted, and therefore it did not appear that this *exigent* was ſued out in this action.

To the *firſt objection* it was anſwered, that the turning up of the *t* being no known abbreviation, ſhould go for nothing.

To the *ſecond*, it was obſerved, that this was an *exigent* ſued out between the ſame parties, that the *capias* was; and that there is no variance between the *capias* and *exigent*, though there is ſomething more contained in the *capias* than what is in the *exigent*. On prayer of *Oyer* of the *meſne proceſs* in this action, this *exigent* was recited, and thereby admitted to be the *exigent* in this ſuit.

It was further argued, that this diſcontinuance, if it was one, was aided by *appearance*, and that the difference is, that appearance and pleading over aids a *diſcontinuance*, but that appearance and demurrer is not law. *Stat.* 9 *H.* 5. *fol.* 2. 2 *Cro.* 284. *Roll. Abr.* 789. 4 *Co. Boſſe's* caſe. 1 *Vent.* 7. *Vide Mod. Rep. vol.* 10. *pages* 86, 87.

Trinity, 4 *Geo.* *The Inhabitants of Almonſbury* v. *the Inhabitants of Hodsfield in Yorkſhire.*

An *appeal* was made to ſeſſions againſt an order of removal, and not ſaid by whom the *appeal* was made: it was objected, that this was a limited juriſdiction, and that it ought to appear by whom the *appeal* was made; yet there being ſeveral precedents conformable thereto, though four to one in oppoſition to it, and not to overturn a great number of orders, (the clerk reporting that moſt of thoſe from the *Weſt-Riding* of *Yorkſhire* were ſo;) for this reaſon only, the court confirmed the order. *Vide Forteſcue, p.* 301.

Trinity, 6 *Geo.* *Anonymous.*

On a *mandamus* to the ſeſſions to proceed on an *appeal*, the court return, that the *appeal* was diſmiſſed for want of ſix days notice, which by a former order they had appointed to be given of every *appeal*.

Per curiam. The return was allowed, for they are the propereſt judges of a point of practice at the ſeſſions, and all courts muſt have ſtated rules to go by. *Vide Stra. vol.* 1. *page* 315.

Eaſter, 12 *Geo.* *The Borough of Taunton.*

A rate for poor, and an *appeal* to a borough ſeſſions, was held well; there being a clauſe in *ſtat.* 43 *Eliz.* that juſtices and ſeſſions of boroughs ſhall have power excluſive of the county. *Vide Forteſcue, p.* 325.

Michaelmas. 12 *Geo.* *The King* v. *the Inhabitants of St. George.*

An order was made by the juſtices at ſeſſions to make a rate on other pariſhes, becauſe that pariſh was not ſufficient, and though it did not appear whether the order was made before the ſix days work done, or after, yet held well; and that it was founded on *ſtat.* 3 & 4 of *W.* & *M.* and it was alſo held, that though they did not *appeal* at the next ſeſſions, yet they might at a future ſeſſions; and as to the matter of accompting, that was deemed to be within *ſtat.* 3 & 4 *W.* only; ſo they may appeal clearly as to that, after the next ſeſſions. *Vide Forteſcue, p.* 327.

Eaſter, 2 *Geo.* 2. *The King* v. *the Inhabitants of Norton* com. *Salop.*

The council for the inhabitants of *Norton* excepted to an order of ſeſſions, made in this matter, for diſcharging an order of removal, becauſe the juſtices order was dated the 21ſt *June*, and the ſeſſions order was not till *Michaelmas* ſeſſions following, ſo that *midſummer* ſeſſions intervened.

It was anſwered, that by the expreſs words of the ſtatute, the appeal is to be the next ſeſſions after the parties find themſelves aggrieved, which is not till the removal, and for ought appears in this caſe, *Michaelmas* ſeſſions might be the next ſeſſions after the grievance, and ſo held in the caſe of the pariſh of *Milbrook* v. *St. John*'s in *Southampton*, *Michaelmas*, 1 *Geo.* 1. in this court.

The court agreed to this determination, and the order of ſeſſions was affirmed. *Vide Stra. vol.* 2. *p.* 831.

Hilary, 3 *Geo* 2. *Pyle* v. *Grant.*

In an *appeal* of *murder*, it appeared the defendant was convicted on the indictment, but pardoned on the report of the judge; and after iſſue joined on the appeal, he moved the court to be bailed, which was refuſed, the preſumption being againſt him contrary to *Bambridge's caſe*. A trial at *bar* being ordered in this caſe, the appellant having taken no ſtep to bring it on, on the day appointed moved to put it off to a further day, on which the court took the appellee's own recognizance in 500 *l.* to appear the laſt day of the term; and ordered that nothing ſhould be done as previous to the day appointed for the trial, that if there was a *diſcontinuance*, the appellee might take advantage of it: and on the laſt day of the term the appellee was diſcharged, the appellant not appearing. *Vide Stra. vol.* 2. *p.* 858.

Michaelmas, 3 *Geo.* 2. *Caſtel, Widow*, v. *Bambridge and Corbet.*

The defendant *Bambridge* having been proſecuted on the report of the committee of the Houſe of Commons, for the murder of the plaintiff's huſband, who was a priſoner in the *Fleet*, under the cuſtody of *Bambridge*, the warden; and having on the trial been honourably acquitted, on the proſecutor's own evidence, was followed with an *appeal*, to which *Corbet*, who on croſs examination appeared to be a material witneſs for *Bambridge*, was now alſo made an appellee, and the writ running, *becauſe* Mary Caſtel, *widow, has made you ſecure to proſecute her plaint by* Thomas Wagſtaff, *and* Foſton Stracy, contrary to the uſual form, which is, *if* the appellant *ſhall have made us*, i. e. *the King*, *ſecure*. Application was made to the Lord Chancellor *King* to ſuperſede this writ on *affidavits*, that the appellees were both in cuſtody on it, but that no ſecurity had been given, and the writ ſetting forth the ſame as an act done before the emanation of it, the ſheriff had not taken any, as he would have done, if it had been put by way of condition, *if ſhe ſhall have made*. It was argued, that the *ſtatute* of *Weſtminſter*, 2 *cap.* 12. giving the appellee a remedy againſt the appellant, her *pledges* and *abettors*, it was not a matter of form, but ſecurity ſhould be entered into by perſons of ability. To which the *Attorney General* anſwered, that it was ſufficient if there were pledges at any time before judgment. *Sir T. Jones*, 154. 9 *Co. Dr. Huſſey's caſe*, *Cro. Jac.* 413.

In *reply* it was obſerved, that at that rate the appellee would never have any remedy againſt the pledges; for if he was convicted he would be entitled to none, and if he was acquitted, the appellant would never pray judgment, and it would be an artifice to elude the law; but notwithſtanding, the *Chancellor* would do nothing in it, but ſaid, if the, *becauſe ſhe ſhall have made you*, were wrong, the defendant might have advantage of it, and therefore refuſed to make any order.

In *Michaelmas* term following, the writ being returned, and the appellees brought up by *habeas corpus*, and turned over to the *King's Bench*, it was here moved to have the proceedings ſet aſide on the ſame *affidavit* of there being no pledges, and the court were of opinion it was a very good objection, and a foundation to ſuperſede the writ, but ſaid it was not in their power ſo to do, for they muſt take the writ as they found it, and not hear *affidavits* to contradict the ſuggeſtions of the writ, and therefore the having ſecurity being recited as an act done, they muſt take it to be ſo, and could not relieve.

On this the appeal was arraigned, *ſtating*, that the appellant's huſband was a priſoner in the *Fleet*, under the cuſtody of *Bambridge*, the warden, who made an aſſault on him, and, contrary to his will, carried him to the houſe of *Corbet*, a victualling-houſe within the *Fleet*, and there impriſoned him, where one *White* then lay ill of the ſmall-pox, which *Caſtell* had never had; that the appellees had notice of this, and were deſired to ſuffer him to remove to another place in the priſon, which they refuſed, and afterwards *Caſtell* fell ill of that diſtemper, and died in *Corbet*'s houſe, whereby the *count* concludes the appellees were guilty of his murder.

Without ſtaying for a copy of the declaration, the appellees *immediately* pleaded *not guilty*, and iſſue was joined.

The appellees council moved that they might be bailed; and on debate, the court were of opinion to bail *Bambridge*, and not *Corbet*: the reaſons they offered were, that *Bambridge* had been acquitted, which was a ſtrong preſumption of innocence; and the judge before whom he was tried had certified that he was very well ſatisfied with the verdict: they ſaid they would bail in all *caſes* after an *acquittal* on the indictment, unleſs the judge was diſſatisfied with the *acquittal*, and it was for that reaſon they denied bail in *Slaughterford*'s *caſe*.

As to *Corbet*, there was no foundation to bail, for they denied that it was of courſe to bail in an *appeal*: ſo *Bambridge* was bailed by two perſons, *body for body*, who juſtified in 1000*l*. each. In this caſe the court agreed, that in an *appeal by writ* on the *civil* ſide, two bail only are required, but had it been on the *crown* ſide by *certiorari*, there muſt have been four.

The appellees council moved the court to fix a time for the trial, having agreed to take ſhort notice; but it being by *original*, there was a neceſſity to have fifteen days between the *teſte* and the return of the *diſtringas*, and they could not be tried on the *venire*, becauſe being in *London*, there could be no trial at *bar*, (the citizens not being to be brought out of the city) and as it muſt be tried at *niſi prius*, there muſt be a *diſtringas*.

Towards the end of the term, the appellees moved to be diſcharged, there being a *diſcontinuance*, for that no *venire* had been taken out, and in appeals, which are a recent proſecution, every delay is a *diſcontinuance*, in ſupport of which, *Cro. Jac.* 283. & *Yelv.* 204, were cited.

On conſideration, the court held that it was not neceſſary to take out the writ, and make it returnable ſooner than it might be, though it muſt bear *teſte* the day that iſſue is joined, and then the appellant took out a *venire*, *teſted* 23 *October*, and returnable 25 *November*, which the court conſidered as an affected delay, and therefore admitted the other appellee, *Corbet*, to bail. They obſerved, that the cauſe might have been tried the ſittings after the term, and then on *acquittal*, he muſt have been *immediately* diſcharged by the judge of *niſi prius*, according to *ſtat.* 14 *Hen.* 5. *cap.* 1.

The appellees being out on bail, appeared on the ſeveral continuance days, according to their recognizance, and the appellant alſo appeared. The beginning of the term the appellees moved for a rule on Mr. *T.* the officer, who keeps the records at the *Old Bailey*, to attend the trial with the record of *Bambridge*'s acquittal; (he not being allowed a copy of it) but the court refuſed to make a rule, and ſaid if the record was brought, it would be no evidence.

On the 26th of *January*, the trial came on at *Guildhall* before the Chief Juſtice, and in the courſe of the evidence, the appellant's council called a quaker, and inſiſted that this is a *civil* ſuit, in which he might be a witneſs, but the judge ſaid it was to *this purpoſe* a *criminal* proceeding, and therefore he could not be a witneſs; after a long examination of witneſſes, the judge directed the jury, that if they believed *Caſtell* was ſo carried to *Corbet*'s againſt his conſent, and was there detained, and that *Bambridge* and *Corbet* knew the ſmall pox was there, and that *Caſtell* had not had it, but feared it, and deſired to be removed, or not be carried there at all, that he caught the ſmall pox of *White*, and died thereof, then the appellees would be guilty of murder, but if any of theſe facts were not proved to the ſatisfaction of the jury, they ought to be acquitted, and there being no pretence to charge either of the appellees, the jury brought them in *not guilty*.

On the acquittal the appellees moved the court for leave to proceed againſt the appellant, (who was then in court) on *ſtat. Weſtminſter* 2. *cap.* 12. but the judge ſaid he was only to try the iſſue, and that the application was proper *above*, or by writ of *conſpiracy*, and all he could do was to record the verdict.

In *February* following, the appellees appeared in court, and having given a rule on the *poſtea*, which they then produced, and *nobody* appearing to ſay any thing againſt them, they were diſcharged. *Vide Strange, vol.* 2. *page* 854. *Fitz-Gibbons page* 94.

Michaelmas, 11 *Geo.* 2. *The King* v. *The Inhabitants of Hedingham Sible*.

In *Eaſter* term, 10 *Geo.* 2. A rule was made by this court to ſhew cauſe why the order of ſeſſions, and alſo the original order made in this cauſe for quaſhing the original order made in the ſame cauſe, for removing *W. C.* his wife, and *E.* and *A.* their children, from *Hedingham Sible* to *Finchingfield*, (both in *Eſſex*) ſhould not be quaſhed, and why the original order ſhould not be affirmed.

In this preſent term, the original order made in this cauſe for the removal of the above *pauper*, *his wife and children*, was quaſhed, and ſo was the *certiorari*, as to the four orders firſt mentioned in the return to it.

The ſame day a *certiorari* was granted to remove all orders made by the juſtices for *Eſſex*, between the inhabitants of *Finchingfield*, and the inhabitants of *Hedingham Sible*, concerning the ſettlement of the ſaid pauper and his family.

In this caſe there was five orders.

The court were of opinion, that the four firſt of theſe orders were not properly deſcribed in the *certiorari*, (there being a variance in the words, *his* and *their* children.) They ſaid the fifth order was well removed, being *rightly* deſcribed, but the ſame was given up as a *bad* one, having been made while the matter was *depending* before the ſeſſions.

The court therefore quaſhed this laſt order, which was well removed, and quaſhed the *certiorari*, as to the four other orders which were not well removed by ſuch *certiorari*, for want of the *paupers* being properly *deſcribed* therein.

This matter coming again before the court on the ſecond *certiorari*; the council for *Hedingham Sible*, objected, that the third of the ſaid orders not having continued the *appeal* by a proper adjournment, but only referring it to the judges of *aſſize*, without reſerving the determination to themſelves after ſuch opinion, that therefore it was a *diſcontinuance* of the *appeal*, and the *ſeſſions* could not take the matter up again, conſequently the fourth order diſcharging the original order, was *bad*.

The council for *Finchingfield* did not attempt to ſupport the matter.

Lee. Chief Juſtice ſaid, the former order was only a *conditional* reference to the judge of *aſſize*, without any continuance or adjournment, and that therefore the *latter* could not be valid.

Per curiam. Let the order of *ſeſſions* (being the fourth of the five orders) be quaſhed, and let the original order (for removing *the pauper and family* from *Headingham Sible* to *Finchingfield*) be affirmed. *Vide Bur. S. C. vol.* 1. *page* 114.

Hilary, 10 *Geo.* 3. *The King* v. *The Inhabitants of Llanrhydd*.

Two juſtices for the county of *Denbigh*, removed a pauper and her three children, from *Llanrhydd* to *Denbigh*. On an *appeal* to the ſeſſions by *Denbigh*, the order of the ſeſſions was quaſhed, but the inhabitants of *Llanrhydd* not being ſatisfied with the opinion of the court, moved to have the facts found *ſpecially*, which accordingly was agreed to be as follows:

That *J. M.* Eſq; and *J. J.* Clerk, removed the above paupers by an order properly ſigned, dated 28 *May*, 1768, from the ſaid pariſh of *Llanrhydd* to *Ruthen*, who were accordingly delivered to the officers of *Ruthen*, who maintained them for a while, and for ſome time after at the joint expence of both pariſhes: and notice of *appeal* to the ſaid order being ſerved on the officers of *Llanrhydd*, by the officers of *Ruthen*, on the morning of the quarter ſeſſions, *previous to the filing of the ſaid appeal*, the officers of *Llanrhydd* conſented to take the paupers back, without troubling the pariſhioners of *Ruthen* to appeal againſt ſuch order: whereon the ſaid pariſhioners of *Llanrhydd*, by order ſigned by *J. Y.* and *D. P.* clerks, dated 11th of *Jan.* 1769, removed the ſaid paupers to the pariſh of *Denbigh*, in the ſaid county; which pariſh appealed againſt the order, and on ſuch appeal, the ſettlement of the ſaid paupers was proved to be at *Denbigh*. But it appearing in evidence on behalf of *Denbigh*, that the ſaid order of *J. M.* and *J. J.* removing them to *Ruthen*, as aforeſaid, *had not been appealed againſt*, the order of removal from *Llanrhydd* to *Denbigh* was quaſhed.

On motion to quaſh this order of ſeſſions, and a rule obtained to ſhew cauſe, it was objected, that though an order of removal ſubmitted to, and *not appealed from, is concluſive on the non-appealing pariſh*, yet this general maxim is to be underſtood to relate only to a *ſubſiſting* order, and not to a *deſerted* one.

The council on behalf of the pariſh of *Denbigh* replied, it was not in the power of private perſons to put an end to the order for removing theſe paupers to *Ruthen*, whilſt an appeal was thus ſubſiſting, and they being removed to *Ruthen* by the order, and *Ruthen* not having *appealed*, conſequently *Ruthen* is concluded to diſpute their belonging to that pariſh. The court being of opinion againſt him on this point, he then objected to the *original* order for the laſt removal, for that the county is only mentioned in the margin, and not in the body of it, and cited *Raym. vol.* 2. *Mich.* 8 *Ann, anonymous*, where an order of two juſtices was quaſhed on this exception.

Lord *Mansfield* obſerved, the caſe cited goes on the notion of an order's being like an indictment; but that an order of removal is not like an indictment. And Mr. Juſtice *Aſton* ſaid, that he thought the caſe cited had been over-ruled.

The order of ſeſſions was therefore quaſhed, and the original order affirmed. *Vide Bar. S. C. vol.* 3. *page* 658.

Trinity, 10 *Geo.* 3. *The King* v. *the Inhabitants of Kirkby Stephen.*

On a rule to ſhew cauſe why an order of *ſeſſions* to remove a *pauper*, his wife, and family, from the townſhip of *Kirkby Stephen, com. Weſtmoreland*, to the townſhip of *Wharton*, in the ſame county, grounded on an original order of removal from *Newport* to *Kirkby Stephen*, ſhould not be quaſhed: after hearing council on both ſides,

Lord *Mansfield* ſaid, the original order made for the removal from *Newport* to the pariſh of *Kirkby Stephen* muſt mean the townſhip of *Kirkby Stephen*; the townſhip was as a pariſh for this purpoſe of a removal to it, the poor within the pariſh not being maintained by the whole pariſh, but by the particular townſhip to which they reſpectively belong. The townſhip of *Kirkby Stephen* ought in this caſe to have appealed. They could not get rid of this order but by appealing, and if they had appealed, the truth might have appeared; and when the facts had appeared to the juſtices, on the whole truth being diſcloſed, the *pauper* might in the end of the inquiry have been ſent to *Wharton*.

Per curiam. Let the rule be diſcharged, and the order of ſeſſions affirmed. *Vide Bur. S. C. vol.* 3. *p.* 664.

Appearance.

Michaelmas, 3 *W. & M.* *Chew* v. *Briggs.*

Held by Chief Juſtice *Holt*, that an *appearance* does not help a *diſcontinuance*, as it does a *miſcontinuance*; and it is a queſtion, whether *diſcontinuance in proceſs* be helped by the ſtatute of *jeoſails*, though *diſcontinuance in pleading may be helped*. *Vide Mod. Rep. vol.* 12. *p.* 8.

Michaelmas, 5 *W. & M.* *Colethirſt* v. *Wiſeman*. Error.

In *Error* brought of a judgment on an action on the *caſe* in the inferior court of *Hull*; the *error* aſſigned was, that a *capias* was the firſt proceſs; and *Yelv.* 158. was cited in ſupport of the objection.

Per curiam. That caſe is not law, and it has often been ruled ſo; for it is but a miſconveyance of proceſs, and helped by *appearance*. The judgment was accordingly affirmed. *Vide Mod. Rep. vol.* 12. *p.* 47.

Michaelmas, 6 *W. & M.* *Wilſon* v. *Law.*

On an *appeal* for murder, *Eyre*, Juſtice, was of opinion, that if the return of an appeal had been ill, the appearance of the appellee would not aid the ſame; for *appearance* aids only when the party comes in and pleads to iſſue; but when the party comes and demurs on the proceſs, *appearance* will not aid any defect in the ſame; and cited the following authorities in ſupport thereof, 1 *Roll. Abr.* 780. 1 *Bulſtr.* 142. 2 *Cro.* 284. *Bradley* v. *Banks. Yelv.* 204. To this the other judges gave no opinion. *Vide Raym. vol.* 1. *p.* 21.

Michaelmas, 10 *W.* 3. *Roſwell* v. *Prior.*

In an action on the *caſe* for ſtopping the plaintiff's light; Chief Juſtice *Holt* held, that the filing a writ of *habeas corpus* is *not* an *appearance*, but that a *procedendo* may iſſue notwithſtanding; but if bail, either common or ſpecial, be put in, then no *procedendo* to iſſue. *Vide Mod. Rep. vol.* 12. *p.* 215.

See this *caſe* more fully ſtated in p. 24. of this Digeſt, under the head *Actions.*

Trinity, 12 *W.* 3. *The King and Queen*, v. *the Inhabitants of Glamorganſhire.*

An order of ſeſſions being made for aſſeſſing to repair a bridge purſuant to a private act of parliament; the order was removed by *certiorari* into this court.

Chief Juſtice *Holt* declared, that by the antient rule of the court, there could not be a voluntary *appearance* without a writ was taken out; but even now, there muſt be a writ taken out before or after; for without a writ the parties have no day in court, without which they cannot appear; and that he ſaw no difference between a *voluntary appearance*, and an *appearance* on a *cepi corpus*, i. e. *an arreſt*; for ſurely the plaintiff ought not to be put in a worſe condition for his good nature in not arreſting the defendant. If a writ is returnable on *The Morrow of All Souls*, and the defendant *voluntary appears* to it, it will be tne ſame as if he *appeared* on an *arreſt*. *Vide Mod. Rep. vol.* 12. *p.* 404.

Michaelmas, 12 *W.* 3. *Moor* v. *Watts.*

Holt, Chief Juſtice, delivered the opinion of the court, and ſaid, that whenſoever a writ is awarded returnable the day of the return, it is always a day to both parties to appear; and though the writ be returned, *not ſerved*, yet the defendant may appear to prevent any ill conſequences. *Vide Raym. vol.* 1. *p.* 616.

Eaſter, 13 *W* 3. *The King* v. *Foſter.*

Foſter being indicted for a *battery*; after *appearance*, made the affair up with the proſecutor, who agreed to ſtop all proceedings on the indictment; but notwithſtanding, the defendant *not appearing* the next term, was ſued to an outlawry.

Per Chief Juſtice *Holt*. The only ſure way had been, on agreement with the proſecutor, to have ſubmitted to a fine, which in that caſe would have been moderate, or to have got a *non pros* entered. And an *appearance* to an *indictment* differs from an *appearance* in a *civil action*, where once an *appearance*, it is an *appearance* to the end of the ſuit; but an *appearance* to an *indictment* is of courſe *only of that term*, and then, if it is not proſecuted, the defendant is out of court the next term, and may be outlawed; and the *outlawry* is a conviction while it ſtands unreverſed: and the defendant's only way now is, to ſubmit to a fine on the *outlawry*. He might have got an attorney to appear for him on the new act of parliament. *Vide Mod. Rep. vol.* 12. *p.* 448.

Eaſter, 13 *W.* 3. *Lord Angleſea's caſe.*

His lordſhip ſtood on his recognizance for his keeping the peace towards his lady; and a motion was made to have his attendance diſcharged in regard of his ill ſtate of health, his lordſhip ſpitting blood, and being adviſed to go abroad for his health by his phyſicians.

Per curiam. By the courſe of the court, no perſon is ever diſcharged ſo till the laſt day of term, unleſs at the requeſt of the Attorney General; though it may abſolutely be done, his attendance being only from *day to day*: the court therefore ordered his lordſhip's council to produce affidavits of the truth of what was offered, and to move the matter again on another day. *Vide Mod. Rep. vol.* 12. *p.* 448.

Michaelmas, 13 *W.* 3. *The King* v. ———

The defendant being indicted for uſing a trade three months, from the day of to the day of not having ſerved an apprenticeſhip to that trade, *&c.* on *not guilty* pleaded, was found *guilty* for *one month*, and acquitted of the reſt. The court was moved in arreſt of judgment, that it was uncertain for which of the three months the defendant was found guilty; and therefore he could not plead this conviction in *bar* of another indictment for the ſame offence.

Per curiam. The defendant may plead a conviction for one month, *abſque hoc*, that he was guilty in any other month.

Judgment was therefore awarded for the King. *Vide Mod. Rep. vol.* 12. *p.* 560.

Michaelmas, 13 *W.* 3. *Walgrave* v. *Taylor.*

On a motion to ſet aſide a judgment in *treſpaſs*, after judgment by default, and a writ of enquiry executed, becauſe the *Eſſoign* day of *Eaſter* term was *Sunday*, which not being a *court day*, it was held on the *Monday*, and the declaration in this caſe was delivered on the *Sunday*, which could not be by *ſtat.* 29 *Car.* 2. *cap.* 7. which reſtrains proceſs in *law* from being executed on *Sundays*. If this doctrine ſhould be allowed, the plaintiff would gain a term by it, where the day ought to be the *Eſſoign* day of *Eaſter* term, and therefore the declaration ought to be of the ſame term; but the declaration being delivered before the *Eſſoign* day, which was held on *Monday*, it will be a declaration of *Hilary* term.

The plaintiff's council *urged*, that the delivery of a declaration was not ſervice of proceſs; and that in the caſe, *Alleſon* v. *Brookbank*, *Hilary*, 11 *W.* 2. it had been held, that the ſervice of a *citation* on a *Sunday* was good, and not reſtrained by ſtat. *Charles* 2. which was allowed by *Holt*, Chief Juſtice, who ſeemed to think that the delivery of a declaration on the *Sunday* was ill, becauſe the ſtatute intended to reſtrain all ſorts of *legal* proceedings: but *Powys'* and *Gould*, Juſtices, were of a different opinion, and ſaid, ſuch delivery was but *as it were* a notice; and as a letter, and not a proceſs: yet, it appearing to the court, that the defendant had appeared, and that a writ of *inquiry* had been executed, they would not intermeddle; and ſaid, that had made all good: and therefore the judgment was ordered to remain. *Vide Raym. vol.* 1. *p.* 705.

Michaelmas, 1 *Ann.* *Anonymous.*

Holt, Chief Juſtice, affirmed, that formerly, when a writ iſſued out of this court it was entered on a roll, ſo that though the officer did not return the writ at the day, yet the defendant might *appear* at the day, and ſhould be received ſo to do; either to ſave a penalty, or his inheritance; and the practice was the ſame in the Common Pleas; they entered the writ on a roll, by way of recital, *viz. Dominus Rex miſit breve ſuum clauſum in hæc verba, &c.* i. e. *our Lord the King ſent his writ cloſed in theſe words, &c. Vide Salk. vol.* 1. *p.* 64.

Eaſter, 4 *Ann.* *Fanſhaw* v. *Morriſon.* Error.

On a writ of *error* of a judgment in the *C. B.* on a *ſci. fa.* on a recognizance, the recognizance was entered into, on bringing a writ of error on a judgment in the *Common Pleas*, in an action of *debt*; and was conditioned that if the plaintiff in *error* ſhould be nonſuited, or the writ of *error* ſhould be diſcontinued through his default, or the judgment ſhould be affirmed, that then the plaintiff ſhould pay, *&c.* The defendant pleads (after *oyer* of the *ſci. fa.* and the conviction) that the plaintiff in the writ of *error* did proſecute the writ of *error* with effect, and did aſſign errors, and that the *plea on the abovesaid writ of error is as yet pending undetermined.*

The plaintiff replied, that the judgment was affirmed, *abſque hoc*, that the plea *is ſtill pending undetermined.* And to this there was a demurrer, and judgment was given for the plaintiff below.

This caſe was formerly debated on an exception to the manner of aſſigning the breach in the *ſci. fa.* and that exception was allowed, but on the plaintiff's applying to the *C. B.* that default was amended, and an exception was taken to the *traverſe* in the replication, that it was a traverſe of a matter of record, which was ill, becauſe a matter of record could not be put in iſſue to be tried by the country; whereas he ought to have replied, that *the judgment was affirmed, as appears by the record.* This exception was taken laſt term, and the cauſe adjourned over thereon. And on a future day, another exception was made, that the defendant *appeared* contrary to the return of the writ, both the *ſci. fa's.* being returned *nihil.*

Holt, Chief Juſtice ſaid, that the books held that two *nihils* returned, amounted to a *ſci. feci*, and that on two *nihils* returned the plaintiff would have judgment.

Powell, Juſtice ſaid, that the defendant's appearance was well, becauſe the *ſci. fa's.* were entered on the roll, and the defendant had a day by the roll. So that exception was over-ruled. *Vide Raym. vol.* 2. *p.* 1138.

Hilary, 12 *Ann.* *The Queen* v. *Green.*

On a motion to quaſh a conviction on the ſtatute 8 *Anne*, againſt a baker for ſelling of bread; among others, an exception was taken to the conviction, that the ſame ſets forth, that being *duly ſummoned, and not appearing*, they proceeded, *&c.* whereas natural juſtice requires that the defendant ſhould have had a reaſonable time allowed him for the making his defence.

Parker, Chief Juſtice, ſaid, this was a material objection, it not being ſaid that he was ſummoned to appear at a certain time, or any time, or when the ſummons was made.

Powys, junior. It is to be conſidered, whether when it is ſaid that he was *duly ſummoned*, the word *debite*, i. e. *duly*, does not import all reaſonable circumſtances relating to that ſummons, and I think it does; and of this opinion was the court. *Vide Mod. Rep. vol.* 10. *page* 213.

Trinity, 13 *Ann.* *The Queen* v. *Simpſon.*

On a conviction for *deer-ſtealing* before juſtices, on the *ſtatute* 3 & 4. *W.* & *M. cap.* 10. the following exceptions were taken:

1ſt. That no certain time was laid when the offence was committed, but only that between ſuch a time and ſuch a time, the defendant did ſteal one *deer*.

2dly. That the conviction was behind his back, and without hearing him; that he was ſummoned, but the act gives no power to proceed by way of ſummons.

3dly. That the ſummons is inſufficient, ſuppoſing the juſtices could proceed in that way; the defendant is ſummoned to appear at *Bolton*, which muſt be underſtood to be a *vill*, and then how ſhould he know the houſe where the juſtices will be.

Then it is to appear on ſuch a day, but the time of the day is not mentioned; perhaps the juſtices might come at five o'clock in the morning, and the defendant not being there at that time, was convicted, though he came afterwards.

4thly. Though in the information the offence may be ſaid to be committed between ſuch a time and ſuch a time, yet the proof muſt be certain; the oath taken is no more than that the defendant did within ſuch a time and ſuch a time, ſteal *one deer*, ſo that the ſame is left as uncertain on the evidence as on the information, and then *it does not appear* that the evidence relates to the ſame deer, it ſhould have been, *the deer in the aforeſaid information mentioned.*

To the *firſt exception*, it was obſerved, that the ſame had been taken in the caſe of *King* v. *Chandler*, and there over-ruled; and that it was the conſtant courſe of informations in the court of *Exchequer* to ſet forth the time, as in this information.

To the *ſecond exception*, it was anſwered, that no way of proceeding was directed by the ſtatute, and therefore the ſtatute being ſilent as to the mode of proceeding, it muſt be left to the diſcretion of the juſtices; that the way of proceeding by ſummons was agreeable to reaſon and juſtice, it giving the defendant time and opportunity to make his defence. The want of ſummons has been objected in caſes on ſtatutes, that did not direct the proceedings to be by way of ſummons. See the *Queen* v. *Peach*, *Michaelmas*, 3 *Ann.* This caſe was enforced by precedents where under *ſtatute* 3 & 4 *W.* & *M.* the proceedings had been by ſummons.

To the *third exception*, it was anſwered, that this *exception* ſuppoſes very great abſurdities, as that the defendant cannot find the juſtice out, and that the juſtice ſhould come at an unreaſonable hour, &c.

2dly. That the return which muſt be taken as true is an anſwer to the *exception*; for the return is, that the defendant *duly ſummoned to appear at this time and this place, did not appear*; ſo that at whatever time or place he was convicted, it muſt be now preſumed that he was ſummoned to appear at that time and place.

To the *fourth exception*, it was anſwered, that it was next to impoſſible for the witneſs to be able to ſwear to the very day, and not to be intended that there were more deer ſtolen than one.

Parker, Chief Juſtice. It is more agreeable to the courſe of the *common law*, that the defendant ſhould be ſummoned; there is no ground in the *exception* as to the evidence, we muſt take time to look into precedents.

Eyre, Juſtice. As to the *exception*, that the time ſhould have been ſtated with more certainty than that between *ſuch a time and ſuch a time*, &c. that is ſufficiently ſettled in the caſe of *King* v. *Chandler*.

It is true, that the *at this time and this place*, cannot be confined to a particular *hour* or *place*, but then, we cannot ſuppoſe but that a magiſtrate will adminiſter juſtice with integrity; and it is the duty of the party ſummoned to attend his time and place.

In *informations* and *indictments*, no judgment can be given unleſs the defendant appears. The defendant, if he does not appear, may have judgment of *outlawry* paſs againſt him for his contempt. If the judges of *ſuperior courts* cannot proceed to judgment, unleſs the defendant appears, *a fortiori*, juſtices of the peace cannot.

Some ſtatutes give juſtices of the peace a power of proceeding on default, *but the exception proves the rule in the thing not excepted*; it ſeems therefore that the defendant ſhould have been apprehended by a warrant.

Powys, junior. The deſign of the ſtatute is to give a ſummary way of proceeding: the defendant has been ſummoned, which is inſufficient; it would be abſurd to ſuppoſe that he ſhould take advantage of his own contempt.

In *Michaelmas* term, 3 *Geo.* 1. this caſe came again before the court, on a queſtion reſerved, *viz.* Whether on the ſtatute of 3 & 4 *W.* & *M.* about *deer-ſtealing*, the juſtice of peace might convict the offender in his abſence on his default to *appear*, being duly ſummoned? Or whether the juſtices ought not, by iſſuing out their warrant for apprehending the party, to have compelled him to appear? after hearing council on both ſides, the Judges gave their opinion.

Parker, Chief Juſtice. A court may, perhaps, in prudence, not care to give judgment in the abſence of the party, but I ſee no reaſon but that it may be done on the ground of *Mawgridge*'s caſe.

An execution cannot be awarded but in the preſence of the party; and the reaſon is, that there may poſſibly be a miſtake of the perſon; ſomething may have happened ſubſequent to the judgment why execution ſhould not be awarded, which, if ſo, it is but reaſonable the party ſhould have an opportunity to inſiſt on it; in this caſe had the defendant *appeared* judgment might have been given in his abſence..

I am of opinion that the ſummons muſt be perſonal, and therefore it is as eaſy to take the party as to ſummon him.

The ſtatute plainly ſuppoſes, that the juſtices have a power to apprehend the party, or the clauſe in the act would be a *nugatory* clauſe, which ſuppoſes the offender *may be apprehended.* The expreſſion in the act of *detaining* does likewiſe ſuppoſe the party preſent, or otherwiſe the ſtatute would have run thus, *in caſe he be preſent.*

It is a general *maxim*, that a ſtatute ought to be interpreted by the rules of *common law*; and ſince the preſent caſe is in nature of a *treſpaſs*, for which a *capias*, by the *common law*, lies, and the juſtices by the ſtatute have a power to apprehend him: I think *at preſent* that the juſtices ought to have the party before them.

Pratt, Juſtice. If a juſtice of peace has a power of iſſuing out his warrant for bringing the party before him, it muſt be given him either by the expreſs words of the ſtatute, or as a power incident to the *juriſdiction* the act inveſts him with; if the latter, he muſt have the ſame power allowed him in all ſummary proceedings.

If a ſummons be ſufficient, I know not why the ſame ſhould not do here, by leaving the ſame at the uſual place of his abode, *where* the party cannot be found, and in that caſe a perſon may be ſummoned when he cannot be taken. The court adjourned this matter.

In *Hilary* term, 3 *Geo.* 1. this matter came on again for the opinion of the court, when the convictions removed here by *certiorari* were adjudged good. *Vide Mod. Rep. vol.* 10. *p.* 248. 341. 379.

Michaelma s, 3 *Geo.* *The Queen* v. *Simpſon.*

In this caſe, *Forteſcue*, Solicitor General, cited *Bagge's caſe* 11 *Co.* 93. where a perſon may be *disfranchiſed*, and loſe his freehold, if when duly ſummoned, he will not *appear*, and ſaid the conſtant practice was to proceed to *disfranchiſement* in the abſence of the party, if he being duly ſummoned, refuſes to *appear*.

In *Glide's caſe*, *Trin.* 4 *W.* & *M.* it was determined, that if the party lives out of the town, he need not be ſummoned, becauſe it was his duty to attend. *Vide Mod. Rep. vol.* 10. *page* 343.

Hilary, 6 *Geo.* *The King* v. *Johnſon.*

The defendant being convicted on *ſtat.* 5 *Ann. c.* 14. for keeping a gun, not being qualified; an exception was taken, that in this caſe there was not a reaſonable ſummons, for it was made on the 5th of *October*, to *appear* the ſame day, which might be impoſſible, on account of diſtance, the ſummons being ſerved late, and his witneſſes might not be got together on ſo ſhort a warning, then it is to *appear at the pariſh aforeſaid*, whereas there are two pariſhes mentioned before, ſo the man might have gone to one, whilſt they were convicting him at the other. *Salk.* 181.

The council for the proſecution replied, The defendant, *appeared* at the time, and made his defence, ſo that cures all defects in the ſummons.

Per curiam. The anſwer is right.

It was then objected, that the ſtatute requires the conviction to be by juſtices of the county where the offence was committed, and that does not appear in this caſe.

Per curiam. That muſt appear, or elſe they have no juriſdiction. The council for the proſecution ſaid, it does, for they diſtribute part of the penalty to the poor of the pariſh of *Chelfield in com. Kent*, within which pariſh the offence aforeſaid was committed. And the juſtices are the juſtices of the county of *Kent*, and ſtile themſelves ſo. Adjourned. *Mich.* 7. *Geo.* this conviction was quaſhed; the court being of opinion, that their juriſdiction muſt appear otherwiſe than out of their own mouths. *Vide Strange, vol.* 1. *p.* 261.

Michaelmas, 13 *Geo. Dyke and others* v. *Blakſton.* Error.

On *error* brought on a judgment on *C. B.* on an *indebitatus aſſumpſit* by *nil dicit*, and a writ of inquiry executed, and final judgment given for the plaintiff in the original ſuit, the following exception was taken by the council for the plaintiff *in error*. The record is, that the defendants below *veniunt & nil dicunt in barram, &c.* i. e. *come and ſay nothing in bar, &c.* but does not ſay they *appeared by attorney*, as it ought; and the law is ſo ſtrict in this point, that the omiſſion of the *Chriſtian* name of the attorney is *error*. 1 *Roll. Rep.* 536. *Hewſon's* caſe: nor is it ſaid, that the defendant's appeared *in propriis perſonis*, i. e. *in their own perſons*. But not allowed, becauſe the word *veniunt* i. e. *they come*, imports in *proper perſon*, if it is not ſaid that it was *by attorney*.

The ſecond error aſſigned was, that the writ of inquiry was returnable *quinden. Paſch.* i. e. *in fifteen days of Eaſter*, and the inquiſition was returned to be taken the 25th of *April*, which was the 15th day of *Eaſter*, and therefore ill; becauſe the law making no fractions of the day, the inquiſition could not be taken on the day of the return of the writ: but not allowed; for the court will ſuppoſe that the inquiſition was taken on the day before the writ was returned, which is well enough, for it may be executed on that day, and might have been executed before the writ was returned, otherwiſe the inquiſition could not have been returned.

Judgment was affirmed. *Vide Raym. vol.* 2. *page* 1449.

Michaelmas, 2 *Geo.* 2. *George Blenkinſon and William Waite* v. *Francis Iles.* Error.

On a writ of *error* brought on a judgment after a verdict in the court of the borough of *Knareſborough* againſt *Blenkinſon* and *Waite* in an action of *treſpaſs* for breaking and entering *Iles's* houſe, and taking away his goods; the *writ of error* was directed to the ſteward of the court of the borough of *Knareſborough* in the county of *York*, and the *writ of error* was returned by the Earl of *Burlington*, as ſteward of that court; and the *pleas* were *in the court of the Lord the King for the borough of* Knareſborough *in the county of* York, *at* ——— *in the borough aforeſaid, within the juriſdiction of the ſaid court, according to the uſage and cuſtom of the aforeſaid borough, from time, whereof the memory of man knows not to the contrary, uſed and approved,* Monday 22*d* June, 1724, *before* Threſher, *under-ſteward of the court.*

Exception was taken by the council for the plaintiff in *error*, 1. that it did not appear, that the underſteward had power to hold the court; for the writ of *error* was directed to the ſteward, who is to be ſuppoſed to be the judge, and he returns the writ; and it is not ſaid the under ſteward was appointed by deputation in writing from him, nor that he had power to conſtitute a deputy: but not allowed, for, *per curiam*, that the court was held according to the cuſtom uſed time out of mind, imports that by the cuſtom the under ſteward might hold the court, and there was no neceſſity to ſhew how he was appointed.

The ſecond exception was, that the plaint was ſaid to be of a *plea of treſpaſs* generally, without mentioning whether, on the *caſe*, or *with force and arms*; which it was inſiſted was ill, and in ſupport thereof *Hales* v. *Moore* in *Styles Rep.* 86. was cited, where in *error* on a judgment in an inferior court, the plaint was of *a plea of debt* generally, which was ſaid to be uncertain, becauſe the defendants could not know what was demanded: and *Bacon*, Juſtice, held it a good exception, and a rule was made for reverſal *niſi*, *&c.* but not allowed, the court aſcertaining which ſort of treſpaſs it was for, *viz. vi & armis*; and treſpaſs *vi & armis* is an action of *treſpaſs*. And as to the caſe of *debt*, in the *K. B.* the bills are *of a plea of debt* generally.

A third exception was made, that the firſt proceſs was a *capias*, whereas it ought to be an attachment. 1 *Roll. Abr.* 780. *c.* 6. In *debt*, if a *capias* is the firſt proceſs, and not a ſummons, though the defendant *appears* and pleads to iſſue, and found againſt him, yet it is *error*, and not aided by the *appearance*, 3 & 4 *Jac.* 1. but not allowed; for the court were of opinion, it is aided by the *defendant's appearance*. And a caſe ſimilar to that before cited in *Roll. Abr.* 780, was adjudged directly contrary, 11 *Jac.* 1 *Inch* v. *Goodfield*, which is ſince the former caſe.

And judgment accordingly was affirmed. *Vide Raym. vol.* 2. *page* 1543.

Trinity, 10 *Geo.* 2. *Stone* v. *Atwol.*

By *ſtat.* 12. *Geo. c.* 29. if the defendant does not file common bail in time, the plaintiff may do it for him: in the preſent caſe the defendant was an infant, and had appointed no guardian by whom to *appear*; and the court made a rule that the plaintiff ſhould name a guardian for him, if he ſhould ſtill refuſe to do it himſelf. *Vide Strange, vol.* 2. *page* 1076.

Apprentice.

Trinity, 4 *W. & M. White* v. *England.*

An action of *debt* was brought on the ſtat. 5 *Eliz.* againſt the defendant for uſing the trade of a *tyler*, not having ſerved an apprenticeſhip for ſeven years.

The defendant pleaded, that his father was a freeman of *London*, and that he was his eldeſt ſon; and that in *right* of *patrimony*, he might uſe his trade.

On a demurrer to this plea, the council did not rely thereon, but took exceptions to the declaration, becauſe it is not ſhewn that the trade of a *tyler* was an art or myſtery uſed in *England* at the time of the making of the ſtatute.

To which it was anſwered, that it was a trade mentioned in the ſtatute, and by conſequence muſt be then uſed; but the plaintiff was adviſed to make his demurrer, which he did, and paid coſts. *Vide Mod. Rep. vol.* 4. *p.* 145.

Trinity, 4 *W. & M. The King and Queen* v. *Prat.*

A man took an *apprentice* in *huſbandry*, according to *ſtat.* 5 *Eliz.* but died before his *apprentice* was out of his time; and the *apprentice* being impotent, and a cripple, the juſtice of peace, by order of ſeſſions, ſent him to his deceaſed maſter's executor, and ordered him to keep him; and the order was quaſhed here, becauſe of the great inconvenience that might enſue if the executor ſhould be forced to obey it; for perhaps he may not have ſufficient *aſſets*, and it cannot be tried whether he has or not, on a proceeding at ſeſſions: beſides, the executor may live in another county, and then cannot be charged with this order.

Per Eyres, Juſtice. An *apprenticeſhip* is a perſonal truſt between maſter and ſervant, and is determined by the death of either, becauſe the end and deſign of it cannot be obtained; for the executor may not underſtand the trade in which the apprentice is to be inſtructed. An action of *covenant* may lie againſt the executor on the *contract* of the teſtator; but there he may make his defence, by pleading *aſſets*, or *debts of an higher nature*.

Holt, Chief Juſtice. By the cuſtom of *London* in theſe caſes, the executor is to put the *apprentice* to another maſter of the ſame trade; and in other places it would be hard to conſtrue the death of the maſter a diſcharge of the covenants; he obſerved, that it has been held, that the covenant for inſtruction failed, but that the boy ſtill continues an *apprentice* with the executor, with reſpect to his maintenance, who is liable to an action of *covenant*, unleſs he inſtructs the lad, or finds him another maſter. *Vide Mod. Rep. vol.* 12. *page* 27.

The ſame caſe is to be found in *Salkeld*, *vol.* 1. *p.* 67. and *vol.* 3. *p.* 42. entituled, the *King* v. *Peck*, *Michaelmas*, 10 *W.* 3.

Michaelmas, 7 *W.* & *M.* *Anonymous.*

If an *apprentice* be diſcharged from his maſter, the ſtatute requires the diſcharge to be under the hands and ſeals of four juſtices; but in a *certiorari* to remove an order of ſeſſions thereon, it is ſufficient that the order takes notice of the diſcharge ſo made, and it is not neceſſary to certify the diſcharge itſelf. *Vide Mod. Rep. vol.* 12. *p.* 83.

Michaelmas, 7 *W.* 3. *The King* v. *Gately.*

On an order of ſeſſions being removed into this court by *certiorari*, the following exceptions were taken to quaſh it.

1. The order is, that the ſervant ſhall be diſcharged from his maſter, but the maſter is not diſcharged from his covenants to the ſervant, therefore the *order* being not mutual, is void.

To which it was anſwered, that it is not neceſſary it ſhould be mutual; for when the ſervant is diſcharged, the other is no longer a maſter.

2. The ſtatute never intended to give the juſtices in ſeſſions a general power to meddle with maſters in all trades, but only in ſuch which were then uſed in *England*, and therein particularly mentioned; and it provides, that if ſuch maſter (which muſt be in one of thoſe trades) ſhall miſuſe his apprentice, then the juſtices may interpoſe: but a *ſurgeon* is not named in that act; and it being a *penal* law, it ſhall not be extended according to equity, to comprehend any other trade but what is expreſsly named in the act.

This objection was anſwered, *viz.* that a *ſurgeon* is a trade within the ſtatute, for it is a manual occupation, and that is particularly mentioned in the act.

But it has been held, that this ſtatute extends to more trades than thoſe mentioned in it; for the apprentice of a *merchant* hath been diſcharged from his maſter by an order of ſeſſions, and yet a *merchant* is not named in that act; beſides, it is not a *penal*, but a *remedial* law, to regulate maſters and apprentices.

3. The juſtices of peace have no authority to diſcharge an *apprentice*, but where he was compelled by them to ſerve; and in ſuch caſe it is reaſonable, that the contracts which were made by their authority ſhould be diſſolved by the ſame power; but they cannot diſcharge any voluntary agreements made between the parties.

If they make an order for the payment of ſervants wages, it is good, becauſe they have power to compel the ſervice; but for the wages of a *coachman*, or the like, they have no power to make an order, becauſe they cannot compel a man to ſerve in that capacity. A juſtice of peace in *Middleſex* made an order for the payment of a *ſeaman's* wages, and on action brought againſt him, the plaintiff recovered 30 *l.* damages.

4. But if juſtices of peace had any power, they have not purſued it; for it does not appear that they who ſet their hands and ſeals to the diſcharge were preſent in ſeſſions, and at the examination of the matter, it being only ſet forth in the order, that the juſtices of the peace of the county whoſe hands and ſeals are thereunto ſet, &c. and thoſe may be juſtices acting out of ſeſſions.

Afterwards this matter being moved again; the order was quaſhed for the ſecond and third exceptions taken to it. *Vide Mod. Rep. vol.* 5. *p.* 138.

Punting's Caſe.

The order of the juſtices made to diſcharge an *apprentice* was quaſhed, becauſe he was put out to the *Trade of a Tallow Chandler*, which is a trade not mentioned in the *ſtat.* 5 *Eliz.* another *exception* was, that it was under the hands and ſeals of *three juſtices*, when the ſtatute requires there ſhould be *four.* *Vide Salk. vol.* 3. *page* 41.

Anonymous.

The maſter brought an action of *covenant* againſt his *apprentice* for departing from his ſervice at ſuch a time. The defendant juſtified by virtue of a licence from his maſter to depart at that time; and iſſue being joined thereon; *Holt*, Chief Juſtice, held, that on ſuch a declaration the maſter ſhall not give evidence of the defendant's departing without leave at any other time, becauſe in this caſe the time is material and not tranſitory, as in *treſpaſs* and other caſes. *Vide Salk. vol.* 3. *page* 42.

10 *W.* 3. *At Surry Aſſizes.* *Froth or Frith* v. *Tarin.*

The lad ſerved ſeven years as an *apprentice* beyond ſea, but was not bound.

Per Holt, Chief Juſtice, This is ſufficient to excuſe him from the penalties of 5 *Eliz.* *Vide Raym. vol.* 1. *page* 758.

Hilary, 11 *W.* 3. *Anonymous.*

The juſtices may compel a maſter to take an *apprentice* put out by them, becauſe by the ſtatute they are to put ſuch *apprentice* out, and therefore they muſt be conſtrued to have a power to oblige the maſter to receive him. If the maſter turns the *apprentice* away, the juſtices can make him refund. 1 *Lev.* 191. On an order made at the ſeſſions to diſcharge the *apprentice*, it did not appear that the *apprentice* had applied himſelf firſt to a juſtice of peace.

Per Holt, Chief Juſtice. The Juſtices have a power to make an order, and if the ſame is diſobeyed by the maſter, the ſeſſions cannot intermeddle, but on complaint the juſtices may bind the maſter to the ſeſſions, whereby they have cognizance of the complaint againſt the maſter.

Turton and *Gould* Juſtices, ſaid, the juſtices could not bind over. This matter was adjourned. *Vide Salk. vol.* 1. *page* 67.

Hilary, 11 *W.* 3. *Dillon's Caſe.*

Per curiam. The juſtices may diſcharge an *apprentice*, and may order a reſtitution of the money within the *equity* of the ſtatute. If the maſter being bound to anſwer at the *ſeſſions*, does not appear, it is a forfeiture of his *recognizance*, but yet at the ſame time the juſtices may proceed to make an order againſt him. *Vide Salk. vol.* 1. *page* 67.

Eaſter, 11 *W.* 3. *The King* v. *Fox.*

The defendant being indicted for uſing the trade of a *taylor*, not having ſerved an *apprenticeſhip* ſeven years, the indictment was quaſhed, becauſe only ſaid *not having ſerved as an apprentice within the kingdom of* England *or* Wales, for perhaps he did ſerve an *apprenticeſhip* beyond the ſeas, and if it were any where, it ſuffices. *Vide Salk. vol.* 1. *page* 67.

Michaelmas, 11 *W.* 3. *The King* v. *Slaughter.*

The defendant was indicted on *ſtat.* 5 *Eliz.* for uſing the trade of a *Feltmonger*, not having ſerved ſeven years to it, and it was moved to be quaſhed; becauſe not a trade known at the time of making the ſtatute. *Vide* 2 *Cro.* 499. That a hemp-dreſſer was not a trade within the ſtatute. But after a rule *niſi* had been obtained, *Holt* ſaid, that it was proper a jury ſhould try whether it was a trade then, or not; and why not as well as try a preſcription; and therefore was againſt quaſhing it on that exception; and affirmed that the trade of a *Wool-comber* was within the ſtatute, though the contrary had been adjudged in 4 *Jac.* 2. *Vide Mod. Rep. vol.* 12. *p.* 311.

Hilary,

Hilary, 12 *W.* 3. *The King* v. *Margaſon.*

Per Holt. A maſter cannot aſſign over his *apprentice*, as he may another chattel, but it muſt be with his own conſent.

Per eundem. There needs no notice to churchwardens, *&c.* of a ſervant's coming into a pariſh to gain a ſettlement; becauſe the juſtices of peace, though there had been notice, cannot diſturb him. *Vide Mod. Rep. vol.* 12. *page* 441.

Eaſter, 12 *W.* 3. *The King* v. *Hayes.*

An order of ſeſſions was for the diſcharging an *apprentice* from his maſter, on ſtat. 5 of *Eliz.* and two exceptions taken to it: 1ſt, That the firſt proceeding was at the quarter ſeſſions, whereas it ought to have begun by complaint to two juſtices; and for this *Hawkſworth* and *Hillary*'s caſe, in 1 *Saund.* was cited; to which was oppoſed 1 *Vent.* 174. 2dly, That it appeared the maſter was not preſent. *Holt* was then ſtrongly againſt the order on the firſt exception, becauſe they ought to have followed the method preſcribed by the ſtatute, the ſtatute directing that the endeavours of a juſtice of the peace ſhould be firſt uſed; and if the party of whom complaint was made had not complied with the juſtice's propoſal, then that he ſhould give a bond to appear at ſeſſions, and that as it were by *appeal:* but if the party had promiſed to obey the juſtice of peace's orders, but afterwards would not ſtand to them, the only way was to complain *anew*, and the juſtice to attach him, and bind him to ſeſſions.

But in the caſes of *The King* v. *Johnſon*, and *The King* v. *Fenwick*, it was unanimouſly reſolved, the order made at ſeſſions, on the firſt ſtep, was good; and *Holt* ſaid, he was brought to that reſolution rather from the neceſſity of the thing, the practice being univerſally ſo, than any reaſon he ſaw for it. *Vide Mod. Rep. vol.* 12. *p.* 349.

Trinity, 12 *W.* 3. *Lacy* v. *Kynaſton.*

Per Holt. Trover lies for the maſter, for a ticket or other writing intituling his *apprentice* to money earned by him during the *apprenticeſhip*; but here the *trover* was againſt the executor of the *apprentice* for a ticket given out after the death of the *apprentice*, for money earned by him during his *apprenticeſhip*; and becauſe it never was in the *apprentice's* poſſeſſion, the action was not maintainable; but after the executor receives the money, the maſter may have *aſſumpſit* for ſo much money received to his uſe. *Vide Mod. Rep. vol.* 12. *p.* 415.

Trinity, 13 *W.* 3. *The King* v. *Johnſon.*

The following exceptions were taken to an order for diſcharging an *apprentice*; 1ſt, That the complaint was made originally at ſeſſions, without any previous application to a ſingle juſtice out of ſeſſions. And 2dly, That the juſtices had ordered money to be returned.

Holt, Chief Juſtice. The order was good. If it had been a new queſtion, I ſhould have held a prior application to ſome juſtice out of ſeſſions neceſſary; but after ſo many orders affirmed in this court, without any application to a juſtice, 'tis too late to unſettle that point. As to the ſecond point, I have no doubt about that, it being a power conſequential on their juriſdiction to diſcharge. *Vide Salkeld, vol.* 1. *p.* 68.

Trinity, 13 *W.* 3. *The King* v. *The Inhabitants of Aicles.*

A boy was put out *apprentice* to a maſter in one pariſh, who by deed aſſigned and turned him over to another maſter, where he ſerved his time, in the pariſh of *A.* and the boy being now poor, the queſtion was, whether he had gained a legal ſettlement in *A.* and an order of two juſtices was for removing him to another town, as not legally ſettled in *A.* becauſe an *apprentice* is not aſſignable in law.

Per curiam. True, an *apprentice* is not aſſignable; yet here the boy ſerved during his apprenticeſhip in the pariſh of *A.* and if one maſter makes a contract with another, that the other ſhall have the ſervice of his *apprentice*, that is good between themſelves; and though the words be, *grant, aſſign, and turn over*, which indeed cannot alter the legal intereſt of the *apprentice*; yet it amounts to an agreement, that he ſhall ſerve the other during the time; like the caſe where one aſſigns a bond over to another, which in its nature is not aſſignable over, but if he does aſſign it over, it is a good agreement that the aſſignee ſhall have the money to his own uſe; and ſo is the caſe of *Deering* v. *Farringdon.* So here in ſtrictneſs, an *apprentice* is not aſſignable over, yet by agreement between the maſters, it may be ſo far done, as that *covenant* lies for an interruption of enjoyment of his ſervice; then the *apprentice* ſerving on ſuch an aſſignment is a good ſervice of an *apprentice*; and therefore ſufficient to give him a ſettlement in *A.* and the order was quaſhed.

The original writ of *appeal* ought to be returned *non eſt inventus*, before a *capias* awarded. *Mod. Rep. vol.* 12. *p.* 553. *Raymond, vol.* 1. *p.* 683.

Trinity, 2 *Ann.* *Barber* v. *Dennis.*

A waterman's widow took an *apprentice*, who went to ſea, and earned two ſailors tickets, which came to the hands of the defendant: the widow brought an action of *trover* for the tickets, and obtained judgment in her favour; for what the *apprentice* gains he gains for his maſter; and whether legally an *apprentice* or not, is immaterial, it is enough if he is ſo *in fact. Salkeld, vol.* 1. *p.* 68.

Eaſter, 3 *Ann.* *The Queen* v. *Gould.*

On a motion to quaſh an indictment brought againſt the defendant, for that one *A.* a *poor boy*, being put out to him as an *apprentice*, under *ſtat.* 5. *Eliz. cap.* 4. he *vi et armis*, refuſed to provide for him.

The defendant's council made the following exceptions to the indictment:

1ſt. That the matter was not indictable.

2dly. That if it was indictable, there ſhould have been firſt an application to a *juſtice of peace*, and after wards an *appeal* to the *ſeſſions*, and then, perhaps, for diſobedience to their orders, an indictment would lie.

3dly. The indictment is laid to have been *vi et armis*, i. e. *with force and arms*, which is abſurd, it being for a *nonfeazance*.

Per curiam. If this had been the *caſe* of a common *apprentice*, an indictment would not lie; formerly it has been held generally, and by the whole court, in *Pyne's caſe*, that the juſtices could not compel a man to take an *apprentice* on the ſtatute, but ſince the contrary opinion has prevailed: if we allow the juſtices ſuch power of neceſſary conſequence, we muſt allow an indictment for diſobedience to their orders, either in not receiving, or in receiving, and after turning off, or not providing for ſuch *apprentice*; and tho' an act of parliament preſcribes an eaſier way of proceeding by complaint, *as is urged*, yet that does not hinder an indictment; and though the *vi et armis* in this caſe is abſurd, yet it is only *ſurpluſage*, which will not vitiate the indictment, and therefore the court refuſed to quaſh it. *Vide Mod. Rep. vol.* 6. *p.* 163.

Trinity, 3 *Ann.* *The Inhabitants of Whitley* v. *Theerſlay.*

A lad, twenty-one years of age, was bound an *apprentice* to his father for ſeven years, and ſerved him for two or three years, and they parted by conſent; the father diſcharged his ſon, and delivered him his indenture, but did not cancel it, and he lived as an hired ſervant in another place; and he was adjudged by the juſtices to be ſettled where he was an *apprentice*.

Per Holt, Chief Juſtice. If the ſeal had been torn off he had been diſcharged. *Vide Forteſcue, p.* 312.

Michaelmas, 3 *Ann.* *Fitzhugh* v. *Dennington.* Error.

On *error* brought on a judgment in the *Marſhalſea* court in *debt* on a bond, where the defendant, on *oyer* of the condition, which recited, that the plaintiff was become an *apprentice* to the defendant for ſeven years, and then the condition was, that if the defendant, at the end of ſeven years, ſhould make, procure or cauſe the plaintiff to be made free of the *company of joiners of London*, if thereunto requeſted, then the obligation to be void. To this action the defendant pleaded, that *at the end* of the ſaid ſeven years, or after, till the time of the action brought, he was not requeſted. To this plea the plaintiff demurred, and judgment was given for the plaintiff below, ſuppoſing the requeſt not material, or if it were, the plea ſhould have been (that he never was requeſted) and not to tye it up to a requeſt at the end of the ſeven years or after, for he might have requeſted before the end of the ſeven years, to make him free at the end of the ſeven years.

The council for the plaintiff in *error* inſiſted, that if in this caſe the requeſt had not been expreſsly made part of the condition, yet the plea had not been good; and made this diſtinction; when there is a duty made by the bond, then there needs no averment of a requeſt; otherwiſe when the bond is for doing a *collateral* act, as in this caſe; and, in ſupport of his opinion, cited 1 *Browl.* 13. but whenever the condition is to do a thing when thereunto required, or if thereunto required, there the requeſt is part of the condition, and to be *averred*.

Per curiam. The requeſt is material here, and the meaning is plain from the recital, that the defendant was to have made the plaintiff free at the end of ſeven years, (that is, when his time was out) if the plaintiff pleaſed; which was to be ſignified to the defendant by requeſt, and the requeſt muſt be when the condition could be performed, *viz.* at the end of ſeven years, and not before; and if it was a good requeſt within the ſeven years, that ought to be ſhewn on the plaintiff's ſide, otherwiſe it ſhall not be intended, for it cannot be ſuppoſed one would requeſt a thing to be done, before it was to be, or could be done: therefore the court reverſed the judgment *Niſi.*

This matter coming on again in the ſame term, the council for the defendant in *error urged* that the plea was naught, and therefore the judgment ought to be affirmed; and quoted ſeveral authorities in ſupport of his aſſertion.

Holt, Chief Juſtice. The obligor was to make him free at the end of ſeven years, or eight years, if thereunto requeſted. When a man is to do a thing by ſuch a time, if requeſted; in that caſe, if the thing in its nature may be done at the time of requeſt, then the requeſt is to be on the laſt convenient part of that time: *for example*, if a man is bound to pay money *on Lady Day*, if requeſted, then the requeſt is to be on the laſt convenient time before *ſun-ſet* of that day, on which ſuch ſum may be paid; in this caſe the condition being at the *end of ſeven or eight years*, if the plea had been, that he did not requeſt at the end of ſeven years, without going further, it had been bad.

Powell, Juſtice, ſeemed to incline, that a *requeſt in a day or two after the ſeven years would be well*, though he agreed, that in a demand for rent it muſt be on the laſt convenient time of the day, becauſe there the law appoints a place where the requeſt is to be made. In this caſe it muſt be a perſonal requeſt, and no place is appointed for making the ſame.

All the judges agreed that the plea was good, though they differed about the time on which the requeſt was to have been made; *viz.* whether on the laſt day of the ſeven years, or after. They unanimouſly reverſed the judgment. *Vide Mod. Rep. vol.* 6. *p.* 227, 259.

Michaelmas, 3 *Ann.* *The Queen* v. *Collingwood*, or *Callingwood.*

On an *indictment* againſt the defendant for inticing an *apprentice* to take away his maſter's goods, after conviction, his council took the following exceptions to the indictment.

1ſt, That it was not directly ſaid that the *apprentice* did actually take away the goods, but only that the defendant did intice him to take them away, and did receive them from him; which is a ſtrong argument indeed that they were taken away, but no direct poſitive charge, as the fact ought to be laid in an indictment; and *cited* the *caſe* of *The Queen* v. *Daniel*, in point.

2dly, That it was not ſaid in the indictment, where the houſe and ſhop of *R. T.* was; and, conſequently, no *venue* where the ſuppoſed taking by the *apprentice* was.

Per curiam. The indictment on the *caſe* of *The Queen* v. *Daniel* went on two points; the one was for ſeducing an *apprentice* from his maſter, the other for perſuading him to take away his goods: as to the firſt, which was the only point in judgment, we hold the offence not indictable, and there was no *venue* laid for the ſecond.

The court were all of opinion, that the charge ought to be direct, and not argumentative; and that it was not enough to lay an *inticement*, without an *act* done in purſuance of it. In the indictment is ſhewn a ſpecial matter, *viz.* that the defendant did receive them, but does not ſhew that the goods were taken away; and if the act was *felony*, as the indictment charges, the defendant would only be *acceſſary*, and that could not be, without a *principal fact* committed. In this caſe you might have charged the defendant as a *principal*, for he that perſuades another to commit a *treſpaſs* is a principal, and the taking of the *apprentice* here, is the taking of the defendant, but you do not ſhew where that was. The court all agreed that an indictment cannot be maintained, but gave them time till the next term, to maintain it. *Vide Mod. Rep. vol.* 6. *page* 288. *Raymond, vol.* 2. *page* 1116.

Hilary, 7 *Ann.* *The Pariſh of St. Giles in the Fields* v. *The Pariſh of Weybridge in the County of Surry.*

One *Symonds*, a taylor by trade, an inhabitant of *St. Giles*, removed to *Weybridge* with a certificate, and there took an *apprentice*, who ſerved out his time, ſet up his trade, and lived two years in *Weybridge*. But his old maſter being become chargeable, the juſtices made an order to remove *Symonds*, and his ſaid late *apprentice*, as part of his family, to *St. Giles*; which order was moved to be quaſhed, becauſe the word *family* muſt not be taken in ſo extenſive a ſenſe. And this term the order was adjudged ill by this court.

Holt, Chief Juſtice, ſaid, The words of *ſtat.* 8 & 9 *W.* 3. *cap.* 30. are, *that he and his family and children* born there, ſhall be removed, unleſs they have gained another ſettlement there. Beſides, this *apprentice* never came with a certificate; the act ſays, *any that moves himſelf, he and his family ſhall be removed*; that is, they who came along with him ſhall go back, and no other than them and the children born after; and for them a ſpecial proviſion is made in the act. 2dly, He inhabited two years after the expiration of his *apprenticeſhip*, which is another ſettlement. Therefore he is well ſettled at *Weybridge*, and cannot be removed to *St. Giles*'s.

Powis, Juſtice, obſerved, that this was like the caſe of *St. Bride's* v. *The Savoy*; where a lodger in the *Savoy* rented a ſhop in *Fleet Street*, but gained no ſettlement there, and took a ſervant or *apprentice*, who ſerved his time with the ſaid lodger: this was adjudged a good ſettlement for the lad, though the maſter himſelf had never gained one; becauſe the ſervice being performed in the pariſh of *St. Bride*'s, it gained the ſervant a legal ſettlement. And the notice to be given according to the ſtatute, does not extend to a ſervant or an *apprentice*.

Gould, Juſtice. As he lived two years in *Weybridge* after the expiration of his *apprenticeſhip*, he could not be removed; but if the maſter had been removed during his apprenticeſhip, it had been another caſe. *Vide Mod. Rep. vol.* 11. *page* 204. *Forteſcue, page* 315.

Hilary, 7 *Ann.* *The Pariſh of St. Albans* v. *the Pariſh of St. Botolph, Biſhopſgate.*

An order of two juſtices was made to remove a *pauper* from *St. Albans* to the pariſh of *St. Botolph*, which ſays "that on complaint being made to them, *&c.* on examination it appears, he is likely to become chargeable; and it appearing that he was bound *apprentice* in the pariſh of *St. Botolph*, and that he there ſerved as long as his maſter lived, they therefore adjudged that to be the place of his laſt legal ſettlement, *&c.*"

The court was moved to quaſh this order for its uncertainty; 1ſt. Becauſe it does not appear that the *pauper* was bound by indenture, and if he was not ſo bound, he does not gain a ſettlement by his ſervitude, 2dly, It does not appear how long he ſerved, the order only ſays that he ſerved as long as his maſter lived, which might not be above a week, therefore it is uncertain.

The council on the other ſide, in ſupport of the order, aſſerted, that it is a queſtion whether the mere act of binding of itſelf does not conſtitute a ſettlement, and the forty days mentioned in the ſtatute only regards the reſidence. 2dly, The juſtices do adjudge *St. Botolph's, Biſhopſgate*, to be the place of his laſt legal ſettlement, which is enough for them to remove him. But *per curiam*, the court concluded the place of his laſt legal ſettlement from the premiſes which are ill; and the order ſays, *therefore* we do adjudge, *&c.* and for the reaſons offered, the order muſt be quaſhed for uncertainty.

Holt, Chief Juſtice, ſaid, that notice is to be given when a perſon comes into a pariſh, but is not neceſſary in the caſe of an *apprentice* or ſervant; and barely binding a lad *apprentice*, does not gain a ſettlement, unleſs he ſerves forty days. And the borough of *St. Albans* is excepted out of the ſtatute which directs, that when an order is made by juſtices of corporations, the appeal muſt be at the next quarter ſeſſions. *Vide Mod. Rep. vol.* 11. *page* 205.

Hilary, 11 *Ann.* *Shepherd* v. *Maidſtone.*

In *debt* on bond, the breach aſſigned was, that ſo many *rupees* the property of the *Eaſt India Company*, came to the hands of the defendant, who was engaged to ſerve the *Company* as a factor at *Fort St. George* for five years, which ſum of money he unlawfully and fraudulently embezzeled, and to his own uſe converted, *&c.* againſt the tenor of the indenture, *&c.*

On demurrer, the queſtion being, whether the breach aſſigned was a breach of the condition of the bond.

Reſolved by the court, that it was not:

Indeed in caſe of an *apprentice*, the caſe is different; for he was only in cuſtody of his maſter's goods and caſh, and therefore the breach here aſſigned would have been a forfeiture of his indentures. *Vide Mod. Rep. vol.* 10. *page* 144.

Hilary, 11 *Ann.* *Mitchell* v. *Reynolds.*

An action of *debt* being brought on a bond thus conditioned, that whereas *A.* had taken the ſhop of *B.* who was a baker, for the term of ſo many years, and had given *B.* ſo much money for it, the condition of the obligation was ſuch, that if during the term aforeſaid, *B.* ſhould not exerciſe the trade of a baker within the pariſh where the ſhop was, that then the bond ſhould be void; otherwiſe remain in full force, *&c.* And whether this be a good or a void bond is the queſtion.

Per curiam. We are all of opinion, that the bond is good, and that the true diſtinction is not between bond and promiſe, that bond ſhould be void, and promiſe good; but between contracts, whether by bond, covenant, or promiſe, entered into on no conſideration, or a vicious one, whether it be by bond, covenant, or promiſe, that the former will be good, the latter void.

Freedom to trade is as much bound by conſent as cuſtom: and the caſe of penalties made for the enforcement of ſuch a cuſtom, ſeems a ſtronger caſe; for there the party is, as it were, judge in his own caſe; whereas here the penalty is fixed by conſent of both ſides.

Such an agreement in taking an *apprentice* is good; and may be conſidered not as a prejudicial or reſtraining agreement, but as a favourable and advantageous one, as putting an *apprentice* in a capacity of getting his living in any part of *England*, except where it would be to the prejudice of his maſter, when without it he can gain it no where. *Vide Mod. Rep. vol.* 10. *page* 130.

Eaſter, 3 *Geo.* *The King* v. *Barnes.*

A. is bound out by the juſtices to *B.* who aſſigns him to *C.* and the ſeſſions, reciting the ſpecial matter, adjudge the aſſignment void, and order him to be returned to *B.*

Per curiam. The ſeſſions had no power to judge of the validity of a deed, or to hinder a man from aſſigning his *apprentice.* The covenant to provide for him is well performed, if the perſon to whom he is bound aſſigns him to another to provide for him. And *apprentices* bound out by juſtices may be aſſigned as well as others. Wherefore the order was quaſhed. *Vide Stra. vol.* 1. *p.* 48.

Trinity, 3 *Geo.* *The Inhabitants of St. Mary Colechurch* v. *Ratcliff.*

A. was bound *apprentice* to a ſeafaring man, and ſerved him for a quarter of a year, in the day time, on land in *St. Mary Colechurch*, but lay every night on ſhip-board in *Ratcliff.* The juſtices ſent him to *St. Mary Colechurch*, where the ſervice was. The order quaſhed.

Per curiam. A man properly inhabits where he lies; as where an houſe is in two leets, he is to be ſummoned to that in which his bed is. *Vide Forteſcue, p.* 306.

Trinity, 4 *Geo.* *The King* v. *the Inhabitants of Hales Owen.*

The *ſeſſion's* order reciting, that *J. H.* was bound out by indenture, as the ſtatute requires, to *J. P.* and being lame, and having the king's evil, and in the opinion of ſurgeons incurable; therefore the *ſeſſions* diſcharged the maſter from his *apprentice*, and four juſtices ſign the order.

The council for the order of ſeſſion moved to confirm it, becauſe the maſter cannot now have the end of the binding, which was the ſervice of his *apprentice.*

The council againſt the order ſaid, the ſtatute only impowers the juſtices to diſcharge for miſbehaviour, and not for ſickneſs; beſides, allowing they had a power to diſcharge, yet, in this caſe, they have not executed it as the ſtatute requires, for it is not inrolled, neither is it mentioned to be by a juſtice of the *quorum.* There muſt be four juſtices, one of the *quorum.*

Both exceptions to the form were held good, but the court quaſhed the order as to the ſubſtance, for the maſter takes him for better and worſe, and is to provide for him in ſickneſs and in health. *Vide Stra. vol.* 1. *page* 99.

Michaelmas, 4 *Geo.* *The King* v. *Vandeleer.*

The juſtices at the *ſeſſions* ordered an *apprentice*, who had been ill uſed, and not taken care of by his maſter, to be diſcharged, and that the maſter having received 5 *l.* with him, ſhould refund 3 *l.* as a further proviſion for ſuch *apprentice.*

The council for the defendant moved to quaſh this order of *ſeſſions*, becauſe ſtatute 5 *Eliz. cap.* 4. which gives the juſtices power to diſcharge *apprentice* on complaint to them, gives them no authority to order any money to be returned.

Per curiam. It is very hard, that if the maſter miſuſes his *apprentice* the next day after he is bound, he ſhould pay back nothing if he is diſcharged; if ſo, it will be an encouragement to maſters to treat their *apprentices* ill; but as the ſtatute is ſilent, the order muſt be quaſhed. *Vide Stra. vol.* 1. *page* 69. *Salk.* 68. 490.

Hilary, 5 *Geo. The King* v. *Gill.*

Per curiam. It has been often determined in this court, that the *ſeſſions* have an *original* juriſdiction to diſcharge *apprentices*, therefore we will not ſuffer it now to be made a queſtion, though it might be doubted on the *ſtatute* itſelf; in theſe orders it muſt be ſet forth, that the maſter appeared, or was ſummoned, as was held in the caſe of the *Queen* v. *Rutter*; and for want of this, the order in this caſe was quaſhed. *Vide Stra. vol.* 1. *page* 143.

Eaſter, 10 *Geo. The Inhabitants of Buckington, or Puckington,* v. *the Inhabitants of St. Michael Sibington in Somerſetſhire.*

An order made by two juſtices for removing a *pauper* to *Buckington*, as the place of his laſt legal ſettlement, and an order confirming the ſame made at the quarter ſeſſions, being removed into the *King's Bench* by *certiorari:* the fact ſtated *ſpecially* in the order of ſeſſions was, that *Richard Allen* was bound an apprentice to *J. S.* in *Buckington*, and ſerved him in that pariſh ſix months; that afterwards *J. S.* broke; on which *Allen*, without *J. S.*'s direction or conſent, hired himſelf as a ſervant to *J. N.* who lived in *St. Michael Sibington*, and ſerved him there two years: that afterwards *J. S.* delivered up to *Allen* his indentures of *apprenticeſhip*.

The court was unanimouſly of opinion, that *Allen* gained no ſettlement by his ſervice at *Sibington*, he having let himſelf without his maſter's conſent; and tho' the maſter had failed, yet that did not determine the *apprenticeſhip*; and the maſter's delivering up the indenture afterwards, if it ſhould be conſidered as a ſubſequent conſent, will not make his hiring himſelf good, ſo as to gain a ſettlement by his ſervice with *J. N.* but if he had let himſelf to *J. N.* with *J. S.*'s conſent, his ſervice would have made a conſent. 1 *Salk.* 68. *Mod. Rep. vol.* 12. *p.* 553. *Pariſhes of Caſtor and Eccles.* But *Allen* was ſettled in *Buckington*, where he was bound *apprentice*, and lived and ſerved his maſter above forty days.

The orders were therefore confirmed. *Vide Raym. vol.* 2. *p.* 1352. *Forteſcue, p.* 321. *Strange, vol.* 1. *page* 582.

Trinity, 10 *Geo. The King* v. *The Inhabitants of St. John the Baptiſt, within the Borough of the Devizes, Com. Wilts.*

By order of two juſtices, one *Warren*, a *pauper*, was removed from *St. John the Baptiſt* to *Biſhops Cannings*. On an appeal to the *quarter ſeſſions*, the order of the juſtices was quaſhed, and the *pauper* returned to *St. John the Baptiſt*, as the place of his laſt legal ſettlement:

On which a *certiorari* was brought, and theſe orders were removed into this court.

The order of *ſeſſions* ſtated, (among other things) that *J. W.* junior, father of the children, (who were removed by the order) was, by indenture dated 25th *March*, 1712, and executed two years after the date thereof, bound apprentice to *J. P.* in which indenture were contained two covenants, in the words following:

Firſt covenant. And the ſaid *J. W.* the father, doth hereby for himſelf, his executors, and adminiſtrators, covenant and agree, to and with the ſaid *J. P.* his executors and aſſigns, that he the ſaid *J. W.* the father, his executors and adminiſtrators, ſhall and will, at his and their own proper coſts and charges, *provide and allow, unto and for his ſaid ſon, ſufficient and neceſſary meat, drink, waſhing, lodging, and apparel*, and all other things fit and convenient for an *apprentice* of the ſaid trade, during the laſt five years of the ſaid term.

Second covenant. And the ſaid *J. P.* for his part, doth hereby for himſelf, his executors and aſſigns, covenant, promiſe, and agree, to and with the ſaid *J. W.* the father, his executors and adminiſtrators, that he the ſaid *J. P.* his executors and aſſigns, ſhall and will, well and truly pay, or cauſe to be paid to the ſaid *J. W.* the father, his executors and adminiſtrators, the ſum of 2 *s.* 6 *d.* of lawful money, *&c.* by the week, weekly, during the third year of the ſaid term of ſeven years; except ſuch time or times as he the ſaid *J. W.* the *apprentice* ſhall by ſickneſs, or any other accident, be unable to work at the ſaid trade; and 3 *s.* of like money aforeſaid by the week, weekly, during the fourth year of the ſaid term, and 3 *s.* 6 *d.* of like money, *&c.* by the week, weekly, during the fifth year of the ſaid term; and 4 *s.* of like money, *&c.* by the week, weekly, during the laſt two years of the ſaid term of ſeven years, (except ſuch time or times of inability as aforeſaid:) that in purſuance of the ſaid indenture, the ſaid *J. W.* began to ſerve the ſaid *J. P.* in his open ſhop, in the ſaid pariſh of *St. John*'s, but had his meat, drink, waſhing, and lodging, during all the time with his father in *St. James*'s, *other than on market days and Saturdays*, when he received his *meat and drink* with his maſter in *St. John*'s, but that he never lodged one night *with his ſaid maſter, or elſewhere* in the pariſh of *St. John*'s, during his ſaid *apprenticeſhip*, or ſervice aforeſaid.

It was further ſworn on behalf of *St. James*'s, that the ſaid monies payable to the ſaid father, by virtue of the ſaid indenture, were paid accordingly, and were in lieu and conſideration for his maintenance and lodging as aforeſaid.

The court, on hearing council on both ſides, quaſhed the ſaid order, being of opinion, that the *pauper* gained no ſettlement in *St. John*'s pariſh by *apprenticeſhip*, becauſe ſerving as an *apprentice* will not make a ſettlement, but the ſettlement muſt be gained by inhabiting, which can only be where the party lodges. *Vide Mod. Rep. vol.* 8. *p.* 285. *Raymond, vol.* 2. *page* 1371.

Michaelmas, 10 G. *Whitley* v. *Loftus.*

In an action of *covenant* on an indenture of *apprenticeſhip*, wherein the plaintiff covenanted with the father and ſon (the apprentice), and they on the other ſide covenanted with him, and this action was brought jointly againſt the father and the ſon; for that the ſon had covenanted faithfully to accompt, at his maſter's (the plaintiff's) requeſt, for all ſuch of his maſter's goods as ſhould come to his hands; and the breach aſſigned was, that the defendant (the ſon) had not accompted, *&c.*

On a plea of *they have not broken the covenants*, the plaintiff had a verdict; and now it was moved in arreſt of judgment:

1. That the declaration was ill, becauſe the plaintiff did not ſet forth any *requeſt* made to the ſon to *accompt*, which he ought to have done, that the defendant might have an opportunity to traverſe it.

Another objection was, that the plea is too general; two breaches being aſſigned. Beſides, it is no plea, for one breach is in the negative, that he did *not accompt*.

To which it was anſwered, that the breach is laid in this manner, *that he did not accompt, by reaſon whereof he broke his covenant*, which is an affirmative. Beſides this is an exception taken by the defendant to his own plea, and is after a verdict which cures an *informal* iſſue.

Beſides this being a joint action againſt the father and the ſon, the breach aſſigned only againſt the ſon, cannot maintain this judgment.

Neither ought the action to be brought againſt the father, for he did not covenant that *his ſon ſhould truly account*, &c. he only covenanted for *himſelf ſeparately*, to pay the money which he was to give the plaintiff for taking the ſon *apprentice*; and the clauſe in the latter end of theſe articles is ſo in the ſingular number, *viz.* that *each of them*, (the father and ſon) *binds himſelf for the true performance thereof*; ſo that the father cannot properly be ſaid to be bound for his ſon, but only for himſelf.

It was argued, on the other ſide, that this was a covenant entered into by the maſter (the plaintiff) on the one part, and by the ſon, with the conſent of his father, on the binding part, but by both father and ſon as to all other purpoſes; for though the ſon only is bound *apprentice*, yet they *both* covenant for the true performance of *all* covenants, *&c.* the words in the cloſe of the articles being, *viz.* that *each of them binds himſelf*,

himſelf, &c. *for the true performance of all the covenants and agreements therein mentioned.*

And even from the nature of theſe covenants, the father is always bound for the ſon; for otherwiſe maſters could not rely on the covenants of their *apprentices*, who are commonly under age, and ſo by law not capable of conſidering what covenants they make; and conſequently, in this caſe, the father ſhall be taken to covenant for the performance of his ſon's part, as well as his own.

The court was of opinion, that the very end of binding the father was to anſwer the wrong which might be done by the ſon to his maſter; therefore he muſt be anſwerable for his ſon's true performance of the articles; it is a joint covenant, and amounts to the ſame as if it had been in this form: *It is agreed between the parties, that* &c. it is true, at the end of the articles the covenant is in the ſingular number, *viz.* that *each of them did bind himſelf*, and it muſt be ſo where the ſon is bound to perform the thing for which the covenant was made; and this clauſe is uſually inſerted, that the covenants may be taken diſtributively, *viz.* that each of the covenanters ſhould perform his part; the latter part makes the former covenants joint or ſeveral; and this makes the covenant of the ſon bind the father, who covenanted for him as well as himſelf. The plea and iſſue is good after a verdict. Wherefore the plaintiff had judgment awarded in his favour. *Vide Mod. Rep. vol.* 8. *p.* 191.

Trinity, 12 *Geo.* *The King* v. *Davie.*

An order of *ſeſſions* for diſcharging an *apprentice* was quaſhed, and the only reaſons offered for ſuch diſcharge was, that the maſter declared in open court he would not take him again.

The court ſaid, that, this was not a poin tnow to be diſputed, but allowed that the ſeſſions had an *original* juriſdiction to diſcharge *apprentices*. *Vide Strange, vol.* 1. *page* 704.

Michaelmas, 12 *Geo.* *The King* v. *Collingbourn.*

On a ſpecial order of ſeſſions, removed into this court by *certiorari*, for diſcharging an *apprentice*, who appeared by the order to have been bound, before the Chamberlain, to a *glazier*, a freeman of *London*; the court was moved to quaſh the order, becauſe the apprentice being bound before the *Chamberlain* of *London*, the juſtices of peace had no power to diſcharge him, but he ought to be diſcharged by the *Chamberlain*; for in *ſtat.* 5 *Eliz. c.* 4. the liberties and privileges of the citizens of *London*, as to having and retaining *apprentices* are expreſsly ſaved, and it is declared that this ſtatute ſhall not be prejudicial to them. But not allowed.

Per curiam. The apprentice being out of *London*, and ſerving his maſter out of the city, there can be no proceedings againſt him before the *Chamberlain*; but the juſtices of the peace have a juriſdiction to diſcharge him, notwithſtanding he was bound in that city.

A ſecond exception was taken to the order, that the juſtices could not diſcharge the apprentice, becauſe the trade to which he was bound, *viz.* a *glazier*, was not within the ſtatute 5 of *Eliz.* but not allowed; for though formerly it was held the trade ought to be a trade within the ſtatute, yet it has been ſince reſolved otherwiſe, particularly in the caſe of *Hone* an apprentice. The *King* v. *Taunton*, 6 *Geo.* *Vide Raym. vol.* 2. *page* 1410. *Strange, vol.* 1. *page* 663.

Eaſter, 4 *Geo.* 2. *Between the Pariſhes of Curenden* and *Laland in Lancaſhire.*

A poor boy was bound out *apprentice by indenture*, and the maſter received 20 *s.* with him; he ſerved three years; but the maſter never paid the duty of 6 *d.* in the pound according to *ſtat.* 8 *Ann c.* 9. *ſec.* 39. which ſays, that if the duty is not paid, the indenture ſhall be void to all intents and purpoſes whatſoever.

Forteſcue, Juſtice, who went the circuit, held it a ſettlement, becauſe the maſter had ſix months to pay the duty in, ſo that during thoſe ſix months a ſettlement was gained: and it ſhould not be in the power of the maſter to defeat it by any matter done afterwards. And purſuant to this opinion, the ſeſſions held it a ſettlement.

But on debate in this court, the order was quaſhed; for they ſaid it was making the indenture good to *one purpoſe*, when the act of parliament had made it void to *all intents and purpoſes whatſoever*; and though it was a hard caſe, they could not break through the poſitive words of the act. Wherefore the order was quaſhed. *Vide Strange, vol.* 2. *page* 904.

Eaſter, 8 *Geo.* 2. *Arglis* v. *Heaſeman.*

In this caſe the court was moved to quaſh an order of ſeſſions made for diſcharging an *apprentice.*

1. Becauſe that this is an original application to the ſeſſions, whereas they have no original juriſdiction; their juriſdiction in theſe caſes ariſes from *ſtat.* 5 *Eliz. c.* 4. *ſec.* 35. and in *Mod. Rep. vol.* 5. *p.* 138. the *King* v. *Gately*, an order was granted for going originally to the ſeſſions.

2. Becauſe, if the ſeſſions have an original juriſdiction, yet it is limited, upon the appearance of the maſter, or ſome default made by him, which ought to be ſhewn in the order, and nothing of that appears in this order.

3. Becauſe the juriſdiction in this caſe is not rightly exerciſed, for the reaſon they give, and they are bound to give a reaſon, is for unkind uſage from the maſter; now the act gives them juriſdiction, if the maſter miſuſes the *apprentice*, or evil intreats him, and the alledging unkind uſage comes not up to that: and though the order ſays further, that the maſter refuſes to continue him in his ſervice, or to entertain him according to the indentures, that will not make it better; for in the caſe of the *King* v. *Davie*, *Stra.* 704. *ſeſ. caſ.* 282. *pl.* 221. *Fel.* 225. *Trin.* 12 *Geo.* 1. an order ſtated, that the maſter declared he would not take his *apprentice*, and held to be no ſufficient reaſon; and the order was quaſhed.

Lord *Hardwicke*. As to the firſt objection, the later caſes have been, that the ſeſſions have an original juriſdiction. The ſecond objection, in my opinion, is not to be got over. In caſes of convictions, appearance has always been held neceſſary, but in caſes of orders in general, the court in many caſes will preſume *that every thing has been done right*, and that diſtinction, I agree, was confirmed in the caſe of the *King* v. *Lloyd*, 2 *Stra.* 296. but then, that preſumption is only in caſe of orders on ſtatutes, which do not in expreſs terms require an appearance; but now we are on an act which gives the juſtices authority to proceed on the appearance of the party, ſo that it is made an eſſential requiſite by the act to ſound their juriſdiction.

As to the third exception; in general, it is not neceſſary to ſet out the reaſons of their judgment; but here the act requires it, and it is rightly ſaid, that uſing unkindly is not ſuch miſuſing as is intended bythe act; and if the following reaſon, *viz.* his refuſing to continue the lad in his ſervice is to be underſtood as an abſolute refuſal to let him continue with him, and not only as a refuſal to entertain according to his articles; that neither will be a ground for this order, becauſe the juſtices have a power to compel the maſter to take him again, as was done in the caſe of the *King* v. *Davie.*

However, this is more doubtful; but on the ſecond exception, the order muſt be quaſhed. *Vide caſes temp. Lord Hardwicke, p.* 101. *Stra. vol.* 2. *p.* 1013.

Michaelmas, 10 *George* 2. *Between the pariſhes of St. Nicholas and St. Peter in Ipſwich.*

On a *ſpecial order of ſeſſions*, it was ſtated, that *James Blythe*, in 1706, was put *apprentice* in *St. Peter*'s for four years, *by indenture*; and that he lived there, and ſerved the time; but inaſmuch as he was not bound for ſeven years, as required by *ſtat.* 5 *Eliz. c.* 4. the ſeſſions adjudged it no ſettlement.

The forty-firſt ſection of that ſtatute was inſiſted on, to ſupport the order; which declares, "That all *indentures, covenants*, and *bargains*, of, or for the having or taking any *apprentice*, otherwiſe to be made or taken than is by that ſtatute ordained, ſhall be clearly void in law to all intents and purpoſes." And one of the ſame regulations is, that the binding ſhall be for ſeven years. And the caſe of *Cureden* v. *Laland* was relied on, *Eaſt.* 4 *Geo.* 2. where the *apprenticeſhip* was for ſeven years, but the indentures never ſtampt; and held to be no ſettlement.

Notwithſtanding this, the court was of opinion, here was a ſettlement; and quaſhed the order. It appears, that between the *twenty-ſixth* and *forty-firſt* ſections, there are many regulations concerning what ſort of perſons ſhould take *apprentices*, and what not, which are never regarded. And it would be of miſchievous conſequence now, to refer this laſt ſection back to all the reſt. They ſaid, the word *void* muſt be conſtrued *voidable*. Here the indenture has had its effect, and neither maſter nor ſervant have taken advantage of the objection: and as to the caſe of *Cureden* v. *Laland*, on *ſtat.* 8 *Ann. c.* 9. there were words prohibiting the giving the indenture in evidence; and admitting improper evidence is always a ground to quaſh. *Vide Strange, vol.* 2. *page* 1067.

Eaſter, 12 *Geo.* 2. *The King* v. *The Inhabitants of Woolſtanton.*

On a ſpecial order of ſeſſions, the *queſtion* was, whether a boy bound over by juſtices (the boy being no party to the indenture) had gained a ſettlement, it being only ſtated that his binding was allowed and approved of by two juſtices. Now *ſtat.* 43 *Eliz. cap.* 2. requires that one of them ſhould be of the *quorum*. And for this omiſſion the court quaſhed the order. *Vide Strange, vol.* 2. *page* 1110.

Trinity, 12 *Geo.* 2. *The King* v. *The Inhabitants of Eaſt Bridgeford.*

On a ſpecial order it was ſtated, that an *apprentice*, on the death of his maſter, was with his own conſent turned over by the widow (who had not adminiſtered) to another maſter, whom he ſerved. And the court held it a good ſettlement in the laſt pariſh, within the reaſon of the caſe of *The Holy Trinity* v. *Shoreditch*, *Mich.* 3 *Geo.* 1. where *A.* was bound to *B.* but ſerved *C.* all the while in another pariſh, and there gained a ſettlement. *Vide Strange, vol.* 2. *page* 1115.

Eaſter, 13 *Geo.* 2. *The Pariſh of Ovingdon* v. *Northoram in Yorkſhire.*

On the ſettlement of an *apprentice*, it was ſtated, that the mother propoſed to put him out to an inhabitant of *Northoram*, who refuſed to take him, becauſe he wanted cloaths; on which the grandfather agreed, that he would pay 30*s.* to the maſter, to cloath the boy withal: in purſuance of which, the maſter laid out 30*s.* in cloaths for him, and he was bound by indenture, in which no mention is made of the 30*s.* nor was any duty paid: that the grandfather paid the 30*s.* and the *apprentice* ſerved out his time, which the ſeſſions adjudge to be a ſettlement.

Per curiam. The order muſt be confirmed: for this is not like the caſe of *Curenden* v. *Laland*, where there was money actually given to the maſter for his own uſe; here the maſter is a mere agent of the grandfather's, to lay out 30*s.* for him. And it could make no difference, whether the maſter did it, or any body elſe. This is not a caſe within the intent of *ſtat.* 8 *Ann. cap.* 9. *ſect.* 39. the poſitive words of which, in a caſe expreſsly within it, obliged the court, in the *caſe* cited, to hold it no ſettlement. *Vide Strange, vol.* 2. *p.* 1132.

Eaſter, 20 *Geo.* 2. *The King* v. *George Trevilian, Eſq.*

An indictment *for not receiving an apprentice* was quaſhed, becauſe it did not appear to be a binding within *ſtat.* 43 *Eliz. c.* 2. and the court ſaid, that was not barely matter of evidence, but the circumſtances muſt be averred. They would not meddle with the general queſtion, whether an indictment *would* lie or not. *Vide Strange, vol.* 2. *page* 1268.

Eaſter, 20 *Geo.* 2. *Baxter Widow, Executrix, &c.* v. *Barfield.*

In *debt* on a bond, conditioned for *M. A.*'s performance of the covenants in an indenture of *apprenticeſhip*; whereby he was bound to the plaintiff's teſtator, who was a mariner: the defendant pleaded, that *A.* ſerved faithfully to the death of the teſtator: the plaintiff replied, that ſince the death of the teſtator, *A.* had abſented himſelf from her ſervice. On demurrer, and after argument at bar,

Per curiam. We are unanimouſly of opinion, that the defendant ought to have judgment; and the executrix can maintain no ſuch action. The binding was to the *man*, to learn his *art*, and ſerve *him*, without any mention of executors: And as the words are confined, ſo is the nature of the contract; for it is *fiduciary*, and the lad is bound from a perſonal knowledge of the integrity and ability of the maſter, *Hob.* 134. *Vaugh.* 182. 3 *Keb.* 519. and 1 *Keb.* 820. 1 *Sid.* 216. and we deny the caſe in 1 *Lev.* 177. *Hil.* 8 *Ann. Horne* v. *Blake.* An award, that an *apprentice* ſhould be aſſigned, was held void; unleſs there was a cuſtom, or the concurrence of the *apprentice*. And they held it was not material, that according to *Cro. Eliz.* 553. the *aſſets* were liable on the maſter's covenant to maintain. Therefore judgment was awarded for the defendant. *Vide Strange, vol.* 2. *p.* 1266.

Hilary, 22 *Geo.* 2. *The King* v. *The Inhabitants of Mawnan.*

This was a motion to quaſh an order of *ſeſſions*, confirming an order of two juſtices made for removing *J. L.* from *Falmouth* to *Mawnan*. The council for the motion ſaid, the determination of the *ſeſſions* in this caſe was contrary to law, being founded on her having ſerved an *apprenticeſhip* in *Mawnan*.

The *exception* taken was, that it was only a *parol* binding, not by indenture; whereas the *ſtatute* 3 & 4 *W. & M. cap.* 11. is confined to a binding by indenture, on which *exception* a rule to *ſhew cauſe* was obtained, and a motion now made to make the ſame *abſolute*, which not being oppoſed by the council on the other ſide, the ſame was ordered accordingly. *Vide Bur. S. C. vol.* 1. *p.* 290.

Trinity, 22 & 23 *Geo.* 2. *The King* v. *The Inhabitants of St. Helen's, in Abingdon.*

This was a motion made to quaſh an order of two juſtices, confirmed by *ſeſſions* on an appeal, for removing *A. H.* wife of *J. H.* and her four children, from *St. Saviour's, Southwark*, to *St. Helen's*, on which a rule to ſhew cauſe was obtained.

The *caſe* ſet forth the minute circumſtances and *parol* evidence concerning an *indenture* of *apprenticeſhip* (not produced) of *J. H.* the father, to *W. H.* his grandfather, on which it appeared, that there was a ſtrong preſumption that it was never *ſtamped*.

The council who moved to quaſh theſe orders made two *exceptions* to the original order, and two to the order of *ſeſſions*.

To the *original* order, he ſaid, 1ſt. It ſends the woman from her huſband.

2dly. It adjudges *St. Helen's* to be the place of her ſettlement, *whereas* it ought to have been the huſband's.

To the order of *Seſſions*, he ſaid, 1ſt. There is only *parol* evidence of an indenture, which ought to have been produced.

2dly. It does not appear to have been *ſtamped*.

On ſhewing cauſe, it was urged by the council, that the *paupers* were ſettled at *St. Helen's*, and cited the following caſes in ſupport thereof, 2 *Salk.* 470. *Dumbleton* v. *Beckford*, and *The King* v. *St. Mary, Cheſter*, *Hilary*, 14 *Geo.* 2.

The council for *St. Helen's* ſaid, the caſe from *Salkeld* was a ſtrange one, and that the *Cheſter* caſe was never determined.

Per curiam. This matter is not ſufficiently ſtated to ſhew the binding is within the act, therefore, let both orders be quaſhed. *Vide Bur. S. C. vol.* 1. *page* 292.

Eaſter, 26 *Geo.* 2. *The King* v. *the Inhabitants of Eakring.*

On a motion to quaſh an order of *ſeſſions* made to diſcharge an order of two juſtices for the removal of *G. W.* from *Eakring* to *Selſon*. The *caſe* ſtated to the court was:

That *G. W.* a *pauper* of *Eakring*, was put out *apprentice* by indentures properly executed to *R. T. to ſerve him as a pariſh apprentice, till he ſhould accompliſh his age of* 21 *years*. The *apprentice* ſerved his maſter under theſe indentures for ſeveral years; about 3 years before he attained the age of 21, he ran away from his ſaid maſter and loitered for ſome time about the country. In *June* 1749, the maſter died, and at *Martinmas* following the ſaid *apprentice hired himſelf as a ſervant* to *W. F.* of *Selſon*, for a year, and ſerved him the time: at *Martinmas* 1750, he hired himſelf to the ſaid maſter for another year, and ſerved the time, and received all his wages to his own uſe, the executors of the maſter to whom he was bound out *apprentice* taking no notice of him.

The ſaid *G. W. did not attain his age of* 21 *years*, till *January* 1750, and the *ſeſſions* were of opinion, that the ſaid *G. W.* did not by virtue of ſuch *hiring and ſervice* at *Selſon*, under the circumſtances aforeſaid, gain a ſettlement in the ſaid pariſh, and therefore diſcharged the original order.

The council for quaſhing the order of ſeſſions *urged*, that after the maſter's death, the *apprentice* was at liberty to hire himſelf. That as he was *hired for a year*, and *ſerved a year in Selſon*, his legal ſettlement was *there*. An *apprenticeſhip* is a *perſonal truſt* between the maſter and ſervant, and *determinable* by the death of either party, and cited 1 *Salk.* 66. *The King* v. *Peck*, *Michaelmas*, 10 *W.* 3. in ſupport thereof.

The council who was to ſhew cauſe owned he could not defend it, but offered two *objections* to the original order.

1ſt. That the *pariſh* of *Eakring* is at firſt mentioned in it, and it then goes on and ſays, "And has lately intruded himſelf into your ſaid town of *Eakring*," So that it is uncertain whether *Eakring* is a *town* or *pariſh*, which are different things.

2*d. Objection*. The *pauper* was only alledged to be *likely to become chargeable there*; Now *chargeable there*, does not imply that the *pauper* was likely to become *chargeable* to the *pariſh*, which it is neceſſary that the order ſhould ſtate.

Three *judges* held the firſt *objection* to be over nice, and over-ruled the ſame.

Deniſon and *Foſter*, Juſtices, thought the ſame concerning the ſecond *objection*, and *Wright*, Juſtice, ſaid, the word *there* did not neceſſarily import that the *pauper* was likely to become ſo to the *pariſh*.

Per curiam. Let the order of *ſeſſions* be *quaſhed*, and the original order *affirmed*. *Vide Bur. S. C. vol.* 1. *page* 320.

Hilary, 28 *Geo.* 2. *The King* v. *The Inhabitants of Sudbury.*

On a motion to quaſh an order of two juſtices for the removal of *J. B.* his wife and children from *Uttoxeter* in *Staffordſhire*, to *Sudbury* in *Derbyſhire*, which order was confirmed by an appeal to *ſeſſions* a rule to ſhew cauſe was obtained.

Caſe. J. B. his wife and family were certificated from *Sudbury* to *Uttoxeter*, *J. B.* died there, and the wife and ſon became *chargeable* in 1731, on which they were ſent back from *Uttoxeter* to *Sudbury*, where the wife died on the 18th of *Auguſt*, 1732, the *ſon* was bound by indenture as a pariſh *apprentice* from *Sudbury* to *E. B.* of *Uttoxeter*, and ſerved out his *apprenticeſhip* there, and has done no act ſince to gain a ſettlement in *Sudbury*.

The juſtices removed him as a *certificate man*, which order of removal is appealed from, and confirmed by the *ſeſſions*; they *conſidering* the *certificate as ſtill in force*, which was oppoſed, alledging that the *pauper* had gained a ſettlement in *Uttoxeter* under his *indenture*.

The council for the motion ſaid, that this was a caſe not within the 9 & 10 *W.* 3. *cap.* 11. which confines certificate perſons to two methods only of gaining a ſettlement. On ſhewing cauſe, this reaſoning was oppoſed by the council on the other ſide, and after much debate, the court gave their opinion.

Per curiam. We are all of opinion, that the removal of *J. B.* from *Uttoxeter* to *Sudbury*, did reſtore him as *fully* as if there had been no certificate at all. A *certificate* can have its effect but once, and the removal is the *effect*, which once had, the certificate ceaſes, the intention being to ſecure the pariſh which receives ſuch certificate perſons from being obliged to ſupport the *pauper* and his family, ſhould they become chargeable.

Then as to what effect this certificate ſhall have after this removal back again, and after it has once had its intended effect.

The conſtruction of the 8 & 9 *W.* 3. *cap.* 30. on the ground and reaſon of certificates is, that many poor perſons who are chargeable to the places where they live, merely for want of work, *may*, and *would* maintain themſelves in other places where their labour is wanted, without being burthenſome to any place, when continuing them for ever under the certificate, would diſcourage pariſhes from giving certificates to ſuch of their poor, whoſe labour might be uſeful and neceſſary elſewhere, for if this method of holding them down to their old certificate was to prevail, they would be chargeable with them *for ever*. The legiſlature in making this act was ſo far from thinking of the certificate continuing in force *for ever*, that it has taken care to *ſecure the pariſh* from inconveniencies that might ariſe to them by granting the certificate, by prohibiting the *pauper's* return to the pariſh under a penalty.

The certificate *eſtops* nothing but what is included in it.

It has been obſerved, that the order of removal of this man back again from *Uttoxeter* to *Sudbury*, was in *affirmance* of the certificate, and that the conſtruction contended for, would deſtroy the certificate, but it does not deſtroy it otherwiſe than by ſatisfying it. Therefore the orders made by the *juſtices* and *ſeſſions* muſt be quaſhed. *Vide Bur. S. C. vol.* 2. *p.* 373.

Trinity, 28 *Geo.* 2. *The King* v. *The Inhabitants of High and Low Biſhopſide.*

On a motion to quaſh an order of *ſeſſions* made to diſcharge an order of two juſtices for the removal of *J. T.* his wife and ſon from the townſhip of *High* and *Low Biſhopſide*, to *Dacre cum Buerley*, (both in the *Weſt-Riding* of *Yorkſhire*;) a rule to ſhew cauſe was obtained.

Caſe. J. J. being an inhabitant legally ſettled in *Menwith* cum *Darley*, went from thence by certificate to *Reade* in the townſhip of *High* and *Low Biſhopſide*, where he lived ſome years. About eighteen years ago the ſaid *J. J.* purchaſed a freehold houſe for 10 *l.* in the townſhip of *Dacre cum Buerley*, and then quitted *Biſhopſide*, and went to live in *Dacre cum Buerly*, to which place he carried his certificate, and delivered it to the proper officer.

In *February*, 1744, *J. T.* the *pauper* was bound *apprentice* to *J. J.* by indenture, for the term of ſeven years, which he ſerved to his ſaid maſter, under the ſaid indenture, who all the time inhabited his houſe in the ſaid townſhip of *Dacre cum Buerley*.

The council for the motion urged, that this *caſe* depended on the act of 8 & 9 *W.* 3. *cap.* 30. and 12 *Ann*, *cap.* 18.

The council againſt quaſhing the order of *ſeſſions urged*, that under *ſtat.* 8 & 9 *W.* 3. *cap.* 30. a pariſh may give a *general* certificate, not addreſſed to any *particular* pariſh, and in that caſe every pariſh to which ſuch *pauper* comes will be bound to receive him.

Per curiam. We are of opinion, that the pariſh of *Dacre cum Buerley* is the pariſh wherein the ſaid *J. T.* was ſettled by his ſervice under the ſaid indenture, and that the *ſeſſions* have done *wrong* in quaſhing the *original* order made for the removal of theſe *paupers* from *Biſhopſide* to *Dacre cum Buerley*: therefore, let the order of *ſeſſions* be quaſhed, and the original order be confirmed. *Vide Bur. S. C. vol.* 2. *p.* 381.

Eaſter, 29 *Geo.* 2. *The King* v. *the Inhabitants of St. Peter's, in Nottingham.*

On a motion to quaſh an order of two juſtices, confirmed by an order of *ſeſſions*, for removing *J. W.* his wife and family, from *Wilford* in *Nottinghamſhire*, to *St. Peter*'s in *Nottingham*; a rule to ſhew cauſe was obtained.

Caſe. Beeſton pariſh gave one *T.* a certificate to *St. Peter*'s; the ſaid *T.* took the *pauper*, *J. W.* to be his *apprentice*; and the ſaid *J. W.* ſerved him a conſiderable time in *St. Peter's*, afterwards *T.* removed to *St. Mary*'s, where the ſaid *J. W.* ſerved him about a year.

The council for the rule moved to make the ſame abſolute, which was not oppoſed by the council on the other ſide, the caſe being the ſame as that of *High* and *Low Biſhopſide*.

Per curiam. Let the rule for quaſhing the orders be made abſolute, and let both the orders be quaſhed. *Vide Bur. S. C. vol.* 2. *page* 391.

Michaelmas, 30 *Geo.* 2. *Raynard* v. *Chace.*

In an action of *debt* for a penalty on *ſtat.* 5 *Eliz. c.* 4. for exerciſing the trade of a brewer without having *ſerved an apprenticeſhip*; a *ſpecial verdict* was given to the following effect: that the defendant and one *Coxe* were, during all the time charged in this count, as partners in the trade, and that the ſame was, and has been for four years, carried on in their *joint* names; that *Coxe* ſerved an *apprenticeſhip*, *&c.* but *Chace* never did; and that *Coxe* is a *working brewer*, and was paid a ſalary for his labour; which ſalary was always deducted, and allowed to him, *previous* to a diviſion of the profits; and the entries at the Exciſe Office were in their joint names: but that the defendant *Chace never exerciſed the trade* himſelf, but only *ſhared the profits*, and *ſtood the riſques of the partnerſhip*, and they find it to be a trade within *ſtat.* 5 *Eliz. c.* 4.

Queſtion; Whether the defendant is within *ſtat.* 5 *Eliz. c.* 4. on this ſpecial finding?

The court were unanimouſly of opinion, that this was *not* an exerciſing the trade within the act; and accordingly judgment was given for the defendant. *Vide Bur. vol.* 1. *page* 2.

Hilary, 31 *Geo.* 2. *The King* v. *The Inhabitants of Auſtrey.*

On a motion to quaſh an order of *ſeſſions*, made to quaſh an order of two juſtices, for removing *F. O.* his wife and child, from *Auſtrey* to *Grindon* in *Warwickſhire*, a rule to ſhew cauſe was obtained.

Caſe. F. O. a *pauper* about ten years of age, was, in *April* 1744, bound *apprentice* by the churchwardens *&c.* of *Grindon*, to *S. L.* of the ſame pariſh, until he ſhould attain the age of 24, under *ſtat.* 43 *Eliz.*

The *pauper* inhabited with his ſaid maſter, and ſerved him under the ſaid indenture till *Michaelmas* 1754, when the maſter, in conſideration of 40*s.* paid him by his *apprentice*, agreed to diſcharge him therefrom; and a *receipt* and *diſcharge* was wrote on the back of the ſaid indenture, by the ſaid maſter.

The *pauper*, on leaving his ſaid maſter, *hired himſelf* for a year, and ſerved the ſame in the pariſh of *Highham*; at *Michaelmas* 1755, he *hired himſelf* for another year to one *L.* in the pariſh of *Auſtrey* aforeſaid, and ſerved the year in the ſaid *pariſh*, and received his *wages*.

The *pauper*, 12*th July* 1757, was upwards of twenty-three years of age, but had not attained twenty-four years.

The *exception* taken to the ſeſſion's order was, that the maſter and the *apprentice* could not agree to part, nor could the maſter diſcharge ſuch an *apprentice* without the conſent of the *pariſh officers*; and therefore he gained no ſettlement by his being hired and ſerving a year, in *Higham* and in *Auſtrey*.

Lord Mansfield, on inquiry, finding the *apprentice* was not of age, ſaid, there was nothing in the caſe; the conſent of an *infant apprentice* cannot be *valid*, and therefore his ſubſequent ſervices muſt be naught.

The two other *judges* on the bench concurred with him in opinion.

Per curiam. Let the order of *ſeſſions* be quaſhed, and the order of the juſtices be affirmed. *Vide Bur. S. C. vol.* 2. *page* 441.

Hilary, 32 *Geo.* 2. *The King* v. *The Inhabitants of Weſtbury.*

An *apprentice to a certificate man* does *not* gain a ſettlement, where the maſter being uncertificated at the time of *binding*, obtains and delivers a certificate, before his *apprentice* has ſerved forty days; it being by *ſtat.* 12 *Ann. cap.* 18. a condition *precedent* to the *apprentice*'s gaining a ſettlement, "that he muſt have been bound to, and ſerved for forty days, a maſter who did not either *come into* or *reſide in* the pariſh, by licence of a certificate. *Vide Bur. S. C. vol.* 2. *page* 470.

Trinity, 5 *Geo.* 3. *The King* v. *The Inhabitants of St. Luke's in Middleſex*,

On a motion to quaſh an order of two juſtices, confirmed by *ſeſſions*, for removing *W. H.* his wife and two children, from *St. Leonard*'s *Shoreditch*, to *St. Luke*'s, a rule to ſhew cauſe was obtained.

Caſe. W. H. at fifteen years of age, was bound *apprentice* by *St. Peter's Cornhill*, to one *F.* a ſhoemaker, till he ſhould attain the age of wenty-four years, and ſerved him three years. The maſter then removed to *St. Luke*'s, and took the *pauper* with him, where he ſerved four years. The maſter then diſcharged him, and told him he might work for himſelf; but no perſon was preſent at their parting, nor were the indentures cancelled, or delivered up.

The *pauper* hired himſelf to ſeveral maſters of the trade, in different pariſhes, with whom he worked and received wages; and ſaid, he believed *F.* never knew with whom he worked, nor did he ever aſk him for his earnings, or did he ever account with him for the ſame, or did the ſaid *F.* ever provide for him after he diſcharged him as aforeſaid.

The *pauper worked* and *lodged* the *laſt forty days* before he attained the age of twenty-four years in the pariſh of *St. Leonard Shoreditch*.

The council for the motion to quaſh the order made two *objections*; *viz.*

1ſt, The maſter could not diſcharge his *apprentice*, without the conſent of *St. Peter's Cornhill.*

2dly, The indentures were *never cancelled or delivered up*, and therefore he was not properly diſcharged.

The council in ſupport of the orders *urged*, that it was not a ſervice by the *apprentice*, in *St. Leonard's*, with the conſent of his maſter, and therefore not a ſervice under the indenture. The maſter and *apprentice* had long before parted.

Lord Mansfield. The indenture remained in force, and therefore the relation between the *maſter* and *apprentice* continued. His ſervice in *St. Leonard*'s cannot be conſidered either as a ſervice of his firſt maſter, or as an aſſignment of the indenture.

Wilmot, Juſtice. The *apprentice*'s ſettlement in *St. Luke*'s continued. He could not make a contract by way of *hiring* and *ſervice*, or do any act to gain a ſettlement.

Per curiam, unanimouſly. Let the rule be diſcharged, and the orders be confirmed. *Vide Bur. S. C. vol.* 2. *page* 542.

Eaſter, 6 *Geo.* 3. *The King* v. *The Inhabitants of Ecleſal-Bierlow in Sheffield.*

On a motion to quaſh an order of two juſtices, confirmed by *ſeſſions*, for removing *S. W.* with his two children, from *Warſlow* and *Elſtone* in *Alſtonfield*, in the county of *Stafford*, to *Eccleſal-Bierlow* in *Sheffield*, in the county of *York*, a rule to ſhew cauſe was obtained.

Caſe. The *pauper*, at ſixteen, was bound out *apprentice* to *W. W. cutler*, an inhabitant of the townſhip of *Eccleſal-Bierlow*, for eight years; and reſided there under the ſaid indenture, upwards of five years: On his attaining the age of twenty-one years, he and his maſter came to an agreement to cancel the indentures, and the ſame were properly cancelled between them.

The *pauper* afterwards was *hired for a year* to *R. M.* of *Warſlow*, and ſerved the ſame, and received his whole wages, and has gained no ſettlement ſince.

The *queſtion* before the court was, whether an *apprentice* of full age (bound out. when under age, by the pariſh) can agree to *cancel the indentures*, and afterwards gain a ſettlement for himſelf by hiring and ſervice for a year.

Lord Mansfield. There ſeems no neceſſity for the *pariſh officers* joining in the conſent to *diſcharge* this *apprentice*; there is no authority for it. The *ſtat.* 43 *Eliz. cap.* 2. impowers them to bind the *man child* out *apprentice*, till he comes to the age of twenty-four; (for without this act he could not be bound out longer than till twenty-one) and two juſtices are to aſſent to this binding. The *diſcharge* of the *apprentice* is a matter between the *maſter* and *apprentice* only, and if the maſter *agrees*, the contract may be diſſolved.

Per curiam. Let the rule be made abſolute, and let both the orders be quaſhed. *Vide Bur. S. C. vol.* 2. *page* 562.

Hilary, 7 Geo. 3. The King v. *The Inhabitants of St. Matthew's Bethnal Green.*

On a motion to quaſh an order of *ſeſſions*, made to quaſh an order of two juſtices, for the removing of *M. F.* widow, and her five children, from *St. Matthew's Bethnal Green*, to *St. Botolph's Aldgate*, a rule to ſhew cauſe was obtained.

Caſe. J. F. huſband of the ſaid *M. F.* and father of the ſaid children, was brought up at the charity-ſchool of *St. John Wapping, com. Middleſex.* In 1747, he was bound *apprentice* by indenture, to *J. R.* a *blackſmith*, for ſeven years; and ſerved the whole time, under the ſaid indenture, with his ſaid maſter in *St. Botolph*'s aforeſaid. When he was put out *apprentice*, the ſum of 5*l.* was inſerted in the ſaid indenture, as a conſideration for putting him out *apprentice* to his ſaid maſter, paid out of a voluntary yearly contribution of the inhabitants of *St. John, Wapping, &c.* That the ſaid indenture of *apprenticeſhip was* not *ſtamped* with any ſtamp denoting 6*d.* in the pound to have been paid by the ſaid maſter for every pound of the ſaid 5*l.* ſo paid to the ſaid maſter as aforeſaid. That the ſaid *J. F.* in 1754, hired a dwelling-houſe in the pariſh of *Aldgate*, within the county of the city of *London*, of one *W. W.* for five months, during the remainder of a term the ſaid *W. W.* had therein, and for which the ſaid *J. F.* agreed to pay the ſaid *W. W.* the ſum of 4*l.* The ſaid *J. F.* came with his family to ſettle in the ſaid houſe, and remained therein five months and upwards. That the ſaid houſe was, at ſuch time as the ſaid *J. F.* hired the ſame, worth, *to be let*, 10*l.* by the year.

The council for the motion propoſed two *queſtions*.

1ſt, Whether a ſettlement was gained by the *apprenticeſhip?* For as it was a *charity binding*, and the money being paid out of a charity, it may be queſtioned, whether it was neceſſary that the indenture ſhould be ſtamped, as directed by *ſtat.* 8 *Ann. cap.* 9.

2d, Whether a taking for *five months*, paying only 4*l.* could be deemed a taking of a tenement of 10*l.* *per ann. value*, when 4*l.* for five months is not *equivalent* to 10*l.* for a year.

Lord Mansfield declared his opinion on each point ſeparately.

1ſt Point. It is a *public* charity, and a very laudable one: it is not neceſſary that it ſhould be a *permanent* charity.

The diſtinction between *public* and *private* charities is, a *private* one might be calculated to evade the act, a *public* one cannot be ſuppoſed to be ſo; but this is a *public* charity, within the reaſon and letter of the ſtatute.

2d Point. We are concluded from treating this tenement as being under 10*l. per ann.* value, by the finding of the juſtices, who have poſitively declared the tenement was, at the time of taking, worth, to be let, 10*l. per ann.* therefore I am clear on both points.

Aſton and *Hewitt*, Juſtices, concurred with the Chief Juſtice.

Per curiam. Let the rule be diſcharged, and the order of *ſeſſions* affirmed. *Vide Bur. S. C. vol.* 2. *page* 574.

Michaelmas, 7 G. 3. The King v. *The Inhabitants of Caſtleton.*

On a motion to quaſh an order of *ſeſſions*, made to diſcharge an order for removing *J. H.* his wife and children, from *Caſtleton* to *Hundersfield* in *com. Lancaſter*, a rule to ſhew cauſe was obtained.

Caſe, J. H. was by indenture of 2d. *April*, 1741, bound *apprentice* to *J. R.* of *Caſtleton, hatter*, for the term of ſeven years, and worked, dieted, and lodged with his maſter, there for four years and a half, and then married a woman who lived in *Hundersfield*, after the marriage the *apprentice* worked and dieted all along with his maſter, *in the day time*, where his maſter lived, lodged, and carried on his trade; but he lodged at nights with his wife at her father's houſe in *Hundersfield*, until the expiration of the *apprenticeſhip*, which was about two years and a half from the time of his marriage. The maſter was acquainted with the intended marriage of his *apprentice*, and did not take advantage of the covenant in the indenture, ſo as to *vacate* the ſame, nor did he before the marriage, or at any time after, *find fault* with his *apprentice* for ſo doing. The maſter was not aſked, nor did give leave to his *apprentice* to lodge in *Hundersfield*, though he knew of the ſame.

The council for and againſt the motion allowed, that the *caſe* was improperly ſtated; there being no *queſtion* ſtated, nor is there any adjudication, that the *pauper* had gained no other ſettlement elſewhere.

Lord *Mansfield*, I take it for granted, that the *ſeſſions* meant to ſtate theſe facts only on which they doubted. The *point* on which they doubted is manifeſt, *viz.* Whether the *apprentice* gained a ſettlement in *Hundersfield*, by lodging there at nights, and you agree it to have been ſettled, that the place where an *apprentice lies* is the place of his legal ſettlement.

Therefore unleſs you deſire that it may be ſent back again to be reſtated, it is better to ſave the expence of further proceedings. Therefore let the rule be made abſolute for quaſhing the order of ſeſſions, and affirming the original order. *Vide Bur. S. C. vol.* 2. *page* 569.

Arbitration and Award.

Eaſter, 3 W. & M. Crofts v. *Hannis.*

An *award* without performance is a good *bar*, but not an *accord* without ſatisfaction. At this day the ſubmiſſion of both parties is a mutual promiſe whereupon an *indebitatus aſſumpſit* lies. *Vide Mod. Rep. vol.* 12. *p.* 4.

Trinity, 3 W. & M. Chew v. *Briggs.*

If an *award* be made, that a general releaſe to the time of *award* be given, a releaſe to the time of the ſubmiſſion is a good general releaſe. *Vide Mod. Rep. vol.* 12. *p.* 7.

Michaelmas, 5 W. & M. Matthew v. *Ollerton.*

In *debt* on an *award*, and a verdict for the plaintiff, a motion was made in arreſt of judgment, and the *exception* taken was, that the matter in difference was referred to the plaintiff himſelf, who made an *award*.

Not allowed. And the caſe of Serjeant *Hard*'s was recollected by juſtice *Dolben*, *viz.* the Serjeant took a horſe from the Archbiſhop of *Canterbury*'s bailiff for a *deodand*; and the Archbiſhop brought his action, and it coming to a trial at the aſſizes in *Kent*, the Serjeant, by rule of court, referred it to the Archbiſhop to ſet the price of the horſe, which was done accordingly; and the Serjeant afterwards moved the court to ſet aſide the *award*, for the reaſon now offered; but it was denied by lord *Hale*. *Vide Mod. Rep. vol.* 4. *page* 226.

Hilary, 8 *W*. 3. *Hooper* v. *Pierce*.

In *debt* on a bond to ſtand to the *award* of two, and if they could not agree to nominate an umpire, and ſubmiſſion was of all actions, ſuits, and demands to the time of ſubmiſſion. The defendant pleaded no *award* made: the plaintiff in his *replication* ſets forth an *award* made by the umpire, *viz.* that they ſhould mutually releaſe all demands to each other to the time of the umpirage, and aſſigns a breach: the defendant *demurs*; and it was objected, that this *award* was void, becauſe releaſes are appointed to be made of a time out of the ſubmiſſion.

Per curiam. Though antiently ſuch an opinion was entertained, yet, for a long time ſuch an *award* has been held good: and that for two reaſons, 1ſt. It ſhall not be intended, unleſs the contrary be ſhewn, that any other matter aroſe between the ſubmiſſion and the making the *award*; and if no matter did ariſe, the arbitrator has *awarded* no more than he ſhould do; and ſince that, a ſecond reaſon has been added, that ſuppoſing other matters to have ariſen, yet as to that, the *award* is void; the general words being to be expounded of all matters in controverſy at the time of the ſubmiſſion; and as to other matters ariſing ſince, to be void: and if in ſuch caſe, the party ſubmitting to the *award* ſhould make a releaſe to the time of the ſubmiſſion, it would be a good performance of the *award*. Judgment for the plaintiff. *Vide Mod. Rep. vol.* 12. *p.* 116.

Hilary. 8 *W*. 3. *Cooper* v. *Pierce*.

It was *adjudged* in this caſe, that an *award* to make general releaſes, until the time of the *award*, is good: becauſe as to *meſne* acts between the ſubmiſſion and *award*, the *award* is void, and therefore it does not exceed the ſubmiſſion. And therefore in this caſe, where an action was brought to perform ſuch *award*, judgment was given for the plaintiff. 3 *Mod.* 264. *Vid. Raymond, vol.* 1. *page* 115.

Michaelmas, 8 *W*. 3. *Stevens* v. *Matthews*.

Reſolved, that if a perſon ſubmits a particular controverſy to *arbitration*, and the arbitrators *award* general releaſes, which are executed, they releaſe no more than the particular controverſy.

Per Holt, Chief Juſtice, if the arbitrators *award* releaſes from the beginning of the world until the time of making the ſaid *award*, and the party releaſes until the time of the ſubmiſſion, this is a good performance of the *award*. *Vide Raymond, vol.* 1. *page* 115.

Michaelmas, 8 *W*. 3. *Bedam* v. *Clerkſon*.

In *debt* on bond, dated the 5th of *April*, 4 *W.* & *M.* conditioned, that if the defendant ſhould perform the *award* of *J. S.* of all actions and demands, *ſo that* the award be made, and ready to be delivered, by three o'clock on the afternoon of the 6th of *April*, (which was the next day) that then, &c. the defendant pleads, that *J. S. made no* award *of the premiſes, till three o'clock of the aforeſaid day, ſpecified in the aforeſaid condition*. The plaintiff replies, and ſhews, that *J. S.* made an *award* after entering into the bond, *and before three o'clock in the afternoon of the aforeſaid day*, viz. *at eleven o'clock*, that the defendant ſhould pay to *W.* the plaintiff's ſolicitor 28 *s.* and that the defendant ſhould pay to the plaintiff, on the 14th of *April*, 8*l.* and that he ſhould deliver to the plaintiff a certain writing obligatory, or bond, then in his poſſeſſion, and that the parties ſhould then ſign general releaſes, &c. and then aſſigns for a breach, that the defendant did not pay to the plaintiff the 8*l.* the defendant *demurred*; and his council argued, that the *award* is not good: for the *award* to pay 28 *s.* to *W.* who is a ſtranger, is ill; except in ſome caſes, where it appears that it is for the plaintiff's benefit, or to diſcharge money owing by him; but nothing of this kind appears, and therefore as to that the *award* is ill, *which the court granted*.

2d *Except*. The *award* is, that the defendant ſhould deliver to the plaintiff a *certain writing* &c. which is altogether uncertain; for it does not lay of what ſum the bond was, nor what the penalty, nor of whom it was obtained; and therefore it is void, for the uncertainty in that reſpect; which the court likewiſe allowed. He then argued, that it was an *award* but of one ſide, and conſequently ill; for the releaſes cannot be performed until the bond is delivered to the plaintiff, which can never be, becauſe it is uncertain what bond is meant; and the releaſes cannot be executed until the bond is delivered to the plaintiff, for the words of the *award* are, that the defendant ſhould deliver to the plaintiff a certain writing &c. and that then they ſhould execute general releaſes on both ſides. Now the *ad tunc*, i. e. *then*, ſhews that the releaſes ſhould not be executed until the bond ſhould be delivered to the plaintiff. So that the *arbitrator* has *awarded*, that the defendant ſhould pay to the plaintiff 8 *l.* which is all of the *award* that is good. And ſo it is an *award* of one ſide. *But not allowed.*

Per curiam, the *ad tunc*, i. e. *then*, refers to the 14th of *April*, and not to the delivery of the bond to the plaintiff; ſo that the *award* is mutual enough, for when the defendant has paid the 8*l.* he may demand a general releaſe.

4th *Except*. The word *altereuter* is uncertain; *viz.* one of the two.

Per curiam. It is as good a word as can be uſed.

The plaintiff's council took exception, that the plea was ill. For the defendant pleads, that the *arbitrator* made no *award before three o'clock of the aforeſaid day*; now there are two third hours, and perhaps the *award* was not made before the firſt third hour, and yet it might be made before the third hour *in the afternoon*, and therefore the defendant ought to have ſaid, *before three o'clock in the afternoon of the aforeſaid day*, for want of which, *in the afternoon*, the plea is ill.

Per curiam. This had been ill, if the plaintiff had demurred to it, but now the replication has made it good. But becauſe the *award* was mutual enough, and a good breach aſſigned, judgment was given for the plaintiff. *Vide Raymond vol.* 1. *page* 123.

Eaſter, 9 *W*. 3. *Reynolds* v. *Gray*.

A motion was made for an attachment againſt the defendant, for refuſing to perform an *award* made by an umpire on a ſubmiſſion by a rule of court, which after ſome diſpute, was referred.

Per curiam. If the ſubmiſſion be to refer the matter in controverſy to arbitrators, and they do not make an *award* by ſuch a day, they ſhall not make an umpire; and there the arbitrators cannot chuſe an umpire till the day is paſt for the making their *award*; and when they have choſen one *generally*, they cannot afterwards chuſe another, becauſe they have executed their authority: but if they chuſe him *conditionally*, that he will accept it, and he refuſes, they may chuſe another, becauſe they never executed their authority. *Vide Mod. vol.* 12. *p.* 120.

Trinity, 9 *W*. 3. *Freeman* v. *Bernard*.

On an *aſſumpſit* for the ſale of hops, the defendant pleaded ſubmiſſion to arbitrators, who *awarded*, that each party ſhould releaſe all actions to each other; that he tendered ſuch a releaſe, and was, and ſtill is ready to releaſe, and ſo prays judgment *whether the action*, &c. to which the plaintiff demurred; the queſtion was, whether the defendant's plea was a good *bar*.

Holt, C. J. ſaid, there is no queſtion but if they had *awarded* a ſum of money to be paid, or a horſe, or any thing in ſatisfaction, the very *awarding* of this, tho' not actually delivered, would have been a good *bar*. But now in this caſe, there is nothing *awarded*, but only a way and means mutually to diſcharge all actions:

tions: now there is a great difference between *awarding* the doing any thing in ſatisfaction, and the *awarding* the releaſe of an action; for when a thing is *awarded* to be done in ſatisfaction, that raiſes a new duty in lieu of the old one diſcharged, as if money be *awarded* to be paid, *debt* lies for it; but in the caſe of a releaſe, there is only a method ordered to diſcharge the action: if the *award* itſelf diſcharges the action there needs no releaſe to be given, becauſe the action was gone before; but the action being not diſcharged till the releaſe comes, it cannot be a *bar* till it is actually executed and delivered. Judgment for the plaintiff. *Vide Mod. Rep. vol.* 12. *p.* 130.

Trinity, 9 *W.* 3. *Bacon* v. *Debarry.*

In *debt* on a bond conditioned, that the defendant on behalf of *De Ruiter*, ſhould ſtand to the *award* of *C.* and *M.* of all matters between the defendant, as attorney to *De Ruiter*, on the one part, and the plaintiff on the other, concerning certain accounts between the plaintiff and *De Ruiter*; the defendant pleads *no award made*; the plaintiff replies, and ſets forth *an award* to have been made concerning the premiſes, that the defendant, on behalf of *De Ruiter*, ſhould pay to the plaintiff 45 *l.* 6 *s.* 10 *d.* and that then the plaintiff, and defendant on the behalf of *De Ruiter*, ſhould execute mutual releaſes to each other, to the uſe of each other, of all actions, matters, &c. concerning thoſe accounts, and aſſigns a breach in non-payment of the money. On demurrer, it was reſolved, 1ſt. The ſubmiſſion of the *debt* is good: for the defendant puts himſelf in the place of *De Ruiter*, and is bound to perform the *award*. 2dly. That this *award* is a void *award*, becauſe not mutual, but of the one part only: for firſt the mutual releaſes are to be made between the plaintiff and defendant, where they ought to have been between the plaintiff and *De Ruiter*, or to have been delivered to *Debarry* for the uſe of *De Ruiter*, for a releaſe to *Debarry*, can by no means benefit *De Ruiter*; we would, if we could, have conſtrued it to be a releaſe to *Debarry* for the uſe of *De Ruiter*; but the words, *to the uſe of each other*, exclude this conſtruction. The laſt time this caſe was argued it was inſiſted, that this *award* was good, if there had been no releaſes at all *awarded*; as to which there hath been ſome doubt if ſuch *award* be made *concerning the premiſes*, which this is not. It is pleaded, indeed, and averred to be *concerning the premiſes*; but when the *award* is ſet out, that ſays no ſuch thing. But ſuppoſing it to have been made *concerning the premiſes*, yet, when he comes and does not reſt on that, there is a void thing *awarded* on the behalf of *De Ruiter*. It is plain, that the arbitrators did not rely on the payment of the money to be ſatisfaction, but on the releaſes too, which ſpoils the whole *award*; and this is grounded on *Capel* and *Holland*'s caſe, *Style*, 44. *Allen*, 10. 1 *Roll. Abr.* 254. and on *Hale* v. *Maſſye*'s caſe, 1 *Roll. Abr.* 254. If in this caſe it had been ſaid, that money ſhould have been paid in ſatisfaction of all accounts, or that they had examined all accounts, and on ſtating thereof, there had appeared ſo much due to *Bacon*, and that they had awarded the money to be paid for all accounts; the ſubſequent matter would not have vitiated it as in the caſe of *Burbridge* v. *Raymond*, 1 *Roll. Abr.* 255. therefore judgment for the defendant. *Vide Mod. Rep. vol.* 12. *p.* 129.

Michaelmas, 9 *W.* 3. *Selby* v. *Ruſſel.*

In *debt* on a bond for the performance of an *award*, it was inſiſted on for the defendant, that the *award* was void, becauſe there was no final determination of the matter ſubmitted, but ſeveral things ſeemed to be ſubmitted to a future determination.

The court ſeemed to be of this opinion; *Holt* ſaying, that where matters are ſubmitted, they ought to *award* all abſolutely, without referring to any future examination: and that he knew but one caſe where arbitrators may refer to a future act; and that is, where they *award* the payment of ſuch coſts as an officer of the court ſhall tax, which has been allowed.

But the matter was adjourned to a future day. *Vide Mod. Rep. vol.* 12. *page* 139.

Eaſter, 10 *W.* 3. *Anonymous.*

Per Holt, Chief Juſtice. Where an *award* is made by rule of court, it ſhall not be ſet aſide; unleſs there was practice with the arbitrators, or ſome irregularity, as want of notice of the meeting. Alſo you ſhall not take exceptions to the formality of it, but ſhall perform it. *Vide Salk. vol.* 1. *page* 71.

Michaelmas, 10 *W.* 3. ——— v. *Palmer.*

A ſubmiſſion to an *award* was of all matters in controverſy by rule of court, and an *award* made, that ſo much money ſhould be paid on one ſide, and nothing was *awarded* on the other ſide; and the court was moved to ſet it aſide, as being an *award* only *ex parte*.

Holt, Chief Juſtice. The common exceptions againſt an *award*, will not hold here, it being an *award* on ſubmiſſion by rule of court, for though there be no releaſe *awarded* on one ſide, yet the ſubmiſſion was of all matters in controverſy; and we will not grant an attachment before they tender a releaſe, for if a perſon comes to have aid of the court, he ſhall do that which is fair and equitable before he obtains it. *Vide Mod. Rep. vol.* 12. *page* 234.

Hilary, 11 *W.* 3. *D'oyley* v. *Burton.*

In *debt* on a bond conditioned to perform an *award*, the defendant pleaded *no award made*. The plaintiff replied and ſhewed the *award*, and aſſigned a breach, &c. The defendant demurred, and his council took exceptions to the *award*. 1. That the *award* did not purſue the ſubmiſſion; which was, that it ſhould be ready to be delivered at *London*, and the pleading that the arbitrators made the *award* at *Weſtminſter*, ready to be delivered at *London*, as in the caſe in 2 *Cro.* 577.

Holt, Chief Juſtice. If it is made, it is ready to be delivered; and therefore if (*ready to be delivered*) had been omitted, it had been well enough, the alledging the *award* to be *of and concerning the premiſes*, ſupplies all averments.

2d. Exception, the arbitrators have *awarded* the bonds of ſubmiſſion to be ſurrendered, which exceeded their authority.

Holt, Chief Juſtice. As to that, it is void, for they could not *award* any thing concerning them; and if as this caſe is, they had *awarded* general releaſes to have been given after the delivery of the bonds of ſubmiſſion; the *award* had been bad, becauſe it would not have been mutual, in regard that the releaſes would have been given after the performance of an act, which they had not power to *award*, that the defendant ſhould do; and conſequently it is void, and ſo nothing to be done on the part of the plaintiff to the defendant, but only that the defendant ſhould pay money to the plaintiff.

3d. Exception, the plaintiff does not aver that he was ready at the place to receive the money.

Holt. C. J. There is no need, becauſe the defendant ought to do the firſt act, and therefore if he does not come and tender the money, though the plaintiff be not there to receive it, the bond will be forfeited.

4th Exception, the *award* as to the general releaſes is uncertain, *viz.* that they ſhould execute mutual general releaſes, according to the extent of the ſubmiſſion.

Holt, Chief Juſtice. The ſubmiſſion is ſpecial, of all controverſies between the plaintiff, and defendant as adminiſtrator, &c. ſo that explaining the generality of the *award*, Judgment was given for the plaintiff. *Vide Raym. vol.* 1. *page* 533.

Michaelmas, 11 *W.* 3. *Chandler* v. *Driver.*

A ſubmiſſion to an *award* being by rule of court, a motion was made for an attachment for non-performance.

Per curiam. There ought to be an affidavit of an *award* demanded, &c. and we never grant an attachment for non-payment of money, on an *award* the firſt day, though the defendant be to do the firſt act. *Vide Mod. Rep. vol.* 12. *page* 317.

Michaelmas, 12 *W* 3. *Anonymous.*

Where a matter was referred by rule of court to the determination of the judges of aſſize, it was moved that their determination might be made a rule of court.

Holt, Chief Juſtice: where a matter is referred to arbitrators by rule of court, and they make their *award*, we will compel a performance of it as much as if the *award* were part of the rule; ſo a new rule is needleſs. *Vide Salk. vol.* 1. *p.* 71.

Michaelmas, 12 *W*. 3. *Clapcott* v. *Davy.*

On an *indebitatus aſſumpſit & quantum meruit* brought by the plaintiff for work done, and goods ſold and delivered, the defendant pleaded *an award*, by which it was *awarded*, that the plaintiff for the work done, *&c.* ſhould accept a bill of ſale, of the eighth part of the *Ship Fortune*; and that the plaintiff and defendant ſhould give to each other general releaſes. To this plea the plaintiff demurred, and for cauſe of demurrer took the following exceptions to the plea.

1ſt *Exception*, That the *award* is pleaded to extend to all the promiſes, whereas it appears, that it extends but to the work done, and therefore the defendant ſhould have pleaded *non aſſumpſit* to the promiſe for the goods ſold and delivered, and for want of this the plea is ill. For an *award* is no plea in *bar*, unleſs ſomething be *awarded* in ſatisfaction of the plaintiff's demand; and nothing being *awarded* for the goods ſold and delivered, it is ill. For though there is a general releaſe *awarded*, yet of itſelf that will be no *bar*, according to the caſe of *Freeman* v. *Barnard*, *Trinity*, 9 *W*. 3. though the ſuing of an action in ſuch caſe, may be a breach of the *award*, on which the defendant might bring his action.

2d. *Exception*, That the *award* was, that the plaintiff ſhould accept the bill of ſale, and the defendant was not *awarded* to deliver it, and ſo nothing was *awarded* to the plaintiff in ſatisfaction for the work done, and he compared it to the caſe in 2 *Saund.* 298. & *Yelv.* 98.

Holt, Chief Juſtice ſaid, that nothing was *awarded* for the goods ſold and delivered, and therefore this caſe was the ſame with that of *Freeman* v. *Barnard*, nothing being *awarded* for that, but a general releaſe. If the bill of ſale had been *awarded* in full of all demands, it had been good. But this releaſe *awarded* here, is not a perfect *bar*, until it be executed. And as to the other matter, he ſaid, that the defendant is not enjoined to do it, which is the only ſatisfaction that the plaintiff ſhould have. But the *award* is only, that the plaintiff ſhould accept, and then the plaintiff cannot be *barred*, nothing being *awarded* to be done by the defendant in ſatisfaction.

At another day, the defendant's council *urged*, that if the firſt objection ſhould be allowed, the declaration might be ſo varied as to make no *award* pleadable: and to the *ſecond objection*, he cited a caſe very lately adjudged in the *C. P.* viz. *Hooper* v. *Hurſt*, where an *award* was, that the defendant ſhould pay to the plaintiff 10 *l.* and fetch away his mare and colt; and on *exception*, it was held to be mutual, and implied a delivery by the plaintiff; and it was adjudged accordingly, for ſupporting of honeſt *awards*.

The plaintiff's council in anſwer ſaid, that the words of the *award* are, that the work done was rated at 32 *l.* for which, the plaintiff would accept a bill of ſale, *&c.* now no action for goods ſold and delivered can be brought for work done.

Per Gould, Juſtice. It is, without doubt, that if nothing be *awarded* but the general releaſes, the plea will be ill: then leaving them out of the caſe, this *award* cannot extend to this demand. For though it is *objected*, that the goods ſold and delivered is the ſame demand with that for work done, yet the court cannot take notice of that on ſuch *generality*. But if the defendant had ſhewn it by particular *averments*, it might have been conſtrued to be within that part of the *award*. And *averments* are admitted in pleading to make an *award* good.

2d. The *ſecond objection* ſeems to be a good *objection*, for an *award* cannot be made good by implication. If the defendant would not have delivered the bill of ſale, the plaintiff could not have aſſigned a breach of the *award* by implication; and judgment was given for the plaintiff. *Vide Raym. vol.* 1. *page* 611.

Michaelmas, 12 *W*. 3. *Anonymous.*

In *caſe*, upon three ſeveral promiſes, and an *award* directing mutual releaſes, pleaded in bar.

Per curiam. This is no good plea, becauſe nothing is *awarded* that bears an action; but if there were any thing *awarded*, for which an action would lie, it would be a good plea, though it were not performed. *Vide Mod. Rep. vol.* 12. *p.* 423.

Hilary, 13 *W*. *King* v. *Croſs.*

In *debt* on an *award*: the defendant ſets forth a void *award*, and pleads performance; the plaintiff joins iſſue on the performance. Verdict for the plaintiff. On the court being moved in arreſt of judgment, the judgment thereon was arreſted. *Vide Mod. Rep. vol.* 12. *page* 634.

Eaſter, 13 *W*. 3. *Mitchel* v. *Harris.*

In *debt* on an *award*, ſetting forth a ſubmiſſion to the *award* of *A.* and *B.* provided they made their *award* by ſuch a day; and if they did not agree, to the umpirage of ſuch perſon whom they ſhould chuſe; on *no award* pleaded; in *reply* it was confeſſed, that there was *no award*, but that the arbitrators had choſe an umpire on ſuch a day, which appeared to be within the time allowed them to make their *award* in; and the *umpirage* and *breach* were ſet forth.

To which the defendant *rejoined*, that they had not choſe an umpire after the laſt day which was allowed them to make their *award*: on demurrer it was objected, that it appeared the arbitrators had choſe their umpire too ſoon, *viz.* within the laſt day allowed them for making their *award* as arbitrators; and ſuch choice was void, for they could not choſe an umpire till their own authority was determined; for notwithſtanding ſuch chooſing of an umpire, they might make an *award* after any time before the end of the time allowed them.

It was anſwered, that by this ſubmiſſion the *arbitrators* had their election to make an *award*, or to chuſe an umpire by ſuch a day; and that by chooſing the umpire before the day, they had determined their election, and given the authority to the *umpire*.

Holt, Chief Juſtice, quoted the caſe of *Twiſelden* and *Travers*, where the ſubmiſſion was to the *award* of two, ſo that they made their *award* before midſummer; and if they could not agree, to ſtand to the umpirage of whoever they ſhould chuſe, ſo as he made his umpirage before that time, and held good; becauſe by the naming an umpire they had determined their authority and election: but if the ſubmiſſion had been to the *award* of *A.* and *B.* ſo that they made an *award* before midſummer; and if they did not agree, *J. S.* ſhould be umpire; and they do not agree; but *J. S.* makes an umpirage before midſummer, that umpirage is void. Judgment *niſi* for the plaintiff. *Vide Mod. Rep. vol.* 12. *page* 512.

Eaſter, 13 *W*. 3. *Cheeſely* v. *Baily.*

The parties entered into mutual bonds, with reſpective conditions, that they ſhould reſpectively ſtand to the *award* to be made by *J. S.* of, *&c.* and if they ſhould conſent to make that ſubmiſſion by rule of court, according to the late act of parliament, that then the bonds ſhould be void. And now a motion was made, that this ſhould be made a rule of court, on affidavit of the execution of theſe bonds, but it was oppoſed, becauſe it was only parcel of the conditon, and the party chuſe rather to forfeit the penalty of the bond.

Per curiam. The conſent to make a ſubmiſſion a rule of court, ought not to be a part of the condition, but only inſerted in the condition, by the late act. Nevertheleſs, *Holt*, held that this was a plain evidence of the conſent of the parties, and if it were not ſo, the condition would ſignify nothing; for no ſubſequent conſent afterwards would be ſufficient within the act. and a rule was made that it ſhould be made a rule of court, *niſi, &c. Vide Raym. vol.* 1. *page* 674. *Salk. vol.* 1. *page* 72.

Trinity, 13 *W.* 3. *Foreland, or Furlong* v. *Thornigold, Hornigold, or Marygold.*

In *debt* on a bond for the performance of an *award*; on *no award* pleaded, the plaintiff ſets forth part of the *award*, but not all, and concludes with a *profert*; the defendant craves *oyer*, and the *award* being ſet forth at large, demurs generally for the variance between the *award* replied, and that ſet forth on the *oyer*, and *Smith* v. *Yeoman*, 1 *Saund.* 319. was quoted, where the plaintiff in ſuch caſe, ought not only to ſet forth the *award*, but alſo to aſſign a breach; it was objected that it is enough to ſhew ſo much of the *award*, as to give himſelf cauſe of action, and to ſhew the *award* good, *i. e.* is mutual; and if there be any thing more in it, it ought to come from the defendant's ſide; as in the caſe of an action on an act of parliament. *Vide* 1 *Leo.* 72. In *debt* on an *award*, nothing was ſet forth, but the ſubmiſſion to the *award* of *J. S.* and that he *awarded* the defendant to pay the plaintiff 10 *l. and held* the action did lie, and that the plaintiff is bound to ſhew no more than makes for him, and the reſt ought to come from the defendant. *Vide Lewis* v. *Scholaſtica in Plow.* that one need ſay no more than is for his purpoſe. *Palmer* 511. That in order to good pleading, when the defendant pleads, they made no *award*, and the plaintiff ſhews an *award* and breach, the defendant ought to rejoin, they made no ſuch *award*.

Holt, Chief Juſtice. You ſet out too little or too much, for you do not ſet out the whole *award*; but you ſay *profert*, as if you had ſet it out. But the queſtion will be, whether it will not be well on a general demurrer. 2 *R.* 3. 13. The iſſue is, *they did not make the award*; but ſuppoſe part of the *award* be well, and another part void, and ſo bad, that it vitiates even the whole *award*, and the plaintiff ſets out only the good part, *and they made no ſuch award* be pleaded, and then the whole *award* is ſet out. 18 *Ed.* 4. 32. *Bro. Arbit.* 39. 41. But in thoſe days they held an *award* void in part, to be ſo in all; as *award* that there ſhould be mutual releaſes for the purpoſe, and that one of the parties ſhould get a third perſon to be ſecurity for the payment of 10 *l.* to the other, ſuch *award* would have been held void *in the whole* in thoſe days, and ſo was the law, till *James's* 1ſt. time; when as appears in *Hob.* and *Hutt.* it was held an *award* might be good in part, and void in part; but here it was ſaid, that the plaintiff ought to ſet forth all the things *awarded* to be done by him, though perhaps he need not ſet out every thing to be done on the other ſide, and the omiſſion hereof in the declaration, and ſetting it out in the other part, is a *ſubſtantial variance.* But if a void part of the *award* be omitted, ſo it be ſuch a void part, as does not avoid the whole *award*, that may be well enough; for where an *award* contains ſeveral matters to be done on the plaintiff's ſide, all which are well *awarded*, and to be performed by the plaintiff, and he only ſets out enough to intitle himſelf to an action, and they come, and plead *no award*, and on *oyer* of the *award*, it appears, the plaintiff was to do more than he ſet forth, and that thoſe things were *well awarded*, that is, that the *award* was legal, as to them; the queſtion is, whether he ought not to ſhew all theſe things that he was to perform, or if the omitting any of them, be not a ſubſtantial variance? It was ſaid, that in *debt* on an *award* he need only ſet out enough to intitle him to the action; but that he ought to ſhew ſo much of the *award*, as was neceſſary to make it good. And *Holt* ſeemed to approve of the caſe in 1 *Leo.* 72. *Vide Style* 98. 1 *Sid.* 161, that *debt* lies on an *award*, without ſetting it all out. But here the variance was held material; and *judgment for the defendant. Vide Mod. Rep. vol.* 12. *page* 533. *Raym. vol.* 1. *page* 715. *Salk. vol.* 1. *page* 73.

Trinity, 13 *W.* 3. *Slanney* v. *Slanney.*

Per curiam. When it is moved to have *ſubmiſſion to an award* made a rule of court, there ought always to be an affidavit of notice, becauſe the act gives the court power to examine the juſtice of the *award. Vide Mod. Rep. vol.* 12. *page* 524.

Eaſter, 1 *Ann.* *Davila* v. *Almanza.*

A matter was referred by conſent at *niſi prius* to the three foremen of the jury; and before the *award* was made, one of the parties ſerved the arbitrators with a *ſubpœna* out of *Chancery*, which hindered their proceeding to make the *award*. The court held this a breach of the rule, and granted an attachment, *niſi, &c. Salkeld, vol.* 1. *page* 73.

Trinity, 1 *Ann.* *The Queen* v. *Mayor of Carliſle.*

Per curiam. A ſubmiſſion of a matter to *reference*, is no ſtay of ſuit in that matter, if it is not particularly ſo agreed on. *Vide Mod. Rep. vol.* 7. *page* 38.

Eaſter, 2 *Ann.* *Morris* v. *Sir Richard Reynolds.*

It was moved, that an *award* made by *arbitrators*, choſen by the conſent of the parties, at *niſi prius* at *Guildhall*, and whoſe ſubmiſſion was made by rule of court there, and afterwards made a rule of the *King's Bench*, might be ſet aſide, on *affidavit* of the miſmanagement of the *arbitrators*; and that they refuſed to hear what the defendant could ſay, after they had heard the plaintiff.

Holt, Chief Juſtice, warmly oppoſed this, as contrary to all practice that he had ever known, which was, that in ſuch caſe, the integrity of the arbitrators (whom the parties by conſent have choſen to be their judges) ſhall never be arraigned, no more than the integrity of any other judge. But *Powel, Powys* and *Gould*, Juſtices, ſaid, that it was abominable to give any countenance to ſuch proceedings, and that therefore they ought to be puniſhed, becauſe they abuſed the office of a judge. And a rule was made that they ſhould attend And the examination was made in court, by affidavit of all their proceedings, on which great miſmanagement appeared to be among them. *Vide Raymond, vol.* 2. *page* 857.

Eaſter, 2 *Ann.* *Anonymous.*

H. bound himſelf in a bond to ſtand to the *award* of *J. S.* which ſubmiſſion was made a rule of court, according to the late act of parliament. The party, for whoſe benefit the *award* was made, moved the court for an attachment for non-performance; which was granted: pending which he brought an action of *debt* on the bond; and now the court was moved, that he might not proceed both ways; and the council who made the motion inſiſted, that this was like the caſes where the court ſtay actions on attornies bills, while the matter is under reference before the maſter.

Per curiam. The motion was denied, and this difference taken; where the court relieves the party by way of amends in a ſummary way, as in the caſe cited, there it is reaſonable; otherwiſe here, where the plaintiff has no ſatisfaction on the attachment. And the defendant was put to anſwer interrogatories. But ſee *Andr.* 299. and *Caſes Temp. Ld. Hardwicke* 106. *Vide Salkeld, vol.* 1. *p.* 74.

Trinity, 2 *Ann.* *Sir John Parſons* v. *Gill.*

In *debt* on bond the condition was, to perform an *award*, which was, that the defendant ſhould pay to the plaintiff, or his aſſigns, 50 *l. and thereupon* the plaintiff ſhould ſeal a releaſe to him of all actions and controverſies *touching the premiſes.* The defendant's council took exception, that the *award* was not mutual; for the 50 *l.* being awarded to be paid *generally*, and the releaſe (which was all the defendant was to have) being only of all actions *touching the premiſes*, that ſhould be underſtood to relate only to the 50 *l.* and not to the controverſies ſubmitted. The court, on the contrary ſaid, that it ſhould be underſtood of the controverſies.

2. It is not ſaid, that the defendant did not pay to the plaintiff's aſſigns, which is naught. 2 *Sid.* 41. *Cro. Eliz.* 348. The court thought otherwiſe, becauſe they held payment to the plaintiff's aſſigns as payment to the plaintiff himſelf; the contrary in the caſe in 3 *Cro.* for not repairing, becauſe the thing demiſed there was demiſable over. Judgment for the plaintiff. *Vide Raymond, vol.* 2. *page* 898.

Trinity, 2 *Ann. Anonymous.*

In *debt* on a bond, with condition to perform an *award,* ſo as the ſaid *award* be made in writing, and ready to be delivered to the parties, *&c.* the plaintiff in ſetting out the *award* in his replication to *no award made* pleaded, ſhewed it was made in writing, but did not ſay it was ready to be delivered, *&c.* And on demurrer,

Per curiam. It is well enough; for being made in writing, it is ready to be delivered. *Vide Raymond, vol.* 2. *page* 989.

Trinity, 2 *Ann.* Bird v. Bird.

In *debt* on a bond, the defendant prayed *oyer* of the condition, which was for performing the *award* of *J. S.* and pleaded *no award made.* The plaintiff replied, and ſet forth an *award*; which was, that the plaintiff and defendant ſhould pay ſuch a certain ſum yearly to *A.* for the uſe of Mrs. *B.* their mother. The defendant's council took an exception to the *award*; that this was to *award* a thing to be done to a third perſon, who is a ſtranger to the ſubmiſſion, and conſequently of a matter out of the power of the arbitrators.

Holt, Chief Juſtice, ſaid, that a general *award* of money to a ſtranger was good; for it ſhall be intended the ſubmittants were bound as truſtees, or were liable to pay the ſame; and the payment ſhall be intended for their benefit, unleſs the contrary appear.

Powell, Juſtice, was of opinion, that it muſt appear to be for their benefit, and it ſhall not be ſo intended, unleſs it does appear; but in the principal caſe he held, that it ſhould be intended to be for their benefit, or rather that it appeared to be ſo, becauſe the payment was to be for the uſe of the mother. *Vide* 5 *Co. Salmon's Caſe.* 2 *Cro.* 4. 758. 1 *Ro.* 247, 259. 2 *Lev.* 235. This matter was afterwards referred to the council on both ſides; ſo the court gave no judgment. *Vide Salkeld, vol.* 1. *page* 74.

Michaelmas, 2 *Ann. Squire* v. *Grevell.* Error.

On a writ of *error* brought on a judgment in *C. B.* in *debt* on a bond for performance of an *award,* the defendant pleaded *no award made*; and in reply, the plaintiff ſet forth an *award* made on ſuch a day, reciting ſeveral ſuits depending between the parties in the *C. B.* and a ſubmiſſion of all matters pending. 1. The arbitrators *award,* that all ſuits between the parties ſhall ceaſe. 2. That the defendant ſhould pay the plaintiff 10*l.* in full of all demands, and alſo give him a general releaſe. 3. That on receipt of the 10*l.* the plaintiff ſhould alſo execute a releaſe to the defendant.

The defendant's council took the following exceptions to the *award.* 1ſt, It is not final; for it is only, that all ſuits now depending ſhould ceaſe, which is no more than that the party ſhould be nonſuited, which is not final, and therefore not good: it is true, no new ſuit can be brought while theſe are pending, becauſe theſe may be pleaded in *abatement*; nor can theſe be proſecuted becauſe of the *award*; but if either of the parties die, new ſuits may be proſecuted for the ſaid cauſes, notwithſtanding this *award.*

2d. The *awarding* a general releaſe would indeed make it a good *award,* if it were concluſive, but it is left in the plaintiff's election, whether he makes any or not; for the releaſe is ordered to be made on the receipt of the 10*l.* and it is not *awarded* that he ſhall receive it; and if he refuſes, he is not bound to releaſe.

3d. The releaſe is ordered to be till the time of the *award*; but we do not much inſiſt on that, the authorities being againſt us on a double reaſon: 1. That no cauſe of action ſhall be intended to have ariſen between the time of the ſubmiſſion and *award,* if it be not ſhewn. 2. That a releaſe to the time of the ſubmiſſion is a good releaſe in purſuance of the *award*; and the latter, in our opinion, is the better reaſon; for a man might have a cauſe of action accrue to him between the ſubmiſſion and *award,* and not know of it; and it were hard to put him under a neceſſity of releaſing it: and the reaſon why a releaſe to the time of ſubmiſſion is held good, is not becauſe it ſhall be intended to be the meaning of the arbitrators that it ſhould be ſo, but it is rather a controlling of their meaning, as far as it is void by conſtruction of law.

The council on the other ſide ſaid, the *awarding* that all duties ſhall ceaſe, is that they ſhall for ever ceaſe; and it extinguiſhes the duty; for if the words had been that all actions ſhould ceaſe, the duty had been gone; for if the remedy be gone, the right is gone: and the word *ſuit* is of a larger extent and ſenſe than *action*; for by releaſe of *ſuits,* one may bar himſelf of execution, which he cannot do by releaſe of *action.* 1 *Rol. Abr.* 261. *p.* 7. That ſuch *award* extinguiſhes the duty. *Eaſt.* 29 *Car.* 2. *Strangford* v. *Green,* and 11 *W.* 3. *Ball* v. *Heſcot*; in this court, the *award* was, that one of the parties ſhould pay the other ſo much money, on ſuch a day, and that all ſuits ſhould ceaſe till failure of payment; and good. 1 *Lev.* 58. Beſides, this ſum being *awarded* in full of all demands; and the ſubmiſſion being with an *ita quod,* i. e. *ſo that, &c.* it is in itſelf final. *Aleyn.* 26. 1 *Rol. Abr.* 260. *pl.* 55. 1 *Sid.* 154. 1 *Lev.* 132, 133. *Hob.* 190. *Aleyn* 85. *Style* 27. 1 *Rol. Abr.* 258, 259. 3 *Cro.* 851. 3 *Cro.* 448.

Holt, Chief Juſtice. As to the releaſe, you ſay that it is put on the party's own act, in receiving or refuſing the money, to releaſe or not; but it has been held in *London,* in *Craven's* caſe, in the latter end of *Style,* that where a thing is argued to be done on payment and receipt, that tender of the payment, and refuſal, intitles the party to it as much as an actual payment; and the authorities have been ſo ever ſince. *Quære* 9. *Co.* 79. *Dyer* 356. 1 *Lut.* 224, 227, 238. *Lev. Ent.* 30. 2 *Sand.* 96.

Then as to the next point, that all ſuits pending between the parties ſhould ceaſe; the queſtion is, whether this goes to the cauſe of action? A man releaſes his action, and has no other remedy for his right, but an action does not diſcharge the right of the thing. Now here is an action depending, if a man releaſes that action, he thereby releaſes the right of action; and, by the ſame reaſon, determining a ſuit determines the right of the thing, becauſe there is no remedy but by ſuit; then this *award* is final. If in *treſpaſs* the plaintiff after the laſt *continuance* releaſes the action, the right is gone; and if a releaſe would do it, why not an *award?* Indeed if the party had two remedies, one by *action* and another by *entry,* if he releaſed the action, he might notwithſtanding enter.

And as for the releaſe to the time of *award* made, it ſhall not be underſtood, that there was any cauſe of action meant, if it be not ſhewn; and if there be, the party may ſhew it, and ſay that he tendered a releaſe to the time of the ſubmiſſion.

Powell, Juſtice. I think all the three points are final; or if but one of them is ſo, the *award* will be good for ſo much, if that does not depend on another branch of the *award,* which is ill; and if there were any ſuits pending, the *awarding* they ſhould ceaſe, is that they ſhould be at an end for ever; and the words (*now depending*) were only to ſhew what ſort of actions they made their *award* of. And the ten pounds being *awarded* to be paid in full of all demands, ſhall be underſtood, in full of all demands to the time of ſubmiſſion, and not to the time of payment. And if money be *awarded* to be paid, and the other on receipt makes a releaſe, that I take to be an *award* to receive: and for this he quoted a caſe in the *C. B.* in his time, and 1 *Rol. Ab.* 254, 255. *pl.* 16.

Holt, Chief Juſtice. Here the very *awarding* a ſum of money is a *bar* of actions; for by the *awarding* money to him, thereby a duty ariſes, and veſts in him, which is a good *bar*, wherever *accord* with *ſatisfaction* is a good plea; but antiently it has been held, that if the thing *awarded* be not money, but the doing of ſome collateral act, the party to whom it is *awarded* is without remedy, and therefore ſuch *award* would be void. But the contrary has been held ſince; for if two men ſubmit to the *award* of a third perſon, they two do alſo thereby promiſe expreſsly to abide by his determination; for agreeing to *refer* is a promiſe in itſelf; but where a ſum of money is ordered to be paid, it is immediately a duty; and if there was no more than an *award* to pay a ſum of money in ſatisfaction of all demands, it would be final. And judgment therefore was affirmed. *Vide Mod. Rep. vol.* 6. *page* 33.

Michaelmas, 2 *Ann.* *Robinſon* v. *Calwood.*

In *debt* on a bond for performance of an *award*, the condition was, to ſtand to *&c.* ſo it were ready to be delivered at ſuch a time; on *no award* pleaded, and an *award* ſet forth, but not ſaid that it was ready to be delivered at the time.

Per Holt, Chief Juſtice. As ſoon as it was made it was ready to be delivered, and ſo it has been adjudged, but judgment was ſtayed on another exception. *Vide Mod. Rep. vol.* 6. *page* 82.

Eaſter, 3 *Ann.* *Oates* v. *Bromel*, *Bromil*, *or Bromhill.*

In an action of *debt* for non-performance of an *award*, where the bond ſtates, *ſo that* it were made and ready to be delivered to the parties, or ſuch of them as ſhould deſire it by ſuch a day; *no award* was pleaded, and the plaintiff ſet out a *parol award*, and an averment that it was ready to be delivered to the ſaid parties. On demurrer, the words, *ready to be delivered*, it was ſaid, neceſſarily import, that the *award* was to have been in writing; and a *caſe* in the *C. B. Trinity*, 1 *Ann*, *Wood* v. *Ardiſt*, was cited as in point: and *Hungate*'s caſe, 5 *Co.* 108. where the condition of the performance was, *ſo that the award be made, and delivered to each of the parties*, there being two defendants; and held that a delivery to one of them was ſufficient, yet if it could be a *parol award*, a publication of it to both would be ſufficient.

The council on the other ſide replied; a *parol award* may be delivered as well as a writing, as in common ſpeaking, to deliver a meſſage; to deliver himſelf well, when a man expreſſes his thoughts gracefully: and delivery is to be underſtood *according to the ſubject matter*; if it be of a writing, it muſt be manual; if of a parol matter, it muſt be an oral delivery: and relied on *Dyer*, 218. *pl.* 5. *Co. Ent.* 126. as caſes in point; and 3 *Bulſt.* 311. *Capel* v. *Rogers*, and ſaid that *Benloe*, 97. which caſe ſeems to differ from *Dyer*, is very obſcure in his report of the *caſe*.

Holt, Chief Juſtice. There are two diſtinct things to be done: 1ſt. The making; and, 2dly. To be ready to be delivered: if it had been, ſo as the ſaid *award* be ready to be delivered, it might be well: if it were in writing, it would be ſufficient to ſay, that it was made; for what is made in writing is then ready to be delivered, becauſe then it is deliverable: but the queſtion is, Whether a parol *award* be properly deliverable? Or whether we ſhall not underſtand the meaning of the words, *ready to be delivered*, to be a delivery in writing? And he and the court ſeemed clear it ſhould be ſo underſtood. But at another day, *Holt*, Chief Juſtice, having peruſed the above caſe in *Dyer*, and the record of it in *Co. Ent.* ſaid, they were very ſtrong authorities for the plaintiff, and that the *award* might have been made behind the parties backs, and delivered, *viz.* pronounced over again to their faces; and if ſo, what may be delivered may be ready to be delivered: and that the caſe, as it is in *Benloe*, was without meaning.

Powell, Juſtice. If the words had been only *ſo as it be made and delivered*, I would take *delivery* to be only to give the parties notice of the *award*; but, *ready to be delivered*, I think, muſt be a delivery in writing; and if iſſue was taken upon the readineſs of delivery, how ſhould it be tried?

Holt, Chief Juſtice. If it were a *new thing*, I ſhould be apt to think ſo too; but when I find ſo clear an authority in the *caſe*, and ſome reaſon for it, I cannot depart from it; and ſo ſaid *Gould*; but they were willing to be well ſatisfied of the *caſe* cited lately in the *C. B.* and therefore no rule was given.

In *Trinity* term following, this matter coming on again, the court delivered their opinion thereon as follows:

On mature conſideration, we are of opinion, that notwithſtanding the late caſe in *C. B.* a *parol award* is capable of a delivery, *viz.* A declaration of it to the parties, or either of them, if they deſire it; and that being ſo, as ſoon as the arbitrators have agreed on the *award*, it is ready to be delivered; and the readineſs of delivery needed not to have been *averred*, becauſe the alledging an *award* made, imports it; nor is the condition in the ſubmiſſion therefore vain; for if after the *award* made, the parties, or either of them, had come, and aſked the arbitrators what *award* they had made, and they had refuſed to tell, then the defendant might have pleaded that it was not ready to be delivered, ſhewing that matter: and perhaps, if the arbitrators had died in a ſhort time after the *award* made, ſo as the party could not have convenient time to aſk them; for the intent of the condition was, that the parties ſhould have notice of the *award*; and it is not eſſential to a *parol award*, that it ſhould be notified to both parties: and as to the *aforeſaid ſum*, though it was agreed the *aforeſaid* could not without *tautology* be applied to *B.* the party, becauſe of the word *aforenamed* before given him; yet, becauſe in ſenſe it could not be applied to the *ſum*, there being no ſum mentioned before, they all agreed that they would make a *comma* after the *aforeſaid*, and ſo join it to the party rather than ſuffer it to go to the *ſum* to vitiate the *awdrd*, and where an *aforenamed* may refer in good ſenſe to either of two antecedents, there it may vitiate, becauſe of uncertainty; but where it has but one thing to refer to, and joining it to that would make it nonſenſe, it ſhall be rejected as idle. *Vide* 2 *Vent.* 242. 3 *Bulſt.* 311. Judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 6. *page* 160. 176.

Trinity, 3 *Ann.* *Winter* v. *Garlick.*

An *award* was made, that one of the parties ſhould pay the other 10 *l.* and the coſts of a ſuit depending in an inferior court, and then to give mutual releaſes.

Per curiam. To pay ſuch coſts, as the maſter ſhall tax, is good; for that is certain which may be rendered certain, but this is uncertain, and carries it farther than has hitherto been allowed. Adjourned. *Vide Salk. vol.* 1. *page* 76.

Michaelmas, 3 *Ann.* *Boiſloe or Purſloe* v. *Baily.*

In *treſpaſs* for aſſault, *&c.* the defendant as to the *with force and arms*, pleads not guilty, and *as to the reſt*, pleads a ſubmiſſion to an *award* of all controverſies, and ſets forth an *award* made, *viz.* that the defendant ſhould provide two fowls at his dwelling houſe, in *Old Bedlam* in *London*, to be eat by the plaintiff and his friends on *Wedneſday* or *Thurſday* in ſuch a week, in ſatisfaction of the ſaid *treſpaſs*; and avers, that on *Thurſday* in the ſaid week he did provide the fowls at his houſe aforeſaid, *&c.* but that neither the plaintiff or his friends came there. To this it was replied, that *Wedneſday* was the day appointed for the treat, and a traverſe that it was *Wedneſday* or *Thurſday*. To which on a rejoinder and demurrer, it was urged that the bare *award* in this *caſe* was not a good *bar*, without an execution of it, becauſe it was of a *collateral* thing, of which the plaintiff could not have an action: and for this was cited *Keilw.* 121. for an *accord* without a ſatisfactory conſideration, cannot be good, and if we have no remedy for what is *awarded*, it is in the power of the defendant, whether he will ſatisfy us or not. 9 *Ed.* 19. *a.* 9 *Co.* 79. 17 *Ed.* 4. 8. *a.* *accord*, and tender and refuſal, is not a good *bar*; and the reaſon is, becauſe the action would not lie on the *accord* for the plaintiff. 16 *Ed.* 4. 8. 9. 1 *Ro. Ab.* 128. *Style* 245.

2d. *Exception* was, that the *treſpaſs* declared on was, *wherefore with force and arms, &c.* and there was no conſideration on ſubmiſſion of the *with force and arms*, and ſo this *award* could not be a *bar* to the declaration,

3d. *Except.* That it being at the election of the defendant to provide the fowls on *Wedneſday* or *Thurſday*, he ought to give the plaintiff notice on which of the days he would provide them, and the time of the day on which he would have them ready; for otherwiſe, if the plaintiff came on *Wedneſday* to his houſe with his friends, the defendant might ſay he would not provide the fowls till next day, and if the plaintiff did not come on *Wedneſday*, the defendant might ſay he provided them the day before.

4th. *Except.* In this caſe it was not enough to ſay, that he had provided the fowls, but he ſhould have tendered them, for the words of the *award* are, *provide and give, &c.*

5th *Except.* There is no *venue* laid where the fowls were provided, only ſaid to be at the defendant's houſe in *Old Bedlam, London*: and in *London* the *venue* ought to be laid in the ward, which is like a hundred, or in a pariſh at leaſt, which is in the nature of a bill in another county. To the firſt objection it was anſwered, that indeed the old authorities held that an *award* of a collateral matter in ſatisfaction of damages, was not a good plea in *bar*, without alledging performance; becauſe as was then held, no remedy lay on the *award*; but though it be true that no remedy lies on the *award* itſelf for it, yet an *aſſumpſit* lies on the ſubmiſſion, which is a promiſe of performance. Chief Juſtice *Holt* very ſtrongly inclined to that opinion, for he ſaid it had often been held latterly, that the mutual ſubmiſſion was an actual mutual promiſe of performance; and if this had been on a bond *awarding* a collateral matter, it had been a good *award*, becauſe the party has a remedy on the bond of ſubmiſſion, and if there be a remedy for the thing *awarded*, it need not be averred executed, and if ſo, the fourth objection, the want of pleading of a *tender* falls to the ground. As to the not ſubmitting the *with force and arms*, it concerns the Queen, and cannot be ſubmitted by the parties.

As to the third objection, it was anſwered, that the giving of notice was not neceſſary, for the defendant by the *award* had the advantage of an election given him: and to the fifth, that the not laying of a *venue* was helped by a verdict.

Per Holt, Chief Juſtice. The want of a *venue* is only curable by ſuch a plea as admits the fact, for which it was neceſſary to lay a *venue*; as if *debt* be on a bond, and no *venue* laid where the bond was made, on demurrer it will be ill; but if the defendant pleads a releaſe, whereby the bond is admitted, that helps the declaration. But in this caſe, by reaſon of the frivolouſneſs of the action, the court gave no judgment, but adviſed the parties to compromiſe the matter. *Vide Mod. Rep. vol.* 6. *page* 221.

Michaelmas, 3 *Ann.* *Arnote* v. *Breame.*

In an action of *debt*, for non-performance of an *award*, the arbitration bond ſtates, ſeveral differences between the plaintiff and defendant, concerning a piece of ground ſouth of the plaintiff's houſe, adjoining to the *River Thames*, and uſed as a wharf, and the erecting ſeveral piles of boards and ſcaffolds thereon, to the nuiſance of the plaintiff's houſe, within the liberties of *St. Bride's Hoſpital, London*. The defendant pleaded *no award* made; and an *award* being ſet forth in the declaration, *adjudging* that the defendant ſhould enjoy the ſaid piece of ground as a wharf, and that the ſaid ſcaffolds ſhould be pulled down and removed; on *demurrer* to the defendant's plea, ſeveral exceptions were taken to the *award*.

1ſt *Exception.* It does not appear what the date of it was; ſo it may be made without authority, as before the ſubmiſſion; *but not allowed*; for it is alledged to have been made on ſuch a day, which appears to be within the time; and if no date be ſet out, it ſhall be intended it had none, and then it is good from the delivery, according to 5 *Co. Clayton's* caſe; and every writing or deed has a date in *law, viz.* the time of the delivery thereof, and a deed may bear date one day, and be delivered on another, and the day of delivery is the date, and the other the bearing date; and the making an *award* or *deed*, is that which gives it the eſſence and being of a *deed* or *award*; and that is the date of it.

2d *Exception.* It was objected, that the ſubmiſſion was of ground, *&c.* within the liberty of the *Hoſpital of Bridewell*, and of ſcaffolds, *&c.* newly erected; and the piece of ground mentioned in the *award* is not *averred* to be within that liberty, nor newly erected.

Per curiam. The *award* is ſaid to be *of and concerning the premiſes*, and therefore it ſhall be underſtood to be within the ſubmiſſion, if the contrary be not proved, which the defendant cannot now do after *no award generally* pleaded, for that would be a departure.

3d *Exception*, It is not *awarded* who ſhall pull down the ſcaffold, therefore the *award* is not final or certain, and void for uncertainty; and this is not to be helped by an *averment* or *intendment* of the court. *Vide Style* 365. 1 *Roll. Abr.* 164. 5 *Co.* 78. *a. Cro. El.* 432. *Mo.* 39. And the difference is, when a thing uncertain may in the nature of the thing be made good by *averment* or *intendment*, and when not; as if one *covenants* to give a bond or obligation for the enjoyment of land, there it muſt be to the value of the land, or if for payment of a certain ſum, it ſhall be in double the ſum. *Cro. Jac.* 116. But in an *award* it is not ſo, for to admit of *averment* is to admit the matter not determined, ſince the *averment* would be traverſable; and to intend would be to make, not to expound the *award*: and it is not an anſwer to ſay that it appears on the face of the *award* that the land was the defendant's, and therefore the nuiſance being thereon, it ought to be removed by him, who may come there without being a *treſpaſſer*.

For it does not neceſſarily appear, that the ground was his; the *award* being only, that he ſhould uſe it as a wharf; which rather ſhews, that it was diſputed whether it was his right before.

2dly, It does not ſhew it to be his now; for the words only are, that he ſhould uſe it as a wharf; that is, that he ſhould have liberty of wharfage there: and if it be admitted to be his ground before, (for if it were the ground of the plaintiff, the erection of the boards could not be a nuiſance to his houſe), yet a nuiſance is by law abateable by him to whom it is a nuiſance; and if it were not, the arbitrators might, by *awarding* the plaintiff to pull it down, enable him to do it, without becoming a *treſpaſſer* thereby. The *award* being left *indefinite*, whether the plaintiff or defendant ſhall pull it down, makes it void for uncertainty; and then this being aſſigned only for breach, though the *award* for other particulars was good, the plaintiff cannot recover; there appearing no cauſe of action on the whole record for him, according to *Turner's caſe.* 8 *Co.*

Holt, C. J. was of opinion, (though *Powell*, *Powys*, and *Gould diſſented*) that when the arbitrators declare it to be a *nuiſance*, and that it ſhould be removed, they ought to have mentioned who was to remove ſuch nuiſance. And though in point of *law* any perſon may remove what is to his *nuiſance*, yet in caſe of an *award*, which is by judges of *equity* as well as *law*, it muſt be intended that it was to be done by the party on whoſe ground it was. Therefore judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 6. *p.* 244.

Michaelmas, 3 *Ann.* *Knight* v. *Burton.*

In *debt* on a *bond*, conditioned for performance of an *award*, which was ſet forth, and a breach aſſigned: on demurrer, exception was taken,

1. That the *award* recited, that the parties were joint-tenants of ſuch land, and ordered they ſhould make partition by mutual conveyances, which was ſaid to be uncertain, and not making an end of the matter, by ſhewing what moiety or part the one ſhould have, and what the other. To which it was anſwered and reſolved, that it was well enough; for whereas they were *joint tenants* before, they would now become *tenants in common*.

2. It was objected, that could not be, for it was further *awarded*, the one ſhould have *one half part or moiety*, which ſhews they intended ſomewhat more than a *tenancy in common*, but left it uncertain; for *dimidia pars*, i. e. *an half part* is a moiety uncertain; and in this very *award*, they in other matters uſed the *Latin* word *medietas* for a moiety in certainty, as *medietas* of the profits of ſuch a ſhip to be delivered, which is to be underſtood of a moiety divided, for otherwiſe it could not be delivered.

Per curiam. Dimidia pars, or *medietas*, ſhall be reſpectively taken for a moiety divided, or undivided, *according to the ſubject matter*, as *medietas* of a thing to be delivered, ſhall be underſtood a divided moiety, becauſe it cannot be delivered, except it be divided; ſo *dimidia pars*, if it be ſuch a thing as cannot be reduced to a divided moiety, ſhall be underſtood a moiety undivided; as in *dower*, a woman demands a *third part*, if it be of ſuch a thing as is capable of having a third part divided made of it, it ſhall be ſo; but if it be of a third part of lands of a tenant in common, a mill, *&c.* it muſt be a third part undivided.

3d. Objection. That they *awarded* money to be paid, which of their own ſhewing, on the face of the *award* did not appear to be due; for it was, whereas ſo much money has been diſburſed by the one party, as is alledged; ſo, though if they had ſaid, whereas ſo much money has been diſburſed, it would be intended, it appeared to them to have been ſo, yet when they go further, and ſay, *as it is alledged*, that takes away ſuch intendment; for they ſhew their certainty of it was only becauſe it was alledged, which might be without any proof; or alledged by any perſon whatever: but it was reſolved, that *alledged* ſhould be underſtood as *alledged*, and not controverted or diſproved by the other ſide.

4th Objection. That it was *awarded*, that a ſuit between the parties in Chancery ſhould be diſmiſſed, which it was urged was ill; for that an *award* ought to be final, and that a ſuit in Chancery might be diſmiſſed, on payment of coſts, ſo as the party might begin again; indeed, if the diſmiſſing be abſolute, it is final; but if it be diſmiſſed, as is frequently done here, without prejudice, the party may begin again, and therefore an *award* of diſmiſſing a ſuit in Chancery is uncertain, but not final; and is like the *awarding*, that one of the parties in a ſuit at law be *nonſuited*, which is void.

Per curiam. It is true, *awarding* that one of the parties be nonſuited is void, for that is not final; but when the *award* is, that a ſuit commenced be diſmiſſed, that muſt be underſtood that it ſhall be diſmiſſed, and ceaſe for ever; that is a ſubſtantial diſmiſſion, and Ceſſer, and not the ſhadow of one; as if the condition of a bond be to deliver up another bond by ſuch a day to be cancelled, and the obligee before the day puts the firſt bond in ſuit, and obtains judgment thereon, and at the day tenders it to be cancelled according to the letter of the condition of the ſecond obligation, yet his obligation is forfeited; and *diſmiſſing* here is in *Latin dimittere*, *anglice*, to *diſcharge*; and to diſcharge a ſuit is to releaſe it, and therefore final. And if an action be depending on a bond, and after the *laſt continuance*, the plaintiff releaſes the action, that releaſes the duty: beſides, this *award* is, that what is *awarded* on the other ſide ſhould be in full of debts, dues, and demands, then owing; and the word *demands* extends to all things that the one party has a right to demand or exact of the other at the time of ſubmiſſion; and the words *due* and *owing* do not qualify or reſtrain it to a debt, or other ſpecial demand, that is more ſtrictly ſpeaking a duty; for whatever a man has a right to demand of another, may well be ſaid to be due and owing from the other to him; ſo it may extend to right of entry into land, to a ſuit for partition, *&c.*

Note. This was agreed to be a ſtated rule in *awards*, that are ſaid to be *of and concerning the premiſes*; that if the words uſed in them be in their own nature more comprehenſive, and ſo capable of being extended to things not within the ſubmiſſion, yet they ſhall be intended that there was no other matter between the parties for them to lay hold on, but what was ſubmitted, if the contrary be not ſhewn: ſo, on the other hand, if the words are more narrow, and leſs comprehenſive, than to take in all the matter of ſubmiſſion; yet it ſhall be intended, that no more was in controverſy than what the words naturally comprehend, if the contrary be not likewiſe ſhewn. Judgment *niſi* for the plaintiff. *Vide Mod. Rep. vol. 6. p. 231.*

Eaſter, 4 Ann. Bell v. *Gipps.* Error.

In *debt* on a bond, with a condition to perform an *award*; to which action the defendant pleaded no *award*; and the plaintiff in reply ſet out an *award*, whereby the defendant was to pay the plaintiff 21 *l.* and that the plaintiff ſhould deliver up to the defendant ſuch a bond, being the matter in controverſy between them to be cancelled, and that the plaintiff and defendant ſhould give to each other mutual releaſes to the day of the date of the ſaid bond; and the plaintiff aſſigned for breach the non-payment of the 21 *l.* On iſſue joined, a verdict was given for the plaintiff in the *C. B.* On a writ of *error* brought on the judgment, the plaintiff in *error*'s council took *exception* to the *award*, that it was not final, for the delivery up of the bond would not deſtroy the effect of it; but ſtill the plaintiff might bring an action on it. And as for the releaſe, that was to be only to the day of the date of the ſaid bond, which muſt be intended to be the bond that was to be delivered up, that being the bond that was laſt mentioned, and the controverſies ſubmitted were ſince that.

The defendant's council in *error* urged, that it did not appear that the bond to be delivered up had any date, and therefore the words muſt be applied to the bond of *arbitration*, which had a date; and alſo that the word *dated* ſignified delivery, and therefore it muſt be conſtrued to the day of the delivering up of the ſaid bond; and that it did not appear that there was any other matter in difference beſides this bond; and that the court would not intend any, and if there were none, the releaſe extending to diſcharge that bond, the *award* will be final. Beſides, the *award* was good without that, for there is money *awarded* to be paid on one ſide, and a bond to be delivered up on the other to be cancelled: and he cited 2 *Vent.* 242. that an *award* by *parol* ſhould be favourably expounded.

Holt, J. C. ſaid, that the *award* was good. For this bond, which is *awarded* to be delivered up, was the foundation of all the controverſies between the parties; at leaſt it does not appear, that there were any controverſies between them about any thing elſe, or that have ariſen ſince the date of the bond; and therefore the *awarding* the bond to be delivered up to be cancelled, and a general releaſe to the defendant to the day of the date of that bond, will make an end of all the controverſies between them.

Powell, Juſtice, held, that the *award* was mutual and final, if the releaſe was left out of the caſe: and therefore the judgment in *C. B.* was affirmed. *Vide Raym. vol. 2. p. 1141.*

Eaſter, 7 Ann. Lupart v. *Welſon.*

An action of *covenant* was brought on an agreement to refer all matters in difference to an *arbitration*, a difference aroſe about a certain demand, and the arbitrators *awarded* 500 *l.* to be paid, and general releaſes to be given. It was argued, that though no expreſs words were in the *covenant*, that the defendant ſhould perform, yet it would be good by implication, and a variety of caſes were cited, particularly 8 *Co.* 82. 1 *Lev.* 113. 1 *Vent.* 69, *&c.* For wherever there is an *equitable* intereſt, it is ſufficient to ſubmit to an *award. T. Jones* 158.

Holt, Chief Juſtice. The very referring a matter to *arbitration* is a mutual undertaking, that each party ſhall perform his part of the *award*; for otherwiſe it cannot be ſaid to be referred. Cannot a ſtranger covenant, that a third perſon ſhall perform the *award* between *A.* and *B.*? This indeed cannot bind the perſon to a performance, but it will be a breach of the other's bond. If a man aſſigns a bond, and afterwards brings an action thereon in his own name, this is a breach of the agreement; the very aſſignment importing a covenant, that the aſſignee ſhall bring the action in the name of the aſſignor, and recover and take the money to his own uſe. Formerly, if an *award* was made to pay a ſum of money, this might have been pleaded in *bar*, though without ſatisfaction; becauſe the law gave *an action of debt* for the money on the *award*, and ſo a remedy. And although that law is now altered, yet, when two perſons ſubmit to an *award*, this amounts to *mutual promiſes*. *Vide Mod. Rep. vol.* 11. *page* 170.

Michaelmas, 10 *Ann.* *Motion for a Mandamus to Sir Gilbert Heathcote, Lord Mayor of London.*

Per Powys, Juſtice. The law in many caſes gives a double remedy, as ſuppoſe a clauſe in a will, that whatever controverſy ſhall ariſe on the conſtruction of it, ſhall be decided by ſuch and ſuch *arbitrators*; the parties will have their election to decide their controverſies, either by *arbitrators*, or by *law*. *Vide Mod. Rep. vol. page* 59.

Hilary, 12 *Ann.* *Abrahat* v. *Brandon.*

In this caſe the arbitrators taking notice of the difference between the parties, *awarded*, that the defendant ſhall pay to the plaintiff ſo much money on the 1ſt of *April*, ſo much on the 1ſt of *May*; and that the parties ſhall pay 1 *l.* 5 *s.* each to the *arbitrators* for their trouble; and that on payment of the *money aforeſaid*, on the 1ſt of *May*, the parties ſhould give mutual releaſes to each other to the time of the making the *award*.

It was *objected* to this *award*, that it was made *on one ſide only*; for nothing was *awarded* in favour of the defendant but the releaſe, for which the defendant had no remedy at *law*; the plaintiff not being by the *award* bound to make the releaſe until after payment of the *money aforeſaid*, on the 1ſt of *May*. Now, the *money aforeſaid* refers not only to the ſums *awarded* to be paid on the 1ſt of *May*, but to all the ſums, and therefore to the ſum *awarded* to be paid to the arbitrators, which part of the *award* is entirely void.

Beſides, the releaſe *awarded* by the arbitrators is a releaſe exceeding their power, which extends only to the time of ſubmiſſion; whereas the releaſe, according to the *award*, extends to the time of the *award* made.

The court were of opinion, that the *award* was good; for the *money aforeſaid* ſhall refer to all the ſums that concern the juſtice of the *award*, but not to that ſum which does not, and as to which the *award* is void.

And as to the *ſecond objection*, it is capable of two anſwers; one a common one, *viz.* that it ſhall not be intended that any new difference has ariſen between the time of the ſubmiſſion, and of making the *award*, unleſs it be ſhewn eſpecially that there has.

The other anſwer is, that a releaſe of all, *&c.* to the time of the ſubmiſſion, is a good performance of an *award* ordering a releaſe to be given of all, *&c.* to the time of the *award*. This opinion *Parker*, Chief Juſtice, ſaid, he had taken from Chief Juſtice *Holt*'s own mouth, in the caſe of *Freeman* v. *Barnard*, 8 *W.* The council likewiſe quoted *Lutw.* 524. 549. to the ſame purpoſe. The reaſon is plain, becauſe that part of the releaſe which extends to the intermediate time, exceeds the power of the arbitrators. *Vide Mod. Rep. vol.* 10. *p.* 201.

Hilary, 12 *Ann.* *Barnardiſton* v. *Fowler.*

There are two points in this caſe:

1ſt. Whether the *award* was a good *award*?

2d. Whether the breach was well aſſigned?

As to the firſt, the court were of opinion that the *award* was a void *award*, though it was not inſiſted on by the counſel, and that for this reaſon.

The *award* was made the 23d of *June*, and the *award* orders ſo much rent, which by the *award* itſelf appeared not to be due until the 24th, to be paid by *A.* to *B.* in ſatisfaction of 6 *l.* which the arbitrators did judge to be owing to *B.* Now, this rent being due on a day ſubſequent to the *award*, the clauſe in the *award* concerning it is void, *Roll. Abr.* 145. *pl.* 8. is an expreſs authority. And the reaſon is plain, *viz.* becauſe the rent may become extinct, either by *ſurrender* or *eviction*, before due. And this clauſe being void, the whole *award* becomes void too; for though an *award* may be void in part, and good for the reſt, yet this muſt not be when it is void in the part that concerns the juſtice of the *award*, which is the caſe here; for if mutual releaſes are to be given, though the rent be not paid according to the *award*, *B.* will be without remedy for that money which the arbitrators acknowledged to be due to him. *Saund.* 292. 2 *Cro.* 584.

But, 2dly. Suppoſing this to be a good *award*, we are of opinion that the breach is not well aſſigned; for the ſubmiſſion being of all ſuits, *&c.* between *A.* and *B.* and the *award* purſuing the very words of the ſubmiſſion, *viz.* that all ſuits, *&c.* between *A.* and *B.* ſhould ceaſe; it is evident that the parties to the *award*, nor the arbitrators, did deſign, the former that their ſubmiſſion, or the latter that their *award* ſhould extend to ſuits depending between *A.* and *B.* and others. But be the intention of the parties what it will, the law is plain, that the proſecution of a ſuit between *A.* and *B.* and others, is no breach of ſuch an *award*. 1 *Roll. Abr.* 249. the caſe of *Brockas* v. Sir *John Savage*, is a much ſtronger caſe, becauſe huſband and wife are to many purpoſes in law conſidered as one perſon. A *certiorari* to return the record of a ſuit between *A.* and *B.* after return of a record between *A.* and *B.* and *B. C.* the record not removed. *Michaelmas*, 12 *W.* 3. on an indictment in this court. *Brown*'s caſe. The ſame law as to orders. Therefore judgment for the defendant. *Vide Mod. Rep. vol.* 10. *p.* 204.

Trinity, 2 *Geo.* *Clark* v. *Elwick.*

The court was moved the preceding term, that one of the witneſſes to a ſubmiſſion to *arbitration* might be obliged to make affidavit thereof, in order to make it a rule of court, purſuant to *ſtat.* 9 & 10 *W.* 3. *c.* 15.

It was inſiſted, that affidavits are voluntary; but the reaſon of the witneſs's refuſal in this caſe was, becauſe the *award* was unfairly made, and they had no other remedy to prevent the ſubmiſſion being made a rule of court.

Per curiam. The hardſhip of this particular caſe will not at all vary our rule, which muſt be a ſtanding method for the future. The act of parliament has appointed only this ſingle way by *affidavit*; and we will not ſuffer a witneſs to evade it by his refuſal. We force a witneſs to a bond by *ſubpœna*, and every witneſs does by his ſigning undertake to prove it when required. And *Hilary*, 6 *Geo.* *Singleton* v. *Bradley*, the ſame rule was granted.

Accordingly, a rule was granted for the witneſs to make affidavit of the execution. *Vide Strange, vol.* 1. *page* 1.

Eaſter, 6 *Geo.* *Anderſon* v. *Coxeter.*

Per curiam. *Stat.* 9 & 10 *W.* 3. *c.* 15. which limits the time of complaining againſt *awards* to the laſt day of the next term, extends not to ſuch as are made in purſuance of an order of *niſi prius*, but only where the ſubmiſſion is by obligation: and nothing is a ground within the ſtatute for us to ſet aſide an *award*, but manifeſt corruption in the *arbitrators*; we will not unravel the matter, and examine into the *juſtice* and *reaſonableneſs* of what is *awarded*. *Vide Stra. vol.* 1. *p.* 301.

Hilary, 10 *Geo.* *Morſe* v. *Surry.*

In an action of *debt* on a bond for the performance of an *award* where the ſubmiſſion was of all actions, *&c.* between the plaintiff and defendant; the defendant pleaded *no award made*, the plaintiff replied, and ſet forth the *award*, wherein the arbitrators *awarded*, that the defendant and his wife ſhould pay 20 *l.* to the plaintiff on ſuch a day, in full ſatisfaction of all *law charges* due to him by the defendant's wife as executrix of one *Bodily*, her firſt huſband, and that both the plaintiff and the defendant ſhould equally pay to the arbitrators the charges of making the *award*, and that they ſhould execute mutual releaſes; the breach aſſigned was, that the defendant had not paid the 20 *l.* on the day.

The defendant's council took *exception* to the *award*; for that the ſubmiſſion being only of all differences between the plaintiff and defendant, the *award* that the defendant and his wife ſhould pay ſo much money to the plaintiff, is ill, becauſe no difference in which the wife is a party, is ſubmitted to the arbitrators. *Rol. Abr.* 246. *pl.* 4.

If *A.* and *B.* ſubmit to the arbitrament of *J. S.* of all ſuits and actions pending between them, the arbitrators cannot make an *award* of an action which *B.* and his wife have againſt *A.* for that is out of the ſubmiſſion.

Hilary, 12 *Ann.* *Barnardiſton* v. *Fowler*. An *award* that all proſecutions ſhould ceaſe in all actions between *A.* and *B.* will not extend to ſuits where *A.* is plaintiff againſt *B.* and others defendants.

2dly. The arbitrators have *awarded* money to be paid to themſelves, which is illegal.

The council for the plaintiff in reply ſaid, the caſe in *Roll's Abridgment* differs from this; becauſe there the wife had a demand, of which ſhe would have been *barred*, without being made a party to the ſubmiſſion. There is a caſe in *Cro. Jac.* 447. in point, where a ſubmiſſion was of all demands betwixt the plaintiff and defendant, and the *award* was that the defendant pay, whereas it was a debt from the defendant's wife as executrix, and yet held good.

2dly. Though that part is void, the reſt is good.

The court were of the ſame opinion, wherefore judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 8. *page* 212.

Eaſter, 12 *Geo.* *Hales* v. *Taylor*.

The plaintiff having brought an action againſt the defendant for turning away his water, the matter was referred to *arbitration*, and the arbitrators *awarded* the defendant to fill up a canal, to reſtore the ſtream to its former courſe, and to do ſeveral other matters relating to his water-works. The plaintiff afterwards applied to the court for an attachment for non-performance of the *award*, and ſeveral affidavits to prove the ſame were read. The defendant alſo produced affidavits to prove his compliance with the directions of the *award*.

The court ſaid, it was diſcretionary, whether they ſhould enforce the *award* by an attachment, and there being a contrariety of evidence, they would not determine it by *affidavits*, ſince the plaintiff was not without another remedy. *Vide Strange*, *vol.* 1. *p.* 695.

Michaelmas, 4 *Geo.* 2. *Philips* v. *Knightly*.

In an action of *debt* on an *award* bond, the defendant pleaded *no award made*. The plaintiff replied, and ſets forth, that *whereas* ſeveral controverſies have ariſen between the plaintiff and defendant, and among others, that the plaintiff had brought an action *qui tam*, as well on the behalf of himſelf as for the *poor of the pariſh of D. &c.* againſt the defendant, *&c.* the plaintiff and the defendant for the adjuſting of the ſaid matters in difference between them, had ſubmitted to the *award* of *J. S.* and *J. N.* ſo as they made their *award* by ſuch a time, and if the arbitrators could not agree, or ſhould not make their *award* within that time, then to the *umpirage* of *H. J. &c.* and ſhews the arbitrators did not make their *award*, *&c*: but that the *umpire* on ſuch a day, made his *umpirage*, *viz.* that the defendant at ſuch a time and place ſhould pay the plaintiff ſuch a ſum, and that done, the plaintiff ſhould enter into a covenant with the defendant, to ſave him harmleſs from the coſts and damages of the *qui tam* action, and that thereon general releaſes ſhould be mutually executed, with regard to all the former matters in difference; and aſſigns for breach of the ſaid *award*, that the defendant did not pay the money according to the purport of the *umpirage*; to which the defendant demurs.

The defendant's council *argued*, that the *umpirage* was void: 1ſt. Becauſe the *umpirage* was made on the laſt day of the time allotted for the making of the *award*, and ſo at a time when the *umpire* had no power by the ſubmiſſion; for that the arbitrators might make their *award* on that day: but on the record being looked into, it was found the *umpirage* was made on the day after; and ſo this objection vaniſhed. 2dly. He inſiſted the *umpirage* was void in itſelf, becauſe it does not make an end of the matter, for it only provides a covenant for the defendant againſt the coſts and damages of the *qui tam* action, and then the plaintiff, notwithſtanding the *umpirage*, might proceed in his action, and defendant would have had no other remedy, but an action of *covenant*; or at leaſt the plaintiff might diſcontinue the action then depending, and bring a new action; ſo that it only tends to create a *circuity* of action; and does not make a final determination of the matter, as it ought: and then the *umpirage* does not aſcertain what the coſts and damages of the *qui tam* action may be, nor does it appoint how, or by whom, thoſe coſts and damages ſhall be ſettled; ſo that it leaves it to the law; and then it cannot be otherwiſe done than by bringing a new action.

The plaintiff's council ſaid, the preſent caſe reſembled that of *Bardſey* v. *Clyſton*, *Cro. Car.* 541. An *award*, that one obligor ſhould acquit the other of a bond, in which they were jointly bound, held good; ſo an *award* that a bond ſhould ſtand in its full force. *Cro. Jac.* 400. 1 *Mod.* 9. 1 *Ro. Ab.* 248. 249. 245. ſo that a ſecurity may be *awarded*; then to the uncertainty of the coſts and damages, he anſwered, *that is certain which may be made certain.*

The defendant's council anſwered to the firſt of theſe caſes, that it was no more than *awarding* the one co-obligor to pay all the money to the next, that it was no more than determining the bond to be a good bond; and certainly where the validity of a ſecurity is ſubmitted, the arbitrators may determine it to be good or bad, which makes an end of the matter: he admitted that an *award* of a ſecurity for the payment of a certain ſum *in future*, may be very good, for that is only giving him that is to pay time for payment of the money, and him that is to receive it a ſecurity, ſince it is not paid *immediately*. But in the preſent caſe, the party is put to an action of *covenant*, and ſo he muſt be recompenſed by a recovery in damages, which is the buſineſs of a jury.

Raymond, Chief Juſtice. This ſeems only to give a new action, the coſts and damages are not aſcertained.

Page, Juſtice. Nor is it appointed by whom they are to be aſcertained.

Lee, Juſtice. There muſt be a jury to aſcertain the coſts and damages, but *awarding* the ſecurity, ſeems good enough. Adjourned.

In *Eaſter* term following the matter was moved again, when the plaintiff's council admitted, that an *award* of a *covenant* to indemnify againſt the ſuit of a third perſon, and the coſts and damages therein, would be bad; but here the plaintiff is to covenant againſt an act, which it is in his own power to prevent, as by diſcontinuing the action formerly by him brought, and conſequently putting it beyond all poſſibility, that any damage could thereby ariſe to the defendant. To the objection that a ſecurity may not be *awarded Salmon's caſe.* 5 *Co.* 77. is a full anſwer; for there an *award*, that one of the parties ſhould enter into a bond to the other, was held bad, for no other reaſon, than not ſpecifying in what ſum the bond ſhould be; and the *caſes* mentioned on the former argument, were *cited* to the ſame point. It is not neceſſary that an *award* of itſelf makes an end of the matter in controverſy, for it may refer that to a future act; ſo is the caſe of *Freeman* v. *Bernard*, *Cath.* 378. An *award* that the parties ſhall execute mutual releaſes, is no *bar* to the demands on either ſide, till the releaſes are executed, and yet that was a good *award*; and either part may have an action for non-performance thereof: ſo in this caſe the plaintiff might both covenant to indemnify the defendant againſt the coſts and damages of the *qui tam* action, and might perform his ſaid covenant, and therefore would be liable to an action for an omiſſion of either; which was making a certain end of the matter then in controverſy.

On this argument, Lord *Raymond*, Mr. Juſtice *Probyn*, and Mr. Juſtice *Lee*, held it a good *award*, but the further conſideration of the matter was adjourned.

At another day this matter came on again, when the plaintiff's council moved for judgment, which the court gave as follows:

Mr. Juſtice *Page* held, this is not a good *award*, for it does not determine the *qui tam* action, and then the defendant might be vexed, and made liable to coſts and damages every day of his life, againſt which no other remedy is provided for him, but a *covenant*, and on that he muſt be put to his action for every new damage, and the recompence will be in the breaſt of a jury; and therefore the *award* will be the occaſion of a greater controverſy than was before. If a bond had been *awarded* for the indemnity of the party, it had provided a certain recompence, which might be recovered by one ſuit. The coſts and damages that might accrue by reaſon of the *qui tam* action, ought to have been aſcertained by the *award*, or the taxation thereof ſhould have been referred to the *proper officer*. 1 *Sid.* 358. 1 *Salk.* 75. And that not being done, the *award* is quite uncertain, and like that, by which it was *awarded*, that the defendant ſhould pay unto the plaintiff what was then due to him for taſk-work, and day work, which was held void, becauſe the whole of the ſaid work, was not ſtated thereby. 2 *Saund.* 292.

Lord *Raymond* obſerved, that the books are growing leſs and leſs nice every day in the conſtructions of *awards*. That the arbitrators could not *award* that the *qui tam* action ſhould be dropped, becauſe the *poor of the pariſh* who were intereſted in that ſuit, were not parties to the ſubmiſſion; and therefore they went as far as they might in providing the defendant ſhould be indemnified, by a covenant on the part of the plaintiff, which though not ſo certain as a bond, yet it is good, for there muſt be an action in both caſes: here the matter to be done by the plaintiff, was in his own power, and the *award* has given the defendant a ſufficent remedy in caſe of non-performance by the plaintiff, ſo that this *award* is as final, and as certain as the nature and circumſtances of the caſe would bear.

Probyn, Juſtice. The plaintiff might have dropped the *qui tam* action, which had made an end of the matter, and by this the defendant would have been indemnified. I cannot diſtinguiſh this from the caſe of *Bardſey* v. *Clyſton*. *Cro. Car.* 541. nor from 1 *Mod.* 9. as to the caſe in *Saunders*, it was part of the ſubmiſſion to ſettle what was due, the party might be reimburſed by one recovery in an action of *covenant*, and the covenant is as good as a bond.

Lee, Juſtice. *Awards* ſhould be *certain* and *final*, as far as may be from the nature of the thing, and therefore an *award* that there ſhall be a *non-ſuit* of the plaintiff in ſuch an action, is not good; becauſe that will not hinder the bringing of a new one. I found my opinion on this, that the preſent *award* was as *final* and *certain* as the matters in difference would bear, for it is not neceſſary that an *award* ſhould of itſelf put a *final end* to the matter. 2 *Cro.* 400. So an *award* that one of the parties ſhall procure a third perſon to do an act which he might be compelled to, is good: accordingly judgment was given for the plaintiff. *Vide Fitz-Gibbons page* 167. 270.

Hilary, 5 *Geo.* 2. *Dilley* v. *Polhill.*

In an action of *debt*, the plaintiff declared, that on the *7th March*, 3 *Geo.* 2. the defendant by bond ſubmitted himſelf to the *award* of *J. P.* an arbitrator indifferently named and elected, as well on the part of the plaintiff, as of the defendant; ſo as the *award* be made in writing under his hand and ſeal, before the *20th of April*. That, on the *18th April*, the ſaid *P.* by a writing under his hand and ſeal, reciting, that an action had been brought by the plaintiff againſt the defendant, for words, therefore, to end the diſpute, he *awarded*, that the defendant ſhould, on the 27th of *April*, between two and five in the afternoon, at the *Cock and Lion* in *Dartford*, pay the plaintiff *ten guineas* for his damages, and 6 *l.* 19 *s.* for his coſts; and that the plaintiff ſhould pay the defendant *one ſhilling*, after which both ſhould give mutual releaſes.

The defendant demurred to the plaintiff's declaration, and his council *argued*, that the plaintiff had not in his declaration ſhewn what was neceſſary to maintain his action, for he has not ſhewn that there was any ſubmiſſion on his part; and it is contrary, 1ſt, To the nature of an *award*, and 2dly. To the *precedents*.

1ſt, An *award* is the determination of a third perſon between two others, who ſubmit to his judgment. Theſe ſubmiſſions create a mutual obligation on both, to acquieſce in his deciſion. It is therefore contrary to the nature of an *award*, that the arbitrator ſhould determine any thing, with regard to one who does not ſubmit to his judgment: and in 1 *Roll. Rep.* 194. it is reſolved in *aſſumpſit*, that mutual promiſes ſhall bind, without any other conſideration.

2dly. The *precedents* are all contrary, and a ſtrong evidence what the *law* is. 2 *Saund.* 61. 127, 337. 1 *Saund.* 32. *Ma.* 359, 642. *Raſt.* 153 *b.* *Co. Ent.* 41. *a.* 64. *a.* *Tho. Ent.* 107, 116. *Aſhton's Precedents*, 188, 200. *Litt. Rep.* 312. 1 *Leon.* 72. 1 *Roll. Rep.* 5. *Brownl.* 181. *Regiſt.* 111 *a.*

The plaintiff's council allowed, that a mutual ſubmiſſion was neceſſary to be ſhewn; but inſiſted that it is ſufficiently averred, it being laid, that the arbitrator was elected for both; and that in declarations it is enough for the plaintiff to ſhew what makes for him, according to 1 *Sid.* 161. *Litt. Rep.* 312.

The defendant's council in reply obſerved, that the *averment* is not that the arbitrator was nominated by, but on the behalf of, the defendant, which might be done by a friend, to whoſe nomination the defendant might not ſubmit; and as to the caſe in 1 *Sid.* it is only ſaid by the council, and agreed by *Twiſden*, Juſtice, that if the plaintiff brings *debt* for money *generally*, without ſhewing the *award* to be of both parts, it is well enough; but not a word ſaid about the ſubmiſſion. And as to *Litt.* 312. that is only that the plaintiff need ſet out no more of the *award* than makes for him: but in that *caſe* it is *averred*, both ſubmitted. And for want of it here, it does not appear that the defendant had any remedy for the 1 *s.* or releaſe *awarded* to him.

Per curiam. There is a great deal of difference where the action is brought on the bond of ſubmiſſion, and where it is on the *award*: in the *firſt caſe*, the defendant, by craving *oyer*, ſhews that there were mutual ſubmiſſions, the condition always ſo reciting it: but in the *other caſe* it muſt be *averred*, before you can properly introduce your *award*: *on the behalf*, does not import him to be named by the defendant; and in *debt* on the bond, *no award made*, admits a ſubmiſſion: we think, therefore, that as a mutual ſubmiſſion is neceſſary to be ſhewn, there is nothing *tantamount* on this declaration. The plaintiff therefore diſcontinued his action, on payment of coſts. *Vide Strange, vol.* 2. *page* 923.

Trinity, 7 *Geo.* 2. *Shephard* v. *Brand.*

On a motion to ſet aſide an *award* made on an order of reference to the three foremen of a ſpecial jury, *exception* was taken thereto.

1ſt, That the arbitrators had taken on them to give a particular ſum for coſts, which ſhould have been left to the taxation of the maſter.

2dly, That they had alſo taken money of the plaintiff *alone* for their charges, without any bill delivered in before the making their *award*.

Hardwicke, Chief Juſtice. Arbitrators, who are judges to determine finally the differences between the parties, may, if they think fit, take on them to enquire of and give *coſts* as well as *damages*; and this court has no power to take notice of it, any otherwiſe than if they are *exceſſive*, without any reaſon given for it, as on evidence of ſome undue practice.

As to the *ſecond point*, where *arbitrators* (let their characters be otherwiſe never ſo unexceptionable) take money of one of the parties *ſingly*, whether for charges, or any thing elſe, before making their *award*, as this is a mattter of ſo tender a nature, that even the appearance of evil in it is to be avoided, and this practice may be of dangerous *example*, it is ſufficient cauſe to ſet aſide the *award*; for if this ſhould be ſuffered, it will be hard to diſtinguiſh what is corruption. *Vide caſes temp. Ld. Hardwicke, page* 53.

Michaelmas, 9 *Geo.* 2. *Nott* v. *Long.*

In an action of *debt*, brought on an arbitration bond; the defendant pleads *no award*; the plaintiff replies, and ſets forth an *award*, which, amongſt other things, *awards* that the defendant ſhall pay the plaintiff ſuch ſums as *J. W.* and *J. G.* ſhall ſettle for coſts, having regard to ſuch coſts as are uſually taxed by maſters in *Chancery*, and then mutual releaſes were *awarded* between the parties: and further, that the ſaid *J. W.* and *J. G.* ſettled the ſum of ——— to be due for coſts, in which they had regard, *&c.* and for breach the plaintiff aſſigns the non-payment of theſe coſts: to which replication the defendant demurred.

The defendant's council on the demurrer *argued*, that the *award* was bad; becauſe the arbitrators had delegated their authority; and cited the caſe of *Winter* v. *Garlick*, in 1 *Salk.* 75. and 6 *Mod.* 195.

The plaintiff's council, in reply, cited *Cro. Car.* 383. *Beal* v. *Beal*, where an *award* to pay the charges in ſuch a ſuit, held good. 1 *Roll. Abr.* 251. *pl.* 14. to pay his part of the voyage, held good; 2 *Ventris* 242. to pay the coſts expended *about proſecuting the aforeſaid*, *&c.* held good. The plaintiff's council *urged* that this taxation to be made by *J. W.* and *J.* G. is but a miniſterial act, and they may delegate their authority in *miniſterial* acts, though they cannot in *judicial* acts; for which diſtinction he cited S*tyle* 217. *Cater* v. *Startue*, and *Palmer* 146. *Grove and others* v. *Craw and others*.

Lord Hardwicke. One would go as far as poſſible to ſupport *awards*, where there is no objection to their being fairly made, but I doubt if this *award* be good. It is true, in the caſe of *Winter* v. *Garlick*, it was held that the arbitrators might *award* the party to pay the coſts to be taxed by the maſter, and even that is going beyond the *general rule*; but the reaſon of it ſeems to be, that arbitrators are judges between the parties, and, as it were, put in the place of the court by the parties; and as the court may give judgment for coſts, ſo arbitrators have been allowed to do alſo; but they muſt order them to be taxed by the maſter, as the court would do; now this is not ſo ordered, but for aught appears, the taxation is referred to perſons who are ignorant of the matter; and the caſes cited by the defendant's council are not contrary to this, for they are where coſts were awarded *generally*, which I think is well enough, for then they will be referred to the proper officer.

Page, Juſtice, concurred with the Chief Juſtice.

Probyn. Juſtice. I am inclined to think the *award* good, and that they may as well appoint theſe two perſons as they might the maſter; for it is no more than taking them to their aſſiſtance.

Lee, Juſtice. I think this is a direct delegation of their authority. And he cited the caſe of *Robinſon* v. *Barneſly*, laſt *Hilary* term, where an *award* that the parties ſhould give ſecurity *fourteen* days after their time was expired, was held to be bad: theſe perſons muſt be conſidered as their delegates; and in caſe of a private authority, it is a *ſettled rule* that they muſt execute it themſelves, and cannot delegate it. Indeed it may be different when referred to be taxed by the maſter, becauſe that is the ſettled way of taxing coſts, by the *law* of the land.

Lord Hardwicke. As to *awards*, there are three rules; 1ſt, That the arbitrators muſt make a *final* end, ſo as the parties may have the fruits of it without ſuit. 2d, That they cannot delegate their authority. 3d, The *award* muſt be made within the time limited. Now this *award* does not make a *final* end, for here is a matter to be done after the time expired; but it is ſaid, that as to coſts to be taxed, that is allowable; and it is true, it has been allowed to be referred to the *proper officer*, as in *Winter* v. *Garlick*; but it is there expreſsly ſaid, they muſt be ſettled by the arbitrators, or by the maſter; and that is reaſonable enough, becauſe the reference to the *proper officer* makes an end of it, for he is ſubject to the authority of the court, who, if he errs, can amend his errors ſummarily; but if referred to ſtrangers, the court cannot intermeddle. 2dly, The arbitrators muſt execute their authority themſelves, which they have not here done; indeed a diſtinction has been taken between *judicial* and *miniſterial* acts; but this is not a mere *miniſterial* act, and appears not to be ſo, from the penning of this *award*, for they are directed to have regard to ſuch coſts as a maſter would allow, which is certainly an act of judgment; but when the reference is to the maſter, it is in the eye of the court: ſuppoſe theſe two perſons had been miſtaken as to what coſts ſhould be allowed, how could it then be ſettled, but by a trial before a jury on *averment*, that it was ſo, or was not ſo? And this is no inconvenience; for they might, within the time limited, have had the aſſiſtance of theſe two men in this matter, and have made it part of their *award*.

Lee, Juſtice. By *Cro. Jac.* 315, 584. the arbitrators cannot reſerve an authority to themſelves after the time of the ſubmiſſion. *Jenkins Cont. fo.* 128. If the *award* be to releaſe to another, by the advice of *J. S.* it is good; and the reaſon given is, becauſe that reference is only for the execution of the arbitrement; for he lays it down as a rule, that the arbitrators cannot delegate their authority. It is true that in *caſes of coſts* it has been allowed to refer to the maſter, and the reaſon is, becauſe they have then made an *award* of coſts in the ſame manner as coſts are uſually given.

In *Comberbach* 456. An *award*, that if the plaintiff makes out before a judge any diſburſements laid out for the defendant, ſhall pay them likewiſe, held bad; but *Holt*, Chief Juſtice, there ſaid, they have no liberty to do any future act, unleſs it be by referring the matters in difference to a maſter of a court, to tax coſts; which is agreeable to what he ſays in *Winter* v. *Garlick*; reference to a maſter is proper execution of the arbitration, and is merely *miniſterial*, but reference to a ſtranger is *judicial*. Therefore judgment was given for the defendant. *Vide Caſes Temp. Lord Hardwicke*, *page* 181.

Michaelmas, 9 *Geo.* 2. *Tipping* v. *Smith*.

An *award* was made in this cauſe, (reciting that the defendant had beat the plaintiff) whereby it was *awarded*, that the defendant ſhould give ſecurity to pay the plaintiff an annual ſum for life; and that all manner of proceedings (if any) depending at *law* ſhould not be farther proſecuted. On demurrer, this *award* was held ill, being uncertain, and not final or mutual. It was *uncertain*, becauſe it did not determine what ſort of ſecurity ſhould be given: it was not *final*, it ſtaying only proceedings then depending, (if any) ſo that if the plaintiff had brought no ſuit he was at liberty ſo to do, or even to diſcontinue what was brought, and bring new ones. And it was not *mutual*, there being no releaſes, or any thing *awarded* to be done by the plaintiff. Therefore the court gave judgment for the defendant. *Vide Stra. vol.* 2. *p.* 1024.

Michaelmas, 11 *Geo.* 2. *Booth* v. *Garnett*.

In *debt* on a bond, the condition whereof recited, that the plaintiff and one *Gilbert* had ſubmitted a diſpute to *arbitration*; and therefore if the defendant ſhould pay what *Gilbert* ſhould be *awarded* to pay (not exceeding 20 *l.*) the bond to be void. On the replication, it appeared that the *award* was for *Gilbert* to give the plaintiff his note for 18 *l.* payable at a future day.

The defendant's council inſiſted, that his bond was only to pay the *money awarded*; and therefore as the *award* was to do a *collateral* act, it was not within the condition.

The court ſaid, that *awards* were to have reaſonable conſtructions, and as the meaning of this was to give the party time, it was equal to ordering him to pay the money at a future day, without ſaying any thing of giving a note in the mean time: and therefore gave judgment for the plaintiff. *Vide Strange, vol.* 2 .*page* 1082.

Hilary, 16 *Geo.* 2. *Harriſon* v. *Grundy*.

The court held, that on *ſtat.* 9 & 10 *W.* 3. *c.* 15. they could not receive any complaint to ſet aſide an *award* till the ſubmiſſion was made a rule of court; and that a conſent in the ſubmiſſion-bond to make the *award* a rule of court, inſtead of the *ſubmiſſion*, would not warrant their interpoſing. *Vide Strange, vol.* 2. *p.* 1178.

Eaſter, 30 *Geo.* 2. *Hawkins* v. *Colclough.*

In an action of *treſpaſs*, for an *aſſault*, *battery*, and *falſe impriſonment*, brought by the plaintiff againſt the defendant, the defendant pleaded an *award*, (made pending the action) and a tender of the ſum *awarded*: to which plea the plaintiff demurred.

The *award* made was in theſe words: "Whereas
"there has been a ſuit at law between the parties,
"that hath run to a great expence on both ſides, and
"it being left to me to make an end of it; I deter-
"mine that they ſhall each of them pay their own
"charges at law, and that the defendant pay the
"plaintiff *five ſhillings*, for his making the firſt breach
"in the law."

The plaintiff's council objected to the *award*, as being *uncertain*, and *not final*.

Firſt, It is *uncertain*, becauſe the ſubmiſſion is of ſeveral matters: and the *award* does not at all ſhew, which of them it means to determine, 1 *Roll. Abr.* 242. *letter B. pl.* 1. 252. *pl.* 10. He *urged*, that an *averment*, without a fact to ſupport it, is of no avail. 1 *Lord Raym.* 246. *in the caſe of Bacon* v. *Dubarry*.

This is an action of *treſpaſs*. The ſubmiſſion is of all *treſpaſſes*; and the *award* does not diſtinguiſh what *treſpaſſes* it determines. 1 *Roll. Abr.* 251. *letter I. pl.* 1. *and pl.* 3. *and the caſe of Maw* v. *Samuel, in Popham* 134. *and* 2 *Ro. Rep.* 1.

Second point. It is not *final*, which it ought to be.

An *award* muſt be *final*; but this *award* was made pending the action, and it does not put any end to it at all.

The defendant's council *cited* ſeveral caſes in ſupport of the *award*, and obſerved, that the preſent *award* (which was made by a *cobler*) *recites* that there was ſuch a ſuit, and that it being left to him to make an end of the ſuit, he determined as follows; *viz.* "That the ſaid *J. H.* and *J. C.* ſhould each of
"them pay their own coſts and charges at law; and
"that the ſaid *J. C.* ſhould pay the ſaid *J. H. five*
"*ſhillings*, for his making the firſt breach." And this may be pleaded in *bar*, in another action.

In this caſe the arbitrator certainly intended to make an end of this ſuit between the parties, and thought 5 *s.* adequate to the injury. To which arguments offered by the defendant's council, the plaintiff's council replied; when the court gave judgment.

Lord Mansfield. The queſtion before us is, whether this is a good *award?* *Awards* are now conſidered with *greater latitude*, and *leſs ſtrictneſs*, than formerly; and it is right they ſhould, becauſe they are made by *judges* of the parties own *chuſing*.

Awards muſt have theſe two properties, they muſt be *certain*, and *final*. The *certainty* is to be judged of according to a common intent, and conſiſtent with *fair* and *probable* preſumption.

In this caſe, the *ſubmiſſion* is in general terms; *viz.* Of all actions, controverſies, and ſuits, between them; and it appears that this ſuit only was depending between the parties, and therefore there is no probable preſumption of any other.

As to its being *final*, it ſeems to be a reaſonable and fair *award*.

The arbitrator thought it a *trifle*, and that both parties were in the wrong, and therefore *awarded* each to ſtand by his own coſts.

The 5 *s. awarded* to be paid is *manifeſtly* in ſatisfaction of this action, and of courſe is a diſcharge of it, being *paid* or *tendered*.

Deniſon and *Foſter*, Juſtices, concurred with the *Chief Juſtice*; and the court gave judgment on the *demurrer* for the defendant. *Vide Bur. vol.* 1. *p.* 274.

Eaſter, 30 *G.* 2. *Perry* v. *Nicholſon.*

On an action of *debt*, brought by the plaintiff againſt the defendant, on the non-performance of an *award*.

The plaintiff, in his declaration on this action, ſets forth the former action, and the reference and *award* made thereon, and *avers*, that there was, at the commencement of the action, or at the time of the reference, no other money any ways due to him the ſaid plaintiff, from the ſaid defendant, but the matter in difference in the ſaid cauſe, and that no other action was depending between them.

The ſum *awarded* to the plaintiff by the ſaid *award*, was 48*l.* 11 *s.* 10 *d.* and the coſts directed to be taxed thereby, was taxed by the maſter at 28*l.*

To which action the defendant pleads, *that no ſuch award was made*. The plaintiff replies, *that there was ſuch an award*. On which iſſue was joined.

The defendant's council reſted his client's defence on the *award*'s not being ſufficiently ſet forth by the plaintiff in his declaration, and that the evidence varied from the charge.

Lord Mansfield. Nothing is more clear, than that in an action of *debt* on an *award*, a perſon need not *ſtate* in his *declaration* any more of the *award* than ſupports his caſe.

If there is any matter by way of condition, *precedent* to the payment of the money, the defendant may ſet it out in pleading.

Deniſon, Juſtice. The queſtion is, whether the *award* given in evidence is ſufficient to ſupport the *award* ſet forth in the declaration.

It has been ſettled that in actions on *awards*, (which are no ſpecialties) there is no occaſion to ſet forth the whole *award*; and cited 1 *Leon* 72. *Smith* v. *Kerfoot. Litt. Rep.* 312, 313. *Leake* v. *Butler.* 1 *Salk.* 72. *Foreland* v. *Marygold.* 1 *Raymond* 715. *Foreland* v. *Hornigold*

Foſter, Juſtice, concurred with his brethren.

Per curiam. Let the *poſtea* be delivered to the plaintiff. *Vide Bur. vol.* 1. *page* 278.

Michaelmas, 32 *Geo.* 2. *Lucas, on the Demiſe of Doctor Markham and others,* v. *Dr. Wilſon.*

On ſhewing cauſe why an *attachment* ſhould not iſſue againſt Dr. *Wilſon* for refuſing to perform an *award* made purſuant to a ſubmiſſion entered into by a rule of this court in the above-mentioned cauſe then there depending; it became part of the queſtion, "Whether this was within the act of 9 & 10 *W.* 3. *c.* 15. for determining differences by *arbitration?*" And the court thought it was not, but that it ſtood on the *common law*, independant of the act, which was made to put ſubmiſſions to *arbitration* in *caſes* where there was no cauſe depending on the ſame fact, in the ſame manner as thoſe where there was a cauſe depending. But here was a cauſe depending at the time of the ſubmiſſion, and therefore the caſe was not within the proviſion of this act.

Lord *Mansfield* ſaid, that *ſtat.* 9 & 10 *W.* 3. was only *declaratory* of what the *law* was before in caſes where there was a cauſe depending in the court. He obſerved, that the court will not enter at all into the merits of the matter referred to arbitration, but only take into conſideration ſuch *legal objections*, as appear on the face of the *award*, and ſuch *objections* as go to the miſbehaviour of the arbitrators. Therefore the rule for an attachment was made abſolute. *Vide Bur. vol.* 2. *p.* 701.

Trinity, 5 *Geo.* 3. *Biſſex* v. *Biſſex.*

In an action of *debt* brought by the plaintiff againſt the defendant on a bond, dated 28 *March*, 1764, to perform an *award* to be made and delivered on or before 21ſt *May*, then next following. The defendant pleaded, that the arbitrators did not make any *award* on or before 21ſt *May*. To this plea the plaintiff replied, that the arbitrators in the ſaid bond mentioned, after the making the ſame, to wit, 21ſt *May*, did make their *award*, whereby they ordered the defendant to pay to the plaintiff 56*l.* due on divers accounts, from *J. B.* deceaſed, the defendant's father. To the plaintiff's *replication* the defendant demurred *ſpecially*, and aſſigned the following cauſes of demurrer.

1ſt. It does not ſhew that the *award* was made, and ready to be delivered to the parties on or before the 21ſt day of *May*, but that the pretended time of making the ſaid *award* is included under a *videlicet*, and not made, or attempted to be made, part of the iſſue in this cauſe.

2dly. The *award* was made concerning tranſactions ſuppoſed to have paſſed between the plaintiff and the defendant's father, without ſhewing that ſuch tranſactions were ever ſubmitted to *arbitration* by the ſaid bond.

3dly. That the *replication* was a mere *negative pregnant*, neither *confeſſing*, *traverſing*, or *denying* the matter alledged by the defendant's plea.

The plaintiff joined in demurrer, on which this matter was brought on to be tried.

The defendant's council *argued*, that it did not appear that the *award* was made within the time limited, for the time of making ſuch *award* is not poſitively, directly, and preciſely alledged, but only comes under a *videlicet*. It is not alledged with ſufficient certainty for the defendant to have taken iſſue on.

The plaintiff's council in reply ſaid, the record ſhews the *award* was dated on the 21ſt *May*.

Wilmot, Juſtice. The *award* was in fact made on the 21ſt *May*.

Yates and *Aſton*, Juſtices, were of the ſame opinion.

Per curiam. Unanimouſly judgment for the plaintiff. *Vide Bur. vol.* 3. *page* 1729.

Arreſt.

An *arreſt* in the night is good. 9 *Rep.* 66.

A perſon *arreſted* in *Weſtminſter Hall*, while the court is ſitting, may be diſcharged on motion, if *arreſted* on *meſne proceſs*, but *cannot* if taken in execution; though even in that caſe the officer is puniſhable by the court. *Bulſt.* 85. *Vide Salk. vol.* 3. *page* 46.

Eaſter, 7 *W.* 3. *Anonymous.*

Adjudged, that a *common bailiff* is not bound to ſhew his warrant, either at the time of the *arreſt*, or at any time after; but he is bound to ſhew the cauſe of the *arreſt*, and at whoſe ſuit; but a *ſpecial bailiff* may be required to ſhew his warrant, for he is not known as a *common bailiff* is, and no man is bound to ſubmit himſelf to one who is not known or preſumed to have an authority. *Moor* 767. 6 *Rep.* 54. 9 *Rep.* 69.

If a writ is returnable, 9 *Feb.* or *in eight days of the Purification*, *&c.* and the defendant cannot be *arreſted* by virtue of ſuch writ, either on the 10th or 11th of *February*, though 'tis before the *fourth day after*, if the perſon is *arreſted*, the officer cannot juſtify it, either in an action of *treſpaſs* or *falſe impriſonment* brought againſt him; but if the defendant be *arreſted* on a *ca. ſa.* on the *ninth* day of *February*, which is the very day the writ was returnable, the *arreſt* is good. 3 *Cro.* 180, 408. *Moor* 711. *Sid.* 229. *Vide Salk. vol.* 3. *page* 46.

Trinity, 7 *W.* 3. *Wilſon* v. *Tucker*.

An *arreſt* on a *Sunday* is a void *arreſt*, and an action of falſe impriſonment lies againſt the officer, at the ſuit of the party arreſted. *Vide Salkeld, vol.* 1. *p.* 78.

Michaelmas, 7 *W.* 3. *The King* v. *Kendall and Roe.*

On a *habeas corpus* directed to the keeper of *Newgate*, he returned, that the defendants were committed to his cuſtody, by a warrant from Mr. Secretary *Turnbull*, for *high-treaſon*, in aiding and aſſiſting Sir *J. M.* to eſcape, who was committed to the cuſtody of a meſſenger, on ſuſpicion of *high-treaſon*, *&c.*

Exceptions being taken to this return: *Holt*, Chief Juſtice, declared, that at *Norwich* aſſizes it was ruled by *Hale*, Chief Juſtice, that if a juſtice of peace directs a warrant to any particular private man, he may execute it, and *arreſt* the party, and well juſtify the execution, in an action of falſe impriſonment; and further, that the *Tower* was conſidered by the law, and really was a priſon, within the *habeas corpus* act. *Gibbon's caſe. Vide Raym. vol.* 1. *p.* 65.

Eaſter, 8 *W.* 3.

Where a *capias* is awarded againſt *W. R.* and a *common bailiff* knows the writ to be in the hands of the ſheriff:

Per Holt, C. J. He may *arreſt W. R.* without actually having the warrant. *Vide Salkeld, vol.* 3. *page* 46.

9 *W.* 3. *Brown* v. *Burlace.*

In this caſe it was held, that the *Temple* is *extra-parochial*, and not within any pariſh, nor within the city of *London*, ſo as to come within the *cuſtoms*, but within the county of the *city*; and that the *White Fryars* was within the juriſdiction of the *city*.

Dugdale and *Stow* ſay, that the *Temple* is privileged from *arreſts*, by the grant of the *King*.

Per Holt, C. J. If the *King* has made ſuch a grant, 'tis void, becauſe the *Templars* have no court of juſtice within themſelves; yet the court inclined, not to countenance *arreſts* in the *Temple*, in term time; but would not ſet aſide the *arreſt* of the defendant, who was arreſted in the *Temple*; and therefore he was held to ſpecial bail. *Vide Salk. vol.* 3. *p.* 45.

Michaelmas, 10 *W.* 3. *Savil* v. *Roberts.*

See this caſe fully ſtated in *page* 23 of this work, under the head *Actions*.

The caſe of *Chamberlain* v. *Preſcott*, being cited in the above cauſe, *Holt*, C. J. ſaid, that he had a manuſcript report thereof, drawn up by *Bridgman*, Chief Juſtice of *C. B.* wherein the caſe is thus ſtated. *C.* brought an action on the *caſe* againſt *P.* in which he declared, that the defendant *P.* cauſed him *falſely and maliciouſly* to be indicted on the ſtat. 8 *Eliz. cap.* 2. for having cauſed *C.* to be *arreſted* at the ſuit of *S.* without his conſent, of which he was acquitted, *&c.* After verdict for the plaintiff, it was moved in *arreſt of judgment*, in the *King's Bench*, and judgment was entered for the plaintiff. On which *error* was brought in the *Exchequer Chamber*, and after the Reſtoration, that caſe had a great debate; and the judgment of the *King's Bench*, for maintaining of the action, was reverſed. *Bridgman*, Chief Juſtice, was againſt all ſuch actions. But it appears by his report, that this was not the reaſon of the reverſal of the judgment, but becauſe *C.* was *indicted* for what was no offence at all; for, in fact, *P. arreſted C.* in his own name, and the name of *S.* for a debt due to them *jointly*, which was lawful, without the conſent of *S.* and if *S.* did not appear, if it were in a *perſonal* action, he might be *nonſuited*, if in a *real* action, ſummoned and ſevered: and therefore it was held to be no offence. *Vide Raym. vol.* 1. *page* 380.

Trinity, 12 *W.* 3. *The King* v. *Fowler.*

The defendant was *arreſted* on an *excommunicatione capiendo.* The *ſignificavit* expreſſed, that the defendant was excommunicated for *contumacy* in a ſuit, for withholding tythes, and other eccleſiaſtical dues. The defendant brought his *habeas corpus*, directed to the ſheriff of the county, *&c.* or to the goaler, who returned the warrant of the ſheriff on the *excommunicatione capiendo*, &c. The council for the crown took *exception* to the return, that as it appeared on the recital of the *ſignificavit* in the warrant, the defendant was excommunicated in a ſuit for tythes or eccleſiaſtical dues in the *diſjunctive*, and therefore ill, becauſe the cauſe of excommunication ſhould appear to be ſufficient, and the *ſpecialty* of it ought to be ſhewn. For perhaps the *eccleſiaſtical dues* may be ſuch as he was not obliged to pay. Excommunication ſo generally pleaded, without ſome other ſpecial cauſe, will not be ſufficient to ſtay another's ſuit. 8 *Co.* 68. 6 *Trollop's caſe*; and the *King* v. *Sanchee* was cited, where on a writ of *habeas corpus* the defendants were returned, committed by a warrant of two *juſtices of peace*, in purſuance of ſtat. 27 *Hen.* 8. *cap.* 20. for *contumacy* in a ſuit before an *eccleſiaſtical* judge for tythes or other *eccleſiaſtical dues*, and on the ſame *exception* as in this caſe, the defendants were diſcharged. The court gave no opinion in this matter: but *Holt*, Chief Juſtice, ſaid, that *Sanchee*'s caſe differed, becauſe the commitment there was by virtue of a *ſpecial* authority given to the *juſtices of peace* by the ſaid act, which ought to be purſued ſtrictly. But the court quaſhed the *habeas corpus* for two reaſons, 1ſt. Becauſe it was directed to the ſheriff or gaoler in the disjunctive, which the *clerks* agreed was contrary to the practice of the court.

2dly. Becauſe the writ of *excommunicatione capiendo* was not returned, but only the warrant of the ſheriff; for the writ ought regularly to be returned; for may be it is right; for if the ſheriff has a good writ againſt a man, and he makes an ill warrant to his *bailiffs* on it to *arreſt* the man, and they *arreſt* him accordingly, though the *bailiffs* cannot, yet the ſheriff may juſtify, by virtue of the writ; for if the ſheriff be in any manner privy to the taking, as if he commands his *bailiffs* to *arreſt* a man by *parol*, when he is taken accordingly, he is in the cuſtody of the ſheriff: and if he has a writ againſt him at the time he is *arreſted*, he is in cuſtody by virtue of the writ. Indeed the ſheriff muſt be privy to the taking, or otherwiſe he cannot be in his cuſtody.

Holt, Chief Juſtice, ſaid, that the carrying of this writ to the *gaoler* was an irregularity; for where a man is committed immediately to the *gaoler*, there the *habeas corpus* ought to be carried to him; but where he is *arreſted* by virtue of a warrant on a writ directed to the ſheriff, there the *habeas corpus* ought to be carried to the ſheriff; for he having the writ in his cuſtody is the only proper perſon to make the return. Since the *habeas corpus* act, the *gaolers* have taken on them to cheat the ſheriffs of the money for the returns, but that is not regular. The writ was therefore *quaſhed*, and a new *habeas corpus* granted, returnable *immediately*: on which the court gave order, that they ſhould procure the writ to be returned. In *Michaelmas* term following, the court was moved that *Fowler* might be diſcharged, as the caſe was uncertainly ſhewn in the writ.

Holt, Chief Juſtice. Sufficient cauſe ought to appear, becauſe the *King's Courts* are judges of their juriſdiction, and not themſelves; and therefore they ought to ſhew, that the matter was within their *conuſance*. And for this reaſon, doubtleſs, the *ſignificavit* is ill, and therefore the defendant may in *Chancery* procure the writ to be ſuperſeded. But the *King's Bench* cannot deliver a man *arreſted* on the King's writ, becauſe the *Chancery* have granted it, where they ought not to have granted it. If the certificate be ill, the *Chancery* ought to *ſuperſede* it; but the *King's Bench* cannot proceed on it, becauſe it is not before the *King's Bench*; for the *King's Bench* cannot give judgment on a *recital*, where another court is poſſeſſed of the *original*. In *error* brought on a judgment of *C. B.* in *debt*, an *exception* was taken, becauſe the writ, as it was *recited* in the declaration, was *attached*, where it ought to have been *ſummoned*, and therefore ill; but the court refuſed to allow the *exception* to be taken, becauſe the writ was not before this court, but only by *recital*; but it was held, the *dimunition* ought to be alledged, and a *certiorari* ſued out; and if on that an *original* was returned, which ran *attached*, the judgment ſhould be reverſed.

The great doubt was, whether this uncertainty in expreſſing the cauſe would vitiate the writ, and then, whether the court would quaſh it; and in proof of the affirmative, *Moor*, *pl.* 667. *Cro. Jac.* 556. *Cro. Car.* 196. 199. *W. Jones*, 226. *Hil.* 29. and 30 *Car.* 2. *B. R. Rex* v. *Price.* 1 *Roll. Rep.* 136. and *T. Jones*, 89. were cited.

After ſeveral arguments on different days, and on great conſideration, and ſearch of *precedents*, it was reſolved that the writ ſhould be *quaſhed*, and a *ſuperſedeas* iſſue. *Holt*, Chief Juſtice, ſaid, that at *common law*, the cauſe had no need to be ſhewn in the writ of *excommunicatione capiendo*; but it was ſufficient to ſay, that the party was *excommuicated for a manifeſt contempt*. *Regiſt.* 65. 7. But in the *ſignificavit*, it ought to be ſhewn. *Fitz. Nat. Bre.* 63. 4. And now, ſince ſtat. 5 *Eliz. cap.* 23. the cauſe ought to be ſhewn in the writ. The ſtatute makes the writ returnable here, on purpoſe that this court ſhould judge of the cauſe, otherwiſe it had been idle to make the writ returnable here, and eſpecially when the proceſs ought to differ, according to the difference of the cauſe for which the *excommunication* was. As to the nine cauſes mentioned in the act, an *alias* ought to iſſue, with a penalty, *&c.* Then this court being poſſeſſed of the writ, and it not expreſſing the cauſe *ſpecially*, but in the *disjunctive* the writ ought to be quaſhed. Before this ſtatute, they ought to have reſorted to the *Chancery*, and procured a *ſuperſedeas* there. 2 *Inſt.* 623. But that cannot be done now, becauſe the writ is returnable here. But becauſe the cauſe is ſhewn inſufficiently out of the writ, it ought to be *quaſhed*, and a *ſuperſedeas awarded*. But a *habeas corpus* is a very improper method to diſcharge the party, for he is well *arreſted* by virtue of the King's writ, and cannot be diſcharged whilſt that is in force. And it is a good return to the *habeas corpus* to ſay, that he is in cuſtody by a writ of *excommunicatione capiendo*.

Gould, Juſtice, ſaid, that before ſtat. 5 *Eliz. cap.* 23. this court could not diſcharge a man taken on an *excommunicatione capiendo*, unleſs he was *excommunicated* pending a *prohibition*. And he agreed, that this court had power to *quaſh* the writ, and *award* a *ſuperſedeas*, where the cauſe is not ſufficiently expreſſed; but he made a doubt, whether there was here any ſuch uncertainty, for the *ſive*, i. e. *or*, ſeemed to him to be *accumulative*.

On the opinion of *Holt* and *Turton*, juſtices, the writ was *quaſhed*, and a *ſuperſedeas* granted; and *Holt* ordered the clerk to enter on the *habeas corpus*, that the party was diſcharged, becauſe the writ was *quaſhed*; and ſaid, in this caſe, that if the writ had been for withholding certain *eccleſiaſtical dues*, it had been well. But he ſaid alſo, that this ſtatute was not well underſtood until the time of *Charles* 1. in *Hughe*'s caſe, *Cro. Car.* 196. and that the form of the proceedings in the *ſpiritual court* ought to be regarded as in a *libel* for words; their form is to ſay, that he ſpoke ſuch words, *or others to that effect*, and yet a *prohibition* was denied to be granted for the ſaid cauſe. *Vide Raym. vol.* 1. *page* 586. 618.

Eaſter, 1 *Ann.* *Atwood* v. *Burr.*

Holt, Chief Juſtice. If a window be open, and a bailiff put in his hand and touches one againſt whom he has a *warrant*, he is thereby his priſoner, and may break open the door to come at him. *Vide Mod. Rep. vol.* 7. *page* 3.

Michaelmas, 1 *Ann.* *Poſt Denning* v. *Cloſe.*

On a *plaint* levied in an *inferior court*, before the debt contracted, and the party *arreſted* thereon.

Per curiam. This *arreſt* is ill. *Vide Mod. Rep. vol.* 7. *page* 55.

Hilary, 2 *Ann.* *Lidford* v. *Thomas.*

The defendant's council moved to have him diſcharged out of cuſtody, for that he had been *arreſted* on a *Sunday* by proceſs out of this court, but in truth it appeared that he was taken without any warrant on a *Sunday*, and kept locked up till *Monday* morning, and then a writ was procured.

Per curiam. If you are impriſoned without a warrant, you have your remedy by action for falſe impriſonment, but then let them ſhew cauſe why an attachment ſhould not go againſt them.

Gould, Juſtice, ſaid, that attachments have gone frequently in ſuch a caſe, and it was ſo ruled here.

Holt, Chief Juſtice, ſaid, that after the *arreſt* bailiff ought to carry the party to the next *gaol*, if he does not deſire to be carried to a particular place, to ſend for his friends. *Vide Mod. Rep. vol.* 6. *p.* 96.

Hilary, 2 *Ann.* *Garibaldo* v. *Cagnoni.*

The plaintiff came into court to confeſs an indictment for an *aſſault* on *C.* and as he was going home, *C.* got him *arreſted* for the ſame *aſſault*; and on motion, and on an *affidavit* of this matter, an attachment *niſi* was granted againſt him, and before the day he diſcharges *G.* and on ſhewing cauſe, the rule was diſcharged,

charged, becauſe the *affidavit* in ſupport thereof did not charge him to have notice that *G.* came to court to confeſs the judgment, for otherwiſe he could not be in *contempt* for the *arreſt*. *Vide Mod. Rep. vol.* 6. *p.* 90.

Trinity, 3 *Ann.* *Wilſon* v. *Gary*.

See this caſe in *page* 32 of this work, under the head *Actions*.

Trinity, 3 *Ann.* *Powell* v. *Ball*.

If a bailiff has a warrant to *arreſt* a perſon, and another hinders him from doing it, there being no *actual arreſt*, it is not a *reſcous*, but a *contempt* of court. *Vide Mod. Rep. vol.* 6. *page* 210.

Trinity, 3 *Ann.* *Genner* v. *Sparks*.

G. a bailiff, having a warrant againſt *S.* came to his houſe, and finding him in the yard, told him he had a warrant for him, and pronounced the words of *arreſt*, but did not lay his hands on him, whereon *S.* ſnatched up a pitch-fork, and kept off the *bailiff*, threatening to kill him if he came near him; and thus *retreated* into his houſe, and ſhut the door againſt the *bailiff*. Theſe circumſtances appearing by an *affidavit*, the court was moved for an attachment on the matter againſt *S.* ſuppoſing this to be a *reſcut*, or at leaſt a great contempt of the Queen's writ.

Per curiam. Here was no *arreſt*, the bailiff having not laid hands on the defendant, for his ſhewing the warrant, and pronouncing the words of *arreſt*, without touching him, was no more an *arreſt*, than it would be one, if a bailiff ſees a man look out of a window one or two pair of ſtairs high, and tells him he has a writ for him, and ſays that he *arreſts* him; and therefore in ſuch caſe the bailiff cannot break the houſe to come at the perſon, as he could lawfully do if he had been his priſoner, and had eſcaped into a houſe from him. But it was agreed, if here he had but touched the defendant, even with the end of his finger, it had been an *arreſt*, and he might have broke the houſe after to ſeize him, and an *attachment* might go for the *reſcue*: as if a bailiff has a warrant againſt a perſon who is in a houſe, and lays his hand on him through the window, he may afterwards break the houſe to come to him. It was likewiſe agreed, that the bailiff had the protection of the law, and therefore if he had ventured on here, and had been killed by the defendant, it had been murder in him; or if the defendant had beat or hurt him, he might have had his action: or in this caſe, if the defendant were within reach of the bailiff when he pointed the pitch-fork at him, he might have had his action of *aſſault* againſt him; ſo if he had preſented a gun at him, at ſuch a diſtance as the ſhot would reach him. Therefore the court denied the motion. *Vide Mod. Rep. vol.* 6. *page* 173.

Eaſter, 4 *Ann.* *Luttin* v. *Benin*.

On an action for an *eſcape*, brought againſt a *Serjeant at Mace* of *Wood Street Compter*, to which he pleaded *not guilty*;

It appeared on evidence at the trial, that the action on which he *arreſted* the perſon who eſcaped, aroſe out of the *juriſdiction*; and the proceſs was executed out of the *juriſdiction*.

The defendant's council ſaid, where an *inferior court* holds plea of matters out of their *juriſdiction*, it is *not before the court*. There is a difference between proceeding *erroneouſly* where they have *juriſdiction*, and where they have no *juriſdiction*. *Cro. Car.* 394. *Hardreſs* 480. That actions will lie againſt officers, appears from the *averment* neceſſary for the officer; *viz.* that the cauſe was *within the juriſdiction*, in order to juſtify: and if an *inferior court* holds plea of a matter out of their *juriſdiction*, all their proceedings are void, and the matter is *not before the court*, and may be avoided by plea. *March* 117. 3 *Lev.* 243. But where they have no *juriſdiction*, no action will lie. 3 *Lev.* 234, 28. 1 *Roll. Abr.* 809. That actions may be brought againſt the officer, as well as againſt the plaintiff. 2 *Mod.* 195. 2 *Cro.* 3. *Sir T. Jones* 214. 4 *Rep.* 14 *b.* 2 *Lutw.* 935, 1516. 2 *Mod.* 30. *Cro. El.* 836. *Hob.* 267. 1 *Vent.* 86. If a man brings an action in an *inferior court*, as in the *Star Chamber*, an action will lie; and ſo where a man ſues a matter not before the court. *Lev.* 95. 1 *Sid.* 125. it not being in the ordinary way of juſtice, that no action of *eſcape* will lie in this caſe. *Vide* 1 *Roll. Abr.* 547. *March* 8. 2 *Bulſt.* 64. 2 *Mod.* 29.

The plaintiff's council, in ſupport of his caſe, cited 2 *Inſt.* 230. 3 *Keb.* 852. 2 *Vent.* 236. *Raym.* 189. 26 *Ed.* 3. 16. This being a matter *tranſitory*, and the court having *in the firſt inſtance* a *juriſdiction*, no one ſhall take advantage of it. *Yelv.* 42. 2 *Cro.* 3. but the defendant, 2 *Bulſtrode* 62. And it ſhall be at his election, to avoid it by plea, or not; and the defendant in this caſe is a *wrong doer*, and ſo ſhall not take advantage of his own wrong. He ſaid, that in the city of *London*, they never ſay the cauſe of action aroſe within the *juriſdiction*, as they muſt within all other *inferior juriſdictions*. A ſheriff cannot take advantage of any erroneous proceedings, if he ſuffers an *eſcape*.

As to the limitations of *inferior juriſdiction*, *Holt* obſerved, that there were three things to be conſidered; *viz. perſons*, *time*, and *place*. As to *perſons* and *place*, as in the caſe of the *Marſhalſea*, and thoſe of the *houſehold*; for in that *court* they have *juriſdiction* only in *debt*, *treſpaſs*, and *covenant*, and therefore ſhould they hold *plea* of an action on the *caſe*, 'tis plain they have no *juriſdiction*. And as to *things*, he ſaid, the *city* have *juriſdiction* in all *cauſes*, and are only reſtrained to *place*; and therefore the defendant ought to have pleaded to the *juriſdiction*. For if he admits of the *juriſdiction*, he is for ever after *eſtopped*. And an iſſue may be taken on it; and if it be found to ariſe within the *juriſdiction*, final judgment ought to be given. If a man is wrongfully brought into a *juriſdiction*, and there lawfully *arreſted*, yet he ought to be diſcharged; for no lawful thing, founded on a *wrongful* act, can be ſupported. If a *juſtice of peace* makes an order for a man to keep a *baſtard child*, which in reality was born two days after marriage; in this caſe all the officers acting under it are wrong, and they are liable; becauſe a *juſtice* can have no *juriſdiction* of the thing. But in this caſe the court had *juriſdiction* of the thing; and therefore it ought to have been avoided by plea.

Powell, Juſtice, was of the ſame opinion; and ſaid, where an *inferior court* had *juriſdiction* in a *tranſitory action*, the defendant ought to plead it, otherwiſe *it does not appear* but it did ariſe within the *juriſdiction*; and to make it *not before the court*, it muſt appear that the court have no *juriſdiction*.

Powys and *Gould*, Juſtices, concurred.

Per curium. Judgment for the plaintiff; *niſi*, i. e. *unleſs*, the defendant ſhew cauſe within a week. *Vide Mod. Rep. vol.* 11. *page* 50.

Eaſter, 5 *Ann.* *The Sheriff of Middleſex's Caſe*.

A *lattitat* iſſued out of the court of *King's Bench* to the ſheriff, to *arreſt* a man; and the ſheriff returned, that the man had enliſted, according to the *ſtat.* 4 & 5 *Ann.* c. 10. *and therefore I cannot take him*.

The court was moved againſt the ſheriff, for not having *arreſted* the man; becauſe, by the act, the plaintiff had liberty to go on to judgment and execution, againſt any thing but the defendant's body, and then the court would diſcharge him on *common bail*, if he appeared to them to be enliſted regularly; but the ſheriff ſhould not take on him to determine whether he was regularly enliſted. But the court, on conſideration, held it to be a good return, and that this act worked by way of a *ſuperſedeas* to any proceſs to be iſſued againſt perſons enliſted; and that if the ſheriff ſhould *arreſt* ſuch a perſon, he would be liable to an action of *falſe impriſonment*. And they ſaid it appeared, that the act did not intend that the man ſhould be arreſted, and then diſcharged on *common bail*, by the proviſo, “that the plaintiff, on leaving notice in writing at the defendant's laſt place of abode, or giving to the defendant ſuch notice in writing of the plaintiff's cauſe of action, might file common bail for the defendant, and proceed to judgment, &c.”

" *&c.*" That in caſe the man was not fairly and regularly enliſted, this was a falſe return; and the plaintiff had his remedy againſt the ſheriff, by an action for the *falſe return. Vide Raymond, vol.* 2. *page* 1246.

Trinity, 8 *Ann. Caſe of Andrew Artemonowitz Mattueof, the Ruſſian Ambaſſador.*

The queſtion was, Whether an ambaſſador could by law be *arreſted* for debt?

The Attorney General argued as follows:

He cannot. If the privileges of an ambaſſador may be broken in on, and invaded for the preſervation of the property of a private ſubject, and this is declared to be law, princes will be cautious of ſending ambaſſadors to us; ours muſt expect the like treatment, and few will be prevailed on to aſſume that character.

Should an ambaſſador be liable to the reſtraints of the law of the land to which he goes, how eaſy would it be, on any emergency, to take off his attendance on his maſter's buſineſs. The law of *England* privileges the body of a member of parliament, and of a ſoldier, and ſhall it not that of an ambaſſador?

The perſon of an ambaſſador has ever been held ſacred and inviolable by the law of nations.

The goods of an ambaſſador are not liable to diſtreſs, *a fortiori*, nor his perſon. An ambaſſador muſt be intreated, and on refuſal ſent back to his maſter. If an ambaſſador commits an enormous crime, the King from whom he is ſent, not the King to whoſe court he is ſent, muſt puniſh him.

Lord *Coke* ſays, *to violate the perſon of an ambaſſador*, is a violation of the law of nations; nor does he add, (as certainly he would, had he thought ſo) that though this be ſo in the *civil law*, it is not ſo in ours. An ambaſſador, by fiction of law, repreſents the perſon of his maſter. Thus *Coke*, on ſtatute 25 *Edw.* 3. affirms it high treaſon at the *common law*, to kill an ambaſſador. Now certainly no body will ſay, the *Czar* himſelf might have been *arreſted.* The ſame fiction of law that makes him repreſent the perſon of his maſter makes him *extra parochial*, and, as it were, in the dominions of his maſter. The ill treatment of ambaſſadors is a thing of dangerous conſequence, for it may involve the nation in a war, and it would be very inconvenient that this ſhould be in the power of any private perſon whatſoever. It was replied by the council on the other ſide: If this be ſo, a ſubject may be left without remedy for the recovery of his debt, which would be a defect in law.

Juſtice ought always to be reciprocal; but an ambaſſador may *arreſt*; *Ergo*, &c.

It is a maxim in law, that the royal prerogative does no wrong; and ſhall the prerogative of an ambaſſador ſurmount that of the crown?

Such a law as this would be a nullity, becauſe contrary to *Magna Charta, cap.* 29. *we will not ſell, deny, or delay juſtice to any one.*

An ambaſſador by his contract renounces his privilege ſo far as to ſubject himſelf to the laws in force in that country where the contract was made.

This ſuit occaſioned an act of parliament, 7 *Ann. cap.* 12. whereby all proceedings againſt the ambaſſador in this cauſe were rendered null and void, and the privileges of ambaſſadors fully ſettled as to this matter. *Vide Mod. Rep. vol.* 10. *p.* 5.

Hilary, 11 *Ann. Parker* v. *Langley.*

See *page* 38. of this work, under the head *Actions.*

Michaelmas, 3 *Geo. Johnſon* v. *Louth.*

The queſtion was, whether a *gunner* was within the late act of parliament, that orders thoſe liſted as ſoldiers to be diſcharged from *arreſts* for debt.

The plaintiff's council *objected*, that they were not within the act, becauſe they were *warrant officers*, and took a particular *oath*, and becauſe the makers of this act of parliament, ſeemed apprehenſive that they would not have been liable to the ſame puniſhment, in caſe of mutiny and deſertion, as other ſoldiers, unleſs they had by an expreſs *clauſe* made them ſo.

He likewiſe *inſiſted*, that the deſign of the act, being to encourage men to enter into the King's ſervice, muſt not be extended to ſuch in the army, whoſe pay is ſo conſiderable as this alone to be a ſufficient inducement. The pay here was 1 *s.* 4 *d. per* day.

Per curiam. As to the clauſe in the act relating to *mutiny* and *deſertion*, the act only ſuppoſes it poſſible that there might be a doubt, and therefore wiſely reſolves to make every thing clear, where the puniſhment to be inflicted is nothing leſs than *death.*

But the act of parliament reſolves the doubt, as we do now, that he is a *ſoldier.*

The matter does not turn on the *quantum* of the pay, if it did, a *trooper* moſt certainly would be out of the act, whoſe pay is much more conſiderable than that of a *gunner*, and who generally gives a good ſum of money for his place.

The reaſon why a *gunner*'s pay is more conſiderable than that of a *ſoldier*, are 1ſt. In reſpect of their ſkill, and 2dly. The hazard they run, both which conſiderations render their ſervice more neceſſary, and make it more reaſonable, that they ſhould not be taken away from the ſervice. The court therefore diſcharged the defendant from his *arreſt. Vide Mod. Rep. vol.* 10. *page* 346.

Trinity, 10 *Geo. Croſſe* v. *Talbot.*

A motion was made on behalf of the defendant to ſet aſide the bail bond given on the *arreſt*, and that common bail might be accepted, and he obtained a rule to ſhew cauſe. His affidavit ſhewed that he was *Valet de Chambre* to *Monſr. Hoffman*, the Duke of *Holſtein*'s reſident here, at 12 *l.* 12 *s. per annum* wages, and 10 *s.* a week board wages, and a certificate thereof was produced, under the reſident's own hand; but it did not appear, that he either lodged in the houſe, or actually executed the office. The court held, that he ought to be a domeſtic ſervant, and really to execute the duty of his office, and that being a meer nominal ſervant was not ſufficient, and diſcharged the rule.

A great many caſes have been ſince determined on the ſame principle, but it has in thoſe caſes been held, that the idea of a domeſtic ſervant is not confined to his lying in the foreign miniſter's houſe, provided he is a real ſervant, and actually performs the ſervice. *Vide Mod. Rep. vol.* 8. *page* 288.

Michaelmas, 11 *Geo. Henley* v. *Roſſe.*

The defendant was *arreſted*, and no declaration being filed againſt him within *two terms* after the *arreſt*, he procured a *ſuperſedeas*, and was diſcharged, and immediately after he was *arreſted* again by a *capias* out of the *C. P.* at the ſuit of the ſame plaintiff, and for the ſame cauſe of action. On a motion to diſcharge the proceedings becauſe irregular,

Per curiam. The defendant had a right to *ſuperſede* the action, becauſe no declaration was filed againſt him in time; and as he had a right to *ſuperſede* the action, certainly the plaintiff muſt have liberty to proceed in another; for his *debt* is not loſt for want of declaring in time, but only that action is gone, and therefore a *new* action may be brought. *Vide Mod. Rep. vol.* 6. *page* 306.

Michaelmas, 7 *Geo.* 2. *Holmes* v. *Gordon.*

The defendant's council moved on the ſtat. of 7 *Ann c.* 12. to diſcharge the execution againſt the defendant, as being a ſervant to Baron *Hopman*, reſident from the Duke of *Mecklenburgh*, the defendant being a menial and domeſtick ſervant to the Baron, and having continued in his ſervice to the time of his *arreſt*, and a certificate of his being a ſervant to the Baron being regiſtered in the ſecretary's office, and alſo in the ſheriff's office, according to the ſtatute.

Probyn. No mention is made of what capacity he ſerved in. *G.* ſwears he was an officiating ſervant; but it is uſual to ſet out what office he ſerves in, the affidavit is very looſe: but the court granted a rule to ſhew cauſe. *Vide caſes temp. Lord Hardwicke, page* 3.

Michaelmas, 8 *Geo.* 2. *Shergold* v. *Holloway.*

A juſtice of peace granted his warrant, directed to the defendant in theſe words, "Whereas com-"plaint is made to me, on the oath of *J. W.* that "*W. S.* refuſes to pay him wages; theſe are to re-"quire you, to cauſe the ſaid *S.* to *appear* before me, "or ſome other juſtice, to anſwer the complaint afore-"ſaid, and give notice to the ſaid *J. W.* before what "juſtice you appear."

On this the defendant *arreſted* the plaintiff, and carried him before the juſtice, who bound him over to the ſeſſions; on which the plaintiff brought his action, and a caſe being made at the aſſizes, the ſame was argued above, and theſe points reſolved.

1ſt. That though the ſtatute 5 *Eliz. c.* 4. does not expreſsly impower juſtices to order the payment of wages; yet they have been ſo long indulged with this power by the courts, under the general power of ſetting the rate, that it is not now to be diſputed.

2dly. That a juſtice has no power to grant a warrant to *apprehend* the party. He can only iſſue a ſummons, and that a warrant expreſsly to *arreſt* the party, will not juſtify the officer, there being no pretence for ſuch a juriſdiction.

3dly. That this though ſtrangely worded, was not a warrant to *arreſt* the plaintiff, for the defendant might cauſe him to appear by *diſtreſs*, and it was not equivalent to the words *bring before me*. Wherefore judgment was given for the plaintiff. *Vide Strange, vol.* 2, *page* 1002.

Trinity, 9 *Geo.* 2. *Williams* v. *Jones and others.*

In *treſpaſs* for entering the plaintiff's yard, and breaking and entering his ſtable, and carrying away divers goods and chattels; *viz.* ſeven horſes; and for an *aſſault, battery, and impriſonment* of the plaintiff. The defendants, as to breaking and entering the plaintiff's ſtable, juſtify; for that the plaintiff detained in his ſtable ſeven horſes or geldings of the defendant *Jones*, who, at a court of our lord the King, in his *Compter*, holden before Sir *J. S.* then ſheriff of *London*, according to the cuſtom of the city, levied a plaint for detaining the ſaid goods; and afterwards the ſaid ſheriff commanded *C.* another defendant, who was a ſerjeant at mace, and a miniſter of the ſaid court, to appraiſe the ſaid goods, and to return them to *Jones*; and the ſaid ſerjeant at mace, and the defendant as his aſſiſtant, entered into the ſaid yard, which was the only way to the ſaid ſtable, and took the horſes, and delivered them to the defendant *Jones*. And as to the *aſſault, battery, and impriſonment*, they juſtify alſo; for that the defendant *Jones* ſued out a *capias ad reſpondend.* againſt the plaintiff, out of the court of *C. P.* directed to and delivered to the ſheriffs of *London*; whereupon the ſheriff iſſued a warrant to the defendant *C.* one of the ſerjeants at mace, who by virtue thereof arreſted the plaintiff, and detained him in cuſtody ſix hours, at the requeſt of the defendant *Jones* who was plaintiff in the ſaid writ, which is the *ſame treſpaſs and aſſault*, &c. To which plea the plaintiff has demurred generally.

The council for the plaintiff, laſt term, took ſeveral exceptions to the firſt part of the juſtification; *viz.*

1ſt, For that the court holden before the ſheriff is not ſaid to be according to the cuſtom.

2dly, That to return ſeven horſes or geldings is too uncertain. *Allen* 32, *Moore* v. *Clipſam*.

3dly, That it does not appear that theſe horſes, when taken, were within the juriſdiction of the ſheriff's court, and precepts of inferior courts muſt be executed within the juriſdiction.

4thly, That the plaintiff levied before *J. S.* ſheriff of *London*, is bad; becauſe the court will take notice there are two perſons that are ſheriffs. *Lambe* v. *Wiſeman*, *Hob.* 70.

But all theſe exceptions were over-ruled.

Lord Hardwicke. The plea in theſe points is well enough; the levying the plaint according to the cuſtom, goes to the whole: for it is not ſaid to be done at any particular court, but before *J. S.* in the *Compter*: as to the uncertainty of the goods taken, that might have been a good exception, according to the caſe in *Allen*, in an action of *replevin*, but it cannot be ſaid to be ſo *void a plaint*, as that the officer cannot juſtify under it. As to the place where the goods are taken; the ſtable is laid to be in *London*, and the goods ſaid to be taken in the ſaid ſtable. As to *J. S.*'s being but one of the ſheriffs, that is well enough, becauſe he is ſaid to be then ſheriff, which is the ſame as then a ſheriff, or one of the ſheriffs, and it is alledged to be according to the cuſtom; and the court is not neceſſary to be holden before both the ſheriffs.

An exception was likewiſe taken to the *juſtification* of the *aſſault* and *battery*; *viz.* that a man may not juſtify a *battery*, by virtue of an *arreſt by proceſs*, unleſs it had been by reſiſtance, or in his defence, &c. which ſhould have been ſet out; and the court doubted on this exception, and ordered it to ſtand over until this term, when it was again argued.

The plaintiff's council, in ſupport of the exception, cited *Co. Ent.* 304. *b. Thompſon's Ent.* 316. 2 *Lutw.* 929. *Patrick* v. *Johnſon*. That an *arreſt* by *gently laying hands on*, is not a juſtification of a *battery*. 2 *Sid.* 46. *b.*

The council for the defendant, in ſupport of the plea, cited *Salk.* 79. *Genner* v. *Sparks*, 1 *Saund.* 13. *Skinner* 387. *King* & *Ux'.* v. *Theobals*, and 21 *H.* 7. *fol.* 29. The court took a further day to give their opinion; and then,

Lord Hardwicke. The queſtion is, whether a *battery* of the plaintiff can be juſtified by ſhewing an *arreſt by lawful proceſs?* and on conſideration of the caſes, we are of opinion that a *battery* cannot be juſtified by ſhewing an *arreſt* barely, but that in order to make it good, ſomething further ſhould be ſhewn, as that the defendant *gently laid his hands on the perſon*, in order to *arreſt*, and *did arreſt* him, as in the caſe of *Patrick* v. *Johnſon*, 3 *Lev.* 403. though that way of pleading has been doubted of; or elſe that the plaintiff made reſiſtance, and was going to *reſcue* himſelf, and by reaſon of that he beat him, to take him. There is no caſe in all the books, that ſays, that a *battery* may be juſtified barely by ſhewing an *arreſt*, or that it is repugnant to plead *not guilty* of the *battery*, and to juſtify the reſidue of the *treſpaſs*, by an *arreſt*; the caſe in 2 *Lutw.* 934. is not ſo, for the repugnancy there is, pleading *not guilty to the aſſault*, and juſtifying by an *arreſt*; and that is right, becauſe an *arreſt* muſt neceſſarily be an *aſſault*, but is not neceſſarily a *battery*. The diſpute in the caſe of *Patrick* v. *Johnſon*, between the two reporters, *Lutw.* and *Lev.* has occaſioned the doubt that has ariſen as to this ſort of pleading; the queſtion then was, whether an *arreſt* by a *gently laying hands on* might be a juſtification of the *battery: Levintz* held it to be good pleading, *Lutw.* thought it not ſo, (and the court inclined that way) but he allows there are precedents of pleading it by a *gently laying hands on*. But neither *Levintz* nor *Lutw.* gave opinion that the *battery* can be juſtified merely by ſhewing an *arreſt*, without ſhewing a *gently laying hands on*, or a *reſiſtance*, &c. As to what has been ſaid, that every *arreſt* admits a *battery*, becauſe it cannot be without *laying on of hands*, and every *laying on of hands* is ſo, that is a miſtake in the caſe of *Genner* v. *Sparks*, which was cited to warrant the diſtinction, which it does not do; for the queſtion there was, whether there had been a *reſcue*; and the court held that there had not, becauſe there had been no *arreſt*, for the officer had not touched the defendant; and to be ſure in that caſe there was no *arreſt*, for the party was neither *touched* nor *confined*: but it does not follow that an *arreſt* cannot be made without *touching* the perſon; for if a bailiff comes into a room, and tells the defendant he *arreſts* him, and locks the door, that is an *arreſt*, for he is in cuſtody of the officer. But ſuppoſing there was a *laying on of hands* in the preſent caſe, every *laying on of hands* is not a *battery*, for the party's intention muſt be conſidered; for people will ſometimes, by way of joke, clap a man on the back, and it would be ridiculous to ſay that in every ſuch caſe a man muſt juſtify, and may not plead *not guilty*. The caſe of *Wilſon* v. *Dodd*, 2 *Roll. Abr.* 546. is directly in point, that a *gently laying hands on* is not a *battery*. That caſe indeed favours *Lutwiche*'s opinion, that a *gently laying hands on* is not a *juſtification*, becauſe it does not admit a *battery*; therefore as an *arreſt* is not a *battery*, this is not a *ſufficient juſtification.*

Per curiam. Judgment for the plaintiff. *Vide Caſes Temp. Lord Hardwicke, page* 298.

Arreſt of Judgment.

Eaſter, 3 *W.* & *M.* *Temple* v. *Killingworth*.

Per Holt. If a declaration be part well and part ill, it ſhall be good for that which is well declared of; but if a writ of enquiry be executed for the whole, or if entire damages be given, it is good cauſe to *ſtay judgment.* 1 *Vent.* 27. *Vide Mod. Rep. vol.* 12. *p.* 5.

Eaſter, 11 *W.* 3. *Anonymus*.

An indictment for a miſdemeanor, was tried three days before the end of the term, and judgment was entered the ſame term; ſo that the defendant had not four days to move in *arreſt of judgment*. The point in queſtion was, Whether this entry of the judgment was regular, and whether it ought not to have been ſtayed till the term following?

Per Holt, Chief Juſtice. If there be four days and more between the trial and the end of the term, *judgment* ought not to be entered within the four days: but if the *diſtringas* be returnable within the term, and the party is tried within two or three days before the end of the term, the judgment ſhall be entered that term, though there be not four days to move in *arreſt of judgment*: it was thus ſettled in the caſe of *Knox* v. *Levarr*, on a conference between *Scroggs* C. J. and Sir *William Jones*, Attorney General, contrary to the report of Sir *Samuel Aſtry*.

Arreſt of judgment is either for matter intrinſic, *i. e.* ſuch as appears by the record itſelf, which will render the judgment erroneous and reverſible; or extrinſic, *i. e.* ſome foreign matter ſuggeſted to the court which proves the writ is abated, for it is not enough that it proves the writ is only abateable: the old courſe of taking advantage in *arreſt of judgment* was thus: the party after a general verdict having a *day in court*, (for ſo he has as to matters of *law*, though not of *fact*) did aſſign his exceptions in *arreſt of judgment* by way of plea; and it was called pleading in *arreſt of judgment*. *Vide* 21 *H.* 7. 37. *b. Yelv.* 125. 1 *Bulſtr.* 5. *Raſt.* 47. *a.* 56. *b.* 127. *a.* 197. *a.* 269. *b.* 288. *a.* 432. *a.* 497. *b. Co. Ent.* 50. *a.* 53. *a. b.* 120. *a.* 572. *a.* 657. *a.* 11 *H.* 7. 10, 11. 2 *Saund.* 333. *Style*, 246. This differed from moving in *arreſt*, which was done by a perſon as *amicus curiæ*, where the party was out of court. *Vide Co. Ent.* 295. *b.* the manner of doing it. 2 *Roll.* 716. 9 *E.* 4. 11. *a.* 4 *H.* 7. 9. 5 *H.* 7. 23. *Raſt.* 107. *Vide Salk. vol.* 1. *p.* 77.

Hilary, 1 *Ann.* *Brook* v. *Biſhop*.

In *treſpaſs* for breaking the plaintiff's cloſe, *&c.* after a verdict for the plaintiff, the defendant's council moved in *arreſt of judgment*, that the damages given by the verdict were entire, and part of the treſpaſs did not lie in *a continuando* i. e. *a continuance*, and yet damages were given for that too. It was *objected*, that if the ſame could be continued, no damages could be given in reſpect thereof, according to *Butler & Hodges's caſe*, yet under this *continuance*, ſeveral new acts of treſpaſs might be given in evidence, and ſo damages recovered for them.

Per curiam. The right way in *treſpaſs*, for repeated acts of *treſpaſs*, would be that on ſuch a day, and *at divers other days and times*, between ſuch a day and ſuch a day, the defendant did ſo and ſo. *Vide* 20 *Hen.* 6. In this *caſe* the *continuance* is impoſſible, and therefore no damages could be given for it, and the only miſchief poſſible would be that of giving other acts of *treſpaſs* in evidence under this pretence.

Another *exception* taken to the verdict was, that the declaration was generally of *Eaſter* term, and yet it appeared that the *treſpaſs* was committed after the 21*ſt April*, which was *quinden paſch.* i. e. *in five weeks of Eaſter*.

Per curiam. That *term* was adjourned by proclamation to the *ſecond return*, which was the 29th. All declarations ſhall refer to that time, and therefore the plaintiff had judgment. *Vide Mod. Rep. vol.* 7. *p.* 152.

Eaſter, 1 *Ann.*

Per Holt, Chief Juſtice. Before you can move in *arreſt of judgment*, the *poſtea* ought to be in court, and delivered to the clerk in court; and after it is ſo brought in, the defendant's council have four days to move in *arreſt* of judgment, nor will the court grant a rule to alter or amend a *poſtea* after it is returned and filed. *Vide Mod. Rep. vol.* 11. *p.* 3.

Michaelmas, 1 *Ann.* *The Queen* v. *Darby*.

The defendant being convicted on an information for *ſubornation* of *perjury*, and judgment *quod capiatur* entered, and a *capias* iſſued, he was taken thereon, and brought into court, where his council moved in *arreſt of judgment*; but the court was of opinion it was out of time, for the judgment *quod capiatur*, *i. e. that he be taken into cuſtody for the fine*, was a final judgment, and the ſubſequent entry only for the certainty of the fine. *Vide Salk. vol.* 1. *p.* 78.

Michaelmas, 2 *Ann.* *Wood* v. *Shepherd*.

Per Holt, Chief Juſtice. One ſhould not move in *arreſt of judgment* till the *poſtea* be brought in; and the defendant ſhould give a rule on the *poſtea*, which is in itſelf a notice to bring it in; and it is againſt the antient courſe of the court to make a rule for *ſtaying of judgment* till the *poſtea* be brought in. By the courſe of the Common Pleas, the clerk of the aſſize keeps it till the days for moving in *arreſt of judgment* be paſt, and the notice is given him, and he has his fee, *viz.* 6 *s.* 8 *d.* for attending with it; and the clerk of the aſſize ought to deliver the *poſtea* to none but to the clerk in court; and notice to the clerk in court is good notice. *Vide Mod. Rep. vol.* 6. *p.* 24. *Salk. vol.* 1. *p.* 78.

Hilary, 4 *Ann.* *The Queen* v. *Deman*.

The defendant was indicted of *perjury*, and the indictment ſet forth a trial had before the Lord Chief Baron, *and his aſſociate J. S.* by *niſi prius* in *Middleſex*; and that the defendant being ſworn before the *Lord Chief Baron* on the *Holy Evangeliſts*, depoſed ſo and ſo, which was *falſe, and ſo* the defendant *committed wilful perjury* before the Lord Chief Baron, *and his aſſociate J. S.* and judgment was given againſt the defendant by *nil dicit*, i. e. *he ſays nothing*; and now the defendant appearing in court, a motion was made by his council to *arreſt* the judgment; and it being doubted whether he was not too late,

Holt, Chief Juſtice, ſaid, that after judgment by *nil dicit*, *judgment has been arreſted*, but never after judgment *on demurrer*, on which his council then took *exception*, that this *oath* could not be at the trial ſet forth in the indictment, for the trial was before the Lord Chief Baron, and the *aſſociate*, but the *oath* before the Chief Baron, *without* the aſſociate, and the aſſignment of the perjury differs from the *oath*, for that is *before* the Chief Baron and aſſociate; whereas the oath was before the Chief Baron only, and that is a material part of the indictment: and for this variance he prayed, that *judgment might be ſtayed*.

Holt, Chief Juſtice. The trial is not ſaid to have been before the Chief Baron and his aſſociate, *&c.* and the *aſſociate* need not be mentioned in every part of the indictment, where the Chief Baron is mentioned; but this is according to the conſtant form; in the *niſi prius* proceſs, the *diſtringas*, and the *jurata*, and in the *continuances*, the *aſſociate* is never mentioned, but only in the entry of the *poſtea*; and by *ſtat.* 18 *Eliz. c.* 12. which erects the *niſi prius* in *Middleſex*, there is no direction that the judge ſhould have any *aſſociate*.

Powell, Juſtice. It ſhall be intended, that the *aſſociate* did continue with the Chief Baron all the trial, having been mentioned to have been there at the beginning.

The council for the proſecutor inſiſted that the oath was ſaid to be *then and there in the ſaid court*.

Accordingly, judgment was given, that the defendant ſhould be ſet in the pillory. *Vide Raym. vol.* 2. *p.* 1221.

Trinity, 4 *Ann.* *Anonymous.*

The defendant's council moved in *arreſt of judgment*, in an *action for words*, the words were, *you have forgot ſince you lived in the Black Bull Yard; you are a raſcal and a villain, there you could procure broad money, and could clip it when you had done, and there the ſheers could go.* He inſiſted there was nothing in theſe words alledged, only a power of doing, but no poſitive charge.

Powell, Juſtice, taking the words altogether, they would bear a ſtrong intendment that the fact was done. *Holt* put this caſe: ſuppoſe a man is dead, and *A.* ſays, *John of Styles* could have murdered him. *Quæ.* If this would be actionable. The court took two or three days to conſider of it, but afterwards the plaintiff had his judgment. *Vide Mod. Rep. vol.* 11. *page* 60.

Trinity, 8 *Ann.* *Young* v. *Slaughterford.*

This being a trial at *bar*, on an appeal of murder, the Solicitor General moved in *arreſt of judgment* that the appeal was not good. See page 80 of this work.

Michaelmas, 10 *Ann.* *Rumball* v. *Ball.*

An action of *debt* was brought on a note to this effect; I acknowledge myſelf indebted to *R.* ſo much, which I promiſe to pay on demand. A motion was made in *arreſt of judgment*, that though on a note acknowledging a debt, it was not neceſſary to alledge a demand, yet where it is part of the agreement, there a demand is neceſſary.

Per curiam. The words *promiſe to pay*, import no more, than that I am ready to pay the money at any time, and ſhall not reſtrain or qualify the other words; this being no debt ariſing on the performance of a certain condition, but a *debt* plainly precedent to the demand. Beſides, ſuppoſing the demand neceſſary, the action itſelf perhaps is a demand. *Vide Mod. Rep. vol.* 10. *page* 38.

Michaelmas, 12 *Ann.* *Harriſon* v. *Thornborough.*

On an action brought by the plaintiff againſt the defendant for words, viz. *Harriſon* got a witneſs to forſwear himſelf in ſuch a cauſe. You or he, (*innuendo*, the plaintiff) hired one *Bell* to forſwear himſelf. And for theſe following words ſpoken at another time, two *Dyers* are gone off (*innuendo*, become bankrupt) and for ought I know, *Harriſon* will be ſo to within *this time twelve month*; on iſſue joined, a verdict was given for the plaintiff, and *joint damages*.

To this judgment the defendant's council moved in *arreſt* thereof, that the words were not actionable, and took the following *exceptions*:

1ſt *Exception* That though the firſt branch of the words, *if they were alone*, are certain enough; yet when he goes on and ſays, *you or the plaintiff hired one* Bell *to forſwear himſelf*, it becomes altogether uncertain to whom the words relate; and to this purpoſe were cited 1 *Roll. Abr.* 81. and 1 *Cro.* 497. where the words were, *one of you three*, &c.

2d *Exception.* That the words were not actionable, becauſe they did not ſet forth that what the witneſs was forſworn in was a material point in the cauſe; and that ſuppoſing theſe words were actionable, yet if the following words that were ſpoken at a different time were not actionable, that then the damages being joint, the judgment muſt be *arreſted*.

The defendant's council further *urged*, that thoſe words were not actionable, becauſe the word, *gone off*, was a word capable of various conſtructions, and was therefore to be taken in the moſt favourable ſenſe. 3 *Mod.* 155. An action brought for theſe words, *broken, run away, and will never return again*: If the words themſelves were not actionable, the *innuendo* will not help it; for an *innuendo* is not to ſet forth a new matter, but to refer to ſomething already mentioned in the declaration. *King* v. *Greepe*, *Newnham*, *innuendo*, *Newnham* in *Devonſhire*, 4 *Co. Rep.* 20. *a.* burnt my barn, *innuendo*, full of corn; in both theſe caſes, the *innuendo* void, becauſe it ſets forth no new matter: he likewiſe ſaid, that the action would not lie unleſs *Bell* had actually forſworn himſelf, which perhaps the words *got*, &c. do not neceſſarily imply.

Per curiam. We are of opinion that the plaintiff ſhould have judgment. *Precedents* are not of equal authority in actions for words as in other actions, becauſe *manner of ſpeaking* is the rule for the interpretation of words; and this rule is different in *one age* from what it is in *another*. The words *that* 100 *years ago* did not import a *ſlanderous* ſenſe, now may; and ſo *vice verſa*.

In this kind of action for words, which is not of very great *antiquity*, the courts did at firſt, as much as they could, diſcountenance; and that for a *wiſe reaſon*, becauſe generally brought for *contention* and *vexation*, and therefore when the words were capable of two conſtructions, the court always took them *in the moſt favourable ſenſe*.

Latterly theſe actions have been more countenanced; for men's tongues growing more virulent, and irreparable damage ariſing from words, it has been by experience found, that unleſs men can get ſatisfaction by *law* they will be apt to take it themſelves. The rule therefore that has now prevailed is, that *words* are to be taken in the *ſenſe* that is moſt *natural* and *obvious*, and in which thoſe to whom they are ſpoken will be ſure to underſtand them.

The words, *you or he*, &c. do not render the former uncertain; for they relate not to the *getting*, &c. but to new matter, viz. *who paid the money*.

Beſides, if the words were, *A.* or *D.* did, *&c.* either *A.* or *D.* might bring an action; but then there muſt be an *averment*, that neither of them did it. It is not neceſſary to the maintaining of this action, that *Bell* did in forſwearing himſelf, *&c.* The ſignification of the words, *gone off*, is very well known among *merchants*.

The *doctrine* laid down concerning *innuendos* is undoubtedly true, when underſtood of matters of *fact*, but here the *innuendos* were not *introductory* of new matters of *fact*, but only *explanatory* of the foregoing words. The court therefore gave judgment for the plaintiff. *Vide Mod. Rep. vol.* 10. *p.* 197.

Hilary, 1 *Geo.* *Walter* v. *Warren.*

This was an action brought by the huſband, for taking his wife away, and raviſhing her, *whereby*, *&c.* *for the ſpace of an whole year*, *&c.* A verdict and general damages were given for the plaintiff.

The court was moved, *in arreſt of judgment*, for that a year had not expired, from the *1ſt October*, the time of the offence, to the time of the verdict, and much leſs at the time the action commenced, and therefore general damages being given, it was erroneous.

Hobart, 186. 1 *Mod.* 271. *Horn* v. *Chandler*. *Moore* 887. 2. *Saunders* 169. *Hamilton* and *Veere*, a caſe full in point.

On the other ſide it was ſaid, that coming under a *whereby*, it was only *conſequential*, and laid by way of aggravation of damages, and was not the cauſe of action; that the words *for a conſiderable time* was enough, and the *viz. for the ſpace of an whole year*, *&c.* ſhould be rejected as ſurpluſage, becauſe impoſſible.

Parker, Chief Juſtice. This caſe is widely different from the common caſes of a time that is altogether impoſſible; as the 30th of *February*, *&c.* for here the whole time is not impoſſible; and it cannot be known for how much of it the jury gave the damages; moſt probably to the time of the verdict. Adjourned. *Vide Mod. Rep. vol.* 10. *page* 273.

Eaſter, 1 *Geo.* *Stafford* v. *Forcer*, *Adminiſtrator of William Moore.*

In an action on the *caſe*, on ſeveral promiſes, as to the 2*d promiſe*, the plaintiff declared as follows; that *W. M.* the inteſtate, gave a note to him, the plaintiff, bearing date the 1*ſt December* 1704, and reciting, that whereas *S.* had, at the ſpecial inſtance of the inteſtate, lent to *A. M.* brother of the inteſtate, the ſum of 100 *l.* and whereas the ſaid *A. M.* had given his bond for the repayment of the ſame on the 2*d of June* following, with intereſt; and, for further ſecurity, had given a *warrant of attorney*, to confeſs judgment on the ſaid bond; the ſaid inteſtate promiſed, if the ſaid *A. M.* did not repay the ſame, with intereſt, on the 2*d of June* following, purſuant to the condition of the bond, that then he would pay the ſame, with intereſt. Avers, &c.

To this the defendant pleads, *that the cauſe of action did not accrue within ſix years.*

To this plea the defendant replied; on which iſſue was joined, and a verdict given for the plaintiff.

The defendant's council moved in *arreſt of judgment*, that notwithſtanding the jury had found for the plaintiff, ſuch judgment was ill, becauſe it appears on the face of the declaration, that the cauſe of action did accrue above ſix years before the death of the inteſtate; for the cauſe of action accrued from the 2*d of June* following the 1*ſt of September* 1704.

The other *objection* he made was, that in this caſe bringing of the action for the *intereſt*, as well as the *principal*, vitiates the whole. 2 *Rolles Rep.* 47. *a.*

Parker, Chief Juſtice. As to the *intereſt*, we are on an *expreſs promiſe*, and an *expreſs promiſe* to pay intereſt, or money won at play, will ſupport an action.

In anſwer to the grand *objection*, it was urged, that the court ſhould take notice of the common practice of not putting bonds in ſuit, while the intereſt was duly paid; that this was the caſe here; that the obligor did for ſome time duly pay the intereſt, and this moved the jury to find as they did; for it was contended, that the cauſe of action did not ariſe until the obligor made default in payment of intereſt.

It was alſo urged, that the note was only the form of the *promiſe*, and evidence of it; and therefore if a *promiſe* made without a note be capable of *continuance*, a *promiſe* by note muſt be ſo too.

In 1 *Ventris* 191. it was held, although it appeared by the declaration, that the cauſe of action did ariſe above ſix years, &c. that yet the defendant ſhould not take advantage of it, without pleading it.

Raym. 86. The plaintiff declares, as executor, on a promiſe thirteen years ago, and *non aſſumpſit* within ſix years pleaded. On iſſue joined, a verdict and judgment was given for the defendant; for though the replication was a departure from the declaration. The defendant ſhould have demurred to the replication, inſtead of joining iſſue. Here the declaration is aided by a verdict.

Per curiam. There is a difference between declarations on a *parol* promiſe, and a promiſe by *note*; in the former the day is not material, in the latter it is.

The iſſue here is on a *promiſe* by this very *note*; and therefore impoſſible, in the nature of the thing, that an evidence of a ſubſequent *promiſe*, or a ſubſequent *note*, can prove a *promiſe* by this note.

As to the *common practice* of not putting a bond in ſuit until the intereſt, &c. the anſwer is, that default of paying the intereſt would never give a cauſe of action, unleſs there were one before. According to this note, on the non-payment on the 2*d of June*, *a cauſe of action accrued.* A verdict will cure any thing that a verdict can cure, but not where on the declaration it manifeſtly appears that no evidence whatever can maintain the iſſue.

Formerly it was held, that the parties ſhould not take advantage of the *ſtatute of limitations*, without pleading it; but now the law is otherwiſe. The caſe of *Dean* v. *Crane* was to this purpoſe; there was a promiſe to the executor, within a year before the action brought; but the iſſue joined was, whether the promiſe was made to the teſtator within *ſix years* before the action brought; and a verdict for the plaintiff.

The defendant's council moved in *arreſt of judgment*, that it appeared on the face of the declaration, that the teſtator was dead above *ſix years* before the bringing the action, and therefore, &c.

Holt, Chief Juſtice, was of opinion at firſt, that the verdict had cured it; but afterwards it was reſolved by the opinion of all the judges, that this was a defect impoſſible for a verdict to cure. In the caſe of *Heylin* v. *Huſkins*, 10 *Ann.* there was a queſtion, whether a bare acknowledgement of a *debt* amounted to a *new promiſe*; and reſolved, that it did not. But in that caſe there was an *expreſs* promiſe, on which the plaintiff declared; *viz.* I deny that I owe you any thing; prove it, and I will pay you. The court arreſted the judgment in the principal caſe. *Vide Mod. Rep. vol.* 10. *page* 312.

Hilary, 2 *Geo.* *Anonymous.*

On a motion in *arreſt of judgment*, in an action of *debt* on a bail bond, wherein the obligor was bound in 40 *l.* conditioned that *J. S.* ſhould appear on the return of the writ; the objection was, that the word *quadrant.* i. e. *forty*, was inſenſible; it is true, if the condition had been for payment of money, ſo that it might explain what was meant in the bond, it might be good; but where the bond is ſingle, or the condition is for doing ſome *collateral* act (as in this caſe it was) which doth not explain what ſum is intended in the bond, there it is void.

To which it was anſwered, that it may be well on the *roll*; and thereupon the court ſtayed all proceedings till the *roll* was brought in; and ſaid, though the condition of this bond was *collateral*, yet the bond being made according to the ſtatute, by which it is enacted, that none be *arreſted by proceſs*, &c. in which the true cauſe of action is not expreſſed, and for which the defendant is bailable by virtue of the *ſtat.* 23. *H.* 6. ſhall be forced to enter into a bond, with ſureties for appearing, in any ſum exceeding 40 *l.*

Now the condition of this bond being for *appearing*, &c. that may explain what is intended by the word *quadrant.* in the bond, *viz.* 40 *l.* according to the ſtatute. *Vide Mod. Rep. vol.* 8. *p.* 343.

Hilary, 3 *Geo.* *Cole* v. *Hawkins.*

In *Trinity* term, 13 *Ann.* on an *aſſumpſit*, the plaintiff declared on a promiſe made the 16*th of January*, 1706, the defendant pleaded in *bar* the ſtatute of limitations; and that the cauſe of action did not accrue within *ſix years* before the exhibiting of the bill. The plaintiff replied, the bill was exhibited the 23*d of January*, 1713; and that the cauſe of action did ariſe within *ſix years* before exhibiting the ſaid bill.

To this the defendant demurred; and, after having been argued by council, the matter was adjourned for further conſideration. And now *Parker*, Chief Juſtice, delivered the reſolution of the court.

Judgment muſt be given for the plaintiff. For this being the caſe of a *parol* promiſe, the day in the declaration is not *material*; and therefore the plaintiff, in his replication, has only departed from an *immaterial* part of his declaration; which would be cured by a verdict, and is now aided on a general demurrer, by the ſtatute for amendment of the law.

Was it more than matter of *form*, a verdict finding the promiſe at another day, could never cure it, as moſt certainly it would.

And for this purpoſe, the caſe of *Lee* v. *Raynes*, 1 *Lev.* 110. 1 *Keble* 556, 578. was cited, where this doctrine is laid down; that for the plaintiff, in his replication, to vary from the time or place in his declaration, in order to follow the defendant's plea, is not a *departure.*

In the old books, indeed, this would have been a *departure.* 22 *Aſſiſe* 86.

And unleſs what ſtrictly ſpeaking is a *departure*, be ſometimes allowed; unleſs the plaintiff, where the defendant by his juſtification makes the time or place material, may follow the defendant's plea, though it lead him to another time or place; all that doctrine, that in *tranſitory* actions, where time and place are *not material*, the plaintiff may declare at any time or place, muſt fall to the ground. Therefore judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 10. *page* 349.

Eaſter, 5 *Geo.* *Rudge* v. *Onon.*

In an action of *aſſault* and *battery*, in the declaration there were two counts; the firſt count was good, the ſecond was with a *cumque etiam*, i. e. *whereas alſo*, and entire damages given. In this caſe the judgment was *arreſted*. *Vide Forteſcue*, *page* 376.

Eaſter, 7 *Geo.* *Edwards* v. *Blunt.*

Per curiam. After judgment on *demurrer*, the defendant ſhall not come to *arreſt the judgment* on the return of the inquiry, for an exception that might have been taken, on arguing the *demurrer*. The party cannot be ſaid to come as *a friend to the court*, nor ſhall any one tell us, that the judgment we gave on mature deliberation is wrong; it is otherwiſe, indeed, in the caſe of judgment by *default*, for that is not given in ſo ſolemn a manner; or if the fault ariſes on the writ of *inquiry*, or *verdict*, for there the party could not alledge it before. *Vide Strange*, *vol.* 1. *page* 425.

Eaſter, 8 *Geo.* *King* v. *Selfe.*

The defendant was indicted at the aſſizes for forging ſtamps, and appeared there, on his recognizance, to anſwer the ſaid indictment, and pleaded *not guilty*, and on his trial, he was convicted; but on a motion in *arreſt of judgment* it was ſet aſide: afterwards he exhibited a bill in *Chancery*, againſt the proſecutor of the indictment, who pleaded this conviction of forgery, in *bar* to the ſaid bill; and now the plaintiff in *Chancery* moved this court, that the record might be made up with the *arreſt of judgment*, for that by a miſtake of the clerk of the aſſize, that was not recorded, nor did there any notes thereof appear in his books, but only that he was bound over by recognizance to appear at the aſſizes, and that he did accordingly appear, and ſaved his recognizance; all which matter being evident to the court by the records of the aſſizes, yet they would make no rule for the record to be made up with the *arreſt of judgment*, becauſe a precedent of this nature might be of dangerous conſequence, and therefore deſired that the cauſe might be put into the paper, and ſpoke to again, that it might be judicially determined. *Vide Mod. Rep. vol.* 8 *page* 45.

Eaſter, 10 *Geo.* *Anonymous.*

A motion was made to *ſtay the proceedings on a judgment*, ſuggeſting that a part of the money was paid, and that the defendant was willing to pay the reſt into court.

To which it was replied, that what money the plaintiff had already received, was in diſcharge of ſome other debts between him and the defendant; but on producing his receipt, it appeared to be paid *indefinitely*, *viz.* as ſo much due on account.

Per curiam. Where a debtor owes money to his creditor on ſeveral accounts, he may pay part, and apply it to any debt; but if the creditor denies that he received it in ſatisfaction of that debt, but on ſome other account, then he hath his election to apply the payment to what debt he will; ſo where it appears that money is paid *indefinitely*, the creditor has his election to declare on what account he received it.

Therefore if the debtor in the principal caſe would have this payment applied to the judgment on equitable terms, he ſhould likewiſe pay or tender all the money due to the plaintiff on ſimple contract, or otherwiſe, as far as the penalty of the judgment covers ſuch debts; for this court will not compel a creditor by judgment to accept a leſs ſum than is due on the judgment, on the account of any former *indefinite payments*, when there were other accounts depending between the parties, unleſs the defendant will conſent to bring in all that is due to the plaintiff. *Vide Mod. Rep. vol.* 8. *page* 236.

Trinity, 10 *Geo.* *Herbert* v. *Morgan.*

The plaintiff was *arreſted* at the ſuit of the now defendant, in a fictitious action, without any colour of reaſon; and afterwards he brought an *action of falſe impriſonment* againſt the defendant, and the jury gave him 80 *l.* damages; and on a motion in *arreſt of judgment*, becauſe the damages were exceſſive, it was oppoſed by the plaintiff's council, and inſiſted, that he might have the benefit of the verdict, which was granted; and accordingly the plaintiff had judgment. *Vide Mod. Rep. vol.* 8. *page* 296.

Michaelmas, 11 *Geo.* *Biggs, or Brigs*, v. *Greinfield et al'.*

In *treſpaſs* againſt two defendants, one ſuffers judgment to go by default, and the other pleads a diſtreſs for rent, and a licence from the plaintiff to ſell the goods; on which iſſue was joined, and a verdict for the defendant.

The court was moved to *ſtay the judgment* againſt the other defendant; ſince on the whole record it appeared, the plaintiff had no cauſe of action. 1 *Inſt.* 125. *b.* *Salk.* 23. *Cro. Jac.* 134. 1 *Lev.* 63.

And accordingly judgment was *arreſted* as to both. *Vide Strange*, *vol.* 1. *page* 610. *Raymond*, *vol.* 2. *page* 1372.

Michaelmas, 12 *Geo.* *Wyat* v. ———

In an action of *treſpaſs*, for taking away *divers goods and chattels*, the judgment was *arreſted* for uncertainty. *Vide Forteſcue*, *page* 377.

Trinity, 3 *Geo.* 2. *The King* v. *Hays.*

The defendant was indicted for *forging* a *bond*, and on the trial, there appeared a variance in the addition of the obligor, on which a *ſpecial verdict* was found. The *Chief Juſtice* doubting whether it was a variance or not; becauſe being put into the paper to be argued on the *ſpecial verdict*, the council for the defendant attempting to ſpeak, it was inſiſted that the defendant ought to be in court, as on motions in *arreſt of judgment*. To which it was anſwered, that a motion in *arreſt of judgment*, is after a *verdict*, whereas till this *ſpecial verdict* is argued and determined, the defendant is not to be conſidered as *guilty*. The court thought this a reaſonable diſtinction, and allowed the defendant's council to proceed.

It was then argued, that the verdict was imperfect, the indictment being for three diſtinct facts. 1ſt. For *forging* a *bond*; 2dly. For publiſhing *ſuch* bond, ſo by him *forged*; and 3dly. For publiſhing a bond, knowing it to be *forged*. To theſe three offences the defendant pleads *not guilty*, and the jury were charged to enquire of the whole, and in their *verdict* they find, that he forged a bond in the words and figures following, and that he publiſhed the ſame, but they ſay nothing as to the third offence, but conclude, that if on this evidence the court is of opinion he is guilty of the facts charged in the indictment, then they find him *guilty*; and if the court think him *not guilty*, they find accordingly.

On this ſtate of the caſe it was inſiſted on, that the jury ought to find all the iſſues with which they are charged, and ſince the evidence extended to two facts only, they ſhould have found him *not guilty* as to the third. 3 *Lev.* 55. In *treſpaſs* for taking a *gown* and *mantua*, it was found ſpecially, that the defendant took the *gown* for a tax, and nothing ſaid as to the *mantua*, and held a *diſcontinuance*. *Cro. Eliz.* 133. 2 *Roll. Abr.* 722. *pl.* 19. & 2 *Sid.* 86. it is ſaid, that in all *ſpecial verdicts*, the judges will not adjudge of any matters of fact but that which the jury declare to be true of their own finding. *Trials per pais*, 236. Here the court are *ſpecially* tied down to ſay, whether on the evidence laid before them the defendant is *guilty* of all the facts; and that they cannot ſay, becauſe there is no evidence as to one. *Co. Lit.* 227. *a.* A verdict that finds *part* of the *iſſue*, and nothing as to the *reſt*, is inſufficient for the whole: as in an information of *intruſion* into a meſſuage, and one hundred acres of land, the jury find as to the *land*, and nothing as to the *houſe*, it is void for the whole. *Godb.* 57. 2 *Leon.* 194. *Hard.* 166.

The court held, that as the verdict ſtood they could not give judgment that the defendant was guilty of all the offences, the evidence only warranting them to adjudge him guilty of the firſt two, the laſt not being confined to the ſame bond; or if it was, yet every publication is a diſtinct offence: but then they ought themſelves not to have been tied up by the ſpecial concluſion, but that the whole evidence being laid before them, they were to do what the jury ought to have done; and therefore they adjudged, that on the matter referred to them by the jury, it appeared to the court that the defendant was guilty of the forgery and firſt publication, and not guilty of the reſt.

Judgment not having been ſigned, the court was of opinion the defendant might move any thing in *arreſt of judgment*. And it having been taken notice of by the council for the King, that the forgery was laid to be *againſt the form of the ſtatute*; it was then objected by the council for the defendant, that all the proceedings againſt him were void; for that the *certiorari*, *venire*, and *diſtringas*, were as if it had been an indictment at *common law*; and many *precedents* were cited, where the proceſs always ran of *certain treſpaſſes and contempts* againſt the form of the ſtatute: and indeed that diſtinction had been kept up in all the forms of the *Crown Office*. But the court thought it not neceſſary, for a *certiorari* to remove all indictments, will remove one for forgery on the ſtatute, and the jury are ſummoned to try whether he is guilty of the offence whereof he is indicted, which is a ſufficient warning to appear in the cauſe; and therefore the court pronounced judgment on the ſtatute. *Vide Stra. vol.* 2. *page* 843.

Trinity, 32 & 33 *Geo.* 2. *The King* v. *Robinſon*, *Clerk*.

The court held, that a motion in *arreſt of judgment* may be made (on the *crown ſide*) at any time before ſentence pronounced; that the judgment ſigned in the *Crown Office* is only an *interlocutory* judgment, and the award *quod capiatur*, i. e. *that he be taken*, is only to bring the defendant in to receive the *final* judgment or ſentence of the court, but is not the *final* judgment itſelf. *Vide Bur. vol.* 2. *p.* 801.

Trinity, 5 *Geo.* 3. *Weſton* v. *Maſon*, & *Weſton* v. *Chapman*.

On a motion in *arreſt of judgment*, after verdict for the plaintiff, on an action of *debt* on bond brought againſt the ſureties of a ſheriff's bailiff, the defendant craved *oyer* of the condition, which ſtates that the ſheriff had appointed the defendant a bailiff for the hundred of *Eaſt Gotſon*; if therefore he ſhall duly execute his office, &c. within that hundred, and ſhall duly execute all warrants directed to him, and make due and ſufficient returns thereof, &c. then the bond to be void. To this action the defendant pleaded the performance of the condition; to which the plaintiff replied, and aſſigned a particular breach; *viz*, *that this bailiff had not made a due return to a particular warrant directed to him*; the defendant rejoined, *that he had*; on which iſſue was joined, and a verdict obtained as aforeſaid.

The defendant's council, on this motion, made an objection to the verdict, that the bailiff was only appointed bailiff of a particular hundred, and the warrants to which he was obliged to make returns were confined to the particular hundred of which he was bailiff; and that it did not appear that the warrant which he is charged not to have returned was directed to him as bailiff of the hundred, and if not, he was not obliged to return it; and cited a caſe in point, in ſupport of his objection, from *Aleyn* 10. *Stoughton* v. *Day*.

The plaintiff's council oppoſed the motion, and argued that it did not appear otherwiſe than by the *recital* of the condition of the bond, that the defendant was appointed bailiff for the hundred of *Eaſt Gotſon* only; and further obſerved, that the warrant was directed to the defendant, and delivered to him, and therefore he ought to have returned it: that theſe bailiffs are appointed bailiffs of a particular hundred only to prevent confuſion in ſummoning juries, &c. as to executing *meſne proceſs*, they are not confined to the particular hundred, but are conſidered as bailiffs for the whole county, or there muſt be as many warrants as there are hundreds in a county; that the practice was for ſheriffs to direct theſe warrants *generally*, and not to the bailiff of a *particular* hundred: that if the objection taken by the defendant's council to the verdict was to hold, there would be an end of all ſheriffs bonds; and therefore prayed judgment on their verdict.

Lord Manſfield. The condition of the bond appeared on *oyer*; the defendant's plea alledges a performance of it by the bailiff's having duly executed, and made due and ſufficient returns to all warrants directed to him: the plaintiff replies to this plea, and ſpecifies a particular warrant which the defendant did not duly return: to this replication the defendant does not demur, but takes iſſue on the fact. It does not appear from any thing offered, that this warrant was directed to the defendant, as bailiff of the hundred, and therefore it is obſerved by the council for the defendant, that he was not obliged to execute it.

If this matter had ſtood on the conſtruction of the bond, it might have been an object of conſideration, but this being in *arreſt of judgment* after a *verdict*, and not on *demurrer*, it does not appear that it was not directed to him as bailiff of the hundred.

Wilmot, Juſtice. If it had ſtood on a *demurrer*, I ſhould have thought the caſe in *Aleyn* in point.

From the record, we cannot take the warrant to be directed to the defendant, otherwiſe than as bailiff of the hundred. The defendant, by joining iſſue on the fact of returning the warrant, *admits* that it was not directed to him *generally*, and after ſuch admiſſion, we cannot intend that it was not directed to him, as bailiff of the hundred, for the purpoſe of *arreſting judgment*.

Yates, Juſtice. The caſe cited in *Aleyn* was on a *demurrer*, and that a *general* one, and before *ſtat.* 4 & 5 *Ann.* ſo that the caſe does not affect this: a verdict will aid a title defectively ſet forth, though not a total defect of title.

It was ſufficient for the plaintiff to purſue the words of the condition of the bond, and it lay on the defendant to ſhew that this was not ſuch a warrant as was within the condition, inſtead of which he *admits* that the bailiff returned this warrant, which is allowing it to be a proper one, and the court will not now intend it to be otherwiſe in order to overturn a verdict.

I am clear that the plaintiff is intitled to his verdict, as the defendant has not choſen to take the opportunity of ſhewing what he might have done if true, and therefore there is no ground for *arreſting the judgment*.

Aſton, Juſtice, concurred; and obſerved that the defendant might have taken the proper method of ſtating the particular *fact*, by a rejoinder.

Per curiam. Let the *poſtea* be delivered to the plaintiff, in both cauſes. *Vide Bur. vol.* 3. *page* 1725.

Aſſault and Battery.

Michaelmas, 7 *W.* 3. *Leward and Wife* v. *Baſely*.

In an action of *treſpaſs* for an *aſſault* and *battery*, the *battery* was committed on the wife, the defendant pleaded *de ſon aſſault demeſne* of the wife. The plaintiffs reply, that the defendant went out to fight the huſband, and that ſhe being deſirous to aſſiſt her huſband, and to keep him from being wounded, *made the aſſault* on the defendant; the defendant demurs, and the plaintiffs council *argued*, that this *made the aſſault* was ill, and in ſupport of his argument, *cited* a caſe, *Jones* v. *Treſilian intr. Trin.* 21 *Car.* 2. *rot.* 1841. In *Treſpaſs*, *aſſault*, and *battery*, the defendant pleaded *de ſon aſſault demeſne*; the plaintiff replied, that he was poſſeſſed of a cloſe, called *Cupner's Cloſe*, and that the defendant broke the gate, and chaced his horſes in the cloſe, and the plaintiff for defending his poſſeſſion *made a gentle aſſault* on the defendant, and on demurrer *adjudged* a bad *replication*, for he ſhould have ſaid, *he laid his hands gently on him*, for he could not juſtify an *aſſault* in defence of his poſſeſſion. And this caſe, the court agreed to be good *law*, but different from the preſent caſe; for this is a juſtifiable *aſſault*, for the wife may lawfully make an *aſſault*, to keep her huſband from harm, and ſhe has pleaded it ſo. In the ſame manner a ſervant may juſtify an *aſſault* in defence of his maſter, but not otherwiſe, becauſe the maſter might have an action, *whereby he loſt his ſervice*. So in this caſe, if the defendant lifted his hand to ſtrike the huſband, the wife might well juſtify an *aſſault* to prevent the blow; and if the fact had been otherwiſe, the defendant ought to have rejoined *de ſon tort demeſne*, and then it had been againſt the plaintiff; but a man cannot juſtify an *aſſault* in defence of his *horſe*, or his *poſſeſſion*, for there he ought to ſay, *he laid his hands gently on him*. Therefore judgment, *niſi*, i. e. *unleſs cauſe ſhewn*, was given for the plaintiff. *Vide Raym. vol.* 1. *page* 62.

Hilary, 8 *W*. 3. *Anonymous.*

In an action of *aſſault*, *&c.* the defendant may juſtify the *aſſault* to ſave his perſon, but not to defend his houſe or poſſeſſion, for in that caſe he muſt plead *molliter manus impoſuit*, i. e. *that he gently laid his hands on him*, but the *law* ſeems to be that he may juſtify an *aſſault* in defence of his houſe, though in ſuch caſe he cannot juſtify a wounding. 2 *Roll.* 548. *Latch.* 20. *Vide Salk. vol.* 3. *page* 46.

Keit's Caſe.

Adjudged, per Holt, Chief Juſtice. That a maſter may juſtify the beating his apprentice, ſervant, ſcholar, *&c.* if the beating is in nature of correction only, and with a proper inſtrument, otherwiſe, *immoderate correction* is a good reply to ſuch action. *Vide Salk. vol.* 3. *page* 47.

Trinity, 9 *W*. 3. *Truſcott* v. *Carpenter and Man.*

The plaintiff brought an action of *treſpaſs*, for an *aſſault*, *battery*, *wounding*, and *impriſonment*, againſt the defendants, and declares that the defendants, on ſuch a day, at *St. Ree* in *Cornwall*, beat, wounded, and impriſoned him, and detained him in priſon until he paid a fine of 3 *l.* 16 *s.* 8 *d.* *&c.* the defendants, to the *wounding* plead not guilty, and *as to the reſt of the treſpaſs, aſſault, and impriſonment*, they plead, that the defendant, *Carpenter*, entered a *plaint* in *debt* againſt the plaintiff, in the court of *Launceſton* in *Cornwall*, for a debt due to him, *within the juriſdiction of the court*; that a ſummons iſſued thereon againſt the plaintiff, and a *nihil* was returned thereon; that then a *capias* iſſued, directed to the defendant *Man*, to ſeize the plaintiff, which was awarded the 27th of *January*, 7 *W*. 3. returnable the 10th of *April* following; that this *capias* was delivered to the defendant, *Man*, and he, by virtue thereof, before the return of the writ, *viz.* the 9th of *March*, at *Launceſton* aforeſaid, at the requeſt and inſtance of the defendant *Carpenter*, took and arreſted the plaintiff, and detained him in cuſtody, for want of ſureties, until the 10th of *March*, at which day the plaintiff paid the debt, which was the 3 *l.* 16 *s.* 8 *d.* *&c.* and the defendant *Man*, then and there, by the conſent of the defendant *Carpenter*, let the plaintiff go at large, which is the reſidue of the ſaid *treſpaſs*, *aſſault*, and *impriſonment*, whereof the plaintiff complains; and they *traverſe without this*, that they are guilty of any other *treſpaſs*, *aſſault*, or *impriſonment*, before the *teſte* of the writ, or after the return, or at *St. Ree*, or any other place out of the *juriſdiction* of the court of *Launceſton*. The plaintiff replies, that the cauſe of action aroſe at *St. Neots*, *without this*, that it aroſe within the *juriſdiction* of the court of *Launceſton*. The defendants demur. The plaintiff's council argued, that the replication has avoided the defendant's plea; that the defendant, by his *demurrer*, has confeſſed, that the cauſe of action aroſe out of the *juriſdiction* of the court of *Launceſton*; and then the officers who execute any proceſs are puniſhable, *otherwiſe*, if the court has *juriſdiction*, but the proceſs is *erroneous*, and for this they cited 10 *Co.* 76. the caſe of the *Marſhalſea*, 1 *Roll. Abr.* 547, 809. *March* 8. 2 *Roll. Rep.* 109. and *Mich.* 28. *Car.* 2. *C. B. Rol.* 516. *Higgen* v. *Martin*, where an action was brought, as in this caſe, againſt the plaintiff, who recovered in the *inferior court*, and the officer for falſe impriſonment: the defendants juſtified as here; and the plaintiff replied, that the cauſe of action aroſe out of the *juriſdiction* of the court; and on demurrer, it was adjudged for the plaintiff, on the reaſon and authority of the caſe of the *Marſhalſea*. So *Hill.* 33 & 34 *Car.* 2. *C. B. Rot.* 458, *or* 1629. *Gelder* v. *Pratt.* the ſame caſe, and the ſame reſolution. *But not allowed.* For, *per curiam*, neither the officer nor the party are bound to take notice, whether the cauſe of action aroſe out of the *juriſdiction* of the court; and therefore the reſolution of the caſe of the *Marſhalſea* was a hard reſolution, and warranted by none of the books there *cited.* But if the cauſe of action aroſe out of the *juriſdiction* of the court, the defendant in the *inferior court* ought to plead it; and if he does not, the affair of the *juriſdiction* is over, and he ſhall not take advantage of it in any collateral action brought againſt the plaintiff, or the officer who executes the proceſs. And ſo it was reſolved in the *Exchequer*, ſince the revolution, in the caſe of *Poole* and *Gwinn*, on ſolemn debate and examination of all the *precedents*, where the action of *falſe impriſonment* was brought againſt the *judge*, *officer*, and *plaintiff*, in the *inferior court*, and the caſe was *adjudged* when *Powell*, Juſtice, was a *baron* of the *Exchequer*, who ſaid, that *Holt*, Chief Juſtice, approved of the judgment, in the caſe of *Poole* v. *Gwinn*, on the ſame being reported to him.

2dly. It was urged for the plaintiff, that notwithſtanding his replication was not good, yet the defendant's plea was ill; for the defendant juſtifies under a *capias teſted* the 27th of *January*, and returnable the 10th of *April* following, and ſays that by virtue thereof he took the plaintiff the 9th of *March*, and diſcharged him the 10th; and *traverſes without this*, that they were guilty at any time before the *teſte*, and after the return of the writ; ſo that there is a time not *traverſed*, in which the defendants may be guilty, notwithſtanding any thing that appears to the contrary, *viz.* between the 10th of *March*, which was the *day* of the *diſcharge* of the plaintiff and the 10th of *April*, which was the *return day* of the writ; and they cited *Carter* 84. *Atkins* v. *Cleaver*. And of this opinion was the whole court.

A *ſecond exception* was taken to the plea, that the plaintiff has declared for an *expreſs battery*, therefore, though the juſtification of the impriſonment by implication juſtifies a *battery*, yet, when an *expreſs battery* is laid, it ought to be juſtified alſo. 1 *Roll. Rep.* 176. *Wilſon* v. *Dod*, and there it was adjudged a *diſcontinuance*, becauſe there was no anſwer to the *battery*. But there is here an anſwer, ſuch as it is; for the defendants ſay, *that as to the reſt of the treſpaſs*, &c. which the defendants intended to be a juſtification for the whole, and ſo to comprehend the *battery*, and therefore no *diſcontinuance*. But it is an inſufficient juſtification, becauſe they juſtify by implication only a *battery*, which is included in the impriſonment, where an *expreſs battery* ought to be juſtified. Beſides, if an officer has a legal proceſs to arreſt a man, yet he cannot beat him, unleſs he reſiſts; but no ſuch thing appears here, and therefore, for this reaſon alſo, the plea is ill. And ſo it was adjudged, *Eaſter*, 1691. *C. B. intr. Hilary*, 2 *W*. & *M. Roll.* 759. *Stony* v. *Calvert*; and 2 *Vent.* 193. *Carre* v. *Donne*. And of this opinion was the whole court; for where an *expreſs battery* is laid, it is not enough to juſtify the impriſonment on legal proceſs, which includes a *battery*; but the defendant ought to go on and ſhew that he arreſted the plaintiff, and the plaintiff offered to reſcue himſelf, and ſo the defendant was compelled to beat him; for otherwiſe, if it be not on ſome occaſion, a man cannot juſtify a *battery* in an arreſt. And therefore, for theſe two defects in the plea, judgment was given

for

the whole court for the plaintiff. *Vide Raym. vol.* 1. *page* 229.

Michaelmas, 10 *W*. 3. *Morice* v. *Green.*

In an action of *treſpaſs* for an *aſſault* and *battery*; on demurrer tendered by the plaintiff, without any *imparlance*, the judgment was thus, *and the aforeſaid* G. *came not*, &c. the defendant's council moved, that this was a judgment by *default*, when it ſhould be by *nihil dicit*, i. e. *he ſays nothing*, for a *default* cannot be without an *imparlance*; for without *imparlance* he was not demandable; and the entry ſhould be, *and it was adjudged by the court that he ſhould join in the demurrer, and he ſaid nothing*, &c. and this is manifeſt from the conſtant practice in caſe of *common recoveries*, where the judgment is ever by *default*: and therefore they are forced to grant a *general imparlance*; by which a ſuit is put in ſuſpence, and the defendant is demandable.

The plaintiff's council in anſwer ſaid, it was a judgment on *nihil dicit*, i. e. *he ſays nothing*; and *non venit*, i. e. *he came not*, muſt not be underſtood that he came not to join in the demurrer; and *Holt* inclined that way; but ſaid they would not be poſitive: and he ſaid, that on a *nihil dicit* a perſon ſhall never take advantage of ill pleading, becauſe there is no iſſue in *law*, but on a joinder in demurrer it is otherwiſe. *Vide Mod. Rep. vol.* 12. *p.* 253.

Michaelmas, 1 *Ann. Rigaut* v. *Galliſard.*

In the declaration on a *prohibition*, it was ſet forth, that at the *ſeſſions of the peace* held at *Weſtminſter* ſuch a day and year of King *William* 3. the plaintiff was indicted for making an aſſault on one *Louiſe Rigaut*, the defendant's wife, with an intent to have a *carnal* knowledge of her; and it was laid to be againſt the peace of the *late King*, &c. and that likewiſe the now defendant brought an action of *aſſault* and *battery* againſt him in *Trinity* 12. of the *late King*, which was likewiſe laid to be *againſt the peace*, which ſuit is ſtill depending; and yet the ſaid defendant has ordered him to be ſued in the *Biſhop of London*'s court, for ſolicitation of the ſaid *Louiſe Rigaut*'s chaſtity to commit adultery with him. The defendant pleads for a *conſultation*, that he is not charged below for any of the crimes charged in the indictment or action. To this plea the plaintiff demurred, and the matter having been argued by the council on both ſides, the court gave their opinion.

Holt, C. J. The *prohibition* ought to ſtand; for it was but one intire act, and they below cannot divide it; for the plaintiff in the *prohibition* has *averred* the fact for which they are indicted, and that for which the ſuit is below, to be the ſame, and to give them *juriſdiction* below, you ſhould have come and *rejoined*, and *traverſed*, it being the ſame fact; but that it was for other cauſe than is in the indictment, and that perhaps would have divided it: he put this caſe, which he ſaid had been *adjudged in Lord Hyde's time.* The libel below was for ſaying the proſecutor had a *baſtard*: the defendant comes and ſuggeſts for a *prohibition*, that he did accuſe the plaintiff below, before a *juſtice* of *peace*, of getting a *baſtard child*; and that the juſtice did *adjudge* him to be the reputed father of it, and that he ſpoke the words before the *juſtice*: and it was replied, that they were ſpoke at large, and no otherwiſe than before the *juſtice of peace*; and to this it was pleaded by way of *eſtoppel*, that ſince he had been *adjudged* before the juſtices to have been the *father*, he could not ſue below for *defamation*; and of that opinion was the court.

Here you ſhould ſay, that it was for another offence than the *ſolicitation* in the indictment, or that it was at another time and place than is laid in the indictment; and their laying in the *libel* another time and place than is in the indictment, is not enough, for below they lay at what time and place they pleaſe. If a man *ſollicits* a woman, and goes gently to work with her at firſt, and when he finds that will not do, proceeds to *force*, it is all one continued act, beginning with *inſinuation*, and ending with *force*.

In the caſe of the *Duke of Norfolk* v. *Germaine*, it was not pretended to be force, and an indictment will not lie for a plain *adultery*, but a *libel* below will, tho' the *law* indulges the huſband with an action of *aſſault* and *battery*, for the injury done to him, though it be with conſent of his wife, becauſe the *law* will not allow her a conſent in ſuch caſe to the prejudice of her huſband, becauſe of the intereſt he has in her; and he compared it to the *caſe* of calling a woman a *whore* and *thief*, there ſhe ſhall not ſplit the words, and puniſh him below for calling her a *whore*, and at law for calling her a *thief*. He agreed, if *adultery* be committed with another man's wife, without any force, but by her own conſent, though the huſband may have *aſſault* and *battery*, and lay it *vi et armis*, i. e. *with force and arms*, yet they ſhall in that caſe puniſh below for that very offence; for an indictment will not lie for ſuch an *aſſault* and *battery*, neither ſhall the huſband and wife join in the action at *common law*; and therefore they proceed below either *civilly*, that is, to *divorce* them; or *criminally*, becauſe they were not *criminally* proſecuted above; and the true action for the huſband in ſuch caſe, is a ſpecial action, *becauſe* the defendant *raviſhed* his wife, and not to lay it, *whereby he loſt the comfort of his ſaid wife. Vide Raſtall*, title, *Treſpaſs*. The court agreed that the offence was not merely *ſpiritual. Vide Mod. Rep. vol.* 7. *p.* 78.

Eaſter, 3 *Ann. Cole* v. *Turner. At niſi prius.*

On an action of *treſpaſs* for an *aſſault* and *battery*: *Holt*, Chief Juſtice declared, 1ſt. That the leaſt touching of another in *anger* is a *battery*.

2dly. If two or more meet in a narrow paſſage, and without any *violence* or *deſign of harm*, the one touches the other *gently*, it will be no *battery*.

3dly. If either of them uſe *violence* againſt the *other*, to force his way in a rude inordinate manner, it will be a *battery*, or any ſtruggle about the paſſage to that degree, as may do *hurt*, will be a *battery*. *Vide Cro. Treſp.* 236. 336. 7 *E*. 4. 26. 22 *Aſſ.* 60. 3 *H*. 4. 9.

Note. This caſe was an action of *battery* brought by huſband and wife, to the damage of them; and though the plaintiff had a verdict, yet the *Chief Juſtice* ſaid, he ſhould never have judgment, and judgment was after arreſted above on that execution. *Vide Mod. Rep. vol.* 6. *page* 149.

Eaſter, 3 *Ann. The Queen* v. *Coleſworth,*

On an indictment for a *battery* on Dr. *R*. the evidence was that the defendant did ſpit in his face.

Per Holt, Chief Juſtice. It is a *battery*; though one cannot juſtify a *battery* by *ſon aſſault demeſne*, by pleading it to an indictment, yet he may give it in evidence on *not guilty*, and he may be thereon *acquitted. Vide Mod. Rep. vol.* 6. *page* 172.

Michaelmas, 4 *Ann. Anonymous.*

In an action of *aſſault*, it appeared that the defendant came with violence to reſcue a *diſtreſs* from the plaintiff, and the plaintiff had not time to requeſt him to forbear.

Per curiam. The *aſſault* was well juſtified. 2 *Roll. Abr*. 549. *Vide Mod. Rep. vol.* 11. *page* 64.

Trinity, 8 *Ann. Young* v. *Slaughterford.*

Per Holt, Chief Juſtice. There is no need of an *aſſault* to be laid in the declaration, if it is ſtated therein *percuſſit*, i. e. *he ſtruck*., theſe words imply an *aſſault*. *Vide Mod. Rep. vol.* 11. *page* 229.

Trinity, 9 *Geo*. 2. *Williams* v. *Jones and Others.*

In an action of *treſpaſs* for an *aſſault and battery*, the defendant juſtified an *arreſt* under proceſs; and on demurrer it was objected, that tho' proceſs will juſtify the aſſault in *arreſting*, yet to juſtify a *battery*, reſiſtance, or an attempt to *reſcue* himſelf, ſhould be ſhewn, and *Lutw*. 929. was cited, and precedents where the plea is *not guilty* to the *battery*, and a juſtification as to the *aſſault*. *Co. Ent*. 303. *b*. *Tho*. 306. 1 *Brown* 237, 238.

2 *Brown.* 134. 145, 146. *Hearne* 489. 2 *E.* 4. 6. *b.* 2 *Roll. Abr.* 546.

And after time taken by the court to conſider of the matter, the Chief Juſtice delivered their opinion, that the plea was ill, and therefore the plaintiff had judgment. *Vide Strange, vol.* 2. *page* 1049. *Caſes temp. Lord Hardwicke, p.* 298.

This caſe may be ſeen more fully ſtated, in *page* 14 of this work, under the head *Arreſt.*

Hilary, 10 *Geo.* 2. *Tottage* v. *Petty.*

In an action of *aſſault*, for ſeveral *batteries* and woundings, the defendant, as to the wounding, pleads *not guilty*; and as to the *battery*, he *juſtifies*, that the plaintiff entered his houſe without his leave, and there diſturbed him; and becauſe he would not go out, the defendant *gently laid his hand on him*, which he *avers* is the ſame *battery*.

On demurrer, the plaintiff's council made *two exceptions* to the defendant's plea:

1ſt. That the ſame was bad, becauſe the plea not only juſtifies the *aſſault*, but alſo the *battery*, which cannot be done on the authority of *Williams* v. *Jones and others, Trin.* 10 *Geo.* 2.

2dly, That the plea was bad, becauſe it does not ſhew that the plaintiff refuſed to go out of the defendant's houſe.

Lord Hardwicke. It is laid here, that becauſe the plaintiff would not go out, therefore, &c. which is a good *averment*. As to the caſe of *Williams* v. *Jones and others*, there the defendant juſtified a *battery* by a bare arreſt, and the queſtion was, whether he ſhould not have ſhewn either a *molliter manus*, or that he having arreſted the plaintiff, did the *battery* in his own defence? but it was not determined by us, that a *battery* could not be juſtified by a *molliter manus*, but that it could not be juſtified by an *arreſt*.

Per curiam. Judgment for the defendant. *Vide Caſes Temp. Lord Hardwicke, page* 358.

Eaſter, 6 *Geo.* 3. *Poſtlethwaite* v. *Parkes.*

In an action of *treſpaſs, with force and arms*, for an *aſſault* on the plaintiff's daughter, and getting her with child the plaintiff in his declaration concluded with a *per quod ſervitium amiſit*, i. e. *whereby he loſt her ſervice.*

The queſtion which aroſe at the trial, and which was reſerved for the opinion of the court, was, whether the plaintiff can maintain this action.

After hearing the council on both ſides, the parties being poor, the court propoſed a compromiſe, which was accepted, and by rule of court, all proceedings were ordered to be ſtayed without coſts on either ſide.

The court ſeemed clearly of opinion, that the action could not be maintained, becauſe this action depends on the *loſs of ſervice*, which was not the preſent caſe, though they gave no opinion. *Vide Bur. vol.* 3. *p.* 1878.

Aſſets.

Michaelmas, 8 *W.* 3. *Oldham* v. *Pickering.*

On an *attachment* brought on a *prohibition*, the caſe ſtated to the court was, that *T. O.* was ſeized of a meſſuage to him and his aſſigns for three lives, and *died inteſtate*, without children, leaving only *A. P.* his ſiſter; adminiſtration was committed to *S. O.* the plaintiff, on which the defendant ſued her in the *ſpiritual court* for *diſtribution*, and the ſingle *queſtion* was, whether an eſtate *pur auter vie*, be now *diſtributable* in the ſame manner as *inteſtates goods and chattels*, according to ſtat. 22 *Car.* 2. and by force of 29. *Car.* 2. *c.* 3. whereby it is *enacted*, that an eſtate *pur auter vie*, ſhall be *deviſeable*; and if no ſuch *deviſe* be thereof made, the eſtate ſhall be anſwerable in the hands of the heir, if it ſhall come to him by reaſon of a *ſpecial occupancy*, and in caſe there be no *ſpecial occupant*, it ſhall go to the *executor* or *adminiſtrator* of the parties, that had the eſtate thereof by virtue of the grant, and ſhall be *aſſets* in their hands.

Per curiam. The *prohibition* ſhall remain an eſtate, *pur auter vie* of an *inteſtate*, is not *diſtributable*, for notwithſtanding the alteration made by the ſtatute, it remains a *freehold*, and the *amendment* of the *law* in this particular, was only deſigned for relief of creditors, that if it came to the *heir*, by reaſon of *ſpecial occupancy*, it ſhall be in his hands as *aſſets* by *deſcent*, *viz.* liable to thoſe debts, where the heir is chargeable, and thoſe only, but if there was no *ſpecial occupant*, then it ſhall go to the *executor* and *adminiſtrator*, that they ſhall be in the room of the *occupant*, and it ſhall be *aſſets* in their hands for the payment of the *debts*; but it is not *aſſets* to pay *legacies*, except ſuch as are particularly deviſed out of it: the *ſtatute* has only made it *aſſets* for a particular intent, *viz.* to pay creditors: and as no debts appear in this caſe, the *adminiſtrator* is as it were the *occupant*, and ſhall not be compelled to make *diſtribution*. *Vide Mod. Rep. vol.* 12. *p.* 103.

Michaelmas, 11 *W.* 3. ——— v. *Harriſon.*

In an action of *debt* brought by *huſband* and *wife*, againſt an *executor*, who pleaded, *that he had fully adminiſtered*, on iſſue joined, it was given in evidence at the trial, that the executor had diſcharged a debtor of the inteſtate's out of *Ludgate*, taking a bond from him for the debt, and it likewiſe appeared that he was ſo extremely poor, that he was downright ſtarving, yet the *debt* was deemed *aſſets* in the executor's hands.

Beſides the executor had not an *inventory*, wherefore it was ſaid, they ought to intend *aſſets*.

Per Holt. If a huſband and wife jointly ſue for a *debt* due to the wife before her marriage, and the huſband dies, and the wife continues the ſuit, the money when recovered ſhall not be *aſſets* to the executor of the huſband, and the huſband alone might bring *debt* for the *portion*, promiſed to him with his wife; and though land had been ſettled by the huſband on his wife, in conſideration of her *fortune*, of which this *debt* was part, yet he having not recovered it, during *coverture*, the wife ſhall recover it to her own uſe; and though it was pretended there was a recovery in the huſband's time, which they would prove by the *ſheriff*, who had a writ of execution, yet they not having the judgment on which the execution was founded in their poſſeſſion, it was ruled, they could not give that matter in evidence. *Vide Mod. Rep. vol.* 12. *page* 346.

Eaſter, 12 *W.* 3. *Nicols* v. *Bride Bridge.*

Per curiam. A man makes a bond to *A.* in truſt for *B. A.* dies, his executor receives the money, this ſhall not be deemed *aſſets*. *Vide Mod. Rep. vol.* 12. *page* 381.

Hilary, 13 *W.* 3. *Ingram* v. *Foot.*

In an action of *debt* on a bond brought againſt an *adminiſtrator*, to which he pleads in *bar*, a *recognizance* in ſuch a ſum entered into by his *inteſtate*, at ſuch a day, for the appearance of *J. S.* on ſuch a day in ſuch a court, and that the ſaid *J. S.* did not appear, whereby the *recognizance* was forfeited, and that his *inteſtate* was indebted by bond to *Mary M.* in ſuch a ſum, who in *Hilary* term, &c. ſued the defendant, and obtained a judgment againſt him in this court, and that he had not *aſſets* beyond what would ſatisfy the ſaid two ſums *at the time of exhibiting the bill of the aforeſaid* Mary, *or ever afterwards*, to which the plaintiff demurs, and ſhews for cauſe of demurrer two *exceptions*, 1ſt. That it appeared the plaintiff's ſuit was commenced in *Michaelmas* term, before the exhibiting of the bill of the ſaid *Mary*, and the defendant does not deny his having of other *aſſets*, beſides thoſe which he might have waſted by *Hilary* term.

The defendant's council *urged*, that there was no expreſs mention made of any bill exhibited by *Mary*, but only *that ſhe had impleaded him*, and though that being in *debt* in the *King's Bench*, it muſt neceſſarily be by bill;

and tho' the words *Mariæ præd.* i. e. *of the aforeſaid Mary*, would tie it up to *Mary*'s ſuit in *Hilary* term, yet ſince there was no bill of *Mary*'s mentioned before expreſsly, the words ſhould be rejected, and then it would be *at the time of exhibiting the bill*, and that muſt be the *plaintiff's bill*; and further obſerved, that in truth it could not refer to *Mary*'s bill, for no ſuch bill was mentioned before; and then it was worſe, for it referred to nothing, and then no time is fixed, when the defendant had no other *aſſets*, and this diſtinction was made by the defendant's council, when a thing ſhall be rejected for *repugnancy*, and when not; when ſubſequent words make a thing, well explained, and perfect, before nonſenſe, there ſuch words ſhall rather be rejected, than that what was well before ſhould be made *nonſenſe*; but where by the ſubſequent words, the thing is made good ſenſe, but altered in its nature from what it was before, they ſhall not be rejected.

The *ſecond exception* was, that by the *ſtatute* 4 & 5 *W. & M.* all *recognizances* are pardoned, except ſuch as were before aſſigned to the *Lord Almoner*, and this being a *general act of pardon*, and concerning the *King's revenues*, therefore the court will take *judicial* notice of it, and here being a general pardon of all *recognizances*, this *recognizance* is thereby to be judged, pardoned *prima facie*, i. e. *at firſt ſight*, if it be not ſhewn to be within the *exception*; and that is to be done by them that would take advantage of it. And if it ſhould be ſaid that the *recognizance* aſſigned to the *Lord Almoner* being excepted, were not pardoned even *pro inſtanti*, i. e. *for the inſtant*, as in caſe of proviſo, and then the plaintiff being the party to take advantage of the ſtatute, ought to ſhew it. This diſtinction was taken by the defendant's council, on that rule, that he that will take advantage of an act of parliament with an *exception*, muſt ſhew himſelf out of the *exceptions*, *viz.* If the *exceptions* be of perſons, the rule holds, becauſe the court on reading of the *ſtatute*, cannot know, whether he be the perſon *excepted* or not, and therefore the party who knows himſelf beſt in that caſe, muſt ſhew himſelf out of the *excepeion*; and it is an advantage given by the *ſtatute*, to ſuch as are not diſabled to take it by the *exception*; but if the *exception* be of offences, of which the court may be informed by reading the *ſtatute*; he that pleads the ſtatute, need not ſay, that it is an offence not *excepted*, and for this he quoted *Noy* 99. *More* 619. and urged the opinion of *Poph.* 95. where on conſideration of the *ſtatute of* 31 *Eliz. c.* — all *Jeſuits* are ordered to leave the *kingdom*, on pain of *high treaſon*, by ſuch a day, except they are retarded by ſtreſs of weather; it was held the better way of framing an *indictment* thereon, would be to do it *generally*, and let the defendant bring himſelf within the proviſo, it being for his advantage. *Vide* a caſe of *More* 303. *Outlawry* pleaded to *debt*; replication of the 31*ſt of the Queen*, of a *general pardon*, and the *ſci. fac.* returned that the plaintiff at whoſe ſuit the *outlawry* was, was dead, and that judgment was, *that he go hence without a day*, and yet there were *exceptions* in that *ſtatute*, and the plaintiff did not ſhew himſelf out of them, ſo there is not that ſtrictneſs required in pleading *an act of parliament* on a collateral matter, as when it is directly pleaded againſt the *King*.

Holt, Chief Juſtice. That plea depended on the validity of the judgment in the *ſci fac.* which though it were *erroneous*, yet was well while it ſtood.

To this it was anſwered, that *acts of pardon* are in the nature of the *King's grant* to the ſubject, and therefore not to be taken notice of, except they be pleaded; and there are abundance of authorities, that he that is to take an advantage of an *act*, muſt ſhew himſelf out of the *exception* of it; and here it is the plaintiff that is to take advantage of the *ſtatute*. 3 *Inſt.* 234. ſettles the *law* in this caſe, for if the act be a *general act of pardon* abſolute, and without *exception*, the judges *officially* muſt take notice of it: but if it has any *exception* or qualification, either of perſons or offences, he that would take advantage of it muſt plead it, or elſe the judges can take no notice of it.

Holt, Chief Juſtice. If a man be indicted for *murder* or *felony*, he may plead *not guilty*, and give the *pardon* in evidence, but if he has occaſion to plead the *pardon* in *bar* of any collateral matter, as if a *ſci fac.* was brought on a *recognizance*, there he muſt plead the *pardon*. He obſerved, that the court could not take notice of a general act of *pardon*, with an exception *judicially*, without the ſame being pleaded ſpecially, if the act itſelf did not expreſsly ordain it. He ſaid, the true way is to plead the pardon *generally*, and if there be an *exception*, the *Attorney General* ſhould ſhew that the party is within it, when an executor pleads a *recognizance*, he muſt ſtate the ſame to the court, that the court may ſee whether it be to be performed or not, if it be a *debt*, they need only ſay that a judgment was obtained againſt him in ſuch a court, if it be in any of the courts at *Weſtminſter*, but if in *an inferior court*, they muſt give it's juriſdiction, &c. in the preſent caſe the court gave judgment for the plaintiff on the *firſt exception*. *Vide Mod. Rep. vol.* 12. *page* 611.

Trinity, 13 *W.* 3. *Emerſon* v. *Inchbird*, *at niſi prius*, *Guildhall.*

In *debt* on bond, brought againſt the defendant, as *heir* to his father, to which he pleaded *riens per deſcent*, the plaintiff replied *aſſets*, and on iſſue joined thereon, the evidence given was, that the obligor, the defendant's father, deviſed to the defendant, his *ſon* and *heir*, certain meſſuages, in *Exchequer Alley* in *fee*, but chargeable with an *annuity*, or *rent charge*, payable to the defendant's mother.

Per Holt, Chief Juſtice. Theſe meſſuages deſcended to the defendant, and were *aſſets*, for the difference is, where the deviſe makes an alteration of the limitation of the eſtate, from that which the *law* would make by *deſcent*, and where the deviſe conveys the ſame eſtate, as the *law* would make by deſcent, but charges it with incumbrances. In the former caſe the *heir* takes by *purchaſe*, in the latter by *deſcent*. *Vide Raym. vol.* 1. *page* 728.

Eaſter, 1 *Ann.* *Anonymous.*

Per Holt. If a tenant in *tail*, contracts debts by *bond*, and dies, and it can be made to appear, that ſome of his *anceſtors*, who bought the eſtate, found an old mortgage on it for a long term of years, which was kept on foot to wait on the *freehold* and *inheritance*. *Quere*, If ſuch a leaſe in *equity* would not be deemed *aſſets* in the hands of the *heir* in *tail*; for it is *equity* only makes ſuch leaſes *deſcend*, and it is the *higheſt equity* a man's debts ſhould be paid. *Vide Mod. Rep. vol.* 11. *page* 5.

Trinity, 1 *Ann.* *Smith* v. *Angel.*

In an action of *debt* brought by the plaintiff and his wife, as executors of *M. F.* againſt the defendant, as ſon and heir of *J. A.* on ſeveral obligations, by which the father bound himſelf and his heirs on ſeveral conditions, &c. The defendant confeſſes the action, and that the bonds are the deeds of his *anceſtors*, but ſays that his father was ſeized in *fee* of four parts in ſix of ſuch a *cloſe*, and of three parts in four of another *cloſe*, and of three parts in four of a *meſſuage*, and the iſſues and profits thereof:

That the ſaid obligor in his life-time, by his indenture, bearing date, &c. a counter part whereof the defendant produced in court, did demiſe the ſaid parts and ſhares to *H. G.* for five hundred years; by virtue whereof he entered, and was poſſeſſed for the term aforeſaid; that the father died ſeized of the *reverſion*, which deſcended to the defendant; that he was thereof ſeized, and that at the time of exhibiting the bill, or at any time ſince, he had not any land or tenements by *hereditary deſcent*; beſides the *reverſion* of the tenements aforeſaid, that after the death of his father and the ſaid *deſcent*, 9 *W.* 3. there was a ſuit in *Chancery* between *Edward* ——— *A. C. J. B.* and *Elizabeth*, the wife of the defendant's father, and the defendant; in which ſuit it was *decreed*, that *Elizabeth* ſhould have one *third* part of the premiſes for her life for her *dower*; by virtue whereof the ſaid *Elizabeth* was ſeized of a third part of the premiſes for her life, and ſo prays judgment whether he as *ſon* and *heir* to his father ought to be charged beſide the *reverſion* of the term aforeſaid; and of the third part whereof the wife was endowed when it ſhould fall. The plaintiff craves *oyer* of the *leaſe*, by which it appeared, that in conſideration of 300 *l.* he had demiſed the premiſes for five hundred *years*, provided that if the father, his executors or adminiſtrators, paid 50 *l.* *per annum* to *H. G.* during his life, then the eſtate ſhould ceaſe: And *replies*, that the defendant, after the death of his father, *entered*, and was thereof ſeized, and took the profits, beſides the *third* part to his wife, which would be ſufficient to pay the 50 *l.* a year; and ſo prays judgment. The defendant *rejoins*, and ſays, he did not enter *in manner and form*, &c. and concludes to the country. On *demurrer*,

Holt, Chief Juſtice, delivered the opinion of the court. We have no doubt but that the plaintiff ought to have judgment; but the queſtion is, what judgment we ought to give him? whether a *ſpecial* one, to have execution of the lands and tenements mentioned in the plea, or *generally* againſt the defendant, as *heir* to his *anceſtors*. We have conſidered both, and we are of opinion there ought to be a *general* judgment againſt the defendant, by which his *body*, his *goods*, and his *lands*, which are not *aſſets*, may be taken in execution.

Two things are to be conſidered herein:

1ſt. The pleading of a *reverſion* of a term for years made by his *anceſtors*: whether pleading a leaſe for years be good and allowable in a defendant, ſued as *heir* to his *anceſtors*; and whether that be ſufficient to hinder the plaintiff from immediate execution.

2dly. If pleading of an *aſſignment of dower* to the wife, and that he had a *reverſion expectant* thereon by the court of *Chancery*, be good.

As to the *firſt*, the caſe is this; a man by bond obliges himſelf and his *heirs* to pay ſo much money, then makes a leaſe for years, and dies, whereby the *reverſion* in *fee* deſcends to his *heir*; the queſtion is, Whether the *heir* may plead this leaſe for years in *bar* of execution, or confeſs *aſſets*, without taking notice of the term for years? There are indeed ſome few *precedents*, and I have known it practiſed, where it was pleaded; but I am not willing to deliver my opinion as to that point now, becauſe the caſe does not require it; but it ſeems to me, that it ſhould not be a matter lying in the breaſt of the defendant to plead any ſuch matter; for he might without danger confeſs, that he had *aſſets*, without taking any notice of the leaſe: Now, what makes *compleat aſſets?* Why, to have the freehold and *inheritance* of the eſtate deſcend to him, and that the defendant has from his *anceſtors*, therefore he has *compleat aſſets*. If it were a leaſe for life, made by the *anceſtor*, and only a *reverſion in fee expectant* thereon had deſcended from the *anceſtor*, that would not be *aſſets in poſſeſſion*; but a *reverſion* in *fee expectant* on an eſtate for *life*: beſides, it appears by the *ſtatute of Glouceſter*, and ſtatute 21 *Henry* 8. That the *common law* did not much regard eſtates for years, for ſuch eſtate was ſubject altogether to the will of him in *reverſion*; for if he in *reverſion* had ſuffered a *recovery* by colluſion or default, the *termor* was bound by it, and his term was loſt without remedy, as appears by the *Comment* of Lord *Coke* on that *ſtatute*, 2 *Inſt*. 321. 1 *Inſt*. 46. and after the *ſtatute* of *Glouceſter*, which gave a termor for years liberty to come and falſify a *recovery* had againſt a *tenant in reverſion*. Leaſes for years becoming more conſiderable, and yet more precarious, becauſe of the frequency of *common recoveries*, which now became a *common conveyance*; the *ſtatute* of *H.* 8. became a further remedy for *termors*; yet notwithſtandihg theſe *ſtatutes*, it never lay in the mouth of a tenant to the *precipe* to plead a leaſe for years, or to ſtop execution on any ſuch plea. If an *aſſize* be brought againſt a *tenant for life*, he cannot ſay there is a leaſe for years precedent to his right, though a tenant for years himſelf may falſify a *recovery* againſt him in *reverſion*: ſo the ſame reaſon holds in this caſe, for the obligation of the father attaches on the land, being *aſſets* in the *heir's* hands, as *Brown* on 9 *aſſets*, *ſci. fa.* grounded on a *fine* to execute a *fine*, whereby lands were conveyed by *grant*, and rendered to one and his *heirs* in *tail*: the tenant pleaded a *warranty* of the *anceſtors* of the plaintiff, and that *aſſets* deſcended to him. The plaintiff replied, that the *aſſets* that did *deſcend* were extended for the *King's debt*, and it was not held a good plea, becauſe the *freehold* and *inheritance* did deſcend, and they were preſent *aſſets*, if it be ſo in caſe of a *real lien*, ſo as to bind the land in caſe of *warranty*. Sure the ſame reaſon, where the *heir* is charged on account of *aſſets* in an action of *debt* on the *lien* of the *anceſtor*: the books ſay, he may plead a leaſe for years, as to the value of the *aſſets*; for *aſſets* in a *real action* is no more than *aſſets* are worth; ſo that if the plaintiff is not to have it diſcharged of the term for years, the *reverſion* is leſs worth; then if it be a good plea, the conſequence is, that an immediate *extend fac.* goes to appraiſe the *reverſion*, on inquiſition taken, and then to deliver it to the plaintiff to enter into it; when it fails in poſſeſſion, as in *Dyer*, 246. in *debt* againſt an *heir*, who pleaded he had nothing but a *reverſion expectant* on an eſtate for life; the plaintiff joins with him, and takes judgment on the *confeſſion*: ſo if this be a good plea, the ſame muſt be done here. *Hern's pl.* 307. is a precedent of this matter. There is no miſchief to him in *remainder*, nor to the *leſſee*, for he will defend his poſſeſſion in *ejectment* by virtue of his leaſe; but we don't give any concluſive opinion in this matter.

2d *Point*. The *dower* to the wife is *ill* pleaded, for it is not ſaid the wife was endowed by *metes* and *bounds*; nor that the *Lord Chancellor* did endow her; but that there was a *decree* in *Chancery*, by virtue whereof ſhe was endowed, and that is not to be underſtood, for the *Chancellor* has nothing to do in *aſſigning* of *dower*. But in a caſe of lands holden of the *King in chivalry*, and the *heirs* being in *wardſhip* to the King; and in ſuch caſe, when ſhe came in as his wife, and prayed to be endowed, for the *King's title* appearing on record, a record was neceſſary to find her *title*; and ſo an inquiſition was taken, and on her being found thereby to be his wife, the *chancellor* uſed to aſſign her *dower*, or to award a commiſſion for it. *F. N. B.* 363. And this was the *legal way* for the wife to recover her *dower* of lands in the *King's hands*, by the reaſon of the *wardſhip* of the *heir*; for as every *guardian* might *aſſign dower* in *pais*, ſo the *dower* in *Chancery* is by the *King* himſelf, in a judicial and proper manner; but for *Chancery* to *decree* that the wife ſhould have ſuch a third part, would not veſt a *legal* intereſt in her; the *heir* may do it in purſuance to a *decree*; and when he does, the wife is in by virtue of the aſſignment of the *heir*, and not by virtue of any *decree*; then if the *decree* be not a title veſted, he has confeſſed *aſſets*, for he ſet forth only a *reverſion* depending on a *freehold*, and does not ſhew there was a *freehold*; and if the aſſignment of *dower* were good *pro tanto*, i. e. *for ſo much*; yet here is two-thirds whereof ſhe was not endowed, and that is only charged with an eſtate for years, and that is enough to charge him with a general judgment. *Plowd.* 420. comes home very near to the caſe in every reſpect. It is *debt* againſt an *heir*, if he plead any plea that is not a ſufficient *bar*; or if he ſuffer judgment to go againſt him by *nihil dicit* or confeſſion, it ſhall be a *general judgment*, becauſe there is no way for the *heir* to defend himſelf but by ſetting forth the truth, what *aſſets* he has, and where they lie, and ſo open the truth of the caſe to the plaintiff, and let him take what benefit he can of it; and if he does not do this, there ought to be a *general judgment* againſt him as well as on *demurrer*. This authority was murmurred at; but there is not a word of it but what is good *law*. *Vide Mod. Rep.* 520. 3 *Cro.* 639. the ſame caſe. If the *heir* will confeſs that he has *aſſets* by *deſcent* in ſuch and ſuch places, beſides which he has no more, and the iſſue is, that he has more, tho' he confeſſed enough; yet if more *aſſets* be found, there ſhall be a general *judgment*. 2 *Leon*. *Vent*. 11.

In this caſe, it is not in the power of the court to give *ſpecial judgment*, if the plaintiff does not deſire it, for it would be erroneous. 2 *Roll. Abr*. 71. If it be by conſent of the plaintiff they may give a *ſpecial judgment*: but how can we do ſo here? If it be on the *confeſſion*, he muſt allow the plea good, that it is a *reverſion expectant* on an eſtate for *life*, when it does appear that it is not ſo; if he had pleaded that he had only a *reverſion expectant* on an eſtate for *life*, and the plaintiff had *replied*, that the tenant was dead, or had ſurrendered, and it is ſo found by *verdict*, ſure there muſt be a *general judgment*, becauſe he has pleaded a falſe plea in *bar* of the plaintiff's *execution*; and it appearing to us, that there never was ſuch an eſtate for *life* in being; it is the ſame as if a verdict had ſo found it: therefore let the plaintiff have a *general judgment*. *Vide Mod. Rep. vol.* 7. *p.* 40. *Raym. vol.* 2. *p.* 783.

Trinity, 2 *Ann.* *Deering* v. *Torrington.*

If *H.* takes a bond *in truſt* for another perſon, and dies, this bond is not *aſſets* in the hands of his executor. It is the ſame, if an obligee aſſigns and covenants not to revoke the ſame, and dies. The bond is not *aſſets* in the hands of his executor. *Vide Salk. vol.* 1. *p.* 79.

Michaelmas, 9 *Ann.* *Buckley* v. *Pirk.*

If an *executor* takes poſſeſſion of the term of the teſtator, and an action is brought againſt him in the *debet* and *detinet* for rent or non-repairs, it is abſurd for him to plead *no aſſets* beyond *what will ſatisfy ſuch and ſuch judgments*; becauſe in ſuch a caſe the ſurplus of the profits, rents and repairs deducted, is all that is *aſſets*, and liable to the judgments; and therefore the reſt of the profits are ſo appropriated to the payment of rent and repairs, as not to be exhauſted by *debts*. *Vide Salk. vol* 1. *p.* 316. *Mod. Rep. vol.* 10. *p.* 12.

Trinity, 13 *Ann.* *Johnſon* v. *Gardiner.* Error.

On a writ of *error* from the *C. B.* the council for the plaintiff in *error inſiſted* that the declaration was naught, becauſe the action was brought againſt the defendant, as executor, on a promiſe made by him *after the death of the teſtator*, that *whereas* the teſtator was indebted to the plaintiff in *March*, for goods ſold and delivered, he promiſed to pay on the 23d of *November*.

Now it was ſaid, that this promiſe of the executor plainly founded, on the conſideration of *forbearance*, made it the contract of the *executor*, and therefore the action ſhould have been brought againſt him in his own name.

Suppoſing the action well brought againſt him as *executor*, then the judgment was wrong, being *de bonis propriis*, i. e. *of his proper goods*, inſtead of *de bonis teſtatoris*, i. e. *of the goods of the teſtator*.

The council for the defendant in *error argued*, that though the defendant is named *executor*, yet it appears by the declaration, that the executor is chargeable on his *own contract*, and the bare naming him executor does not hurt. It is always ſuppoſed, where there are promiſes of payment on ſuch conſiderations, that the executor has *aſſets*, and therefore not neceſſary to *aver* his having *aſſets*, for unleſs he had, there was no occaſion for ſuch a promiſe. *Cro. Jac.* 602, 613.

On an *aſſumpſit* by an executor, judgment is always *de bonis propriis*, for it is all one as if the executor had given a bond for the money. 9 *Co.* 93. *Cro. Eliz.* 91, 406.

The plaintiff in *error*'s council in reply obſerved, that the conſideration was not the *forbearance*, but the old debt, the debt of the teſtator, and that the promiſing to pay it barely on a future day, will not make a *new conſideration*. *Hob.* 188. Judgment *de bonis teſtatoris*, though *non* repair, was in the time of the executor.

Parker, Chief Juſtice. The naming him executor is *ſurpluſage*; becauſe it appears on the face of the record, that the demand was a demand againſt him, on his *own contract*.

In effect, the *forbearance* is the conſideration of this promiſe, becauſe without *forbearance* no advantage can be taken of this promiſe. *Yard* v. *Ellard*, 10 *W.* 3. *Salk.* 117. And to this opinion the reſt of the court ſeemed inclined. But the matter was *adjourned*. *Vide Mod. Rep. vol.* 10. *page* 254.

Eaſter, 2 *Geo.* *John Burland* v. *John Tyler and Mary his Wife.*

The plaintiff, as adminiſtrator of *J. B.* brought an action of *debt* in the *debet* and *detinet*, on two ſeveral bonds, entered into by *John Hobbs*, deceaſed, by which he bound himſelf, and his heirs, to whom the defendant *Mary* was daughter and heir. The defendant prayed *oyer* of the bonds, and the conditions; the firſt bond was dated 21ſt *December* 1704, in the penalty of 400*l.* with condition that *John Hobbs* ſhould pay 103*l.* to one *Nathaniel Brewer*, for payment whereof the inteſtate and *John Hobbs* were bound in a bond of 200*l.* penalty, to the ſaid *Nathaniel Brewer*, but for the debt of the ſaid *John Hobbs*, the other bond was dated the 17th of *September* 1712, in the penalty of 300*l.* with condition that *John Hobbs* ſhould pay *David Yea* 103*l.* the debt of the ſaid *John Hobbs*, for payment whereof the ſaid *John Hobbs*, and the inteſtate, were bound in a bond of 200*l.* penalty, to the ſaid *David Yea*: after which the defendants *proteſtando*, that the ſeveral ſums were paid to the ſaid *Nathaniel Brewer*, and *David Yea*, according to the ſeveral conditions of the ſaid bonds, pleaded, that the defendant *Mary neither poſſeſſes, any lands or tenements by hereditary deſcent from the aforeſaid* J. H. *her father, in fee ſimple, nor did poſſeſs, at the time of ſuing out the bill aforeſaid, nor ever afterwards; except one meſſuage with its appurtenances, in* Storguſey *aforeſaid, all and ſingular which premiſes are not worth in the whole* 140*l*.

Then they further plead, that the ſaid *John Hobbs*, the father, in his life, by his obligatory writing being lawfully indebted, became bound to one *William Clark*, in 140*l.* and ſo being indebted died, that debt to the ſaid *William Clark* not being paid; whereon one *Margaret Hobbs*, widow of the ſaid *John Hobbs*, mother and guardian of the ſaid *Mary*, paid the ſaid debt of the ſaid *John Hobbs*'s to the ſaid *William Clark*, and that payment was made by the ſaid *Margaret*, as guardian of the ſaid *Mary*, and while the ſaid *Mary* was under the age of twenty-one years; and that neither the ſaid *John Tyler*, nor *Mary* his wife, nor the ſaid *Margaret*, nor any of them, had any notice, nor ever knew of the bonds mentioned in the declaration, nor either of them, from the ſaid *Burland* the inteſtate, nor from the plaintiff, nor from any other perſon whatſoever, before the payment of the ſaid bond of the ſaid *John Hobbs* as aforeſaid, made by the ſaid *Margaret* to the ſaid *William Clark*; and therefore pray judgment, *if they ought not to be diſcharged from the debt aforeſaid, by virtue of the aforeſaid writing obligatory*.

To this plea the plaintiff *demurred* generally, and the defendants joined in *demurrer*.

The council for the defendants offered nothing to maintain the plea, but admitted that to be ill; but inſiſted the declaration was naught, becauſe the action was brought by the plaintiff, as adminiſtrator, in the *debet* and *detinet*, whereas it is laid down as a rule, in 5 *Co.* 31. *b. Hargrave's caſe*, that in all caſes where executors are forced to name themſelves as executors, in actions brought by them, the writ ſhall be in the *detinet* only, becauſe the thing or damages recovered ſhall be *aſſets*. So *debt* for an eſcape brought by an adminiſtrator, for an eſcape in the life of the inteſtate, muſt be in the *detinet* only. *Styles* 232. *Martyn* v. *Hendley*, becauſe the plaintiff does not recover to his own uſe. In *Cro. Jac.* 545. *Sir George Reynell* v. *Lanycaſtle*, held, that bringing an action by an executor in the *debet* and *detinet*, where it ought to be in the *detinet* only, is not matter of form only, but a fault in ſubſtance, after verdict, and not aided by *ſtat.* 18 *Eliz. c.* 14.

The council for the plaintiff ſaid, in reſpect of the debt of the heir, the action was rightly brought; for as to her, it ought to be in the *debet* and *detinet*, becauſe it is brought on the *lien* by which the heir is bound, and is not brought againſt her *en auter droit*, as if the defendant had been an executor. And yet if ſuch an action is brought againſt an heir in the *detinet* only, yet after verdict for the plaintiff that would be cured by *ſtat.* 16 & 17 *Car.* 2. *c.* 8. Then in reſpect of the plaintiff's being an adminiſtrator; if an adminiſtrator brings an action in the *debet* and *detinet*, where it ought to be in the *detinet* only, after a verdict, that is helped by the ſame ſtatute. 1 *Lev.* 250. *Frowin, and his Wife*, v. *Paynton*, 1 *Sid.* 379. And by the ſame reaſon, he ſaid, it would be good by the ſtatute for the amendment of the law. 4 *Ann. cap.* 16.

the defendant not having demurred ſpecially, and aſſigned this cauſe of his demurrer.

The court were of opinion, that this would have been ill on a general demurrer, before the ſtatute made for the amendment of the law; but ſince that ſtatute, they all agreed, that an action brought as this is, would be good on a general demurrer; and that in this caſe, the defendant having pleaded in *bar*, and not having taken advantage by demurring ſpecially, and ſhewing it for cauſe, it was well enough. That it would be good after a verdict, by *ſtat.* 16 & 17 *Car.* 2. *cap.* 8. the caſe cited, 1 *Lev.* 250. is expreſs, and yet this is none of the defects particularly mentioned in that ſtatute, but came under the words (all other matters of the like nature, not being againſt the right of the matter of the ſuit). Then that reſolution has determined, that this defect is not againſt the right of the matter of the ſuit, but is of the like nature with the omiſſion of a *profert in curia* of a bond or indenture, and the other things mentioned, particularly in the ſtatute 16 & 17 *Car.* 2. *cap.* 8. Then comes the act 4 *Ann. cap.* 16. for amendment of the law, and enacts, that notwithſtanding many of the ſame defects (ſpecifying them) mentioned in *ſtat.* 16 & 17 *Car.* 2. *c.* 8. the court ſhould proceed to give judgment, according to the very right of the cauſe, without regarding any ſuch defects, or any other of like nature, except the ſame ſhall be ſpecially ſhewn for cauſe of demurrer. This defect then, not being againſt the right of the ſuit, as was adjudged in that caſe of 1 *Lev.* 250. ought to be ſhewn ſpecially for cauſe of demurrer, if the party would take advantage of it. Beſides, the act for the amendment of the law takes notice, that a defect in matter of ſubſtance ſhould not be took advantage of, without a ſpecial demurrer; for it enacts, that the court ſhall proceed to give judgment, according as the very right of the cauſe and matter in law ſhall appear to them, without regarding any defect, *&c.* except, *&c.* notwithſtanding ſuch defect, *&c.* might have been heretofore taken to be matter of ſubſtance, and not aided by *ſtat.* 27 *Eliz. cap.* 5. ſo as ſufficient matter appear by the pleadings, on which the court may give judgment according to the very right of the cauſe. Now here it appears, that the plaintiff has a right to recover, and to recover as adminiſtrator; and what is recovered will be *aſſets*. And judgment was given for the plaintiff. *Vide Raym. vol.* 2. *page* 1392.

Trinity, 10 *Geo.* *Seviniack* v. *Marſhall.*

This was an action brought againſt an adminiſtratrix, who pleaded, that ſhe had not *aſſets* on the day of ſuing out the *original* writ, where the action was brought by *bill*, and not by *original*; and for this cauſe the plaintiff demurred, and had judgment. *Vide Mod. Rep. vol.* 8. *page* 289.

Hilary, 9 *Geo.* 2. *The Bank of England* v. *Morice.*

The plaintiffs declare againſt the defendant as executrix of *Humphry Morice*, her late huſband, in caſe, for money had, and received by him to the uſe of the plaintiffs.

The defendant pleaded a judgment and ſeveral bonds and articles entered into by Mr. *Morice*, particularly a bond to Sir *William Morice*, in the penalty of 53,000 *l.* conditioned for the payment of 26,500 *l.* by inſtalments, all of which were paſt, and paid at Mr. *Morice*'s death, except one of 5000 *l.* and another of 1,500 *l.* the days of payment whereof were not come at the time of the plea, ſhe alſo pleaded a bond to *Thomas Wilſon* in the penalty of 5000 *l.* for the payment of 2,500 *l.* at a certain day before the death of Mr. *Morice*; and a like bond to *Duncan Campbell*, in 3000 *l.* conditioned for the payment of 1,500 *l.* at a day likewiſe paſt, and then concludes, that ſhe had not more than 1000 *l.* *aſſets*, to anſwer the ſaid ſeveral ſums, by the ſaid ſeveral bonds, articles, and judgment due and payable. To which the plaintiffs replied, that on the day of exhibiting their bill, ſhe had *aſſets* of her late huſband, beyond what would pay, and ſatisfy the ſaid ſeveral ſums by the ſaid bonds, articles, and judgment due, and payable, whereby ſhe could make ſatisfaction to the plaintiffs.

And iſſue being joined hereon, the jury find a ſpecial verdict. That *Humphrey Morice* at his deceaſe, was indebted to the plaintiffs in 28,993 *l.* 8 *s.* 1 *d.* that the *aſſets* come to the hands of the defendant on the day of exhibiting the plaintiff's bill, were 41,152 *l.* 2 *s.* 5 *d.* that the money payable by the conditions of the ſaid three bonds, together with the penalties on all the other articles, and the judgment pleaded by her amounted to 22,182 *l.* 10 *s.* which being deducted from the ſaid 41,152 *l.* 2 *s.* 5 *d.* there remained the ſum of 18,969 *l.* 12 *s.* 5 *d.* that ſhe had not *aſſets* to diſcharge the penalties of thoſe three bonds, nor were they diſcharged; and that if the penalties on thoſe three bonds were not charges on the *aſſets*, then they find for the plaintiffs, that ſhe had *aſſets* to ſatisfy them to the amount of 18,969 *l.* 12 *s.* 5 *d.* but if the penalties were charges on the *aſſets* then they find for the defendant.

The cauſe was argued ſeveral times, and this term Lord *Hardwicke* delivered the reſolution of the court.

There are three points to be conſidered in this caſe. 1ſt. Whether on theſe pleadings the penalties or the leſſer ſums ought to be conſidered, as the debt due to *Wilſon* and *Campbell?* 2d. Whether there is any legal difference between thoſe bonds, and that to Sir *William Morice?* and 3d. What judgment the court can give on this verdict, conſidering the opinion they are of?

As to the firſt, there is nothing more certain, than that when the day is paſt, the penalty is the debt, and the remedy is in equity. It is admitted the defendant might have pleaded the obligation only; but it is contended, that here ſhe has claimed only the leſſer ſums. And my brothers *Page* and *Probyn*, and myſelf, my brother *Lee* (declining for particular reaſons to give any opinion) think, that the penalties on theſe two bonds ought to be conſidered as the debt at law.

The ancient way of pleading was only to ſet out the bond, and ſo are the old entries, I cannot find when this was departed from, but believe it was when the judges found what inconvenience it was to plaintiffs in not ſetting out the whole; as appears by the caſes of *Page* v. *Denton*, and *Parker* v. *Atfield*, from which it was argued for the plaintiffs, that when the condition ſhews what is due, why ſhould more *aſſets* be covered, or how are ſuits in equity avoided. This weighed greatly with me a long time, but on great deliberation, I am of opinion, that thoſe *obiter* ſayings are not ſufficient, and that this way of pleading may ſtill have great uſe.

The plaintiffs cannot have *oyer*, becauſe the defendant is not ſuppoſed to have the bond, and therefore makes no *profert* of it; he cannot tell whether it be a bond for payment of money, or performance of covenants, and muſt therefore be forced to bring a bill in equity, for a diſcovery to reply by. All this is avoided by the ſpecial way of pleading, and therefore ſatisfies the expreſſion, that it will ſave many a ſuit in equity. The penalty is a ſecurity for coſts, and on the act for amendment of the law, ſome coſts muſt be incurred, before a motion to pay can be received, and this is a loſs he may ſuſtain by taking it ſhort on his plea, without putting the plaintiff to ſhew ſome fraud, and it may be dangerous for us to blend the rules of law and equity together.

The caſe of *Page* v. *Denton*, at firſt ſight ſeemed ſtrong for the plaintiffs, but conſidering it as a bond to the executor who would retain, and not a bond to a ſtranger, it could not be replied to as a fraud, for it was payment in his hands, and the ſame as if a ſtranger had been paid the leſſer ſum and intereſt.

The caſe of *Thompſon* v. *Hunt* in 3 *Lev.* 368. (and which is mentioned as law in *Lutw.* 450) is ſtrong for the defendant, for though there the penalties were only pleaded, and the conditions appear in the replication, whereas here it is all in the plea; yet that makes no real difference, for when in the rejoinder the defendant took iſſue on the penalties, he admitted the replication, and ſo made it part of his plea.

It was inſiſted here, that the defendant by the manner of her pleading ſeems only to claim a protection for the leſſer ſums, and the concluſion of her plea relates to that. This at firſt ſeemed to have weight, but on a nice inſpection, there appears a variation in the expreſſion, one being *due and unpaid*, and the other *due and payable*. But there is a more ſubſtantial anſwer, for as to the articles, the penal ſums of them are averred due, and therefore the general words cannot ſometimes refer to the penalties, and at other times to the leſſer ſums. And though it was objected, that there is no precedent of a replication *for fraud*, where the condition is ſet out, it may be anſwered, that there never was a precedent of a plea worded as this is.

As to the practice at *niſi prius* on *plene adminiſtravit*, it may be the executor deſires no more allowance, to avoid a ſuit in equity. And on the trial in *C. B.* on the *ſcire facias* there, it appeared the leſſer ſums had been received, and the bonds delivered up.

Whatever therefore my firſt thoughts were, and how much ſoever the law of executors wants alteration, we think that as to the two bonds which were forfeited, the defendant muſt have allowance for the penalties.

2dly. The next thing to be conſidered is, whether the bond to Sir *William Morice* differs from the others, and we are all of opinion it does, inaſmuch as there the former inſtalments were paid, and as to the other two the time was not come for payment; and it is no more than a bond for payment of money at a time to come, which is certainly pleadable, 1 *Roll. Abr.* 925. *Cro. Car.* 363. But then it ſhall cover no more than is due, for the force of the bond is ſuſpended till the condition is broken, which appears by the manner of pleading it, *Cro. Eliz.* 315. where the claim is only for the 20 *l.* in the condition, 3 *Lev.* 57. Here it is in her power to ſave the penalty, and *aſſets* ſo to do, are admitted by pleading: it will be a *devaſtavit* in her to ſuffer the *aſſets* to be further charged. 1 *Vent.* 198. 2 *Lev.* 139. Another reaſon to diſtinguiſh this is, that *by fraud* could not be replied, for it is no fraud not to pay before due.

3dly. The laſt thing is, what judgment can be given on this opinion, and this is a matter of great difficulty, for the *aſſets* are found in one entire ſum; and the queſtion is, Whether we can ſever them, or muſt not award a *venire de novo?* The caſe of *Hays, Hilary,* 1 *G.* 2. *Strange, vol.* 2. *p.* 843, is in point, where the court made the jury give two verdicts; one for the King, and the other for the defendant; and we can adjuſt the allowance to be made without introducing or ſuppoſing any new fact. The caſes of ſevering damages, which are intire, are ſtronger than the diviſion of *aſſets*. In *Townſ.* 2 *Jud.* 117, 151. 189. the entries are that in *Thompſon*, and they warrant our giving judgment in the manner that is prayed on the behalf of the plaintiffs. And judgment was entered accordingly. *Vide Stra. vol.* 2. *p.* 1028.

Trinity, 21 *Geo.* 2. *Allam* v. *Heber.*

On *riens per deſcent*, i. e. *nothing by deſcent*, pleaded, it appeared that the anceſtor deviſed the lands to the heir, for payment of debts; and the court held, that notwithſtanding they were a charge on the land, yet the *heir* was in by *deſcent*; for the tenure is not altered. The caſes cited were, *Salk.* 242. *Hob.* 30. *Dy.* 124, *Sti.* 148. 3 *Lev.* 127. *Mo.* 614. *Cro. Eliz.* 833, 919. 1 *Roll. Abr.* 626. *J. Lutw.* 797. *Cro. Car.* 161. 2 *Mod.* 286. *Lord Raymond* 728. And the ſtatute of King *William* only charges other deviſees. *Vide Strange, vol.* 2. *page* 1270.

Aſſignments.

A determination on aſſignments under Stat. 32 *Hen.* 2. *cap.* 34.

The *leſſor* made a leaſe for years, and afterwards aſſigned his reverſion to *W. R. Adjudged*, that all conditions and covenants between the *leſſor* and *leſſee*, which concern the thing demiſed, or rent reſerved; as for inſtance, conditions or covenants for repairing, *&c.* paying the rent, *&c.* are annexed to the reverſion, by this ſtatute, and paſs with it to the *aſſignee*, ſo that he may take the ſame advantage of them, as the *leſſor* himſelf might have done before he made any *aſſignment*, but no *collateral* covenants, as to pay a ſum in groſs, *&c.* are transferred to the reverſion by this ſtatute. *Vide Salk. vol.* 3. *page* 48.

Hilary, 2 *W. & M.* *Barker* v. *Damer.*

B. made a leaſe for years of land in *Ireland*, in which leaſe the leſſee covenanted to pay the rent in *London*; *B.* ſold his reverſion, and the *aſſignee* brought an action of *covenant* in *London* for the rent; the defendant pleaded to the *juriſdiction*, that the lands lay in *Ireland*; on demurrer, the defendant's plea was *adjudged* good, this being a *local covenant* and adheres to the land. The *leſſor* himſelf could not have maintained an action on this *covenant* in *England*, and the ſtatute transfers it to the *aſſignee* in the ſame plight that the *leſſor* had it; and the payment being to be made in *London* alters not the caſe. *Shower* 191. *Vide Salk. vol.* 1. *page* 81.

Michaelmas, 3 *W. & M.* *Hannam* v. *Woodford.*

After the death of a cognizee in a *ſtatute*, his adminiſtrator ſued forth an *extent*, and the *liberate* being returned, he made an *aſſignment* of the lands without an actual entry, or without executing the deed on the land.

And the queſtion was, whether this *aſſignment* was good or not?

It was compared to an *intereſſe termini*; and that this *aſſignment* was good, becauſe a man may grant or diſpoſe of what he has not actually in poſſeſſion.

And to prove this aſſertion, the caſe of *Powſley* v. *Blackman* was cited, which is reported in many books, and is ſhortly thus:

A mortgage was made of lands for payment of money within the ſpace of five years, for ſeveral payments; and in the ſame deed it was agreed, that the mortgagee ſhould not intermeddle with the actual poſſeſſion of the profits, until default of payment, *&c.* afterwards the mortgagor made a leaſe of the lands for ſix years; the leſſee entered, the money was not paid, and at the end of the term the leſſor had his eſtate again, the mortgagee, without any lawful entry, deviſed the lands to his ſon, and died; and it was adjudged, that the leaſe was good, which could not be, if the leaſe made by the mortgagor had been a *diſſeiſin*.

But on the other ſide it was ſaid, that by the return of the *liberate*, the adminiſtrator had no right, only a poſſeſſion in *law*.

The proper way had been to bring an *ejectment* on the *liberate* to recover the poſſeſſion, and then the *aſſignment* had been good; and of this opinion was the court. *Plow.* 423. 1 *Inſt.* 270. *a. Vide Mod. Rep. vol.* 4. *page* 48.

Hilary, 3 & 4 *W. & M.* *Glover* v. *Cope.*

In an action of *covenant*; the caſe on the pleadings was,

A *copyholder* in *fee* made a leaſe of a meſſuage for twenty-one years; warranted by the *cuſtom*, and the leſſee covenanted to repair during the term.

Afterwards the leſſor granted the reverſion to his ſon, who ſurrendered to the plaintiff, who brought an action of *covenant* againſt the leſſee for not repairing, and whether the action would lie or not, was the principal queſtion.

The doubt aroſe on the tenure of the meſſuage, which was *copyhold*; for if it had been a *freehold*, the action might have been well brought by the *aſſignee* of a reverſion againſt a leſſee for years, after he had aſſigned the term, notwithſtanding the leſſor or his *aſſigns* had accepted the rent from the *aſſignee* of the leſſee, and this on the general words of the ſtatute of *H.* 8. which gives the *grantees* and *aſſignees* of reverſions of lands, tenements, and other hereditaments, the like advantage againſt leſſees by entry for non-payment of rent, as the leſſors or grantors themſelves might have.

Now, whether *copyhold* lands may be comprehended in theſe general words, was the chief queſtion.

Firſt, it was premiſed, that without the aid of the *ſtatute*, a grantee of a reverſion might bring an action of *debt*; for ſo was the *law* before this ſtatute was made; and it was grounded on this reaſon, that wherever a man was intitled to a reverſion, ſo that he had the rent, which was incident to it, and which is given by the *law*, there the *law* did likewiſe create the *privity* on purpoſe to maintain an action of *debt* for the rent.

Two queſtions were made:

1ſt. Whether this *covenant* runs with the *reverſion*; for if ſo, then the plaintiff being a grantee of a reverſion, may bring this action at *common law*.

2d. If not, then whether the *aſſignee* of a *reverſion* of a copyhold is aided by the *ſtatute* of *H.* 8.

Per curiam. A copyholder hath an inheritance, tho' he hath it in the *poſt*, and his eſtate is now fixed and eſtabliſhed by the *cuſtom*; and therefore it is reaſonable to conſtrue him to be within the *equity* of this ſtatute; and the rather, becauſe of *late* he has been held to be within the *ſtatute de donis*, &c. And ſo, without further argument, judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 4. *p.* 80.

Eaſter, 4 *W.* & *M.* *Pitcher* v. *Tovey.* Error.

On a writ of *error*, on a judgment in the *Common Pleas*, in *covenant*, wherein the plaintiff declared, that by an indenture, bearing date the 9th of *July*, 1680, he demiſed a houſe in the pariſh of *St. Martin's*, &c. rendering rent, with a covenant for payment thereof, to *R. Gill*, who *aſſigned* to the defendant; and for rent in arrear for three years after *aſſignment*, he brings *covenant*: the defendant, as to part, pleads *he owes nothing*; and as to the reſidue, an *aſſignment* over before it incurred. The plaintiff demurred, and judgment, by three judges in the *Common Pleas*, for the plaintiff; and it was urged for the defendant here, who was plaintiff below, that there was a privity of eſtate, though no privity of contract, between the aſſignee of a term, and the leſſor, after acceptance of him for a tenant, which continues, notwithſtanding the *aſſignment*, till notice of it; as if a tenant makes a feoffment, the lord ſhall avow on him for rent in arrear, till notice of it. 3 *Co.* 23. *a.* and ſo it was adjudged in the caſe of an aſſignee of a term. 1 *Sid.* 339. by two juſtices; and *Twiſden*'s reaſon to the contrary is not good, that the leſſor had a remedy by *diſtreſs*; for there is no reaſon that the leſſor, who had two remedies, ſhould be deprived of one of them; for he cannot have *debt*, where the party to whom the term is *aſſigned* is not known to him; and perhaps his remedy by *diſtreſs* may fail, where the *aſſignment* is to a poor man, who is not able to manure the land, or by indigence, or otherwiſe, ſuffers it to lie freſh, and then the leſſor ſhall be without remedy by *diſtreſs*, or by action of *debt*, and ſuch notice ought to be pleaded, as in the caſe of *Marrow* v. *Turpin*, 3 *Co.* 24 *a.*

Per curiam. The *debt* lies by the leſſor againſt the aſſignee, only on privity of eſtate, and when this fails by the *aſſignment* over, the action is at an end; and is not like an avowry, which ſhall be made on a perſon certain. That of *Sid.* 339. was haſtily reſolved by *two* againſt *Twiſden*, and the bar thought it new law. The leſſor is not at ſuch great prejudice as is pretended, for he may diſtrain, or have *covenant* againſt the leſſee, or his executors; and if there be no covenant for payment, he may have *debt* againſt the ſecond *aſſignee*, when known; and if that were not ſo, it was his own folly that he accepted the firſt *aſſignee* for a tenant, by which he gave him a liberty of *aſſignment* to the other, and diſcharged the leſſee. Accordingly the judgment was reverſed. *Vide Mod. Rep. vol.* 12. *page* 23. 2 *Salk. vol.* 1. *page* 81.

Michaelmas, 8 *W.* 3. *Woodward* v. *Marſhall.*

In this action the plaintiff declared as *aſſignee* of a reverſion *by fine*, for rent in arrear. On the defendant's putting in an ill plea, to which the plaintiff demurred, the *Chief Juſtice* obſerved, that the plaintiff had not ſet forth an *attornment*, without which the reverſion could not paſs.

The plaintiff's council, in anſwer to this *objection*, *argued*, that this being an action of *covenant*, it was not grounded on the privity of *contract*, and differed from an action of *debt*, which is grounded on the privity of *eſtate*.

Holt, Chief Juſtice, ſaid, unleſs the reverſion paſſed by the *aſſignment*, the *covenant* cannot paſs, for there is nothing wherewith it can be transferred.

Per curiam. As nobody appears for the defendant, let the plaintiff take judgment. *Vide Salk. vol.* 1. *page* 82.

Michaelmas, 10 *W.* 3. *Cook* v. *Harris.*

The plaintiff brought an action of *debt* againſt the defendant as aſſignee of a term, being executor of the firſt leſſee, in which the plaintiff declared, that he demiſed a meſſuage to *John Harris* for the term of twenty-one years, rendering 60 *l. per annum* rent; *and that afterwards*, viz. the *firſt of July*, *the whole reſidue of the aforeſaid term of years came by aſſignment* to the defendant; and this action was brought for *rent* due at the *Michaelmas following*. The defendant pleads, *that before the aforeſaid day for payment of the rent, or before any part thereof became due*, ſhe aſſigned *her whole intereſt and term for twenty-one years* to *J. S.* viz. 29 *June*, and that the *aſſignee* accepted it, &c. The plaintiff replies, that the defendant *aſſigned all the right, title, and intereſt of her the ſaid* Mary (viz. the defendant) *in the declaration aforeſaid mentioned, and expreſſed, to defraud the plaintiff.* The defendant rejoins, and traverſes the fraud, on which the plaintiff *demurs*. The plaintiff's council took *exception* to the plea, becauſe it appears that the defendant *aſſigned* before the term was *aſſigned* to her by the *aſſignment* of which the plaintiff declares, but ſhe does not ſay that ſhe *aſſigned* after: now it may be that it was *re-aſſigned* to her again on the *firſt of July*, which is very conſiſtent with her plea, and then ſhe ſhall pay the plaintiff his rent. But if the plea had been, that after the defendant was *aſſignee*, ſhe *aſſigned*, viz. ſuch a day, which in *fact* was before the day of the *aſſignment* to her mentioned in the plaintiff's declaration. There the *viz.* had been void, and the plea good: but otherwiſe, ſince the words, *after the aſſignment*, are not in the plea.

Holt, Chief Juſtice. This plea ought to have ſaid, *after the aſſignment*, for the defendant muſt either traverſe the *aſſignment* mentioned in the plaintiff's declaration, or confeſs and avoid: and therefore here, if the plaintiff had not replied, this plea had been ill; but here the plaintiff has aided it by his replication, where he ſays, that the defendant aſſigned *all the right, title, and intereſt of her the ſaid* Mary *in the declaration aforeſaid mentioned and expreſſed*; and he obſerved, that the *ancient method* of pleading *aſſignment* was by *virtue whereof*, the *aſſignee* entered, and was poſſeſſed; but that is diſuſed now; for the *aſſignee* has the eſtate in him before entry, though not to bring *treſpaſs*: and if there be an agreement between the *leſſor* and *leſſee*, that the *leſſee* ſhall pay the rent at the beginning of every year before hand, when the *leſſee* at the end of the firſt year pays his rent, (which he deſigns for the year following) yet in *judgment of law* it is rent for the year paſt, and ſo the *leſſee in judgment of law* pays no rent for the laſt year of the term.

Rokeby, Juſtice, took *exception* to the plea, that it is not ſaid that the plaintiff had notice of the *aſſignment*; and he ſaid, that it was *adjudged* in *C. B*, *Tovey* v. *Pitcher*, that in ſuch caſe there ought to be notice; and therefore judgment was given by *Pollexfen*, *Powell*, and *Rokeby*, that the *leſſor* ought to have notice. Judgment for the defendant. *Vide Raym. vol.* 1. *p.* 367.

Trinity, 13 *W.* 3. *Between the Pariſhes of Caiſter and Eccles.*

Per Holt, Chief Juſtice. A bond, though it be not *aſſignable* in point of intereſt, yet is a *covenant*, that the aſſignee ſhall receive the money to his own uſe. *Vide Raym. vol.* 1. *p.* 683.

Michaelmas, 11 *Ann. Parker* v. *Lilly.* Error.

A man *aſſigns* a bond to *B.*; *B.* ſues this bond in the name of the *aſſignor*, and has judgment. A writ of *error* is brought, and judgment *affirmed.* After execution taken out, but before it was returned, the *aſſignor* gives a *warrant of attorney* to confeſs ſatisfaction on record, which is accordingly done, and on this a *ſuperſedeas* taken out to ſtop the execution, and now the court was moved to ſet aſide the *ſuperſedeas*, on the following *objections:*

1ſt. Becauſe after *aſſignment* the court will not ſuffer the *aſſignor* to give a *warrant of attorney* to acknowledge ſatisfaction; and for this 1 *Keble*, 803. was quoted.

But as to this, it was ſaid, that the *Aſſignment* was matter of *equity*, and was more proper for *Chancery* than for this court; and a late caſe was quoted in *C. B.* where a bond was taken *in truſt* for another, and the *obligee* dying while the ſuit on the bond was pending; it was *held* that *ceſtuy que truſt* could not go on in the action, becauſe this court could not take notice of the *truſt*, or of any other plaintiff than the perſon who appeared to be ſo on record. And of this opinion was the court.

In favour of the motion, it was *further inſiſted* on, that after execution had iſſued, it was not regular to grant a *ſuperſedeas* without a judge's authority, on which the court took time to enquire into the practice. *Vide Mod. Rep. vol.* 10. *p.* 103.

Michaelmas, 12 *Ann. Turner* v. *Goodwin.*

This caſe had been argued laſt term, and came now to be ſpoken to again. It was on an action of *debt* on *bond*, conditioned for the payment of ſo much money, the plaintiff *aſſigning* over to the defendant ſuch a judgment againſt *D.*

The council for the defendant inſiſted, that the *aſſigning* was a condition *precedent* to the payment.

It was ſaid, that in the obligation there were very proper and ſignificant words to make a condition, either *precedent* or *ſubſequent*; that therefore it ſhould be taken either one way or the other, as would beſt anſwer the intention of the parties.

Now the intention of the parties undoubtedly was, that the plaintiff ſhould have the money, and the defendant the judgment. But now this intention could never be ſupported, taking it to be a condition *ſubſequent*; for the money once paid, cannot be brought back again in caſe the judgment ſhould not be *aſſigned* over.

The *law* lays ſuch a ſtreſs on the intention of the parties, that it will interpret words, not at all proper to amount to a condition, rather than the intention of the parties ſhould be violated, as the caſe of *Co. Lit.* 24. a grant of an annuity *pro concilio impendendo.*

It cannot be objected, that the defendant ought to have concurred in doing this act, and requeſted the plaintiff to *aſſign &c.* becauſe this was an act that it was in the power of the plaintiff to perform alone; for the judgment would, immediately on the *aſſignment*, veſt in the defendant, before his acceptance of it; as in the caſe of *Butler* v. *Baker.*

The plaintiff's council inſiſted, that the defendant was bound to do the firſt act, *viz.* to offer to pay the money, though he aknowledged that the payment of the money, and *aſſignment* of the judgment, were to be *concomitant* acts in the execution.

He relied on the replication of the plaintiff, which the defendant having demurred to, muſt be admitted to be true. In this replication, the plaintiff ſays, that he was ready to *aſſign, &c.* and requeſted the defendant to pay the money, which the defendant refuſed. This refuſal the council inſiſted to be an abſolute refuſal, and not a conditional one, *viz.* unleſs the judgment was *aſſigned.* And this abſolute refuſal of the defendant to pay the money, he inſiſted on to be a ſufficient diſcharge to the plaintiff, from preparing the *aſſignment.*

In 1 *Lutwyche* 245. *Thorpe* v. *Thorpe*, moſt of this ſort of learning is ſtated. Adjourned.

In *Eaſter* term following it was agreed on both ſides, that the queſtion was no more than this, who was obliged to do the firſt act? for if the judgment was to be *aſſigned* before payment of the money, then judgment muſt be for the defendant; but if, *&c.*

For the defendant it was ſaid, that thoſe acts of paying the money, and *aſſigning* the judgment, were alternate acts, which cannot go on *in an original path*, but there muſt be a priority in *law.* That in *law*, proper and formal words of condition, are not required in *wills, grants,* or *contracts.* Not in *wills*, *Cro. Eliz.* 46, 454. 2 *Roll. Rep.* 68. Not in *grants*, 1 *Inſt.* 204. a grant of an annuity, *pro conſilio impendendo.* The reaſon aſſigned by *Coke* was not a good one; the true reaſon is, the *law* implies a condition, becauſe elſe there would be no remedy. 5 *Rep.* 78. *Gray's caſe.*

The caſe chiefly relied on for the defendant, was, 14 *H.* 4. *pla.* 19. which was a debt on bond, conditioned, that if the defendant reſigned his living by ſuch a time, for a certain penſion to be conveyed to him, then, *&c.*

For the plaintiff it was *urged*, that the words *aſſigning* the judgment, did not make a condition *precedent*, from the neceſſary import of the words; and to ſhew this, ſeveral authorities were quoted, where this way of expreſſion was uſed, and yet not held a condition *precedent.* 3 *Cro.* 204, 454, 146. 2 *Roll.* 68. *T. Jones* 235, 206.

1ſt *Objection.* The condition of a bond is always to be taken in the ſenſe that is moſt favourable to the obligor, which is, that this ſhould be a precedent condition.

Anſwer. This rule is generally true, but not always 5 *Rep.* 23. *b.* 1 *Vent* 255. 2 *H.* 7, 8, 9.

2d *Objection.* If the money muſt be firſt paid, the defendant is without remedy for the judgment,

Anſwer. No; for the plaintiff, in that caſe, becomes a truſtee to the defendant for the judgment, the *aſſigning* of the judgment being only a deed, to manifeſt the truſt. (But to this it was replied, that this was not a remedy in *law*, but *equity*). 1 *Mod.* 113. *Aſſigning* over a thing in an action, interpreted as a covenant againſt the *aſſignor*; and therefore if the money be paid, and no judgment *aſſigned*, it is a breach of covenant. In caſe of a mortgage, the money is always paid firſt.

This *aſſignment* muſt make mention of the money, as paid firſt; ſince otherwiſe it will want a good conſideration, and be void, for it will be *maintenance* 3 *Leon.* 234. *Noy.* 52. 3 *Cro.* 552, 170. 34 *H.* 6, 30. *Bro. Main.* 8. 1 *Bulſt.* 187. (To this it was anſwered, that the *aſſignment* need not recite the money as paid, but only the bond, and the ſpecial agreement).

Laſtly. This *diſtinction* was offered, by the plaintiff's council, in anſwer to ſeveral caſes; that if by the agreement of parties two acts are to be done, and the time is limited for the doing of one, and no time for the other, there, if the nature of the thing will bear it, that thing is to be done firſt, for which the time was limited. 1 *Ventris* 147. 1 *Saunders* 319. 1 *Lutwyche* 251. 1 *Cro.* 384, 5. 2 *Saunders*, 350, 352. 1 *Lutwyche* 490, 565.

In the following term, judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 10, *pages* 190, 222.

Trinity, 13 *Ann. Miles* v. *Williams.*

In an action of *debt* on *bond*, brought againſt the defendant and his wife, in *Trinity* term laſt, to which they pleaded a diſcharge by the *bankruptcy* of the *huſband*, and conclude, *and this they are ready to verify.*

To this plea the plaintiff demurred ſpecially, and offered the following objections.

1ſt. Becauſe a bond entered into by the wife, *while ſhe was ſole*, is not diſcharged by the *bankruptcy* of the *huſband.*

2dly. Becauſe they ought to have concluded their plea to the country.

And this term, *Parker*, Chief Juſtice, delivered the reſolution of the court.

As to the *firſt point*, ſuch a *debt* is within *ſtat.* 4 *of the Queen*, and conſequently diſcharged by the *bankruptcy* of the *huſband.*

The words of the *ſtatute* are, ſhall be diſcharged from all debts by him, her, or them, due and owing, at the time that he, ſhe, or they did become *bankrupt*.

The queſtion therefore will be, whether this be a debt due and owing at the time of the *bankruptcy*.

It has been argued by the *bar*, and very reaſonably, that if debts due to the *bankrupt*'s wife, are *aſſignable* by the commiſſioners, then it is reaſonable that debts owing by the *bankrupt's* wife, ſhould be diſcharged by the *bankruptcy*.

Now in order to know, whether a debt due to the wife of the *bankrupt* be *aſſignable*, the intention of the *ſtatutes* 13 *Eliz. cap.* 7. and 1 *Jac. cap.* 15. muſt be conſidered.

By *ſtat.* 1 *Jac.* which is *explanatory* of that of *Eliz.* it is provided, that the commiſſioners ſhall have power to *grant* and *aſſign*, or otherwiſe to order or diſpoſe all debts due, or to be due, to and for the benefit of the *bankrupt*, by what perſon or perſons ſoever, or in what manner and form ſoever, to the uſe of the creditors, *&c.* and that the ſaid *aſſignment* or *diſpoſition*, *&c.* ſhall ſo veſt the property, *&c.* in the *aſſignees*, as fully, *&c.* as if the ſaid bill, bond, *&c.* whereon the ſaid debts ſhall ariſe and grow due, had been made to, with, or for the *aſſignees*.

Now the intention of this *act of parliament* is plainly this, that the *bankrupt* being not thought a proper perſon to be intruſted with the management of his own eſtate, for fear he ſhould defraud his creditors, therefore the act puts the commiſſioners in the place and ſtead of the *bankrupt*, and conſequently whatever eſtate the huſband can turn into money, in order to pay his debts, the ſame is *aſſignable* by the *commiſſioners*.

The beſt way of *interpreting ſtatutes*, is by the rules of *common law*, in like caſes.

Thus the ſtatute *de donis*, which ſays, that a fine levied of intailed lands ſhall be *to make his right void*, has been interpreted not to make a *nullity*, but a *diſcontinuance*; becauſe at the *common law*, if a biſhop ſeized in right of his church, or a huſband of his wife, had aliened by *fine*, *&c.* it was but a *diſcontinuance*. 3 *Co.* 85, *&c.*

21 *H.* 7: *fol.* 19. A bond entered into to two, if one grants the bond to the *King*, the *King* may ſue alone.

It is the conſtant practice in *outlawry* to ſeize all the debts due to the wife, and yet the words of the writ, *goods and chattels*, *lands and tenements* of the perſon *outlawed*, are rather weaker than the words of the *ſtatute*.

In *Hobart* 253. *Breadman* v. *Coals*, is a ſtrong caſe, for it proves, 1ſt. That the huſband may *aſſign* a debt due to his wife, by the *common law*; and 2dly. That he was not reſtrained by *ſtat.* 7. *Jac.* becauſe the book ſays it was the huſband's own debt, which brings it within the very words of *ſtat.* 4 *of the Queen*.

It is certainly a very *equitable* interpretation, that whatever may be applied by the *bankrupt* to the payment of debts, may be *aſſignable* by the *commiſſioners*.

The contrary opinion, that it is not *aſſignable*, promotes no good end in the world.

To the *objection*, that the *ſtatute* does not extend to debts due to the *bankrupt* as *adminiſtrator* or *executor*, it may be anſwered that it is nothing to the purpoſe, for he has no intereſts in thoſe debts to his own uſe, and when he recovers them they are *aſſets*, *&c.*

But it is objected, that this *ſtatute* extends not to debts due to him and another, and for this purpoſe. 1 *Levintz* 17. is quoted.

To this I anſwer *firſt*, that there is no judgment in that *caſe*. 2dly. That I doubt whether it be certain that the whole debt is not veſted in the *crown* on the *outla wry* of one, where there are two *obligees*.

That a debt due from the *bankrupt*, and another, is within the *act*, appears from *ſtatute* 10 *Ann. cap.* 5. a *declaratory law*, but this is his debt, as he is one with his wife.

Another *objection* has been taken, that this debt ſhall ſurvive to the wife, if the huſband die before he recovers it, and this conſtruction will deprive her of this contingency.

The anſwer is, that the *huſband* might by his *releaſe* have diſcharged this *debt*, now this is a diſcharge of the *legiſlature*, applied in eaſe of his debts.

The *aſſignee* has the ſame remedy to recover it that the *bankrupt* himſelf had.

If a note be payable to a *feme ſole*, or order, and ſhe afterwards marries, her huſband is the proper perſon to indorſe this note.

Now that this debt due from the wife is diſcharged by the *bankruptcy*, ſeems to me to be clearer than that a debt to the wife ſhould be *aſſignable*, *&c.*

For this conſtruction makes for the benefit and intereſt of the *bankrupt*'s creditors, and wife. As to the *bankrupt* nothing can be harder, than that he ſhould be ſtripped of every thing, forced on *oath*, and at the peril of *felony*, to make a full diſcovery, and yet after all, not be diſcharged. The intention of the *capias* is only that the love of liberty ſhould compel a full diſcovery.

The diſcharge of the *bankrupt* ſtands on this reaſon, that he is ſtripped of every thing that ſhould enable him to pay.

This reaſon holds equally to all the debts for which he may be ſued.

This expoſition is better likewiſe for the creditors, for if this debt be diſcharged, then a creditor of the wife is a creditor within the *ſtatute*, and entitled to come in for an equal proportion, which is far more eligible than an action, which is of no uſe, unleſs the wife ſurvives, and perhaps not then neither.

As to the wife, that this expoſition is beneficial to her is ſo plain, that it has been *urged* as an *objection*, that it will be too beneficial.

Whether this be a *temporary* diſcharge during the *coverture*, or a *perpetual* one is not now a queſtion; but I am inclined to think it a *perpetual* one; nor is this unreaſonable, for the *law* looks on the debt as paid ſince the creditor is let into the *common* fund.

As to the *objection*, that this may be a fortune to a woman. The anſwer is, it is very reaſonable, that ſhe ſhould ſhare in the *advantages*, as well as *diſadvantages* of the *bankruptcy*.

If a ſuppoſition be made, that a woman may, *precedent* to her marriage, put her eſtate into the hands of *ruſtees* for her ſeparate maintenance; and ſo her debts will be diſcharged by the *bankruptcy*, and her eſtate out of the reach of the creditors. The anſwer is, No, for I am of opinion, that ſuch a *ſettlement* or *conveyance* as to the creditors, ſhall be deemed void and fraudulent.

As to the *objection*, that this diſcharge is a *perſonal* privilege, and therefore not communicable to the wife: the anſwer is, that her diſcharge is neceſſarily conſequential on his.

As to the *ſecond point*, the court were unanimouſly of opinion, that the plea of the defendants in bar, was naught, for not concluding to the country; and therefore on this *ſecond point* (being ſpecially *aſſigned* for cauſe of demurrer). Judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 10, *page* 243.

Eaſter, 2 *Geo.* *Lovelock* v. *Sorrel.*

A leaſe was made to *W. R.* and afterwards the leſſor brought an action of *covenant* againſt the *aſſignee* of an *aſſignee*, for not repairing, but did not ſet forth the intermediate *aſſignments*.

The defendant pleaded that this leaſe did not come to him by any *meſne aſſignment* of the leſſee, to which plea the plaintiff demurred.

And it was inſiſted by his council, in order to maintain the *demurrer*, that the plea was too *general*, and altogether immaterial, for if the defendant had the land by an *aſſignment* from the original leſſee, he is ſubject to this *covenant*; therefore he ſhould have pleaded that the leaſe did not come to him, and not that it did not come to him by *meſne aſſignment*, and ſo is 1 *Saund.* 238, 285. & 2 *Saund.* 188.

The defendant's council argued, that in an action of *covenant* againſt an *aſſignee* of a *leſſee*, the plaintiff ſhould ſpecially ſet forth, all the intermediate *aſſignments*, and ſhew how the defendant came to the land, and not as *aſſignee generally*.

But the court were of opinion, that the declaration was good againſt the defendant, as *aſſignee* general, becauſe it may often happen that the leſſor may not know all the *intermediate aſſignments*.

There was no judgment given this term, but in *Trinity* term following an *objection* was made to the declaration, *viz.* That the plaintiff had declared on a leaſe for years *as yet to come*, when by the very record it appeared, that the leaſe was expired by the effluxion of time, therefore he had declared on another leaſe; but the court gave no judgment as to this point, but ſaid, that in all actions of *trover*, the uſual form of declaring was, that the goods came to the defendant *by finding*, but it would certainly be an immaterial plea, if the defendant ſhould deny the finding, as in *Saund.* 238, *&c.* 2 *Mod.* 217. *Show. Rep.* 155. *pl. Vide Mod. Rep. vol.* 8. *page* 73.

Attachment.

Eaſter, 1 *W. & M. Clerk* v. *Andrews.*

A motion was made for a prohibition to the *Sheriff's Court* of *London*, to ſtay proceedings where they *attached* the debt of the garniſhee, becauſe it aroſe out of the juriſdiction; but it was denied, becauſe the debt was on ſimple contract, which follows the perſon of the debtor. *Vide Raymond, vol.* 1. *page* 347.

Trinity, 7 *W.* 3. *Maſters* v. *Lewis.*

The plaintiff was indebted to one *Goſtwright*, and had alſo a debt owing to him by the defendant. The plaintiff dies inteſtate, and *Goſtwright* entered a *caveat* in the *Spiritual Court*, and then enters a *plaint* in the court of the *Sheriffs of London*, againſt the *Archbiſhop of Canterbury*, as *ordinary*, to *attach* this debt in the hands of the defendant, and on default, has judgment and execution. Then the *archbiſhop* granted adminiſtration to *Alice Maſters*, who brings this action of *indebitatus aſſumpſit* againſt the defendant, who pleads this *foreign attachment*, in *bar*. The plaintiff demurs; and the defendant's council argued, that the *foreign attachment* in this caſe was good, and the defendant's debt well *attached*, and therefore he ought not to be liable over to the plaintiff.

1ſt, They ſaid, that this *foreign attachment* had the approbation of all courts, for more than 150 years, and there was no inconvenience, for if the defendant againſt whom the *attachment* is ſued comes within the year and day, he may ſue out a *ſci. fa.* againſt the plaintiff, to diſprove the debt.

2dly. They ſaid, that it had been allowed in a caſe of the very ſame nature. *Calthrop. Rep.* 66. And though it may be *objected*, that this may work a *devaſtavit* in the adminiſtratrix, for by this means a *debt* on a *ſimple contract* may be ſatisfied before a *debt* on *ſpecialty*; they anſwered, that the adminiſtratrix might well plead, in an action brought againſt her, *plene adminiſtravit*, i. e. *that ſhe has fully adminiſtered*; for ſhe is not chargeable for more than what comes to her hands. And by 5 *Co. Snelling's caſe*, the adminiſtrator is bound by the *cuſtom of London*, to pay a *debt* by *ſimple contract*, as well as a *debt* on *ſpecialty*. And although in this caſe it may be *objected*, that the *ordinary* was not liable to any action of *debt*, they anſwered, that by 10 *Ed.* 2. *cap.* 19. the *ordinary* is liable, ſo long as he hath *aſſets.* 2 *Inſt.* 397. But they ſaid, that admitting that this judgment in the *attachment* was *erroneous*, nevertheleſs, ſo long as it continues in force, it ſhall bind the parties; for which reaſons, they prayed judgment for the defendant.

The plaintiff's council ſaid, 1ſt. A *foreign attachment* cannot charge any perſon but a *debtor*, and the *ordinary* is no *debtor* before goods come to his hands. 5 *Co.* 82. 9 *Co. Henſloe's caſe. F. N. B.* 210. *b.* 2. *Garniſhment* cannot be, but where the *garniſhee* is liable to the action of the defendant; for the *garniſhee* may plead all things that the defendant might have pleaded. But in this caſe the *ordinary*, who was the pretended defendant, could not have had an action againſt *Lewis* for this money. Therefore, if this *foreign attachment* ſhall be allowed good, it will be in effect to adjudge a power in the *attachment*, to give an action to a perſon who cannot have one by *law*, which the *attachment* cannot do; but where there is no executor or adminiſtrator, a *foreign attachment* may well be allowed, becauſe they may be ſued, or may ſue. And the court ſaid, the adminiſtratrix, in this caſe, could not reverſe that judgment, becauſe ſhe is not a party to the *record.* And *Holt*, Chief Juſtice, affirmed, that *Snelling's caſe*, 5 *Co.* 82. where it is ſaid, that the adminiſtrator is bound by the *cuſtom* to pay a *debt* on *ſimple contract*, &c. is not ſound *law.* And afterwards, in *Michaelmas* term following the whole court gave judgment for the plaintiff. *Vide Raymond, vol.* 1. *p.* 56.

Michaelmas, 8 *W.* 3. *Forſter* v. *Brunetti.*

An *attachment* will not lie for not performing an award made on a rule of court, without a perſonal demand. *Holt*, C. J. ſaid, he remembered the firſt *attachment* of this kind was in Sir *John Humble's* caſe, in *Kelynge's* time; in which, and ever ſince, a *perſonal demand* has been thought *neceſſary.* In *caſes* of *awards*, though they be not legally good, an *attachment* lies for *non-performance.* Otherwiſe if the matter is impoſſible; but the party is excuſed as to that part which is impoſſible only. *See Mich.* 9 *W.* 3. *Harriſon* v. *Bowman. Vide Salk. vol.* 1. *page* 83.

Hilary, 9 *W.* 3. *Anonymous.*

On a motion for an *attachment*, for not returning a *mandamus*, it was ſaid, *per Holt*, that an *attachment* in *Chancery*, on an *alias* and *pluries*, is returnable in court, and is not merely for the *contempt*, but is really an action whereon the plaintiff ſhall recover *damages* for the delay in not executing the writ; and we have without reaſon gone on in imitation of *Chancery.* It is a *contempt* not to return the firſt *mandamus*, therefore let a return be made within a week. *Vide Mod. Rep. vol.* 12. *page* 164.

Trinity, 10 *W.* 3. *Cook* v. *Licence.*

A motion was made in behalf of the defendant, for a *prohibition* to be directed to the *Sheriff's Court* in *Briſtol*, on a ſuggeſtion, that cauſes of action ariſing out of the juriſdiction of the *Sheriffs Court* ought not to be ſued there. The fact was, the court at *Briſtol*, for default of appearance, proceeded to *attach* the goods of the defendant, in the hands of a *garniſhee*; to ſtay which procedings, the above application was made to the *ſuperior court.* In oppoſition to the motion, it was inſiſted, that the defendant cannot pray a *prohibition* on the ſuggeſtion of a matter which he could not plead. Now he cannot plead this before *appearance*, and therefore he ought not to make ſuch a motion until he has appeared.

Per Holt, Chief Juſtice, a perſon ſhall not plead to the juriſdiction, until he appears. But if the original cauſe of action aroſe out of the juriſdiction of the court, the *garniſhee* may plead it, and of that opinion was Chief Juſtice *Hale.* But if it is a debt on a ſimple contract, it is *attachable* where the perſon of the debtor is. *Vide Raymond, vol.* 1. *page* 346.

Michaelmas, 10 *W.* 3. *Johnſon* v. *Nayler.*

Per curiam. If a *reſcous* be returned, an *attachment* ſhall go of courſe, without motion. *Vide Mod. Rep. vol.* 12. *page* 247.

Michaelmas, 10 *W.* 3. *Anonymous.*

A rule was made to put off a trial, *on payment of coſts*, and the coſts not being paid, and the trial put off, the plaintiff moved for an *attachment*, which was refuſed; for the court ſaid he ſhould have gone on. *Vide Salk. vol.* 1. *page* 83.

Michaelmas, 11 *W.* 3. *Hall* v. *Miſter.*

If a rule is made at *niſi prius* to refer a matter to the three firſt named perſons in the *pannel*, and the plaintiff has a verdict for his ſecurity; after the award made, the plaintiff may either enter up judgment on the verdict, or have an *attachment* for not obeying the rule of court, it being in his election which way he will execute the award; and this was affirmed by Mr. *Northey*, and at the *bar* to be the conſtant practice. *Tourton* and *Gould*, (in the abſence of the Chief Juſtice) doubted of it, becauſe the verdict ſtood ſtill on record. To which *Northey* anſwered, there could not be a judgment entered on ſuch a verdict, without leave of the court: and the *attachment* was granted. *Vide Salk. vol.* 1. *p.* 84.

Michaelmas, 11 *W.* 3. *Bignoll* v. *Rogers.*

In *debt* againſt the ſheriff of *Bucks*, for the reward given by *ſtat.* 6 & 7 *W. & M.* to thoſe that diſcover and convict *clippers* and *coiners*: note, here the plaintiff had a certificate from Lord Chief Juſtice *Holt*, who tried the malefactor, of his having been convicted on the plaintiff's evidence, which being produced, though under his lordſhip's hand, yet was proved by my lord's clerk, to the jury. And here *Holt* held, the demand of this *debt* of the ſheriff, after the certificate, did *attach* the debt on him; and that the money was to be paid out of the profits of the county, or on failure thereof, out of the *Exchequer*; and that in ſuch caſe the action would lie againſt the ſheriff's executor, becauſe given by act of parliament, and *attached* in the teſtator; but for the penalty given in the act againſt the ſheriff, for default of payment, that ſhould not affect the executor; and that if the ſheriff paid the debt, and died, it ſhould be allowed to his executor.

One *Holland*, an attorney of the court, having informed his client, that he had entered up judgment two years before, but could not ſue execution, by reaſon of a writ of *error* pending, when in truth there was no judgment entered, for this notorious practice was ordered to anſwer *interrogatories*; and here it was agreed, that if *interrogatories* be not exhibited in a week, the recognizance entered into for anſwering them, is diſcharged of courſe. It was likewiſe agreed by the court, and the maſter of the *Crown Office*, that in all caſes the party has *four* juridical days to anſwer the *interrogatories*, though they be exhibited in *vacation*; but if he does not anſwer in that time, he is to be committed on motion. *Vide Mod. Rep. vol.* 12. *page* 310.

Michaelmas, 11 *W.* 3. *Chandler* v. *Driver.*

A ſubmiſſion to an award being by rule of court, a motion was made for an *attachment* for non-performance.

Per curiam. There ought to be an affidavit of award demanded, &c. and we never grant an *attachment*, for non-payment of money on an award the *firſt* day, though the defendant be to do the *firſt* act. *Vide Mod. Rep. vol.* 12. *page* 317.

Michaelmas, 11 *W.* 3. *The King* v. *Tooley.*

The defendant had been a mayor of a corporation, and declined ſwearing in the mayor elect, and after a peremptory mandamus an *attachment* was moved for againſt him, on affidavit, that he kept out of the way, ſo that he could not be perſonally ſerved; and that a writ had been left at his houſe, and ordered he ſhould ſhew cauſe, &c. and this difference taken between this caſe, and where money is to be paid on award; that in the latter there ought to be a perſonal notice before *attachment*. But this point may be queſtioned. *Vide Mod. Rep. vol.* 12. *page* 312.

Hilary, 12 *W.* 3. *Ingram* v. *Bernard.*

In *debt* on a bond conditioned to perform an award, where the award was, that the defendant ſhould pay money on ſuch a day, and he pleaded a *foreign attachment* in *London* iſſued the ſame day that the money was payable by the award, and that by virtue thereof they *attached* the money in his hands the day after, which was the day after that on which the money was payable by the award. An exception was taken to this plea, that at the time when the money was pleaded to be *attached*, the day of payment by the award (which is now parcel of the condition of the bond) was paſt, and the bond forfeited; and ſo the penalty of the bond was due, and not the money awarded, and therefore that ought to have been *attached*, and not the other. The defendant's council argued, that the *attachment* was awarded on the very day, though it was not executed till the day after; and that it was their cuſtom to *attach monies in hand*, and not the penalty.

The court were of opinion, that the plea was ill. And *Holt*, Chief Juſtice ſaid, that it would have been a good plea to an action of *debt* on the award, but not to *debt* on the bond, the penalty of the bond being due by the failure of payment of the money awarded on the day; and therefore that ought to have been *attached*, for after that the bond is forfeited, the money contained in the condition cannot be *attached*. If the *attachment* had been executed before the bond had been forfeited, it had been well; but though it was *attached*, yet until it was executed, the defendant might pay the money to whom he would; and therefore not paying it according to the award, he forfeited the bond. And judgment was given for the plaintiff. *Vide Raym. vol.* 1. *page* 636.

Eaſter, 12 *W.* 3. *Sir —— Cecil and others of the Town of Nottingham.*

The queſtion was, whether ſerving an *attachment* for contempt on a *Sunday*, was within the ſtatute againſt *Sabath breaking*. The words that all arreſts on *Sunday*, except for breach of the peace, are void.

Holt, Chief Juſtice. Suppoſe it was a warrant to take for *forgery*, *perjury*, &c. ſhall they not be ſerved on *Sunday*, and ſhall not any proceſs at the King's ſuit be ſerved on *Sunday*; ſure the Lord's day ought not to be a ſanctuary for malefactors; and this here partakes of the nature of proceſs on an indictment, but the court will conſider the matter further.

On an *attachment*, a perſon is only to anſwer interrogatories; and if he can ſwear off the *contempt*, he is diſcharged; and ignorance of the law cannot be pleaded in ſatisfaction of an act againſt law, but may be offered in mitigation.

The Solicitor General moving for an *attachment* on the *alias mandamus*, *Holt*, Chief Juſtice ſaid, it had been ſometimes granted in the like caſe, but not frequently: and there were two ſorts of *attachments* on a mandatory writ; the one intitles the party to his action for *damages*, and that muſt be on the *pluries*; *Vide* 1 *Cro.* 559. And the other puniſhes the *contempt*, which may be on the *alias*; ſo is the *attachment* on a *prohibition*, which is the caſe in *Cro.* and here they took a *pluries*, and no *attachment*. *Vide Mod. Rep. vol.* 12. *page* 348.

Eaſter, 12 *W.* 3. *Stout* v. *Fowler.*

See *page* 77 of this work under the head *Appeal.*

In this cauſe Lord Chief Juſtice *Holt* cited the caſe of one *Starkey*, ſteward of *Windſor Court*, where it was adjudged that a miſdemeanor in an inferior court is an *offence* againſt this court, and the caſe of 28 *H.* 8. was likewiſe quoted by him, where a Sheriff was *fined* 40 *l.* for refuſing to make a return, and he ſaid if any Sheriff in *England* had ſerved him ſo, he would have laid him by the heels. *Vide Mod. Rep. vol.* 12. *page* 374.

Norwich Summer Aſſizes, 12 *W.* 3. *Palmer* v. *Hooke or Gouche.*

On a trial at *niſi prius* it was ruled by *Holt*, Chief Juſtice, that if in an *indebitatus aſſumpſit* for goods ſold and delivered, on *non-aſſumpſit* pleaded, the defendant gives in evidence, that the debt was *attached* by *foreign attachment* in *London*, on a plaint levied by *J. S.* (to whom the plaintiff was indebted) againſt the plaintiff, &c. the defendant will be obliged to prove that the plaintiff was indebted to *J. S.* becauſe the plaintiff has no notice of the *foreign attachment*; and therefore it may be only a contrivance by the defendant and *J. S.* to bar the plaintiff of his preſent action. 2dly. In ſuch caſe, the plaintiff may ſhew in evidence, that the ſuit in *London* was *after* an *original* filed by the plaintiff in one of the ſuperior courts; and that will avoid the operation of the *foreign attachment*. 3dly. If the *original* did not iſſue before the plaint was entered in *London*, but only was antedated, and bore teſte before; and no arreſt was made on it before; that will not avoid the *foreign attachment*. This laſt point *Holt* reſerved for his farther conſideration, but at laſt continued in his former opinion. *Vide Raym. vol.* 1. *page* 727.

Hilary, 13 *W.* 3. *Ingram* v. *Bernard.*

Arbitrators having made an award, that *W. R.* ſhould pay a ſum of money on the *ſecond day of January*, he having given a bond to perform the award, it was *attached* on the *firſt day of January*, and the money awarded was taken on that *attachment*.

Per Holt, Chief Juſtice. This would have been a good plea in an action of *debt* brought upon the award, but not to an action of *debt* brought upon the bond of ſubmiſſion, becauſe the bond is forfeited, and when a bond is forfeited, it is not the money in the condition, but the money in the bond itſelf which is *attached*.

A debt due by judgment obtained in the courts of *Weſtminſter*, whether the action was for *debt* or *damages*, cannot be *attached* by the cuſtom of *London*.

A creditor of *W. A. attaches* his debt in the hands of *W. S.* who was indebted to the ſaid *W. A.* and this being removed here by *certiorari*, a *procedendo* was granted, becauſe the party cannot have the like remedy in this court as he may in *London*.

Per curiam. If *A.* ſhould ſue *W.* here, and the defendant ſhould plead the foreign *attachment*, we will allow the cuſtom, becauſe it comes in by way of plea, but when it comes by way of original ſuit we cannot do right to the parties, therefore a *procedendo* was granted. *Vide Salk. vol.* 3. *page* 50. *Raym. vol.* 1. *page* 636.

Eaſter, 13 *W.* 3. *The King* v. *Sims.*

Per curiam. If a perſon brought in in *contempt*, denies all on oath, he is of courſe diſcharged of the *contempt*; but if he has forſworn himſelf, he may be proſecuted for *perjury*. *Vide Mod. Rep. vol.* 12. *p.* 511.

Eaſter, 13 *W.* 3. *The King* v. *Raw.*

The court was moved for an *attachment* againſt an officer for executing by *diſtreſs* an order of juſtices, for levying of money for the repair of a bridge, after the order was removed by *certiorari*.

Holt, Chief Juſtice. There never is any formal allowance of a *certiorari* below; but to bring one in *contempt*, the diſtreſs muſt be after the *certiorari* preſented below; and if a warrant was delivered before that time, the way had been, on producing the *certiorari*, to get a *ſuperſedeas* of it, and deliver it to the officer, or elſe he cannot be in *contempt*. *Vide Mod. Rep. vol.* 12. *p.* 499.

Eaſter, 13 *W.* 3. *Howe* v. *Acton.*

Per curiam. On coſts being taxed by the maſter, on an order of reference of an attorney's bill, if the coſts be not paid, an *attachment* ſhall go. *Vide Mod. Rep. vol.* 12. *p.* 493.

Trinity, 13 *W.* 3. *The King* v. *The Inhabitants of Mile-End.*

Stat. 30 *Car.* 2. *cap.* 5. prohibits the burying in linen, under the penalty of 5 *l.* one moiety whereof to be given to the informer, and the other moiety to the poor of the pariſh. *Mile-End* is a hamlet of itſelf, and has diſtinct officers, and a chapel of eaſe, but lies within the pariſh of *Stepney*. The *Jews* have a burying-place at *Mile-End*. And the juſtices of the peace in 36 *Car.* 2. made an order at their ſeſſions, that the churchwardens of *Mile-End* ſhould give an account of their receipts of the buryings ariſing within their precinct, to &c. to the end that there might be an equal diſtribution through the whole pariſh; which order being removed during the ſame reign into this court, was afterwards confirmed, and the churchwardens of *Mile End* accounted accordingly for ſome time. But the preſent churchwardens of *Mile-End* not having accounted according to the ſaid order, the court was moved laſt term for an *attachment* to be granted againſt them for not accounting according to the ſaid order, it being confirmed in this court, and ſo a contempt of this court. And a rule accordingly was made to ſhew cauſe, but afterwards diſcharged, and an *attachment* refuſed, becauſe the proper remedy was, to have applied to the juſtices for a new order. And the court unanimouſly held the order juſt and good. *Vide Raym. vol.* 1. *p.* 676.

Eaſter, 1 *Ann.* *Davila* v. *Dalmanſer.*

A *ſubmiſſion* to an arbitration was by rule of court, and after the arbitrators had made ſome progreſs in the matter, the party came and ſnatched away the papers, and ſo hindered their farther proceeding thereon.

Per Holt. There ought to be an *attachment* if the party did not enlarge the rule and pay coſts. *Vide Mod. Rep. vol.* 7. *page* 8.

Eaſter, 1 *Ann.* *Wright* v. *Crump.*

A motion being made for an *attachment* againſt one *Rolfe*, an attorney, ſteward of a court in *Norfolk*, for having miſdemeaned himſelf in a trial before him, between the above parties,

On this motion, *Holt*, Chief Juſtice, cited a caſe adjudged in this court in the time of Chief Juſtice *Hyde*, *viz.* The Mayor of *Hereford* claimed a title to a houſe in that city, and in order to recover it, made a leaſe thereof to *J. S.* with an intent that he ſhould bring an *ejectment*, which the ſaid *J. S.* did accordingly in the *Mayor's court* in *Hereford*, and ſo the Mayor was in fact judge in his own cauſe, and he gave judgment for his *leſſee*, and execution was ſued out there by him; and on complaint of this matter in this court, an *attachment* was granted, and the Mayor committed for theſe proceedings. *Vide Raym. vol.* 2. *p.* 766.

Trinity, 1 *Ann.* *George* v. *Pierce.*

Per Holt, C. J. If a perſon be brought in on an *attachment*, you can have no more than his anſwer on *interrogatories*, and if he *forſwears* himſelf, he is ſubject to a *proſecution* for *perjury*. *Vide Cro. Car.* 89. *Vide Mod. Rep. vol.* 7. *page* 31.

Trinity, 1 *Ann.* *The Queen* v. *The Mayor* &c. *of Carliſle.*

An *attachment* was granted againſt him for proceeding after a *certiorari* brought and delivered to him. *Vide Mod. Rep. vol.* 7. *page* 38.

Michaelmas, 1 *Ann.* *Hall* v. *Hill, and others.*

The defendants were *judges* of a court at *Briſtol*, in which the plaintiff had obtained a verdict, and damages for 28 *l.* and the ſame day he goes to the *town-clerk*, and gets his *coſts taxed*, he being the *proper officer*, and takes out a *capias* againſt the principal; and on return thereof, a *ſci. fac.* againſt the bail, who after the return of a *ſecond ſci. fac.* ſurrendered the principal; after which a year elapſed from the verdict and taxing of coſts, when the court granted a *new trial*, which being complained of to the *court* in *Trinity* term, a rule was made for an *attachment*, niſi.

And now the defendant's council came to ſhew cauſe, and *urged*, that the *judges* below were in no fault, for there never was any judgment entered below; and until judgment entered, the hands of the court are not tied from granting a *new trial* at any time before judgment, if they ſee cauſe; and if they miſtake that for a cauſe, which is none, that only is an error of their judgment, for which they are not puniſhable: and though in this caſe a *new trial* was granted after a *writ of error* allowed, that will not alter the caſe; for it is uſual to have a *writ of error* allowed before judgment, and the proceeding againſt the bail was groundleſs, there being no judgment entered, and ſuch proceedings did not hinder the courts being open to grant a *new trial.* He quoted the caſe of *Tiny* v. *Roberts*, where the plaintiff having omitted entering judgmenr as ſoon as he might have done it, the court granted a *new trial*; and he ſaid, here the court were not bound to enter judgment without prayer of the plaintiff, tho' an *inferior court.* 2 *Vent.* 189.

The plaintiff's council in reply ſaid, that the *coſts* were *taxed* here by the *proper officer*, and that he thereon had made out a *proceſs* againſt the defendant, and that is warrant enough for execution, though there be not a *final* entry of the judgment on the *roll*, which is never done in thoſe courts till the *writ of error* is brought; where they are forced to make up the records, indeed they ſometimes enter in the margin: judgment for the plaintiff.

Holt, Chief Juſtice. The *writ of error* ought not to be allowed till judgment given; and it is a good return to it, that judgment is not yet given, which the plaintiff's council *confeſſed* as to the point of the return, but *affirmed*, that they frequently do allow them before judgment. The Chief Juſtice likewiſe agreed, that a *judge* is not puniſhable for an *error* in *judgment*; but he ſaid, that it was rare for the ſame *judges* to grant a *new trial* before themſelves, as here, after a *trial* at *bar*; though that, he ſaid, had been done, but never with his conſent; but it is uſual to grant a *new trial* after a *trial* at *niſi prius*, but that is ever after *freſh purſuit*, that is, the very *next term*; but here it was granted after a year, coſts taxed, and as much an entry of a judgment, as is in any caſe there, and execution taken out; and it is no excuſe for them to ſay, they are not *lawyers*, for they ought to take advice of *lawyers*; and if they are ſo preſumptuous to take on themſelves the knowledge of the *law*, it ought not to be ſuffered, though there be no *corruption* in them. He cited the *caſe* of the *ſteward of Windſor-court*, who was both *council* and *judge*, and after bail to the *writ of error* brought on his own judgment. But on complaint the judgment was ſet aſide, and reſtitution awarded. But he ſaid they would not grant an *attachment* for an *error* in *judgment*, where it is a matter within their judgment, as here it was not, they having already given their judgment why we ſhould not grant it.

Note. In this caſe it was argreed to be the courſe of the court, that where, on an *affidavit* made, a *day* is *given* to hear *council* on both ſides; the party may read as many *affidavits* as he pleaſes in corroboration of the firſt, and concerning the ſame matter, but muſt read none concerning new matter.

It was alſo agreed, that the principal cannot be rendered by bail after plea pleaded: and here the *rule* was, that the *rule* for a *new trial* be ſet aſide, and the *rule* for an *attachment* be diſcharged on payment of the expences of the complainant, and judgment entered below as in due time. *Vide Mod. Rep. vol.* 7. *p.* 84.

Eaſter, 2 *Ann.* *The Queen* v. *Chaffey.*

Several orders made by the juſtices of peace in *Wilts* againſt the defendant, the reputed father of a baſtard child, were removed into this court by *certiorari*; and the court was moved to quaſh one of them, which was, that the churchwardens and overſeers of the poor ſhould ſeize of the defendant's goods what they ſhould judge proper, to ſecure the pariſh from the maintenance of the child; becauſe by *ſtat.* 13 & 14 *Car.* 2. *cap.* 12. they have only authority to make an order to impower the churchwardens and overſeers, &c. to ſeize what the juſtices ſhould think proper, and not what the churchwardens, &c. ſhould judge proper, &c. and for this reaſon it was quaſhed. Then an exception was taken to the original order, becauſe it ordered, that the defendant ſhould give ſecurity for the payment of the ſum by them impoſed for the maintenance of the child; when it did not appear that the defendant had diſobeyed the order in point of payment; and by *ſtat.* 18 *Eliz. cap.* 3. an order for ſecurity cannot be made till after contempt. And for this reaſon the order was quaſhed as to that part, and was confirmed as to the reſidue.

Per curiam. When an order is confirmed in this court, an *attachment* lies for non-performance of it; wherefore this court will not take ſecurity of the party for performance of it; but if the original order had been one of the ſeſſions, not removed hither, the court would have taken ſecurity of him to appear there. *Vide Raym. vol.* 2. *p.* 858.

Michaelmas, 2 *Ann.* *Smith* v. *The Mayor and Aldermen of London.*

A perſon who had been a *bankrupt*, and gone abroad, had conſigned goods to three perſons here, for the equal benefit of his creditors, two whereof were his conſignees, who ſet up a truſtee for them to *attach* the goods in *London.* The third conſignee, to whom nothing was due, offered to appear; the other two would not appear: and the court would not receive the *third* man's appearance without he appeared for all, which he could not juſtify doing, having no *warrant* for it: and now a *prohibition* was moved for, becauſe they refuſed his plea.

Holt, Chief Juſtice. If they refuſe your plea, your way is by *bill of exceptions:* if they proceed otherwiſe *erroneouſly*, you may have a *writ of error*; and we are not to prohibit *inferior courts*, becauſe they proceed againſt *law*, for in that caſe the *law* gives another remedy.

On an *attachment* of goods, there goes a *ſci. fac.* by way of *garniſhment*, and two of the *garniſhees* will not appear, and the third offers to appear, and plead, but is not admitted, without appearing for all. Sure this courſe is of very ill conſequence, and here we can have no *bill of exceptions*, becauſe they are not in court till appearance; and they will not ſuffer us to appear, tho' a *bill of exceptions* be always of matter not appearing of *record:* and the court were ſtrongly againſt the *cuſtom* to compel one *garniſhee* to appear for the reſt; and here they ſaid, there could be no *certiorari*, becauſe they could not proceed in this court according to the *cuſtom of London.*

And *Dee*, the *common ſerjeant*, ſaid, that in ſuch caſe, if he put in *bail*, and *waged* his *law* alone, that would have diſſolved the *attachment*; this caſe was put: if a *præcipe* be brought againſt two, and one of them appears, and takes the whole *tenancy* on himſelf, and *traverſes* the other's having any thing, and pleads in *chief*, he may do it. Adjourned for further conſideration. *Vide Mod. Rep. vol.* 6. *p.* 78.

Eaſter, 3 *Ann.* *The Queen* v. *Pugh and others.*

An *affidavit* was made of a *reſcous* of one taken by *meſne proceſs*, on which an *attachment* was moved for.

Per curiam. On a return of *reſcous*, it would go of courſe.

But *Holt*, Chief Juſtice, would diſtinguiſh between this, and the caſe of *reſcous* on a *writ of execution*; for there the *ſheriff* cannot return a *reſcous*, and therefore the court can have no other ground for an *attachment*, but *affidavits*, and ought to be contented therewith; but here a *reſcous* might be returned, which being a matter of *record*, and conſequently a better motive, ought to be given to the court. Yet the court ſeemed againſt him; and a rule to ſhew why an *attachment* ſhould not go, was obtained.

Touching the difference of *reſcous* on *meſne proceſs*, and thoſe of perſons taken in *execution*, ſee 1 *Cro.* 33. 37, 175. 2 *Cro.* 289, 360. *Pop.* 189. 3 *Bul.* 198, *Dyer* 212, 241. 3 *Lev.* 44. & 2 *Sal.* 586. *Poſt* 220. See alſo, *Inſt. Leg.* 176, 394 *to* 400. 1 *Hawk. ch.* 65. *ſec.* 2, 11, 18 *to* 23. *Vide Mod. Rep. vol.* 6. *page* 141.

Hilary, 9 *Ann.* *Anonymous.*

A motion was made for an *attachment* againſt the defendant on affidavit, that being ſerved with the rule of court to ſhew cauſe why an information ſhould not be filed againſt him, he ſaid, *he did not care a fart for the* *rule of court*. And the Attorney General inſiſted he ought to be firſt heard to ſhew cauſe againſt it.

Per curiam. He ſhall anſwer in cuſtody; for it is to no purpoſe to ſerve a perſon with a ſecond rule, who has ſlighted and deſpiſed the firſt: it is to expoſe the court to a further contempt. And accordingly the defendant was brought in, and entered into a recognizance to anſwer interrogatories. *Vide Salk. vol.* 1. *page* 84.

Trinity, 5 *Geo*. *The King* v. *Jones*

The defendant having treated the *proceſs* of the court *contemptuouſly*, an *attachment* went againſt him, without a rule to ſhew cauſe, as is *cuſtomary*.

The court being informed that the defendant relied on the aſſiſtance of his fellow-workmen to *reſcue* him, ſent for the *Sheriff of Middleſex* into court, and ordered him to take a ſufficient force. *Vide Strange, vol.* 1. *page* 105.

Trinity, 7 *Geo*. *The King* v. *Barber*.

The defendant preſented a petition to the *common council* of *London*, reflecting on one of the aldermen, and uſed *contemptuous* words of this court, at the ſame time.

For the *petition*, the court granted an *information* againſt him, and thoſe who ſigned the ſame; and, for the *contempt*, an *attachment*.

The proſecutor, in his *interrogatories*, to which the defendant was examined, aſked him if he did not preſent the petition, and uſe ſuch and ſuch words.

The defendant's council moved, that the *interrogatory* which charges the defendant with preſenting the petition might be ſtruck out, becauſe otherwiſe it would be making the defendant accuſe himſelf of that which will convict him of a *libel*.

Per curiam. He is not obliged to anſwer it. You may aſk him, whether, when the petition was preſented, he did not ſay ſo and ſo. Therefore, let that part of the *interrogatory* be ſtruck out. *Vide Strange, vol.* 1. *page* 444.

Eaſter, 9 *Geo*. *The King* v. *Wiatt*.

On a motion for an *attachment* againſt the defendant, for publiſhing a *libel* againſt a *doctor of divinity* in the *Univerſity of Cambridge*, and a rule being made on him to ſhew cauſe, on ſuch a day, why it ſhould not be granted, he now moved, by his council, to diſcharge that rule, on an *affidavit* that his *fault* was not *wilful*, but merely through *ignorance*; that he had the *libel* from one *Crownfield*, a printer in *Cambridge*; that it was in *Latin*, which the defendant did not underſtand; and that he did not know who was the author, otherwiſe than by a letter which he received from the printer, and which was now annexed to his *affidavit*, by which letter it appeared, that one *Dr. Middleton* was the *author*; ſo that having ſhewed how he came by this *libel*, and having told all that he knew of the *author*, for that reaſon it was inſiſted in his behalf, that the *rule* ſhould be *diſcharged*, and that the *printer* ſhould be proſecuted.

But the rule was continued on the defendant, until he made out his allegation againſt the *printer*, who was therefore joined in the *rule*, that both of them might be before the court.

In the next term *Dr. Middleton* appeared, and confeſſed in court that he was the *author* of the book: and thereon the rule was diſcharged againſt the defendant and the *printer*, and *Dr. Middleton* was committed till farther conſideration of the matter.

And within a few days afterwards he was brought into court, and fined 50 *l*. and was bound to his good behaviour for a year; and ſo was *Dr. Colbatch*, the ſame term, for the like offence. *Vide Mod. Rep. vol.* 8. *page* 123.

Trinity, 9 *Geo*.. *The King* v. *Ackworth and others*.

On a motion for an *attachment* againſt the defendants, on an *affidavit* of their withdrawing a *witneſs* from giving evidence at the *aſſizes*, in a trial had there on an *information* againſt certain *ſmugglers*, it was ſhewed for cauſe, that the defendants had *affidavits* to diſprove the charge made againſt them by the *affidavits* of the plaintiff; whereon thoſe *affidavits* were now read in court; and it was affirmed to be the *conſtant practice*, that though the *affidavits* produced by the plaintiff were very full as to the charge, yet if the perſon denied ſuch charge, by as plain and poſitive *affidavits*, in ſuch caſe he ſhould be diſcharged, and an *attachment* ſhould not go; and if ſuch *affidavits* were not true, then the plaintiff had a proper remedy, which was, by *indicting* them for *perjury*.

And becauſe a man ſhall not be kept in *cuſtody*, and deprived of his liberty by an *attachment*, therefore this is the only caſe where a *negative oath* ſhall be preferred to an *affirmative*; all which was agreed to by the court, but that the preſent caſe differed; for the defendants did not, by their *affidavits*, plainly deny the fact with which they were charged. *Vide Mod. Rep. vol.* 8. *page* 81.

Michaelmas, 9 *Geo*. *Cæſar* v. *Holt and others*.

A rule was made for the defendants to *ſhew cauſe*, on ſuch a day, why an *attachment* ſhould not go againſt them, for committing a *reſcue*, *&c.* and now they ſhewed for cauſe, that ſuch *attachments* ought not to be allowed, on *affidavits* of a *reſcue*, becauſe in ſuch caſe the parties might be taken into *cuſtody*, before the writ is returned: therefore the *ſheriff* ought to return a *reſcue* before the defendants ſhould be proſecuted for it; and the court was of that opinion, *viz.* that the *ſheriff* ought to return the *writ*, which, if *falſe*, then the plaintiff hath an action againſt him; but if the return is *true*, then the action lies againſt the *reſcuers*; therefore if an *attachment* ſhould be granted on an *affidavit* of a *reſcue* before the return of the *writ*, the defendant can have no action againſt the *ſheriff*, for a *falſe return*. *Vide Mod. Rep. vol.* 8. *page* 110.

Michaelmas, 9 *Geo*. *The King* v. *Seymour Richmond*.

An *attachment* was granted *laſt term*, againſt the defendant, *unleſs cauſe*, *&c.* for that he being *town clerk* of *Wallingford*, had *attached* ſo much *meal* in the *market* there, in *ſacks*, and had ſold the ſame, under colour of the ſaid *attachment*, when the owner would have given an appearance to the ſuit, for which his goods were thus *attached*; and on complaint made by the ſaid owner to the *mayor and burgeſſes* there, he the ſaid defendant was ordered to deliver the meal to the owner, on giving an appearance as aforeſaid: but the defendant refuſed to deliver the meal, and ſaid, that the owner ſhould never have his meal again.

And now his council came to ſhew cauſe, why an *attachment* ſhould not go againſt him, *viz.* he made an *affidavit* that he was *town clerk* of that *borough*, and that when he made out the order to *attach* the meal, he thought it a good order; and that if the *mayor and burgeſſes* made an order for the defendant to deliver the meal to the owner, ſuch order was only *verbal*, and not in *writing*; and that if he had offered any *contempt* to ſuch *verbal order*, he ought to be puniſhed there, where the ſuppoſed offence was done.

To which it was anſwered, by the council for the proſecution, that where an officer of an *inferior court* abuſes the *proceſs* of that court, to the oppreſſion of any perſon, he may be puniſhed by this court; and that the defendant having iſſued out an *attachment* as the very firſt *proceſs*, it is altogether *irregular*, and then afterwards to make uſe of it as an *execution*, is ſtill worſe, and an apparent oppreſſion; and having ſold the meal, by virtue of that *attachment*, contrary to the expreſs order of the *mayor*, and declaring that the owner ſhould never have it again, ſhews he had a deſign to oppreſs him.

It is true, he ſwears that he had only a *verbal order* to deliver the meal, but yet that can be no excuſe to him, becauſe he is the very perſon (being the *town clerk)* who ſhould have entered that order in writing. *Vide Mod. Rep. vol.* 8. *page* 96.

Hilary, 10 *Geo.* *The King* v. *Colvin.*

On a motion for an *attachment* againſt the defendant, a *gaoler*, for denying to *return* an *habeas corpus* directed to him, and for *extorting* a *note* from the proſecutor, then in his cuſtody, ſo as by *menaces* and *dureſs*, he was forced to comply, and give the *note* for payment of the money to the *gaoler*.

The court made a *rule*, that he ſhould *ſhew cauſe* why an *attachment* ſhould not go againſt him.

Note. An *attachment* was iſſued out againſt an *aſſociate* for amending a *record* after a motion in *arreſt of judgment* for the ſame fault which he amended; but on his making the *record* as it was before it was amended, and paying coſts, the court, *ex gratia*, *ſuperſeded* the *attachment*.

A motion was made to ſet aſide two verdicts, becauſe the diſtringas's were not ſtamped, ſo that the trials were void by the ſtamp act; but the Solicitor having got thoſe writs ſtamped before the *poſtea* was brought into court, this motion was rejected, for it did not appear to them, but that they were ſtamped; and they could not take any notice, whether they were ſtamped or not at the aſſizes; if they were not, the defendant ſhould have taken notice, and inſiſted on it at that time.

Note. It was held by the court, that it is not ſufficient to deliver a copy of a declaration to the turnkey or gaoler, where the defendant is in cuſtody, unleſs the declaration is firſt filed in the office; and therefore where a judgment was had on a declaration ſo delivered, it was ſet aſide by the court.

And if judgment is regularly obtained againſt ſuch defendant, the plaintiff muſt charge him in execution, within two terms afterwards, and not after thoſe two terms are expired, or if he is charged afterwards, the court will diſcharge him with coſts. *Vide Mod. Rep. vol.* 8. *page* 227.

Eaſter, 10 *Geo.* *The King* v. *Dunbar.*

On the defendant being ordered to be examined on *interrogatories*, the maſters report to the court was as follows:

The defendant, *Dunbar*, was a *priſoner* in the *King's Bench*, and charged in execution there at the ſuit of one *Pilkington*, and afterwards was turned over to the *Fleet*, and there likewiſe charged in execution at the ſuit of the *ſame party*, and on the 30*th day of January laſt*, was taken in *Leiceſter Fields* on an *eſcape warrant*, ſigned by one of the judges of this court, and then he inſiſted on his having a *day rule*, but on ſearch there was none for that day; whereon as he was carried through the *Old Bailey* towards *Newgate*, the officers of the *Fleet* reſcued him.

And now on a motion for an *attachment* againſt them, and that *Dunbar* might be taken out of the *Fleet*, and ſent to *Newgate*; it was inſiſted for him, that he being charged in execution in the *Fleet*, could not be taken by an *eſcape warrant* iſſuing out of this court.

Beſides the defendant ſuppoſed he had a good *day rule*, for his name was entered in the *petition* for *day rules*, on the 30*th day of January*, but the clerk did not come in time to have it read in court that day.

As to the *objection*, that this man being charged in execution in the *Fleet* (which is the *priſon* of the *Court of Common Pleas*) cannot be taken by an *eſcape warrant* ſigned by any of the *judges of the Court of King's Bench*. This appears to be otherwiſe on reading the *ſtatute*.

So that any *judge* of the *court* where the action was brought, may grant an *eſcape warrant*; and a *judge of the Common Pleas* may grant it, though the priſoner is turned over, and charged in execution in this court, and ſo *vice verſa*.

As to the entry of his name in the *petition* for a *day rule*, it ſignifies little, unleſs it is read in court; therefore an *attachment* was granted againſt thoſe who *reſcued Dunbar*, and a *rule* was made, that he ſhould be taken out of the *Fleet*, and ſent to *Newgate*. *Vide Mod. Rep. vol.* 8. *page* 241.

Eaſter, 10 *Geo.* *The King* v. *Burridge.*

A *rule* of this court was made by *conſent*, that the *ſheriff* of the county of *Devon* ſhould bring the *freeholders book* before the *maſter of the office*, and that he ſhould return *forty eight men*, and that each of the parties ſhould be at liberty to ſtrike out twelve; and that the maſter ſhould appoint the *twenty-four* remaining to be returned by the *ſheriff* to try the iſſue joined between the parties.

Afterwards, when the parties attended the maſter, the defendant ſtruck out *ſome hundredors*; and at the trial he challenged the *array* for want of *hundredors*; and the *judge* of *aſſize* allowed the *challenge*, and directed that the plaintiff in the action might take what remedy he could by *law*.

Thereon it was now moved for an *attachment* againſt the defendant; for that this *challenge* to the *array* was a *breach* of the *rule* of court, and a *contempt* thereof.

And it was *argued* for him, that his entering into this *rule* did not take from him the liberty of *challenging* the jury; if it did, it muſt be by implication, which could never be a good foundation for an *attachment*; for the cauſe to iſſue out an *attachment* ſhould be as *certain* as the cauſe to warrant a judgment, and there was never yet an *attachment* granted in ſuch a caſe.

There are *rules* where there was an *expreſs injunction* not to *challenge*, as in *Dunſter's caſe*, 10 *El.* in which rule it was ordered, *that neither party ſhould challenge the pannel*; and there are other *rules* where it was inſiſted on but denied, as in the caſe of *the King* v. *Kiffin Eaſter*, 29 *Car.* 2. a *rule* was made (as in this caſe) for ſtriking a ſpecial jury: and *Jones*, Attorney General, moved that it might be inſerted in the *rule*, that neither of the parties ſhould be at liberty to *challenge* the *array*, but it was denied by the *whole court*, for it could not be granted but by conſent; and it was not at that time pretended, that this was implied in the *rule*; for if it had, he need not have moved the court, that it might be *expreſſed*.

In the caſe of *the King* v. *Sherrard*, 1 *Geo.* theſe words were added to the like *rule*, by conſent of both parties, *that no advantage ſhould be taken for want of hundredors*, 2 *Roll. Rep.* 365. But admitting this was implied by the *rule*, yet the defendant cannot be ſaid to be guilty of a *contempt* for *challenging* the *array*, for it is no more than an inadvertency, or a miſtake of the ſenſe and meaning of the *rule*.

Now the different way of drawing up theſe *rules* ſhews, that there muſt be an *expreſs conſent* of the parties not to *challenge*, otherwiſe no *attachment* will lie for *challenging*; neither will ſuch conſent take away any *legal objection* the party hath to *challenge*; and if ſuch a *rule* (as in the principal caſe) would ſerve, what reaſon can be given why an *expreſs conſent* ſhould be put in ſo many *rules* for ſtriking *ſpecial juries*.

Beſides, this matter has received judgment already, for the *rule* was produced at the aſſizes, and pleaded in *bar* to this *challenge*, and the defendant demurred to it, and the plaintiff joined in *demurrer*; and when the judge came to town, he gave judgment for the defendant, at which the *Chief Juſtice* ſeemed to be ſurpriſed, that a judge ſhould give judgment after he came to town, but the council for the defendant ſaid he might, when it was by the conſent of the parties; as where a verdict is found, and the judge takes time to conſider what judgment to pronounce, or what fine to ſet; and for theſe reaſons it was inſiſted that no *attachment* ſhould go.

It was inſiſted for the *attachment*, that this *challenge* was a *contempt* of the court, and a breach of their *rule*, for that was, that the maſter ſhould appoint *twenty-four* perſons to be returned by the *ſheriff* to try the iſſue; now this *challenge* to the *array* deſtroyed this *rule*, for it was a *ſuperſedeas* of the whole return, like a *rule* of court on a bond to ſtand to an award; yet if the party retracts the ſubmiſſion, it is a breach of ſuch *rule*, and a forfeiture of the bond, both which are implied in the ſubmiſſion.

The defendant might have taken a *challenge* to the *polls*, but he knew that would be ſupplied by *taleſmen*; therefore, to make all ſure, and to prevent the trial, he took the *challenge* to the *array* for want of *hundredors*, and this with an air of inſolence, after he had been ſummoned to appear before the *Chief Juſtice* of this court, and had his opinion, that the defendant could not ſtrike out the *hundredors*; for which reaſon it was inſiſted, that the *attachment* might iſſue.

The court was of opinion, that the defendant was guilty of a premeditated *contempt*, becauſe his *challenge*, drawn up in form, and *arraigned* at the *aſſizes*, ſhews his deſign was to put off the trial.

As to the rule made in this caſe, it may be without the conſent of the parties, as well where the trial is by *niſi prius*, as at *bar*, and that likewiſe in *criminal* caſes as well as *civil*, and without any infringement of the liberty of the ſubject, but rather for the ſake of juſtice, and to preſerve their liberties; and if ſuch *challenges* are good, theſe rules would be avoided, and made uſeleſs, which is a *contempt* of this court: and the caſe cited, of *Thomas* v. *Kiffin*, to ſhew that the party may challenge, if it is not *expreſsly prohibited* in the *rule*, is wrong; for though it is not *expreſſed*, yet if it be neceſſarily implied, the power of *challenging* is taken away; for otherwiſe theſe rules would be to little purpoſe.

Now this rule is, that the iſſue ſhall be tried by the *remainder of the jury challenging* the *array*, is as much as to ſay it ſhall not be tried by that jury, and that the *ſheriff* ought not to return them, when he was bound by the *rule* to return thoſe, and no other.

Now, as the court have a power to inforce obedience to their own *rules*, it is but reaſonable they ſhould puniſh thoſe who break them; ſo the *rule* was made *abſolute* for an *attachment*. *Vide Mod. Rep. vol.* 8. *p.* 246.

Trinity, 10 *Geo.* *Smith* v. *Graham.*

On a motion for an *attachment*, againſt one *Chaſe*, a *bailiff*, for taking *inſufficient bail* on the arreſt of a perſon, (at the plaintiff's ſuit;) a *rule* was made to *ſhew cauſe*. *Vide Mod. Rep. vol.* 8. *p.* 283.

Michaelmas, 10 *Geo.* *Williams* v. *Lyons.*

An action on the *caſe* was brought againſt the defendant for *criminal* converſation with the plaintiff's wife; and on *not guilty* pleaded, the cauſe was tried at the ſittings after term, and the jury gave a verdict for the plaintiff, and 200 *l.* damages; and afterwards the defendant uſed ſome indirect means with the plaintiff to take a ſmall ſum, and releaſe the damages; and becauſe he would not take 30 *l.* and give ſuch a releaſe, the defendant got a warrant of a *juſtice of peace* to take up the plaintiff for a pretended *murder*; which warrant was executed on him on a *Sunday*, and he was kept in *cuſtody* till *Monday*; and then was arreſted in an action of 500 *l.* at the ſuit of the defendant, all which was done to extort a releaſe from him; which appearing plainly to the court, a rule was made for him, the *conſtable*, *bailiff*, *juſtice of peace* and his *clerk*, to *ſhew cauſe* why an *attachment* ſhould not go againſt them. *Vide Mod. Rep. vol.* 8. *p.* 189.

Michaelmas, 10 *Geo.* *The King* v. *Burchet and his Attorney, and againſt the Town Clerk of Guildford.*

One *Burchet* was convicted by a *juſtice of peace*, for keeping *dogs*, *nets*, and *ferrets*, to catch *conies*, not being qualified, *&c.* and by a warrant from the ſaid juſtice, his goods were diſtrained for the *forfeiture*; and whilſt they were in poſſeſſion of the *conſtable*, and before they were ſold, the *town clerk* granted a *replevin* to take them from the *conſtable*.

And now the court was moved to ſet the ſaid *replevin* aſide, (becauſe goods thus taken by diſtreſs, on ſuch convictions, are *irrepleviable*) and for an *attachment* againſt the *town clerk*.

The court would not ſet aſide the *replevin*, but made a *rule* to *ſhew cauſe* why an *attachment* ſhould not go; which was afterwards diſcharged. *Vide Mod. Rep. vol.* 8. *page* 209.

Michaelmas, 10 *Geo.* *Wrotham Pariſh* v. *The Pariſh of Saint Olave.*

John Richards, and his *wife*, and *five children*, were removed by an *order* of *two juſtices*, from the *pariſh of Capell*, to the *pariſh of Wrotham* in *Surrey*, that being *adjudged* to be the laſt place of their *legal ſettlement*; and afterwards, on an *appeal* brought to the next *quarter ſeſſions*, that *order* was *quaſhed*; and thereon the *poor man*, and his *family*, came back to the *pariſh of Capell*, and by another *order* were again removed to *Wrotham*; which *order* being removed into this court by *certiorari*, it was, by the conſent of both parties, referred to the *judge of aſſize*, who, on hearing the evidence on both ſides, directed that the matter ſhould be *tried* on a *feigned iſſue*, which was done accordingly at the next *aſſizes*, and the *pariſh of Wrotham* had a verdict; and ſo both the former *orders* were *quaſhed*.

But the *pariſh of Capell* being diſſatisfied with this verdict, procured the *pariſh officers of St. Olave in Southwark* to permit this *man*, and his *family*, to dwell in a tenement there, on purpoſe that they might remove him to *Wrotham*; and accordingly they came into the *pariſh of St. Olave*, and lived there ſome time, and were afterwards removed from thence, by an *order* of *two juſtices*, to *Wrotham*, which *order* was confirmed, on an *appeal* to the next *ſeſſions*; ſo that by this means the *pariſh of Capell* was diſcharged of them, becauſe an *order*, confirmed on an *appeal*, makes a good ſettlement in that *pariſh*, by whom the *appeal* is brought, againſt all other *pariſhes* whatſoever.

The court was now moved, that this laſt *order* might be *quaſhed*, and for an *attachment* againſt the *churchwardens*, *&c.* of *Capell*, for this contrivance.

But the court would not *quaſh* the *order*, but made a *rule* for them to *ſhew cauſe*, on ſuch a day, why an *attachment* ſhould not go; becauſe probably, when they come to ſhew cauſe, they may conſent to have the *orders quaſhed*; but they ſhewed no cauſe, and ſo the *rule* was made *abſolute*. *Vide Mod. Rep. vol.* 8. *page* 201.

Michaelmas, 11 *Geo.* *The King* v. *Robinſon.*

On a *mandamus* directed to the *mayor and aldermen*, *&c.* of *&c.* to proceed to the election of a *new mayor*, who was to be choſen out of the *aldermen*, the return was, *that there was no aldermen*, *&c.* and now the court was moved for an *attachment* againſt the defendant, for that this was rather a *banter* than a *return*.

Per curiam. If there are no *aldermen*, yet an *attachment* muſt not go. But the plaintiff may have his action for a *falſe return*, or he may traverſe the return, if falſe, ſo there is no colour for an *attachment*; but afterwards, on further conſideration, a *rule* was made, to *ſhew cauſe*, *&c.* for if it appears this was a *frivolous return*, and purpoſely made to avoid the *juſtice* of the *court*, an *attachment* ſhall go. *Vide Mod. Rep. vol.* 8. *page* 336.

Trinity, 2 *Geo.* 2. *Wyat* v. *Winkford.*

In *Eaſter* term laſt, a motion was made for an *attachment* againſt *Rolf Baily*, for not attending at the aſſizes at *Wincheſter*, to give his evidence, to prove the hand of a ſteward of a manor, to a copy of a court roll, having been *ſubpœnaed*, and received a *guinea* for his charges, and promiſed a *guinea per* day while there, and his expences paid. A *rule* to *ſhew cauſe* was accordingly made, and this term the court was moved to diſcharge the rule, for that an *attachment* ought not to go, but the party injured had his action on the *ſtat. of Eliz.* and it was ſaid, that ſuch a rule had been granted by this court, in the caſe of *Hammond* v. *Stewart*; but, on ſhewing cauſe, it was diſcharged. And that ſuch a rule was granted againſt one *Joſeph Roſſington*, *Mich.* 10 *Geo.* in the cauſe of *Daliſon* v. *Aland*, for not appearing at *Guildhall*, before Lord Chief Baron *Mountague*, being *ſubpœnaed* as a witneſs, but was afterwards diſcharged. But the court, in this caſe, thought it was a good foundation for an *attachment*, the diſobedience to the *ſubpœna* being a contempt of the court; and though an action might be brought on the *ſtatute*, yet that was a more dilatory method, and more difficult to proceed in, which encouraged witneſſes not attending frequently on the trials at which they were *ſubpœnaed* to appear, and give evidence. And therefore the rule was made abſolute. *Vide Raymond, vol.* 2. *p.* 1528.

Eaſter, 8 *Geo.* 2. *Stork* v. *Huggins and De Smith.*

The defendants council, on ſhewing cauſe againſt the rule for an *attachment* obtained againſt the defendants for diſobeying an award, which was made a rule of this court, he obſerved that the defendants have liberty by *ſtat.* 9 & 10 *W.* 3. *cap.* 15. which inſtitutes this ſummary way of enforcing awards to complain of any undue practice in making the award any time within the next term after it is made, and in the preſent caſe, one of the *arbitrators*, was not ſummoned, nor the defendant, *Smith*, one of the parties.

It was further *urged* on behalf of the defendants, that where an award appears to be unreaſonable, though an action of *debt* may lie on ſuch award; yet the court will not grant an *attachment*, as was determined in the caſe of *Williams* v. *Allen*, *Eaſter*, 4 *Geo.* 2. In this caſe the *arbitrators* have charged the defendants with the value of the goods, when they acted only as *factors*; and an *affidavit* was produced on behalf of the defendants, that the plaintiff had made his *election* in ſuing out an action of *debt*, and therefore is not entitled to an *attachment*.

The plaintiff's council *argued*, that as to the action of *debt* which was brought, it is as reaſonable to grant an *attachment* notwithſtanding, as the ſeveral remedies which are allowed on mortgages, &c. and cited. 1 *Salk.* 73. *Richardſon* v. *Chancey*, *Michaelmas* 1730, in ſupport of his caſe.

Lord *Hardwicke*. I am ſatisfied you ought not to have an *attachment*, while an action is pending, I deny the two caſes cited by the plaintiff's council are *ſimilar* to this. Therefore the rule to ſhew cauſe was diſcharged. *Vide Caſes Temp. Lord Hardwicke, page* 106.

Hilary, 9 *Geo.* 2. *The King* v. *Hoſkins.*

On a *mandamus* iſſuing out of this court, directed to the defendant, as *late* Mayor of *Boſſiney* in *Cornwal*, and to *Lyne*, the *town clerk*, and to, &c.

The defendant ſent a return of this writ to the *Crown-office*, which was, *that the office is full of one* Robins, *who is the Mayor*, in the name of himſelf and the *town clerk*, &c.

The *town clerk* exculpated himſelf by affidavit.

On a *rule* being granted by this court for the defendant to anſwer the matters of the *affidavits*.

The defendant's council *argued*, that an action would not lie, for that the return was a falſe one, becauſe of the multiplicity, none of the corporation being hurt particularly, but that an information might be granted, and ſo have the return tried, but that it was no way proper for an *attachment*.

Lord *Hardwicke*. The court made this *rule* only, that the defendant might anſwer the matter of the *affidavits*, in order that the court might either grant an *information* for a *falſe return* or an *attachment*, as the matter ſhould come out. I am now of opinion, that this conduct of the defendant is a *contempt*, and therefore an *attachment* ſhould iſſue: whether the return be good or not in *law*, or true in fact or not, can be no reaſon for this *attachment*, becauſe that ſhould be tried on *demurrer*, or on an iſſue on the *fact*, but the behaviour of the defendant, who is the only perſon that can tranſmit the return to us, is an impoſition on the court and a *contempt*.

Per curiam. Let an *attachment* iſſue againſt the defendant. *Vide caſes Temp. Lord Hardwicke, page* 188.

Hilary, 9 *Geo.* 2. *Dodd* v. *Adcock.*

On a motion for an *attachment* againſt one *Slater*, for taking an *affidavit* of the cauſe of action, being a deputy *town clerk*, and then acting as *attorney* for the plaintiff.

Lord Hardwicke. Whether this be right or wrong done, I do not ſee there can be any ground for an *attachment*, for our doctrine is, that if there appeared only a miſtake in judgment, to refuſe the reading ſuch *affidavit*, and if it were done wilfully, then to grant an *information*: therefore I think, this is no reaſon for an *attachment*; though if he acted as *judge* in the cauſe, being *attorney* at the ſame time, that would have been a ground for an *information*. *Vide Caſes Temp. Lord Hardwicke, page* 211.

Michaelmas, 9 *Geo.* 2. *Baſket* v. *Rayner.*

The plaintiff obtained an *injunction* in *Chancery* againſt the defendant for printing *bibles*, who was then in *contempt* on the ſaid *injunction*, and a priſoner in the *K. B.* for a *libel*.

The plaintiff's council moved the court for liberty to charge him with an *attachment*, and having given notice to the *Attorney General*, he conſented to the ſame.

Lord *Hardwicke*. To charge a perſon who is in cuſtody here, on a *criminal* proſecution with *civil proceſs*, is a motion of courſe, and a *judge* may grant it at his chambers. Therefore be it ſo. *Vide caſes Temp. Lord Hardwicke, page* 170.

Michaelmas, 9 *Geo.* 2. *The King* v. *Holland.*

The proſecutor's council moved laſt *term* for an *attachment* againſt the defendant for a *contempt* in not obeying an order of the *quarter ſeſſions* removed into this court by *certiorari*, and confirmed. The order as ſtated to the court was:

That the defendant who was convicted of being the father of a baſtard child, ſhould pay ſo much a week for its maintenance, and an arrear of *twenty weeks* being demanded, he refuſed to pay the ſame, and the court would only grant a rule to ſhew cauſe, becauſe they ſaid it was not like a refuſal to pay *coſts taxed*.

This *term* the defendant ſhewed cauſe, which was deemed inſufficient, and thereupon the *rule* was made *abſolute*, but the *attachment* was ordered to lie in the *Sheriffs* hands for a week, that the defendant might have an opportunity of paying the money if he choſe it. *Vide caſes Temp. Lord Hardwicke, page* 160.

Michaelmas, 9 *Geo.* 2. *Woodin* v. *Colledge.*

On a *rule* to *ſhew cauſe*, why a *bond* and *warrant of attorney* to confeſs a judgment, ſhould not be ſet aſide, it having been made during the defendant's confinement under an arreſt, and no attorney preſent, except the plaintiff's attorney; and alſo why the judgment and execution thereon ſhould not be ſet aſide.

The plaintiff's council, on *ſhewing cauſe*, ſaid, that the *warrant of attorney* was made to confeſs a judgment in the *C. B.* and that accordingly the judgment is a judgment of that court, and therefore this court has nothing to do with the matter.

The defendant's council, in anſwer, *urged*, that the *bond* and *warrant of attorney* was made to confeſs a judgment in the *C. B.* but he was then under an arreſt by *latitat* out of this court.

Lord Hardwicke. Then we have had to do with this matter, or elſe this would be a trick to avoid both courts.

The plaintiff's council obſerved, that the plaintiff's attorney was preſent, and the defendant was ſatisfied with him.

Lord Hardwicke. The judgment is *irregular*, for want of the preſence of an attorney named by the defendant, which is contrary to an expreſs rule of the court, not becauſe ſuch warrant of attorney may not be fairly obtained in ſuch caſe, but be in order abſolutely to prevent any abuſe, and againſt this rule I do not know any excuſe can be allowed; ſo that the judgment is irregular, and though we cannot here ſet aſide a judgment of the *C. B.* yet as the *latitat* was ſued out in this court, we can lay our hands on the plaintiff and his attorney.

Per curiam. Let an *attachment* go againſt the plaintiff and his attorney, and lie in the ſheriff's hands a week, to be executed, if he do not conſent either to enter up ſatisfaction on the *record* in the *C. B.* or conſent there, that the judgment and execution be ſet aſide, and pay the coſts. *Vide Caſes Temp. Lord Hardwicke, page* 177.

Hilary,

Hilary, 10 *Geo.* 2. *North* v. *Wiggins.*

On a motion for an *attachment*, in the firſt inſtance, againſt the defendant, who, on ſervice of proceſs, abuſed the officer, and ſpoke *contemptuous* words of the court:

It was doubted by the court, whether, when ſuch words are ſworn by *one* perſon *only*, the *rule* ſhould be abſolute, or only to *ſhew cauſe*; the *rule* in *Chancery* requiring two *affidavits*, to deprive the party of the benefit of ſhewing cauſe. In the preſent caſe, there being a *ſupplemental affidavit*, the point was not determined. The *Chief Juſtice* obſerved, that he ſhould be unwilling to eſtabliſh a practice, that would put it in the power of one hardy man to hinder another of an opportunity of defending himſelf, before he was reſtrained of his liberty. *Vide Strange, vol.* 2. *p.* 1068.

Michaelmas, 30 *Geo.* 2. *Habin's Caſe.*

The court, on motion, granted an *attachment* againſt the ſaid *Habin*, who had ſet the name of an attorney of this court to proceedings in a cauſe in this court, in which he was concerned, without leave of ſuch attorney. *Vide Bur. vol.* 1. *page* 20.

Trinity, 31 *Geo.* 2.

An *attachment* may be moved for in the two following caſes, on the laſt day of *term*; viz.

For the *non-payment* of *coſts*; and

Againſt a *ſheriff*, for not returning a *writ*.

Vide Bur. vol. 1. *page* 651.

32 & 33 *Geo.* 2. *The King* v. *Beardmore.*

On a motion for an *attachment* againſt the defendant, then *under-ſheriff*, for a contempt of the court, in taking on himſelf, without any pretence of authority, to remit part of the ſentence pronounced on *John Shebbeare*, in *Michaelmas* term laſt, *viz.* That the defendant, *John Shebbeare*, be ſet in and on the pillory:

The *attorney general* on behalf of the proſecution produced ſeveral *affidavits* in ſupport of the charge, on which a *rule* to *ſhew cauſe* was obtained.

On *ſhewing cauſe*, the defendant's council read the defendant's *affidavit*, and ſeveral others, in *extenuation* of the crime, but they were over-ruled, and the *rule* for an *attachment* againſt him was made *abſolute*.

The defendant ſoon after appeared in court, and gave *bail* to anſwer interrogatories.

The maſter of the *Crown office* examined the defendant, and reported the ſame to the court, and that the defendant was *in contempt*; on which a rule was made for the defendant to appear in court the *ſecond day* of the next term, to receive judgment.

When *Deniſon*, Juſtice, pronounced ſentence on the defendant, as follows:

To pay a fine of 50*l.* and to be *committed* to the cuſtody of the *marſhal* for *two months*, and till the fine ſhall be paid. *Vide Bur. vol.* 2. *p.* 792.

Trinity, 2 *Geo.* 3. *The King* v. *Plunket.*

An *attachment* being granted againſt the defendant for not appearing to give evidence to a *ſubpœna* regularly ſerved on him:

On *interrogatories* filed againſt him, to which he was *examined*, he ſwore that the proſecutor had undertaken to give him further notice, if it ſhould be neceſſary for him to attend, but that he neglected ſo to do. He further ſwore, that he had been *ſubpœnaed* on a former intended trial of the ſame cauſe, which he attended, but the ſame did not come on; and further, that he would have attended if he had received ſuch further notice from the proſecutor ſo to do.

On the *maſter* of the *Crown Office* reporting to the court that he had cleared himſelf of the *contempt*; and it appearing to the court that the complaint brought againſt the defendant was *groundleſs* and *unreaſonable*, and not unknown to the proſecutor,

The court therefore ordered the proſecutor to pay the defendant his coſts, contrary to the general practice of the court on *contempts*. *Vide Bur. vol.* 3. *p.* 1329.

Michaelmas, 2 *Geo.* 3. *The King* v. *Wheeler.*

On a motion for an *attachment* againſt the defendant for bringing a bill in *equity* contrary to a rule of this court, made between the parties by conſent, to refer all matters in difference between them to one *Corderoy*, who awarded the defendant to pay the proſecutor a ſum of money, which he paid, and afterwards filed this bill on which the *attachment* was founded.

After the rule to ſhew cauſe why an *attachment* ſhould not be granted was obtained, the defendant filed a *ſupplemental bill*, ſtating the motion for an *attachment*, and praying an *injunction* and relief: to this bill the defendant in *equity* pleaded in *bar* the *rule* of *this court*, which was allowed.

The defendant was taken up on the *attachment*, and *interrogatories* were filed againſt him, to which he was examined by the maſter of the *Crown Office*, who reported him in contempt.

On the defendant's being brought up to receive judgment for his *contempt*, the court were unwilling to puniſh him further by *fine* or *impriſonment*; but as his *contempt* was ſo obſtinate, they did not chuſe that a ſlight ſentence ſhould ſtand on the records, and therefore waived giving judgment by conſent, but obſerved, that the *attorney* and *council* were equally guilty of the contempt, and more criminal, and if ever ſuch a matter ſhould happen again, they would proceed againſt them. The court therefore ordered a rule to be made, that his *recognizance* ſhould be diſcharged. *Vide Bur. vol.* 3. *p.* 1256.

Attorney.

Hilary, 2 *W.* & *M.* *Berkenhead* v. *Fanſhaw.*

On an *indebitatus aſſumpſit*, brought by an *attorney* for fees and diſburſements, in defending ſuits in an *inferior court*, and in this court. To this action the defendant pleaded *ſtat.* 3 *Jac.* 1. *c.* 7.

Per curiam. The ſtatute may as well be pleaded to an *indebitatus aſſumpſit*, as to the action of *debt*, unleſs a *ſpecial promiſe* be laid; but to a *ſpecial promiſe*, or an *inſimul computaſſet*, 'tis no plea.

2dly. The ſtatute does not extend to *attornies* of *inferior courts*, but only to *attornies* of the courts at *Weſtminſter*; ſo that it is no plea as to this ſuit. *Therefore judgment was given for the plaintiff. Vide Salkeld, vol.* 1. *page* 86.

Michaelmas, 6 *W.* & *M.* *Jones* v. *The Earl of Bath.*

A trial at *bar* was appointed in this cauſe; and the day before the trial, the plaintiff moved to put off the ſame, becauſe he wanted a *witneſs* to prove a deed.

This motion was denied, and the next day the *attorney* refuſed to bring in the writ. This refuſal was a contrivance of the *attorney*, in order to prevent his client being *nonſuited*.

The court ordered the *roll* to be brought into court, that they might take notice there was ſuch a *writ*; and the defendant's council informed them, that *Lord Chief Juſtice Hale* had committed an *attorney* for the like practice, which was likewiſe done now. *Vide Mod. Rep. vol.* 4. *page* 367.

Eaſter, 8 *W.* 3. *Stephens* v. *Squire.*

In an action brought againſt one *Squire* an *attorney*, and two others, for appearing for the plaintiff, without a *warrant*, the cauſe was carried down to be tried at the *aſſizes*; and the defendant promiſed, that in conſideration that the plaintiff would not proſecute the action, that he would pay 10*l.* and coſts of ſuit. And now an action was brought againſt the defendant, on this promiſe.

The queſtion was, whether this was a *void* promiſe, by the *ſtatute of frauds* being made on behalf of another, and not in writing, when the ſtatute enacts, That no action ſhall be brought to charge the defendant on any ſpecial promiſe, to anſwer for the *debt*, *default*, or *miſcarriage*, of another perſon, unleſs it be in writing.

But the court were of opinion, that this cannot be ſaid to be a promiſe for another perſon, but for his own debt, and therefore not within this ſtatute. *Vide Mod. Rep. vol.* 5. *page* 205.

Michaelmas, 8 *W*. 3. *Jones* v. *Bodiner*.

An action of *treſpaſs* being brought in this court, for taking the plaintiff's ſheep, the defendant pleaded his *privilege* as an *attorney* of the court of *C. P*. And, on demurrer,

It was inſiſted for the defendant, that being in the cuſtody of the marſhal, ſhall not hinder him from pleading his *privilege* of an *attorney* of the *C. P.* and to prove it, a caſe was cited out of the year books, which was an action of *treſpaſs* brought in *B. R.* ſuppoſing it to be done in a *franchiſe*; and the bailiff of that *franchiſe* demanding *cognizance*, (which is the ſame thing as *privilege*) it was oppoſed; becauſe it was not claimed whilſt the proceſs was continued: but the court was of opinion, that it might be demanded at any time.

Per curiam. The defendant was in the cuſtody of the marſhal, by compulſion of the law, and therefore he ſhall have his privilege of an *attorney* of the *C. P.* but if he had admitted the juriſdiction of *B. R.* it had been otherwiſe.

Therefore judgment was given, that the bill ſhould abate. *Vide Mod. Rep. vol.* 5. *page* 310.

Michaelmas, 8 *W*. 3. *Latuch* v. *Paſherante*.

On an *aſſumpſit*, the defendant pleaded, *non aſſumpſit infra ſex annos*, i. e. *he did not aſſume within ſix years*. The plaintiff replied; and for want of the defendant's joining iſſue in due time, the plaintiff's *attorney* ſigned judgment, but afterwards conſented to accept the joinder in iſſue: but on motion to the court, to compel him to accept it, it was oppoſed, becauſe the plea was a hard plea; and the client had notice of the advantage, and ordered the *attorney* to inſiſt on it. The court ſaid, that ſince it was a hard plea, they would not have compelled him, if he had not conſented to *waive* the advantage, but now they would hold him to his conſent: and as for the client, he was bound by the conſent of his *attorney*, and they could take no notice of him. *Vide Salk. vol.* 1. *p*. 86.

Michaelmas, 10 *W*. 3. *Goring* v. *Biſhop*.

Where writings come to an *attorney*'s hands in the way of his buſineſs as an *attorney*, the court, on motion, will make a rule on him to deliver them back to the party; but where they come to his hands in any other manner, or on any other account, the party muſt reſort to his action, for the recovery of the ſame. *Vide Salk. vol.* 1. *page* 87.

Michaelmas, 10 *W*. 3. *Kilbey* v. *Weyberg*.

One *attorney* having promiſed to accept a declaration from another, was compelled (on motion, and affidavit of the fact) to do it. *Vide Mod. Rep. vol.* 12. *page* 251.

Michaelmas, 10 *W*. 3. *Johnſon* v. *Nayler*.

Per curiam. If an *attorney* of the court, on motion, gets his name ſtruck out of the *roll*, he ſhall never after be admitted to act as an *attorney*. *Vide Mod. Rep. vol.* 12. *page* 247.

Michaelmas, 10 *W*. 3. *Anonymous*.

One *Beal*, an *attorney* of this court, ſued in the *Sheriff's Court* for his fees; but, on motion, he was forced to refer it to the maſter, becauſe his perſon is under the power of the court. *Vide Mod. Rep. vol.* 12. *p*. 251.

Michaelmas, 10 *W*. 3. *Anonymous*.

Per Holt, Chief Juſtice. The courſe of this court is, where an *attorney* takes on him to appear, the court looks no further, but proceeds as if the *attorney* had ſufficient authority, and leaves the party to his action againſt him, if it turns out otherwiſe. *Vide Salk. vol.* 1. *page* 86.

Trinity, 11 *W*. 3. *Anonymous*.

A motion was made to compel an *attorney* to appear for *J. S.* and the court held he was not compellable to appear for any one, unleſs he takes his fee, or backs the *warrant*; and then they will compel him. *Vide Salk. vol.* 1. *page* 87.

Michaelmas, 11 *W*. 3. *Newton* v. *Rowland*.

In an action of *debt* brought againſt an *attorney* as executor, who pleaded his *privilege*, *&c.* on demurrer it was argued for the defendant, that the reaſon of *privilege* in that caſe, was in reſpect of his *perſonal attendance*, which was equal, whether ſued in his own, or in *auter droit*. But,

Per Holt. The authorities are of the other ſide in this caſe, and the plaintiff had judgment, *niſi*. *Vide Mod. Rep. vol.* 12. *p*. 316.

Hilary, 12 *W*. 3. *Grant* v. *Baily*.

Per curiam. A perſon cannot change his *attorney* on record, without leave of the court; and after judgment, the *attorney* on record may receive and acknowledge ſatisfaction by virtue of his former warrant, and when an *attorney* of record is changed, the record ought ſpecially to mention that it was by conſent of the court. *Vide Mod, Rep. vol.* 12. *page* 440.

Hilary, 13 *W*. 3. *Craddoc* v. *Glin*.

In an action againſt an *attorney*, for money received to the plaintiff's uſe; the *attorney* ſhewed to the court, that he had been employed as an *attorney* for the plaintiff, and had applied ſome of his money towards paying for his labour, and ſome to a ſolicitor in the cauſe; and moved to have his bill taxed, and an allowance of what ſhould then appear due to him.

Per cur. If the plaintiff had applied by motion for us to compel an *attorney*, by virtue of our power over him, as our officer, to pay the money there, foraſmuch as that is diſcretionary in us, we would not help the plaintiff, unleſs he did the fair thing on his ſide: but here when he demands no favour of us, we cannot deny him the law, and let the defendant take his legal remedy againſt the plaintiff. *Vide Mod. Rep. vol.* 12. *p*. 657.

Hilary, 13 *W*. 3. *The King* v. *The Town of Andover*.

Per Holt. If one *attorney* gives another leave to practiſe in his name, he ſhall anſwer for all the villainies and practices that he ſhall act in his name. *Vide Mod. Rep. vol.* 12. *p*. 666.

Eaſter, 13 *W*. 3. *The King* v. *Brown*.

Per Holt. We may order an *attorney* of the court to deliver papers, which are not his, to the owner. *Vide Mod. Rep. vol.* 12. *page* 516.

Trinity, 13 *W*. 3. *Anonymous*.

Per curiam. The court will not compel an *attorney* to give up writings, without the other party agrees to pay him his reaſonable demands. *Vide Mod. Rep. vol.* 12. *p*. 554.

Michaelmas, 13 *W*. 3. *Chancey* v. *Win and Others*.

Mr. Trevanion, an ancient decayed gentleman at the *bar*, having brought an action of *falſe impriſonment* againſt an *attorney* of the court, moved to have an *attorney* aſſigned him, for none would voluntarily appear for him, and the court appointed one of his own nomination. *Vide Mod. Rep. vol.* 12. *page* 583.

Hilary, 1 *Ann.* *Oades, or Odes,* v. *Woodward.*

The defendant gave a *warrant of attorney* to confeſs a judgment, and died within a year afterwards in *vacation*, before the *Eſſoign-day* of the *ſubſequent term*, which was *Eaſter-term*; the *attorney*, after his death, entered up the judgment as of the *precedent term*, but did not bring in the *roll* before the *Eſſoign*-day of *Eaſter* term; and it was now moved to have the judgment ſet aſide, the *warrant of attorney* being revoked by the death of the party.

Per Holt, Chief Juſtice. 1ſt. By the courſe of this court, a *warrant of attorney* to confeſs a judgment is not revokable; and the court will give leave to enter up the judgment, though the party does revoke it; but it is determined by the party's death: but if the party dies in the *vacation*, the *attorney* may enter up the judgment that *vacation* as of the *precedent term*; and it is a judgment at the *common law* as of the *precedent term*, though it be not ſo on the *ſtatute of frauds* in reſpect to purchaſers, but from the ſigning; ſo that this judgbeing a judgment at *common law*, as of *Hilary* term, it was a judgment entered when the party was alive, and therefore good without all queſtion, if the *rule* had been brought in before the *Eſſoign day of Eaſter* term; but that not being done, the queſtion will be, Whether we can now admit it to be filed? By the courſe of the court, all the *rolls* of *Hilary* term ought to be brought in before the *Eſſoign-day* of *Eaſter* term, and made part of the bundle of *Hilary* term; and it is for this reaſon that what is done in the *vacation* is looked on as an act of the *term preceding*; and there cannot be a *poſt terminum roll* received without leave on motion, which the court does not grant, but when it appears that nobody can be prejudiced, for it is dangerous; and by my conſent it ſhould never be allowed again; for by this means the *ſtatute of frauds*, and the *act for docquetting* of judgments will be fruſtrated; for if the court allows the filing of this *roll* in *Eaſter term* as a judgment of *Hilary* term, when it was not among the *rolls* of that *term*, how ſhall purchaſers avoid the conſequence of it, when it was neither *docquetted* nor *brought in?* On this account the court diſallowed the filing. *Vide Salk. vol.* 1. *p.* 88. *Raym. vol.* 2. *p.* 766.

Trinity, 1 *Ann.* *The Queen* v. *Ogden.*

Adjudged in this caſe, that no man, though by conſent of parties, can be *attorney* on both ſides. *Vide Mod. Rep. vol.* 7. *p.* 47.

Michaelmas, 1 *Ann.* *Withers* v. *Harris.*

Holt, Chief Juſtice. You cannot change your *attorney* without leave of the court, to be obtained on motion, though he be ever ſo great a cheat. *Vide Mod. Rep. vol.* 7. *p.* 50.

Hilary, 2 *Ann.* *Carleton* v. *Mortagh.*

An *attorney* of the *Common Pleas* pleaded to the *juriſdiction* of the court. See 1 *Salk.* 1, 2. 4. 30.

Per curiam. He ſhall not, nor need the *writ of privilege* be ſet out at large: and if matter of fact be pleaded in *abatement*, and found againſt the defendant, final judgment ſhall be given againſt him. *Vide Mod. Rep. vol.* 6. *p.* 114.

Hilary, 2 *Ann.* *Lett.* v. *Mills.*

In this caſe it was the opinion of the court, that a bill filed againſt an *attorney* muſt be filed in *full term*; and it is not enough for it to be on any of the *Eſſoign days*. For an attorney's privilege, ſee *Carthew*, 57. 162. 147. 377. *Ante*, 26. *Vide Mod. Rep. vol.* 6. *p.* 106.

Hilary, 2 *Ann.* *Lamb* v. *Williams.*

In an action of *treſpaſs* a verdict was given for the plaintiff, and his *attorney* entered a *remittit damna* as to part, and judgment for the remainder.

Per curiam. The *attorney* has authority by his *warrant* to remit damages, and a *remittitur* need not be by the plaintiff in *his proper perſon*, as a *retraxit* muſt. *Vide Salk. vol.* 1. *page* 89.

Trinity, 2 *Ann.* *Sir John Parſons* v. *Gill.*

Per Holt, Chief Juſtice. The authority of the *attorney* continues after a claim of conuſance, but not after a writ of error brought. *Vide Raym. vol.* 2. *page* 895. *Salk. vol.* 1. *page* 88. or *page* 61. of this work, where this caſe is fully ſtated under the head of *amendment*.

Trinity, 2 *Ann.* *Anonymous.*

An *attorney* appears, and judgment is againſt his client, and he had no warrant of *attorney* from him to appear. The queſtion was, if the court would ſet aſide the judgment.

Per curiam. If the *attorney* is reſponſible, it ſhall not be ſet aſide, becauſe the judgment was regular, and there is no reaſon that the plaintiff ſhould ſuffer when he is not in fault; but if the *attorney* is not reſponſible, or ſuſpected to be unable, the judgment ſhall be ſet aſide, for otherwiſe the defendant has no remedy. *Vide Salk. vol.* 3. *page* 50.

Michaelmas, 2 *Ann.*

If an *attorney* of property and character appears for another without a *warrant*, and judgment is given againſt his client, ſuch judgment ſhall ſtand good, and the party ſhall be put to his action againſt the *attorney*, but if the *attorney* be a *beggar*, or in a *ſuſpicious* condition, the court will ſet aſide the judgment. *Vide Mod. Rep. vol.* 6. *page* 16. *Salk. vol.* 1. *page* 88.

Michaelmas, 2 *Ann.* *Shepherd and Baily* v. *Orchard.* Error.

The defendants brought a writ of *error*, and made two *attornies* on the *ſci. fac.* the one *attorney* aſſigned *error*, to which the defendant took iſſue, and the other pleaded a plea in abatement of the writ.

Per curiam. If one of the plaintiffs had made *default*, he ſhould be ſevered; but if they go on, they muſt proceed jointly, and if one *attorney* will aſſign *error*, &c. without authority from both, we cannot help him, let him take his remedy againſt the *attorney*.

Note. If a record of this court be pleaded, *nul tiel record* without more, is a compleat iſſue. *Vide Mod. Rep. vol.* 6. *p.* 40.

Michaelmas, 2 *Ann.* *Holderſtaffe* v. *Saunders.*

The court was moved for an *attachment* againſt an *attorney*, and others, for having got a perſon who was in quiet poſſeſſion of certain lands, turned out of the ſame; the caſe was as follows: the attorney got one to come on the land, who aſſumed the name of the tenant in poſſeſſion, and owned himſelf to be the man, and got the *common affidavit* of ſervice to be made by him in a borrowed name, as tenant in poſſeſſion, having delivered a declaration to him before, and thereon got *judgment* againſt the *caſual ejector*, and turned the tenant, who was wholly ignorant of the tranſaction, out of the poſſeſſion. On *affidavit* of this matter, all the accomplices were ordered to attend; for though the court looked on it as a very great offence, they would not at firſt grant an *attachment*, but ſaid, that it being in a *criminal matter*, if endeavours were uſed to ſerve them with the rule, and they could not be found, on *affidavit* of that matter, they would grant an *attachment* without requiring perſonal ſervice. Afterwards the council inſiſted to have it made part of the rule, that they ſhould not move for an *injunction* in *Chancery* in the mean time, for that would hinder the further inquiry into this practice; but the court ſaid they could not do that, for that were to ſend an *injunction* into *Chancery*; but ſaid, when the court had a hank over a man, and he came for a favour to the court, they often refuſed to grant him that, without he conſented not to go into *Chancery*; and that if after ſuch conſent he did go into *equity*, they would iſſue an *attachment* againſt him for the contempt.

Holt, Chief Juſtice, obſerved, that he was ſure *Chancery* would not grant an *injunction* in a *criminal matter* under the examination of this court; and if they did, this court would break it, and protect any that would proceed in contempt of it; and he ſaid, he thought that a copy of theſe *affidavits* on which the rule was made here, and an oath of their being a true copy, ought to be ground ſufficient to ſtay the *Chancery* from granting an *injunction*.

On an *attachment of privilege* brought by the *Marſhal*, he ſhall have no *attorney*, becauſe preſent in court.

A *clerk in court* may confeſs an indictment for his *client*. *Vide Mod. Rep. vol.* 6. *p.* 16.

Michaelmas, 2 *Ann.* *Wigg.* v. *Rook and Wife.*

The caſe, on the report of Mr. *Clarke*, the *ſecondary*, was, a writ brought againſt huſband and wife, and an attorney, in right of the writ, undertook to appear for them, but after would not do it; they delivered a declaration, which he received *de bene eſſe*; and judgment was entered for want of plea, which the court ſet aſide for *irregularity*, and ordered the *attorney* to be laid by the heels; and it was ſaid, that if an *attorney* undertakes to appear, and afterwards will not do it, on ſummons before a *judge*, he ſhall be compelled thereto. In an action brought againſt huſband and wife, if the huſband will order an appearance for himſelf, it will not be received without an appearance for the wife too; and for an *attorney* to undertake to appear and not to do it afterwards, is a contempt of the court. *Vide Mod. Rep. vol.* 6. *p.* 86.

Trinity, 3 *Ann.* *The Queen* v. *Criſp.*

Per curiam. Any perſon may file a bill againſt an *attorney* any day within the term; and if there be *four days* of the term to come, he may be ſerved with rules as of that *term*; but if the *delaration* be in *Eaſter vacation*, which is indeed a *declaration* of *Eaſter term*, the defendant ſhall have *four days* in *Trinity term* to plead; and one is not confined to *four days* to plead in *abatement*, but he has the *whole term* of which the *declaration* is delivered; but if he has *four days* in the *term* of which the *declaration* is, he ſhall not plead in *abatement* the *next term*. 2 *Salk.* 515, 517, 519. 1 *Salk. Lut.* 24. *Vide Mod. Rep. vol.* 6. *p.* 175.

Michaelmas, 3 *Ann.* *Trevannion's Caſe.*

On motion for leave to file an *information* againſt one *Trevannion*, an *attorney*, for aſſuming to himſelf an authority of granting *replevins*, whereby he in his own caſe granted a *replevin* for his own goods; this the council for the motion *urged* to be a great *miſdemeanor*, and that to uſurp an authority, as to hold a *leet*, and ſummons people in, and the like, is puniſhable by *information*, &c. but the court denied the motion at firſt, becauſe there was another remedy, *viz.* by a *parco fracto*, this being a *pound breach*; but afterwards they ordered him to ſhew cauſe, *&c.*

Note. As no *under ſheriff* ought to practiſe as a common *attorney*, ſo no *attorney* ought to practiſe as *under ſheriff* in granting *replevins*. *Vide Mod. Rep. vol.* 11. *p.* 32.

Eaſter, 4 *Ann.* *The Earl of Yarmouth* v. *Ruſſel.* Error.

On a writ of *error* brought on a judgment in the *Common Pleas* by default, in an *indebitatus aſſumpſit*, and a *writ of inquiry* awarded, and ſeveral damages given, and a *remiſit damna*, i. e. *remits the damages* entered on all the *counts* but one.

The plaintiff in *error*'s council took two exceptions: 1ſt. That the *inquiſition* was taken on a *writ of inquiry*, which was awarded without returning the firſt, but on a *vicecomes non miſit breve*, i. e. *the ſheriff did not ſend the writ*, only to the firſt; and that he ſaid was held ill in the caſe of *Atwood* v. *Burr*, on a writ of *error* of an award of execution on a *ſcire facias* on a recognizance againſt bail in the court of *Maidſtone*, and the proceedings were, on the *alias ſcire facias*, and that was awarded without any return of the firſt, and for that the *judgment* was held to be *erroneous*. 1 *Ann*; *B. R.* Secondly, that the *remiſit damna* was not entered in his proper perſon.

Holt, Chief Juſtice, admitted the caſe of *Atwood* v. *Burr*, but ſaid that this was only a *ſicut prius*, i. e. *as before*. And as to the ſecond, he ſaid, that it was neceſſary, that it ſhould be ſo; and therefore the judgment was *affirmed*. *Vide Raym. vol.* 2. *p.* 1142.

Eaſter, 5 *Ann.* *Burr* v. *Atwood.* Error.

On a writ of *error* brought on an award of execution againſt bail, on the record of the original judgment being returned, the defendant's council took an *objection*, that the plaintiff at the return of the *ſci. fac.* appeared by *J. S.* his old *attorney*, and prayed an *alias*, and that *J. S.* continued to act throughout the whole, though he had no other warrant than the old one, which was given him on the commencement of the original action.

Per Holt, Chief Juſtice. Any perſon may ſue out or pray the *ſci. fac.* and therefore the old *attorney* might; but when the *ſci. fac.* is returned, then the *plea commences*, and a *new warrant of attorney* ought to have been entered, which is done by entering, *that the plaintiff put in his place, &c.* for the warrant to appear in the principal action is no warrant to appear on the *ſci. fac.* againſt the bail, becauſe this is a new cauſe, and a different record.

The *Chief Juſtice* obſerved, that on this writ of *error*, the record of the judgment againſt the principal, ought not to have been certified, therefore the judgment againſt the bail was reverſed. *Vide Salk. vol.* 1. *p.* 89.

N. B. *Raymond* cites this caſe as determined in 1 *Ann.*

Eaſter. 5 *Ann.* *Gregg's Caſe.*

An executor of an *attorney* brought an action for fees and law buſineſs done by his teſtator. The defendant moved to refer the plaintiff's demand to the maſter, but denied, becauſe all the buſineſs was done in another court, otherwiſe, had the buſineſs been done in this court, or partly in this, but in this caſe the plaintiff was an executor. *Vide Salk. vol.* 1. *p.* 89.

Eaſter, 7 *Ann.* *Turton* v. *Prior.*

In an action brought againſt an *attorney* of *C. B.* who was in the cuſtody of the *Marſhal of the King's Bench*, at the ſuit of another; in this action they declare againſt him in the *cuſtody of the Marſhal.*

The defendant pleads his *privilege* as an *attorney* of *C. B.* and therefore cannot be *arreſted* in *B. R.*

The council for the plaintiff argued, that they might declare againſt the defendant ſo, becauſe he was actually *in the cuſtody of the Marſhal*. But the court directed, that the defendant ſhould be removed by *habeas corpus* to the *Common Pleas*, and that an action ſhould be brought againſt him there. *Vide Mod. Rep. vol.* 11. *p.* 168.

Hilary, 8 *Ann.* *Anonymous.*

On a motion to ſet aſide an *execution* executed after a writ of *error* allowed; the court held that though there was no notice given to the plaintiff's *attorney* of the allowance of the writ of *error*, yet it was a *ſuperſedeas* to the *execution*; but to bring the *attorney* into contempt, he muſt have had notice thereof. Therefore the motion was granted. *Vide Mod. Rep. vol.* 11. *p.* 272.

Michaelmas 10 *Ann.* *Lord Say and Seale's Caſe.*

On a trial at *bar* in an *ejectment* brought by the heirs at law againſt his lordſhip, who claimed as heir in *tail*, the ſingle queſtion was, Whether or no a *com-*

mon recovery that was ſuffered to dock the intail was good or not?

The objection to the *recovery* was, that there was no tenant to the *precipe*.

To prove the recovery good, a deed, bearing date 23d of *October*, 1701, directing the uſes of the recovery, and the *fine*, viz. the *chirograph* of the fine, and *common recovery* were produced.

The council for his Lordſhip deſired to call one *Knight*, an *attorney* at law, to prove, that though the deed was dated *October* the 23d, it was not executed until *five months after*. *N. B.* The *attorney* was the perſon intruſted in ſuffering the *common recovery*.

The council for the heirs at law oppoſed the ſwearing an *attorney*, becauſe, as the *attorney* has a privilege not to be examined as to the ſecrets of his client's cauſe, ſo the *attorney's privilege* was likewiſe the *client's privilege*; for the client intruſts an attorney with the ſecrets of his cauſe, in confidence not only that he will not, but alſo that though he would, yet he ſhould not be admitted by the law to betray his client; and for this, *Holbech*'s *caſe* was relied on. Beſides, it was ſaid, that his evidence would tend to accuſe himſelf either of *ignorance*, *negligence*, or ſomething worſe; and in *Moor's Reports*, antedating deeds, is *adjudged felony*.

The court were of opinion, that *Holbech*'s *caſe* was good law; and that an *attorney's privilege* was the *privilege* of his *client*; and that an *attorney*, though he would, yet ſhould not be allowed to diſcover the ſecrets of his client: but notwithſtanding this, they thought *Knight*'s evidence was to be received; for that a thing of ſuch a nature as the time of executing a deed, could not be called the ſecret of his client; that it was a thing he might come to the knowledge of without his client's acquainting him, and was of that nature, that an *attorney* concerned, or any body elſe, might inform the court of. *Vide Mod. Rep. vol.* 10. *p.* 41.

Michaelmas, 1 *Geo.* *Clerk* v. *Lee*.

Mary Clerk, being proſecuted in the *ſpiritual court* by a *proctor* for his fees in a ſuit brought by her againſt her then huſband, *Young*, to be divorced, prays a *prohibition*; ſuggeſting, 1ſt. That ſhe was a *feme covert*; and as ſuch not liable to be ſued *ſingly* to pay the fees. And, 2dly. That all actions on the *caſe* are ſuable at *common law*, and not elſewhere.

It appearing that the *libel* was brought againſt her not as a *feme ſole*, but againſt her and her huſband *Clerk*, that point was thrown out of the caſe.

And then the ſingle queſtion was, Whether a *proctor* may not ſue in the *ſpiritual court* for his fees.

The council for the defendant inſiſted that he might:

1. From authorities, 1 *Mod.* 167. 3 *Keble*, 203. and this reaſon given, that fees are due by provincial conſtitutions, 1 *Vent.* 160. 165. if the cuſtom be denied, then a *prohibition* muſt go, and not otherwiſe. 2 *Keble*, 810. 845. And ſaid, that the *juriſdiction* extended as much to *fees* as *coſts*. 3 *Keble*, 516.

2dly. From the reaſon of the thing.

Fees are nothing but *wages* for work done in a *ſpiritual court* by a *ſpiritual officer* in a ſuit of *ſpiritual connuſance*.

A *proctor* is as much an *officer* of the *ſpiritual court* as an *attorney* of a court at *common law*.

The *ſpiritual court* is an *ancient court*, and has *ancient officers* belonging to it for theſe ends; 1ſt. To carry on the buſineſs; and, 2dly. To preſerve the honour of the court; but it is impoſſible that theſe ends can be attained, if the court is bereaved of the attendance of its officers.

Michaelmas, 8 *W.* 3. a *proctor* is compellable by law to ſerve in his employment.

Co. Lit. 195. held, that an *attorney* is ſo too; conſequently the attendance of neither of them ought to be hindered, by obliging them to ſue for their *fees* in *foreign courts*.

By the *ſtat. of Eliz.* juſtices of the peace have power to compel men to ſerve in *huſbandry*; in which *ſtatute* there is no expreſs clauſe whereby the *juſtices* are enabled to redreſs ſuch *ſervants* in caſe their wages are denied; yet held by the *equity* of the *ſtatute*, that ſince the *juſtices* had a power to compel their ſervice, they ſhould likewiſe have a power to give them redreſs as to their wages.

All courts have proper *fees* belonging to their reſpective *officers*, of which *fees* each court is moſt certainly the propereſt judge.

2 *Keble*, 615. The *ſpiritual court* has a *juriſdiction* to try extortion in taking *fees*.

The council for the *prohibition* urged, that notwithſtanding the caſes quoted, *it cannot be denied*, but there have been reſolutions that way: but the point is now ſettled in the caſe of *Johnſon* v. *Oxendon*, 4 *Mod.* 254. where moſt of the *caſes* quoted are taken notice of; and this reaſon given by *Holt*, C. J. that if *proctors* might ſue in the *ſpiritual court* for their *fees*, they would avoid the *ſtatute of limitations*.

In the caſe of *Brioker* v. *Goodall*, a *prohibition* was granted, where a woman was ſued for *fees* in a cauſe carried on by her againſt her huſband, in order to bring the matter *judicially* before the court.

As to the *caſe* of *extortion*, no weight is to be laid on it, becauſe no favour is ſhewn to ſo heinous a crime.

As to the arguments from the reaſon of the thing, if they prove any thing they prove too much, *viz.* that a *proctor* cannot ſue at *common law*.

Parker, Chief Juſtice. If the *ſpiritual court* has *juriſdiction*, perhaps it is not neceſſary by the forms of their *law* for the huſband to be named in the ſuit; as in the caſe of an *executrix*: And the reaſon of the difference between the *common law* and the *civil law* is this, that in the *ſpiritual court*, the huſband, though not named, may come *for his own intereſt*, and make defence himſelf, ſhould the wife deſert the cauſe.

Whether therefore the huſband muſt be joined, muſt be determined by the *ſpiritual law*, and may be a good *cauſe* for an *appeal*, but can be none for a *prohibition*.

Whether the *fees* may be ſued for in the *ſpiritual court*, is a matter much doubted, and there are reſolutions both ways.

Eyre, Juſtice. There is no ſuing in the court of *admiralty*, or court of *honour* for fees. In the caſe of *Donvill* v. *Oldiſh*, a *prohibition* was granted by all the judges of *England*.

Pratt, Juſtice. I ſee no reaſon why *fees* in the *ſpiritual court* may not be recovered at *common law* as well as *fees* in *Chancery*. *Vide Mod. Rep. vol.* 10. *p.* 261.

Hilary, 2 *Geo.* *Strong* v. *Howe*.

The defendant, who was an *attorney*, had deeds delivered to him by the plaintiff, and gave a note under his hand to deliver them ſafe, whole, and uncancelled, to the plaintiff, on demand; which not being done, the plaintiff moved for an *attachment* againſt him, and obtained a *rule* for the defendant to *ſhew cauſe*, why the ſame ſhould not iſſue.

Afterwards it was ſhewed for cauſe, that theſe deeds were delivered to the defendant, by the order of his (the plaintiff's) brother, to be laid before council, for his opinion, and did not come to his poſſeſſion, as he was an *attorney*, in the way of his buſineſs; and that he delivered the deeds to the council, who delivered them to a perſon who lent his brother 200 *l.* on a mortgage of his eſtate, ſo that he (the defendant) could not have them back again; and therefore the court will not grant an *attachment* for not returning them, when it is impoſſible it ſhould be done, eſpecially ſince if the plaintiff has any right to the deeds he may recover them on an action of *trover*, or by a *bill* in *equity*.

It is an eſtabliſhed *rule* of this *court*, that wherever deeds or writings come to an *attorney*, in the way of his buſineſs, to compel him to re-deliver them to the perſon of whom he received them; for as he is intruſted with them, the court will compel him to execute the truſt, he being ſubject to the *juſtice* of this *court*; and it is not material whether he is an *attorney* of this court, or not, if he practiſes therein; and the other courts have the ſame power over the *attornies* of this *court*; and they have gone ſo far, as to compel a council to deliver up the writings intruſted with him.

As to ſuing for them, it would be very inconvenient to put the deliverer to a ſuit, either at *law*, or in *equity*; for he may not be able to defend his poſſeſſion, for want of them. Therefore the rule was made abſolute. *Vide Mod. Rep. vol.* 8. *p.* 340.

Michaelmas, 2 *Geo. Lawſon* v. *Dickenſon.*

The plaintiff had an eſtate mortgaged to him, and the defendant, who was an *attorney*, and who drew the mortgage, had by that means got all the deeds relating to the title into his poſſeſſion, and now refuſed to deliver them to the plaintiff, unleſs the mortgagor would pay a debt due from him, as the defendant pretended.

And now, on a motion for a rule to deliver the deeds to the plaintiff, for that he, the defendant, made the mortgage, and therefore ſhall not be allowed any money due to him from the mortgagor, before or after the mortgage, but that he ſhould deliver up the deeds, on payment of what is due for drawing and engroſſing them:

The court was of opinion, that an *attorney* may detain papers till the money is paid for drawing them; but that he cannot detain any writings which are delivered to him on a *ſpecial truſt*, for the money due to him in that very buſineſs; therefore a *rule* was made for the defendant to deliver thoſe deeds to the plaintiff.

The like rule was made in a caſe, *Hooper* v. *Howard*, this *term*, that an *attorney* ſhould deliver ſeveral deeds of lands, which he received for a certain purpoſe, and would have kept them, becauſe he pretended his client had a mortgage on thoſe lands, and the *rule* was, that he ſhould deliver them by ſuch a day, or an *attachment* ſhould go againſt him, and accordingly he delivered them upon the day, but was ordered to pay coſts, and ſuch damages to the party, as the maſter ſhould think reaſonable, for what the plaintiff had ſuſtained for want of the deeds, becauſe it appeared that the defendant had received the profits, and kept the plaintiff out of poſſeſſion by this means.

And in the caſe of *Geary* v. *Faſhion*, a *rule* was granted for an *attachment* againſt the defendant, for not delivering deeds to the plaintiff; and the like *rule* in the caſe of *Strong* v. *Howe*, for not delivering deeds given to him, in order to borrow money on them. *Vide Mod. Rep. vol.* 8. *p.* 307.

Hilary, 4 *Geo. Forſter* v. *Cale.*

In *aſſumpſit*, the defendant pleads in abatement, that he is an *attorney* of this court, and that he ought to be ſued as a *privileged perſon*. The plaintiff replies, that he is not an *attorney*, and concludes to the country; to which the defendant demurs. The plaintiff's council urged, that he ought to have concluded to the *record*. *Raſt. Ent.* 610 *b.* *Aſton* 347. *Thompſon* 4. 2 *Mod. Caſ.* 106.

The defendant's council *argued*, that thoſe entries were where the *privilege of C. B.* was pleaded, which differs from this court, for there is a regular *record* kept of the *attornies*, and they muſt be *forejudged* before they can be *arreſted*; whereas here, the remedy againſt the *attornies* is ſpeedier than againſt other perſons, for the firſt proceeding is a *bill* left in the office, and after a *rule to plead*, the plaintiff may ſign his judgment.

The court inquired of the *ſecondary*, who informed them, that *anciently* there were *rolls* kept of the *attornies*; but ſince the *ſtamp-act*, that method has been diſuſed, and a *book ſtamped*, and the names entered in that. And the plaintiff's council ſaid, that on the trial of the *aſſize* for the office of *chief clerk*, the *rolls* from *Edward* 3. were produced.

Per curiam. The *book* which is now kept muſt be taken as *minutes*, in order to make up the *record*, and it is a *warrant* to the proper officer for that purpoſe, and whenever they are wanted, they may be made up. Let that be done regularly for the future. In this caſe, the plaintiff ſhould have *concluded* to the *record*, for no man can be an *attorney*, but by the act of the court, and that act muſt appear by the *record*, for we will not go to a jury, to inquire into our own act. When an *attorney* is ſtruck out, the rule is, *let him be ſtruck out of the roll of attornies and clerks of this court.* Judgment that the bill be quaſhed. *Vide Strange, vol.* 1. *p.* 76.

Michaelmas, 5 *Geo. Stratton* v. *Burgis.*

An *attorney* undertakes to appear for the defendant, an *infant*.

Per curiam. He is obliged to do it in a proper manner, and having entered ſuch appearanc *by attorney*, when it ſhould have been by *guardian*, it may be *amended*. *Vide Strange, vol.* 1. *p.* 114.

Hilary, 7 *Geo. Wiar* v. *Smith.*

The plaintiff's *attorney* ſent the *iſſue book* to the defendant's *attorney*, who accepted it, and paid for it; but the plaintiff not going on to *trial*, the other ſide gave him a *rule* to *enter* his *iſſue*, in order to carry down the cauſe by *proviſo*. And on an *affidavit* that the plaintiff's *attorney* had miſlaid the papers, the court ordered the defendant's *attorney* to give him a copy of the *iſſue*, the better to enable him to comply with the *rule*. *Vide Strange, vol.* 1. *p.* 414.

Michaelmas, 7 *Geo. Gynn* v. *Kirby.*

The plaintiff's *attorney* was *ſummoned* before *Forteſcue*, Juſtice, to produce his client, and the judge thereon made an order, that unleſs he was produced in a month, the defendant ſhould by conſent be at liberty to ſign a *non proſ.* He did not produce him, and the *non proſ.* was ſigned, and on an *affidavit* that no ſuch man as the plaintiff could be found, the court, on motion, made a *rule* on the *attorney* to pay the *coſts*; and afterwards on an *affidavit* that they were demanded and unpaid, an *attachment* was granted againſt him. *Vide Strange, vol.* 1. *p.* 402.

Hilary, 9 *Geo. Mr. Dottin's Caſe.*

Hacket agreed to *aſſign* a leaſe to *Sutton*, who ſent for *Dottin* an *attorney* to take the deeds, and peruſe them. *Dottin* drew an *aſſignment*, and then *Sutton* paid him for it, and took back the deeds. And now *Hacket* moved for a *rule* on *Dottin* to deliver him the deeds: but on laying the caſe before the court, they would make no rule on the *attorney*, it appearing to be a fair tranſaction in delivering back the deeds to his own client. *Vide Strange, vol.* 1. *p.* 547.

Eaſter, 9 *Geo. Coke* v. *Allen.* Error.

On a writ of *error* brought in this court on a judgment in the *Common Pleas*, the *error* aſſigned was, the not filing a warrant of *attorney*, as required by the late ſtatute for the *amendment* of the *law*, by which it is enacted that the *attorney* for the plaintiff ſhall *file* his *warrant* the ſame term in which he *declares*, and the *attorney* for the defendant in the ſame term in which he *appears*; but this was over-ruled, for if the plaintiff's *attorney files* the *warrant* at any time before the defendant has pleaded, it is ſufficient to maintain the judgment, though by the ſaid *ſtatute* he may be fined, if he does not *file* it in the *term* when he declares; but the not filing it in manner as aforeſaid, doth not impeach the judgment. *Vide Mod. Rep. vol.* 8. *p.* 77.

Michaelmas, 9 *Geo. Wright* v. *Maſon.*

On a motion for an *attachment* againſt the defendant, and one *Purcell* an *attorney*, for *mal-practice*, and for oppreſſing the defendant, by threatening to take him up by a *warrant* of the *Chief Juſtice*, and by colour thereof getting ſome money from him, and a note under his hand to pay more, for not ſending him to *Newgate* for a *treſpaſs*, which they pretended to be done by his wife; a *rule* was made for them to *ſhew cauſe* on ſuch a day, why an *attachment* ſhould not go againſt them; and on that day they appeared, and produced *ſeveral affidavits*, which were read in court, and by which they denied the charge, but not *poſitively* and *directly*; and it appearing by the *affidavits*, that the fact was done by the wife, there was no colour to procure the *warrant* of the *Chief Juſtice* againſt the huſband; and it farther appearing, that the *attorney* had indorſed the note to another, on purpoſe to load the defendant with an action, he was ordered to ſtand *committed*, until he ſhould anſwer *interrogatories*, which were to be filed in *four days*; and afterwards in anſwer to the *interrogatories*, he ſwore off all that was charged againſt him, for which he was *indicted* and *convicted* of *perjury*. *Vide Mod. Rep. vol.* 8. *page* 110.

Hilary, 10 *Geo.* *The King* v. *Pepper*.

A rule of this court was made, *anno* 15 *Car.* 2. that the plaintiff ſhould ſet forth, in his *writ* or bill, an *ac etiam* of the ſum for which he expected the defendant ſhould give bail, and that if he brought a frivolous action to hold the defendant to *ſpecial bail*, he ſhould be puniſhed.

And now the court was moved for an *attachment* againſt *Pepper*, who brought an action with an *ac etiam bill*, in a great ſum, to hold the defendant to *ſpecial bail*, where nothing was due, as it appeared before a *judge*, the plaintiff being ſummoned before him to ſhew his cauſe of action; and this was ſaid to be an abuſe of the *proceſs* of this *court*, and conſequently a *contempt*.

The court held, this was not ſuch a *contempt* as to iſſue out, or grant, an *attachment* againſt the plaintiff, but directed, that if the defendant was injured, he might bring his *action*. *Vide Mod. Rep. vol.* 8. *p.* 227.

Eaſter, 10 *Geo.* *Hawker* v. *Hinton*. Error.

On a writ of *error* on a judgment in the *Common Pleas*, the *error* aſſigned was, a variance between the *original* and the *declaration*.

On the other ſide it was ſaid, that the record was right; and on producing it, ſo it was, but it was of another *Number Roll*.

Then it was *objected*, that the *original* was *anno* 7 *Georgii*, and the *declaration* was *anno* 9, and no *continuance* entered between the one and the other.

To which it was anſwered, that the *continuances* might be entered at any time, and that when entered the plaintiff is intitled to his judgment.

The court were of opinion, that the *attorney* ought to be puniſhed, for making up a *ſecond record*, but that the plaintiff muſt have his judgment. *Vide Mod. Rep. vol.* 8. *p.* 243.

Michaelmas, 10 *Geo.* *Lord Conningſby* v. *Steed*.

A rule was made, that the *coroners* of the county of *Hereford*, and the high bailiff of the *franchiſe* of *Leominſter* in the ſaid county, ſhould ſhew cauſe on ſuch a day why an *attachment* ſhould not iſſue againſt them. The caſe ſtated to the court was as follows:

The defendant *Steed*, an *attorney* of this court, and formerly *high bailiff of the liberty* or *franchiſe of* Leominſter aforeſaid, at that time entered into a bond of 500 *l.* for the faithful execution of the ſaid office; but falling under the diſpleaſure of the plaintiff, he brought an action of *debt* againſt *Steed* on the ſaid bond, and ſued out a *latitat*, directed to the *ſheriff* of that *county*; to which writ one of the *coroners* was *attorney*, and ſolicited the *ſheriff* for a precept to the *high bailiff* of the ſaid *franchiſe* to make a *warrant* to apprehend the defendant *Steed*, who having brought his *writ* of *privilege* as an *attorney* of this court, the *ſheriff* having returned it on the *latitat*, would make no *precept* to the *high bailiff*, &c. whereon the plaintiff brought an *alias latitat*, directed likewiſe to the ſaid *ſheriff*, who ſtill refuſed to grant ſuch *precept* as aforeſaid, becauſe of the *privilege* of the defendant, which he (the ſheriff) had returned on the *firſt latitat*; then an *original* was ſued forth, directed to the *coroners*, who accordingly made a *precept* to the *high bailiff*, (who was privy to all theſe proceedings) and then he iſſued forth his *warrant* to the *under bailiffs*, who *arreſted* the defendant, and ſtill keep him in cuſtody.

And now the court was moved for an *attachment* againſt the *coroners* and the *high bailiff*, and *under-bailiffs*, for a great oppreſſion, and for an abuſe of the *proceſs* of this court, under a pretence and colour of juſtice; and a *rule* being made for them to ſhew cauſe why an *attachment* ſhould not go.

Their council inſiſted, that though it was wrong to ſue out this *latitat* directed to the *coroners*, yet they being *officers* who are to execute the *proceſs* of this *court*, are not to diſpute or queſtion whether the *writ* is iſſued *lawfully* or *not*; neither are the *high bailiff* nor *under bailiffs* to do any ſuch thing, but all of them are to obey the *writ*; and if ſo, then the *affidavit* of the defendant charges them with no crime, but only in obeying the *proceſs*; which is ſo far from being an *offence*, that it is probable, if the defendant had brought an action of *falſe impriſonment* againſt the *coroners*, and the reſt, &c. they might have juſtified under this *writ* and *warrant*.

Per curiam. A *writ* is never directed to the *coroners* where the *ſheriff* (who is the *proper officer*) ſtands indifferent; and it was admitted on all ſides in this caſe, that the *ſheriff* was indifferent, ſo that the matter ſeems to be very ſuſpicious againſt the *coroners* and the *high ſheriff*, viz. that they were privy to this oppreſſion, therefore the rule was made *abſolute* as to them, but diſcharged as to the *under-bailiffs*.

Afterwards, on the laſt day of *Hilary* term following, one of the *coroners* was brought up in *cuſtody* into *court*, and *bailed*, the other being *bailed* before to anſwer on *interrogatories* the *next term*.

And accordingly *Edwards*, one of the ſaid *coroners*, and *Carpenter*, the *high bailiff*, were brought into court; the other *coroner*, *Landen*, being in the *King's Bench*; and *Edwards* depoſed that he knew nothing of this oppreſſion, or acted therein, otherwiſe than by a *general power* he gave to the other *coroner*, *Landen*, to put his (the ſaid *Edwards's*) name to all *writs* that came to him, directed to the *coroners*, &c. and that he never ſaw this writ.

His council moved that he might be diſcharged; for if one *coroner* gives the other authority to put his name to a particular *writ*, that might probably be a *contempt* to this court, becauſe he might know the nature of ſuch a *ſingle writ*; but where ſuch a *general truſt* or power is repoſed in one *coroner* by another, as to ſet his name to all *writs* which ſhall come to his hands, there cannot be ſo much as the leaſt ſuſpicion of any *contempt*.

Per curiam. This *general authority* muſt be intended to do all *legal acts*, ſo that if the other *coroner* to whom it was given abuſes it, ſuch abuſe cannot be a contempt by that *coroner* who gave the power; therefore this appearing to be the *caſe* of *Edwards*, one of the *coroners*; he was diſcharged.

But *Carpenter*, the *high bailiff*, having owned that what he had done, was by order of the plaintiff, and that he did it *knowingly*, though he did not adviſe the doing of it, being in *contempt*, was committed. *Vide Mod. Rep. vol.* 8. *p.* 192.

Michaelmas, 11 *Geo.* *Brown* v. *Coombs*.

An *objection* was taken by the plaintiff's council, againſt the bail put in in this cauſe, for that it is againſt the *rules* of this court, to take an *attorney* as bail.

Per curiam. It is very true, there is ſuch a *rule*, but the intention of making it was, that an *attorney* ſhall not be taken as *good bail*, merely by his being an *attorney*; but when he is *reſponſible*, and *juſtifies*, and is an *houſekeeper*, then, though he is an *attorney*, he ſhall be deemed *good bail*. *Vide Mod. Rep. vol.* 8. *page* 339.

Michaelmas, 11 *Geo.* *Hunſton* v. *Howard*. Error.

The plaintiff had obtained judgment in the court of *C. P.* which was now of above *ten years* ſtanding, when the defendant brought a writ of *error* in this court, and aſſigned the want of an *original* for *error*; and now the defendant in *error* pleaded *there is no error*; and the want of an *original* being not yet certified, he moved to put it off till next term, that he might, in the mean time, procure an *original* to be filed; this being a contrivance of his own *attorney* to defraud him.

Per curiam. This motion ſhould have been made before the cauſe was put in the paper, but it having the countenance of fraud, it was ruled to go over, on payment of the coſts of the day. *Vide Mod. Rep. vol.* 8. *page* 327.

Eaſter, 12 *Geo.* *Lorymer* v. *Holliſter.*

A *bailiff* who had a writ againſt the defendant, came to one *Stapleton*, an *attorney*, and told him, the defendant deſired he would back the *writ*, and appear for him; and afterwards, on the plaintiff's *attorney* applying to him, he told him, he had ſent orders to his agent to appear, and he believed he had done it. Whereon the plaintiff's *attorney* delivered a declaration, and ſigned judgment, for want of a plea.

On a motion to ſet ſuch judgment aſide, it appeared, that the *bailiff* went of his own accord to *Stapleton*, without the direction of the defendant, and that *Stapleton*, diſcovering this, had countermanded the orders for appearing, and that, in fact, there was no appearance entered. But the court refuſed to ſet it aſide, and ſaid, they would oblige *Stapleton* to file *common bail*, according to his undertaking, in order to make the proceedings regular, there being no fault in the plaintiff's *attorney*. *Vide Strange*, *vol.* 1. *p.* 693.

Trinity, 12 *Geo.* *Frontin* v. *Small.*

In an action of *covenant*, the plaintiff declares, that by a deed made between *her as attorney* for *James Frontin* on the one part, and the defendant on the other part, ſhe demiſed a houſe to the defendant, and that he covenanted to pay the yearly rent of 60 *l.* to *James Frontin*, and then aſſigns a breach in non-payment of rent, *to the damage* of the plaintiff, who was the *attorney*.

On demurrer the defendant's council *objected*, that this is a void leaſe, and that no action can be maintained on it, eſpecially by the plaintiff, who was but the *attorney*, and to whom the rent is not reſerved; neither is it ſo much as a *covenant* with the plaintiff, but only generally *that he covenanted* to pay the rent to *James Frontin*. The power is not purſued by a leaſe in the name of the *attorney*, for it ought to have been in the name of the *principal*. 9 *Co*, 76, 77. *Combes caſe* is expreſs, "If *attornies* have power to make leaſes by "indentures for years, they cannot make the indentures in their own names, but in the name of him "who gave the warrant of *attorney*," and 1 *Roll. Abr.* 330. 501. *Godb.* 389. *Mo.* 71. It is ſaid ſuch leaſes are void. A warrant of *attorney* in the nature of it, is only giving another power to ſet my name in my abſence, but not to enable him to act as owner of the eſtate.

The plaintiff's council *inſiſted*, that the agreement that one ſhall procure an entry and enjoyment, and the other ſhall pay the rent, may be good, though the deed be void, ſo as to paſs an intereſt in the land; and the word *demiſit*, i. e. *he demiſes*, is a *covenant*, on which an action will lie. 4 *Co. Noak's caſe*. And a leaſe may be good, reſerving rent to a ſtranger, who is no party to the deed, and ſo is 1 *Mod.* 113.

Per curiam. No doubt but in a good leaſe, the rent may be ſo reſerved, and that *demiſit* will amount to a *covenant*; but then that muſt be where the deed is valid, and this is not; and if on the one hand it be void, ſo as to paſs an intereſt in the land, it is but juſt on the other hand that it ſhould be void, as to the reſervation of the rent; eſpecially in this caſe, where the *covenant* is not with the plaintiff, nor the rent reſerved to her. Therefore judgment was given for the defendant. *Vide Strange*, *vol.* 1. *p.* 705.

Eaſter, 3 *Geo.* 2. *The Mayor of Baſingſtoke* v. *Bonner.*

The court was moved, that the defendant being an *attorney* of *C. B.* might be diſcharged on *common bail*, ſuggeſting it to be the practice of *C. B.* to pay that reſpect to the *attornies* of *B. R.* if they are ſued there, and 2 *Mod* 181. 1 *Mod.* 10. *Salk.* 544. were cited.

The council on the other ſide aſſerted, that there was no ſuch practice in *C. B.* and as to the caſe in 2 *Mod.* it is ſo far from being an authority for the defendant, that it appears the *Common Pleas* did not diſcharge him, though arreſted in the *Palace Yard*, but ſent him up to the *King's Bench*. And the other two caſes are of *attornies* of the ſame court, who no doubt are to be diſcharged on *common bail*.

Per curiam. The defendant muſt find *ſpecial bail* here, and may plead his privilege in *abatement* after.

Accordingly he put in bail, and pleaded his privilege; to which the plaintiff demurred, and objected that he had not *averred* himſelf to be an *attorney* at the time of filing the bill, but only at the time of pleading, it is *before the time of exhibiting the bill fecit anglice, he made*, (inſtead of *fuit, anglice, he was*) *and ſtill is one of the attornies* of the *C. B.* and for this fault the court held it ill, and ordered him to anſwer over. *Vide Strange*, *vol.* 2. *p.* 864.

Michaelmas, 10 *Geo.* 2. *Weſton* v. *Pool.*

An *attorney* delivered his bill, and after his death, application was made to tax it, and above a ſixth part was ſtruck off: it was moved that the *executrix* might pay the *coſts*: but the court held ſhe ſhould not; for the words of the *act* 1 *Geo.* 2. *c.* 23. affect the *attorney* or *ſolicitor* only; and the *executrix* is not to blame if ſhe ſtands on his *bill*, or makes out one from his *books*. *Vide Strange*, *vol.* 2. *p.* 1056.

Hilary, 13 *Geo.* 2. *The Caſe of Henry Waldron, a Clerk in the Crown Office.*

Ingram, an *attorney*, employed *Waldron* in ſeveral *quo warranto* cauſes in the borough of *Eveſham*, which were proſecuted and defended by Sir *John Ruſhout*, and Mr. *Rudge*, who were *Ingram*'s clients, and bills were delivered by *Ingram* to them, in which were included the clerk in court's demand, amounting to 292 *l.* 6 *s.* ſince which *Ingram* is dead *inſolvent*, and his executors inſiſt to receive the whole of Sir *John Ruſhout*, and Mr. *Rudge*, and leave the *clerk in court* to come in as a creditor. On this the court was moved, that Sir *John Ruſhout* and Mr. *Rudge* (who admitted to have above 600 *l.* in their hands of *Ingram*'s bill) might pay the *clerk* in *court* his ſhare, as is done every day in *Chancery*; and the gentlemen ſubmitted to do as the court ſhould direct.

Per curiam. There is no reaſon why we ſhould not take the ſame care of our *clerks*: the money paid to *Waldron* will not be *aſſets* that have come to the hands of the executors, ſo they cannot be prejudiced. A rule was made for their paying to Mr. *Waldron* 292 *l.* 6 *s.* which was his proportion of the bill *Vide Strange*, *vol.* 2. *p.* 1126.

Eaſter, 30 *Geo.* 2. *Frazier's Caſe.*

One *Frazier* an *attorney* of this court having by *colluſion* taken a *turnkey of the King's Bench* priſon for his articled clerk, the articles were cancelled by order of the court, and ordered to remain there. 1 *Bur. p.* 192.

Michaelmas, 30 *Geo.* 2. *Oppenhein qui tam* v. *Harriſon.*

The proceedings in this cauſe were ſet aſide by the court for *irregularity*, not having an *attorney*'s name duly ſet thereto. It appearing that though there was an *attorney*'s name put to the proceedings, the ſame was ſet without his conſent or concurrence. *Vide Bur. vol.* 1. *p.* 20.

Michaelmas, 32 *Geo.* 2. *The King* v. *Fielding, Eſq*;.

On ſhewing cauſe why an information ſhould not be granted againſt *John Fielding*, Eſq; for a *miſdemeanor* in his office of *juſtice*, the complaint appeared *frivolous* and *vexatious*, ſo that the juſtice ought to have *coſts*, the queſtion with the court was, who would pay ſuch *coſts*.

The complaint being grounded on a *joint affidavit* made by the proſecutor and his *attorney*, and it appearing to the court by *affidavit*, that the *attorney* had declared, that if it ſhould coſt him 100 *l.* he would lay the juſtice by the heels.

Per curiam. We are clear and unanimous that the *attorney* ought to pay the coſts of this motion jointly with his client, becauſe he not only appeared as proſecutor by joining in the *original affidavit* of complaint, but had expreſsly declared, that if it coſt him 100 *l.* he would lay the *juſtice* by the heels. Therefore let the rule be diſcharged, with coſts to be paid by the *proſecutor* and his *attorney*. *Vide Bur. vol.* 2. *p.* 654.

Eaſter,

Eaſter, 5 *Geo.* 3. *The King* v. *Dixon one*, *&c.*

On a *ſubpœna* out of the *Crown Office* being ſerved on the ſaid *Dixon* with a *duces tecum*, i. e. *bring with you*, certain papers, in order to his giving evidence before the *grand jury* of the county of *Northampton*, and to produce vouchers which had been produced, and inſiſted on by one *Pearch*, his client, before a maſter in *Chancery*.

Dixon did not appear before the *grand jury* in obedience to this *ſubpœna*, on which the proſecutor moved for an *attachment* againſt the ſaid *Dixon*.

Per curiam. We are clearly of opinion, that *Dixon*, inſtead of producing the papers againſt his client. ought to have immediately delivered up the papers to his client on receiving ſuch *ſubpœna*. Therefore let the rule be diſcharged with coſts. *Vide Bur. vol.* 3. *p.* 1688.

Michaelmas, 5 *Geo.* 3. *Silk* v. *Rennet one*, *&c.*

On a motion for an *attachment* againſt the commiſſioners of the *Court of Conſcience in London*, for iſſuing an execution againſt the defendant, after being ſerved by him with a *writ of privilege*.

The queſtion was, whether the *Court of Conſcience in London*, the old city court, not under the new acts, can proceed againſt an *attorney*, after being ſerved with a *writ of privilege*.

The court held the writ of privilege would not lie.

Per curiam. Take nothing by the motion. *Vide Bur. v.* 3. *p.* 1583.

Attornment.

Hilary, 5 *W.* 3. *Quarn* v. *Rowe.*

A tenant in *tail* made a leaſe to *W. R.* to commence five years after, but in the mean time levied a *fine* to *L. R.* to the uſe of the conuſee and his heirs; afterwards the *leſſee* entered by virtue of this *fine*, and the *conuſee* brought an action of *debt* againſt him for arrears of rent, reſerved on the ſaid leaſe; and on a demurrer to the declaration it was objected, that it was ill, becauſe the plaintiff did not ſet forth any *attornment*, and he being in by the *common law*, and not *by the ſtatute of uſes*, an *attornment* is neceſſary to create a privity, and to ſupport this action: but this objection was not allowed, becauſe the leſſee having only an *intereſt of the term*, at the time the fine was levied, could not *attorn*; and the reverſion on his term paſſed at that time as included in the poſſeſſion.

W. R. made a leaſe to *B.* for fifty years, and afterwards granted his reverſion to *R. B.* aſſigned the term to *R.* before any *attornment*, and before he had notice of the grant of the reverſion.

Adjudged, that the whole eſtate is veſted in *R.* immediately, and that term is extinguiſhed; for in this caſe there is no body to *attorn*, and therefore the law veſts all in *R.* without any *attornment*.

The leſſor granted the reverſion to another, and afterwards brought an action of debt for the rent; the leſſee pleaded that he had granted away the reverſion, but did not ſet forth that he *attorned*; *adjudged*, that this plea of itſelf amounted to an *attornment*. 1 *Vent.* 248.

2 *Cro.* 87. *Adjudged*, that an *attornment* to part is good for the whole, for it ſhall be taken moſt ſtrongly againſt him; and he having only a power to aſſent, he cannot divide or apportion the thing granted. *Vide Salk. vol.* 3. *p.* 52.

Trin. 5 *W.* 3. *Gwam and Ward* v. *Roe.*

A. makes a leaſe for years to *B.* reſerving rent, and afterwards leaſes the ſame premiſes to *C.* rendering rent: *A.* levies a *fine* to the *conuſee* and his *heirs*, to the uſe of the *conuſee* and his *heirs*; the firſt leaſe expires, the ſecond *leſſee* enters, and the *conuſee* brings *debt* againſt the ſecond *leſſee* for rent in arrear; on *demurrer*, it was *objected* on the part of the defendant, that here was no *attornment* of the ſecond *leſſee alledged*, and that it ought to be in this caſe, becauſe the plaintiff came in by the common law, and not by the ſtatute of uſes, *which was allowed*: it was obſerved, that the plaintiff could not without *attornment* have maintained an action againſt the firſt *leſſee*, *which the court allowed*; but held there was a plain difference between the firſt *leſſee* and the ſecond: at the time of the *fine*, the reverſion was expectant on the firſt leaſe, notwithſtanding the grant of the ſecond leaſe; for that continued only an *intereſſe termini*, and did not alter the reverſion, which remained entirely expectant on the firſt leaſe, as it was before; therefore the *fine* paſſed but one reverſion, and that expectant on one particular eſtate, and conſequently there could be but one *attornment*, viz. from the firſt *leſſee*, and not from the ſecond. Therefore judgment was given for the plaintiff. *Vide Salk. vol.* 1. *p.* 90.

This is the ſame caſe as the former, differently reported.

Michaelmas, 5 *Ann.* *Hudſon* v. *Jones.*

In an action of *replevin* the avowant made out his title by a grant of a reverſion expectant on an eſtate for life to the plaintiff, unto which reverſion there was a rent incident, *to which conceſſion* the plaintiff (being particular tenant) did *attorn*: the plaintiff pleaded, *that he did not agree in manner and form*; and the queſtion on the trial was, Whether the want of *attornment* might be given in evidence upon this iſſue? and being made a point for the reſolution of the whole court, it was urged for the plaintiff, that on *non conceſſit* the operation and effect of the grant is put in iſſue, and a deed, if it be ineffectual, is void: if the grantee dies before *attornment*, it can never be made good; if a ſecond grant be made, and *attornment* obtained to that, the firſt grant is avoided. That *he did not enfeoff*, *livery* muſt be proved; *by which*, &c.

On the other ſide it was *argued*, that in pleading a grant of a reverſion, an *attornment* is always alledged, but not of a feoffment: and if a feoffment be of a manor, it is neither neceſſary to alledge a livery nor an *attornment*, becauſe it is *an entire thing*, and the tenants are ſuppoſed to be numerous; yet if the feoffee avow on any particular tenant for rent, *&c.* he muſt ſhew *attornment*. *Yelv.* 135. Alſo in pleading a grant of a reverſion, the plaintiff muſt *alledge* a *venue* for the *attornment*, which ſhews it was traverſable, and that which is traverſable, and not traverſed, is admitted. To this opinion the court inclined; but *held*, that on *nothing paſſed by the deed*, want of *attornment* might be given in evidence, becauſe the operation of the deed is put in iſſue; and livery differs, for that is the act of the *feoffor* to complete his *feoffment*, but this is the act of another, and nothing farther remains on the part of the *grantor*.

The court afterwards held, that an *attornment* need not be given in evidence on *he has not granted*, though it muſt be pleaded, and though it muſt be pleaded, yet it need not be pleaded with a *venue*, but ſhall be tried where the land lies, on which it is ſuppoſed to be made, as a ſurrender is, and the reaſon given was, becauſe it is traverſable, and whatever is traverſable and not traverſed, is admitted, and the grant is perfect as far as the grantor can perfect it. See 1 *And.* 220, 221. 1 *Lev.* 192. *Hutt.* 102. 2 *Co.* 61. *Dyer*, 9. *Statutes* 4 *Ann*, *cap.* 6. and 11 *Geō. cap.* 19. *Vide Salk. vol.* 1. *p.* 91.

Hilary, 4 *Geo.* *Vandeput* v. *Lord.*

In *covenant* brought by the plaintiff, as aſſignee of an executor of an aſſignee, who by *meſne* aſſignments came to the poſſeſſion of a reverſion of a term of years, granted in 1624, by the *mercer's company*, reſerving rent; and ſets forth the leaſe by them made; that the leſſee made an under leaſe for a leſſer term, wherein the leſſee covenanted to leave the premiſes in repair, and that then the firſt leſſee granted the reverſion to *A.* who granted it over till it came to the plaintiff, who, as aſſignee of that reverſion, brings *covenant* againſt the defendant, as aſſignee of the ſecond leſſee, the under-leaſe being expired, and aſſigns for breach the not leaving the premiſes in repair. Judgment by default, *&c.*

The defendant council moved in *arreſt of judgment*, for that the plaintiff had not ſhewn a good title to the reverſion, there being no *attornment* ſet forth on the firſt grant to *A.* nor on any of the *meſne* aſſignments. And he put the queſtion, and argued on it, whether when a tenant for years makes an under-leaſe for a leſſer term, and afterwards grants the reverſion, it paſſes without *attornment*, for this caſe muſt be conſidered as at *common law*, the grant being made long before the late *ſtatute*, in *Bro. Abr. tit. attornment, pl.* 45. it is ſaid, that ſuch a reverſion will not paſs without *attornment*, becauſe of the attendancy of the rent, which is the preſent caſe. If the *ſtatute* 32 *H.* 8. *c.* 34. be objected, the anſwer is, that the *ſtatute* only gives a *compleat aſſignee* the action, and has no operation ſo as to make good his title. 1 *Inſt.* 215. *a.* A grantee by fine cannot bring *covenant* without *attornment*, a *fortiori* a grantee cannot by deed.

The plaintiff's council urged that the caſe in *Bro.* was before 32 *H.* 8. ſo that what was neceſſary at *common law* is not ſo ſince that *ſtatute.* I agree *attornment* is neceſſary on a fine, but why? Becauſe the conuzee could compel it, by a *what right does he claim*, which the grantee of this reverſion cannot. In the caſe of *Sands* v. *Brookes*, *Mich.* 5 *W. & M.* it was held, that the grantee of a reverſion of a copyhold, without *attornment*, might maintain *covenant* againſt the leſſee. *Stat.* 32 *H.* 8. was made to aſſiſt ſtrangers to deeds, and therefore ſupplies all circumſtances.

But further, this is a judgment by default, and aided by the ſtatute for the amendment of the law, which extends all the ſtatutes of *jeofailes* to judgments by default, in the ſame manner as if there had been a verdict; and nobody can ſay, but that in this caſe a verdict would have cured the want of ſetting out an *attornment.*

It was replied, the caſe of a grantee of a copyhold doth not come up to this, for copyholders do not claim by deed, but by cuſtom, and therefore no *attornment* is neceſſary, as it was before the late ſtatute on common law conveyances, which is the preſent caſe. I agree, a verdict would have cured this defect, becauſe the plaintiff could not have had a verdict, unleſs he had proved an *attornment*; but as this is a judgment by default, and was not a *jeofaile* before *ſtat.* 4 & 5 *Ann.* *c.* 16. that ſtatute can have no relation to this.

Chief Juſtice. The reaſon why the plaintiff is required to ſet out an *attornment* is, becauſe his title is not compleat without it, as a copyholder's is. *Stat.* 23 *H.* 8. gives none but an aſſignee this action; it does not enable him to be aſſignee, but only as ſuch to bring an action. To which *Powys*, Juſtice, agreed.

Eyre, Juſtice. *Statute* 32 *Henry* 8. is out of the caſe; for as the plaintiff is not a compleat aſſignee, we muſt take it as it ſtood at common law, and ſuch a grantee of the reverſion as the plaintiff is, at *common law* could not maintain an action of *covenant.* *Jones, Sir W.* 243. *Jones, Sir Tho.* 217. 232. *Moor* 527. This was not a *jeofaile*, ſo not helped by 4 & 5 *Ann.*

Pratt, Juſtice, ſaid, that the queſtion was no more, than whether the *ſtat.* 32 *H.* 8. gives the action to him who has not the reverſion, for without *attornment* it paſſed not. For theſe reaſons the judgment was arreſted. *Vide Strange, vol.* 1. *p.* 78.

Trinity, 4 *Geo.* *Long* v. *Buckeridge:*

In an action of *replevin*, for taking the plaintiff's goods aud chattels, in the pariſh of *St. Botolph Aldgate*, in his ſhop there, the defendant *avowed* the taking by diſtreſs, for a fee-farm rent; and ſays, that *K. James* 1. by letters patent, dated 24th *May*, in the 7th year of his reign, *gave and granted* the premiſes, (*among others*) to the grantees therein named; *to hold* to them and their heirs for ever, *held* of him and his ſucceſſors, as of his manor of *Eaſt Greenwich*, by fealty, only in free and common *ſocage*, and not in *capite*, or by *Knight's ſervice*; *yielding* to the King, and his ſucceſſors, the yearly rent of 22 *l.* in lieu of all rents, ſervices, and demands, iſſuing out of the premiſes. The King being ſo ſeiſed of this rent, in right of his crown, by *letters patent*, dated 19th *January*, in the 9th year of his reign, gave the ſaid rent and ſervices to *L. W.* and *H. P.* and their heirs; that *H. P.* died, and *W.* ſurvived, and was ſolely ſeiſed, and made his will; from whence, and from a great many *meſne* conveyances, the *avowant* brings down a title to himſelf; and then goes on, and ſays, that he was ſeiſed in fee of this rent; and *avows* the taking for arrears; and prays judgment, and a return. To this the plaintiff demurred, and the *avowant* joined in demurrer.

The court, in this cauſe, gave judgment for the *avowant*, reſerving the following point to be ſpoke to; *viz.*

Whether the *avowry* is ill, for want of alledging an *attornment* of the *terre-tenant*, on the fine levied of the rent in queſtion, by *J. B.* and his wife, to *W. B.* under a deviſe, from whom the *avowant* claims.

On hearing council for the plaintiff and defendant, the court gave judgment.

Pratt, Chief Juſtice. This caſe is now reduced to a ſingle point; whether it is neceſſary for the *avowant* to ſet out an *attornment* on the fine to *W. B.* under a deviſe, from whom he claims, we are all of opinion, that for this fault the *avowry* is ill, and that the *conuſee* was in at *common law.* The fine is a *common law* conveyance, by which both the legal eſtate, and the uſe, would have paſſed to the conuſee, without any declaration of uſes, according to the doctrine in the caſe of *Lord Angleſea* v. *Altham*; and therefore the uſes need not have been averred. If it had been to the uſe of a third perſon, they muſt have been *averred*, in order to controul the general operation which the fine would otherwiſe have had. The *conuſee* did not want the help of the *ſtatute*, and therefore it meddles not with him, but leaves him in at *common law.* 2 *Roll. Abr.* 780. *pl.* 3. 2 *And.* 15. *Salk.* 90. *Co. Lit.* 309 *b.*

Since the *conuſee* is in at *common law*, it is not diſputed but that an *attornment* was neceſſary, to enable him to diſtrain; but the *avowant* ſays, he is in the caſe of a deviſee, and that on a deviſe no *attornment* is neceſſary. This is true, that generally a deviſee ſhall diſtrain without *attornment*, but then his deviſor muſt have been enabled. If he had not that power, he could not transfer it, according to the maxim laid down in *Sir Moyle Finche's caſe*; *no one can transfer a greater right to another than he has in himſelf.* This maxim holds in all ſciences; for example, a bargainee has no more privilege than his bargainor; and, of the two, he is to be favoured before the deviſee. 5 *Co.* 113.

We think it neceſſary that an *attornment* ſhould be ſet out, and we are of opinion that no *attornment* appears on the record. The *conuſee* was *ſeiſed*, and the tenant *charged* by the fine only, but that paſſed no power to diſtrain. If this had been by deed, an argument might have been drawn from theſe words, becauſe there nothing could have paſſed before *attornment.* We are likewiſe of opinion that this is a matter of ſubſtance, and ſo the *avowry* is ill on a general demurrer.

The defendant's council prayed to diſcontinue the ſuit, becauſe the *avowant* is an actor in the ſuit

Per curiam. This is the plaintiff's ſuit, and how can one man diſcontinue another's ſuit? Therefore judgment was given for the plaintiff. *Vide Strange, vol.* 1. *p.* 106.

Averment.

Michaelmas, 1 *W.* 3. *Matthews* v. *Carey.*

In *treſpaſs* for taking a diſtreſs, the defendant juſtified, under a *preſentment in the leet*, for an offence, *&c.* and did not *aver* in his plea, that the offence *was com-*

mitted; and on a demurrer it was adjudged, that he need not make ſuch an *averment*, becauſe as to him it is not material whether the offence was actually committed, or not, it is ſufficient that the jury had preſented it; and as to this matter, the court diſtinguiſhed between a *replevin* and a *treſpaſs*, for in the firſt caſe the bailiff is an *actor*, and muſt recover on the merits of the cauſe, but in *treſpaſs* he is only to excuſe the wrong alledged againſt him; but the plea was adjudged ill on another point.

Adjudged, that *negative pleas* ought not to be *averred*, becauſe a negative cannot be proved; but *affirmative* pleas muſt be *averred*, with, *and this he is ready to verify*.

But now the want of *paratus eſt verificare* i. e. *he is ready to verify*, or *prout patet per recordum* is aided by the ſtatute 16 *Car.* 2. *Vide Salk. vol.* 3. *p.* 53.

Michaelmas, 4 *W.* & *M.* *The King and Queen* v. *Portington* & *al.*

In an *ejectment* brought by the heir at law againſt the deviſee, it appeared from the evidence given, that the defendants were Roman Catholics, and that one of them recommended a prieſt to be confeſſor to the teſtatrix, who perſuaded her ſhe could not be ſaved, unleſs ſhe deviſed her eſtate *to God and his Saints*; and that one of the defendants was an abbeſs in *France*, and joining with the confeſſor in the ſame deluſive perſuaſions, prevailed on the teſtatrix to deviſe her eſtate to her; and this was urged to be evidence of a ſuperſtitious uſe.

Per curiam. This being an abſolute deviſe, and no truſt declared, or appearing on the face of the will itſelf, no ſuch *averment* could be made or admitted, for if the law will not allow an *averment to ſupply a will*, *a fortiori*, there can be none to *defeat* it.

And Chief Juſtice *Holt* ſaid, *ſtat.* 23. *H.* 8. makes uſes void, but does not give them to the King, and *ſtat.* 1. *Ed.* 6. gives them to the King, but does not extend to future uſes made after that ſtatute; and that it might not be improper for the heir at law to apply to parliament for a remedy, agreeable to the caſe in *Moor* 784. *Vide Salk. vol.* 3. *p.* 335.

Michaelmas, 5 *W.* & *M.* *The King* v. *Hebbard.*

Holt, C. J. In *treſpaſs*, *aſſault*, and *battery*, if the defendant in his plea varies from the time alledged, he muſt *aver that it is the ſame treſpaſs*; but where he agrees in the time, he need not. *Vide Mod. Rep. vol.* 12. *p.* 48.

Trinity, 6 *W.* & *M.* *The King and Queen* v. *Knollys.*

The defendant was indicted at *Hicks's Hall* by the name of *Charles Knollys*, Eſq; for the murder of Captain *Lawſon*, which indictment he removed by *certiorari* into this court, and there pleaded a *miſnomer* in abatement, *viz.* that *William Knollys*, Viſcount *Wallingford*, by letters patent, bearing date the 18th of *Auguſt*, 2 *Car.* 1. was created Earl of *Banbury*, to hold the dignity to him and the heirs male of his body, lawfully begotten, &c. that *William* had iſſue *Nicholas*, who ſucceeded *William* in the dignity, from whom the ſame deſcended on the defendant, as ſon and heir to *Nicholas*, *and this he is ready to verify*.

The *Attorney General*, replied to this plea, that the defendant on the 13th of *December*, 4 *W.* & *Mary*, preferred a petition to the houſe of peers, that he might be tried by his peers, and after long conſideration the houſe diſmiſſed the ſame *according to the law of parliaments*, and diſallowed his peerage; and made an order that the defendant ſhould be tried by the courſe of the *common law*, &c. To this replication the defendant demurred, and the *Attorney General* joined in demurrer; and after many ſolemn arguments, the court gave their opinion unanimouſly for the defendant.

Holt, Chief Juſtice. There are two queſtions ariſe in this caſe.

1ſt. If the plea be good.

2d. Suppoſing it to be ſo, if the replication confeſſes and avoids the plea.

To the plea, the council for the King have taken three exceptions.

1ſt. It does not appear that *Banbury* is in *England*.

2dly. That Mr. *Knollys* ought to have *averred* that he is *one of the peers of England*, for it may be that he is *Earl* of *Ireland* or *Scotland*, and then he has not any title to be tried by the Lords in this realm.

3dly. That he ought to have concluded his plea with *prout patet per recordum*, or ought to have produced a writ to certify that he was *Earl* of *Banbury*, *F. N. B.* 247. *b. Reg. Orig.* 287. 1 *Cro.* 205. Lord *Savil's caſe*, baron or not baron being triable by record, 22*d. Aſſize*, 24 *Br. Aſſize* 240.

As to the *ſecond objection*, that the defendant ought to have *averred*, that he is *one of the peers of England*, he anſwered, that what is apparent has no need to be *averred*, but that he is an *Earl* appears by the letters patent, which he has produced, and then that he muſt be of *England*, is ſufficiently demonſtrated by what goes before, beſides, that he does not plead this plea here to make a right or title to the *Earldom* of *Banbury*, but only by way of *miſnomer* in abatement of the indictment, and that *miſnomer* is a good plea. *See* 2 *Inſt.* 595. If a *Knight* be indicted by the name of *Eſquire*, the indictment ſhall abate. *Vide Raym. vol.* 1. *p.* 10.

Hilary, 6 & 7 *W.* & *M.* *Wate* v. *Briggs*, *Marſhal.*

In an action of *debt* brought againſt the *Marſhal* for the eſcape of *J. S.* the plaintiff, in his declaration, ſhewed his recovery, and that *J. S.* was brought up by *habeas corpus* before Mr. *J. Gregory*, and was by him committed in execution to the *Marſhalſea*; but does not ſay, *as appears by the record* of the commitment. To this declaration, the defendant demurred generally; and the plaintiff's council argued, that this omiſſion was only matter of form, and therefore aided by the general demurrer. *See* 1 *Sid.* 216. *Middleton* v. *The bail of Silveſter*; for it is only inducement to the action, and not the foundation of it.

Per curiam. When the record is the ground of the plaintiff's action, he ought to conclude *as appears by the record*; but in this caſe the *eſcape* is the foundation of the action, and although the commitment is not diſtinctly put in iſſue, yet it may be found on the *general iſſue*, and the defendant is not *eſtopped* by this record; but he may *aver* that *J. S.* was not in priſon notwithſtanding that, and the plaintiff ought to prove him an actual priſoner. Therefore judgment was given for the plaintiff. *Vide Raym. vol.* 1. *p.* 35.

Michaelmas, 7 *W.* 3. *St. Leger* v. *Pope.*

Holt, C. J. *Debt*, with an *averment* in the declaration, differs from the conditionof a bond; for the plaintiff here muſt fully intitle himſelf to an action, but the condition of a bond goes only in *defeaſance*, and muſt come on the part of the defendant. And here the plaintiff does not intitle himſelf to any action, for he has no cauſe of action, unleſs the 105 *l.* as well as the value, were unpaid.

Where foreign coin itſelf is demanded, the action is in the *detinet*; but if the value be demanded, it is in the *debet* and *detinet*; and the *averment* always is, that the defendant hath neither rendered the foreign coin, nor the value. *Vide Mod. Rep. vol.* 12. *p.* 80.

Michaelmas, 8 *W.* 3. *Lockey* v. *Darbey.*

The plaintiff brought an action of *debt* on a bond againſt the defendant. On the defendant's craving *oyer* of ſuch bond, the condition appeared to be, that if the defendant ſhould ſave the plaintiff harmleſs from all damages that might accrue to him by the executing a writ of execution, that then, &c. the defendant pleaded, that the plaintiff did not execute the writ, &c. The plaintiff replied, and offered iſſue thereon: the defendant demurred to his replication.

The defendant's council *argued*, that the plaintiff's replication was ill, becauſe it has not *aſſigned any breach*, and therefore he cannot have judgment, and that the plaintiff ſhould have ſhewn in his replication, that ſome action was ſued againſt him for the execution of this writ, or how he was injured by it. *But not allowed.*

Per curiam. The point in this caſe in iſſue, is a collateral matter, to which the defendant by his plea has inveigled the plaintiff, and therefore he is not obliged to ſhew a breach; for the defendant has admitted that the plaintiff was injured, by offering this plea of a collateral matter; beſides, if the plaintiff had *aſſigned a breach* on the replication, the defendant could not have traverſed it, becauſe it would be a departure from his *bar*. Therefore judgment was given for the plaintiff. *Vide Raym. vol.* 1. *p.* 108.

Michaelmas, 10 *W.* 3. *Odes* v. *Clerk.*

On an action brought for an *eſcape*, the plaintiff declared, *that he ſued out of the court of our Lord the King, and late Lady the Queen, then being at* Weſtminſter, *a writ of* latitat *againſt* William Hakes, returnable in *five weeks of* Eaſter *before the aforeſaid Lord the King, and Lady the Queen, whereſoever*, &c. which writ was directed to the defendant as ſheriff of and that the defendant, by virtue of this writ arreſted the ſaid *William Hakes*, and permitted him to *eſcape*, &c. On a judgment by default, and a writ of enquiry executed, the council for the defendant moved in arreſt of judgment, that the plaintiff has not ſhewn out of what court the writ of *latitat* iſſued; for though it is returnable in *B. R.* yet it might iſſue out of the *Common Pleas*, and then it would be a void writ. The ſheriff may take advantage of *void proceſs*, though he cannot take advantage of *voidable proceſs:* though there is the word *latitat*, yet that is uſed in the *Common Pleas* in the *teſtatum capias*, and *capias utlegatum*.

Per curiam. There is no writ properly called a writ of *latitat* but that which iſſues out of the *King's Bench:* and therefore the court ſeemed clear for the plaintiff; but the matter was adjourned. *Vide Raym. vol.* 1. *p.* 397.

Hilary, 11 *W.* 3. *Bringar* v. *Allanſon.*

On a *ſci. fac.* againſt the defendant as bail, *&c.* the defendant demurs, and his council took exceptions to the *ſci. fac.* 1ſt. That it was *in this behalf*, whereas it ought to be *in that behalf*.

Holt, Chief Juſtice. In caſe of a *ſci. fac.* againſt bail *in this behalf* is the moſt proper.

2d. *Exception*, That it does not appear in the *ſci. fac.* where the court was at the time of the judgment, which ought to be ſhewn, becauſe it is an *ambulatory* court, and if the ſame be not ſhewn, one cannot know to what place one ought to ſend a *certiorari*. *Stat.* 7 *Hen.* 6. 106. 3 *Cro.* 504. *Yelv.* 227.

Holt, Chief Juſtice ſaid, that he always thought that exception very *ſlight*, *viz.* to ſay, that one does not know where the court is, but it has been held a cauſe of demurrer in both the old and new books, but yet it is but form, and therefore ſhould have been ſhewn as cauſe of demurrer. Therefore judgment was given for the plaintiff. *Vide Raym. vol.* 1. *p.* 532.

Eaſter, 11 *W.* 3. *Shales* v. *Seignoret.*

In an action of *covenant* on *articles* of agreement, the plaintiff declared, that it was covenanted and agreed between him and the defendant, that he, in conſideration of *twenty guineas* by the defendant to him then paid, ſhould transfer to the defendant, before, or on the 19th of *November*, 1695, 1000 *l. bank ſtock*; and that the defendant covenanted with the plaintiff to accept it on *three days* notice, and to pay to the plaintiff for it 940 *l.* and then the plaintiff *avers*, that no *bank ſtock* is transferable by *law*, but in the office of the *Bank* of *England*, in the preſence of both parties; and that he gave *three days* notice to the defendant, that he would transfer to him the *bank ſtock* in the office of the bank the 19th of *November*, and that he attended there the whole day to have transferred it; but that the defendant did not come to accept it, for which he brings this action for the 940 *l.* The defendant after *oyer* of the articles, pleads that the plaintiff nor none of his aſſigns had any intereſt in any *bank ſtock* on the 18th of *November*, *&c.* the plaintiff demurs; and the whole court were of opinion, that the plea was ill, becauſe though the plaintiff had not any *bank ſtock* on the 18th of *November*, yet if he had it the 19th, he might have performed the contract within the time, for the covenant was not that he ſhould transfer any particular 1000 *l.* of *bank ſtock* which he had at the time of the covenant, but any 1000*l.* of bank *ſtock*.

Per curiam. This action will not lie for the plaintiff in this caſe, becauſe it appears, that the plaintiff has not transferred, and without transfer to the defendant, the defendant is not bound to pay the money, for the money was to be paid on the transfer, and therefore no transfer no money. *Co. Lit.* 404. *Dyer* 371. 2 *Mod.* 266. *Otway* v. *Holdips*.

The matter in the declaration might have been a good excuſe for the plaintiff, if the defendant had ſued him for not transferring the *bank ſtock*, or the plaintiff might have aſſigned his breach in the *non-acceptance* of the *ſtock* by the defendant.

The court obſerved, that it did not appear but that the *bank ſtock* was transferrable at another place than at the office of the *bank*, for though the act ſays that no transfer ſhall be, but as the King ſhall appoint, and the King has appointed it to be at the office of the *bank*, and not in any other place; yet that ought to have been pleaded, or otherwiſe the court cannot take notice of it; and therefore, notwithſtanding any thing that appears to the contrary, the transfer might have been in any other place, and then a tender ought to have been made to the perſon. Therefore judgment was given for the defendant. *Vide Raym. vol.* 1. *p.* 440.

Trinity, 11 *W.* 3. *Maſon* v. *White, Marks, & al.*

The plaintiff brought his action againſt the defendant *White*, an attorney, and the other defendants, for entering up judgment againſt him without his aſſent, or without his being arreſted, or any proceſs ſued out againſt him, and without having made any warrant of attorney to *White*, on which a *fieri fac.* iſſued, and his goods were taken, *&c.* On judgment by default, and a writ of inquiry being executed and returned:

The defendant's council moved in arreſt of judgment.

1ſt. That the declaration is againſt *White*, one of the attornies of the *court of our Lord the King of the Bench here*, whereas it ought to be at *Weſtminſter*; for one cannot underſtand what place *here* means, and therefore one cannot know what court the plaintiff means. *But not allowed.*

Per curiam. Of the court of our Lord the King of the Bench, is the Common Pleas, and the judges will take notice that the *Common Pleas* is at *Weſtminſter*, and therefore *here* is at *Weſtminſter*.

2dly. A *ſecond exception* was, that the plaintiff has not ſaid who were juſtices of the court, whereas he ought to have mentioned the chief juſtice by name, *and his brethren*, &c. *but not allowed.* For though in pleading of a fine they plead that the fine was levied before the Chief Juſtice by name, *and his brethren*, yet there is no neceſſity here to name the juſtices of the court.

3dly. A *third exception* was, that it is ſaid in the declaration that the defendants, the 21ſt *December*, 5 *W. & M.* procured judgment to be entered, *&c.* Now the 21ſt *December* always happens out of term, and the court will take notice of that; but every judgment muſt be entered of ſome day in the term; and alſo that they proſecuted a *fieri fac.* the 23d *December*, &c. is out of term.

The plaintiff's council in reply ſaid, that the declaration ſets forth, that they procured the judgment then to be entered as of *Michaelmas* term before, which is good, and of that opinion was the court; and as to the writ, the plaintiff's council obſerved, that it was, *they had cauſed it to iſſue* ſuch a day, *&c.*

The defendant's council ſaid, that that would be taken to be the *teſte*, and he is included by the *teſte*, and cannot *aver* againſt it.

Per Holt, Chief Juſtice. A man cannot *aver* that a writ is of another *teſte* than it bears, but he may *aver* that it did not iſſue at the *time alledged*. Judgment was given for the plaintiff. *Vide Raym. vol.* 1. *p.* 485.

Trinity, 11 *W.* 3. *Maſon* v. *March*.

In an action of *falſe impriſonment*, laid to be in the vacation, the defendant pleaded a writ iſſued, *teſted in term time*, *whereby* he took the plaintiff.

Per Holt, Chief Juſtice. He may reply, that though it was *teſted in term time*, yet he took him in vacation; for where the *teſte* of a writ is in ſupport of juſtice, no *averment* ſhall be admitted againſt it; otherwiſe, where it is to juſtify a wrong done. *Vide Salk. vol.* 3. *p.* 53.

Michaelmas, 12 *W.* 3. *Harman* v. *Owden*.

In an action of *aſſumpſit*, the plaintiff declared, that the defendant, in conſideration of 20 *l.* paid to him by the plaintiff, aſſumed to deliver to the plaintiff, on or before the 8th of *January*, forty-five quarters of oatmeal, and *ſix hair ſieves*, and a fan, out of a ſhip into a barge, to be brought there by the plaintiff for the ſaid purpoſe; and he *avers*, that on the 8th *January* he brought there his barge, and the defendant *did not deliver* on the 8th *January*, &c. On *non aſſumpſit* pleaded, a verdict was given for the plaintiff.

The defendant's council moved in arreſt of judgment, 1ſt. That the ſieves being of divers ſorts, the plaintiff ſhould have ſhewn how many of each ſort were to have been delivered.

The plaintiff's council in anſwer *urged*, that in *treſpaſs* or *trover* this might have been a good exception, but not in *aſſumpſit*, where we ought to declare as the agreement was.

Holt, Chief Juſtice, ſaid, that if the agreement was ſuch, this uncertainty would not vitiate it, but the defendant has his election, how many of each of them he will deliver, ſuppoſe the agreement was to deliver ſix *cows* and *calves*, the plaintiff ought to have ſix of each of them; beſides, it does not appear here but that they might be the ſame.

The *ſecond exception* was to the breach, that it was not well aſſigned, the promiſe being to deliver at or before the 8th *January*; and the breach aſſigned is, that he did not deliver on the 8th *January*, ſo that he might have delivered them before, which would have been a good performance of the agreement. But after conſideration had of this exception,

Holt, Chief Juſtice, delivered the opinion of the court, that the plaintiff ought to have judgment after verdict, but ſaid it would have been good without verdict; for when the promiſe was to deliver the things out of a ſhip into a barge, to be brought by the plaintiff on or before, *&c.* and the plaintiff ſays only that he did not deliver on the day, and not that he did not deliver before, yet in a caſe ſimilar to this, it will be well enough; for though the defendant has election to deliver before, *&c.* yet there ought to be a concurrence of the plaintiff, and he ought to be ready to accept them; for the defendant cannot make a tender before the laſt day to oblige the plaintiff to accept them, and if he comes before the laſt day to make a tender, that will not excuſe him from making a tender or delivery of the goods on the laſt day, according to 3 *Cro.* 14. 73. where a place is appointed for payment of money; for if the plaintiff be not ready there with his barge, the tender will not be ſufficient; and therefore, ſince the laſt day is the time appointed by the law, when the one is obliged to deliver, and the other to receive, it will not be preſumed that the plaintiff was there before with his barge ready to receive them; but however, it is aided by the verdict, for if there had been an actual delivery, the jury could not have found for the plaintiff, for at this time performance is given in evidence on *non aſſumpſit*, and if the defendant had delivered the goods, it had been *non aſſumpſit*; and therefore no delivery being proved, the court gave judgment for the plaintiff. *Vide Raym. vol.* 1. *p.* 620.

Eaſter, 13 *W.* 3. *Mitchell* v. *Broughton*.

In *aſſumpſit* on a ſpecial promiſe to transfer ſtock in —— the plaintiff declared on an agreement in writing, by which the defendant agreed, in 1692, in conſideration of   to transfer a certain quantity of ſtock to the plaintiff or order on requeſt; and he ſhewed a requeſt, *&c.* and *averred* that the plaintiff had not transferred. The defendant pleaded the *ſtat.* 8 *&* 9 *W.* 3. *cap.* 32. againſt ſtock-jobbing. The plaintiff demurred; and it was inſiſted that this contract was within the ſaid act, becauſe it may be, the transfer was not to be made before the   day of

Holt, Chief Juſtice. The ſaid act ſhall be taken ſtrictly, becauſe it deſtroys bargains; and therefore, if the requeſt was before the ſaid day it is well enough. A ſecond exception was taken to the declaration, becauſe the plaintiff had not *averred* that the defendant had not paid   to the plaintiff's order.

Per curiam. That ought to come of the other ſide, if payment was made to the order of the plaintiff. Judgment *niſi*, *&c.* for the plaintiff. See the caſe of *Smith* v. *Weſtall*. *Raym. vol.* 1. 316. *Vide Raym. vol.* 1. *p.* 673.

Trinity, 13 *W.* 3. *Berty* v. *Dormer*.

On an *iſſue* directed out of *Chancery*, whether land aſſigned for payment of a legacy, were deficient in value; iſſue was joined on the deficiency, the one alledging it was deficient, and the other that it was not,

Per curiam. Though *averring* that it was deficient is ſuch an *affirmative* as implies a *negative*, yet it is ſuch an affirmative as turns the proof on thoſe that plead it; if he had joined the iſſue, that the lands were not of the value, and the other had *averred* that they were; the proof then had lain on the other ſide. If a perſon pleads *under age*, which is no more than that he is not of age, and iſſue is taken thereon, he that pleads muſt prove it.

Per Holt. The common way of apraiſing *tithe herbage*, is *two ſhillings* in *twenty*: and if a perſon deviſes land to the value of 100 *l.* a year to another, it is, *at firſt ſight*, the beſt rule of valuation, to eſtimate them at the value they were of at the death of the deviſor. *Vide Mod. Rep. vol.* 12. *p.* 526.

Michaelmas, 13 *W.* 3. *Spenceley* v. *Hutton*.

In *eſcape* againſt the defendant *Marſhal*, of this court, for the eſcape of *W.* &c. on *not guilty* pleaded, the plaintiff obtained a verdict. On the trial it was proved, that *W.* was a priſoner in the *Marſhalſea* of this court, and that a *committitur* was entered on the roll. The defendant's council objected, that though ſuch *committitur* entered on the roll is all the record made of ſuch commitment by the court, yet, by the practice of the court, the plaintiff who recovers, *&c.* ought to make ſuch entry in the *Marſhal*'s book, kept for that purpoſe; and that the *Marſhal* keeps a clerk to make ſuch entries; and the intent of it is, that the Marſhal ſhall have notice of ſuch commitments, and that without that he ſhall not be chargeable in *eſcapes*. For though a *committitur* be entered on the roll, yet, perhaps the Marſhal has no notice of it, and it is unreaſonable that he ſhould be liable for an *eſcape*, without notice that the error was committed in execution. The like practice in a caſe of *redditit ſe* in diſcharge of bail; for though the *redditit ſe* is entered on parchment, and filed with the proper officer, yet ſuch entry is made alſo in the Marſhal's book, to the end that he may have notice of it. Now, in this caſe, no ſuch entry was made in the Marſhal's book, and therefore he is not chargeable in *eſcape*. But *Holt*, Chief Juſtice, before whom this cauſe was tried at *Guildhall*, held the entry of the *committitur* upon the roll, *&c.* as aforeſaid, to be good evidence. And a verdict was given for the plaintiff; but he gave leave to the defendant to move it in the court of *King's Bench*; and he afterwards moved to ſet aſide the verdict for the above reaſon, when the motion was denied.

Per curiam. Trials ſhall not be ſet aſide becauſe the defendant might have prevented it before the trial, as in this caſe he might have moved the court; and it ſeems to be a trick to keep it in ſecret to ſet aſide a verdict, if it were not according to the defendant's wiſh. But if the defendant had intended to act rightly, he ſhould have given notice to the plaintiff of this irregularity, but it will not ſet aſide the verdict when the plaintiff has proved all his declaration. Accordingly, the plaintiff had his judgment. *Vide Raym. vol.* 1. *p.* 704.

Michaelmas, 1 *Ann.* *Ingledew* v. *Cripps*, *or Grips* v. *Ingledew*.

In an action of *debt*, the plaintiff declared on a bill *penal*, ſealed and delivered by the plaintiff to the defendant, reciting, that whereas the plaintiff had agreed with the defendant to ſell him ſo many ſtacks of wood, the defendant, for that, covenanted to pay to the plaintiff 35 *l.* for every hundred of the ſaid ſtacks, and bound himſelf, in the penalty of 100 *l.* to do it: then the plaintiff ſhews, that there were ſo many ſtacks, *&c.* and brings his action for 310 *l.* *&c.* as the total amount of all the ſaid ſtacks. The defendant demurred to the plaintiff's declaration, and his council made the following *exceptions*.

1ſt. That ſince there is a penalty of 100 *l.* in the bill, the plaintiff cannot have an action for more than the 100 *l.* *But not allowed.*

Holt, Chief Juſtice. The plaintiff has his election to ſue for the penalty, or for the rate agreed, although it be more than the penalty; and he may ſue for the 310 *l.* *&c.* for the wood, and for the 100 *l.* penalty alſo; for this penalty was only inſerted to enforce the payment for the wood; and it cannot be intended, that if the plaintiff ſold wood to the value of 1000 *l.* he ſhould be contented with the penalty only.

2d *Exception.* Admitting that the plaintiff might ſue for the wood ſold, yet he ought to have *covenant*, and not an action of *debt*, becauſe the duty was not certain; for the agreement is, to pay ſo much money for every hundred ſtacks that ſhould be in ſuch a place, and it is altogether uncertain how many hundred ſtacks were there. *But not allowed.*

Per curiam. The plaintiff may have *debt* or *covenant*, at his election; for the rate being certain, *viz.* 35 *l.* for every hundred ſtacks of wood, when the defendant has the wood the agreement becomes certain, for which an action of *debt* lies.

3d *Exception.* That the plaintiff has demanded more than appears by his own ſhewing could be demanded; becauſe he demands ſo much for *fifty* ſtacks, and the agreement is only that the plaintiff ſhould be paid for every *hundred* ſtacks. It would have been otherwiſe, if the agreement had been that the defendant ſhould pay according to the rate of 35 *l.* for every hundred, *&c.* *Allen* 9. *Stile* 12. *Needler* v. *Gueſt.* 2 *Lev.* 124. *Rea.* v. *Burnis*, which is in point.

The plaintiff's council *argued*, that this covenant or agreement ought to be conſtrued according to the intent of the makers of it, and it could not be imagined that the plaintiff intended to give fifty ſtacks of wood for nothing; and he cited 1 *Lev.* 140. *Keyme* v. *Goulſton.* *But not allowed.*

Per curiam. The agreement is only for every hundred, and ſince it is not ſaid, *according to the rate*, the plaintiff cannot recover any thing for it by this agreement.

4th *Exception.* That the agreement is, that the defendant ſhall have liberty to take the wood in ſuch a place, and he ſhall pay 35 *l.* for every hundred ſtacks, on tale; and the plaintiff has not *averred* that the defendant had all the hundred ſtacks for which this action is brought, but the plaintiff has only *averred*, that they were all at the place, *&c.* at the time of the articles made. Now, 1ſt, It was neceſſary to *aver*, that the defendant had the ſtacks, *&c.* becauſe, otherwiſe, the defendant is not obliged to pay for them; for the agreement is, to pay for, *&c.* which is a condition precedent, which muſt be performed before the plaintiff can be entitled to his action. *Stat.* 15 *H.* 7. *cap.* 10. 1 *Lev.* 70.

2dly, The plaintiff ought to do the firſt act, *viz.* to tell them; for the payment is to be made for every hundred ſtacks on tale. *But not allowed.*

Holt, Chief Juſtice. There is no condition precedent, nor firſt act, to be done or performed by the plaintiff, for he has ſold all his intereſt in this wood, and the defendant may and ought to tell it.

The plaintiff's council moved the court, for leave to enter a *remittit* for the 17 *l.* 10 *s.* demanded more than ought to be, for the fifty ſtacks, and that he might have his judgment for the reſidue.

A day being given by the court to argue this matter, the defendant's council *urged*, that the plaintiff, in this caſe, could not enter a *remittit*, for the difference is, where the demand is intire, and where ſeveral; where the demand is ſeveral, and a part is well demanded, and part ill, the plaintiff might have judgment for that which is well demanded, and may be *barred* for the reſidue; as in *Hob.* 178. *Andrews* v. *De la Hay*, in an action of *debt*, on ſeveral bonds, one of which was not payable at the time of the action brought, yet the plaintiff ſhall have judgment on the reſt; but where the demand is entire, an abridgment of it cannot be, neither can the plaintiff have judgment for part.

The plaintiff's council *argued*, that a *remittit* may be entered for the 17 *l.* 10 *s.* *&c.* and that the plaintiff ſhall have judgment for the reſt; for where the money is certain and entire on the face of the contract, the demand of more than is due is ill, and cannot be aided by the entry of a *remittit*; but where the money recoverable is compoſed of ſeveral parcels, there, if the plaintiff demands more than is due, he may enter a *remittit* for the overplus; for there he ought to recover that which he can prove to be due, and not according to his demand; and therefore the plaintiff may as well waive that which is not due, by the entry of a *remitit*, as the jury may, it not being proved at the trial; and cited *Cro. Jac.* 498, 529. 1 *Saund.* 206. and the caſe of *Thwaites* v. *Lady Aſhfield*. In *debt*, for rent, the plaintiff declared as aſſignee, by virtue of a decree made by the commiſſioners, at *Clifford's Inn*, for the determination of differences about the fire of *London*; and the plaintiff demanded 8 *l.* more than was due, as appeared by his declaration. The defendant pleaded, *nul tiel record*; which being for the plaintiff, the defendant brought a writ of *error*, and moved the court, that the plaintiff ſhould not enter his judgment, without leave of the court, and a rule was made accordingly: and afterwards a motion was made, to ſet aſide that rule, and that the plaintiff might have leave to enter a *remittit* for the 8 *l.* and have judgment for the reſt; and the caſe of *Barber* v. *Pomeroy*, 1 *Roll. Abr.* 785. *Stile* 175. was cited, as a caſe in point; and though it is ſaid, in 1 *Saund.* 286. by *Hale*, Chief Juſtice, that no judgment was entered in the ſaid caſe, yet that was a miſtake, as appeared on ſight of the record, then brought into court. On this authority, the the plaintiff had liberty given him to enter a *remittit* for the 8 *l.* which put an end to the writ of *error*.

Holt, *Powell*, and *Powys*, Juſtices, agreed to the diſtinction taken by the plaintiff's council, that the demand here is no more entire, than every action of *debt*, for rent or other thing. The demand is entire, as to *action*, but not as to *lien*; and the difference is, where, on *covenant* to pay a ſum certain, *debt* is brought, the variance of the ſum contained in the deed, will vitiate the ſame; but where the deed relates to matter of fact, there, though the plaintiff demand more than is due, he may enter a *remittit*; and the caſe of *Barber* v. *Pomeroy*, is in point.

Gould, Juſtice, held, that this was an entire contract, and therefore, that a *remittit* could not be entered for part, no more than there can be an abridgement of an entire thing at *common law*; and cited *Dyer* 65. *ſtat.* 10 *Hen.* 6. *cap.* 5. *Yelv.* 66. This caſe differs from the caſe of *Barber* v. *Pomeroy*, becauſe that was after verdict, but here it would be hard to take away the defendant's good cauſe of demurrrer, which he had at the time he demurred.

Holt, Chief Juſtice. The verdict makes ſuch a caſe worſe; for there the jury find the intanglement, and yet the court, ſeeing the verdict to be impoſſible, will give leave to enter a *remittit*: the court therefore gave judgment for the plaintiff, for what was due; with leave to enter a *remittit* for the reſidue. *Vide Raym. vol.* 2. *p.* 814. *Mod. Rep. vol.* 7. *p.* 87.

Michaelmas, 2 *Ann.* *Staple* v. *Heydon*.

The court were of opinion, that the pleadings in this cauſe were ſuch, as a repleader ſhould be awarded on, at the common law; for the defendant having inſiſted on a title to a way, by grant, his *averment*, that he had no other way, was immaterial, and, by conſequence, the iſſue thereon impertinent; beſides, there was no iſſue at all joined, the plaintiff's affirmative not concurring with the defendant's negative. *Vide Mod. Rep. vol.* 6. *p.* 3.

Michaelmas, 3 *Ann.* *Stanyon* v. *Davis*. Error.

On a writ of *error* brought on a *judgment* in the *Marſhalſea Court*, the plaintiff declared, that at ſuch a day, &c. in the county of *Middleſex*, he did deliver into the ſtable of the defendant, then a *common inn-keeper*, a certain *gelding*, to be by him ſafely kept, at a reaſonable rate; and to be ſafely re-delivered by him to the plaintiff; that the defendant then and there ſo negligently the ſaid *gelding* did keep, that through his neglect he was taken out of the inn, and ſo immoderately ridden, and whipped, that he was quite ſpoiled; on which a verdict and damages were given for the plaintiff, and judgment for him below: on the writ of *error*, the following *exceptions* were taken.

1ſt. That the horſe, for aught that appears, was put into the defendant's ſtable without his privity, and if ſo, he was not bound to take any care of it; for, as the declaration is worded, it is to be underſtood, that it was delivered into his ſtable, he being a *common inn-keeper*; for *prædict. com. hoſpitat. exiſtent*, muſt be taken in the *ablative caſe*; but the words being indifferent to an *ablative* or *dative*, taking them in a *dative* makes the declaration good, and the other bad;

Per Powys, *Powell*, and *Gould*, *Holt* being abſent. It ſhall be taken in that ſenſe which makes it good.

2d *Exception* was, that no place was laid where the immoderate riding was, nor that it was within the juriſdiction of the inferior court: and it was laid down for a rule, and agreed to by the court, that whatever is eſſentially neceſſary to maintain an action, if the action be brought in an inferior court, that matter muſt be *averred* to have been within their juriſdiction, otherwiſe they have no juriſdiction; for whatever is not *averred* to be within their juriſdiction, ſhall be intended to be out of it. *Vide* 1 *Saund.* 73. It was alſo agreed clearly, that if that, which is the *giſt* of the action, and the compleat cauſe of it, be laid within the juriſdiction, and the declaration ſhews further matter, which is only aggravation, or conſequential damage, without which the action would have lain, ſuch matter need not be *averred* to be within the juriſdiction: as in *caſe* for calling a woman *a whore*, whereby ſhe loſt a marriage; there not only the *words*, but alſo the *loſs of marriage*, muſt be alledged to be within the juriſdiction, becauſe the one, without the other, would not maintain the action; and there one may confeſs the *words*, and traverſe the *damage*. So in *treſpaſs*, by the maſter, for the *battery* of his ſervant, *whereby he loſt his ſervice*, the *loſs of ſervice*, as well as the *battery*, muſt be laid within the juriſdiction. But in an action by a tradeſman, for calling him a *cheat* in his trade, whereby he loſt his *cuſtomers*, there the loſs of *cuſtomers* need not be alledged within the juriſdiction, becauſe the words are actionable without it, and it is only aggravation. 1 *Cro.* 570. 1 *Ro. Ab.* 548. 1 *Jo.* 448. In an action for arreſting one in another man's name, without the conſent of the other, *by which* his other creditors arreſted him, it is not needful to alledge that the creditors came on him within the juriſdiction, becauſe the arreſting in another's name, without the other's conſent, is in itſelf actionable. Then the doubt was, whether the defendant's neglect, in ſuffering the *gelding* to go out of his cuſtody, was a compleat cauſe of action, without any regard to the riding, &c.

And the council urged, that the ſole cauſe of action was the not keeping the *gelding* ſafely, according to the contract; and for this he quoted, the *Regiſter* 106. *Raſt. Ent.* 3. And then it being a *non-feſance*, no *venue* need be, where the *non-feſance* was. *Vide* 1 *And.* 139. and *Walker* v. *Aſhwood*, *Mich.* 10 *W.* 3. in *B. R.*

In *Eaſter term laſt*, on arguing of this caſe, *Holt*, Chief Juſtice, aſked the council for the plaintiff in *error*, if the original declaration had been in this court, whether they would venture to demur to it, for not ſhewing the place where the horſe was immoderately ridden; and he ſaid, ſure they would not: and then if this were a good declaration in a ſuperior court without that, then it will not be neceſſary to *aver* it within the juriſdiction of an inferior court, in an action brought there. To which it was anſwered, that the inference did not follow; for if *indebit. aſſumpſit* be in a ſuperior court, for goods ſold and delivered, though no place be laid where the ſale or delivery was, yet it is no cauſe of demurrer; but the not alledging it to be within the juriſdiction of an inferior court, would be fatal.

Per curiam. The judgment muſt be affirmed, for the neglect of not keeping according to the contract, is the ſole *giſt* of the action; for if the declaration had been, that the defendant did ſo negligently keep the horſe, that he was taken out of his ſtable, and ridden into *Somerſetſhire*, to his damage, &c. the action would lie; or that he ſo negligently kept him, that through his neglect he was beat or abuſed, or wanted reaſonable provender in his inn. And the ſole cauſe of action is, his neglect of due care of him.

Note, The Chief Juſtice ſaid, he recollected the caſe of *Mayo* v. *Combe*, in *Lord Hale*'s time, where the counterpart of an ancient deed was admitted in evidence, and a ſpecial verdict being found in the caſe, finding the original deed, it concluded, *as by the counterpart it did appear*: and this was ſo done, to preſerve the precedent. 1 *Mod.* 4, 94, 114. 2 *Keb.* 31, 546. 3 *Keb.* 1, 2. 5 *Mod.* 211, 386.

And the court held, that the counterpart of an ancient deed, which might be loſt, was good evidence with other circumſtances, but not of itſelf, without other circumſtances; but that a counterpart of a deed, leading the uſes of a fine, was of itſelf good evidence. *See alſo*, *Carthew* 79, 80, 142, 181, 220, 225, 265, 346. *and Skinner* 15, 24, 82, 174, 205, 431, 579, 584, 623, 624, 639, 640, 672, 673. *Vide Mod. Rep. vol.* 6. *p.* 223.

Michaelmas, 3 *Ann.* *Phips* v. *Jackſon*.

The defendant pleaded in *abatement*, that *tempore quod memoria non extat*, i. e. *from time immemorial*, all the clerks of the *Queen*'s court of *Exchequer* were privileged from being ſued elſewhere than in that court; and that the defendant was clerk to *R. P.* one of the *barons* of the *Exchequer* aforeſaid.

On demurrer; *per curiam*, there are two ways of pleading privilege;

One is, to go to iſſue, and at the trial, if the party is an officer of record, to ſhew it by producing the record; if he is not an officer of record, but an attendant to one of the barons, that muſt of neceſſity be tried by a jury, becauſe the court of *Exchequer*, as a court, cannot take notice of it any more than we can.

The other way is, if he is an officer on record, to produce a writ of privilege at the time of the plea pleaded, and then no iſſue can be joined on it: and here the cuſtom is ill pleaded, the *Latin* not being grammar.

But he having ſhewed that he is one of the clerks of a baron, and inſiſting on privilege, ought not we to take notice, that he ought to have privilege?

To which it was anſwered, that he did not *aver* that he was clerk to one of the barons of the *Queen's Exchequer*, but of *our Exchequer*; and for that a *reſpondeas ouſter* was awarded. *Vide Mod. Rep. vol.* 6. *p.* 305.

Michaelmas, 3 *Ann.* *Davenport* v. *Rafter*. Error.

On a writ of *error* of a judgment in the *C. B.* in an action of *debt* on bond, the plaintiff's council took ſeveral *exceptions* to the defendant's plea; and among others the following:

That it was not *averred* any where in the plea, that this judgment, on which the writ on *error* was brought, was the ſame judgment, the *errors* in which were releaſed, except only in the body of the pleading of the releaſe, as if there was ſuch an *averment* in the releaſe itſelf, which was naught: for no iſſue could be taken on that, but there ought to have been a diſtinct *averment* of that, either in the end of the plea, as is uſual in pleas of recoveries in other actions, *&c.* or elſe, after the words *of and concerning the judgment aforeſaid*, the defendant ſhould have added, *the ſame judgment ſtill remaining*, of which the plaintiff has now brought his writ of *error*; and ſo, on that *averment*, iſſue might have been taken.

Holt, Chief Juſtice. There never was ſuch a form of pleading.

Powell, Juſtice. It was better this way.

Holt, Chief Juſtice. The plea is good now after the releaſe is ſet out on *oyer*, for now it appears to be a releaſe of this judgment, and it ſhall not be intended that there was another judgment between the ſame parties of the ſame term; and the replication is not good, for if there was another judgment to which this releaſe might be applied, you ſhould have pleaded it *ſpecially* and *certainly*, and have *averred* that this releaſe was a releaſe of the *errors* in that judgment, and ſo have given the plaintiff an opportunity of anſwering that judgment, as by pleading *nul tiel record*; for if there be no ſuch record, the very foundation of your replication is gone, for if there be no other judgment, this releaſe releaſes this judgment, and the *traverſe* is of a thing not exiſting. The court therefore would not alter the rule, *niſi*. *Vide Raym. vol.* 2. *p.* 1052.

Trinity, 4 *Ann.* *The Queen* v. *Beſt.*

On an *indictment* for conſpiring to charge a man as father of a baſtard child, the defendant demurred to the indictment, and his council took the following exceptions thereto:

1ſt. That it did not appear that any thing came of this conſpiracy, and the bare conſpiring to do an ill thing by another is not *criminal* unleſs the thing be done, for it is the damage the party receives by the conſpiracy, that makes it criminal.

2dly. That it did not appear that the facts the defendants conſpired to charge the proſecutor with were *falſe*; and a conſpiracy to charge a man with a fact that is true is not puniſhable, and therefore the indictment ought to have ſaid the proſecutor was not the father of the child; and as for the *adverbs falſely*, *unjuſtly*, *wickedly*, and *deviliſhly*, which were inſerted in the indictment, thoſe went to the conſpiracy, and the defendants might falſely conſpire to charge the proſecutor with a fact that was true, as if they had promiſed him not to do it; and he compares this to the caſe of *perjury*, where it is not enough to ſay a man did *falſely*, *&c.* ſwear, but the indictment muſt lay, that the fact was falſe.

3dly. The woman on whoſe body the child was ſuppoſed to be begotten was laid in the indictment by ſeveral ſurnames, and he ſaid that ſhe might be the wife of the proſecutor, and ſhe might go by his name among the reſt of her *alias*'s; and this he ſaid was rather to be intended, becauſe they charge the proſecutor with being *father*, which he could not be to a baſtard child.

4thly. The indictment ought to have laid, that the child was like to become chargeable to the pariſh; for unleſs the proſecutor by this accuſation was like to be ſubjected to ſome penalty, the indictment will not lie. The indictment here is nothing but that the defendants conſpired to tell the proſecutor that he was the father of the child *E. E.* was big with.

The court ſeemed to reſt much on the *ſecond exception*, and they ordered *precedents* to be ſearched; and for the *queen* were cited the caſes of the *Queen* v. *Kimberly*, 1 *Lev.* 62. 1 *Sid.* 68. An indictment for conſpiring to charge *J. S.* for having begot a baſtard on the body of *J. G.* to the intent to extort money of him, and held good, and yet no *averment* that the proſecutor was not the father. The *King* v. *Armſtrong*, 1 *Vent.* 304. An indictment in like manner for conſpiring to charge one for the keeping of a baſtard child, and thereby alſo to bring him to diſgrace, and in both theſe caſes, a conſpiracy without any further act done, was held to be indictable.

The court gave judgment for the *Queen*; for they obſerved, that the defendants were charged at leaſt with a conſpiracy to charge the proſecutor with fornication; and though that was a *ſpiritual* defamation, yet the conſpiring to do it was a *temporal* offence, and indictable, and the conſpiracy was the *giſt* of the indictment.

The Chief Juſtice ſaid, that conſpiracies were one of the articles in the commiſſion of *oyer*; and the court obſerved, that *E. E.* would not be intended to be the proſecutor's wife. And *Powell*, Juſtice, ſaid, becauſe in the indictment ſhe was named *ſpinſter*. *Vide Raym. vol.* 2. *p.* 1167.

Trinity, 4 *Ann.* *The Queen* v. *Wyatt.*

On an indictment for *deer-ſtealing*, it was held that convictions are but inducement, and therefore they may be pleaded without *as appears by the record*; the *giſt* of the offence is, the not returning the warrant, and there are many caſes, that where a matter of record which is *alledged* in pleading is only introductory, it is not neceſſary to *aver* it by the record. *Vide Raym. vol.* 2. *p.* 1189.

Hilary, 11 *Ann.* *Thornicraft* v. *Barns.* Error.

On a writ of *error* brought on a judgment given in the court of *C. P.* where the action was *debt* on a bond of 1000 *l.* penalty, conditioned, that if ſuch a one, being an apprentice, ſhould *purloin* or *imbezzle* any thing to his maſter's damage, that then he ſhould make it good. The breach aſſigned was, that he did imbezzle and purloin 200 *l.* On this iſſue being joined, a verdict was found for the plaintiff, and judgment accordingly.

On *error* brought, it was inſiſted, that the breach was not well aſſigned; for the condition of the bond tying it up to ſuch purloining as ſhould be to the damage of the maſter, the plaintiff in the original action, ſhould have *averred* that this was a purloining to the damage of the maſter.

But the whole court thought the judgment of the court of *C. P.* was well given; for the words purloining and imbezzling are always taken in a bad ſenſe, and neceſſarily import damage to the maſter; and what appears plainly needs not to be *averred*, according to the maxim of law, *what clearly appears need not be verified*. Judgment affirmed, *niſi*. *Vide Mod. Rep. vol.* 10. *p.* 149.

Michaelmas, 12 *Ann.* *Seſtern* v. *Cibber.*

In an action of *debt* on bond, brought by the plaintiff, as aſſignee of the ſheriff; on demurrer, the defendant's council took the following *exceptions* to the declaration.

1ſt. That the breach of the condition was ſet forth to be, his not appearing *according to the exigence of the writ, and according to the form of the writ*; whereas it ought to have been, his not appearing at the return of the writ. 1 *Levinz.* 145. 3 *Lev.* 243.

2dly. It was objected, that the very foundation of the action, *viz.* the *breach*, was ſet forth by way of recital, *when alſo he did not appear*, which ought to have been expreſsly *averred*, that ſo the defendant might have the liberty of traverſing it. *Cro. Eliz.* 441. 2 *Jones* 197. 2 *Lev.* 206.

3dly. The declaration does not ſet forth on what day the writ was returnable; and then it *does not appear*, whether the defendant did, or did not appear *according to the exigence of the writ*, nor whether the bond was or was not forfeited.

Eyre, Juſtice. This caſe differs very much from the caſe of a ſheriff ſuing this bond himſelf, for there he has nothing to do but declare on the bond; but where the action is brought by the *aſſignee*, there it is the forfeiture that gives the action, which in this caſe is the *non-appearance*, and is a matter traverſable, and muſt not be ſet forth by way of recital, but muſt be poſitively *averred*.

In declaring on an *indebitatus aſſumpſit*, the *cumque etiam* is uſed; ſo in a bond, *quod cum by his certain obligatory writing*. But then in the firſt caſe it is the *promiſe*, and in the ſecond the *breach of the condition*, which gives the action; both of which are always poſitively *averred*, and not ſet forth by way of recital.

Parker, Chief Juſtice. It is not true, that there is no traverſing what is only ſet forth by way of recital; for the pleas of *non aſſumpſit*, and *non eſt factum*, are both of them pleas that traverſe matters, in thoſe reſpective actions that are pleaded by way of recital.

The return of the writ not being ſet forth, is a fatal objection. *Vide Mod. Rep. vol.* 10. *p.* 191.

Trinity, 13 *Ann.* *Johnſon* v. *Gardiner*.

On a promiſe of payment made by an executor after the death of his teſtator, it is not neceſſary for the plaintiff in his declaration to *aver* that the defendant has aſſets; for unleſs he had, there was no occaſion for his making ſuch a promiſe. *Cro. Jac.* 602, 613. *Vide Mod. Rep. vol.* 10. *p.* 254.

Michaelmas, 2 *Geo.* *Child* v. *Peirce*. Error.

On a writ of *error* brought to reverſe the judgment obtained in this cauſe, it was inſiſted by the council for the plaintiff in *error*, that the declaration of the plaintiffs was naught, becauſe they declared, that the defendant was indebted to them as aſſignees of a commiſſion of bankruptcy againſt *J. S.* in the ſum of 320 *l.* for ſo much money had and received by the defendant from the bankrupt, and the declaration did not ſtate that the money was the money of the bankrupt.

The council on the other ſide argued, that the declaration was good, becauſe it firſt of all ſets forth, that the defendant was indebted, and then goes on and ſhews how he was indebted, *viz.* by money received by the defendant, that is by a neceſſary intendment, ſuch money as will create a debt, the money of the bankrupt, and cited the caſe of *Atherpe* v. *Jones*, where judgment by default in the *C. B.* was given, and a writ of *error* brought; there the declaration ſet forth, that the defendant was indebted to the plaintiff in ſo much money, for the uſe of a coach-horſe of the plaintiff's, delivered by the plaintiff to the defendant.

The council for the defendant in *error*, in that cauſe objected, that the delivery of the coach-horſe did not neceſſarily import a debt, for poſſibly the defendant might be to pay nothing for the uſe of him: but the court were of opinion, that ſuch a delivery muſt be preſumed as did create a debt. Adjourned. *Vide Mod. Rep. vol.* 10. *p.* 331.

Eaſter, 6 *Geo.* *Nicholſon* v. *Simpſon*.

In *debt* on bond, with a condition, reciting that *H. Simpſon* was convicted on the proſecution of the plaintiff, for unlawfully killing a deer on a place called *Whinny Rig Ground*, in the pariſh of *Clifton*, in a chace of the Earl of *Thanet*, about the 6th of *Auguſt* laſt, and that it was removed into this court by *certiorari*, that if *H. Simpſon* pay the proſecutor coſts and damages within a month after the confirmation of the conviction, a *procedendo* granted, &c. after *oyer* of the condition, the defendant pleads, that the conviction in the condition mentioned of the ſaid *H. S.* at the proſecution of the ſaid *N.* for unlawfully killing *unum cervum* i. e. *a red deer*, about the 3d of *Auguſt*, &c. was never affirmed by this court.

The plaintiff in reply, ſets out the information, and that the conviction was removed, and affirmed, *as appears by the record*; and then *avers*, that the defendant was never convicted of killing any one red deer in the chace aforeſaid, except that in this conviction; and that the deer in the condition, and that in the conviction is the ſame, and the killing the ſame, and that the place called *Whinny Rig* in the condition mentioned, lies within the ſaid chace, called *Eglebird*, alias *Whinfield*, in the condition mentioned, and not elſewhere, and ſo alledges the identity of perſons and things in the conviction and condition. The defendant rejoins, and prays *oyer* of the records, and pleads as before, that the conviction was never affirmed, to which the plaintiff demurs; and objected, that the conviction and condition varied both in time and place; as to the time, the condition is about the 3d of *Auguſt*, and the conviction is between the laſt day of *July* and the 6th of *Auguſt*; and as to the place, the condition is for killing in a place, called *Whinny Rig Ground*, in the chace of Lord *Thanet*, the conviction for killing in the ſame chace, called *Eglebird* alias *Whinfield*.

Per curiam. The variances are helped by the *averments*, which might have been traverſed, and not having been traverſed, muſt be admitted to be true; and therefore judgment was given for the plaintiff.

Eyre and *Forteſcue*, Juſtices, doubted whether the plea was good, becauſe it is ſaid, the conviction in the condition mentioned, and yet deſcribes it wrong, and ſays for killing of a *red deer*, and in the condition it is ſaid for killing of a *deer*. *Vide Forteſcue*, *p.* 357.

Michaelmas, 6 *Geo.* *Hayman* v. *Rogers*.

In an action of *covenant*, the plaintiff declared on articles, dated the 30th of *September* 1718, not to ſet up the trade of a baker, *from the day of the date of the articles*, for ſuch a number of years, and then ſays, that *afterwards on the* 1*ſt of May*, 1718, (which is four months before the ſaid articles were made) the defendant exerciſed the trade in that place; and after a verdict for the plaintiff, it was moved in arreſt of judgment, that the time of the breach was no part of that to which the reſtraint goes, and therefore the plaintiff has no cauſe of action.

The council for the plaintiff inſiſted, that the verdict cured this objection, for ſaid he, we could not have recovered without proof of an exerciſing after the date of the articles.

Per curiam. Where what comes under a *ſcilicet* is conſiſtent with that which preceded it, it is always conſidered as an *averment*; but if inconſiſtent we reject it, as in the common caſe in *ejectment*, where the leaſe is from *the day of the date*, and the entry and expulſion laid the ſame day; we will reject *the* 1*ſt of May*, 1718, and then the caſe is, that he covenanted *the* 30*th of September*, 1718, and afterwards committed the breach. Wherefore the plaintiff had judgment. *Vide Strange*, *vol.* 1. *p.* 232.

Michaelmas, 9 *Geo.* *Holoway* v. *Thurſton*.

In an action on the *caſe*, &c. the plaintiff declared, and laid his damages to 400 *l.* The defendant pleaded the ſtatute of limitations, *viz.* he did not promiſe within ſix years: the plaintiff replied, that he ſued out a *latitat* to take the defendant two years before the action brought for 150 *l.* and on a demurrer to this replication, it was inſiſted for the defendant, that theſe were different actions, for no man would take out a *latitat* for 150 *l.* and declare *ad damnum* 400 *l.* it is true, if the plaintiff had *averred* it had been one and the ſame cauſe of action, it might have been otherwiſe; and ſo it was ruled by the court. *Vide Mod. Rep. vol.* 8. *p.* 109.

Michaelmas, 11 *Geo.* *Elliot* v. *Cowper*.

An action was brought againſt the indorſer of a promiſory note, wherein the plaintiff declared, that one *Coates made a note* in writing, omitting the words *ſubſcribed with his own hand*, by which he promiſed to pay to the defendant or order, ſo much money, &c. that the defendant indorſed this note to the plaintiff, and that, *although* he demanded the money *of the ſame Coates*, he did not pay it.

The defendant demurred ſpecially, for that the plaintiff did not ſet forth that *Coates*, of whom the money was demanded, was the ſame *Coates* who drew the bill; to which it was anſwered, that the declaration ſets forth, that the note was made by one *Coates*, and that the plaintiff demanded the money *of the ſame Coates*, which is a good and certain *averment* that he was the ſame perſon, and the court was of that opinion.

Then it was objected, that the ſtatute, which gives credit to ſuch notes, and a remedy to recover on them, where there was none at *law*, enacts, that all notes ſigned by any perſon, &c. and it doth not appear by this declaration, that *Coates* ſigned this note.

To which it was anſwered, that the plaintiff ſet forth, that *Coates made a note*, which implies ſigning it; for he could not make it without ſigning it. The plaintiff had judgment. *Vide Mod. Rep. vol.* 8, *page* 307.

Hilary, 1 *Geo.* 2. *The King* v. *Franklin.*

The defendant having been convicted on an information for publiſhing a libel againſt the government, it was now moved in arreſt of judgment, that the *diſtringas* was not returned by the proper officer; and the caſe was, the defendant having been tried in *London*, the ſheriffs of *London* returned the *venire fac.* and put their names thereto, according to the ſtatute of *York*, *Tho. Lone*, *Mil.* and *J. S. viz.* the other ſheriff; and the *diſtringas* was returned by *Tho. Lone*, *Mic.* and by his companion *J. S.* and therefore it was now inſiſted, that the *diſtringas* was not returned by the proper officer, and ſo the defendant was not duly tried, for the two ſheriffs of *London* are to be taken as one returning officer, ſo that this is not to be compared to a return made by *coroners*. *Hob.* 70. Now this exception comes before the court in this caſe, in a different manner from what it would on a writ of *error*; for there it would be an *averment* againſt the record; but here this being a proceſs which iſſued out of this court, any irregularity in the execution of the ſame, muſt be taken notice of: and here the defendant's council proved *Tho. Lone*, *Mil.* to have been one of the ſheriffs of *London*, at the time of this return made: to this exception, the Attorney General anſwered, that here it muſt be intended, *Tho. Lone*, *Mil.* was ſheriff of *London* at the time the *venire* was returned, and that he died, or was turned out, before the return of the *diſtringas*, and was ſucceded by *Tho. Lone*, *Mic.* who, as ſheriff, returned the diſtringas; for the matter appearing thus on the record, no *averment* or proof can be received to the contrary.

Raymond, Chief Juſtice. The name in the *venire* is different from that in the *diſtringas*; and had the return been made by a ſtranger, it had not been good, and the party muſt have had a remedy, which he cannot have in any other manner, than by proving that he who made the return was not ſheriff: the preſumption is, that he who makes the return is the proper officer; but when the contrary is offered to be proved, I do not ſee how we can refuſe admitting it.

Then the Attorney General moved, that the ſtatute of *York* requires only the ſheriff's name to be indorſed, and therefore that the addition of *Mil.* and *Mic.* in this caſe is ſurpluſage, and conſequently, that one man who was the ſheriff, returned both writs: and further, ſince it can be proved the ſheriff made this return, that he may be bound by rule to attend, in order to amend it; which the court ſaid, they would conſider of. *Adjourned. Vide Fitz-Gibbons*, *p.* 5.

Michaelmas, 1 *Geo.* 2. *Holiday* v. *Fletcher.*

The declaration ran thus; A. H. *complains of* P. F. *adminiſtratrix of all and ſingular the goods and chattels, rights and credits, of her late deceaſed huſband*, B. F. *who died inteſtate*, &c. to which the defendant demurred, and ſhewed for cauſe, that there was no *averment* that adminiſtration was committed to the defendant; it being common, towards the concluſion of the declaration, to ſay, *to which ſaid* P. F. *letters of adminiſtration* &c. *have been granted.* And the defendant's council cited, *Cro. Jac.* 10. 1 *Sid.* 228. 2 *Vent* 84. *Litt. Rep.* 30. *Jones* 1. *Bro. Adm.* 11. *Raſt* 820.

Per curiam. There is a material difference between declarations in this court, and in the *Common Pleas*, where the beginning of the declaration is only a recital of the writ, whereas in this court it runs, A. B. *complains of* C. D. &c. Here it is ſufficiently alledged, ſo as to be traverſed; and the word *exiſtente* muſt be underſtood. Accordingly the plaintiff had judgment. *Vide Strange*, *vol.* 2. *page* 781. *Raymond*, *vol.* 2. *page* 1510.

Eaſter, 2 *Geo.* 2. *Philips* v. *Knightly.*

In *debt* on a bond for non-performance of an award, the defendant pleads that no award was made: the plaintiff replies, that according, *&c.* the arbitrators had appointed an umpire, who awarded, that whereas a ſuit by *qui tam* was carried on by the plaintiff againſt the defendant, the defendant ſhould pay the plaintiff 5 *l.* on ſuch a day at *L.* and thereon the plaintiff ſhould covenant with the defendant to ſave him harmleſs from the coſts and damages of that ſuit; and the plaintiff *avers*, that he, the plaintiff, did come to *L.* on the day appointed, between the hours of ten and twelve of the clock in the forenoon, and continued there; and that the defendant, nor none for him, was there to pay the money, *&c.* The defendant demurred ſpecially.

And it was argued by his council, that the umpirage is void, for that the coſts and damages being not thereby aſcertained, the law muſt reduce them to a certainty; and for that, notwithſtanding this covenant ſhould be entered into, ſtill the defendant might be ſued for thoſe coſts and damages, though the plaintiff ſhould thereby be liable to an action of *covenant*; ſo that this umpirage does not put an end to the matters that were in controverſy between the parties: then the plaintiff has not entitled himſelf to this action, for it is not *averred* that he continued at *L.* the whole day appointed for the payment of the money, ſo that it does not appear that the defendant had an opportunity to tender the ſum awarded, for that ſhould be a convenient time before the ſetting of the ſun; and it is not *averred* the plaintiff was then at *L.* ſo that no breach is aſſigned.

The plaintiff's council in reply ſaid, an umpire may appoint a particular ſecurity againſt a matter in controverſy between the parties, as the *covenant* is in the preſent caſe. 1 *Cro.* 541. 1 *Mod.* 9. And the reaſon why the award was held void in *Salmon*'s caſe, 5 *Co.* 77. was, becauſe the bond awarded to be given was not appointed to be for any certain ſum, which ſhews that otherwiſe it would have been a good award, and ſo by the ſame reaſon is the awarding a *covenant* to be entered into in the preſent caſe.

As to the other objection; the plaintiff's replication, though it be in aſſigning a breach, is to be taken to a common intendment; and it is *averred* the plaintiff came to the place appointed, and continued there; and though it is not ſpecially *averred* that he continued there till the laſt inſtant of the day, it ſhall be ſo intended till the contrary is ſhewn by the other ſide.

Raymond, C. J. The plaintiff muſt intitle himſelf to his action, by ſhewing a ſpecial breach of the condition of the bond, which he has not done in this caſe: the replication therefore is not to be taken to a common intent, and if the defendant ſhould ſhew in this caſe that he had it not in his power to perform the award, it would be a departure, for he pleaded that no award was made.

Reynolds, J. I think a particular ſecurity pointed out by the arbitrators may be good; and here it ſeems to amount to a *covenant perpetual*, according to the caſe of *Clayton* v. *Kynaſton*, *Salk.* 573, 574. but here is no breach aſſigned.

And the court being determined to give judgment for the defendant on the pleadings, the plaintiff *diſcontinued*, on paying coſts. *Vide Fitzgibbons*, *p.* 53.

Eaſter, 2 *Geo.* 2. *Bowles* v. *Markwith.*

In an action of *covenant*, the plaintiff declared, that he covenanted with the defendant to transfer, at a certain day, ſuch a ſhare of ſtock, with the dividends and profits that in the mean time ſhould ariſe on the ſame, to the defendant at the *South Sea* houſe, at the uſual hours when the books of the company are open; and that the defendant did covenant to accept the ſame, and pay ſo much to the plaintiff for it, provided the plaintiff tendered it at the time and place above mentioned; and he *avers* that he was at the *South Sea* houſe on the day, at the uſual hours when the books are open, to tender the ſaid ſhare of ſtock, with the dividends and profits of the ſame to the defendant; but that the defendant did not accept the ſame, *but abſolutely refuſed, and ſtill doth refuſe to accept*, &c. The defendant demurred ſpecially; and it was argued for the defendant, that the plaintiff ſhould not only have ſaid generally that he did tender the dividend and profits, but alſo have ſpecified what they were; and this is the ſame with a tender of rent and arrears, which muſt be alledged ſpecially; and the defendant having demurred ſpecially to it, makes it fatal.

And the declaration is naught, for another reaſon, for the plaintiff only *avers* that he was at the *South Sea* houſe at the uſual hours, whereas he ought to have ſpecially *ſet forth* theſe uſual hours, and then have *averred* that he continued at the *South Sea* houſe, till ſuch a time of the extremity of thoſe hours, within which he might have conveniently made a tender, according to the covenant, and the caſe of *Lancaſhire* v. *Killingworth*. 2 *Salk*. 623. and 5 *Mod*. is in point.

The plaintiff's council replied, it is ſufficient to aſſign a *breach* in the words of the *covenant*. 2 *Cro*. 171. and here the plaintiff has *averred* a tender of the dividend and profits, according to the letter of the *covenant:* and the only diſadvantage that could be ſuppoſed to the defendant from the plaintiff's not having ſpecified how much the dividends and profits were, is, that if *iſſue* were joined, it would be too general for the defendant to make a defence thereto, which cannot be in the preſent caſe, thoſe being things certain in their own nature: as to the other objection, it is generally true, the party muſt be at the place appointed at the extreme time of the day or hours, to make a tender; but if he is there at any time of the day or hour, and makes a tender, and the other party refuſes to accept, he has performed his part, 1 *Inſt*. 206. *b*. 5 *Co*. 114. Now, the plaintiff has ſet forth, that the defendant refuſed to accept, which neceſſarily implies a tender; and this makes a clear difference between the preſent caſe, and that of *Lancaſhire* v. *Killingworth*, for there no refuſal was laid: and though it is not expreſsly laid, that the refuſal was at the place appointed, yet it muſt be ſo taken; and if *iſſue* had been joined, the plaintiff muſt have proved it.

Per curiam. The plaintiff has not entitled himſelf to his action, becauſe he has not ſhewn what are the uſual hours of keeping the books open, and that he was at the place a convenient time before the ſhutting the books, ready to make a tender; and the refuſal being not expreſsly laid to be at the time and place, ſhall not be ſo intended; if it had been ſo laid it would have been good: wherefore the plaintiff praying to *diſcontinue*, and it being oppoſed, the court anſwered, that as this caſe is, judgment for the defendant would not be a *bar* to the bringing another action. *Vide Fitz-Gib. p*. 61.

Eaſter, 4 *Geo*. 2 *The King* v. *Lady Lawley*.

The defendant moved in arreſt of judgment after conviction, on an information for attempting to perſuade a witneſs not to appear an evidence againſt *Japhet Crooke* for forgery: and the exception taken was, that it was not poſitively *averred* that *Crooke* was indicted; it was only laid, that ſhe, *knowing* that *Crooke* had been indicted, and was to be tried, acted in ſuch and ſuch a manner; whereas in all criminal caſes the fact muſt be poſitively alledged, and not by inference. 5 *Co*. 120. 6 *Mod*. 30. 4 *Co*. 44. *b*. 2 *Cro*. 19. 4 *Co*. 18. *Hard*. 2. *Bulſ*. 292. 1 *Roll. Rep*. 70.

Per curiam. It is well enough; there is no real difference between indictments and actions, when the *giſt* of the action muſt be poſitively *averred*. 1 *Sid*. 183. 337. 2 *Sid*. 137. *Salk*. 686. 2 *Lev*. 208. 5 *Co*. 120. 2 *Roll. Abr*. 82. *pl*. 4. 9. 12. *Dy*. 69. *a*. *Appendix to State Trials*, 50.

Judgment was accordingly given for the *King*, and the defendant fined 300 marks, and ſentenced to a month's impriſonment. *Vide Str. vol*. 2. *p*. 904.

Eaſter, 5 *Geo*. 2. Goodtitle v. *Petto*.

In *ejectment* on the demiſe of *William Thornton*, a caſe was made for the opinion of the court, that *Angelo Burt* being ſeized in fee of the premiſes in queſtion *June* 20, 1702, covenanted to ſtand ſeized to the uſe of him and his wife, for their lives, and the life of the ſurvivor, remainder to the iſſue of their two bodies, remainder to the uſe of ſuch perſon or perſons, as his wife ſhall think fit to diſpoſe to, and for want of ſuch diſpoſition to the uſe of the leſſor of the plaintiff: that by indentures of leaſe and releaſe, 13th and 14th of *April*, 1724, after the death of the covenantor, without iſſue, *Ann*, the wife, conveyed the premiſes to her ſiſter *Joan*, and her heirs, reciting the power, and her intention to diſpoſe. That *Joan*, by her will, gave the premiſes to the defendant, that the leſſor of the plaintiff was the nephew of the covenantor, and whether he or the defendant had the right, was the matter diſputed.

Two points being made in the caſe, 1ſt. Whether any uſe can ariſe to the defendant, who is a ſtranger to the conſideration; and 2dly, Whether if the defendant has no title, the leſſor can be ſaid to have any, as within the conſideration:

The court were unanimouſly of opinion as to the firſt point, that the defendant had no title. Had the limitation been to the wife in fee, beyond all doubt thoſe claiming under her would have enjoyed. But the expreſs condition being only for the ſupport of the wife, and the appointment not for her benefit, and ſhe having a naked power for the benefit of ſtrangers only; thoſe ſtrangers can never claim under ſuch a conſideration, according to the caſe of *Thomlinſon* v. *Dighton*. *Salk*. 239. 4 *Co*. 176.

And as to the ſecond point, that the leſſor of the plaintiff had a title; 1ſt. Becauſe he is named in the deed; 2dly. Becauſe it is ſtated that he was nephew to the covenantor. And though the deed does not mention him as ſuch, yet being expreſsly named, he may *aver* himſelf within the conſideration, according to *Mildmay*'s caſe. 1 *Co*. 176. 7 *Co*. 40. 11 *Co*. 23. Wherefore the plaintiff had judgment. *Vide Str. vol*. 2. *p*. 934.

Michaelmas, 9 *Geo*. 2. *Obin* v. *Knott*.

Nul tiel record being in the negative, need not be *averred*. *Vide Forteſcue, p*. 339.

Trinity, 32 & 33 *Geo*. 2. *The King* v. *Boyall*.

On a motion to *ſhew cauſe againſt* quaſhing an indictment brought againſt the defendant, a pariſhioner of *Market Deeping*, in *Lincolnſhire*, for not ſending out his carts, &c. to the ſix days highway labour, purſuant to an order from the overſeers, &c.

The defendant's council took the following *exception*, among others, to the indictment.

Objection. That *J. M*. and *J. T*. are not ſufficiently alledged to be ſurveyors of the ſaid highways; it is only, that they *being* ſurveyors, &c. and it is not ſaid by whom they were appointed.

Lord Mansfield. As to this *objection*, *being* is a ſufficient *averment*. *Vide Bur. vol*. 2. *page* 833.

Eaſter, 33 *Geo*. 2. *Johnſon and another, aſſignee, &c.* v. *Smith Wid. Extrix, &c.*

On arguing the *demurrer* in this cauſe, the queſtion was, whether the *truth* of the *fact* could in this caſe be *averred* contrary to the *fiction* of *law*.

After hearing council for the plaintiff and defendant, the court gave their opinion.

Lord *Mansfield*. This *demurrer* can only be ſupported on one of theſe two grounds.

1ſt. That the fact *averred* is not *relevant*.

2dly. Suppoſing it *relevant*, that proof cannot be received to ſhew the truth.

The firſt depends on the conſtruction of the *ſtatute* of *limitations*, 21*ſt Jac. cap*. 16. *ſect*. 3.

Second point, whether the party may be permitted to ſhew that the *latitat* was taken out after the *ſix years* expired.

Where the *arreſt* is before the *actual* ſuing out of the writ, it has been often determined, that it cannot be juſtified, and that the *day* when it iſſued may be *averred*, notwithſtanding the *teſte* is before the *arreſt*.

An *averment* that a *latitat teſted* the laſt day of the preceeding *term* iſſued in the *vacation*, does not tend to diſcredit the officer, for by *law* it may ſo iſſue, and ought to be ſo *antedated*. It cannot be ſet aſide on motion for irregularity, becauſe it is right. The *averment* does not contradict the record, becauſe taking the courſe of this court, together with the *teſte* of the *writ*, it ſtands indifferent whether the writ was ſued out the laſt day of the *term*, or in the *vacation*.

In caſe of *purchaſers*, the time of *ſigning judgment* may be *averred*.

If to invalidate the writ, there was an *averment* that it *iſſued* on a *day* in the *vacation*, there the inference would hold from the caſe of a judgment or *fieri facias*, and ſuch an *averment* could not be allowed, becauſe to that purpoſe the *fact* is not *relevant*, for by *law* a *latitat* may *iſſue* in the *vacation teſted* the laſt day of the *preceding term*.

Per curiam. We are all clearly of opinion, that the *averment* in the defendant's *rejoinder* ought by *law* to be *admitted*, and conſequently the *demurrer* muſt be over-ruled. *Vide Bur. vol.* 2. *p.* 950.

See this caſe fully ſtated in *page* 9 of this work, under the head *Abatement*.

Michaelmas, 33 *Geo.* 2. *Collins* v. *Gibbs*.

On a motion in *arreſt of judgment*, the defendant's council took this *objection*, *viz.* the want of an *averment* of the performance of what he inſiſted to be a condition *precedent*.

Lord Mansfield. This is a motion made by the defendant in *arreſt of judgment*, by *default*; ſo that it comes before the court, exactly as if it had been on *demurrer*, and is not like the caſes of objections to judgments after verdict.

The plaintiff had not *averred performance* of what was to be done on his part, nor ſhewn that he was ready to perform it.

Therefore we are all of opinion, that it cannot be made good, as laid in the declaration; and the true *diſtinction*, as to ſupplying ſuch defects, is, whether the objection be made after a verdict, or not.

Per curiam. Let the *judgment* be *arreſted*. *Vide Bur. vol.* 2. *p.* 899.

Trinity, 33 & 34 *Geo.* 2. *The King* v. *Pemberton*.

On *ſhewing cauſe* againſt a rule for quaſhing an indictment on *ſtat.* 5 *Eliz. cap.* 4. *ſect.* 31. for exerciſing the occupation of a *tanner*, not having ſerved an apprenticeſhip thereto, for *ſeven years*.

The defendant's council took *three exceptions* to the indictment, the laſt of which was,

That an indictment will not now lie on *ſtat.* 5 *Eliz. cap.* 4. *ſect.* 31. *alone and generally*, but it ought to ſpecify all the other qualifications allowed by the *ſubſequent ſtatute*, and to ſhew that the party is not within any of them, as is uſual in *convictions* on the *game acts*, and for ſwearing; and on *ſtat.* 8 & 9 *W.* 3. *cap.* 27. for the better preventing the counterfeiting the current coin of this kingdom.

. *Per curiam*. Whatever *licence* might be given by any ſtatute *ſubſequent* to the 5 *Eliz. cap.* 4. to perſons who had not ſerved a *ſeven years* apprenticeſhip, to exerciſe the trade of a *tanner*, under certain other qualifications therein deſcribed; yet as the trade of a *tanner* was clearly a trade uſed at the time of making *ſtat.* 5 *Eliz. cap.* 4. and ſeems acknowledged by 1 *Jac. cap.* 22. to be *included* in 5 *Eliz. cap.* 4. It is not neceſſary, in an indictment on 5 *Eliz. cap.* 4. for having uſed this trade without having ſerved ſuch an apprenticeſhip, to *aver* the want of *other qualifications*, which by the *ſubſequent* ſtatute entitled a perſon ſo *qualified* to uſe the trade but ſuch other *qualifications*, or *exceptions*, muſt be ſhewn by the defendant, by way of excuſe, either by *plea*, or in *evidence*. It is ſufficient for the proſecutors to bring the caſe within the general *purview* of the ſtatute on which the indictment is founded, if that ſtatute has general *prohibitory words* in it; for where an indictment is brought on a ſtatute which has *general prohibitory* words in it, it is ſufficient to charge the offence *generally*, in the words of the ſtatute. Therefore the *rule* to *ſhew cauſe* was diſcharged. *Vide Bur. vol.* 3. *p.* 1036.

Trinity, 3 *Geo.* 3. *Combe, Eſq.* v. *Pitt*.

This was an action of *debt* for 1500 *l.* brought by the plaintiff againſt the defendant, for corrupting three voters at an election; and another action was brought againſt him, by another perſon, for the very ſame penalty.

Per curiam. Where there are two actions brought for the ſame penalty, it behoves the defendant to *aver* the right of action was *attached* in ſome other perſon, before the preſent plaintiff's action commenced. *Vide Bur. vol.* 3. *p.* 1423.

See this caſe fully ſtated, in *page* 10 of this work, under the head *Abatement*.

Bail.

Common and Special.

Hilary, 5 *W.* 3. *Wyatt* v. *Evans*.

In debt for 99 *s.* on a plaint levied in an *inferior court*, and bail put in afterwards, the cauſe was removed by *habeas corpus* into this court, and there the plaintiff declared as in *debt* on bond for 6 *l.* The queſtion was, whether the *bail* put in here to the *habeas corpus* ſhould be liable. *Adjudged*, that they ſhould not, for that it was another cauſe of action, than that to which they were *bail*. *Vide Salk. vol.* 3. *p.* 55.

Hilary, 7 *W.* 3. *King* v. *Sharpe*.

On a *ſci. fac.* againſt the *bail*, who pleaded that the *principal* died before the return of the *capias*, &c. on a ſpecial demurrer, the plea was *adjudged* ill, for it ſhould be that he died before the return of any *capias*, that it may appear he was not alive at the return of the firſt *capias*, for if he was, the *recognizance* is forfeited.

The reaſon why, the death of the *principal* before any *capias* ſued out, is a good plea, is, becauſe the *principal* had an election either to pay the money, or to *render* his body to priſon, and the laſt is become impoſſible by the act of God. *Vide Salk. vol.* 3. *p.* 57.

Hilary, 8 *W.* 3. *Conyers* v. *The Bail of Rawlins*.

On a *ſci. fac.* brought againſt the *bail*, they come in and plead, that before the return of the *ſecond ſci. fac.* the *defendant* in the *original action* paid the money; to which the plaintiff replied; and inſtead of the defendant concluding to the country, and iſſue being tendered, concluded with, and *this he is ready to verify*, whereon the plaintiff demurred.

Per curiam. *Bail* may plead payment by the principal; but it muſt be in a right manner, which is not done in this caſe, becauſe the *recognizance* was broke before the ſuing out of the *firſt ſci. fac.* and there fore pleading payment before the return of the *ſecond* has not the colour of a good plea. Whereon it was *urged*, that the plaintiff could not have judgment, becauſe he prays execution *for the debt and damages*, whereas it ſhould have been *for damages* only; for the *recognizance* in this court not being in a ſum certain, there can be no *debt* created in the *bail* thereby.

Per curiam. We will reject *for the debt* as *ſurpluſage*; wherefore let the plaintiff have judgment. After which the defendant brought a writ of *error*, returnable in the *Exchequer Chamber*, but on a motion, the plaintiff had leave to take out execution; for no writ of *error* lies on a *ſci' fac'* againſt *bail* in that court. *Vide Mod. Rep. vol.* 12. *p.* 112. *Raym. vol.* 1. *p.* 157.

Eaſter, 8 *W.* 3. *Williams* v. *Williams*.

A. ſued *B.* in three actions, and he put in three *bails*; the plaintiff recovered in all, the defendant rendered himſelf, and one of the *bails* entered an *exoneratur* on the *bail-piece*, the others did not.

Per curiam. The rendering is a diſcharge as to all, but is not compleat as to all, till all have entered an *exoneratur* thereon. *Vide Salk. vol.* 1. *p.* 98.

Trinity, 8 *W.* 3. *Williams* v. *Batter & al.*

The queſtion was, Whether a *reddidit ſe* on one action, where there were two actions againſt the ſame party, in which the ſame parties were *bail*, ſhould be a diſcharge to the *bail* in the other action? and the court were of opinion that it ſhould diſcharge the *bail* in the other action too; and the plaintiff's attorney having notice of it, and afterwards taking out execution againſt the *bail*, the execution was diſcharged, and the attorney ordered to pay ſuch coſts as the maſter ſhould tax. *Vide Mod. Rep. vol.* 12. *p.* 99.

Hilary, 9 *W.* 3. *Anonymous.*

By an act for granting to their Majeſties ſeveral duties on parchment, paper, *&c.* it is enacted, that 6 *d.* ſhall be paid for every piece of parchment on which any *common bail* ſhall be filed, and on which any *appearance* ſhall be made on ſuch *bail*; which *appearance* or *common bail*, the defendant ſhall cauſe to be entered or filed in *eight days* after the return of the proceſs, on pain of 5 *l.* to be paid to the plaintiff, for which the court ſhall immediately give judgment, and the plaintiff take out execution. The writ and return was brought into court, and a certificate from the *proper officer*, that *common bail* was not filed within *eight days*, &c. on which a motion was made, and the court gave judgment *niſi*, &c. *Vide Mod. Rep. vol.* 5. *p.* 392.

Hilary, 10 *W.* 3. *Ethericke* v. *Cooper.*

Per Holt, Chief Juſtice. If the ſheriff takes *inſufficient bail*, he is liable to an *action*, as well as to *amercements*. *Vide Raym. vol.* 1. *p.* 425.

Eaſter, 10 *W.* 3. *Ward* v. *Bendall.*

On a *ſci. fac.* againſt *bail*, the defendant's council urged, that no *capias* had been iſſued againſt the principal; the plaintiff replies, that a writ of *error* was iſſued out, and therefore he could not ſue a *capias*, &c. The defendant demurred.

Per Powell, Juſtice. *Error* on the principal judgment is no *bar* to hinder the ſuing of a *capias* in order to charge the *bail*; and it was ſo adjudged in this court very lately. Judgment for the defendant. *Vide Raym. vol.* 1. *p.* 342.

Trinity, 10 *W.* 3. *The Duke of Ormond* v. *Brierly.*

In an action on a *replevin* bond, *common-bail* ſhall be filed. *Vide Salk. vol.* 1. *p.* 99.

Michaelmas, 10 *W.* 3. *Anonymous.*

On an action brought againſt the maſter of a ſhip for imbezzling goods laden on board his ſhip, he was held to *ſpecial bail*; but if the action had been for negligent keeping, *common bail* would have done. *Vide Mod. Rep. vol.* 12. *p.* 251.

Michaelmas, 10 *W.* 3. *Anonymous.*

A. had made a compoſition with his creditors according to the late act; and being ſued by a *non-ſubſcribing* creditor, he moved for leave to file *common bail*, on *ſuggeſtion* that the *debt* on which the plaintiff brought this action, according to the proportion of his compoſition, would be leſs than 10*l.* and ſince the plaintiff, though a *non-ſubſcribing* creditor, was bound by that agreement, it is reaſonable that *common bail* ſhould be accepted. But the motion was oppoſed, becauſe it would amount to a determination of the merits of the cauſe. And it was compared to the *caſe* of an *uſurious contract*, where, though the *contract* be void, the defendant is compelled to give *ſpecial bail*, which the court allowed: for the plaintiff may here traverſe, that the defendant abſconded the 19th of *November*, &c. but if the *plaintiff* had been *ſummoned* before a *judge*, then the matter would have received a determination as the ſtatute directs; or if the plaintiff had been a ſubſcribing creditor, and that had appeared to the court, it would have been reaſonable to allow *common bail*, becauſe his ſubſcribing had been a confirmation of the compoſition againſt himſelf. *Vide Raym. vol.* 1. *p.* 383.

Michaelmas, 10 *W.* 3. *Holland* v. *Serjeant.*

A perſon in the cuſtody of the ſheriffs of *London*, on an execution, was charged according to *Stat.* 4 & 5 *W.* 3. *cap.* 21. in their cuſtody, and for want of proceeding in two terms after, was diſcharged on *common-bail*, as uſual, where perſons are charged in cuſtody of the *Marſhal*; for by this *Stat.* the plaintiff has the ſame benefit as if the defendant was in cuſtody of the *Marſhal*, and therefore it is but reaſonable there ſhould be the ſame rule for the defendant. *Vide Salk. vol.* 1. *p.* 99.

Michaelmas, 10 *W.* 3. *Adams* v. *Cox.*

Per curiam. In the courts of the city of *London* the plaintiff never excepts againſt *bail*, but there is an officer who receives *bail*; and if he takes *inſufficient bail*, on complaint made to the aldermen, he muſt either pay the debt, or the profits of his office are ſequeſtered till the debt is ſatisfied; and when the cauſe is removed up hither, the *bail* and *clerk below* are diſcharged; and if the *bail* given below be offered here, they may be excepted againſt. *Vide Mod. Rep. vol.* 12. *p.* 249.

Hilary, 11 *W.* 3. *Anonymous.*

In *debt* on a bond to perform covenants, no *bail* ſhall be given, but with reſpect to the breaches and the damage done thereby; the meaſure of which ſhall be taken from the plaintiff's oath. *Vide Salk. vol.* 1. *p.* 100.

Hilary, 11 *W.* 3. *Anonymous.*

A queſtion was made, if *bail* be put in in one term, and *new bail* is added the next term after, whether this ſhould be a *bail* as of the firſt term, or only of the term when added? The clerks differed, but the court were of opinion it was only *bail* of that term when the additional bail was put in; for they ſaid, it was not *bail* till completed and accepted, and making the *additional bail* to be *bail* of the firſt term, might do a wrong to a third perſon, who might be a purchaſer after the firſt, and before the *additional bail* was put in. *Vide Salk. vol.* 1. *p.* 100.

Hilary, 11 *W.* 3. *Anonymous.*

On a *non eſt inventus* returned on the *capias* againſt the *principal*, the *bail's recognizance* is forfeited in ſtrictneſs of *law*; but by the courſe of the court, if the principal be rendered before the return of the *alias ſci. fac.* againſt the *bail*, the court will ſtay proceedings. But inſtead of a *ſci. fac.* againſt *bail*, the plaintiff brought *debt* on the *recognizance*, and the *bail* pleaded a *render* before the return of the *latitat* i. e. a *latitat* actually ſued out and entered.

Per curiam. Though this cannot be pleaded, yet the plaintiff ſhall not by this new courſe prevent the grace of the court; we will allow a *render* in this caſe of an action of *debt*, as well as a *ſci fac.* and that at any time before the return of the *latitat*, and perhaps we may enlarge the time; the court denied the caſe in 3 *Keble, Miles* v. *Bateman. Vide Ray.* 14. But in regard there had been pleadings in this caſe, the defendant was ordered to pay coſts. *Vide Salk. vol.* 1. *p.* 101.

Hilary, 11 *W.* 3. *Anonymous.*

Per Holt, C. J. The merits of a cauſe ſhall not be tried in a motion for *bail*. In an action of *debt* on a bond, though the defendant ſays it was thro' *dureſs*, that will not excuſe him from *ſpecial bail*, for the court will not determine the merits on ſuch a motion, nor put a ſlur on the plaintiff's cauſe, which ought to come down fairly to trial without prejudice: the ſame where the defendant ſays a contract is uſurious. *Vide Salk. vol.* 1. *p.* 100.

Eaſter, 11 *W.* 3. *Carril* v. *Cockran.*

On a motion, the queſtion was, whether the court would hold the defendant to *ſpecial bail* on a *ſpecial aſſumpſit* for money won at play. And,

Turton and *Gold*, Juſtices, ſeemed to incline to think that they ſhould not give the plaintiff better ſecurity than he was willing to take at firſt.

Holt, Chief Juſtice, ſaid, they never ought to enter into the merits of a cauſe on a queſtion about *bail*; for to order *common bail* on the merits would *ſlur* a man's *cauſe of action*; and no man ought to have his *cauſe* tried under that *predicament*; and though this may be for money won at play, yet it was a *lawful contract*, which the act of parliament allowed of; and no man ought to be wiſer than the *laws*; and this was giving money againſt money, for which *indebitatus aſſumpſit* would not lie, but an action on the ſpecial contract; and to ſay that becauſe he depended on the defendant's word at firſt, he therefore ſhould have no *ſpecial bail*, would be a reaſon why there ſhould be no *ſpecial bail* in any *ſimple contract*; and here *ſpecial bail* was ordered, and it was ſaid it was alſo the practice of *C. B.* *Vide Mod. Rep. vol.* 12. *p.* 295.

Eaſter, 11 *W.* 3. *Dodd* v. *Beckman and Carman.*

The defendant, *Beckman*, being arreſted at the ſuit of the plaintiff, put in *bail* to the action; and afterwards the plaintiff obtained judgment againſt the ſaid *Beckman*. And after a *capias ad ſatisfaciendum*, ſued againſt him, and *non eſt inventus* returned thereon, the plaintiff ſued two *ſci. fac.'s* againſt *Carman*, as *bail* of *Beckman*, in the aforeſaid ſuit; and after two *nihils* returned, and judgment againſt the *bail*, he took the goods of *Carman* in execution.

The court was moved, on behalf of *Carman*, that he might have his goods out of the *ſheriff's hands*, and that a *vacat* ſhould be made of the judgment, on *affidavit* that *Carman* was not at *London* all the day in which the *bail* was ſuppoſed to enter into the *recognizance*, and therefore that he was perſonated, and for this reaſon that all proceedings ought to be ſet aſide: and cited 2 *Cro.* 256. *Cotton's caſe*, as in point. On which the court referred it to the maſter to examine the ſame, who reported the fact to be thus; *viz.* the defendant, *Beckman*, being arreſted at the ſuit of the plaintiff, gave a *bail-bond* to the *ſheriff*, to appear at the return of the writ. And at the return of the writ, he put in *bail* before *Mr. Juſtice Rokeby*, which not being ſufficient, the plaintiff's attorney *excepted*; and, for want of a *juſtification* of this *bail*, or of putting in of *better bail*, obtained an aſſignment of the *bail-bond*; on which the defendant, *Beckman*, came to the plaintiff's attorney, and told him that he would put in *Carman* as an *additional bail*. Afterwards the plaintiff's attorney went to ſearch in the *judges book*, and there he found *Carman added* to the *bail-piece*. And he proceeded regularly in obtaining judgment againſt the defendant *Beckman*, and afterwards judgment againſt *Carman*, and in taking the goods of *Carman* in execution. The maſter reported alſo, that at the day when *Carman* is ſuppoſed to have been before the judge, and become *bail* for the defendant *Beckman*, he was at *Canterbury*, as appears by an *affidavit* made to that purpoſe by *Carman*'s ſervant. But farther, that *Carman* had been bail for the defendant *Beckman*, in two actions in the *Common Pleas*, before *Mr. Juſtice Blencowe*, within *five* or *ſix days* after the time that he is ſuppoſed to have been entered as *bail* in *Mr. Juſtice Rokeby's bail-book*, in this caſe; and that the defendant *Beckman* was bound in a bond with *Carman*, for *Carman's* debt, about the ſame time, or a very little time after; and that the defendant *Beckman* was inſolvent, and gone beyond ſea. On which the court refuſed to diſcharge the proceedings againſt the *bail*, but diſcharged the *rule* of reference. *See* 3 *Keb.* 694. 1 *Ventr.* 301. *Beaſly's caſe.* 1 *Ventr.* 49. *Parris's caſe.* *Palm.* 197. *Chapleyn* v. *Alleyn.* 19 *Hen.* 6. 44. 21 *Jac.* 1. *cap.* 26. 4 & 5 *W.* & *M. cap.* 4. *Vide Raym. vol.* 1. *page* 445.

Trinity, 11 *W.* 3. *Anonymous.*

Per Holt, Chief Juſtice. In all caſes where a cauſe comes in by *habeas corpus*, the defendant ſhall find *ſpecial bail*, except in the caſe of an executor, &c. and the court acts in this manner through favour and indulgence to *inferior juriſdictions*. *Vide Salk. vol.* 1. *p.* 98.

Michaelmas, 11 *W.* 3. *Anonymous.*

Per Holt, Chief Juſtice. Where a plaintiff in an action ſues on the *bail-bond*, he cannot refuſe the ſame perſons as were *bail* to the *original action*; but if the plaintiff proceeds againſt the *ſheriff*, by *amercements*, he is not compellable to accept thoſe perſons who are ſureties to the *ſheriff*, to be *bail* to the action; ſo if a cauſe be removed by *hab. corp.* out of any *inferior court*, and the *bail* there become *bail* in this court, the plaintiff is compellable to take them; becauſe he might, but did not except againſt them below. Otherwiſe, where a cauſe comes hither out of *London*; for the ſufficiency of the *bail* there is at the *peril* of the *clerk*, and he is reſponſible to the plaintiff; ſo that the plaintiff had not the liberty of excepting againſt them; and the *clerk* is not reſponſible if they are deficient in this court, though he was in *London*. *Vide Salk. vol.* 1. *p.* 98.

Michaelmas, 11 *W.* 3. *Corps* v. *Kitchen Hall.*

Bail was put in in *Michaelmas* term, and excepted againſt, and *additional bail* was put in in *Hilary* term; and the doubt was, whether the *additional bail* were of *Michaelmas* term. In this caſe, if the *bail* referred to *Michaelmas* term, and the *bail* ſhould alien *bona fide*, in the interim, the land would have been charged with the recognizance by that relation.

Holt, Chief Juſtice. It has been an old queſtion, whether *bail* in this court be liable from the time of the recognizance, or from the time of the judgment; and the court here ordered all proceedings to ſtay till they had conſidered of it. *Vide Mod. Rep. vol.* 12. *p.* 318.

Eaſter, 12 *W.* 3. ——— v. *Watts.*

In *debt* againſt *bail*, the queſtion was, whether they ſhould be admitted to *ſurrender* the *principal*, as they might on a *ſci. fa.* on two *nihils* being returned; and it ſeemed reaſonable they ſhould. Therefore a rule of court was made for doing the ſame. *Vide Mod. Rep. vol.* 12. *p.* 351.

Trinity, 12 *W.* 3. *Lyell* v. *The Bail of Galletly.*

H. has a judgment obtained againſt him, and he *renders* himſelf before the return of the *capias*, but never gives the plaintiff notice of his *render*, or gets the *bail-piece* diſcharged; the plaintiff proceeds to judgment againſt the *bail* on a *ſci. fac.* and the court would not relieve them on motion, becauſe no *exoneratur* was entered, and a *ſci. fac.* returned; but put them to their writ of *audita querela*. *Vide Salk. vol.* 1. *p.* 101.

Trinity, 12 *W.* 3. *Anonymous.*

On the return of an *habeas corpus* granted for a perſon committed on an *excom. capiendo* in a ſuit for teaching ſchool.

Holt, Chief Juſtice, ſaid, he was not ſatisfied that they have juriſdiction in the eccleſiaſtical court; and it was agreed by the court they might *bail* the priſoner while the matter was in debate.

Holt, Chief Juſtice, ſaid, he *bailed* one *Clerk* at his chambers, on a matter relating to the Vinters Company, the *habeas* being returnable there, while the matter of the return was in debate; and we *bail* a man in execution on an *audita querela*; but the court did not *bail* the defendant in this caſe, but ordered him to come again next day. *Vide Forteſcue, p.* 243.

Michaelmas, 12 *W.* 3. *Moor* v. *Watts.*

On a *habeas corpus* brought, the *ſheriff* returned, that the defendant was in his cuſtody on a *capias in withernam*: and the caſe was, that a *homine replegiando* was brought; and the *ſheriff* returned an inquiſition, finding, that the party was *eloined* by the defendant, and on that a *capias in withernam* iſſued, and the defendant was taken on it, and a motion was made that the defendant might be *bailed.*

After this matter had been ſeveral times before the court, they, on mature conſideration, came to the following reſolutions:

1ſt. That the defendant cannot be *bailed* on the *habeas corpus,* being taken by the *King's writ*; and that therefore this matter was premature, the writ not being returnable until *eight days of St. Martin,* which was almoſt *fifteen days* after the *firſt motion* made in this cauſe; but the defendant ought to come in when the writ was returned, and demand a declaration, and plead *non cepit,* i. e. *he did not take,* and then the court will *bail* him. And as to the objection made, that men had been *bailed* on an *appeal of murder* brought againſt them, before the return of the writ.

Holt, Chief Juſtice, confeſſed, that he had known *judges* do ſo at their *chambers,* but that he always looked upon it as a miſtake, and that it could not be done.

2dly. That on a plea of *non cepit,* i. e. *he did not take,* the defendant ſhall be *bailed,*

3dly. That when the defendant pleads *non cepit,* he ſhall not wage *deliverance,* becauſe he cannot deliver whom he never took.

4thly. That the *bail* ought to be bound in a *ſum certain,* with condition that the defendant ſhall appear from *day to day,* and if judgment be *given* againſt him, that they ſhall *render* his body *in withernam, there to remain until* he *renders* the party, and ſuffers him to go at large.

But then the opinion of the court being, that the defendant could not be *bailed* until after he had pleaded *non cepit*; the queſtion was, Whether he was demandable on the *withernam* or not.

Holt, Chief Juſtice, delivered the opinion of the court, and ſaid, the plaintiff is demandable at the return of the *capias in withernam* after a *homine replegiando,* if he does not appear he ſhall be *nonſuited. Vide Raym. vol.* 1. *p.* 613.

Michaelmas, 12 *W.* 3. *The King* v. *Purſey.*

Per curiam. When exception is taken to *bail,* notice of it ought to be given to the defendant's attorney. *Vide Mod. Rep. vol.* 12. *p.* 434.

Michaelmas, 12 *W.* 3. *Clapham* v. *Wray.*

Per Holt, Chief Juſtice. When a priſoner renders himſelf in diſcharge of *bail,* at a *judge's chambers,* the practice is, to have an *entry* of it on a *piece of parchment,* ſigned by the *judge,* which is ſent over with the *priſoner* to the *marſhal,* and ought to be brought back and *filed* in the *office,* and is in truth the *record*; and the entry in the *judge's book* is not ſo very material. *Vide Mod. Rep. vol.* 12. *p.* 423.

Michaelmas, 12 *W.* 3. *Duke of Schomberg* v. *Murrey.*

In this caſe it was moved to have leave to charge the defendant *Murrey,* being a priſoner in *Newgate,* on a *ſcandalum magnatum,* and *alſo to anſwer to a bill* of 100*l.* in order to hold him to *ſpecial bail,* for ſaying the *D.* of *S.* was a *cheat,* and had *cheated* the *King* and the *army.*

Holt, Chief Juſtice. The defendant being a poor man, to charge him thus will be a *perpetual impriſonment* to him, and *ſpecial bail* has often been demanded in theſe actions, yet it has been frequently denied: but he was ordered to find *two* that would ſwear themſelves to be worth 25 *l.* each, and himſelf to be bound in 100*l. Vide Mod. Rep. vol.* 12. *p.* 420.

Hilary, 13 *W.* 3. *Croſſe* v. *Smith.*

On *error* brought on a judgment in the court of *Ely,* which, after *errors* aſſigned, was removed into this court by *certiorari.*

Holt, Chief Juſtice, ſaid, he was ſurpriſed that the ſuitors did not bring a *habeas corpus,* and not a *certiorari*; for the defendant may well ſay, I will not be ſued in an *inferior court,* but will be ſued *above,* and there I will put in ſuch *bail* as the court above ſhall direct, and ſo he may well remove the cauſe by *habeas corpus*; and in ſuch caſe, if he does not put in ſuch *bail* above as the action would require below, a *procedendo* ſhould be granted; for if by the courſe below there ought to be *ſpecial bail,* though *common bail* would do if it had commenced above *originally,* yet *ſpecial bail* muſt be given above, or a *procedendo* ſhall go; and if one action requires *ſpecial bail,* and another not, and that does not appear to be done fraudulently to hold the defendant to *ſpecial bail,* there we will hold him to *ſpecial bail,* or grant a *procedendo*; but if fraud appear we will retain the ſuit; and though in this caſe the matter is between *two perſons* dwelling within the *Iſle of Ely,* yet that makes no difference. And he ſaid he had known *inferior courts* held to harder terms than theſe, for he had known in the court of *Common Pleas* that in *eſcape* out of execution on a judgment in an *inferior court,* the officer was let in to alledge that the original cauſe of action was not within their juriſdiction, though it were laid to have been within it, and admitted by the party ſo to be: but I think that hard, becauſe it is a court having juriſdiction; and ſince they have ſhewed the matter within that juriſdiction, and that has been admitted on record, I hold that the party himſelf would be afterwards concluded to ſay that it was not within, and conſequently the officer is ſo too. And it has been held, that *falſe impriſonment* would lie againſt the officer for the arreſt, if the cauſe had not ariſen within their juriſdiction, though it had been alledged by the plaintiff to have ariſen within it, and ſo confeſſed by the defendant; but that was hard. The beſt way is, to make a right uſe of the juriſdiction, and not to pretend to hinder the ſubject of his right of uſing the *King's courts*: and property is much larger now than formerly; for then there were many *villains,* but now we are all *freemen.*

Per curiam. It is apparent *error*: but then an exception was taken to the writ of *certiorari. Vide Mod. Rep. vol.* 12. *p.* 646.

Hilary, 13 *W.* 3. *Smith* v. *Oxbring.*

In *debt* on a *recognizance* of *bail.*

Holt, Chief Juſtice. It is now much practiſed to *ouſt* the *bail* of the benefit of *rendering* the *principal,* as he may do on a *ſci. fac.* and ſince there is ſufficient reaſon the *bail* ſhould have equal indulgence in both caſes, let the *rule* be, that the *bail* have *eight days* in *full term* after the return of the *proceſs* againſt the *principal,* to render him. So, if for that purpoſe the *proceſs* be returned only within *four days* of the end of the *term,* the *bail* ſhall have *four days* in the next *term* to *render*; and on their bringing in the *principal* in the mean time, they ſhall be *diſcharged*; and till that time be paſt, the court will grant an *imparlance. Vide Mod. Rep. vol.* 12. *p.* 650.

Hilary, 13 *W.* 3. *Milner* v. *Petit.*

An action of *debt* was brought againſt the defendants, as *bail* on a recognizance. The judgment againſt the principal was given in *Trinity* term; and if the plaintiff had ſued out a *ſci. fac.* the *bail* would have had time to bring in the defendant until the return of the *ſci. fac.* whereof they were deprived by this means. And therefore the defendant's council prayed, that the defendant might have an imparlance; and he ſaid, that according to ſome books, in ſuch caſe, *debt* does not lie. And for that he cited *Raym.* 14.

Per curiam. The *bail* ſhall have the ſame time for the render of the principal as if they had been ſued by *ſcire facias,* and a rule ſhall be made accordingly. On the *ſci. fac.* they cannot plead the render after the return of the *capias ad ſatisfaciendum,* becauſe the condition of the recognizance is broken by the return of *non eſt inventus* on the *capias ad ſatisfaciendum.* And they ſaid, that the *bail* ſhould have fifteen days in the term; and in vacation they ſhould have as much time as they would have had, if they had been ſued on a *ſci. fac.*, to render the principal.

But afterwards, at the end of the term, *Holt*, Chief Juſtice, ſaid, that the judges had made a rule, that if the plaintiff in the original action brings *debt* againſt the *bail* on their recognizance, the *bail* ſhall have *eight* days after the return of the writ to render the principal; and if there are but *four* days in the term after the return of the writ, he ſhall have *four* days in the following term. *Vide Raym. vol.* 1. *p.* 721.

Eaſter, 13 *W.* 3. *Palmer* v. *Stavely.*

An *heir*, ſued as ſuch, ſhall no more be held to *ſpecial bail*, than an *executor*. *Vide Mod. Rep. vol.* 12. *p.* 511.

Trinity, 13 *W.* 3. *Taylor* v. *Brudon.*

Per Holt, Chief Juſtice. On *common bail* being filed, if the plaintiff does not deliver his declaration before the end of the 2*d term*, he ſhall be *nonſuited*. If, on examination before a *judge*, the plaintiff in the action does not make out a good cauſe of *action*, *common bail* ſhall be ordered; and if, on examination before a *judge*, *common bail* be ordered, and the plaintiff does not there declare that he will move the court, or give notice of ſuch his intent to the defendant, the *judge's order* ſhall be final againſt him. And if the plaintiff has ſeveral attornies, a demand of a declaration of any one of them is a good demand. *Vide Mod. Rep. vol.* 12. *p.* 526.

Trinity, 13 *W.* 3. *Taylor* v. *Brudon.*

Per curiam. If a perſon has ſeveral cauſes of action, each whereof is too ſmall for *ſpecial bail*, he cannot join them to enforce *ſpecial bail*. *Vide Mod. Rep. vol.* 12. *p.* 527.

Trinity, 13 *W.* 3. *Almanſon* v. *Davila.*

On a motion in this cauſe, *Holt*, Chief Juſtice, ſaid, that he had known it held by the court, that where the plaintiff was *nonſuited* for want of a declaration, and afterwards brought another action for the ſame cauſe, that he ſhould have but *common bail* to the ſaid action. *Vide Raym. vol.* 1. *p.* 679.

Trinity, 13 *W.* 3. *Slanney* v. *Slanney.*

Bail were *excepted* againſt in *vacation*, and no other put in, nor juſtified, till *term*; and then the principal would have *ſurrendered* himſelf in diſcharge of his *bail*.

Per Holt, Chief Juſtice. *Bail* can never *ſurrender*, nor the party come in by way of *ſurrender*, but at the return of the *proceſs* or when he is in court by his *bail*. If a *ſheriff* return a *cepi corpus* on a *diſtringas*, the *principal* may *ſurrender* himſelf; but *bail* excepted againſt is as no *bail*, till *changed* or *juſtified*. *Vide Mod. Rep. vol.* 12. *p.* 525.

Michaelmas, 13 *W.* 3. *Dundee* v. *Petty.*

On a *capias* being returned againſt the *principal*, he brings his writ of *error*, and the plaintiff brings *debt* on the *recognizance* againſt the *bail*, and delivered a declaration as of the *preceding term*. The defendant's council moved for an *imparlance*; and *urged*, that if the plaintiff had gone by way of *ſci. fac.* the *bail* might *render* the *principal* at any time before the *ſecond ſci. fac.* was returned. *Vide Raym.* 14. *Godlington* v. *Lee.* And there is no reaſon but the *bail* ſhould have the like time in this caſe; and this they cannot have without the favour and aſſiſtance of the court; for the *recognizance* being forfeited by the *non eſt inventus* being returned on the *capias* a *ſubſequent render* of the *principal*, cannot be pleaded in *bar* of the action. And the court afterwards made a rule, that there ſhould be in this caſe *eight days* in *full term* for the *bail* to render the *principal*.

Per curiam. After a *capias* returned againſt the *principal*, though a writ of *error* be brought, yet the plaintiff may proceed againſt the *bail*; for the writ of *error* does not *ſuperſede* the *recognizance*. *Vide Mod. Rep. vol.* 12. *p.* 567.

Michaelmas, 13 *W.* 3. *Anonymous:*

The *principal* died before the return of the *ſecond ſci. fac.* againſt the *bail*, and after a *capias* returned againſt the *principal*. It was *urged*, that ſince the *bail* would have been diſcharged by *rendering* the *principal* at any time before the *ſecond ſci. fac.* was returned, and that they are now deprived of that advantage by the *act of God*, therefore it is but reaſonable to diſcharge them.

Per curiam. It cannot be, for it is an indulgence to allow a *render* after a *capias* returned in diſcharge of *bail*; and their *recognizance* is forfeited on the *capias* returned againſt the *principal*; and the court will only diſcharge the *bail* after, where they *render*, but not where they *cannot*; but the death of the party before a *capias* returned, had been held a good plea to a *ſci. fac.* and ſo it was held in this caſe. *Vide Mod. Rep. vol.* 12. *p.* 601.

Eaſter, 1 *Ann.* *Lumley* v. *Quaree*, *or Quarry.*

An action of *trover* being brought againſt the defendant, in the ſheriff's court of *London*, for goods to a large amount, the defendant moved the cauſe by *habeas corpus* into this court; and a motion was made here, that he might be diſcharged on *common bail*, becauſe he had ſeized theſe goods as Judge of the *Admiralty* in *Penſylvania*, they being condemned there, and the ſentence affirmed here, on an appeal.

Per Holt, Chief Juſtice. The practice is, that if the plaintiff does not ſhew his cauſe of action on ſummons, the defendant ſhall be diſcharged on *common bail*, notwithſtanding the cauſe is removed from an inferior court. In the preſent caſe, the defendant having acted as judge, is not liable to an action. But *bail* was ordered to be put in for 500*l.* becauſe, if the defendant acted as a judge, he will be in no danger from any action; but if he did not act in that capacity, it is very reaſonable that *ſpecial bail* ſhould be put in. *Vide Raym. vol.* 2. *p.* 767.

Eaſter, 1 *Ann.*

Per Holt, Chief Juſtice. If a perſon who becomes *bail* has a warrant of attorney to indemnify him, he cannot enter it up, and take out execution thereon, till ſome proceſs has iſſued on the *bail-bond*, whereby he is injured. *Vide Mod. Rep. vol.* 11. *p.* 2.

Eaſter, 1 *Ann.*

Per Holt, Chief Juſtice. Notice of *bail* on an *arreſt*, &c. ought to be not only by a note given of the names of the parties who intend to become *bail*, but alſo of their addition, trade, ſubſtance, and place of abode, that they may be the more eaſily enquired after by the plaintiff's attorney. *Vide Mod. Rep. vol.* 11. *p.* 2.

Michaelmas, 2 *Ann.* *The Queen* v. *Foxby.*

A perſon cannot move to ſtay proceedings on a bail-bond, on payment of *principal*, *intereſt*, and *coſts*, till *bail* is put in, for till then the parties are not in court. See *ſtat.* 4 & 5 *Ann.* for amendment of the law. *Vide Mod. Rep. vol.* 6. *p.* 11.

Michaelmas, 2 *Ann.* *Corniſh* v. *Marks.*

If a *feme covert* is arreſted, let the cauſe of action be what it will, ſhe ſhall be diſcharged on *common bail*; but if the huſband is arreſted, he ſhall not be diſcharged by giving bail for himſelf, without giving it for his wife likewiſe. *Vide Mod. Rep. vol.* 6. *p.* 17.

Michaelmas, 2 *Ann.* *Noell* v. *Gray.*

One who had been diſcharged on the *inſolvent* act gave bail to an action of *debt* on a *bond*, with which he was charged in priſon, and confeſſed the action, and that execution might go againſt his goods, *&c.* The plaintiff takes execution againſt the goods, and likewiſe ſues the *bail*, who ſurrender their principal in diſcharge; and this appearing on motion, the court ſaid, that the *bail* were actually diſcharged by the pleading and judgment; and ordered him to bring the record of the judgment into court, whereon he was taken in execution, and that they thereon would diſcharge him. *Vide Mod. Rep. vol.* 6. *p.* 22.

Michaelmas, 2 *Ann.* *Wood* v. *Shepherd.*

There are *twenty* days to except againſt *bail*, after notice; and bail cannot be juſtified before a judge at his chambers, except it be by conſent, or for neceſſity in vacation; but in the latter caſe they ought to be juſtified again in term; and on that the defendant is compelled to accept a declaration to go to trial at the aſſizes, if it be an *iſſuable* term. And, on putting in *bail*, it is not enough to give notice of their being put in, but it ought to be of their names, places of abode, and trade, or vocation, that the plaintiff may know how to enquire after them; and after exception to *bail*, there is no ſet time to juſtify, or exchange them for better, but it muſt be in convenient time. *Vide Mod. Rep. vol.* 6. *p.* 24.

Michaelmas, 2 *Ann.* *Jordan* v. *Thomkins.*

Per curiam. If a perſon gives a *warrant of attorney* to confeſs a judgment for the ſaving *bail* harmleſs, though the *debt* be not paid, he cannot ſue execution before he is damnified. *Vide Mod. Rep. vol.* 6. *p.* 77.

Eaſter, 3 *Ann.* *Parkins* v. *Woollaſton.*

In *debt* on a recognizance againſt *bail*, and plea that there was no *capias* againſt the principal; *replication* averring a *capias*, as appears by the record in the *Common Pleas.* Rejoinder, that there was a writ of *error* taken out, and allowed before the *capias* was returned and filed; and on demurrer adjudged, that the rejoinder was a departure from the plea; for it was a new matter, which does not agree with or inforce the matter of the plea; for the plea is, that there was no *capias*, and the rejoinder ſays there was a *capias*, but it was ſuperſeded; and there is a great difference between no *capias* and a *capias* ſuperſeded; for the ſuperſeding does not make it null, or no *capias*, but only ſuſpends the effect of it. And this *capias*, though ſuperſeded, is nevertheleſs a writ, and therefore if after allowance of it, the ſheriff, before a *ſuperſedeas* ſerved on him, executes it, the writ ſhall excuſe him, which a *void* writ could not do: and if the writ of *error* had been quaſhed before the return of the *capias*, then this writ might be well executed. And the caſe 2 *Lev. Vere* v. *Smith*, was allowed to be law, for it was *debt* on a bond to account for money. The defendant pleads that he did *account*; the plaintiff replies, that the defendant had received 20 *l.* at ſuch a time, of which he gave him *no account.* The defendant rejoined, that he was robbed of the ſum, whereof he gave notice to the plaintiff; and ſure that maintains his firſt plea, for it was a legal account of the money. Judgment for the plaintiff. *Vide Mod. Rep. vol.* 6. *p.* 139.

Trinity, 3 *Ann.* *Linch* v. *Hook.*

If a writ is returnable in one term, the defendant ought to put in *bail* in that *term*; that is, at any time before the *Eſſoign* day of the next *term*, and till then it is irregular to proceed on the *bail-bond*; but in the mean time the plaintiff may take an aſſignment on it, and take out a warrant. *Vide Mod. Rep. vol.* 6. *p.* 226.

Michaelmas, 3 *Ann.* *Cragger* v. *Glover.*

The defendant, who had been in priſon the 8th of *November* before, for a debt under 100 *l.* and after, in purſuance of the late act of parliament, on ſummons to the creditor, at whoſe ſuit he was in, was diſcharged by the juſtices of peace, and afterward arreſted for a ſum above 800 *l.* and the doubt was on the conſtruction of the ſtatute, whether he ſhould be held to *ſpecial bail*, or diſcharged on *common bail*; and upon a conference of all the other judges, it was reſolved he ſhould be held to *ſpecial bail.*

The doubt aroſe on the words, *any debt.* But then the proviſo is, that no perſon ſhall be diſcharged out of priſon by virtue of this act, who ſhall ſtand charged and indebted to any perſon in above 100 *l.* Now, ſome would have this applied to the firſt diſcharge, that is, the diſcharge by the juſtices of peace; but why not rather to the ſecond diſcharge, or equally to both diſcharges; for he that is diſcharged on an appearance, is diſcharged; and by this act power is given to diſcharge them, if they be taken again; and then the proviſo is, that he ſhall not be diſcharged if the debt be above 100 *l.* ſo no man is to be diſcharged by virtue of this act that is charged with a debt of above 100 *l.* at the ſuit of one perſon.

And he that is now arreſted at the ſuit of one perſon is diſcharged for debt above 100 *l.* therefore ſhall not be charged by virtue of the act.

And as to the diſcharge on *common bail* by virtue of the act, the judges may do it as well as the juſtices of peace. *Vide Mod. Rep. vol.* 6. *p.* 301.

Michaelmas, 3 *Ann.* *Anonymous.*

On an action removed by *habeas corpus*, the court held there muſt be *bail* here, for elſe the defendant, by his own act, puts the plaintiff in a worſe condition than he was below; but they would conſider the quantity of the ſum in which the *bail* ought to be taken, if the action appeared to them to be vexatious. *Vide Salk. vol.* 1. *p.* 102.

Michaelmas, 3 *Ann.* *Bignall* v. *Deveniſh.*

Per curiam. If the defendant, on a *habeas corpus*, removes a cauſe from an inferior court, in which there ought to have been *ſpecial bail* below, he ſhall not thereby put the plaintiff in a worſe condition, but be compelled to give in bail above; but as to the ſum which the *bail* are to juſtify themſelves to be worth, that may be moderated as the court ſees occaſion.

Per curiam. It is good cauſe for a new trial, where the judge who tried the cauſe has denied to admit that for evidence, which was legal evidence, or where he miſdirects the jury. *Vide Mod. Rep. vol.* 6. *p.* 242.

Michaelmas, 3 *Ann.* *Jacob* v. *Dallo.*

Per curiam. The *bail* have their principal always on a ſtring, and may pull the ſtring whenever they pleaſe, and render him in their own diſcharge; they may take him on a *Sunday*, and confine him till the next day, and then render him; for the entry in this court is *he is delivered to bail*, and the doing it on a *Sunday* is no ſervice of proceſs, but rather like the caſe where a ſheriff arreſts by virtue of a proceſs of court on *Saturday*, and the party eſcapes, he may take him on a *Sunday*, for it is only a continuance of the former impriſonment. *Vide Mod. Rep. vol.* 6. *p.* 231.

Michaelmas, 3 *Ann.* *Wells* v. *Oſmond.*

Per cur. If *bail* ſurrender the principal at or before the return of the ſecond *ſci. fac.* it is good, tho' there be not immediate notice of it to the plaintiff; for the end of notice in that caſe is two-fold: one is the plaintiff may, if he pleaſes, charge him in execution; the other is, that he be at no further trouble or charge in proceeding againſt the *bail*; but if through want of notice he is at further charge againſt the *bail*, that ſhall not vitiate the ſurrender; but yet the *bail* ſhall not be delivered till they pay ſuch charges. If at any time after the return of the *capias* the *bail* ſurrender the principal at a judge's chambers, and he thereupon is committed to the tipſtaff, from whom he eſcapes or is reſcued, that will not be a good ſurrender, becauſe it is indulgence to the *bail* to ſurrender after a *capias* returned;

turned; otherwiſe, if it be before a *capias* returned, for to ſurrender at the return of the *capias* or before, is a matter of right: and now, by a rule of court, on the firſt ſort of ſurrender, the principal ought to be two days in the *Marſhal*'s cuſtody, to make it a good ſurrender. *Vide Mod. Rep. vol.* 6. *p.* 238.

Michaelmas, 3 *Ann.* *Cholmley* v. *Veal.*

On a *ſci. fa.* againſt the *bail*, who plead no *capias* againſt the principal; in the replication, a *capias* is ſet forth, and a *non eſt inventus* returned on it, which appeared to be *teſted* a year after the judgment.

Holt, Chief Juſtice, the plaintiff is intitled to recover againſt the *bail*, on a breach of the *recognizance*; which is, that he ſhould anſwer the condemnation, or render the principal at the proper time.

And the breach is aſſigned, and a *capias* ſet forth to have been taken out and returned, and what need he take notice of a *ſci. fac.* for the *bail* are ſtrangers to the record, and cannot take advantage of *error* in it. So there not being a *ſci. fac.* previous to the *capias* taken out after the year, is but an error at beſt, of which *bail* cannot take advantage. So if it had actually appeared to us that there was no *ſci. fac.* I queſtion whether it be any thing more than an *error*, and ſo not available to the *bail*; but if it were actually void, ſtill it ought to come on the *bail*'s ſide, and the plaintiff in intitling himſelf againſt the *bail* never mentions any thing of the *capias*; and you come and admit all that intitles him to his *ſci. fac.* againſt you, *viz.* the non-payment of the condemnation money, and non-rendering the *principal*, but ſay, there was no *capias*, which is to ſay, that his time to render was not yet come: and what has the plaintiff to do, but to ſhew that there was a *capias*, and the *capias* which is ſhewn may be irregular; and if it be ſo, we ſhall not intend it, till you ſhew it ſo; and there is full title made for the plaintiff, and your plea is only an excuſe that there was no *capias*; and the reaſon of it is, that I am not bound to render the *principal*, till I know what execution the plaintiff will chuſe; whether he will chuſe to have his body, which he makes appear by ſuing out a *capias*; for he might have ſued out an *elegit* or a *fieri fac.*

The court unanimouſly gave judgment for the plaintiff.

If the defendant dies after a *capias*, and before the return of it, *bail* is diſcharged. *Vide Mod. Rep. vol.* 6. *p.* 304.

Michaelmas, 3 *Ann.* *French's Caſe.*

French had been arreſted at the ſuit of ſeveral perſons, and had given *bail*; who having charged him with an action of 4000 *l.* had him taken in the *city*, and committed to the *Poultry Compter*, in order to remove him by *habeas corpus*, and rendered in diſcharge of themſelves to the priſon of the *King's Bench*, where the original actions were brought; and it being *circuit* time, and all the judges out of town, before the the *bail* could render him, he was charged with the *Queen's debt*; and the *bail* having now brought an *habeas corpus* to remove him up, and render him, the *Attorney General* oppoſed it; becauſe the *Queen*, as he alledged, might chooſe her priſon, and the *Compter* was ſafer than the *Marſhal*'s priſon; and quoted the caſe of *Village* v. *Clayton*, as a precedent in point.

Per curiam. If he had been taken by the *Queen* firſt, there might be ſome reaſon that they ſhould not for their own advantage leſſen the *Queen's* ſecurity of her priſoner; and that the *Queen's* intereſt claſhing with that of the ſubject, ſhould be preferred; but on the other hand, the *bail* having taken him here, and the *Queen* taking advantage thereof in charging him with her debt, ought not to prejudice them; and he was turned over. *Vide Mod. Rep. vol.* 6. *p.* 247.

Michaelmas, 3 *Ann.* *Garibaldo, or Genbaldo*, v. *Cagnoni, or Cognoni.*

Garibaldo being convicted on an indictment of *battery*, he, in conſideration that *Cagnoni*, the proſecutor, would not preſs for a great fine, undertook to put in *ſpecial bail* to an action of *treſpaſs*, to be brought by the plaintiff for the ſaid *battery*; and at this time a writ, which the plaintiff had taken out, returnable in *Michaelmas* term laſt paſt, was expired; and in *Hilary* term *bail* was put in, and after a trial, 100 *l.* damages were given to the plaintiff: and now a *ſci. fa.* being brought againſt the *bail*, they applied to the court for relief; for that the *ac etiam*, which was by leave put into the ſaid writ, in *Michaelmas* term, was only for 40 *l.* and the *bail* meant to undertake for no more; and ſince the plaintiff had declared for more damages, and recovered more, the *bail* were thereby altogether diſcharged: and a rule of court ſaid to have been made, 22 *Car.* and found in the then ſecondary's book; that in caſe of *bail*, if the recovery were for more than was mentioned in the *ac etiam*, the *bail* ſhould not be charged at all *in that action*, was very much inſiſted on.

The *Chief Juſtice* remembered a caſe of *Thomſon* v. *Collins*, in which he had been council in *Lord Pemberton*'s time, where, in an *indebitatus aſſumpſit*, the declaration and recovery was for more than the *ac etiam*, and though it was offered to level it with the *ac etiam*, by entering a *remittitur* on the record for the reſt, it was denied them on debate.

In this caſe, on ſearch, the above rule could not be found in the clerk of the rule's books; but the *Chief Juſtice* ſaid there was reaſon for ſuch rule, to purſue *ſtat.* 13 *Car.* 2. *cap.* 2. that *bail* ſhould know what they became bound for, and not be ſaddled with more; and that muſt be by recovering no more than was mentioned in the writ, to which the *bail* of neceſſity muſt relate: whereas, if the plaintiff recovers more, the *bail*, if at all liable, muſt be liable for what is recovered; for their condition is, to anſwer the condemnation, or render the principal; and it would be very hard to enſnare the *bail* to a greater ſum than is mentioned in the writ: and ſince the proceſs againſt them muſt be founded on the judgment, it ſeems, from thence, they muſt anſwer for all or none; but if leſs than is mentioned in the writ be recovered, then there is no inconveniency to the *bail*; and if there be no *bail* inſiſted on, but *common bail*, it is juſt the wrong-doer ſhould anſwer whatever is recovered. And he further ſaid, that in caſes of *outrageous batteries*, when people came to him for leave to charge defendants with *ac etiams*, he would give them leave to charge them with a good ſum; but when they came for bail, they muſt be content with *bail* of reaſonable value, and not inſiſt on their worth in proportion to the ſum charged.

Powell, Juſtiee, and the reſt of the judges, agreed, the *bail* by no means ought to anſwer for more than was mentioned in the *ac etiam*.

And he added, that if ſuch a rule as was mentioned had been, the reaſonable conſtruction of it would be, not to ſuffer the *bail* to be charged with more than was mentioned in the writ, but likewiſe not to diſcharge them for good and all; for though it be true the proceſs againſt them muſt be for the ſum recovered, yet he ſaid the court might withhold the plaintiff from levying more than was mentioned in his writ; and the *bail*, on bringing ſo much into court, might obtain a rule to ſtay any further proceedings againſt them, as is done every day in caſes of *render* of the *principal* before the return of the ſecond *ſci. fa.* though in ſtrictneſs of law they ought not to do it after a *capias* returned againſt the principal.

Holt, Chief Juſtice, ſaid, the caſes differed very much; for the rule was in imitation and purſuance of the *law*, and they ought not to make any conſtruction contrary to it; and the words of it were, that the *bail* ſhould be looked upon as none, in *that action*, and to render before the return of the ſecond *ſci. fa.* is the ancient courſe and practice of the court.

Then it was further moved, that this *bail* being of *Hilary* term, could not be looked on as *bail* to the writ returnable in *Michaelmas* term; and then the caſe would be no more than if one had by conſent, on a good conſideration, put in *ſpecial bail*, in a general action of *aſſault* and *battery*; in which caſe there would be no pretence of a ſurpriſe on the *bail*, and therefore they ought to anſwer the whole condemnation, which the court inclined to; but being informed there was never any other writ taken out, the ſecondary acquainted the court, that *filing of bail*, without a writ taken out before or after, was void: which *Holt*, Chief Juſtice, and *Gould*, Juſtice, affirmed to be true; but the other clerks all ſaid, that rule was underſtood thus, *viz.* that if *bail* were filed by conſent, and no writ already taken out, nor taken out within *eight days* after, the *bail* was void, and the defendant was not obliged to accept of a declaration; but if he did accept one, it would be well; and this ſeemed a reaſonable explication; but at laſt the whole was referred to the ſecondary to examine, and there the matter reſted.

Holt, C. J. ſaid, he wiſhed attornies would beware of charging extravagant *ac etiams*, for otherwiſe an action on the *caſe* would lie againſt them for holding to *exceſſive bail*.

Note. The ſame point came in queſtion afterwards, this term, in the caſe of *Bovey* v. *Wheeler*; and then *Holt*, Chief Juſtice, ſaid, the abovementioned rule was made to rectify an extraordinary practice in this court; which was, if a man became bound for another in an action of 10 *l.* he was thereby *bail* in all actions of the ſame term, by the ſame plaintiff againſt that defendant, let the ſum be ever ſo great, which was highly inconvenient.

. And this rule was made in purſuance of *ſtatute* 13 *Car.* 2. that *bail* might know what they undertook for. *Vide Mod. Rep. vol.* 6. *p.* 166. *Salk. vol.* 2. *p.* 102.

Eaſter, 4 *Ann.* *Colonel Layton's Caſe.*

Holt, Chief Juſtice, ordered precedents to be ſearched, whether a perſon in execution for a *fine* can be *bailed*, having brought a writ of *error*, and aſſigned *error*; (*N. B.* the Colonel was brought up by an *habeas corpus*,) and after a ſearch made, ſaid, he found the caſes not put fair in caſe of execution; and that in caſe of execution, *bail* was always refuſed; and the whole court coincided with his opinion, and remanded the priſoner. 2 *Keb.* 173. There is a difference between *bail* to reverſe an *outlawry*, and to reverſe a *judgment*; becauſe in the firſt caſe he is liable, that being in order to bring the cauſe to a trial; and the latter is to defeat the whole record. *Vide Mod. Rep. vol.* 11. *p.* 59.

Eaſter, 4 *Ann.* Sir *William Drake* v. ——.

The court was moved for a *ſpecial writ* againſt a perſon to hold him to *ſpecical bail*, for ſpeaking very ſcandalous words againſt Sir *William Drake*, *viz. that he was a traitor, one of the* 134 *for bringing in the Prince of* Wales, *&c.* but the court refuſed to grant it; and ſaid it was refuſed in Lord *Wharton's* caſe for *ſcandalum magnatum*. *Vide Mod. Rep. vol.* 11. *p.* 49.

Eaſter, 4 *Ann.* *Anonymous.*

A perſon brought to this court by an *habeas corpus* on a *commitment* by the *juſtices of peace*, who have cognizance of the cauſe, is *not bailable* till the order is quaſhed; becauſe till then he is in execution. *Vide Mod. Rep. vol.* 11. *p.* 45.

Eaſter, 4 *Ann.* *Anonymous.*

In the *Common Pleas*, on a recognizance entered into in that court, a *fieri facias* or an *elegit* may iſſue, but no *capias* lies; but otherwiſe in this court, a *capias* lies, for here the *bail* is body for body. *Vide Mod. Rep. vol.* 11. *p.* 45.

Eaſter, 4 *Ann.* *Page* v. *Price.*

Where an *executor* is ſued in an action of *detinet*, as he muſt on the contracts of his teſtator, he ſhall not put in *ſpecial bail*; but he muſt, if ſued on his own bond, or contract. *Vide Salk. vol.* 3. *p.* 57.

Eaſter, 4 *Ann.* *Anonymous.*

Adjudged, that though *non eſt inventus* is returned on a *Ca. Sa.* *againſt the principal*, yet the court will receive a *render*; ſo they will on the return of the firſt *ſci. fa. againſt the bail*, and alſo on the return of *the ſecond ſci. fa.* if made on the day of the return, either during the ſitting of the court, or afterwards at a judge's chambers; but thó' the court receives ſuch *renders* in favour of the *bail*, yet it is done *out of favour*, and not as a *matter of right*, and therefore the *bail* cannot plead ſuch *render* to a *ſci. fa.* brought againſt them. But on a *ſci. fa*, againſt the *bail*, they may plead the death of the *principal* before the return of the *capias*; for they had time till then to render him, but not afterwards, for by the return of *non eſt inventus*, the recognizance is forfeited. *Vide Salk, vol.* 3. *p.* 56.

Eaſter, 4 *Ann.* *Anonymous.*

An action of *debt* was brought in *C. B.* and a recognizance taken; and an action of *debt* was brought here, on that recognizance. The court was moved that there might be no *ſpecial bail* given, for that this was only a device to better the ſecurity.

Per Holt, Chief Juſtice, and *Powell*, Juſtice. On a recognizance of *bail* in *C. B.* no *capias* lies, becauſe it is a ſum certain; but on the recognizance in *B. R.* a *capias* lies, becauſe it is *body for body*, and there may be reaſon to help them to a *capias* on the recognizance.

Per Holt, Chief Juſtice. In *debt* on a judgment pending a writ of *error*, the court will diſcharge the defendant on *common bail*.

Powell, Juſtice. It was anciently otherwiſe. *Vide Salk. vol.* 3. *p.* 55.

Trinity, 4 *Ann.* *Ball* v. *The Bail of Ruſſell.*

On a *ſci. fac.* againſt *bail*, the *recognizance* was, that the defendant ſhould render himſelf *to the Marſhal of the Marſhalſea of our Lady the Queen, before the Queen herſelf*. The breach in the *ſci. fac.* was, that he did not render himſelf to the *priſon of the Marſhal of our Marſhalſea*. The defendants plead that no *capias* was ſued out and returned againſt the *principal*. The plaintiff replied, and ſet out a *capias*, to which the defendant demurred; and his council offered the following exceptions:

1ſt. That the plaintiff in his *oyer* ought to have ſet out what term the *recognizance* was of, that it might appear to be the ſame on which the *ſci. fac.* was grounded.

Holt, Chief Juſtice, obſerved, that this was an imperfect *oyer*, not being the whole record, but then the defendant ſhould have inſiſted on want of *oyer*, and not have gone on; that it was no variance, for what is ſet out agrees well enough with the *recognizance* on which the *ſci. fac* is grounded.

2dly. That it appears by the *capias* ſet out in the replication, that there was but *five days* between the *teſte* and return of it; whereas every *capias* ſued out againſt the *principal*, in order to charge the *bail*, ought to have *eight days* between the *teſte* and return, and ought to lie *four days* in the ſheriff's office; which the court allowed, but ſaid it was only an irregularity in proceeding, and therefore the defendant ſhould have moved the court to have them ſet aſide for the irregularity.

3dly. That the plaintiff had not aſſigned a ſufficient breach by reaſon of the variance in the ſtile of the priſon between the *ſci. fac.* and the *recognizance*, for the breach was too large, the word *mareſcalciæ* being uſed for more priſons than the priſon of the *K. B.* *Mareſchallus*, indeed, ſignifies no more than a *keeper*, and there being ſo many *marſhals* and *marſhalſeas*, *priſona mareſchalli mareſcalliæ dominæ reginæ*, may as well be taken for the marſhal of the marſhalſea of the houſehold's priſon, as the priſon of the *Queen's Bench*, for it is never ſtiled but as in the *recognizance*, or elſe *mareſchal del bank le roy*, as in *F. N. B.* 257, *&c.*

This *exception* ſtuck with the court ſome time, but the court at laſt gave judgment for the plaintiff; becauſe it being a *bail* taken in this court; *priſona mareſcalli, mareſcalciæ noſtræ*, muſt be intended the priſon of the Marſhal of this court, for the court cannot take any other *bails*. See caſe *Snow* v. *the Bail* of *Firebraſs*. 2 *Raym. p.* 804. *Vide Raym. vol.* 2. *p.* 1177.

Eaſter, 5 *Ann.* *Parkin* v. *Wilſon*.

In an action of *debt* brought on the *recognizance* of the *bail*, the defendant pleaded, that no *capias* iſſued; the plaintiff replied, a *capias* was ſued out and returned; the defendant rejoined, that the defendant in the *original action* brought *error* on the judgment, before the *capias* was ſued out, returned, and filed. To this rejoinder the plaintiff demurred *generally*, and the defendant joined in demurrer; and *adjudged* for the plaintiff.

This term, the council for the defendant in the *original action* moved to ſet aſide the *capias* as irregular, becauſe it was ſued out returnable *on Monday next after eight days of St. Martin*, which was the 22*d day of November*; and on that very day the writ of *error* ſued out by *Woollaſton* in the *original action* the 20th, was allowed; after which the *capias* was filed, but returned the ſame day. *Adjudged* by the court, that the *capias* was well ſued out to charge the *bail*; and therefore the motion was denied. *Vide Raym. vol.* 2. *p.* 1256.

Eaſter, 10 *Ann.* *Whetherborn* v. *Wright*.

Where a debt is 10 *l.* or upwards, by the courſe of the court *ſpecial bail* is required, otherwiſe not. It is not uſual, where an action of debt is brought on a bond of 20 *l.* conditioned for the payment of 9 *l.* to hold to *bail*; for though the penalty, which is the *legal debt*, exceeds 10 *l.* yet the *real* and *equitable debt* is leſs. But in ſome particular caſes, as where it is to be feared a perſon will run away, &c. the court will hold to *bail*, for the *legal debt* exceeds 10 *l.* *Vide Mod. Rep. vol.* 10. *page* 24.

Michaelmas, 11 *Ann.* *Arne* v. *Johnſon*.

Per curiam. A *ſoldier* has, by act of parliament, the privilege of not being held to *ſpecial bail*, which the court muſt take notice of. *Vide Mod. Rep. vol.* 10. *p.* 111.

Trinity, 5 *Geo.* *Anonymous*. Error.

On a *ſci. fac.* in the court of *C. B.* on a *recognizance* taken in an action of debt; judgment for the plaintiff, and *error* brought thereon in this court,

It was inſiſted in behalf of the plaintiff in *error*, that the breach was not well aſſigned, for though it is a general rule, that a breach aſſigned in the very words of the condition, is a good aſſignment; yet that rule does not hold where the words are by the law interpreted contrary to their natural ſignification, which is the caſe here; for the words of the condition are, that he ſhould render himſelf in execution of the judgment; which words, in their natural ſenſe, import an act that it is impoſſible for the *bail* to do, for it is the *principal* only that can render himſelf in execution of the judgment; ſo that the meaning of the words in this caſe muſt be, to render himſelf, in order to execution. And therefore the pleading ſhould not have been in the very words of the condition, but in ſuch words as are expreſſive of that ſenſe that the words of the condition are, by operation of law, to be underſtood in.

This objection was over-ruled by the court; who were of opinion, that the words in the pleading muſt be underſtood in the ſame ſenſe, as when uſed in the condition of the recognizance.

Then it was argued for the plaintiff in *error*, that there were *variances* between the *ſci. fac.* and the recognizance.

The council for the defendant acknowledged, that there were *variances*, and material ones; but inſiſted, that the plaintiff could not now take advantage of them; becauſe he had not by demanding *oyer* of the recognizance in the court below, made it part of the record, and ſo brought it before this court; and that as it ſtands now, the recognizance is no part of the record. *Salk.* 262, 264. 1 *Roll's Abr.* 760. *pl.* 1. 2.

And the court being of this opinion, gave judgment for the defendant in *error*. *Vide Mod. Rep. vol.* 10. *p.* 444.

Trinity, 5 *Geo.* *Wraight* v. *Kitchingman*. Error.

On a writ of *error* from the *C. B.* of an award of execution on a *ſci. fa.* on a *recognizance* of *bail*;

The defendants aſſign for *error*, that the plaintiffs in *Hilary* term, 3 *Geo.* obtained judgment againſt *Welbourn*, (one of the *bail*) *in a plea of treſpaſs, and alſo in a plea of debt on demand*, for 53 *l.* debt, and 15 *s.* damages, on which proceſs iſſued againſt him, returnable in *eight days of the Purification*, at which day the defendants entered into a *recognizance* for his paying the debt, or rendering his body. And further, that the plaintiffs did not, within *two terms*, according to the practice of the court, declare againſt the ſaid *Welbourn*, *in the plea aforeſaid*, whereby the *recognizance* was diſcharged. And they further ſay, that the plaintiffs, in *Trinity term* following, cauſed the defendant to be *ſummoned* in the ſaid court, to anſwer the plaintiffs in a plea of debt for 53 *l.* and obtained judgment thereon, and that ſuch judgment was had on thoſe proceedings, and not in that action wherein the defendants became *bail*; but notwithſtanding this, the award of execution is grounded on the judgment in that *collateral* action.

The plaintiffs in *error* aſſigned ſeveral other *errors*; and on *in nullo eſt erratum* pleaded by the defendants in *error*, the matter was ſet down for argument. And, on hearing council,

Pratt, Chief Juſtice. At preſent this *recognizance* is no part of the record. The defendant, by praying *oyer*, might have made it ſo; and if the court below had denied *oyer*, he would have had the ſame advantage on a bill of *exceptions*.

Powis, Juſtice, concurred.

Eyre, Juſtice. In the caſe of *Trevivian* v. *Lawrence*, the judgment on which the *ſci. fa.* was brought, was really of another term than the recital mentioned; yet the court held, that no advantage could be taken of it after a *ſci feci* returned. Therefore the judgment of the *C. B.* was affirmed. *Vide Strange, vol.* 1. *page* 197.

Trinity, 7 *Geo:* *Everett* v. *Gery*. Error.

On the return of the *ſecond ſci. fa.* againſt the *bail*, a *four day* rule was given, and on the *fourth day* the *principal* brings *error*; and the defendant's council, thereon, moved to ſtay proceedings againſt the *bail*, pending the writ of *error*; and cited *Myer* v. *Arthur*, and *Church* v. *Throgmorton*, in the *Houſe of Lords*; where the houſe threatened to commit the *attorney*, for proceeding againſt the *bail*, pending *error* in *parliament*.

As to the firſt caſe, the court ſaid it differed, for there the *bail* came in time, while they might *ſurrender* the *principal*; which they cannot do here after the return of the *ſecond ſci. fa.* at which time no writ of *error* was brought. And as to the caſe in the *Houſe of Lords*, it was there agreed, that the court below could not reſtrain them; but the Lords ſaid, they expected more reſpect.

Per Curiam. We can make no rule. *Vide Strange, vol.* 1. *p.* 443.

Trinity, 7 *Geo.* *Turton* v. *Hays*.

The plaintiff had been *non pros'd* in a former action, for want of a declaration; and in a ſecond action it was moved, that the defendant might be diſcharged on *common bail*, alledging it to be the practice of *C. B.*

Per curiam. We know of no ſuch practice here, and think it very unreaſonable; for the plaintiff ſuffers enough by paying coſts in the firſt action, and therefore ought not to be in a worſe condition than before. *Vide Strange, vol.* 1. *p.* 439.

Hilary, 8 *Geo.* *Glynn* v. *Yates*.

The caſe was, the *principal* died, not having ſurrendered himſelf before the return of the ſecond *ſci. fac.* and on motion the queſtion was, whether the *bail* are liable to the *debt*.

Pratt, Chief Juſtice. The *bail* are bound by their *recognizance* to *render* the *principal* where judgment is againſt him, or to pay the condemnation money; but by the courſe of the court, the *principal* hath time to *render* himſelf in diſcharge of the *bail*, till the ſecond *ſci. fac.* againſt them is returned; and here the *act of God* intervened, *viz.* the *principal* died, ſo that he could not *render* himſelf within that time.

Eyre, Juſtice. It is true, the grace of the court is uſually extended to the *bail* where the *principal* did ſurrender himſelf, but never where he did not; this was the courſe of the court when *Popham* was Chief Juſtice, but it was altered by Lord *Coke*, and altered again in *Crook*'s time; that if the *principal* did ſurrender himſelf before the return of the *ſecond ſci. fac.* againſt the *bail*, they ſhould be diſcharged; but the indulgence of the court never extended farther.

It is wrong to ſay, that the plaintiff hath no damage by the death of the *principal*, dying before the time he had to *ſurrender* himſelf; for it is ſeen by daily experience, that men will pay their debts rather than be committed; and ſo might the *principal* in this caſe rather than be *rendered* in cuſtody.

Beſides, the plaintiff is a ſtranger to the *bail*, and there is no truſt or privity between him and them; but there is a great truſt between the *principal* and the *bail*; ſo that it ſeems very reaſonable they ſhould ſuffer in this caſe, rather than the plaintiff, who is an innocent perſon, for it is probable they may have a counter-ſecurity from the *principal* to indemnify them; and therefore it is more proper for them, than for the plaintiff to ſue ſuch executor or adminiſtrator on ſuch counter-ſecurity; for it is to be preſumed, that by reaſon of the truſt that is between them, they may know more of his concerns than it is poſſible for the plaintiff to know.

On the laſt day of *term*, judgment was given for the plaintiff againſt the *bail*. *Vide Mod. Rep. vol.* 8. *p.* 32.

Trinity, 8 *Geo.* *Fiſher* v. *Emerton.*

The plaintiff obtained judgment on the *ſci. fa.* againſt the *bail*, pending a writ of *error* by the *principal*, and took them in execution; and now they moved to be diſcharged.

Per curiam. Though you might have applied, and had the proceedings ſtayed, yet we will not ſet them aſide. If an action of debt had been brought on the judgment, we ſhould have granted an *imparlance*, if it had been aſked; but we never ſet aſide a judgment when it is once ſigned; becauſe we take it, you, by not applying in time, have ſubmitted to meet the plaintiff. *Vide Strange, vol.* 1. *p.* 526.

Michaelmas, 8 *Geo.* *Anonymous.*

On a motion for an attachment, the Chief Juſtice declared, that all the judges, on conſideration, had reſolved, that the *ſheriff* could not take *bail* on an attachment, but a *judge* at his *chambers* might. *Vide Strange, vol.* 1. *p.* 479.

Michaelmas, 8 *Geo.* *Combes* v. *Blackall.*

In *debt* on a bond, *non eſt factum*, i. e. *it is not his deed* was pleaded; and a verdict and judgment for the plaintiff.

To a *ſci. fa.* on this judgment, the defendant pleaded *bankruptcy*, and that the cauſe of action accrued before; and on the trial it appeared, the bond was given before the *bankruptcy*, but the judgment was after: and the judge who tried the cauſe, being of opinion againſt the defendant, there was a verdict for the plaintiff. And now, in an action of *debt* on the judgment, the defendant's council moved that the defendant might be diſcharged on *common bail*, becauſe the bond, which was the foundation of the demand, was before the *bankruptcy*. *But not allowed.*

Per curiam. We can look no farther back than the judgment, and therefore there muſt be *bail*. *Vide Strange, vol.* 1. *p.* 477.

Eaſter, 9 *Geo.* *Aldridge* v. *Snowden.*

This was a motion to ſet aſide a judgment againſt the *bail*, where the *ſecond ſci. fac.* was returnable on the 13*th day of May*, and the writ of *error* was allowed on the ſame day, and notice given between *three* and *four o'clock*, the ſame day the *bail ſurrendered* the *principal*, and then judgment was obtained againſt the *bail*; and for an authority in point, the caſe of *Myer* v. *Arthur* was cited, *Eaſter*, 7 *Geo.* where it was reſolved by this court, that after a writ of error is brought on the principal judgment, the proceedings on the *ſci. fac.* againſt the *bail* ſhall ſtay, and the *bail* ſhall have *four days* after the affirmance of the judgment, to *render* the *principal*, or pay the condemnation money; and on the authority of this caſe, a rule was now made for the plaintiff to ſhew cauſe, &c. why judgment ſhould not be ſet aſide, and all further proceedings ſtayed.

And at another day a motion was made to diſcharge that rule, becauſe the *bail* ought to *render* the *principal*, &c. on the very day that the *ſecond ſci. fac.* was returnable, otherwiſe the plaintiff muſt have judgment, and it ought not to be ſet aſide.

It is true, the *bail* brought a writ of *error* on the very laſt day allowed by *law* for them to *render* the *principal*, and gave notice thereof about *three of the clock* in the afternoon, but did not *render* the *principal* till *nine days* afterwards, which cannot diſcharge the *bail*, neither is it any foundation to ſet aſide this judgment againſt them.

The council for the *bail* cited *Myer* v. *Arthur*'s caſe to prove that they ought to be diſcharged, for in that caſe the *ſecond ſci. fac.* was returnable the 13*th February*, which was the *laſt day* of *Hilary* term, and notice given, that a writ of *error* was allowed *two days* before; and the plaintiff intending to proceed on the *ſecond ſci. fac.* was ſtopped on a motion.

It is true, the *render* of the *principal* on the *day* the *ſecond ſci. fac.* is returnable, would be too late; if the writ of *error* did not help it; but that being brought before the return of the *ſecond ſci. fac.* the *bail* hath till *four days* after the affirmance of the judgment to *render* the *principal*.

To which it was anſwered, that this judgment was regular, and though, if the *bail* had come before the return of the *ſecond ſci. fac.* and moved the court that proceedings might be ſtayed againſt them, there might have been ſome indulgence; yet when they did not make any application till after the judgment was ſigned, it ought not now to be ſet aſide.

Pratt, Chief Juſtice. Application to ſtay proceedings againſt *bail*, by reaſon of a writ of *error* brought by the *principal*, ought to be made before the judgment was ſigned; for ſuch writ of *error* of itſelf is no *ſuperſedeas* to the proceedings againſt the *bail*. However, on the circumſtances of the caſe, ſince notice was given of the allowance of the writ of *error*, I think in *reaſon* and *equity*, the judgment ought to be ſet aſide, paying coſts, on the authority of *Myer* v. *Arthur*.

The *bail* may ſurrender the *principal* at any part of the day of the return of the *ſecond ſci. fac.*

He was further of opinion, that it was neceſſary to move the court to ſtay proceedings; and if they could be ſtayed on a motion, then if the defendants paid coſts, and the plaintiff was put in as good a condition as if the motion had been made in time, the court may ſtay the proceedings, though the motion was made out of time, and the rather, becauſe it is againſt the *bail*, who ought to be favoured as far as poſſible.

Forteſcue, Juſtice. Such ſurrender on the *return day* of the laſt *ſci. fac.* muſt be made during the *ſitting of the court*. This judgment againſt the *bail* is ſtrictly regular, and ought not to be ſet aſide. The ſtaying proceedings againſt the *bail*, when the *principal* brings a writ of *error*, is merely an indulgence of the court, even when the *bail* move in time. All the proceedings are paſt, for judgment is obtained. This caſe differs from the *common* motions to ſtay proceedings on the *bail-bond*, for that is never granted, but by making the plaintiff ſecure of his *debt* if he recovers: for the judgment on the *bail-bond* ſtands as ſecurity for the *debt*. When proceedings againſt *bail* are ſtayed on a motion made in proper time, if the judgment is afterwards affirmed, the *bail* are allowed *four days* to *ſurrender* the *principal* after ſuch affirmance.

Then the court made a propoſal to ſet aſide the judgment, if the *bail* would be *bound* to pay the *debt* abſolutely, (without an election to pay the *debt* or *ſurrender* the *principal*) if the judgment ſhould be affirmed.

Which not being agreed to, the rule for ſhewing cauſe was diſcharged. *Vide Mod. Rep. vol.* 8. *p.* 131.

Eaſter, 9 *Geo.* *Waller's caſe.*

The court was moved to ſtay proceedings on a *ſci. fa.* brought againſt the *bail*, there being a writ of *error* depending in the *Exchequer Chamber*.

Per curiam. The rule in the caſe of *Myer* v. *Arthur*, on a motion in this court, in *Eaſter term*, 7 *Geo.* was, that if the defendants in a *ſci. fa.* will confeſs judgment, and enter into a rule to pay the debt, or deliver up the *principal*, within *four days* after judgment ſhall be affirmed, in ſuch caſe, the proceedings on the *ſci. fa.* ſhould be ſtayed; and the Chief Juſtice was of opinion, that the like rule ſhould be made in this caſe.

It is true, the plaintiff in the *ſci. fa.* is to have judgment immediately againſt the *bail*, but he is tied up from ſuing out execution, till *four days* after judgment ſhall be affirmed, and then, on non-payment of the *debt*, or not *rendering* the *principal*, he is at liberty to take out execution; and by this means expences would be ſaved on both ſides. *Vide Mod. Rep. vol.* 8. *page* 130.

Hilary, 10 *Geo.* *The King* v. *Pepper.*

A rule of this court was made, 15 *Car.* 2. that the plaintiff ſhould ſet forth in his *writ* or *bill*, an *ac etiam* of the ſum for which he expected the defendant ſhould give *bail*; and that if he brought an action without any cauſe, on purpoſe to hold the defendant to *ſpecial bail*, he ſhould be puniſhed.

The court was moved for an *attachment* againſt the defendant, who brought an action, with an *ac etiam billæ* in a great ſum, to hold the defendant to *ſpecial bail*, where nothing was due, as it appeared before a judge, the plaintiff being ſummoned before him, to ſhew his cauſe of action; and this was ſaid to be an abuſe of the *proceſs* of this *court*, and conſequently a *contempt*.

The court held, this was not ſuch a *contempt* as to grant an attachment againſt the plaintiff; but directed, that if the defendant was damnified, he might bring his action. *Vide Mod. Rep. vol.* 8. *p.* 227.

Eaſter, 10 *Geo.* *Hutchinſon* v. *Smith.*

The *caſe* was, one *T. S.* was arreſted at the ſuit of the plaintiff, and the defendant became *bail* to the *ſheriff*, for the appearance of the ſaid *T. S.* at the *return* of the *writ*; but before any further proceedings were had, the plaintiff died; yet his attorney took an aſſignment of the *bail-bond*, and proceeded to judgment and execution againſt the *bail*; and the court was moved to ſet aſide theſe proceedings, as irregular; and the matter being ſo reported by the *maſter*, they were ſet aſide. *Vide Mod. Rep. vol.* 8. *p.* 240.

Eaſter, 10 *Geo.* *Webſter* v. *Gearing.*

A motion was made to quaſh the proceedings againſt the *bail*, the plaintiff having declared for more than was contained in the *ac etiam* in the writ.

One judge replied, that in the caſe of *Wiatt* v. *Evans*, *anno* 1694, it was *adjudged* to be a diſcharge of the *bail*; and another judge ſaid, that in the *Common Pleas* it was held good *for ſo much*; but that there being two cauſes of this kind now depending, the proceedings were ſtayed in this cauſe, till the point was reſolved in the other. *Vide Mod. Rep. vol.* 8. *p.* 234.

Eaſter, 10 *Geo.* *Chriſty* v. *The Bail of Anſtruther.*

On a writ of *error* brought in the *Exchequer Chamber*, on a judgment given in *B. R.* the now defendants entered into a *recognizance*, purſuant to the *ſtat.* that the plaintiff in *error* ſhould proſecute his writ with effect; if the judgment ſhould be affirmed, then to pay the debt, damages, and coſts.

Afterwards the judgment was affirmed; and the plaintiff brought an action of *debt*, on this *recognizance*, againſt the *bail*; and the queſtion was, whether they ſhould be diſcharged on *common bail*; and it was ſaid, by their council, that they ought to be diſcharged, for it is againſt the practice of the court, that *bail* ſhould be required of *bail*.

The council on the other ſide obſerved, it was never yet determined, that *ſpecial bail* is not requirable in an action of *debt* on a *recognizance* of *bail*, but the reaſon of the caſe ſeems to require it, becauſe the *recognizance* is directly for payment of money; *viz.* to pay the *debt* if the judgment ſhould be affirmed; and certainly it was never yet denied, that where an action of *debt* was brought on a *bond* for the payment of money, but that *ſpecial bail* is always required; and the reaſon is the ſame for *ſpecial bail* in an action of *debt*, on a *recognizance* againſt the *bail*; for ſuch *recognizance* is a ſecurity for the payment of the condemnation money, and a *collateral* undertaking, that it ſhall be paid on the affirmance of the judgment; and the *bail* on the *recognizance* cannot be diſcharged, but on payment of the money; for they cannot *render* the *principal*, becauſe ſuch *render* does not lie by the *bail* on a writ of *error*.

Per curiam. It depends on practice, and practiſers not agreeing.

Forteſcue and *Raymond*, Juſtices, ſeemed of opinion, that *ſpecial bail* might be required; and thought, that in *debt* on a judgment *ſpecial bail* was always given.

Pratt, Chief Juſtice, rather inclined to think ſo. Adjourned. *Vide Mod. Rep. vol.* 8. *p.* 238.

Trinity, 10 *Geo.* *Wild* v. *Harding.*

A rule being made to diſcharge the *bail* in this cauſe, on pretence that the *principal* had ſurrendered himſelf before the return of the *ſecond ſci. fa.* againſt the *bail*; now the court was moved to diſcharge that *rule*, for two reaſons.

1ſt. For that if there was any ſuch *ſurrender*, the plaintiff's attorney had no notice of it; and if there had been notice, the defendant's attorney ſhould have brought the *bail-piece* before the maſter, to have had it diſcharged, otherwiſe it is no *ſurrender*, by the *expreſs rule* of this *court*: and neither of theſe things being done, the ſurrender is not regular; and therefore the *bail* are not diſcharged there being no *exoneretur*, i. e. *he is diſcharged*, entered on the *bail-piece*, nor that the plaintiff owned the *ſurrender* was made in time.

It is the practice of the court, that the *bail* are not diſcharged without entering an *exoneretur* on the *bail-piece*, on notice given of the *ſurrender*; but if the defendants did not give notice, it is an irregularity which will not be ſupplied by the court, without paying coſts; but if the *bail ſurrendered* the *principal* fairly, though not ſtrictly regular, they ought to be favoured, and are indulged by the court to *ſurrender* him at any time before the return of the *ſecond ſci. fa.*

The queſtion in this caſe was, whether the *principal* did *ſurrender* himſelf before ſuch return, and the beſt evidence of the matter is the *bail-piece*; but if he did *ſurrender* himſelf, and gave notice, he ought to pay coſts until the *bail-piece* was *marked*; for he is to take notice of the *exoneretur*, and not of what the attorney for the plaintiff told him. *Vide Mod. Rep. vol.* 8. *page* 282.

Trinity, 10 *Geo.* *Croſſe* v. *Talbot.*

The court was moved, on behalf of the defendant, to ſet aſide the *bail-bond* given on his arreſt, and that *common bail* might be accepted for him; and he obtained a rule to ſhew cauſe. His *affidavit* ſhewed, that he was retained as *valet de chambre* to *Mr. Hoffman*, the *Duke of Holſtein*'s reſident here, at 12*l.* 12*s.* *per annum* wages, and 10*s.* a week board wages, and a certificate of this was produced, under the *reſident*'s own hand; but it did not appear that he either ſlept in the houſe, or actually executed the office.

The court held, that he ought to be a domeſtic ſervant, and really to execute the duty of his office, and that being a mere nominal ſervant was not ſufficient; and they diſcharged the rule.

A great many caſes have ſince been determined, on the ſame principle; but it was in thoſe caſes held, that the idea of a domeſtic ſervant was not confined to his lying in the foreign miniſter's houſe, provided he is a real ſervant to him, and actually performs the ſervice. *Vide Mod. Rep. vol.* 8. *p.* 288.

Trinity, 10 *Geo.* *Addiſon* v. *Patterſon.*

One *Charles Fountaine* was arreſted at the ſuit of the plaintiff, and the *bail-piece* was marked thus; Peter Fountaine *is delivered to* bail, &c. *who was arreſted by the name of* Charles Fountaine; and in the *recognizance* of the *bail*, it appeared that they were *bail* for *Peter Fountaine*; and now, on a *ſci. fa.* brought againſt them, both the *principal* and *bail* plead this matter in abatement; and the court was moved to ſet aſide this plea, becauſe the *bail* cannot plead this in abatement; beſides, the *principal* and his *bail* cannot join in one plea.

The court were of opinion that the *bail* could not plead this *miſnomer* in *abatement*, though the *principal* might. So a rule was made for the defendant to anſwer over. *Vide Mod. Rep. vol.* 8. *p.* 290.

Trinity, 10 *Geo.* *Smith* v. *Graham.*

A rule was made on a motion for an *attachment* againſt one *Chaſe*, a bailiff, for taking inſufficient *bail*, on the arreſt of one (at the plaintiff's ſuit) on a *bill of Middleſex*. *Vide Mod. Rep. vol.* 8. *p.* 283.

Trinity, 10 *Geo.* *Manning* v. *Turner.*

The court was moved to ſet aſide a judgment againſt the *bail*, for that the *principal ſurrendered* himſelf the 2d *day of May*, and *ſeven days* afterwards gave notice thereof to the attorney for the plaintiff, that he had *ſurrendered* himſelf on that day before Juſtice *Tracy*, and *two days* afterwards he gave notice that he had *ſurrendered* himſelf before Juſtice *Powys*, and all this before the return of the *ſecond ſci. fac.*

It was ſaid on the other ſide, that though notice was given to the attorney, yet by the expreſs rule of this court, the *bail* are not diſcharged until the *bail piece* is marked, which was not done till after the return of the *ſecond ſci. fac.* it is true there is an *exoneratur* entered now, but that was after the ſigning the judgment.

To which it was replied; that admitting the fact to be as before-mentioned, yet the judgment ought to be ſet aſide, becauſe the plaintiff's attorney took the *bail-piece* from the *judge's chambers*, but did not leave it with the proper officer; but as ſoon as it was left with him, the attorney for the defendant entered an *exoneratur*, ſo that it was the plaintiff's fault that it was not entered ſooner.

This matter being referred to the maſter, he reported that the *principal ſurrendered* himſelf on the *ſecond day of May*, and notice was given to the plaintiff's attorney, that the *ſurrender* was before Juſtice *Tra y* on the *ſeventh day of May*, and *two days* afterwards that it was before Juſtice *Powys*, and the *bail piece* was diſcharged on the *fourth day* of the ſame month, and the *ſecond ſci. fac.* was returnable on the *ninth day of May*, and that the plaintiff's attorney took the *bail piece* from the *judge's chambers*, and kept it for a conſiderable time; and that there was not *fifteen days* between the *teſte* and *return* of the *ſecond ſci. fac.* neither was it *four days* in the office; and on this report the judgment was ſet aſide. *Vide Mod. Rep. vol.* 8. *p.* 281.

Michaelmas, 10 *Geo.* *Crofts Executor of Curtis* v. *Butel the Bail of Harris.*

The caſe was thus, *viz.* an action was brought in this court, and judgment obtained, and a writ of *error* brought, returnable in the *Exchequer Chamber*. Two perſons became *bail* to the writ of *error*, before *Pratt*, Chief Juſtice; to which *bail* exception being taken; one juſtified himſelf in court, but the other did not; ſo that another additional *bail* was put in before *Powys*, Juſtice, at his chambers; on which entry before *Powys* the *recognizance* of the *bail* was drawn up, and the judgment being affirmed on the writ of *error*, two *ſci. fa.'s* were brought in *London* againſt the *bail*, and two *nihils* returned; and a *ca. ſa.* againſt the defendant, on which he was taken and impriſoned.

Per cur. If the *ſecond bail* had entered into a *recognizance* before the Chief Juſtice, as the firſt man did, that would not have related to the time of the firſt *recognizance* given by the other *bail*, and taken *before* the ſame Chief Juſtice; but here the *ſecond bail* entered into a *recognizance* before another judge, which makes no alteration of the caſe.

A judge may take a *recognizance* of *bail* at his chambers, and the entry in his book is a good warrant for the entry of it in the office, and the practice is ſettled to take ſuch *recognizance* at one time, and another at another time; for the firſt is *de bene eſſe*, and no *common bail* is given till the laſt is taken, and from that taking the *recognizance* is made up; for ſuch judge before whom the laſt *bail* is taken ſigns the roll, therefore though taken by different judges, the firſt is of no value till the laſt is taken, for then the *bail* and the entry is entire and perfect, and not before.

2dly. The return is good and proper; for the *ſci. fac.* is not grounded on a proceeding by bill, but on a collateral matter.

3dly. The *ca. ſa.* is good, though it is not indorſed.

4thly. The *ſci. fac.* is well directed to the *ſheriff* of *London*.

5thly. The body may be taken in execution on ſuch *recognizance*.

Per curiam. The proceedings are regular: wherefore the motion was denied. *Vide Mod. Rep. vol.* 8. *p.* 187.

Michaelmas, 10 *Geo.* *Clark* v. *Corniſh*, *or Corniſh* v. *Clark et al'.*

Two perſons jointly and ſeverally entered into a recognizance of 4000*l. bail* for another; and afterwards the plaintiff brought a *ſci. fac.* againſt both of them jointly, and had two *nihils* returned, on which the plaintiff prayed execution againſt each for the whole debt, which was awarded accordingly.

And now it was objected, that execution ought not to be awarded againſt each for the whole debt, becauſe a ſeveral judgment cannot be given on a joint *ſci. fa.* no more than on a bond.

It is true a recognizance may be joint and ſeveral, (as this was) and ſuch recognizance may warrant a joint and ſeveral *ſci. fac.* but yet, a ſeveral judgment can never be had on a joint *ſci. fac.* againſt each of the cogniſors, for the plaintiff might have brought a *ſci. fac.* againſt each of them ſeverally, and not againſt both jointly.

The court was of opinion, that this was the conſtant form; ſo the judgment was affirmed.

For if the award of the execution be joint, yet the plaintiff may have ſeveral executions; and though the *ſci. fac.* is joint againſt both, yet the execution may be ſeveral, for as the recognizance is joint and ſeveral, to compel the plaintiff to bring two *ſci. fac.'s*, would be only to multiply actions. *Vide Mod. Rep. vol.* 8. *p.* 199.

Hilary, 11 *Geo.* *Anonymous.*

See page 117 of this work, under the head arreſt of judgment.

Hilary, 11 *Geo.* *Anonymous.*

The practice of the court is, that where judgment is obtained againſt the *principal*, the *bail* may *ſurrender* him at any time before the return of the *firſt ſci. fac.* when it is returned *ſcire feci*, or at any time before the return of the *ſecond ſci. fac.* where *two nihils* are returned thereon.

If the plaintiff proceeds by action of *debt* on the *recognizance*, the *bail* may *ſurrender* the *principal* within *eight days* after the return of the writ.

This was an action of *debt* on the *recognizance* againſt the *bail*, the writ was returnable on the *eſſoign day* of the term, and the *principal* was *ſurrendered*, and an *exoneretur* entered in the *bail-piece* on the *fourteenth day of January*; ſo it was moved, that the *bail* might be diſcharged, and they were diſcharged accordingly. *Vide Mod. Rep. vol.* 8. *p.* 341.

Eaſter, 11 *Geo.* *Heavyſide* v. *Davis.*

In the principal caſe, there was judgment againſt the defendant, who became a bankrupt, and the plaintiff did not come before the commiſſioners to prove his debt, but took out a *ſci. fac.* againſt the *bail*; and after two *nihils* returned, had judgment againſt them, and they were taken in execution.

The court was moved, that they might be diſcharged, becauſe a certificate of the commiſſioners allowed by the Lord Chancellor is a diſcharge of the *principal*, who if he had been taken in execution, would have been diſcharged on producing it.

The judgment againſt the *bail* being regularly obtained, there being *fifteen days* between the *teſte* of the firſt writ of *ſci. fac.* and the return of the *ſecond*, and two *nihils* returned, bankruptcy in the *principal*, ſhall not be given in evidence, to avoid ſuch judgment regularly entered againſt the *bail*. *Vide Mod. Rep. vol.* 8. *p.* 349.

Michaelmas, 11 *Geo.* *Anonymous.*

The plaintiff obtained judgment againſt the *principal* for 2318 *l.* which judgment was conteſted by him, as far as he could, even to an affirmance in the Houſe of Lords, and afterwards the plaintiff obtained a judgment on a *ſci. fac.* againſt the *bail*; and the queſtion now was, whether they ſhould pay intereſt from the time: judgment was had againſt the *principal*, they offered to pay the principal ſum and coſts; and it was inſiſted for the plaintiff, that he ought to have the whole; and the court inclined to that opinion. *Vide Mod. Rep. vol.* 8. *p.* 336.

Michaelmas, 11 *Geo.* *Brown* v. *Combs.*

An objection was made againſt the *bail* in this cauſe, for that it is againſt the rule of this court to take an attorney as *bail*.

There was ſuch a rule, but the intention of making it was, that an attorney ſhall not be taken as good *bail* merely becauſe he is an attorney; but when he is reſponſible, and juſtifies, and is an houſe-keeper, then though he is an attorney, he is good *bail*. *Vide Mod. Rep. vol.* 8. *p.* 339.

Michaelmas, 11 *Geo.* *Bond* v. *Turner.*

Judgment was obtained by the teſtator, who died, and his executor ſued out a *ſci. fac.* againſt the defendant, and had judgment therein, and then he ſued out a *capias ad ſatisfaciend.* againſt him; and on *non eſt inventus* returned, he ſued out a *ſci. fac.* againſt the *bail*; and on a motion made to ſtay the proceedings againſt them, as being irregular, becauſe there were not *four days* between the *teſte* and the return of the *ſci. fac.* againſt the principal, that motion was granted; and then the plaintiff moved to quaſh all the proceedings for his own expedition; which was likewiſe granted on payment of coſts. *Vide Mod. Rep. vol.* 8. *p.* 305.

Michaelmas, 11 *Geo.* *Sir John Walrond* v. *Jacob, Senior, Henricus Van Moſes.*

On motion for leave to change the *bail* in *this* cauſe on the very day it was to have been tried by *niſi prius*, becauſe one of them was a very material evidence for the defendant, the council for the plaintiff objected againſt it, *viz.* that the *bail* ſhould not be changed, becauſe the *principal* was run away, and the *bail* had offered 100 *l.* reward to any perſon who ſhould bring him in; beſides, the new *bail* now offered, inſtead of the former, were *bail* to an action on a *South Sea* contract for 13,400 *l.* ſo that the plaintiff in this action cannot tell what they may be worth after the payment of that ſum.

If the *bail* ſurrender the *principal*, they ſhall be admitted to put in new *bail*, and then the old *bail* may give evidence at the trial; but the *bail* now offered being *bail* in another action for a conſiderable ſum, and a verdict againſt the principal; the plaintiff in this action cannot have timely notice to enquire into their circumſtances; therefore the court will not force new *bail* to the action, but the old ones muſt ſtand.

Note. That at the ſame time the court held that a plaintiff who was in *Holland* might make affidavit there, and get it atteſted by a public notary; and that it ſhould be admitted as evidence to hold the defendant to *ſpecial bail* here. *Vide Mod. Rep. vol.* 8. *p.* 322.

Michaelmas, 12 *Geo.* *The Caſe of the Bail of Boiſe and Sellers.*

Boiſe and *Sellers* were brought up by *habeas corpus* from *Wincheſter* gaol, and were returned charged with two civil ſuits, and ſeveral *Exchequer* informations for frauds in the cuſtoms. It was moved on behalf of the *bail* in the civil actions, that they might be at liberty to ſurrender, according to 25 *E.* 3. *c.* 19. To which it was anſwered, by the attorney-general, that the king had a prerogative to hold his debtor in what lawful gaol he pleaſed. However, the court would never turn them over, till they were ſatisfied as to the reality of the debts, it being an application by the *bail*: whereon a reference was made to the maſter, and on his reporting that the civil actions were for juſt debts, and actually brought before any of the informations, they were turned over to the marſhal, on the ſurrender of the *bail*. *Vide Strange, vol.* 1. *p.* 641.

Michaelmas, 13 *Geo.* *Parry* v. *Berry.*

On a motion to ſtay proceedings on a *ſci. fac.* againſt *bail*, becauſe the defendant in the *original* action died after judgment recovered againſt him, and after a *capias* thereon ſued out and returned; but before the return of the ſecond *ſci. fac.* againſt the *bail*, till which time the *bail* had time by the courſe of the court to *ſurrender* the *principal*, and were prevented doing it by the *act of God*, viz. his death; a *rule* was made to *ſhew cauſe*, which was afterwards diſcharged, becauſe it was the *bail*'s omiſſion that they did not ſurrender him, he living till after the return of the *capias*. *Vide Raym. vol.* 2. *p.* 1452.

Michaelmas, 1 *Geo.* 2. *Chambers* v. *Robinſon.*

The defendant, after judgment, *ſurrendered* himſelf in diſcharge of his *bail*, and lay *two terms* without being charged in execution, during which time the plaintiff brought an action of *debt* on the judgment; and after a recovery in that action, the defendant lay *two terms* more without being charged, and the plaintiff brought another action of *debt* on the ſecond judgment; whereon the defendant moved for a *ſuperſedeas* as to the two firſt actions, and that *common bail* might be accepted in the laſt: and, on conſideration, both were granted. It was agreed, that in the *firſt* action of *debt* on judgment, *ſpecial bail* might be required; but the court ſaid it would be a handle of oppreſſion, if they carried it any farther. *Vide Strange, vol.* 2. *page* 782.

Michaelmas, 1 *Geo.* 2. *Hunter* v. *Sampſon et al'*, *Bail of Yardley.*

It was moved to ſtay proceedings againſt the *bail*, pending a writ of *error* brought by the *principal*, on the terms it was done in *Myers* v. *Arthur*'s caſe: but it appearing here, that the *bail* was not put in on the writ of *error*, ſo as to make it an abſolute *ſuperſedeas*, the court refuſed it; ſaying, they would not go one ſtep further than the caſe of *Myers* v. *Arthur*. *Vide Strange, vol.* 2. *p.* 781.

Hilary, 2 *Geo*. 2. *Goodchild* v. *Chaworth*.

A *capias ad ſatisfaciendum* was taken out againſt the *bail* on a writ of *error*, and the court refuſed to ſet it aſide, though 1 *Rol. Abr.* 898. is a caſe in point, that it will not lie againſt *bail*. *Vide Strange, vol.* 2. *p.* 822.

Hilary, 2 *Geo*. 2. *Baldwin* v. *Morgan*.

The plaintiff out of the penalty of a *recognizance* of *bail*, levied not only the money recovered, but ſome *coſts* not included in the judgment, but ſuch as he really had been put to; and on motion it was held, that though *equitable coſts* may be levied out of the penalty of a bond, yet it was too hard to ſuffer it to be done againſt the *bail*, and therefore the overplus money was ordered to be returned. *Vide Str. vol.* 2. *p.* 826.

Eaſter, 3 *Geo*. 2. *Steward* v. *Smith*.

The defendant's council took *exception* to the *ſci. fac.* againſt the *bail*, that on ſetting out the *capias ad ſatisfaciendum* in the replication, it appeared the *ſci. fac.* bore *teſte* the very day the *capias ad ſatisfaciendum* was returnable; therefore it was ill, becauſe the *ſci. fac.* cannot iſſue till a *capias ad ſatisfaciendum* is *returned* and *filed*, which could not be preſumed to have been done the very day of the return. But the court ſaid it was well enough, and gave judgment for the plaintiff. *Vide Strange, vol.* 2. *p.* 866.

Eaſter, 3 *Geo*. 2. *Hall* v. *Howes*

The defendant put in *ſpecial bail*, and then the plaintiff recovered judgment againſt him, and his *bail* ſurrendered him; but afterwards for want of the plaintiff's charging him in execution within *two terms*, he was diſcharged on filing *common bail*, and then the plaintiff brought an action of *debt* on the judgment, and held the defendant to *ſpecial bail*; the defendant now moved that he might be diſcharged on *common-bail*, on the authority of *Clever* v. *Jordan*, *Hilary* 8 *Geo*. 2. which was juſt this caſe. The defendant ſurrendered in diſcharge of his *bail*, and after *two terms* was diſcharged for want of the plaintiff's charging him in execution, and an action being brought on the judgment, was diſcharged on *common-bail*. The caſe of *Chambers* v. *Robinſon* was alſo cited, which was *Michaelmas*, 1 *Geo*. 2. where in an action of *debt* on a judgment, *ſpecial bail* was put in, and judgment for the plaintiff; and a *ſecond* action on that judgment being brought, the court would not then hold the defendant to *ſpecial bail*.

On the other ſide was cited *Burdus* v. *Hoſier*, *Hilary*, 7 *Geo*. 2. where a judgment of 2000 *l*. being recovered, and the defendant diſcharged in *two terms* for want of the plaintiff's charging him in execution, in an action on that judgment, the court obliged the defendant to put in *ſpecial bail*. But now, at the ſhewing cauſe, it appeared by *affidavits* which were made in the cauſe laſt cited, that the reaſon the defendant obtained a *ſuperſedeas* from the execution, was not any *laches* in the plaintiff, but by reaſon of ſome treaty between the parties, in hopes of making matters up.

Lord *Hardwicke*. The queſtion in *Chambers* v. *Robinſon*, was only how far the plaintiff was intitled to *bail* in an action of *debt* on a judgment; and the court held, that if the cauſe of action on which the judgment was obtained was *bailable*, that the plaintiff would be intitled to *ſpecial bail* in an action of *debt* on that judgment; but if he went on with actions on the *ſecond* judgment, he ſhould not, for that would be vexatious, and to accumulate coſts: and they held likewiſe, that if the original cauſe was not *bailable*, but the addition of coſts only made the judgment amount to a *bailable* ſum, that no *ſpecial bail* ſhould be required in an action on the judgment; but in this caſe the cauſe of action was *bailable*, but it depends on a *collateral* circumſtance, *viz.* the not being charged in execution; now, in the caſe of *Burdus* v. *Hoſier*, the great reaſon of the court's requiring *ſpecial bail* was, the agreement depending between the parties, which prevented the plaintiff's charging the defendant in execution; and the caſe of *Clever* v. *Jordan* is directly in point, where the court diſcharged the defendant on *common bail*, and that is to be ſure a reaſonable way, and will prevent vexation. Indeed we do not ſuffer little matters of treaties between the parties to alter the courſe of the court, unleſs it be a particular and expreſs agreement not to take advantage of *laches*: and I think a rule ſhould be made to make this matter certain; for in no caſe, where the defendant is diſcharged for want of being charged in execution, ſhould the plaintiff be intitled to *ſpecial bail* in an action on the judgment.

Per curiam. Let the defendant be diſcharged on *common bail*. *Vide caſes Temp. Lord Hardwicke, p.* 244.

Hilary, 4 *Geo*. 2. *Doldern* v. *Feaſt*.

Per curiam. We have ſeen ſo much oppreſſion in letting the ſheriff's officers be *bail*, that we think proper to concur with the *Common Pleas*, in a *general rule*, not to accept of them, or *ſerjeants at mace*. *Vide Strange, vol.* 2. *p.* 890.

Trinity, 4 *Geo*. 2. *Cole* v. *Buckland*.

In this caſe the *ſecond ſci. fac.* was returnable the *firſt day of term*, and a week within term the *bail* moved to ſtay the proceedings, on the *common terms* of giving judgment on the *ſci. fac.* and taking *four days* to *ſurrender* after affirmance in the *principal* cauſe. But the court held they came too late, after their time to *ſurrender* was gone, and would not revive it again: all they would do was, to ſtay the ſuing out execution till after affirmance. *Vide Strange, vol.* 2. *p.* 872.

Michaelmas, 4 *Geo*. 2. *Ritſon* v. *The Bail of Naſh*.

After judgment on a *ſci. fac.* againſt *bail*, it was moved to ſtay execution, the *principal* having brought *error*, and the *bail* undertaken to pay the *condemnation money*, and the coſts on the *ſci. fac.* in *four days* after the affirmance: but in this caſe there being no *bail* on the writ of *error*, the court made the *bail* undertake alſo to pay the *coſts* on the writ of *error*, in caſe the judgment was affirmed: and ſaid, it was a favour they were aſking, and they would make them ſubmit to *equitable* terms. *Vide Strange, vol.* 2. *p.* 877.

Michaelmas, 4 *Geo*. 2. *Berchere* & *al.* v. *Colſon*.

The defendant having prevailed with *Collins* and *Bevan* to become *bail* for him to the ſheriff in 300 *l*. at the return of the writ, they went before a judge, in order to put in *bail* above. And the defendant himſelf appearing and inſiſting that no *bail* ſhould be taken, the judge refuſed to do any thing in the matter; whereon the court was moved, to prevent ſo palpable a fraud, that the *bail* might be permitted to perform the condition of their bond, by putting in *bail* above, and on leave being given ſo to do, they put in *bail* before a judge, and the next day took up the defendant, and *ſurrendered* him in diſcharge of themſelves. *Vide Str. vol.* 2. *p.* 876.

Hilary, 5 *Geo*. 2. *Martin* v. *Moore*.

The *latitat* was with an *ac etiam* for 80 *l*. and the declaration was *to his damage of* 150 *l*. and the verdict for 104 *l*. and there being variety of opinions in the books whether the *bail* ſhould be liable for *ſo much*, or totally diſcharged; and the queſtion having been many terms depending in this cauſe, it now came to be finally ſettled, and the authorities contradicting one another, the court took it up on the reaſon of the thing; and reſolved as on the one hand there was no colour to ſubject the *bail* to more than they were bound in, let the plaintiff's demand be ever ſo much more; ſo on the other hand there was no reaſon the plaintiff ſhould ſuffer by his moderation in taking *bail*, but the *recognizances* ſhould be conſidered as an agreement to pay 80 *l*. or deliver up the defendant; and therefore they made a rule, that the goods taken in execution ſhould be re-delivered, on the *bail*'s paying the 80 *l*. and the *coſts*, or elſe the goods to be ſold, and the ſurplus returned. *Vide Strange, vol.* 2. *p.* 922.

Michaelmas,

Michaelmas, 5 *Geo.* 2. *Hoare* v. *Mingay Ux'* &c.

In *Eaſter* term laſt the plaintiff brought his action in *C. B.* againſt the defendant on a *recognizance* of the *bail*, but the defendant appearing to be an attorney of *B. R.* the plaintiff was forced to deſiſt: on the 20th of *October* laſt, the defendant *ſurrendered* the *principal*; and the *firſt day* of this *term*, a bill was filed. And on the defendant's motion to ſtay the proceedings; as having *rendered* the *principal* before an action brought, the queſtion was, whether proceedings in *C. B.* were to be regarded; for if they were, the *render* would be too late; and the court held the *render* to be good, it being before the return of the proceſs in this ſuit; and it was the fault of the plaintiff not to begin right at firſt. *Vide Strange, vol.* 2. *p.* 915.

Trinity, 6 *Geo.* 2. *Duchett* v. *Martin*.

Pending a writ of *error* to reverſe an *outlawry* on *meſne* proceſs, the defendant in *error* moved to quaſh the writ, becauſe no *bail* was given.

Per curiam. That is never done till the *outlawry* is reverſed; and then we take *bail* to appear to an *original* to be brought within *two terms*; and ſo it was done in this caſe. *Vide Stra. vol.* 2. *p.* 951.

Eaſter, 7 *Geo.* 2. *Gammage* v. *Watkin*.

The debt was *three guineas*, but the *coſts* ſwelled it to 14 *l.* 10 *s.* for which the plaintiff had judgment, and the defendant brought a writ of *error*. The plaintiff brought *debt* on the judgment, and held the defendant to *bail*; and on motion the proceedings were ordered to ſtay pending the writ of *error*, and *common bail* to be accepted; for as the *original* demand did not require *bail*, the addition of *coſts* will not alter the caſe. *Vide Strange, vol.* 2. *p.* 975.

Eaſter, 7 *Geo.* 2. *Rice* v. *Kelly*.

On a motion to ſet aſide *bail* given in before a judge, the plaintiff not having notice of the *bail*, and that the defendant might put in *bail* to the plaintiff's ſatisfaction.

Reſolved, that leaving notice under the party's door is in that caſe ſufficient.

That though notice ſhould not be given to the plaintiff of the *bail*, yet if after the *bail* is put in, he takes notice of it, and makes enquiry after the perſons, and declares himſelf ſatisfied with them, it is the ſame thing as if he had notice before. *Vide Caſes Temp. Lord Hardwicke, p.* 28.

Trinity, 8 *Geo.* 2. *Collet* v. *Jennis*.

The defendant's council moved, that the *recognizance* of *B.* one of the *bail* for the defendant might be diſcharged, and another perſon, one *Spillet* might be put in in his room, becauſe the ſaid *B.* is a *material witneſs* for the defendant.

And *Spillet* came and offered himſelf, and undertook to be *bail* in court and juſtified.

Per curiam. Let *B.* be ſtruck out of the *bail piece*, and *Spillet's name* inſerted in his room. *Vide Caſes Temp. Lord Hardwicke, p.* 133.

Trinity, 10 *Geo.* 2. *Robinſon* v. *Nicolls*.

The plaintiff brought *debt* on a judgment where the money recovered was under 10 *l.* but by the addition of *coſts* exceeded it; and he held the defendant to *bail*, and *bail* was put in above. Then the defendants moved on the authority of *Gammage* v. *Watkin, Eaſter*, 7 *Geo.* 2. that *common bail* ſhould be accepted, and the council for the plaintiff agreed it was the rule, but inſiſted, that by actually putting in *bail*, the defendant was too late in the application; and cited *Laſerre* v. *Johnſon, Hilary*, 13 *Geo.* 1. where on *error* an executor gave *bail*, which he need not have done; and the court refuſed to *vacate* the *recognizance*.

But in this caſe the court ordered *common bail*; for the plaintiff, who was an attorney, ought not to have marked his proceſs for *bail*, and therefore ſhould not take advantage of his own miſtake. *Vide Stra. vol.* 2. *p.* 1077.

Michaelmas, 11 *Geo.* 2. *Turner* v. *Warren*.

The plaintiff brought his action for 200 *l.* for ſo much loſt to the defendant at play; and the queſtion was on *ſtat.* 9 *Ann, c.* 14. which gives an action of *debt* at any time within *three months* againſt the winner, whether the defendant could be held to *ſpecial bail*; the defendant's council comparing it to the caſe of actions on *penal ſtatutes*, where *bail* is never required.

Per curiam. There ought to be *ſpecial bail* in this caſe, which is at the ſuit of the party aggrieved, and wherein the defendant is a debtor to the plaintiff; and the clauſe is to be conſidered as *remedial*. And therefore, on conſideration, and talking with the other *judges*, *ſpecial bail* was ordered. *Vide Stra. vol.* 2. *p.* 1079.

Michaelmas, 12 *Geo.* 2. *Smith* v. *Dudley*.

By *ſtat.* 11 & 12 *W.* 3. *c.* 9. *ſheriffs* are not to take *ſpecial bail* in *Wales*, or *counties palatine*, on proceſs from *Weſtminſter-hall*, unleſs a debt of *twenty pounds* is ſworn to. In this caſe *ſpecial bail* was taken for 12 *l.* on a proceſs iſſued in *Lancaſhire*; and on a motion for *common bail*, it was inſiſted, that *ſtat.* 12 *Geo.* 1. *c.* 29. for not holding to *bail* under 10 *l.* having only an exception of *Scotland*, was intended to extend to all other places, and conſequently was a virtual repeal of *ſtat.* 11 & 12 *W.* 3.

Per cur. They are not inconſiſtent; for *ſtat.* 12 *Geo.* 1. does not ſay you ſhall have *bail* for 10 *l.* but that you ſhall not have *bail* under 10 *l.* whereas in *ſtat.* 11 & 12 *W.* 3. there are *negative* words: and the oath here being only to 12 *l.* the plaintiff was not intitled to *ſpecial bail*, and the rule for *common bail* muſt be abſolute. *Vide Stra. vol.* 2. *p.* 1102.

Trinity, 13 *Geo.* 2. *Elliott* v. *Smith*.

It was held, that if there is *fifteen days* between the *teſte* of the *firſt*, and the return of the *ſecond ſci. fa.* againſt the *bail*, it is ſufficient, without any regard to the number of *days* between the *teſte* and return of each: and that a *capias ad ſatisfaciendum* may be taken out againſt the *bail*, without any *fieri facias*, or return of *no goods*, being made thereon by the ſheriff. *Vide Strange, vol.* 2. *p.* 1139.

Trinity, 14 *Geo.* 2. *Heathcote* v. *Goſlin*.

The *affidavit* to hold to *bail* was, that the defendant borrowed 2000 *l.* of the plaintiff on *bottomree*, which money is now due and owing to this deponent, by virtue of the ſaid bond, as thereby may appear. It was objected by the defendant's council, that this was no oath for the debt; for ſuppoſe every *penny* is paid, and a ſeparate receipt taken for it, yet on the face of the bond the whole will appear due.

Per curiam. It is not ſufficient.

The plaintiff would have made a *ſupplemental affidavit*, but the court refuſed to receive it, for the *act of parliament* requires a full oath previous to the iſſuing the proceſs, that defendants may not be harraſſed. And therefore, in this caſe, the defendant was diſcharged on *common bail*. *Vide Strange, vol.* 2. *p.* 1157.

Eaſter, 15 *Geo.* 2. *Grey* v. *Jefferſon*.

On a *ſci. fa.* brought againſt *bail*, the plaintiff made a miſtake in ſetting out the recognizance, which the defendant took advantage of by pleading *nul tiel record*; and afterwards the plaintiff moved to amend it, but was denied; for *ſcire facias*'s againſt *bail* are never amended, and the practice is, for the plaintiff to quaſh his own writ. This may be to defeat the *bail* of an opportunity to *ſurrender*, which he would have done, if he could not have been ſure of ſucceeding in his plea. *Vide Strange, vol.* 2. *p.* 1165.

Eaſter, 16 *Geo.* 2. *Smith* v. *Nicholſon*.

The plaintiff, in order to proceed againſt the *bail*, took out a *capias ad ſatisfaciendum* on the 3d of *December*, and on the 4th a writ of *error* was allowed; notwithſtanding which he called for a return of the *capias* from the ſheriff, who returned *non eſt inventus* thereon; and then waiting till the writ of *error* was at an end, proceeded by *ſci. fa.* againſt the *bail*. And now, on motion, the whole proceedings were ſet aſide; for the ground of them, *viz.* the return of *non eſt inventus*, was obtained after notice of the writ of *error* allowed, which in its nature ſtopped all ſort of proceedings; and the ſheriff could not ſo much as look after the defendant, in order to ground ſuch a return. *Vide Strange, vol.* 2. *p.* 1186.

Eaſter, 17 *Geo.* 2. *Rios* v. *Beliſante*.

The *affidavit* to hold to *ſpecial bail* was made by a *merchant* in *London*, ſwearing that the defendant owed the plaintiff 270 *l.* as appears by an *affidavit* made by the plaintiff, in *Amſterdam*, which the deponent believes to be true.

Per curiam. There can only be *common bail*; for the oath abroad is no ground for our *proceſs*, and then there is nothing but the belief of a *third perſon*, which is not ſufficient. *Vide Strange, vol.* 2. *p.* 1209.

Eaſter, 17 *Geo.* 2. *Beliſante* v. *Levy*.

The *affidavit* to hold to *ſpecial bail* being defective, *common bail* was ordered; and thereon the plaintiff, on the 19th of *April*, made a *full affidavit*, and took out a new writ, and held the defendant to *bail*; and the next day, *viz.* 20th *April*, moved to diſcontinue, on payment of *coſts*.

Per curiam. The plaintiff has been too quick, for he ſhould have had the *coſts* taxed and paid, before he took out a new writ: therefore let the defendant be diſcharged on *common bail*, and let the plaintiff pay him his *coſts* of this application. *Vide Strange, vol.* 2. *page* 1209.

Hilary, 18 *Geo.* 2. *Walrond* v. *Franſham*.

An *executrix*, in order to hold the defendant to *bail*, made an *affidavit* that he was indebted to her *teſtator* in ſo much money, as appears by the books of her *teſtator*. And it was held inſufficient, and *common bail* was ordered. *Vide Strange, vol.* 2. *p.* 1219.

Trinity, 18 *Geo.* 2. *Turner* v. *Schomberg*.

The defendant gave his note for 36 *l.* and was afterwards diſcharged on the *inſolvent debtors act*. He afterwards meeting the plaintiff, promiſed to pay him the *debt*, at *two guineas* per *month*, and paid *twelve guineas* accordingly: And being now ſued for the reſt, the court diſcharged him on *common bail*, ſaying it was no new conſideration, but the old debt. *Vide Strange, vol.* 2. *p.* 1233.

Michaelmas, 18 *Geo.* 2. *Taylor* v. *Waſteneys*.

The defendant being arreſted for 25 *l.* laid in gaol till he was *ſuperſeded*. The plaintiff meeting him afterwards, got a note of him for 20 *l.* and brought a freſh action on it, and held him to *bail*. But the court diſcharged him on *common bail*; for it is but a farther ſecurity, and does not extinguiſh the former cauſe of action, which may be declared on ſtill. *Vide Strange, vol.* 2. *p.* 1218.

Michaelmas, 18 *Geo.* 2. *The Caſe of the Bail of Peter Vergen.*

The defendant was convicted for *felony*, and *pardoned* on condition of tranſportation; and having alſo a *civil* action depending againſt him, in which he had given *bail*; they brought him up by *habeas corpus*, in order to *ſurrender* him. It was *objected*, that the court could not take him out of the cuſtody of the *ſheriff*, and commit him to the *Marſhal*; to which it was anſwered, that on the return of the writ he was to be conſidered as the priſoner of the court, who might do what they would with him, and ſend him back to *Newgate* for ſafe cuſtody: ſo the *bail* were admitted to deliver him to the *Marſhal*, and the court immediately remanded him to *Newgate*. *Vide Strange, vol.* 2. *p.* 1217.

Michaelmas, 18 *Geo.* 2. *Olmius* v. *Delany*.

In *debt* on a bond for 900 *l.* the defendant put in *bail*, who juſtified in court, and were allowed. The plaintiff finding they were *forſworn*, and worth nothing, diſcontinued; but before he had done ſo, he arreſted the defendant in a ſecond action, and held him to *bail*. The defendant moved to be diſcharged on *common bail*, according to the caſe of *Beliſante* v. *Levy*, and obtained a *rule* to *ſhew cauſe*; when the whole *villainy* appearing, the court diſcharged the *rule*, and ſaid, the plaintiff was right in laying hold of him as he did; for had he diſcontinued before, the defendant would probably have run away; and therefore ordered that he ſhould be held to *ſpecial bail*. *Vide Stra. vol.* 2. *p.* 1216.

Michaelmas, 19 *Geo.* 2. *De Balſ* v. *Mackenſie*.

The plaintiff recovered in the court of *Meudon* in *France*, damages and coſts, for a malicious proſecution, to 2500 *l.* he arreſted the defendant here, and held him to *bail* on an *affidavit* of ſo much being due to him on a judgment or decree. The court held, that this did not warrant holding to *bail*; for on a decree here, there can be no *bail*; and whatever might be the caſe of a money debt contracted and ſued for abroad; yet this being a caſe of damages for a malicious proſecution, can never be conſtrued to raiſe a debt here. So *common bail* was ordered. *Vide Stra. vol.* 2. *p.* 1243.

Trinity, 21 *Geo.* 2. *Richardſon* v. *Jelly*.

Per curiam. Where the *bail* do not apply to ſtay the proceedings, pending a writ of *error*, till their time to *ſurrender* is out, we will not give them any time for that purpoſe, but only *four days* to pay the money in, after the judgment is affirmed. *Vide Stra. vol.* 2. *p.* 1270.

Hilary, 30 *Geo.* 2. *Woolley and others*, v. *Cobbe and others, Bail of Cobbe, a Bankrupt.*

The defendant being a bankrupt pending the action, the *bail* were fixed in *July*, and the bankrupt obtained his certificate in *Auguſt* following.

The queſtion before the court was, whether the *bail* ſhould be diſcharged, the bankrupt having obtained his certificate, though not till after the debt *levied*, and the money in the *ſheriff*'s hands; or whether the *bail* were *abſolutely fixed*, from the levy being made before the certificate was obtained?

Per curiam. If the certificate is obtained before the *bail* are fixed, they ſhall be diſcharged; but if they are fixed before the certificate is obtained, they remain liable. *Vide Bur. vol.* 1. *p.* 245.

Eaſter, 30 *Geo.* 2. *Capron* v. *Archer*.

The queſtion before the court was, the *terms* on which the *bail* ſhould be allowed time to *ſurrender* the *principal*, after a writ of *error* brought.

Deniſon and *Foſter*, Juſtices, (being the only judges on the bench) held, that it was the allowance of the writ of *error* that was a *ſuperſedeas* to the proceedings below, and that the notice of ſuch allowance was only neceſſary to bring the party into *contempt*, if he ſhould proceed on his judgment afterwards.

In this caſe, the defendant's writ of *error* was allowed before the time was expired, within which the *bail* had indulgence to *ſurrender* the *principal*; the notice of ſuch allowance was not given to the plaintiff's attorney till after the expiration of the time which they had for *ſurrendering* the *principal*.

The court gave the *bail* the ſame *terms* in this caſe, as are uſual when they apply within the time given *ex* *gratia* by them to *ſurrender* the *principal*; and accordingly the rule to *ſhew cauſe* why the proceedings on the writs of *ſci. fac.* brought againſt the *bail* ſhould not be ſtayed till the writ of *error* was run out; the *bail* undertaking to pay the plaintiff the damages recovered by the ſaid judgment, or *ſurrender* the defendant into cuſtody, &c. within *four days* next after the determination of the ſaid writ, provided the ſame was given in favour of the defendant, was made *abſolute* *Vide Bur. vol.* 1. *p.* 340.

Eaſter, 30 *Geo.* 2. *Bond* v. *Iſaac.*

The defendant being inliſted for a *ſoldier*, and in the *Savoy*, was brought up by his *bail* by *habeas corpus*, in order to be *ſurrendered* in diſcharge of them.

Lord *Mansfield*. We may firſt commit him to the *Marſhal*, and then remand him immediately to the *Savoy*.

If he was a *ſoldier* at *large*, his *bail* may bring him in and *ſurrender* him; he muſt be committed to the cuſtody of the *Marſhal* on ſuch ſurrender, and *inſtantly* ſet at large, and ſo may we in this caſe.

Accordingly, the defendant was, on being ſurrendered by his *bail*, firſt committed to the cuſtody of the *Marſhal*; and the *Marſhal* was ordered to deliver him *inſtantly* to the keeper of the *Savoy*; and an *exoneratur* was ordered by the court to be marked on the *bail-piece*. *Vide Bur. vol.* 1. *p.* 339.

Michaelmas, 31 *Geo.* 2. *Bond* v. *Iſaac.*

The *exoneratur* before directed to be entered on the *bail-piece* in this cauſe, was not actually entered thereon, by the *omiſſion* of the officer whoſe duty it was ſo to do; but the plaintiff in the ſuit had notice of the defendant's *ſurrender*, though his attorney had not.

The plaintiff's attorney ſued out *ſci. fac.*'s againſt the *bail*, who paid the money. The *bail* were ſued in *London*, where the *original* action was; the *ſurrender* was in *Middleſex*, and there the *bail-piece* remained.

The council for the *bail* moved to ſet aſide the *ſci. fac.*'s for *irregularity*, with coſts, and the money to be reſtored, on the following *objections*, and obtained a rule to *ſhew cauſe*.

1ſt. The plaintiff being *appriſed* of the *ſurrender* and order of the court.

2dly. The *ſci. fac.*'s not being ſued out into *Middleſex*.

Per curiam. We are clearly of opinion that the *ſci. fac.*'s are *irregularly* ſued out. Therefore the rule was made *abſolute* without coſts; the plaintiff being gone abroad, and his attorney not having acted with any ill deſign or intention to oppreſs. *Vide Bur. vol.* 1. *p.* 409.

Hilary, 32 *Geo.* 2. *Bailey* v. *Dillon.*

On a *rule to ſhew cauſe* why the defendant ſhould not be diſcharged on *common bail*.

Caſe. The defendant being indebted to the plaintiff, became a bankrupt. The commiſſion iſſued 7th *May* 1754, and he obtained his certificate, which was ſigned 30th *Auguſt*, and allowed in *September* following. In *September*, or *November*, 1755. this plaintiff, who had not come in under the commiſſion, produced to the defendant an account between them, in which there was a balance due from the defendant to the plaintiff, of 74*l.* and upwards, and which was remaining due at the time of the bankruptcy. The defendant acknowledged the balance, and promiſed to pay it to the plaintiff *when he ſhould be able*.

The queſtion before the court was, whether the defendant ought to be diſcharged on *common bail*, or ſhould be held to *ſpecial bail*.

The court would not enter into the *general* and *principal* queſtion, but were unanimous, that the defendant ought in this caſe to be diſcharged on *common bail*; and the *rule* was made *abſolute*. *Vide Bur. vol.* 2. *p.* 736.

Trinity, 32 *Geo.* 2. *Pomp* v. *Ludwigſon.*

On a motion to diſcharge the defendant on *common bail*, the *caſe* was; a merchant of *London*, whoſe correſpondent in *Sweden* had ſent him over the accounts between him and the defendant, could only ſwear to his *belief* of his debt, with a reference to the account ſent from *Sweden*.

Lord Mansfield. The *ſtat.* 12 *Geo.* 1. *cap.* 29. requires a *poſitive* oath of the debt, which *poſitive* oath may not be contradicted by the defendant.

Foſter, Juſtice, concurred, and the defendant was diſcharged on *common bail*. *Vide Bur. vol.* 2. *p.* 655.

Trinity, 33 & 34 *Geo.* 2. *Moultby* v. *Richardſon.*

The defendant's council moved, that the defendant might be diſcharged on *common bail*; the *affidavit* to hold to *bail* being, only that the defendant was indebted to the plaintiff *in ſuch a ſum*, as he computes it.

Foſter and *Wilmot*, Juſtices, (the only two on the bench) thought it ſufficient, and the motion was denied. *Vide Bur. vol.* 2. *p.* 1032.

Eaſter, 3 *Geo.* 3. *Palmer* v. *Needham.*

On a motion to ſhew cauſe why the *bail-piece* ſhould not be diſcharged, and *common bail* be accepted, and alſo to ſtay execution till *four days* after the determination of the writ of *error*, a rule was obtained.

Caſe. The *original* demand was 3*l.* 13*s.* 6*d.* the plaintiff brought his action thereon, and obtained judgment, with coſts; the *debt* and *coſts* amounted to above 10*l.* The plaintiff brought an action of *debt* on the judgment, and held the defendant to *ſpecial bail*.

On *ſhewing cauſe*, the court were clearly of opinion, that as the *original* debt was under 10*l.* the increaſe of *coſts* was not ſufficient to oblige the defendant to give *ſpecial bail*; the intention of the *ſtat.* being, that *ſpecial bail* ſhould be required where the *original* debt amounted to upwards of that ſum; and that, as *ſpecial bail* ought not to have been taken at all, the *bail-piece* muſt be *diſcharged*, and *common bail* accepted. Therefore the rule was made *abſolute*. *Vide Bur. vol.* 3. *page* 1389.

Michaelmas, 3 *Geo.* 3. *Hunt* v. *Coxe.*

On a *rule* to *ſhew cauſe*, the court were unanimouſly of opinion, that it was neceſſary to adhere ſtrictly to the eſtabliſhed rules of the court, as to the time and manner of *bail ſurrendering* the *principal*.

The *two points* on which this caſe turned, were the *filing* the return of the *ca. ſa.* againſt the *principal*, and the actual *render* of the *principal* within the limited time.

The court ſaid, the *ca. ſa.* againſt the *principal* was little more than form, and chiefly deſigned to intimate to the *bail*, what kind of execution the plaintiff deſigned to take; and as the leaving the *ca. ſa.* in the *ſheriff's office*, was a notice to the *bail*, that the plaintiff would proceed againſt the defendant's perſon, it was the *bail's* duty to ſearch the office to ſee if any *ca. ſa.* was left.

As to the time and manner of ſurrendering, the court held, that a ſurrender at about *half after* 11 *o'clock at night*, on the *laſt day*, without bringing the defendant into court, or before a judge, in order to have an *exoneratur* entered on the *bail-piece*, was not ſufficient. Therefore, the *rule* to *ſhew cauſe*, was diſcharged with *coſts*, for the court would not meddle with the ſufficiency of the time for *rendering* the *principal*, becauſe a *ſci. feci* had been *duly returned* by the proper officer. *Vide Bur. vol.* 3. *p.* 1360.

Eaſter, 4 *Geo.* 3. *Cracraft* v. *Gledowe.*

On a *rule* to *ſhew cauſe* why an *attachment* ſhould not iſſue againſt the *Sheriff* of *Middleſex*, for diſcharging out of his cuſtody the defendant in this cauſe, who had been taken on a *capias utlegatum*, on the defendant's attorney engaging under his hand, to appear for the defendant, and reverſe the *outlawry*, without taking ſecurity by bond in double the ſum for which *bail* was required as directed by *ſtat* 4 & 5 *W.* & *M.* *cap.* 18. in all caſes where *ſpecial bail* is required by the court.

On *ſhewing cauſe*, *Yates*, Juſtice, obſerved, that by *ſtat.* 13 *Car.* 2. *cap.* 2. no *Sheriff* can diſcharge any perſon taken on a *capias utlegatum*, without a *ſuperſedeas* firſt obtained, the words of the *ſtat.* being "without a lawful *ſuperſedeas* firſt had and received for the ſame;" and by *ſtat.* 5 *Geo.* 2. *cap.* 27. no *ſpecial* writ or *proceſs* ſpecially expreſſing the cauſe of action, ſhall be iſſued where the cauſe of action in a ſuperior court ſhall not amount to 10 *l.* In this caſe the *capias utlegatum* recites the *original*, ſpecially expreſſing the cauſe of action.

The court were ſtrongly inclined to think that the *ſheriff* had acted improperly, and adviſed his council to put in *bail* to the *outlawry*, and to give him an opportunity, enlarged the rule, when the *ſheriff* thought proper to undertake to pay the *debt* and *coſts*. *Vide Bur. vol.* 3. *p.* 1482.

Michaelmas, 4 *Geo.* 3. *Pullen* v. *White.*

On a *rule* to *ſhew cauſe*, the queſtion before the court was, whether the defendant was, or was not, entitled to be diſcharged on *common bail*, on *ſtat.* 4 & 5 *W.* & *M. cap.* 21. and the rules made thereon.

Caſe. The defendant was arreſted on a writ taken out *four days* before the end of *Eaſter* term, returnable on the laſt day of the then next *term*. The arreſt was made within *two days* of *Eaſter* term. The defendant remained a priſoner in cuſtody of the *ſheriff*, till after the end of *Trinity* term following, without being charged with a declaration, and then applied by *ſummons* to be diſcharged, which was refuſed.

On *ſhewing cauſe*, the court were of opinion, that the defendant ſhould be diſcharged on *common bail*. Lord *Mansfield* obſerved, there was no difference between a man's being in the cuſtody of the *ſheriff*, and his being in the cuſtody of the *Marſhal*. The defendant was therefore ordered to be diſcharged, on filing *common bail*. *Vide Bur. vol.* 3. *p.* 1448.

Michaelmas, 4 *Geo.* 3. *Jennings* v. *Martin.*

On a *rule* being obtained by the defendant to *ſhew cauſe* why he ſhould not be diſcharged on *common bail*, from a defect in the plaintiff's *affidavit* to hold him to *bail*, *viz.*

That the defendant was indebted to him in ſuch a ſum as appears by agreement, bearing date ſuch a day.

Per curiam. The *affidavit* not being *poſitive*, as *ſtat.* 12 *Geo.* 1. *cap.* 29. requires, is a fatal objection. Therefore let the rule be made abſolute. *Vide Bur. vol.* 3. *p.* 1447.

Trinity, 6 *Geo.* 3. *Campbell* v. *Daley.*

The opinion of the court was taken in this cauſe, on the following queſtion, "Whether in a caſe *originally* requiring *ſpecial bail*, and the defendant ſtanding out to an *outlawry*, he can come in and appear to the *outlawry*, without putting in *ſpecial bail*." See *ſtatutes* 31 *Eliz. cap.* 3. and 4 & 5 *W.* & *M. cap.* 18.

Per curiam. There ought to be *ſpecial bail*; it would be unreaſonable that the defendant ſhould reap a benefit by ſtanding out till *proceſs* of *outlawry*; he certainly ought not to be in a better ſituation than if he had appeared at firſt; the court therefore in this caſe gave directions, that the *filacer* ſhould not iſſue a *ſuperſedeas* till the defendant had put in *ſpecial bail*, and a *week* was given him ſo to do. *Vide Bur. vol.* 3. *p.* 1920.

Criminal Caſes.

All crimes were *bailable* at common law, homicide alone was by *ſtat.* excepted out of the power of the ſheriff, ſo that he could not *bail* in that caſe, without the writ *de odio & atia*, and that was founded on an inquiſition, by which it was found, that the party was indicted out of malice.

In caſes of *murder*, *manſlaughter*, *felony*, &c. the party is not *bailable*, by a juſtice of peace, by *ſtat.* 1 *Weſtm. cap.* 15. where there is any preſumption of guilt; but the court of *K. B.* has a diſcretionary power of *bailing* in ſuch caſes, the *ſtatute* not extending thereto.

Michaelmas, 6 *W.* & *M.* *Croſby's Caſe.*

The defendant was brought to the bar by a *hab. corp.* the *laſt day* of *term*; and his council moved that he might be diſcharged or *bailed*, having entered his prayer the *firſt* day of *Trinity term* laſt, and was indicted the laſt term; and afterwards this term again, was indicted for the ſame ſpecies of *treaſon*, but never tried on either of them; the council alledged, that the end of the *ſtatute* was, that no perſon ſhould be above *two terms* under the ſame accuſation; and if a *ſecond indictment* being found ſhould prevent his being ſet at liberty, at that rate, freſh indictments being found every term, he would never be diſcharged, and ſo the *ſtatute* would be eluded. The *attorney* and *ſolicitor general* agreed, if the caſe had ſtood ſingly on the firſt indictment, he ought to be *bailed*; but there is an indictment for another *treaſon*, in conſpiring the *death* of the *King*, and the *overt-act* was laid in *Ireland*; but the *ſecond* is for a *treaſon* in *England*.

Holt, Chief Juſtice. This commitment and both indictments are for the ſame ſpecies of *treaſon*, though the *overt-acts* are differently laid; but the laſt indictment agrees exactly with the commitments; beſides, the prayer relates to the commitment, ſo that the party ought to be tried for the *treaſon* for which he is committed within *two terms*; and the deſign of the act was, to prevent a man's lying under an accuſation for *treaſon*, &c. above two *terms*.

Eyre, Juſtice, concurred: both declared they would give no opinion in the caſe, but *bailed* the priſoner by virtue of their diſcretionary power. *Vide Mod. Rep. vol.* 12. *p.* 66.

Trinity, 7 *W.* 3. *Fitz-Patrick's Caſe.*

Fitz-Patrick was committed to *Newgate* by the privy council for aiding Colonel *Dorrington* to eſcape out of the Tower, where he was committed for high treaſon, and being brought here by *habeas corpus*, was *bailed*; becauſe, though the commitment was for *high treaſon*, yet there was no proſecution, and a ſeſſions was paſt. *Vide Salk. vol.* 1. *p.* 103.

Hilary, 8 *W.* 3. *The King* v. *The Earl of Aileſbury.*

The *Earl of Aileſbury* moved to be *bailed*, and ſeveral reaſons were urged by his council; but the court *bailed* him by virtue of their diſcretionary power, without any regard to its being in or out of the *habeas corpus* act, conſidering the length of his impriſonment, his indiſpoſition of body; and that *Goodman*, who was ſworn to be a *material evidence* againſt him, was here in *England* ſeveral months after his Lordſhip's impriſonment; and that during all that time he was neither indicted nor proſecuted. *Vide Mod. Rep. vol.* 12. *p.* 117. *Salk. vol.* 1. *p.* 103.

Hilary, 8 *W.* 3. *Armſtrong* v. *L'Iſle.*

On an appeal of murder, the appellee was brought to the bar; and it was moved, that he might have his clergy, on his conviction of manſlaughter; on an indictment whereon he was tried laſt aſſizes for *Cumberland*.

Per Holt, Chief Juſtice. There have been reſolutions, that the judges may defer the allowance of clergy to a priſoner to expoſe him to an appeal. In the caſe of *Goring* v. *Deering*, the priſoner was convicted of manſlaughter; his clergy was reſpited; and an appeal was brought: he pleaded all this matter, but his plea was diſallowed, by advice of all the judges. I tried him on the appeal; but I muſt confeſs I was never ſatisfied with that reſolution, being of opinion that it is the duty of the court to allow the priſoner his clergy, the ſame aſſizes or ſeſſions wherein he is convicted.

The clergy, in the time of *Edw.* 3. complained that after clerks were convicted of felony, the judges delayed the giving them their clergy, on ſuggeſtion that there were other matters againſt them; which they might do on this account, becauſe till *ſtat.* 23 *H.* 8. clergy was allowed in all caſes except *treaſon*. And if a man had his clergy once, the delivering him over to the ordinary was an abſolute diſcharge of all offences before clergy had; but notwithſtanding this reaſon, they complained thereof; whereon *ſtat.* 25 *Ed.* 3. *c.* 5. was made, which ſtands unrepealed; whereby it is enacted, that a clerk ſhall be preſently arraigned for all his offences, or otherwiſe delivered to the ordinary; where by the word *preſently* is meant the ſame ſeſſions or aſſizes, *&c.* wherein he is convicted. Now then, if by this ſtatute the party muſt have his clergy the ſame ſeſſions he is convicted, and you have lodged an appeal, you may go on therewith; but if you will not go on, you muſt not delay him of his clergy. By *ſtat.* 3 *H.* 7. *c.* 1. *auterfoits convict* ſhall be no bar in an appeal, unleſs clergy had; the deſign whereof was, to ſave the right of the church, by which the having of clergy was a diſcharge not only for the offence for which he was convicted, but alſo for all other offences before; ſo that having clergy on conviction of manſlaughter was a diſcharge of an indictment of larceny, or other ſuch crime. Before the ſtatute 18 of *Eliz.* if a man was guilty of two felonies, in one whereof he might have had his clergy, in the other not, and he had his clergy in one before he was arraigned of the other; the other was hereby diſcharged; for remedy of which that ſtatute was made. *Stone's caſe, in Dy.* 214. *b.* which is obſcurely reported, is remarkable in this point. *Stone* had committed two felonies, in one whereof he might have his clergy, in the other not. He was firſt indicted of the felony where the clergy lay, and convicted, and had clergy, but no entry having been made of his being delivered to the ordinary, next ſeſſions he was convicted of the other felony, but judgment reſpited; and the advice of all the Queen's judges and ſerjeants was taken, whether he ſhould receive judgment to be hanged, or delivered to the ordinary: they were divided in their opinion, ſeven againſt ſeven; but at length the opinion of the latter ſeven prevailed, that he ſhould not be hanged; becauſe if he had his clergy, it would have been a diſcharge of all other felonies committed by him before that conviction; and the delay thereof being the act of the court, ſhould not turn to his prejudice. Now, I think, a man, notwithſtanding his being found guilty of manſlaughter, may be appealed to, the ſame ſeſſions before the clergy had; but to make no determination in this point, we are to conſider now, whether he may be *bailed*. *Co. Ent.* title *Indictment*, there was an indictment at the aſſizes for murder, the party being found guilty of manſlaughter; the conviction removed into this court, where he was *bailed*.

Per curiam. Let him be *bailed*. And after his clergy was allowed him, for the reaſons before given by *Holt. Vide Mod. Rep. vol.* 12. *p.* 109.

Hilary, 8 *W.* 3. *Barney's Caſe.*

A bill of *indictment* was found againſt her at the *quarter-ſeſſions*, in *Norwich*, for *petty treaſon*, and the *murder* of her huſband. She came now in cuſtody, and moved the court, by her council, that ſhe might be *bailed*. It is true, this caſe was not within the *common rule*; but it appearing by *affidavit* of the fact, that it was a *malicious proſecution*, and there being nothing done either on the indictment, or the *coroner's* inqueſt, or at the *aſſizes*, and the man being dead above a year, ſhe was *bailed*. *Vide Mod. Rep. vol.* 5. *p.* 323.

Michaelmas, 8 *W.* 3. *The King* v. *Keat.*

The court refuſed to *bail* the priſoner, he being found guilty of *manſlaughter*; for that they could not *bail* him till clergy had, according to *Buckler's* caſe, in *Style*. *Vide Mod. Rep. vol.* 12. *p.* 102. *Salk. vol.* 1. *p.* 103.

Michaelmas, 8 *W.* 3. *Armſtrong* v. *L'Iſle.*

Per Holt, Chief Juſtice. We cannot *bail L'Iſle* on a conviction of *manſlaughter*, before *clergy* had, unleſs a pardon be ready to be produced under the great ſeal, and then we may, though attainted of *murder*, or *treaſon*; and ſo on a writ of *error* to reverſe an *attainder*, we may *bail* him, and bind him over to proſecute the writ of *error*. *Vide Mod. Rep. vol.* 12. *p.* 108. *Salk. vol.* 1. *p.* 103.

Michaelmas, 9 *W.* 3. *Marriot's Caſe.*

Marriot was committed for forging indorſements on *Exchequer bills*; and on a *habeas corpus*, was *bailed*; becauſe the crime was only a great miſdemeanor; for though the forging the bills be felony; yet forging the indorſement is not. It is now felony, *per ſtat.* 8 & 9 *W.* 3. *cap.* 20. *Vide Salk. vol.* 1. *p.* 104.

Michaelmas, 9 *W.* 3. *Lord Mohun's Caſe.*

Per curiam. If a man is found guilty of murder by the coroner's inqueſt, we ſometimes *bail* him; becauſe the coroner proceeds on depoſitions taken in writing, which we may look into. Otherwiſe where a man is found guilty of murder by a grand jury; becauſe the court cannot take notice of their evidence, which they by their oath are bound to conceal.

There is no difference between peers and commoners, as to *bail*. *Vide Salk. vol.* 1. *p.* 140.

Trinity, 11 *W.* 3. *Anonymous.*

A perſon was committed for *murder*, and he moved to be *bailed*: two judges were of opinion that he might, becauſe the evidence did not prove him *guilty*; but *Holt*, Chief Juſtice, and *Gould*, Juſtice, were againſt it; becauſe the evidence did affect him, and to allow him this favour would diſcourage proſecutions; and they would not give any opinion of the evidence; for as it might prejudice the priſoner on the one ſide, ſo it might the proſecutor on the other. *Vide Salk. vol.* 1. *p.* 104.

Michaelmas, 11 *W.* 3. *Captain Kirk's Caſe.*

The court was moved, that *Captain Kirk*, who was indicted for the murder of *Conway Seymour, Eſq.* might be admitted to *bail*; for that he and the other gentleman, *Mr. Cage*, were dangerouſly ill, by reaſon of the badneſs of the air, and the inconveniency of the priſon; and that on proof of the matter, the court had frequently *bailed* perſons, though the *coroner's* inqueſt had found them guilty of *murder*; and the reaſon is, impriſonment in ſuch, caſes is not deſigned as a puniſhment, but only to bring the parties to juſtice.

The council on the other ſide replied; It is true, your Lordſhip has a power to *bail* in *treaſon* or *murder*; but you will not exert that power, unleſs it be under extraordinary circumſtances: as in the caſes that have been quoted; and eſpecially in ſuch, where the proſecution is thought not to be well grounded.

But here is no pretence of a malicious proſecution; for here are two inquiſitions for *murder* found, one before the *coroner*, and the other before the *grand jury*. And it is not doubted whether *Mr. Seymour* was killed by this gentleman; that too plainly appears. Here is no *peradventure*, whether this unfortunate gentleman was killed by *Captain Kirk*; ſo that it is but reaſonable he ſhould give an account for his ſpilling blood.

Then here has not been any long lying in priſon, this being the firſt term after their commitment.

The blood of *Mr. Conway* is on the land, until it be revenged, or the juſtice of the nation be cleared by a fair trial. I could remind your Lordſhip of a caſe, where a perſon, after he was out on *bail*, was taken up again in the *vacation*, and committed, it being in the caſe of murder.

Chief Juſtice. I was very well ſatisfied with what I did then, and am ſo ſtill.

But indeed, in this caſe, I do not think their *affidavits* are full enough. It does not appear, that by this impriſonment they are in danger of their lives.

It is ſaid, in *Egerton's caſe*, in the 13 *Jac.* 1. that if there were any delay in the priſoners in putting off their trial, or in not giving timely notice, there could be no *bailing* of them; and here, ſince they did not give notice of their *render* to the proſecutor, as this is good reaſon for deferring their trial, ſo it is alſo the ſame for their not being *bailed*. *Vide Mod. Rep. vol.* 5. *page* 454. and *vol.* 12. *p.* 309.

Trinity,

Trinity, 12 *W*. 3. *The King* v. *Daviſon*.

On a *habeas corpus*, to bring up the body of one *Daviſon* a *Quaker*, the cauſe returned was a writ of *excommunicato capiendo*, which recited a *ſignificavit* of an excommunication, for teaching ſchool without a licence; and the court doubting whether this was an offence, deſired to hear council upon it; and then his council moved he might be *bailed* in the mean time; and cited ſeveral authorities, that a man might be *bailed* while the legality of the return is under the conſideration of the court. *Vaugh*. 157. *Lat*. 174. 1 *Cro*. 552, 557. and alſo *Price*'s caſe, *Mich*. 29 *Car*. 2. *B. R*. who was taken on an *excommunicato capiendo*, and brought up by *habeas corpus*, and *bailed*, while the return was under conſideration; and in that caſe the court being againſt *Price* on the return, his council inſiſted that he could not be committed again, and thought they had got an advantage that way: but notwithſtanding that he was re-committed. He cited alſo *Clerk*'s caſe, who was committed by the *Vintner's Company*, and bailed by *Holt*, Chief Juſtice, at his chambers. On theſe authorities, the defendant was *bailed*; and the entry was, *he is delivered to* bail, *and in the mean time the court will adviſe thereon*; and the condition of the recognizance was to appear the *firſt day* of the *term*, and from day to day, if the court ſhould adjudge the return good, to render his body to priſon. The Chief Juſtice ſaid, they *bailed* men in execution, on an *audita querela*; and by the petition of right, muſt *bail*, or *remand* men in convenient time. The ſame rule was made this *term*, in *Reynold*'s caſe, (who was committed by the *Court of Aldermen*, for aſſiſting to marry a city orphan) while the court conſidered the return. *Vide Salk. vol*. 1. *p*. 105.

Michaelmas, 12 *W*. 3. *Moore* v. *Watts*.

Per Holt, Chief Juſtice, a perſon of *ill fame* is not *bailable*, by the *ſtatute* of *W*. 2. *Vide Mod. Rep. vol*. 12. *p*. 431.

Michaelmas, 12 *W*. 3. *The King* v. *Purſey*.

Per Holt, Chief Juſtice. A perſon charged with *ſodomy* is not *bailable*. *Vide Mod. Rep. vol*. 12. *p*. 435.

Eaſter, 13 *W*. 3. *The King* v. *Stukely*.

Per Holt, Chief Juſtice. The *bail* to the action may plead an *uſurious contract*, though he be not privy to it. And a ſpecial plea is no plea till it be paid for; but if the party accept it, without inſiſting on that, it will be well. *Vide Mod. Rep. vol*. 12. *page* 493.

Trinity, 1 *Ann*. *Anonymous*.

The defendant, in an indictment in this court being *bailed* on the indictment, and likewiſe in a civil action then pending againſt him in *C. B.* rendered himſelf in diſcharge of his *bail* in the civil action, to the *Fleet*; and from thence, by *habeas corpus*, he moved himſelf to the *King's Bench*, and eſcaped. His *bail* to the indictment moved, that their recognizance might be *eſtreated*, pretending he was taken out of their cuſtody by his commitment to the marſhal: *but not allowed*; for they muſt take care of him there, and they might have had him committed in diſcharge of them. *Vide Salk. vol*. 1. *p*. 105.

Michaelmas, 1 *Ann*. *Dr. Watſon's Caſe*.

Dr. Watſon, late Biſhop of *St. David*'s, was taken on an *excommunicato capiendo*, and brought by *habeas corpus*; he pleaded to the writ, that he was a Lord of Parliament; and moved to be *bailed* while the return was under conſideration.

Powell, Juſtice, ſaid, though it had been done, it was in their diſcretion, and was contrary to the *ſtat*. of *Weſtminſter*; and he did not think it diſcretion, on ſuch a plea, which every body knew to be falſe, he being deprived by commiſſioners delegates, of whom he himſelf was one, on the appeal.

Holt, Chief Juſtice, agreed. And though they could not take judicial notice of the frailty of his plea, yet it ſhould lead their diſcretion: and he was not *bailed*. *Vide Salk. vol*. 1. *p*. 106.

Michaelmas, 2 *Ann*. *The Queen* v. *Bothell*.

If a perſon brings a *certiorari* to remove an *indictment*, and does not give *bail* to try it according to the *ſtatute*, it is no *ſuperſedeas*; and a record once filed in this court is never ſent back, though council at the bar ſaid, it might be ſent back the ſame term. *Vide Mod. Rep. vol*. 6. *p*. 33.

Eaſter, 4 *Ann*: *The Queen* v. *Layton*.

Layton, and others, were committed by the Lord Mayor of *London*, on his view, for a forceable detainer, and fined 100*l*. and committed in execution; and the record of the conviction was removed by *certiorari*; and the defendants brought a writ of *error coram nobis*, and aſſigned *error* in perſon: and now it was moved that they might be *bailed*. *Vide* 1 *Cro*. 557. *Keb*. 43. *Sid*. 320. 2 *Keb*. 173. The council for the Crown, in oppoſition thereto, urged, that in *error* to reverſe an outlawry, the court will take *bail*; but not to reverſe a judgment on an indictment: at laſt the court refuſed to *bail* him, being in execution for a fine, and having committed a very notorious breach of the peace in the heart of the city, though a long vacation was coming on. *Vide Salk. vol*. 1. *p*. 106.

Trinity, 10 *Ann*. *The Queen* v. *Derby*:

The defendant was committed in *vacation*, by a Secretary of State's warrant, for a *libel*, and brought on *habeas corpus* before *Parker*, Chief Juſtice; and entered into a *recognizance* to appear the *firſt* day of *term*.

On the *firſt* day of *term* he appeared, and, by his council, moved to be diſcharged; taking ſeveral exceptions to the commitment, which were over-ruled.

Per curiam. The defendant muſt anſwer the complaint, before he can be diſcharged from his *recognizance*. *Vide Forteſcue*, *p*. 140.

Eaſter, 12 *Ann*. *The Queen* v. *Ridpath*.

A *recognizance* was entered into by the defendant, with ſecurities; whereby he was bound to appear the *firſt* day of *term*, *to anſwer*, &c. (in the mean time to his good behaviour) and not to depart without the licence of the court.

An *information* is preferred againſt him by the *attorney general*; to which *information*, by reaſon of ſome defect in the pleading, the *attorney general* thought fit to enter a *nolle proſequi*, and then the *attorney general* exhibited another.

It was inſiſted, in favour of the defendant and his ſecurities,

1ſt. That the words *to anſwer* muſt be extended to thoſe crimes only, the ſuſpicion of which was the cauſe of his commitment, and entering into the *recognizance*, and not to the crime he ſhould afterwards commit, or be charged with; for then it would be utterly impoſſible for a man to get any body to be bound in a *recognizance* with him, an opinion of the innocence of the perſon, as to the crime charged, being probably the only motive that can be ſufficient to induce men to become bound for others.

2dly, That *to anſwer* refers to the *firſt* day of the *term*, when he was bound to appear.

3dly. That the entering a *nolle proſequi*, was a *bar* to the offence contained in the *information*; at leaſt, it was a diſcharge from any further proſecution from it: and that it was all one, whether he was diſcharged from the *recognizance* by a rule of court made for that purpoſe; or by a judgment, that by a neceſſary conſequence amounted to a diſcharge.

But the court were of opinion, that the *recognizance* extended to all crimes whatſoever he ſhould be charged with; and that if it had relation to any particular crime only, it muſt be mentioned in the *recognizance*; but that is only *to anſwer* generally.

That there was no ſuch inconvenience as was pretended; the *bail* in this caſe being bound in a ſum certain, and not to ſtand in the place of the *principal*, as in *civil* caſes: that the perſon's not appearing according to his *recognizance*, (be the cauſe or reaſon of his abſence what it will) was the cauſe of the *forfeiture* of the *recognizance*.

That *anciently*, in *ſpecial bail*, in *civil* actions, where the *bail* is to ſtand in the place of the *principal*, *bail* to one action was to ſtand *bail* to all actions that the defendant ſhould be charged with when in court: that this was hard in caſe of *ſpecial bail*, and is therefore now altered, though altered only by rule of court; that as to *common bail*, the *law* is ſtill the ſame; and that the *nolle proſequi* was neither a bar nor diſcharge. *Vide Mod. Rep. vol.* 10. *p.* 153.

Trinity, 2 *Geo.* *The King* v. *Windham*.

Sir *W. W.* being brought up by the *Lieutenant of the Tower*, his council moved that he might be admitted to *bail*, and offered ſeveral arguments to induce the court to *bail* him, which, with the anſwers given thereto by the *Attorney* and *Solicitor General*, are compriſed in the opinion of the court, which was delivered the laſt day of term, as follows:

Parker, Chief Juſtice. It has been admitted on all hands, that the court has a *diſcretionary power* in this caſe, and I think the arguments that have been made uſe of by the council for Sir *W. W.* are on theſe four points:

Firſt exception. That the commitment is, *that he ſhall be kept ſafe and cloſe*; it has been inſiſted, this is more than can be juſtified by *law*. This *exception* is offered without any authority to ſupport it, and is againſt an infinite number of precedents. But admitting this were a good *exception*, the conſequence would not be, that we ſhould diſcharge Sir *W. W.* but only as to his being kept cloſe. *The keeping him ſafe* is only by way of admonition to the officer, to put him in mind of his duty, and the puniſhment he muſt undergo in caſe of an *eſcape*. The *common proceſs* which goes to the *ſheriff*, commands him to take the defendant, and *keep him in ſafe cuſtody*.

Second exception. That the charge is not ſaid to be on *oath*; and if the *Sercetary of State* might commit people without oath, the whole nation would be their tenants at will. In anſwer to this I muſt obſerve, that the precedents are many of them ſo, and no authority has been cited in ſupport of the objection. The not mentioning it to be on oath, is not concluſive that it was not on oath. In *Ferguſon's caſe*, this exception was over-ruled, *Trinity*, 2 *W. & M.* And it was held in *Kendal's caſe*, that an impriſonment may be without oath; and alſo in the *Houſe of Lords*, that commitments may be without oath. If a man be taken with *treaſonable papers*, he may be committed, and any magiſtrate may commit him *on ſight*, without *oath*.

Third exception. That the commitment is *generally* for *high treaſon*; and it has been *urged*, that ſome particular ſpecies of *treaſon* muſt be expreſſed, and that it muſt have ſo much certainty as to appear to be *high treaſon* to the court. 2 *Inſt.* 52. 591. I think this opinion is not to be maintained. We preſume a magiſtrate does right till the contrary appears; and it has never been held neceſſary to expreſs the *overt-act* in the commitment. Lord *Coke* puts the caſe of *treaſon* againſt the *King's perſon*, and admits that to be ſufficient.

Fourth exception. It has been *argued* in favour of this laſt *exception*, that the *habeas corpus* act ſuppoſes the crime to be ſpecifically mentioned; becauſe it provides, that no perſon ſhall be committed a *ſecond time* for the ſame offence, after he has been once *bailed*; the conſequence of which is, that the court muſt judge by the two commitments, whether the offence be the ſame. This argument will appear of little weight, if we conſider how eaſy it is to vary the expreſſion in the ſecond commitment, and yet keep cloſe to the principal charge.

Fifthly. The caſe of *Kendall* v. *Roe*, 1 *Salk.* 347. 5 *Mod.* 78. has been relied on by the council for Sir *W. W.* as a caſe in point. But in my opinion it will not come up to that now before us. The caſe did not turn on the point on which the exception has been taken, *viz.* that the *treaſon* of Sir *J. M.* was not expreſſed in the warrant; for it was held neceſſary that Sir *J. M.* ſhould be *averred* guilty *of*, and committed *for*, *high treaſon*. And becauſe both theſe particulars were not expreſſed in the warrant, the defendants were admitted to *bail*. A commitment, it is true, for ſtealing fruit generally, would not be good, becauſe, if it was on trees it would not be felony. 2 *Inſt.* 52.

There is a caſe in *Anderſon*, which was to be a direction for the future in making commitments, which is entered in the council book. In *Crofton*'s caſe, reported in 1 *Sid.* 78. 1 *Keb.* 305. it was reſolved that a commitment for *high treaſon generally* is good. *Vaug.* 142.

The next thing relied on is the illneſs of Sir *W. W.* which appears to be a diſtemper incident to the family. We are of opinion that this is not ground enough ſingly to induce the court to admit Sir *W. W.* to *bail*; for it muſt be a preſent indiſpoſition, ariſing from the confinement; and ſo we held this term in the caſe of Mr. *H.* of *C.* who ſtabbed himſelf after his examination; and was refuſed to be *bailed*, becauſe his illneſs was from an act of his own. But I ſhall not enlarge on this head, ſince we are all of opinion Sir *W. W.* ought to be *bailed*. *Four terms* have paſſed ſince his commitment, and one *aſſizes* in *Somerſetſhire*, out of which county it has been hinted the ground of complaint againſt Sir *W. W.* ariſes: and therefore there being no proſecution againſt him, he muſt be admitted to *bail*, himſelf in 10,000*l.* and *two* ſureties of 5000*l.* each. *Vide Stra. vol.* 1. *p.* 2.

Trinity, 2 *Geo.* *Harvey of Comb's Caſe*.

A commitment for *treaſon* generally, without expreſſing the ſpecies of treaſon, is good; for the proceſs is the ſame in one ſort of treaſon as in another.

The court of *King's Bench* have power to *bail* in *high treaſon*, notwithſtanding the ſuſpenſion of the *habeas corpus* act.

And on *affidavit* made, that the priſoner was in ſuch an ill ſtate of health, that longer confinement would bring his life in danger, it has been done in Lord *Montgomery*'s caſe. *Vide Mod. Rep. vol.* 10. *p.* 334.

Michaelmas, 3 *Geo.* *The King* v. *Biſhop*.

The defendant was convicted of printing a ſeditious libel, and appearing to be in a very ill ſtate of health, was brought up, and moved for the judgment of the court, and to be admitted to *bail*.

Chief Juſtice. The offence is ſo great, that an adequate puniſhment may endanger his life, and to leſſen the judgment would be an ill precedent; therefore *bail* him for the preſent, and we will give judgment when he is better. The defendant in 2000*l.* and two ſureties in 1000*l.* each. *Vide Strange, vol.* 1. *p.* 9.

Michaelmas, 7 *Geo.* *Reeve* v. *Trindal*.

On the trial of the appeal there were two iſſues. The firſt was to a plea in abatement, where the defendant pleaded that he was not a labourer, according to the addition of the writ; but a barber ſurgeon; which was found with the defendant. The ſecond was on his plea over to the ſelony, where the jury found him guilty of *murder*. And what would be the conſequence on theſe two verdicts, was a point to have been argued in court; but neither ſide bringing it on for near three years, the defendant moved to be *bailed*, and the appellant ſaid, he did not oppoſe it.

Per curiam. We cannot do it; he is convicted of murder, and therefore we cannot *bail* him, unleſs the appellant will actually conſent; which he refuſing to do, the defendant was remanded. *Vide Strange, vol.* 1. *p.* 402.

Hilary, 9 *Geo.* *The King* v. *Sarah Saliſbury*.

The defendant was committed to *Newgate*, for ſtabbing a gentleman with a knife, ſo that his life was deſpaired of: and having obtained a *habeas corpus* from this court, the day before ſhe was to be brought up, ſhe moved that a *phyſician* and *ſurgeon* of her own nominating, might be permitted to be preſent at the dreſſing the gentleman's wound, ſo as to be able to ſatisfy the court that he was out of danger, in order that they might *bail* her.

Per curiam. There never was a motion of this nature, eſpecially ſo early as this is; the courſe is, for the friends of the party injured, to lay his condition before the court, when they oppoſe the *bailing*; if they do not do it, then we may order ſuch an attendance for our own ſatisfaction; but at preſent the defendant has no right to demand it. *Vide Strange, vol.* 1. *p.* 547.

Eaſter, 9 *Geo.* *The King* v. *Earbery*.

The defendant having been indicted for writing a libel againſt government, for want of appearance was outlawed; whereon he moved the court for a writ of *error*, which the Attorney General oppoſed, as not being allowed in the caſe of the crown, without the leave of the King.

The Attorney General moved this matter again at another day; when *Pratt*, Chief Juſtice, and *Powys*, J. ſeemed to think that the defendant in diſcretion ought not to be *bailed*; but *Eyre*, Juſtice, and *Forteſcue*, J. were clearly of opinion, this was a caſe within the act of parliament for reverſal of outlawries, and therefore he ought to be *bailed*, and cited 2 *Salk.* 504. that it was the reſolution of all the judges in *England*, except *Price* and *Smith*, that the Queen could not deny a writ of *error*, but that it was grantable from right, and a principle of juſtice, (except in treaſon and felony;) and the true reaſon why a perſon outlawed for treaſon or felony cannot have a writ of *error* without the King's leave, is, becauſe it is a conviction; and then the culprit has forfeited all he has to the crown.

On this the court unanimouſly thought it reaſonable and juſt, that *Earbery* ſhould have a writ of *error*; and the Attorney General immediately ſigned a warrant for a writ of *error*, and conſented to his being *bailed* to appear accordingly. *Vide Forteſcue*, *p.* 37.

Michaelmas, 9 *Geo.* *The King* v. *Reader*.

The defendant was convicted for keeping an alehouſe without licence, and was thereon committed for a month, as the act directs. After he had lain a fortnight, he brought a *certiorari*, and on the return of it, he was admitted to *bail*, the court being of opinion, that if the conviction was confirmed, they could commit him in execution for the reſidue of the time. *Vide Strange, vol.* 1. *p.* 531.

Trinity, 10 *Geo.* *The King* v. *The Bail of Strudwick*.

On a motion that the *recognizance* entered into by the *bail* of *Strudwick*, might be *eſtreated*, the caſe was; *Strudwick*, who was the *principal*, gave a *recognizance* with *bail*, conditioned to keep the peace for *one year*, and afterwards to appear in this court on the *firſt* day of *term*, which he did not; and therefore it was moved, that his *recognizance* might be *eſtreated*, ſo that the *bail* might be proſecuted.

The *Chief Juſtice* held, that where a man was admitted to *bail*, he is by intendment of *law* in their cuſtody, but when he is taken from them by the *proceſs* of this court, then they are diſcharged.

All the other judges were of a contrary opinion, *viz.* that they are not diſcharged till the *committitur* of the *principal* is entered; for though he was committed on the *conviction* on the *information*, he was as much in the power of his *bail*, as if he had been at large, or ſtill in their cuſtody; for on a motion in this court, they might have brought him up at any time, and *rendered* him back again in diſcharge of themſelves.

Afterwards, at another day it was moved that the *committitur* of the *principal* might be entered, ſo as the *bail* might take advantage thereof, and that the proceedings on the *ſci. fac.* might be ſtayed in the mean time.

The court would not ſtay the proceedings on the *ſci. fac.* but ordered, that a *committitur* ſhould be entered on the right *recognizance*; for there being *two*, *viz.* one for the *peace*, and the appearance of the *principal*, which was forfeited for his not appearing; and the other for his *appearance* to anſwer the *information*, on which he was afterwards convicted; the *committitur* muſt be entered on the laſt *recognizance*. *Vide Mod. Rep. vol.* 8. *p.* 195.

Hilary, 3 *Geo.* 2. *Pyle* v. *Grant*.

In an appeal of *murder*, it appeared that the defendant was convicted on the indictment, but pardoned on the report of the judges; and after iſſue joined on the appeal, he moved to be *bailed*, which was refuſed, the preſumption being againſt him, contrary to *Bambridge*'s caſe. But a trial at bar being ordered this term, and the appellant having taken no ſtep to bring it on, but on the day appointed moving to put it off to a further day, the court took the appellee's own recognizance in 500 *l.* to appear the laſt day of the term, and ordered that nothing ſhould be done previous to the day appointed for the trial; and if there was a diſcontinuance, the appellee might take advantage of it: and the laſt day of the term he was diſcharged, the appellant not appearing. *Vide Stra. vol.* 2. *p.* 858.

Michaelmas, 3 *Geo.* 2. *The King* v. *Kimberley*.

The defendant was brought up by *habeas corpus*, being committed to *Woodſtreet Compter*, for feloniouſly marrying *Bridget Reading*, contrary to an *Iriſh* act of parliament, 6 *Ann*, in order to be ſent over to *Ireland* to be tried, the offence being committed there.

On motion that he might be diſcharged, or *bailed*; his council inſiſted that juſtices of the peace in *England* are confined to act only as to ſuch offences as are againſt the laws of *England*, and committed in *England*; and that the proviſo in the *habeas corpus* act gives no power as to offences in *Ireland*, but leaves it on the former practice.

Per curiam. It has been done in Col. *Lundy*'s caſe, 2 *Vent.* 314. and in 3 *Keb.* 785. The court refuſed to *bail* a man committed for murder in *Portugal*. If application is not made to have him ſent over in a reaſonable time, you may apply again: and thereupon the defendant was remanded. *Vide Stra. vol.* 2. *p.* 848.

Michaelmas, 3 *Geo.* 2. *The King* v. *Acton*.

The defendant was deputy-keeper of the *Marſhalſea* priſon, and on the addreſs of the Houſe of Commons was proſecuted for ſeveral murders, ſuppoſed to have been committed by him on priſoners in his cuſtody. He was tried on four ſeveral indictments, whereon the only queſtion was, whether a place within the priſon, called the *ſtrong room*, was a proper place for the confinement of diſorderly priſoners: and the jury, on all the four trials, acquitted him, to the ſatisfaction of every body. Soon after he was ſet at liberty, a ſingle juſtice of the peace, on an information of a fifth perſon's having been put in the ſame ſtrong room, and dying within a year after, thought fit to commit the defendant again for murder. On a *hab. corp.* brought, the defendant's council moved he might be admitted to *bail*, on producing copies of the informations, and affidavits of the former trials, and of the identical nature of the offences: but the court refuſed to look into the informations, though they were preſſed with Lord *Mohun*'s caſe, *Salk.* 104. where they looked into the depoſitions taken by the coroner, on a motion to *bail*. And in the preſent caſe they remanded the defendant, who lay in priſon till the next aſſizes, when the grand jury returned the bill *ignoramus*, and he was diſcharged. *Vide Stra. vol.* 2. *p.* 851.

Hilary, 3 *Geo.* 2. *Caſtell* v. *Bambridge and Corbet*.

On an appeal for *murder*, ſtating that the appellant's huſband was a priſoner in the *Fleet*, under the cuſtody of *Bambridge*, the warden, who made an aſſault on him, and contrary to his will carried him to the houſe of *Corbet*, a victualling-houſe in the *Fleet*, and there impriſoned him, where one *White* then lay ill of the ſmall-pox, which *Caſtell* had never had; that the appellees had notice of this, and were deſired to ſuffer him to remove to another place in the priſon, which they refuſed, and afterwards *Caſtell* fell ill of that diſtemper, and died in *Corbet*'s houſe. The appellees inſtantly pleading *not guilty*, iſſue was joined, and the court was then moved that the appellees might be *bailed*. And on debate, the court were of opinion to *bail Bambridge*, and not *Corbet*. And the reaſon they gave was, that *Bambridge* had been acquitted, which was a ſtrong preſumption of innocence, and the judge before whom he was tried had certified that he was very well ſatisfied with the verdict; and they ſaid they would *bail* in all caſes after an acquittal on the indictment, unleſs the judge was diſſatisfied with the acquittal; and that was the reaſon they denied to *bail* in *Slaughterford*'s caſe, becauſe *Holt*, Chief Juſtice, had ſent out the jury again, whether they would ſtand to their verdict of acquittal; and when they inſiſted on it, he himſelf ordered the appeal.

But as to *Corbet*, there was no foundation to *bail*, for they denied it was of courſe to *bail* in an *appeal*: ſo *Bambridge* was *bailed* by two perſons, body for body, who juſtified in 1000 *l.* each. And it was agreed, that in an *appeal* by *writ* on the *civil ſide*, *two bail* only are required; but had it come on the *crown ſide* by *certiorari*, there muſt have been *four*. *Vide Stra. vol.* 2. *p.* 854.

Trinity, 5 *Geo.* 2. *The King* v. *Dalton.*

The defendant had the misfortune to kill his ſchoolfellow at *Eton*, and being brought up by *habeas corpus* to the Chief Juſtice's houſe, it was returned, that he was committed by the coroner for *manſlaughter*. It was therefore prayed he might be *bailed*. But the Chief Juſtice ſaid, that was no reaſon, for if the depoſitions made it *murder*, he *would not bail*; on the contrary, if they amounted only to *manſlaughter*, he *would bail*, though the coroner's inqueſt had found it *murder*; and he ſaid, the diſtinction was between the coroner's inqueſt, where the court can look into the depoſitions; and an indictment, where the evidence is ſecret. That Lord *Mohun*'s caſe, in *Salk.* 104. was in point, though that was at *Holt*'s chambers, and not in court, as reported; and that the Lords *bailed* him after an indictment for murder was found. He ſaid, that himſelf refuſed to *bail* Mr. *Clifton*, becauſe he thought the depoſitions made it *murder*, though the inqueſt was *manſlaughter* only.

The *bail* were four, in 4000 *l.* The Chief Juſtice ſaid, it had been uſual to take them in a ſum, or body for body; and that where they are taken *body for body*, it was a miſtake to imagine the *bail* were to be hanged if the *principal* ran away; but that the method is, to *amerce* them. *Vide Stra. vol.* 2. *p.* 911.

Trinity, 13 *Geo.* 2. *The King* v. *Greenwood.*

Greenwood came up on a *habeas corpus*, charged with a commitment, for a robbery on the highway. And the proſecutor attending, inſiſted he was the man, and though eight affidavits of credible perſons, proving him to be at another place at the time the robbery was ſworn to, were read; yet the court refuſed to admit him to *bail*, but ordered him to remain till the aſſizes. *Vide Strange, vol.* 2. *p.* 1139.

Eaſter, 15 *Geo.* 2. *The King* v. *Sidney.*

On removing an indictment from the *ſeſſions of oyer and terminer*, the defendant and his *bail* entered into a *recognizance* of 500 *l.* to plead, go to trial, and appear on the return of the verdict; he did ſo, and received judgment. On motion to diſcharge the *recognizance*, it was inſiſted he ſhould pay *coſts*; but this not being in 20 *l.* the ſum required by *ſtat.* 5 & 6 *W.* & *M. c.* 11. the court held it was to be conſidered as a *recognizance* at *common law*, and *precedents* being ſearched, it was found that *coſts* had not been required: Here therefore being a performance of every thing the words extended to; the court diſcharged the *recognizance*. *Vide Strange, vol.* 2. *p.* 1165.

Hilary, 17 *Geo.* 2. *The King* v. *Chetwynd.*

A ſpecial verdict on an indictment for *murder* was found at the *Old Bailey*, and removed into this court. But before the matter was argued, the defendant obtained his Majeſty's pardon, which he pleaded on his knees, and it was allowed: then the council for the proſecutor inſiſted, that by virtue of *ſtat.* 3 *H.* 7. *c.* 1. the court ought to require *bail* for his appearance to anſwer an appeal; there being an affidavit produced, that the brother and heir was beyond ſea, but expected in time; and it was alſo inſiſted, that by virtue of *ſtat.* 5 & 6 *W.* & *M. c.* 13. the court ſhould take ſecurity for the good behaviour.

As to the firſt point, the court were of opinion, that the preſent caſe was not ſuch as the act of parliament meant; and that the word *acquittal* therein muſt be underſtood *in a courſe of law*, and not an interpoſition of the crown's mercy.

As to ſureties for his good behaviour, the priſoner's council ſaid, they had them ready. *Wright*, Juſtice, and *Deniſon*, Juſtice, were inclined to take them; but as there had been no inſtance ſince the act, and this was merely diſcretionary, the *Chief Juſtice* was unwilling to make the precedent in the caſe of an infant, where ſome favourable circumſtances were ſtated in the verdict; and at laſt his brethren agreed to diſcharge the priſoner without ſecurity, though the council on behalf of the proſecutor refuſed to waive their demand. *Vide Strange, vol.* 2. *p.* 1203.

Hilary, 18 *Geo.* 2. *The King* v. *White and Others.*

The condition of their *recognizance* was, to appear in this court the *laſt day of Michaelmas term*, on which day articles of the peace were exhibited, and the defendant, *White*, forbore to move to have his appearance recorded, (though he was there) and went to get *bail*. The proſecutor on this took out a *ſci. fac. teſted the* 28*th of November*, and partly for the ſharpneſs of the proceeding, and becauſe the *ſci. fac.* muſt be *teſted* in *term time*, and the defendant had to the laſt moment of it to appear in, the court ſet aſide the proceedings. *Vide Strange, vol.* 2. *p.* 1220.

Michaelmas, 18 *Geo.* 2. *The King* v. *W. Clarke, Eſq.*

The defendant, a juſtice of peace for the county of *Surry*, committed a man on ſuſpicion of *ſtealing a mare*, and bound over the owner to proſecute. Afterwards on examining two other perſons, he admitted the party to *bail*. The proſecutor appeared at the *aſſizes*, and found a bill, but the party accuſed did not appear. The court granted an *information* againſt the juſtice, declaring they would not have *bailed* the man themſelves. *Vide Strange, vol.* 2. *p.* 1216.

Michaelmas, 5 *Geo.* 3. *The King* v. *Baptiſt Rebord.*

On a *rule* to *ſhew cauſe* why the defendant ſhould not be diſcharged on *common bail*, on an action brought on *ſtat.* 26 *Geo.* 2. *cap.* 21. for a forfeiture of 200 *l.* for having unſealed wrought ſilks found in his cuſtody.

The 8*th ſect.* of this *ſtat.* expreſsly authoriſes to hold the party to *ſpecial bail*: it gives a *capias* in the the firſt proceſs, ſpecifying the ſum of the penalty ſued for, and directs, that the defendant ſhall be obliged to give ſufficient *bail*, &c.

Per curiam. The plaintiff's *affidavit* is poſitive enough; he ſwears therein, that he had cauſe of action againſt the defendant for 200 *l.* forfeited by him, &c. The *ſtatute* does not require any *affidavit* at all; therefore the *rule* to *ſhew cauſe* was diſcharged. *Vide Bur. vol.* 3. *p.* 1569.

Bail *in Error.*

Hilary, 7 *W.* 3. *The King* v. *Sharp.*

Bail in a writ of *error* cannot render the *principal* in diſcharge of themſelves, becauſe they are bound that he ſhall proſecute his writ of *error* with effect, or pay the money, if judgment is affirmed. *Vide Salk. vol.* 3. *p.* 57.

Eaſter, 10 *W.* 3. *Atwood* v. *Duell.*

There was a judgment on the *ſci. fac.* againſt the *bail*; and they brought a writ of *error* as well on the *principal* judgment as on the judgment on the *ſci. fac.* but it was quaſhed, becauſe they were not parties to the *original* judgment. *Vide Mod. Rep. vol.* 5. *p.* 397.

Michaelmas, 11 *W.* 3. *Shoot* v. *Higgs.*

The *bail* on a writ of *error* cannot diſcharge themſelves by *ſurrendering* their *principal. Vide Mod. Rep. vol.* 12. *p.* 319.

Trinity, 13 *W.* 3. *Wilbraham.* v. *Doley.*

On a writ of *error* to reverſe an *outlawry* for *error* in *law*, the queſtion was, whether the plaintiff muſt give *bail* to the original action, as he muſt do when it is to be *reverſed* for want of *proclamations*, on *ſtat.* 31 *Eliz. c.* 3. And *Gould* cited a caſe out of *Littleton's Reports*, where he was held to *bail* on an *error* in *law*; the original cauſe of action being ſuch as required *ſpecial bail.*

Per Holt, Chief Juſtice. He ought not to be held to *bail* on any *error* in *law*, for the *ſtat.* of *Eliz.* mentions only want of *proclamations*; and the caſe out of *Littleton's Reports* is badly reported. And the court ſaid, if it did appear to them that there was want of *proclamations* in the *outlawry*, and an *error* in *law* beſides, tho' the party aſſigned the *error* in *law* only, yet they would *reverſe* it for want of the *proclamations*; and ſo held him to *bail*; but if there were not want of *proclamations*, but merely an *error* in *law*, there need be no *bail*; for as the *ſtatute* made a new *error*, for the advantage of the *outlawed* perſon, ſo it ought to recompence that with another to the creditor, that in that caſe he ſhould have good *bail* to his action; but however, they directed the party *outlawed* to put in *bail* to anſwer the condemnation, or render his body.

Per Holt, Chief Juſtice. *Special bail* to *reverſe* an *outlawry* muſt be ſimply to anſwer the condemnation; but other *ſpecial bail* is to anſwer the condemnation, or *render* his body; and it was agreed, if the party were taken on the *cap' utlegat'*, he muſt give *bail* to *reverſe* the *outlawry*: and the court further ſaid, the *ſheriff* was fineable for making ſuch errors in *outlawries. Vide Mod. Rep. vol.* 12. *p.* 545, 546.

Hilary, 1 *Ann.* *Tilly* v. *Richardſon.*

In *debt* on bond in the *C. B.* judgment was given for the plaintiff, on which a writ of *error* was brought in this court, and *bail* put in according to the *ſtatute*, and judgment being affirmed thereon, *error* was brought in *parliament*; and the *clerk* of the *errors* refuſed to allow the writ, unleſs the party would give a *new recognizance*; and the defendant's council moved that it might be allowed without the ſame; it not being required by *ſtat.* 3. *Jac.* 1. *c.* 8.

Per curiam. The firſt *recognizance* does not include payment of coſts to be aſſeſſed in the *Houſe of Lords*, and thoſe coſts ought to be paid, and therefore a *new recognizance* ought to be given within the intent of the ſtatute; and it is not the buſineſs of this court to examine whether the *bail* was put in on the *firſt writ* of *error. Vide Salk. vol.* 1. *p.* 98.

Eaſter, 1 *Ann.* *Anonymous.*

Per Holt, Chief Juſtice. By *ſtat.* 3 *Jac.* 1. *c.* 8. when a writ of *error* is brought on a judgment on a *bond* to pay money only, *ſpecial bail* ought to be given: and after a year, a *ſci. fac.* ought to precede the *levari*, or *fi. fa. Vide Mod. Rep. vol.* 11. *p.* 2.

Michaelmas, 3 *Ann.* *Morris* v. *Spencer.*

On a writ of *error*, the exception taken to the *bail* was within *twenty days*, but the rule was ſerved after the expiration of the *twenty days*, which the plaintiff in *error* thought irregular, and therefore did not put in *better bail*, whereon the defendant in *error* took out execution, which was held an irregular proceeding by the court, on ſolemn debate; and the following rules were ordered to be obſerved as a ſtandard for practice.

1ſt. Exception to the *bail in a writ of error* muſt be taken within *twenty days.*

2dly. The rule ought to be ſerved before execution can iſſue for want of *better bail.*

3dly. The not ſerving the rule within *twenty days*, is neither material or inconvenient; becauſe it is only in delay of the plaintiff in *error* himſelf. *Vide Mod. Rep. vol.* 11. *p.* 33.

Hilary, 4 *Ann.* *Read* v. *Charnley.*

A writ of *error* was brought on a judgment obtained in the court of *Carliſle*, on a *ſci. fac.* againſt *bail.*

The plaintiff's council took *exception* to the *recognizance*, that it differed from the *recognizances* taken in this court, and conſequently was illegal and void, this *recognizance* being poſitive that the defendant ſhould render himſelf, but thoſe in this court only if the defendant do not pay the money, that then he ſhould render his body to priſon.

Holt, Chief Juſtice. They are both the ſame; the words in this *recognizance* are, that the defendant ſhall not withdraw nor abſent himſelf from the execution of the judgment; now if the defendant pays the money, that is an execution of the judgment, and conſequently the *recognizance* is performed. If a *capias ad ſatisfaciendum*, be returned *non eſt inventus*, and the money be not paid, then the defendant has withdrawn and abſented himſelf from the execution: and the *bail* may plead payment by the *principal.*

Powell, Juſtice, concurred with the Chief Juſtice, and the judgment below was *affirmed. Vide Raym. vol.* 2. *p.* 1225.

Eaſter, 4 *Ann.* *Gibbons* v. *Dove.*

Per curiam. Where *bail* is put in on the bringing of a writ of *error*, the practice is, that the other ſide ſhall have *twenty days* to except againſt them; which *exception* muſt be entered in the *book* of the *clerk* of the *errors*, and then he who *excepts*, muſt take out a *rule* to put in better *bail*, and ſerve the attorney on the other ſide with a copy; but ſuch *rule* need not be ſerved within *twenty days. Vide Salk. vol.* 3. *p.* 56.

Michaelmas, 8 *Ann.* *Bull* v. *Clifton.*

In an action on the *caſe* on a *bottomree bond* to pay money on a contingency, the court was moved, that the plaintiff in *error* might put in *ſpecial bail*, the condition of the bond was, *that if the* Oley Frigate, &c. *ſhall with all ſpeed ſail from the river of* Thames *to* China, &c. *without deviation, and return to the river within* 36 *calendar months, hazard of the ſea excepted; and if the ſaid J. S.* ſhall within the ſaid 36 *months*, or *thirty days* after the arrival of the ſaid ſhip, pay, *&c.* to *J. S.* the ſum of —— pounds, then the obligation to be void.

Holt, Chief Juſtice. This is not a bond only for the payment of money, for if he does not go the voyage, he forfeits the penalty; his going the voyage, return, and payment of the money, are all conditions; and he was of opinion, that the caſe did not require *ſpecial bail.* But the matter was adjourned. *Vide Mod. Rep. vol.* 11. *p.* 260.

Hilary, 9 *Ann.* *Goodwin* v. *Godwin.*

The point in queſtion was, whether an action of *debt* founded on a judgment in this court, might be brought pending *error* in the *Exchequer Chamber.*

This point was given up on account of the number of caſes in point, that *debt* would lie pending *error*. But it was ſtrongly inſiſted on, and *ſtat.* 27 *Eliz. cap.* 8. cited for that purpoſe, that the record itſelf was, in point of *law*, removed by the writ of *error*; and that therefore the declaration was naught, being of a record in this court, *whereas* it ſhould have been on a record in the *Exchequer Chamber*.

Per curiam. Theſe actions of *debt* pending *writs of error* were never favoured by *Hale* or *Holt*.

The authorities only kept the court from rejecting theſe actions, and therefore though they held the *writ of error* to be no plea in *bar*, yet they doubted whether they might not admit it as a plea in *abatement*.

In theſe kind of actions, to diſcourage them, *bail* is never allowed. Adjourned. *Vide Mod. Rep. vol.* 10. *p.* 17.

Hilary, 1 *Geo.* *Hammond* v. *Webb*.

The plaintiff gave a bond to one *Patchell*, conditioned for the payment of ſo much money by *Webb*; *Webb* gives a bond to the plaintiff conditioned thus: whereas *Hammond* has given a bond to *Patchell*, for the payment of ſo much money at ſuch a day, by him the ſaid *Webb*, the condition of this obligation is ſuch, that if the money be paid by *Webb*, according to the condition of the ſaid bond, then this obligation is void; otherwiſe, *&c.* An action was brought on this laſt bond, and judgment was given for the plaintiff, on which a writ of *error* was brought.

The court was moved, that on this writ of *error* the plaintiff in *error* ſhould find *ſpecial bail* by virtue of *ſtat.* 3 *Jac.* 1. *c.* 8. the words are no execution ſhall be ſtayed on any writ of *error* or *ſuperſedcas*, for reverſing a judgment in any action of *debt*, or contract for payment of money only, unleſs, *&c.* Now here the bond is conditioned for the payment of money only; for the condition properly ſpeaking, begins at theſe words, the condition of this obligation is ſuch; and what went before is only a *recital*.

We are therefore within the very words of the act, and if ſo, I am ſure this court will not conſtrue us out of the meaning of the ſtatute; for this is a remedial law, and ought therefore to have a large and liberal conſtruction. Writs of *error* are in delay of that right which the judgment has given the party; and therefore have always been looked on by the *common law* with an evil eye.

The defendant in *error*'s council ſaid, this act ought not to be conſtrued *equitably*; becauſe it is to take away, or clog a remedy, that the party has by *common law*; and for this very reaſon it has been ruled, that this *ſtat.* ſhould not be taken by *equity*.

Parker, Chief Juſtice. This bond ſtands only as a ſecurity for damages; this bond may be diſcharged, and the plaintiff not paid one penny; there is no difference between this and a bond to ſave harmleſs, out of the meaning of the act.

Pratt, Juſtice. The only queſtion is, whether the caſe be within the meaning of the act; for no matter whether within the words or not; and it ſeems to me, that the preſent caſe, though poſſibly within the words, is out of the meaning of this act, which is plainly, that where a recovery does neceſſarily import a *debt* due, there this act takes place; and not where a recovery may, or may not import a *debt* due; and the reaſon is, that delay in the latter caſe is not eſteemed ſo prejudicial, as in the former. Adjourned. *Vide Mod. Rep. vol.* 10. *p.* 281.

Michaelmas, 1 *Geo.* *Weddal* v. *The Bail of Jocar*.

An action was brought in this court on a *recognizance* entered into by the *bail*, to *ſurrender* the body of the *principal*, or pay the condemnation money. Judgment was given againſt the *principal* for 105*l.* for damages and coſts; on which a writ of *error* was brought in the *Exchequer Chamber*, and judgment affirmed; and 9*l.* *additional* coſts given for the delay, *&c.*

Now, a *ſci. fac.* being brought a gainſt the *bail* on this *recognizance*, the *bail* pray *oyer* of the *recognizance*, which is ſet forth, *&c.* and then the *bail* plead the death of the *principal before the iſſuing of the writ*; to this plea the plaintiff demurs, becauſe the *plea is double, and wants form.*

Parker, Chief Juſtice. *Rendering* is to be underſtood, rendering on demand, *viz.* at the return of the *capias*; for then is the *legal* demand compleated. Not *rendering* then is a refuſal; and then the *bail* become liable, and not before. Pleading therefore the death of the *principal* before the return of the *capias*, is moſt certainly a good plea.

But pleading the death of the *principal* before the iſſuing out of the *capias*, is certainly an immaterial plea; becauſe material only, in caſe it be found one way. For death before the iſſuing out of the *capias*, is death before the return of it. But ſuppoſe it be found that the *principal* did not die before the iſſuing out of the *capias*, that is plainly nothing to the purpoſe; for notwithſtanding this, he may die before the return of the *capias*.

As for the *authorities* wherein the pleading is, the death of the *principal* before the iſſuing of the *capias*, this anſwer may ſerve, that the *objection* was never taken; and that the doubt in theſe caſes was, whether the *bail* were not bound to *render* the *principal* in convenient time, or had time to do it, until the iſſuing out of the *capias*. This *objection*, therefore, the ſtrength of which lies on the *principal* having till the return, *&c.* would have been abſurd, at a time when it was a controverted point, whether the *bail* had time till the iſſuing out of the *capias*. But now the *law* is ſettled, that they have time till the *return*.

The reſt of the judges being of the ſame opinion, the plaintiff would have had his judgment, had not another objection been ſtarted, *viz.* that the *ſci. fac.* ſets forth all the proceſs till judgment in the court of *B. R.* and likewiſe all the proceedings on the writ of *error* till the affirmance of the judgment, and the damages and coſts in both courts; and concludes with a demand for *the aforeſaid damages and coſts* in both courts; whereas *bail* are not liable for thoſe in the *Exchequer Chamber*.

Per curiam. If judgment be *general*, execution muſt be ſo too; but ſince the ſums in their own nature are *ſeveral* and *diſtinct*, why may not the court enter the judgment for the damages and coſts recovered in *K. B.* *Vide Mod. Rep. vol.* 10. *p.* 267.

Michaelmas, 8 *Geo.* *Pitt* v. *Coney*.

The plaintiff recovered againſt the defendant on a *bottomree bond*, and the defendant brought a writ of *error*, but put in no *bail*; and the queſtion before the court was on the words of the *ſtatute*, which are, *bonds for the payment of money only.*

Per curiam. The *contingency* having happened, this is now in every reſpect a bond for the payment of money only, and therefore there muſt be *bail* to the writ of *error*. *Vide Stra. vol.* 1. *p.* 476.

Trinity, 9 *Geo.* *Colebrooke* v. *Diggs*. Error.

On a writ of *error* brought in the *Exchequer Chamber*, on a judgment given in this court for 1600*l.* in an action of *debt* on bond, *conditioned* for payment of money only, and the judgment being affirmed; afterwards a writ of *error* was brought in the *Houſe of Peers*; and the plaintiff in the original action being about to take out execution againſt the defendant for not entering *bail*, according to *ſtat.* 3 *Jac. c.* 8. *ſect.* 1. it was inſiſted for the defendant, that he having already entered into ſuch *recognizance* in this court before the writ of *error* was allowed; that he was not obliged by this *ſtatute* to give a new *recognizance* of *bail*, having already purſued the *ſtatute* by giving *bail* in that court where the judgment was given; and it would be very hard for him to be *bound* in *two recognizances* for one and the ſame matter.

Per curiam. We, after an affirmance in the *Exchequer Chamber*, award execution, which we ought not to delay, without taking new ſecurity for the damages and coſts. This act is a *remedial law*, and is to be conſtrued *equitably*. It is conſidered as a judgment and record in this court, after it is affirmed in the *Exchequer Chamber*, for the writ of *error* returnable in *parliament* is always directed to the *Chief Juſtice* of this court, and he carries up the records.

And there is no manner of inconveniency in entering into *two recognizances*, for both are the ſame with reſpect to the plaintiff in *error*, becauſe by the late *ſtat.* he has a proper remedy, if the plaintiff in the original action takes out execution for more than is due; but it would be very inconvenient for him to be delayed by a writ of *error*, and to have no ſufficient ſecurity to make ſatisfaction for his loſs.

Hob. 24. in *Luck*'s caſe an *executor* was obliged to give *bail* in the *Chamberlain of London's court*, and likewiſe *bail* for the ſame thing in the *ſpiritual court*, and ſo double *bail*; and this was warranted only by a particular cuſtom in *London*, which is not to be favoured ſo much as a *general ſtat.* made for the advancement of juſtice: ſo the party was ruled to put in *new bail* in this court, or elſe execution was to be awarded. *Vide Mod. Rep. vol.* 8. *p.* 79.

Hilary, 13 *Geo.* *Gabriel Johnſon* v. *James Laſerre.*

On a writ of *error* brought on a judgment on a *ſci. fac.* ſued out in the *C. B.* by the defendant, on a *recognizance* for 440 *l.* entered into by the plaintiff to the defendant, in the *C. B.* who prayed *oyer* of the *recognizance* and the *condition*; which condition recited, that *H. H.* and *T.* his wife, executors of *J. L.* had ſued out a writ of *error*, returnable in this court on a judgment recovered in the *C. B.* by *Laſerre* againſt *H.* and his wife: if therefore the ſaid *H.* and his wife proſecuted the writ of *error* with effect, *&c.* and paid the ſum recovered, and alſo the damages and coſts that ſhould be awarded if the judgment ſhould be affirmed, *&c.* that then, *&c.* and after *oyer* obtained, the ſaid plaintiff pleaded in *bar* of the *ſci. fac. ſtat.* 16 *&* 17 *Car.* 2. *cap.* 8. to prevent arreſts of judgment, and ſuperſeding executions, and the proviſo therein, that the act ſhould not extend to any writ of *error* to be brought by an executor, *&c.* and on demurrer, judgment was given for the plaintiff *Laſerre*, in the *C. B.*

The council for the plaintiff in *error inſiſted* that executors, by *ſtat.* 16 *&* 17 *Car.* 2. were not obliged to enter into *recognizances* on writs of *error* brought by them on indictments obtained againſt them, and that this appearing to be ſuch a *recognizance*, was void.

Per curiam. If a perſon will voluntarily enter into ſuch a *recognizance*, it is good at *common law.* Judgment was therefore affirmed. *Vide Raym. vol.* 2. *p.* 1459. *Strange, vol.* 2. *p.* 745.

Hilary, 2 *Geo.* 2. *Gomez Serra* v. *Munez.*

On a writ of *error* brought on *debt* on a bond, the *bail* are to be *bound* in *double* the penalty recovered; but by the courſe of the court it is ſufficient if they juſtify in double what is really due. *Vide Stra. vol.* 2. *p.* 821.

Trinity, 16 *Geo.* 2. *Thrale* v. *Vaughan.*

The condition of a bond was, that if the plaintiff furniſhed a *third* perſon's cellar with *beer*, the defendant would pay not exceeding 100 *l.* The defendant pleaded that none was delivered; to which the plaintiff replied, on a delivery to the value of 80 *l.* to which the defendant demurred: and judgment was given for the plaintiff.

On this judgment *error* was brought, and *bail* not being put in, execution was taken out. And now, on conſideration of *ſtat.* 3 *Jac.* 1. *c.* 8. where the words are, *bonds for the payment of money only*, the court ſet aſide the execution: for this is by no means a certain demand, but reſts on a *quantum meruit*, and the ſum is only put into the replication, in order to aſſign a breach; and the act being to reſtrain a *legal remedy*, muſt be taken ſtrictly. 1 *Keb.* 613. *Carth.* 28. 2 *Bulſt.* 54. 1 *Lev.* 117. *Vide Stra. vol.* 2. *p.* 1190.

Trinity, 4 *Geo.* 3. *Bidleſon, Eſq;* *Adminiſtrator*, &c. v. *Whitel, Eſq;*

On a *rule* to *ſhew cauſe* why the return of the writ of *cap. ad ſa.* iſſued in this cauſe ſhould not be ſet aſide, and the proceedings againſt the *bail* of the defendant ſtayed with coſts, to be taxed by the maſter, and in the mean time all proceedings to be ſtayed.

The following queſtion came before the court, *viz.* "Whether the plaintiff in a writ of *error* brought on a judgment in an action of *debt*, commenced in this court on a former judgment recovered here by the plaintiff's inteſtate, in an action of *debt* on a bond *conditioned* for payment of money only, (which former judgment was confeſſed by a *warrant of attorney*) was, or was not, obliged to put in *bail* on ſuing out ſuch writ of *error*, on *ſtat.* 3. *Jac.* 1. *cap.* 8.?"

Lord *Mansfield* delivered the opinion of the court, and declared that the opinion of all the judges had been taken on this queſtion, who were of opinion, "that *bail* is not requiſite on bringing a writ of *error* on a judgment in an action of *debt* founded on a *prior* judgment:" the rule was therefore made *abſolute*, without coſts. *Vide Bur. vol.* 3. *p.* 1545.

Bail-Bond.

Hilary, 13 *W.* 3. *Ingram* v. *Foot.*

Holt, Chief Juſtice. Proceedings cannot be ſtayed on a *bail-bond* till other *bail* be put in and *juſtified*, if *excepted* againſt. *Vide Mod. Rep. vol.* 12. *p.* 611.

Hilary, 13 *W.* 3. *The King* v. *Dawes.*

An *attachment* iſſued out of this court againſt the defendant, for a *contempt* committed by him, directed to the *ſheriff* of *Cumberland*; on which the defendant being arreſted, the *ſheriff* of the ſaid county took a *bail-bond*, in which perſons very ſufficient were bound for his appearance at the return of the *attachment*, and let him go at large. The defendant refuſed to appear at the return of the writ, which was on *Friday next after the morrow of the Holy Trinity* laſt paſt; on which the *ſheriff* was *amerced*, though he offered the plaintiff in the action to *aſſign* to him the *bail-bond*, which he refuſed, alledging that the *ſheriff* could not take a *bail-bond* on an *attachment*. On which the *ſheriff*, thinking he was oppreſſed, moved this court to compel the plaintiff to accept the *aſſignment* of the *bail bond*: and his council *urged*, that it was very reaſonable that ſuch a rule ſhould be made; for the *ſheriff* is compellable by the *ſtatute* to let a man arreſted on an *attachment* go at large on a *bail-bond* given; and when he is at large, the *ſheriff* cannot ſeize him again after the return of the writ; and conſequently it is not then in his power to bring him in at the return of the writ: it will then be very hard, that when he has done his duty, and no more, he ſhall be liable to *amercements* for not doing that which the *law* ſays he cannot do lawfully. That no action lies againſt him in ſuch caſe appears from, 2 *Saund.* 54. *Poſterne* v. *Hanſon*, and 1 *Sid.* 23. and if no action lies, he ought not to be *amerced* for it. But not allowed.

Per curiam. This court cannot make a rule, that the plaintiff ſhall accept the *aſſignment* of the *bail-bond*; for he may either accept of it, or proceed againſt the *ſheriff* by *amercements*; and the *ſheriff* may reimburſe himſelf, by ſuing the *bail-bond*; and if the *bail-bond* is not ſufficient, (as here it was but for 40 *l.*) he is without remedy. But it was clearly agreed, that he may take a *bail-bond* on an *attachment.* See *Stile*, 212, 234. *Burton* v. *Low.* 2 *Vent.* 237. *contra.* 3 *Leonard*, 208. *Bland* v. *Riccards.*

Afterwards, on the laſt day of the term, the council for the *ſheriff* ſhewing to the court that this was a hard caſe, and that *Dawes* was in town, the court granted a tipſtaff to bring him in *during the ſitting of the court*, but he could not be found. And ſo nothing was done for the relief of the *ſheriff*. *Vide Raym. vol.* 1. *p.* 722.

Eaſter, 13 *W.* 3. *Pickering's Caſe.*

Per curiam. Let the *bail* taken by the ſheriff be ever ſo good, yet the plaintiff may refuſe an *aſſignment* of the *bail-bond*, and proceed againſt the *ſheriff* by *amercements*; therefore it behoves him to take good *bail*: it is true, the *ſheriff* ſhall not be brought into *contempt* for not bringing in the body; but the only way is, to *amerce* him, and the *ſheriff* may proceed on the *bail-bond*; the plaintiff, by *ſtat.* 23 *H.* 6. *c.* 10. has his election of *bail* or *amercement*. *Vide Mod. Rep.* 12. *p.* 447.

Michaelmas, 1 *Ann.* *Hyon* v. *Ballard*.

On a motion to ſtay proceedings on a *bail-bond* for want of *bail* above, the defendant produced a *releaſe* under the ſeal of the plaintiff; and thereon the plaintiff's attorney ſuſpecting it, conſented to deliver a declaration forthwith, and that the defendant ſhould plead the releaſe, and ſo try it; which being done, the plaintiff was *nonſuited* at the trial; but afterwards it being diſcovered to be a *notorious forgery*, a motion was made for a *new trial*: but the court ſaid, they could make no rule in this caſe, the plaintiff being out of court on the *nonſuit*; but ſince the rule to ſtay proceedings on the *bail-bond* was not *abſolute*, they ſaid the cauſe was ſtill before them: and therefore granted a rule for the defendant to *ſhew cauſe* why proceedings ſhould not go on. *Vide Mod. Rep. vol.* 7. *p.* 54.

Michaelmas, 1 *Ann.* *Fiſh* v. *Horner*.

Per curiam. If a plaintiff accepts of an *aſſignment* of the *bail-bond*, and the defendant puts in the ſame *bail* that were put into the *ſheriff* at the return of the writ, the plaintiff can not *except* againſt them; but it is otherwiſe where he has not taken an *aſſignment*.

It is a ſtanding rule of this court, that in a *country cauſe*, after an *aſſize*, or in a *town cauſe* after *two terms*, proceedings are never ſtopped on a *bail-bond* on filing *common bail*. *Vide Mod. Rep. vol.* 7. *p.* 62.

Michaelmas, 1 *Ann.* *How* v. *Granville*.

Per curiam. After an aſſignment of a *bail-bond*, if the defendant puts in the ſame *bail* that are put in to the ſheriff, the plaintiff cannot except againſt them; *otherwiſe*, if he has not taken an aſſignment, and on an action brought againſt the *bail*, they are not held to *bail*. *Vide Mod. Rep. vol.* 7. *p.* 117.

Trinity, 2 *Ann.* *Grovenor* v. *Saame*.

On a *bill of Middleſex*, taken out againſt three, with an *ac etiam*, in *debt* on a *bond* by them jointly and ſeverally entered into, the ſheriff took one *bail-bond* for the appearance of all three; and there being no appearance, the plaintiff took an *aſſignment* of the *bond*, and now moved to have the *ſheriff amerced*.

Firſt, It was agreed that the *bail-bond* was not according to the ſtatute, being for a joint appearance of three ſeveral perſons.

Holt, Chief Juſtice, ſaid, it had been *adjudged* in the time of *Glyn*, Chief Juſtice, that if the *ſheriff* takes inſufficient *bail*, and has not the party at the return of the writ, an action would lie againſt him; but the contrary has been held ſince in the *C. B.* it was indeed always agreed, that an action would not lie for taking inſufficient *bail*; but it was not ſettled whether it would not lie for taking inſufficient *bail*, and not having the party at the return of the writ; for though the *ſtatute* commands him to take reaſonable *bail*, yet if he has not the party, he ſhall be *amerced*, and the *ſtatute* does not exempt him from that: the writ was in a *plea of treſpaſs*, and alſo to a *bill*, &c. and the *bail-bond* was to appear in a *plea of treſpaſs* only, and held good in *Hale*'s time: and though the clerks ſaid they knew the ſheriff *amerced* after an *aſſignment* of a *bail-bond*, yet *Holt*, Chief Juſtice, ſaid, he had known it denied; and ſo held by the other judges.

If a perſon accepts of an *aſſignment*, and the ſame perſons are put in as *bail* to the action who were *bail* to the ſheriff, he cannot deny them.

Holt, Chief Juſtice. If the ſame perſons that were *bail* to the ſheriff become *bail* to the action, and the plaintiff excepts againſt them, and they do not juſtify on ſuch exception, he may go on with *amercements* againſt the *ſheriff*. *Vide Mod. Rep. vol.* 6. *p.* 122.

Eaſter, 3 *Ann.* *Shuttle* v. *Wood*.

Per curiam. Anciently there could be no proceedings on a *bail-bond* till the *next term*, and it is a great grievance to put it in ſuit till after a convenient time, though it has been otherwiſe practiſed in the *C. B.* *Vide Mod. Rep. vol.* 6. *p.* 132.

Michaelmas, 3 *Ann.* *Bernardiſton* v. *The Sheriff of Middleſex*.

The plaintiff took out a writ againſt *J. S.* and delivered it to the defendant, to be executed: on the arreſt, the *bail-bond*, taken by the officer, was to appear at the ſuit of *Bernardiſtant*, and *bail* was put in by that name; and after a *reddidit ſe*, i. e. *he has rendered himſelf*, by the ſame name, the plaintiff ſued the ſheriff for an *eſcape*.

The court was moved, that the *bail-piece*, and *reddidit ſe*, might be made according to the writ.

Per curiam. It cannot be; for the *bail* muſt be according to the *bail-bond*, and not according to the writ, or the return of it; and though it be *an error of the writer* of the *bond*, yet we cannot help it. *Vide Mod. Rep. vol.* 6. *p.* 309.

Eaſter, 4 *Ann.* *Butler* v. *Rolls*.

The defendant was ſued on a *bail-bond*, to which action he pleaded, and had notice of trial; and then he moved to ſtay proceedings on the *bail-bond*, on bringing the *principal*, *intereſt*, and *coſts*, into court; which was granted, ſo as he brought it in by ſuch a time, that the plaintiff might not be delayed of his *trial*, or otherwiſe the plaintiff might proceed.

Holt, Chief Juſtice. The *ancient* practice was, that a *bail-bond* could not be put in ſuit till a *rule* was had to *amerce* the *ſheriff* for not having the body at the return of the writ; and the courſe now is to ſtay proceedings on the *bail-bond*, if there is no return of a *cepi corpus*. *Vide Salk. vol.* 3. *p.* 56.

Hilary, 7 *Ann.* *Sumner* v. *Ferryman*.

In *debt* for 60 *l.* on a bond dated 16th of *Auguſt* 1706, on *oyer* of the condition, it was ſet forth in theſe words, " The condition of this obligation is ſuch, that if *N. H.* do and ſhall appear before the *Mayor, Aldermen, Bailiffs* and *under Steward* of the *borough* of *New Windſor*, at the next court of record, to be held at the *Guildhall* of the ſaid *borough*, on the *19th day of Auguſt inſtant*, there to anſwer to *W. D. B. C.* and *B. T.* in a plea of *treſpaſs* on the *caſe*, then this obligation to be void, or elſe to remain in full force, *&c.* The defendant pleaded in *bar*, that he was a ſervant to *N. H.* and that he was employed by *H.* in governing a barge loaden with ſeveral people's goods, from *Oxford* to *London*, and that in his voyage on the *River Thames*, near *New Windſor*, the bailiff of *New Windſor* pretending to have a proceſs againſt *N. H.* and power and authority to *attach* the goods of the ſaid *H.* did attach the barge then being in the cuſtody and government of the defendant, of which the ſaid *H.* was maſter; and ſo hindered and detained them from going their voyage, and refuſed to let them go, unleſs the defendant would give the ſaid *bond* to the ſaid *bailiffs*; ſo that the ſaid defendant, to free the barge, and that he might deliver the goods to the owners, gave the ſaid *bond* with the aforeſaid *condition*; *when indeed* no bailiff ought to take ſuch *bond*; and that it was took extorſively, *&c. and this he is* ready to verify, *&c.* to this plea the plaintiff demurs, and the defendant joined in demurrer.

Per Holt, Chief Juſtice. The defendant having ſubmitted to the *proceſs*, let it be *right* or *wrong*, the *bond* which he gives ſhall be a good *bail-bond*, and ſhall not be avoided. And if the goods of a ſtranger are in my cuſtody, and are *attached*, if I do not conteſt it, but give a *bail-bond*, their being the goods of a ſtranger ſhall not avoid the *bail-bond*. Indeed if they had taken it *under colour of office*, when there was no *proceſs* at all, it had been void by the ſtatute.

Powell, Juſtice, ſaid, a man cannot avoid his *bond* by *dureſs* to his goods, but only to his *perſon*. Therefore judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 11. *p.* 201.

Eaſter, 7 *Ann*. *Buſhell* v. *Haynes*.

In *debt* on a *bail-bond*, as *aſſignee* of the *Sheriff* of *Suſſex*, according to the late act of parliament; the plaintiff declared *generally*, without ſhewing the matter *ſpecially*, that it was a *ſheriff's bond*, which by the late act is *aſſignable*; to which there was a demurrer.

Per curiam. It ſhould have been ſhewn that it was a *bond aſſignable*: and when the plaintiff's council found the opinion of the court was againſt him, he prayed to *diſcontinue*, which was granted, on payment of *coſts*. *Vide Mod. Rep. vol.* 11. *p.* 170.

Michaelmas, 12 *Ann*. *Seſtern* v. *Cibber*.

There was an action of *debt* on a *bond* brought by the plaintiff as *aſſignee* of a *bail-bond*, and on demurrer theſe *objections* were taken to the declaration,

1ſt. That the breach of the *condition* was ſet forth to be, his not appearing *according to the requiſition of the writ*, and *according to the form of the writ*, *whereas* it ought to have been, his not appearing at the return of the writ. 1 *Lev.* 145. 3 *Lev.* 243.

2dly. It was *objected*, that the very foundation of the action, *viz.* the breach, was ſet forth by way of *recital*; *when alſo he did not appear* which ought to have been expreſsly *averred*, that ſo the defendant might have the liberty of traverſing it.

3dly. It was not ſet forth on what day the writ was returnable; and then *it does not follow* whether he did or did not appear *according to the requiſition of the writ*, conſequently it does not appear whether the bond was, or was not forfeited.

Per curiam. This caſe differs very much from the caſe of a *ſheriff* ſuing this *bond* for himſelf; for there he has nothing to do but to declare on the *bond*: but where the action is brought by the *aſſignee*, there it is the forfeiture that gives the action, which here is the *non-appearance*, and is a matter traverſable, and muſt not be ſet forth by way of *recital*, but muſt be poſitively *averred*.

It is true, that the declaring in an *indebitatus aſſumpſit* is *when alſo* he was indebted: ſo in a bond.

But then in the firſt caſe it is the *promiſe*, and in the *ſecond* the breach of the *condition*, which gives the action; both which are always poſitively *averred*, and not ſet forth by way of *recital*.

Parker, Chief Juſtice. It is not true, that there is no traverſing what is only ſet forth by way of *recital*; for the pleas of *non aſſumpſit* and *non eſt factum* are both of them pleas that traverſe matters in theſe reſpective actions, that are pleaded by way of *recital*; beſides, the return of the writ not being ſet forth, is a fatal objection. *Vide Mod. Rep. vol.* 10. *p.* 191.

Hilary, 1 *Geo*. *Kitton* v. *Fag*.

This caſe was; one *H. Hamlin*, high-ſheriff, did by a legal inſtrument, make *Lancaſter* his under-ſheriff, in truſt for *Altham*, who had been under-ſheriff the year before; neither *Altham* nor *Lancaſter* took the oaths required by *ſtat.* 27 *Eliz. c.* 12. after *Hamlin*'s year was expired, and a new ſheriff appointed; *Altham* makes an aſſignment of a *bail-bond*; and the queſtion was, whether *Altham* had ſuch an authority, as that his aſſignment of the *bail-bond* was a good aſſignment within the ſtatute for the amendment of the law.

The plaintiff's council argued that this aſſignment was good.

This caſe turns on two points:

1ſt. Whether it is neceſſary that this aſſignment be made by the high-ſheriff in perſon?

2dly. If it be not, whether this aſſignment being made by *Altham*, the under-ſheriff, *de facto*, be not a good aſſignment?

It was formerly a doubt, if the ſheriff returned a *cepi corpus*, (as he muſt, notwithſtanding by *ſtat.* 23 *H.* 6. *c.* 10. he is obliged to take bail) and has not the body in court at the day of the return, whether he was not liable to an action. The law was not ſettled in this point till 21 & 22 *Car.* 2. See 1 *Vent.* 55. when it was reſolved that he was not liable to an action.

In the ſtatute for the amendment of the law, tho' the under-ſheriff is not mentioned, yet he is far from being excluded; he may poſſibly be included under the words, *other officers*.

In all miniſterial acts, whatever is done by the under-ſheriff is of the ſame authority as if done by the ſheriff himſelf.

Aſſignments of *bail-bonds* to the plaintiff are no new things. It was a common practice before the ſtatute; and though in ſtrictneſs of law a bond being a *choſe* in an action, ſuch aſſignments were not good, yet ſuch aſſignments have been taken notice of in courts of law, and not ſuffered to be evaded. *Foſter* v. *Jackſon*, 22 *Car.* 2.

This act is not in nature of an authority to the ſheriff, but a judgment in parliament, that the ſheriff ſhall do it, and he is liable to an action if he does not; and in Chancery he may be compelled to a ſpecific performance, according to this act of parliament.

There were two reaſons for making this act; the one to obviate the abuſive practice of ſheriffs in releaſing theſe bonds; and thereby depriving plaintiffs of the advantage of them, for whoſe ſecurity alone they were taken. The ſecond reaſon was, to remove the chicane of the law, that theſe bonds were not aſſignable, becauſe *choſes* in action.

Had the ſtatute only made the *bail-bonds* aſſignable, and not ſaid by whom, the law would have ſaid, that the ſheriff was the perſon to aſſign it.

If the ſheriff dies before aſſignment, muſt not the executor of the ſheriff aſſign it?

As to the objection that may be made, that the circumſtances required by the act of parliament to be obſerved in aſſigning, make it neceſſary for the ſheriff to do it in perſon: it may be anſwered, that the reaſon for preſcribing theſe circumſtances was only to make the aſſignment more effectual, and to diſtinguiſh the aſſignments by virtue of this act, from thoſe in uſe before; and may therefore be compared to fines. 3 *Co.* 88. But no deſign to abridge the power of the under-ſheriff.

An under-ſheriff, by virtue of his office, is included in ſeveral acts of parliament, though not named. *Stat. Weſtm.* 2. *c.* 11. 25 *Edw.* 3. *c.* 17. *Weſtm.* 2. *c.* 18. *Elegit*, *Fitzh. N. B.* 266. *b.* 4 *Co.* 64. *Fullwood's caſe*.

Execution is the end and life of the law. 5 *Co. Rep.* 92. This is a mechanical part of the ſheriff's office. *Cro.Car.* 26.

As to the ſecond point, it amounts to no more than this, whether all acts done by one that appears and acts as under-ſheriff, ſhould be void for want of ſome circumſtances, that none think themſelves obliged to enquire into, and concern the under-ſheriff only.

Though there be an under-ſheriff legally appointed, yet the not appearing nor acting makes no alteration at all in the caſe.

A gaoler *de facto* is bound to take care of the priſoners; and generally the law is ſo, that acts done by thoſe reputed in authority are good. 2 *Inſt.* 381, 382. *Cro. Eliz.* 699. *Harris* v. *Jay*. *Moore*, 112. *Cro. Eliz.* 34. ——— v. *Howell*. and others. 1 *Keb.* 357. If acts of under-ſheriffs *de facto* were void, in ſo many acts of parliament relating to ſheriffs, ſome care would very probably have been taken about it.

The defendant's council inſiſted, that the oath to be taken was an oath of office: that *Lancaſter* was in a legal manner conſtituted under-ſheriff; but that *Altham* had no deputation at all, and was a mere intruder.

He inſiſted, that ſuppoſing the aſſignment performed during the year of *Hamlin*, might have been good, yet it would not now, being performed after. *Moore*, 112. *Yelv.* 44. 2 *Cro.* 73. *Moore*, 757. 34 *H.* 6. 3, 6. 1 *Roll. Abr.* 894.

He took this difference, where a ſtatute appoints things to be done by the ſheriffs, and preſcribes no particular manner for the doing of it, that makes it neceſſary to be a perſonal act; there the under-ſheriff may do it, though the ſheriff is only mentioned: but where the manner and circumſtances, injoined and preſcribed by the act, make it a perſonal act, there the under-ſheriff cannot perform it; which difference anſwers all the inſtances drawn from acts of parliament.

Then he inſiſted, that the ſtatute injoining the aſſignment to be under the hand and ſeal of the ſheriff, made it a perſonal act.

Indeed, in *Englefield's* caſe, 7 *Co. Rep.* 11. it is held, that tendering a ring is no perſonal act; but then it is reſolved in the Duke of *Norfolk's* caſe, there quoted, that the uſes being revocable by writing under the proper hand and ſeal of the duke it was a perſonal act, and not capable of being performed by any body elſe. This caſe is exactly the ſame with that at the bar, except the addition of the word *proper*, which according to 1 *Mod.* 40. and 1 *Vent.* 128. makes no difference at all.

If the ſheriff dies before aſſignment, his executor cannot do it, this being a *caſe omitted*; and the plaintiff muſt ſue in the ſheriff's name as at common law before this act. Adjourned. *Vide Mod. Rep. vol.* 10. *p.* 288.

Trinity, 7 *Geo.* *Watkins* v. *Parry.*

In debt on a *bail-bond*, the defendant traverſed the arreſt of the *principal*; and on demurrer judgment was given for the plaintiff; for otherwiſe this will be a way to avoid all *bail-bonds* that are *civilly* taken, without expoſing the party by an arreſt. *Vide Strange, vol.* 1. *p.* 444.

Trinity, 7 *Geo.* *Watkins* v. *Marſh.*

An action having been brought by the *aſſignee* of a *bail-bond*, on *ſtat.* 4 *&* 5 *Ann.* the defendant pleaded, that the principal was not arreſted by the perſon, at the ſuit of the plaintiff, by virtue of the *latitat*, as in the declaration mentioned; to which the plaintiff demurred. The defendant urged, that there is a condition precedent in the ſaid *ſtat.* if the party be arreſted: but judgment was given for the plaintiff.

Per curiam. The defendant firſt pleads *ſtat. H.* 6. and ſays, by *proteſtation*, that this *bond* was taken of the ſheriff *officially*, and then pleads the above plea. The words are, *if any perſon ſhall be arreſted, by writ, bill, or proceſs, and the ſheriff ſhall aſſign*; ſo the laſt words ſay only, *where a proceſs is taken out*; and it would be ſtrange to ſay, no *bail-bond* ſhould be aſſigned, but where the party is actually arreſted, though he ſhould appear without an arreſt. The ſame judgment was given in the caſe of *Haley* v. *Fitzgerald*, *Mich.* 12 *Geo.* *Vide Forteſcue, p.* 364.

Michaelmas, 7 *Geo.* *Mills, Aſſignee of the Sheriff*, v. *Bond.*

In an action on a *bail-bond*, the condition of the ſaid bond was, to appear on *Saturday next*, *after eight days of the Purification of the Bleſſed Virgin*, and the term ended on *Friday*, which was the day before; and this appeared in the declaration brought by the *aſſignee* of the *bail-bond*: the defendant pleaded *nil debet*, to the bond; to which the plaintiff demurred.

Per curiam. *Nil debet* is no plea to a bond, but a writ to appear out of term is a void writ, and ſo is the condition of the bond; and therefore the plaintiff has no cauſe of action on his own ſhewing. *Vide Forteſcue, p.* 363.

Eaſter, 8 *Geo.* *Belgardine* v. *Preſton.*

In *debt*, brought by the *aſſignee* of a *bail-bond*, the writ appeared to be returnable *in eight days of Hilary*, which was the 23d of *Jan.* and the *bail bond* was ſaid to be taken the 17th of *December* before the return of the writ; the defendant pleaded *ſtat. H.* 6. and that the *bail-bond* was taken, to wit, at a certain place, on the 25th of *January*, after the return of the writ; *abſque hoc*, that the bond was made the 17th of *December*, at *Weſtminſter*.

On *demurrer*, judgment was given for the plaintiff; for, *per curiam*, the plea makes the place where the bond was made material, which the court held to be naught.

And, *per curiam*, Though the *bond* was made two days after the return of the writ, yet it is good; becauſe the defendant has *four days* to put in bail, by the practice of the court, which the court will take notice of. *Vide Forteſcue, p.* 365.

Trinity, 8 *Geo.* *Hange, Aſſignee of Caſewell, and Billers*, v. *Manning.*

An action being brought on an *aſſignment* of a *bail-bond*, the defendant pleads, that at the time of the *aſſignment* they were not ſheriffs, but out of their office, and two other perſons were ſheriffs at that time: the plaintiff demurs.

Per curiam. The plaintiff ſhall have judgment; the *aſſignment* is good, and the deſcription of the party and ſheriffs good likewiſe. *Vide Forteſcue, p.* 364.

Trinity, 9 *Geo.* *Tucker* v. *Goldburne.* Error.

An action of debt was brought on an aſſignment of a *bail-bond* taken by the *ſheriff*, who had arreſted the defendant on a *capias, &c.* and on a demurrer to the declaration, it was *objected*, that the plaintiff had not ſet forth the *capias*, or the *teſte* or *return* of any *capias*, as he ought to have done; and the court of *C. B.* being of that opinion a writ of *error* was brought in this court; but the judgment of the *C. B.* was affirmed, for it is the *capias* which gives life to the *bond*. *Vide Mod. Rep. vol.* 8. *p.* 78.

Eaſter, 12 *Geo.* *Peedle, Aſſignee of the Sheriff*, v. *Chriſtmas.*

An action being brought on an *aſſignment* of a *bail-bond*, the defendant pleaded *ſtat. H.* 6. and ſays, it was a *bond* made for eaſe and favour, and therefore void: to which the plaintiff demurred.

Per curiam. The plea is not good; for ſince the ſtatute, the plaintiff ſets out the *proceſs*, and the *bond*, and that the bond was to appear only at the return of the writ, and the defendant affirming that it was a *bond* for *eaſe* and *favour*, ought to have traverſed the condition ſet out by the plaintiff; beſides, here are two affirmatives only, which cannot make an *iſſue*; and where a condition of a *bond* is ſet out to *anſwer the plaintiff in a plea of treſpaſs, and alſo to a bill for* 200 *l.* and does not ſay, *to a bill of the ſaid plaintiff*, yet it is well; for it cannot be to a bill to be exhibited by any other perſon. *Vide Forteſcue, p.* 365.

Eaſter, 13 *Geo.* *Gregſon* v. *Heather.*

In *debt*, on an *aſſignment* of a *bail-bond*, brought in *London*; in the declaration it appeared the *bond* was made in *Surry*, and that the *aſſignment* by the ſheriff of *Surry*, was laid in *London*; it was held well: for the action is brought on the aſſignment. *Vide Forteſcue, p.* 366.

Trinity, 13 *Geo.* *Robinſon* v. *Taylor.*

In *debt*, on an *aſſignment* of a *bail-bond*, if there is a *profert* to the *bond*, it is enough, and there is no occaſion to name witneſſes. *Vide Forteſcue, p.* 366.

Michaelmas, 1 *Geo.* 2. *Studley* v. *Sturt.*

The writ was returnable on *Wedneſday*, and the *bail-bond* was aſſigned on the *Monday following*; the court held the plaintiff was too ſoon by a *day*, for that *Sunday* was not to be reckoned as a day. *Vide Strange, vol.* 2. *p.* 1782.

Hilary, 3 *Geo.* 2. *Nott* v. *Stephens.*

An action being brought by the executor of an aſſignee of a *bail-bond*, it was objected, that the act ſays the aſſignee ſhall bring an action. Judgment for the plaintiff; it is an intereſt veſted, which will go to the executor. *Vide Forteſcue, p.* 366.

Hilary, 3 *Geo.* 2. *Jenyns* v. *Gooſtrey.*

In *debt*, on an *aſſignment* of a *bail-bond*, it appeared on the face of the declaration, that the *ac etiam* was for 30*l.* and the *bail-bond* for 40*l.* ſo bail was taken in a greater ſum than the debt, contrary to the act. The declaration was demurred to, and the following *exceptions* taken; 1ſt, that the plaintiff has not ſet out that the writ was indorſed; but this *exception* was over-ruled: 2dly, that the *bail-bond* being for more than the ſum in the writ, vacates the *bond.*

Per curiam. If it were void, it ought to be pleaded, but this *bond* is not void; and the act makes it only a miſdemeanour in the officer, and the act is only directory. The court of *Exchequer* were of the ſame opinion. *Vide Forteſcue, p.* 366.

Hilary, 3 *Geo.* 2. *Fromanteel* v. *Williams.*

In this caſe, which was an action brought by the *aſſignee* of a *bail-bond*, *ſtat. H.* 6. and *ſtat. Geo.* 1. were pleaded: the indorſement of the writ being ſet out different from the *ac etiam*, the plaintiff had judgment. *Vide Forteſcue, p.* 367.

Hilary, 3 *Geo.* 2. *Watkins* v. *Harris.*

In *debt* brought by the *aſſignee* of *William Morris*, bailiff of the liberty of the dean and chapter of *Weſtminſter*, it was objected, that it was not ſaid, that the aſſignment was under hand and ſeal. *Anſwer*, it is ſaid in the declaration, the *aſſignment* being *ſigillat, et atteſtat.* Held well, becauſe in the very words of the ſtatute. *Vide Forteſcue, p.* 367.

Michaelmas, 3 *Geo.* 2. *Hen. Mifflin alias Peters and Others*, v. *Sir William Morgan.* Error.

On a writ of *error* brought on a judgment by *nil dicit* in *debt* on a *bail-bond* in the penalty of 500*l.* obtained by the plaintiff and others, againſt the defendant, as aſſignees of the Sheriff of *Glouceſter*.

The *error* aſſigned was, that the plaintiffs did not ſhew that the ſheriff aſſigned the *bond* to them, by indorſing the ſame, and atteſting it under his hand and ſeal, in the preſence of two or more credible witneſſes, according to the words of *ſtatute* 4 *Ann. cap.* 16. but only alledged that the ſheriff at the requeſt and coſts of the plaintiff in the ſuit, according to the form of the ſtatute, in that caſe lately made and provided, did aſſign to the plaintiffs the ſaid *bond*.

The council for the plaintiff in *error* inſiſted, that it was not ſufficient, without ſhewing particularly that the *bond* was aſſigned, as the act directed, by indorſement, *&c.*

The court unanimouſly over-ruled this exception, and ſaid, that all defects which would have been aided by a verdict, are aided after judgment by *nil dicit*, by *ſtat.* 4 *Ann. cap.* 16. for the amendment of the law; and it being expreſsly alledged, that the *bond* was aſſigned *according to the form of the ſtatute*, therefore the judgment was affirmed. *Vide Raym. vol.* 2. *p.* 1534.

Eaſter, 4 *Geo.* 2. *Mayhew* v. *Mayhew.*

Nil debet pleaded to an aſſignment of a *bail-bond*; held not a good plea. *Vide Forteſcue, p.* 367.

Hilary, 5 *Geo.* 2. *Vaus* v. *Hall.*

In an action on the *caſe*, on an *aſſignment* of a *bail-bond*, it was ſet out in the declaration, that the bond was *aſſigned* to the uſe of the plaintiff; whereas the act is, *ſhall be aſſigned to* the plaintiff.

Per curiam. It is all one, and we hold it well. *Vide Forteſcue, p.* 369.

Trinity, 5 *Geo.* 2. *Cook* v. *Brockhurſt.*

In an action againſt the ſheriff of *Middleſex*, for an *eſcape*, the defendant pleaded *not guilty*; and nothing appeared againſt the ſheriff, but that he took a *bail-bond*, with one ſurety only in the *bond*, *viz.* the party himſelf, and another perſon.

Per curiam. It is well; and as to his not appearing at the day, no action will lie againſt the ſheriff, but he muſt be amerced. In the caſe of a *bail-bond*, the ſufficiency of the bail is not traverſable. *Vide Forteſcue, p.* 369.

Hilary, 8 *Geo.* 2. *Derby* v. *Roſe.*

A *bail bond* was given to the gaoler of the *Marſhalſea* priſon, after *oyer* of the bond, and condition, he pleaded *ſtat.* 23. *H.* 6. and that *A. B.* ſued out of the *palace* of the King at *Weſtminſter*, held in *Southwark.* It was objected to the plea, that it is not ſaid that the proceſs iſſued out of any court, but only ſued out of the *palace* inſtead of the *court* of the palace.

Per curiam. It is wrong. The plaintiff accordingly had judgment on the *bond*, though a *Marſhal's court bond. Vide Forteſcue, p.* 370.

Eaſter, 8 *Geo.* 2. *Derby* v. *Hamond.*

In an action on a *bail bond* given to the goaler of the *Marſhalſea* priſon; it was objected, that it does not appear in the plea or declaration, that the *bond* was entered into to the plaintiff by the name of his office, but only to *John Derby*; ſo void by *ſtat.* 23 *H.* 6.

Per curiam. No *oyer* is craved of the *bond*; ſo the *original bond* may be right, *&c.* it does not appear to be wrong.

It was then objected, that *theſe bonds* were not within the ſtatute; but this objection was over-ruled; and the plaintiff had judgment. *Vide Forteſcue, p.* 371.

Michaelmas, 9 *Geo.* 2. *Neat, aſſignee of the ſheriff of Middleſex*, v. *Mills.*

In the declaration, the *aſſignment* of the *bail bond* was ſet out to be atteſted in the preſence of one witneſs, naming him, *viz. John Weaver.* On *nil debet* pleaded, and demurrer, it was held wrong. According to the ſtatute, it ſhould be done in the preſence of two witneſſes: on which the plaintiff diſcontinued. *Vide Forteſcue, p.* 371.

Trinty, 14 *Geo.* 2. *Shuttleworth* v. *Pilkington.*

A *ſpecial original* being taken out returnable *before the Lord the King, whereſoever he ſhould then be in England*, the *bail-bond* was without the words *whereſoever, &c.* and in an action on it, it was *objected*, that by *ſtat. Hen.* 6. (which was pleaded) the *ſheriff* could take no *bond*, but ſuch as was to appear at the place in the writ mentioned; *whereas* this might be to compel an appearance out of *England*, if the King ſhould happen ſo to be.

Per curiam. There is no ſet form of words for theſe *bonds*, but if in ſubſtance they are to *appear* according to the deſign of the writ, it is ſufficient. 2 *Cro.* 286. 2 *Vent.* 237. 2 *Show.* 51. 2 *Lev.* 180. *Trin.* 3 *Geo.* 2. *Phillips* v. *Phillips* in the *Exchequer*, on a *quo minus*. The plaintiff muſt have judgment. *Vide Strange, vol.* 2. *p.* 1155.

Michaelmas, 20 *Geo.* 2. *Merryman* v. *Carpenter.*

The writ was returnable in *Eaſter term*, and a *bail-bond* taken thereon, the plaintiff never ſtirred till the *24th of October*, and then took an aſſignment; and *ſpecial bail* being put in the *next day*, the queſtion was, whether on ſtaying proceedings the *bail bond* was to ſtand as a ſecurity. The defendant's council *inſiſted* it ſhould not, becauſe the plaintiff did not deliver a declaration *de bene eſſe*, as he might have done, and thereby quicken the defendant.

Per curiam. He was not bound ſo to do; and the defendant was in the *firſt* fault, whereby the plaintiff had loſt a *trial.* So the defendant was forced to conſent to let the *bail-bond* ſtand as a ſecurity. *Vide Str. vol.* 2. *p.* 1262.

Trinity, 31 *Geo.* 2. *Cheſterton* v. *Middlehurſt.*

On a *bail-bond* given in the court of the county *Palatine* of *Cheſter*, in an action commenced there, which was afterwards *aſſigned* by the *ſheriff* to the plaintiff, who brought an action thereon in this court, the defendant put in *ſpecial bail* below to the action, and then moved the court to ſtay proceedings here.

Per curiam. The bringing an action here is *unfair practice*, unleſs under *ſpecial circumſtances* to warrant ſuch proceedure; as for example, the defendant's living out of the *juriſdiction*, &c. but that not being pretended, they held that the plaintiff ought to have proceeded *below*, and therefore ſet the proceedings aſide in this court. *Vide Bur. vol.* 1. *p.* 642.

Trinity, 6 *Geo.* 3. *Walton Aſſignee*, &c. v. *Bent.*

Per curiam. It is the ſettled *practice*, that an action on a *bail-bond* muſt be brought in the ſame court where the *bail* were taken; and in this cauſe the proceedings in this court were ſtayed, the *bail-bond* on which this action was brought being on a proceſs out of the *C. B.* *Vide Bur. vol.* 3. *p.* 923.

Bailiffs.

Michaelmas, 12 *W.* 3. *Heliard* v. ———

Per Holt. If a verdict finds a perſon another's *receiver* or *bailiff generally*, it ſubjects the defendant to account for the whole declaration; but if it finds him *receiver ſpecially* as to ſuch and ſuch things, he is only accountable for ſo much as is found. *Mod. Rep. vol.* 12. *p.* 420.

Trevilian v. *Pyne.*

In an action of *replevin*, the defendant made conuſance as *bailiff* to *J. S.* To this plea the defendant demurred: and on argument, the traverſe was held to be well taken; and a difference was made between an action of *treſpaſs quare clauſum fregit*, and an action of *treſpaſs* for taking cattle on *replevin*. In the firſt caſe, if the defendant juſtifies an entry to the cloſe by command, or as bailiff to one in whom he alledges the freehold to be, the plaintiff ſhall not in his *replication* traverſe the command; becauſe it would admit the truth of the reſt of the plea, *viz.* that the freehold was in *J. S.* and not in the plaintiff, which would be ſufficient to *bar* his action, whether the defendant was impowered by *J. S.* to enter, or not impowered; for it is not material that the defendant has done a wrong to a ſtranger, if it be none to the plaintiff: but in the other two caſes, if the defendant juſtifies taking my cattle as *bailiff* to *J. S.* in whom he lays a title to take them, as for *diſtreſs*, or other cauſe, there it may be material to traverſe the command or authority; for though *J. S.* had a right to take the cattle, yet a ſtranger who had no authority from him will be liable; ſo that both parts of the defendant's plea in this caſe muſt be true, and therefore an anſwer to any part is ſufficient; the ſame in treſpaſs for taking goods; *otherwiſe* in *treſpaſs quare clauſum fregit.* *Vide Salk. vol.* 1. *p.* 107.

Michaelmas, 1 *Ann.* *Matthews* v. *Carew.*

In an action of *treſpaſs* for taking the defendant's tankard; the defendant pleaded that at a court-leet at *Weſtminſter*, a *preſentment was made*, that the plaintiff in a cellar within the leet did melt tallow, *to the common nuiſance*, &c. for which he was amerced 5 *s.* by the jurors, *of which he had notice*, and that being requeſted he did not pay the defendant, who as bailiff to the dean and chapter, *by their order*, diſtrained.

Per curiam. 1ſt. It is not ſufficient to plead a *preſentment was made*, without *averring* in fact that he did melt, &c. for *it does not concern him* whether the offence was done or not, ſince there was a preſentment: and the court took a difference between a *replevin* and *treſpaſs*; in the firſt, the *bailiff* is an actor, and is to recover, which ſhall be on the merits; but in *treſpaſs*, as in this caſe, the bailiff is only to excuſe the wrong. *Vide* 3 *Cro.* 885. 27 *H.* 8. 8. 3 *Leon.* 14.

2dly. The plea is naught, becauſe the defendant juſtifying as *bailiff*, ought to have ſet out ſome *eſtreat* of the court, or warrant from the ſteward, and to have juſtified under that. *Vide Salk. vol.* 1. *p.* 108.

Eaſter, 10 *Ann.* *Biſhop* & *al.* v. *Eagle.*

This action of *account* was brought by the preſent *churchwardens* againſt the former ones. They plead that the plaintiffs are no *churchwardens*. On iſſue joined, a verdict was given for the plaintiff; and judgment *that they may account.*

Before the *auditors* the defendants pleaded, that they received ſuch a ſum of money as *churchwardens* through a miſtake, when none was due to the *pariſh*; that perceiving the miſtake, they repaid the money; to this plea the plaintiffs demurred.

Powell, Juſtice, was of opinion in favour of the plaintiffs, for they might have pleaded this matter ſpecially, though they could not plead *they were no receivers* generally.

Parker, Chief Juſtice, ſaid, admitting this to be a good plea before the *auditors*, it will be neceſſary for the *churchwardens* to plead ſuch a plea as ſhews them to be honeſt men, *viz.* not only that it was paid them by miſtake, but repaid; *whereas* taking it the other way, and to be a good plea in *bar*, a receipt by miſtake will be no receipt at all, and it will not be neceſſary to ſhew re-payment, but only that the money did not belong to the *pariſh*; he therefore was inclined to ſupport the plea as far as poſſible. Beſides, had they paid this money to the *pariſh* before the knowledge of this miſtake, the pariſh would have been charged with this money; repayment was therefore an act done in diſcharge of the *pariſh*, and therefore a proper plea before *auditors*.

The queſtion then was, whether or not the *churchwardens*, after payment of the money to the pariſh, *viz.* the uſe for which they received it, and this before the knowledge of the miſtake, could have been charged in an *indebitatus aſſumpſit* for the money? *Powell* and *Parker*, Juſtices differed; the former thought they might, and the latter, that they could not.

There was another point in this caſe, *viz.* whether the *churchwardens* ſhould be allowed their expences and ſurpluſage, in caſe their expences out balanced, &c.

Per curiam. They certainly ſhould; for *churchwardens* are more than bare *receivers*; they are in all reſpects *bailiffs*.

The rule generally taken, that a *bailiff* be allowed his expences and *ſurpluſage* in an action of *account*; but not a receiver; holds true only of a mere *receiver*, and as to him, the reaſon is evident. But where the nature of the thing ſhews that the *receiver* muſt be put to trouble and expence, the rule is falſe. *Vide Mod. Rep. vol.* 10. *p.* 23.

Hilary, 3 *Geo.* 2. *Wilſon* v. *Poulton.*

In *trover* brought by the plaintiff as adminiſtratrix of *W. W.* aſſignee of the eſtate and effects of *E. P.* a bankrupt, for ready money, to the damages of 6000 *l.* On *not guilty* pleaded, a ſpecial caſe was made for the opinion of the court,

That *E. P.* on the 7th of *May*, 1724. became a bankrupt, and a commiſſion iſſued againſt him on 3d *Auguſt* following, by virtue of which he was declared a bankrupt, and the plaintiff's inteſtate was choſen aſſignee, and had an aſſignment.

That 16th *June* 1724, the bankrupt's wife brought to the defendant 3082 *l.* 3 *s.* 11 *d.* of the bankrupt's money, and deſired the defendant to lay it out in *India* and *South Sea* bonds, that the defendant knowing of the bankruptcy, and that the money was part of the bankrupts effects, received the ſame; and on the ſaid 16th and 23d of *June*, with part of the ſaid money, bought *twenty South Sea* and *India bonds*, and *J. A.* the defendant's ſervant, by his order, with the other part of the money, bought *ten bonds* more, and the defendant delivered all the *thirty* to the bankrupt's wife: that on the 2d of *September*, 1724. the aſſignee having notice where ſome of the effects were depoſited by the wife, ſeized *twenty-two* of the *bonds* for the benefit of the creditors, and accepted them as part of the bankrupt's eſtate: and on this ſtate of the caſe, the point reſerved was, whether the defendant is liable in this action, to make ſatisfaction for the money, with which the *eight bonds* that did not come to the hands of the aſſignee, were purchaſed.

The council for the plaintiff argued, that here was a plain property in the plaintiff, and a converſion in the defendant. In order to make it out, there are ſome things ſtated, which ſhould be laid out of the caſe; 1ſt. That at the time of the receiving the money, and buying the bonds, there was no commiſſion; the tranſaction by the defendant being in *June*, and the commiſſion and aſſignment not till *Auguſt* following. But as to this, it is ſtated, that he became a bankrupt on the 7th of *May* before, and from that time the property of the aſſignee commenced. 2dly. That *ten* of the *bonds* were bought by another perſon, one *J. A.* But this is ſtated to have been done by the defendant's order, and with part of the money received by him of the bankrupt's wife; and that the defendant had the bonds of his ſervant, and delivered them to the wife, by which he has made it his *own* act. 3dly. The ſeizing *twenty-two* of the bonds by virtue of the commiſſion for the benefit of the creditors, and accepting them as part of the bankrupt's eſtate. This is not ſtated to be done in affirmance, and by way of authenticating the act done by the defendant in purchaſing theſe bonds, but only to leſſen the damages which otherwiſe muſt be given for all the money, and to ſhew that in point of *juſtice* and *equity* the plaintiff is intitled only to a ſatisfaction for the money with which the *eight bonds*, not yet brought to light, were purchaſed; for if the plaintiff had taken a verdict for the whole, ſhe muſt have been compelled in a court of *equity* either to deliver up the *twenty-two bonds*, or abate for them; and it is in eaſe and favour of the defendant, who had parted with the poſſeſſion, to take theſe bonds out of the hands of a *third perſon*, and at the ſame time allow him the benefit of the ſeizure. The purchaſe of every bond is a diſtinct act, and where that which is the produce of my money is to be come at, I have my election to ſue for the money, or the thing ſo purchaſed with my money. *Huſſey* v. *Phydall*, 12 *W.* 3. If the bankrupt ſells goods, the aſſignee may bring *trover* for the goods, or affirm the *ſale*, and ſue for the money; and if the bankrupt does ſo in two inſtances, the aſſignee is not bound to make one uniform election for both caſes; but as they are diſtinct and independent, he may ſue one *vendee* for the money; and as to the other, may *diſaffirm* the *ſale*, and maintain *trover*. In this caſe it is ſtated, that the bonds were purchaſed at different times; ſome on the 16th, and others on the 23d *June*; not that it is material what he did with the money, for as he was poſſeſſed of the money of the aſſignees, he can no otherwiſe diſcharge himſelf of it than by a payment to them. 4thly. The danger that in general will attend brokers and others, if they ſhould be charged merely on account of the money's paſſing through their hands, may be laid out of the caſe. If they do not know it, it may be hard, but if they know it, they ought to be charged; and there is expreſs knowledge ſtated in this caſe, not only of the bankruptcy, but that the money was the bankrupt's effects.

If theſe things are laid out of the caſe, there will then be a plain property in this money in the plaintiff, and a converſion in the defendant. It will be no more than this; a man knowing of the bankruptcy; and having money or goods of the aſſignee, diſpoſes of them without his authority; and it will not at all differ from the caſe of *Parker* v. *Godin*, *Michaelmas*, 2 *Geo.* 2. where *S.* a bankrupt, left plate with his wife, who, to raiſe money, delivered it to her ſervant, who went with the defendant to a broker's door, and there the defendant took the plate, and went into the ſhop and pawned it in his own name, and gave his own note to repay the money; and on the receipt of it went back and paid the money to the bankrupt's wife: and in *trover* for the plate, it was held that he was liable, tho' he did not apply the money to his own uſe. He was charged with the plate, as having had it in his cuſtody, and not delivering it to the aſſignee; and there the plate was forth-coming, but theſe *eight bonds* are not; there the directions were to pawn, here to buy. The produce of the plate was delivered to the wife, here the produce money was delivered to her. In neither caſe, had the defendant any advantage; if any difference, his diſadvantage was greater there than here, becauſe there he had by note ſubjected himſelf to pay the money.

It may be ſaid, he laid out the money as directed, and purſued his authority. To which it is anſwered, that no body could give him any directions or authority but the aſſignee, and he was not privy to the tranſaction; for though in another caſe it ſhall be taken, that the wife acts as a ſervant, yet that is only where the huſband himſelf has power; and though the aſſignee comes in in privity under the bankrupt, yet, that is only as to all tranſactions previous to the bankruptcy, but no act of the bankrupt ſubſequent can bind the aſſignee, there being then no privity between them.

The court, without hearing council on the other ſide, declared, that if the four things inſiſted on for the plaintiff were all to be laid out of the caſe, the concluſion drawn from thence, and the application of the caſe of *Parker* v. *Godin* would be right; and as to the firſt, ſecond, and fourth things, they thought they ought to have no weight againſt the plaintiff: but as to the third, they were all very clear in opinion, that the ſeizing part of the bonds was an affirmance of the defendant's act in laying out the money; and that the plaintiff therefore could not avow the act as to part, and diſavow it for the reſt. So the defendant had judgment. *Vide Strange, vol.* 2. *p.* 859.

Bailment.

Eaſter, 13 *W.* 3. *Lane* v. *Sir R. Cotton and Sir T. Frankland, Poſtmaſters General. Entered Eaſter*, 10 *W.* 3. *Rol.* 403.

Per Gould, Juſtice. The opinion of 4 *Co.* 83. of a general *bailment*, is not law; for on a general *bailment*, the *baillee* ought to keep the goods only as his own. *Vide Raym. vol.* 1. *p.* 665.

Trinity, 2 *Ann.* *Coggs* v. *Bernard.*

Holt, Chief Juſtice. There are ſix ſorts of *bailments*, the *firſt* is a bare naked *bailment* of goods delivered by one man to another, to keep for the uſe of the *bailor*. The *ſecond* ſort is, when goods or chattels that are uſeful, are lent to a friend *gratis*, to be uſed by him. The *third* ſort is, when goods are left with the *bailee*, to be uſed by him for hire. The *fourth* ſort is, when goods or chattels are delivered to another as a pawn to be a ſecurity to him for money borrowed of him by the *bailor*. The *fifth* ſort is, when goods or chattels are delivered to be carried, or ſomething is to be done about them for a reward to be paid by the perſon who delivers them to the *bailee*, who is to do the matter. The *ſixth* ſort is, when there is a delivery of goods or chattels to ſome body, who is to carry them, or do ſome thing about them *gratis*, without any reward for ſuch his work or carriage.

In the firſt ſort of *bailment*, the *bailee* is not anſwerable if the goods are ſtolen without any fault in him, neither will common neglect make him chargeable, for he muſt be guilty of ſome groſs neglect.

In the ſecond ſort of *bailment*, or lending *gratis*, the borrower is bound to the ſtricteſt care and diligence to keep the goods ſo as to reſtore them back again to the *lender*, becauſe the *bailee* has a benefit by the uſe of them, and therefore, if he is guilty of the leaſt neglect, he will be anſwerable.

In the third ſort of *bailment* or lending for hire, the *bailee* is bound to take the utmoſt care, and to return the goods when the time of the hiring is expired.

In the fourth ſort of *bailment*, there are two things to be conſidered, *firſt*, What property the *pawnee* has therein. *Secondly*, For what neglects he ſhall make ſatisfaction. He has a ſpecial property, for the *pawn* is a ſecurity for the *pawnee*, that he ſhall be repaid his debt, and to compel the *pawner* to pay him. If the thing is ſuch as it will be the worſe for uſing, the *pawnee* cannot uſe it, but if it will not be the worſe for uſe, he may uſe it.

The *fifth* ſort of *bailment*, a delivery, *&c.* is of two kinds, either a delivery to one that exerciſes a public employment, or a delivery to a private perſon; if of the firſt ſort, and he is to have a reward, he is bound to anſwer for the goods at all events.

As to the *ſixth* ſort of *bailment*, it is to be taken, that tho' the *bailee* is to have no reward for his pains, yet, if by his ill management the goods are ſpoiled, it is a good ground for an action. *Vide Raym. vol.* 2. *page* 909.

Eaſter, 5 *Geo.* *Atkin* v. *Barwick, or Berwick, and Co.*

The plaintiff, as aſſignee of the effects of *C.* and *Q.* bankrupts, brings an action of *trover* againſt the defendants for ſeveral parcels of ſilk, who were mercers and partners in *London*, and uſually dealt with *C.* and *Q.* who were alſo partners, living at *Penryn* in *Cornwall*; and on the 17th of *April*, 1715, the defendants by their order, ſent the goods in the declaration mentioned, and gave them credit in their books, they being at the ſame time indebted to them for other goods. The 18th *May* following, *C.* and *Q.* without the knowledge of the defendants, ſent divers ſilks (the ſame as were ſent down in *April*) to Mr. *P.* at *Penryn*, for the uſe of the defendants. *June* the 4th, *C.* and *Q.* became bankrupts. *June* 6th, they wrote a letter to the defendants, ſignifying their affairs were in a declining condition; and thinking it not reaſonable the laſt parcel of goods ſhould go to ſatisfy their other creditors, therefore they had not entered them in their books, but left them with *P.* who had orders to deliver them to the defendants. *June* 9th, a commiſſion of bankruptcy iſſued, and the effects were aſſigned to the plaintiff. *June* 13, the defendants received the letter, which was the firſt notice they had of the delivery to *P.* and as ſoon as poſſible, they ſignified their conſent to take the goods again.

Chief Juſtice. The queſtion is, whether by the delivery to *P.* without more, the property was altered; for if the delivery was countermandable, then the act of bankruptcy intervening before any aſſent of the defendants, will prevent the property from veſting in them. I think, on the circumſtances, that there appears a ſufficient conſideration to bar a ſubſequent power of countermanding, and that this delivery was in ſatisfaction of the debt. It is true, the bare delivery will not extinguiſh it, becauſe he had a power to diſſent; but yet according to *Butler* v. *Baker*'s caſe in *Rep.* 3. the abſolute property paſſed ſubject to a diſagreement by one of the parties: the contract does not ſtand open till agreement, but is compleat, unleſs there be an actual diſagreement. The conſequence of all this is, that the delivery to *P.* to the uſe of the defendants, being before the act of bankruptcy, and founded on a good conſideration, tranſfers the abſolute property to them, it being ſtated that they never diſagreed. *Powys*, Juſtice, concurred.

Eyre, Juſtice. All theſe caſes go on the diſtinction, where the delivery is with, and without conſideration. *Dy.* 49. If with conſideration, and the delivery is of money, *debt* lies. *Yelv.* 23, 24. 2 *Cro.* 687. *Raſt.* 159. If of goods, *trover*. 1 *Bulſt.* 68. The precedent *debt* is a ſufficient conſideration, and it veſts before notice; for it being to his benefit, a diſagreement ſhall not be preſumed.

Forteſcue, Juſtice. Property by our *law* may be diveſted without an actual delivery; as a horſe ſold in a ſtable: but it is otherwiſe by the *civil law*. A general *bailment* alters no property, but this is not ſuch; it cannot be taken for a *re-ſale*, for defect of contract; but is properly a payment in ſatisfaction. It is moſt reaſonable to apply it to diſcharge the debt, and not as a gift; for a man is juſt before he is kind; and ſince he paid it in ſatisfaction, we will intend an acceptance, till the contrary appears. Therefore judgment was given for the defendants. *Vide Strange, vol.* 1. *p.* 165. *Mod. Rep. vol.* 10. *p.* 432.

Michaelmas, 7 *Geo.* 2. *Smith* v. *Smith, at Niſi Prius.*

The plaintiff's inteſtate lodged at the defendant's houſe, and had furniture and plate there, and was proved to have ſaid, that whatever he brought into theſe lodgings, he never intended to take away, but gave directly to the defendant's wife. And now in *trover* for the goods which were there at the inteſtate's death, it was ruled that a parol gift, without ſome act of delivery, would not alter the property, and that ſuch an act was neceſſary to eſtabliſh a *donation by reaſon of death*. On this opinion it came to this queſtion, whether there was any delivery. And to prove one, the defendant ſhewed, that the inteſtate, when he went out of town, uſed to leave the keys of his room with the defendant; and that was inſiſted to be ſuch a mixed poſſeſſion, that the *law* will adjudge the poſſeſſion to be in him who has the right. And the *Chief Juſtice* ruled it ſo, and the jury found for the defendant. *Vide Strange, vol.* 2. *p.* 955.

Michaelmas, 12 *Geo.* 2. *Mytton* v. *Cock.*

The plaintiff, who was owner of a *cartoon*, left it in the hands of the defendant, who was an auctioneer, without any particular agreement to take care of it, or re-deliver it ſafe, and without any agreement for a reward. And in a ſpecial action on the caſe for not re-delivering it ſafe, but ſuffering it to be ſpoiled; it appeared on the evidence, that the painting was on paper, paſted on canvaſs, and that it was kept by the defendant in a room next to a ſtable, in which there was a wall that made it damp and peel. And on this evidence it was left to the jury, whether this was not a groſs neglect. And they found for the plaintiff 30 *l.* damages.

And now, on motion for a new trial, the court agreed, that in this caſe of a ſimple *depoſit*, without a reward, the *law* raiſes only a promiſe not groſsly to neglect or abuſe the depoſit; and that therefore it was left properly to the jury, and there ought to be no new trial. *Vide Strange, vol.* 2. *p.* 1099.

Hilary, 16 *Geo.* 2. *Paterſon* v. *Taſh.*

It was held by *Lee*, Chief Juſtice, that though a factor has power to ſell, and thereby bind his principal, yet he cannot bind or affect the property of the goods by pledging them as a ſecurity for his own debt, though there is the formality of a bill of parcels and a receipt. And the jury found accordingly. *Vide Stra. vol.* 2. *p.* 1178.

Hilary, 16 *Geo.* 2. *Scrimſhire* v. *Alderton.*

The plaintiff, who was a farmer in the *Iſle of Ely*, ſent up oats to *Bear Quay*, conſigned to one *H.* as his factor. The cuſtom of the trade appeared to be, that formerly the factor had *four pence per quarter* for ſelling them, and he gave immediate notice to the farmer of the name of the buyer, and the price: but this being inconvenient to farmers who lived at a great diſtance, it had for many years been cuſtomary for the farmer to allow *two pence per quarter* more, on the factor's taking the riſque of the debts; ſince which factors had ceaſed to inform the farmers of the names of the buyers. The goods in the preſent caſe were ſold, but the factor failing, the plaintiff (before actual payment) gave notice to the defendant (the buyer) not to pay the factor, which he did notwithſtanding; and thereon this action was brought.

The *Chief Juſtice* was of opinion, that this new method had not deprived the farmer of his remedy againſt the buyer, provided there was no payment to the factor. And the only reaſon of advancing *two pence per quarter*, was, to have both at a ſtake, and here being notice before actual payment, there could be no harm done; and therefore he directed the jury in favour of the plaintiff. They went out, and found for the defendant; and were ſent out a *ſecond* time, and a *third* time, to re-conſider it, and ſtill adhered to their verdict; and being aſked, man by man, they ſeparately declared they found for the defendant. On this a new trial was moved for, and no cauſe being ſhewn, was accordingly granted. And at the ſittings after this term, it came on again before a ſpecial jury; when the *Chief Juſtice* declared, that a factor's ſale does, by the general rules of law, create a contract between the owner and buyer; but notwithſtanding this, the jury found for the defendant, and being aſked their reaſon, declared, that they thought from the circumſtances, no credit was given, as between the owner and the buyer, and that the latter was anſwerable to the factor only, and he only to the owner. *Vide Strange, vol.* 2. *p.* 1182.

Eaſter, 16 *Geo.* 2. *Sir John Hartop* v. *Alderman Hoare & al'.*

In *trover* for *jewels*, the jury found this *ſpecial* verdict: that the plaintiff being owner of the jewels, lodged them in the hands of *S.* a goldſmith, for ſafe cuſtody only, incloſed in a paper, ſealed up; and that alſo incloſed in a bag ſealed with the plaintiff's ſeal, and took a receipt of him for the ſame: that *S.* broke the ſeals, and carried the jewels to the defendant's open ſhop in *Fleet-ſtreet*, where they traded in *jewels*, and often lent money on the ſecurity of jewels, and there borrowed of them 300 *l.* and depoſited the jewels as his own, by way of ſecurity; at the ſame time giving his note for the money: that *S.* had no authority from the plaintiff to *ſell*, *order*, *pawn*, or *diſpoſe* of the *jewels*, and that the defendants have converted them to their own uſe.

Lee, Chief Juſtice. The general *queſtion* in this caſe is, whether the property found to be originally in the plaintiff is diveſted by any act found to have been done in this caſe. In order to conſider this, it will be proper to ſee, 1ſt. How *S.* ſtands with regard to the plaintiff; and, 2dly. How with regard to the defendants.

1ſt. As to the plaintiff, he is a mere *baillee* for ſafe cuſtody only, without any authority to open the bags the jewels were in; and he was a *treſpaſſer* in ſo doing. 4 *Co.* 23. *Mod.* 248. *Co. Lit.* 39. *a.*

2dly. As to the defendants, though they came honeſtly by them, yet they are within the general rule of, *let the buyer beware*, unleſs ſomething appears particularly to exempt them. What they rely on is, that they were purchaſers of them in a market *overt*, it being found that they bought them in an open ſhop, where they dealt in jewels, which, according to the cuſtom of *London*, is a market *overt* for that purpoſe.

To this it was properly anſwered by the plaintiff, that this cuſtom not being found, the court cannot judicially take notice of it; and in all caſes theſe cuſtoms are pleaded or found. For this purpoſe was cited the caſe of *Argyle* v. *Hunt*, *Trin.* 5 *Geo.* 1. where a *prohibition* was moved for after ſentence, becauſe it appeared in the *libel* that the word *whore* was ſpoken in *London*; but denied: for though the words appear to be ſpoken there, yet the cuſtom does not appear; and though (ſaid the court) we have ſuch a private knowledge of it, that on motions we do not put the party to produce an *affidavit* of it, yet we cannot judicially take notice of it. And agreeable to this, is 5 *Mod.* 162. *Carth.* 75. *Salk.* 125. 243. *Mo.* 360. *Co. Lit.* 175. *b.* *Cro. Car.* 517. *Cro. Jac.* 69.

Another, and we think a proper anſwer, was likewiſe given, that if we could take notice of the cuſtom, yet that extends only to the caſe of a *ſale*, and not of a *pawn*. *Perk. ſect.* 435. *Noy.* 28. 2 *Sid.* 139. *Lamb.* 619. 35 *H.* 6. 25 *Jenk. Cent.* 83.

It is a rule, that all cuſtoms muſt be taken ſtrictly, and not extended to *ſimilar* caſes. 1 *Roll. Abr.* 567, 568. *Show.* 4. 2 *Leo.* 109. 208. 1 *Bulſt.* 207. 2 *Roll. Abr.* 85. *Pl.* 7. 2 *Inſt.* 713. But here a *pawn* is not a *ſimilar* caſe; *ſales* in market *overt* are encouraged, becauſe it is a circulation of property; whereas *pawning* is *for a time*, and is a locking of it up.

There is no occaſion to pray in aid of *ſtat.* 1 *Jac.* 1. *c.* 21. in this caſe; though it was not immaterially argued from for the plaintiff. We are all of opinion the plaintiff muſt have judgment. *Vide Stra. vol.* 2. *page* 1187.

Bankrupts.

Eaſter, 1 *W. & M.* *Cary* v. *Criſp.*

In an *indebitatus aſſumpſit*; the defendant pleaded that the plaintiff became a *bankrupt*, and a commiſſion was taken out, and ſo all his goods, *&c.* belonged to the commiſſioners, *&c.* The plaintiff demurred, and had judgment; for till an aſſignment the property of the goods is not transferred out of the *bankrupt*, by *ſtat.* 1 *Jac.* 1. *c.* 15. *ſect.* 13. *Vide Salk. vol.* 1. *p.* 108.

Trinity, 2 *W. & M.* *Cane* v. *Coleman.*

In *debt* on a ſpecial verdict, the caſe was, *H.* a ſilkman, owed *B.* 100 *l.* and *C.* 50 *l.* *B.* arreſts him for the 100 *l.* in the ſheriff's court, and had bail within a month after. *H.* pays off *C.* and afterwards renders himſelf in diſcharge of his bail in *B.*'s action. *Stat.* 21. *Jac.* 1. *c.* 19. ſays, *he ſhall be a bankrupt from the time of the firſt arreſt.*

Per curiam. That is, and muſt be taken, from the time of the firſt arreſt on which he is in priſon, not where he puts in ſufficient bail, for that might be infinitely prejudicial and miſchievous; and no man could ever ſafely pay or receive from a tradeſman. Adjudged in this court, *Michaelmas* 1 *Jac.* 2. and affirmed in *error* in the *Exchequer Chamber* this term. *Vide Salk. vol.* 1. *p.* 109.

Michaelmas, 2 *W. & M.* *Eliot* v. *Danby.*

An *aſſignment* of a term by commiſſioners of *bankruptcy*, was made to a creditor, who, before the *inrolment* of the deed of aſſignment, made a leaſe to the defendant, and then the deed was *inrolled*.

Per curiam. Such a leſſee cannot maintain an *ejectment*, becauſe the leaſe could not have been before the *inrolment*; the words of the ſtatute are, *that commiſſioners may ſell by deed inrolled*; ſo without *inrolment* it is no ſale. 2 *Co.* 26. *a.* *Vide Mod. Rep. vol.* 12. *p.* 3.

Trinity, 3 *W. & M.* *Newton* v. *Trigg.*

An inn-keeper being part-owner of a *ſhip*, and having 51 *l.* ſtock in the ſhip, abſconded.

Eyre, Juſtice, held, the ſhare of the ſhip ſignified nothing; it not being a ſtock in the power of the party to trade with, that will make a *bankrupt*; but there muſt be trading therewith *in fact*. And he held that an *inn-keeper* could not be a *bankrupt*, being not like a trader; he muſt receive all comers, feed them and lodge them, taking a reaſonable price for ſo doing; which, if he does not, he is *indictable*.

Holt, Chief Juſtice, concurred, and ſaid, that he was not taken notice of in *law* as a trader, but as an *hoſt*; and is paid not merely for his proviſions, but alſo for his care, pains, protection, and ſecurity; and he buys meat and drink, not for ſale and trading, but for accommodation. And an *inn-keeper* cannot make a contract *at will*, nor does he, to buy or ſell at large, but to gueſts only; and ſaid, that wherever a man buys and ſells under a particular reſtraint and limitation, he is not a ſeller within the ſtatute, as a *commiſſioner of the navy*, or a *farmer*. *Vide Salk. vol.* 1. *page* 110.

Eaſter, 5 *W. & M.* *Bird* v. *Sedgwick.*

A gentleman of the *Temple* went from thence to *Liſbon*, where he turned factor, traded to *England*, and broke: his council argued, that the ſtatutes concerning *bankrupts* do not extend to perſons out of the realm; the ground of them is caſes of *arreſt*, *outlawries*, and *departing out of the realm*; and *ſtat.* 21 *Jac.* 1. which extends to *aliens*, is only aliens reſident here.

Per curiam. He is a *bankrupt*, by reaſon of his trading hither and back again, which gained him a credit here. *Vide Salk. vol.* 1. *p.* 110.

Eaſter, 7 *W.* 3. *Anonymous.*

Per Holt, Chief Juſtice. Where there are two joint traders, and one of them becomes a *bankrupt*; the commiſſioners cannot meddle with the intereſt of the other, for his eſtate and effects are not affected by the *bankruptcy* of his companion. *Vide Salk. vol.* 3. *p.* 61.

Hilary, 9 *W.* 3. *Meggot, Aſſignee of Watſon, a Bankrupt* v. *Mills and Waine.*

It was ſaid by *Holt*, Chief Juſtice, and not denied by the court, that an *inn-keeper* cannot be a *bankrupt*, but a *victualler* may; and if a man contracts a debt while he is a dealer, and after leaves off his trade, and then commits an act of *bankruptcy*, there none of his creditors, becoming ſo ſince the leaving off his trade, can ſue out a commiſſion of *bankruptcy*; but if thoſe who were his creditors before his leaving off trade, ſue out ſuch a commiſſion, the other creditors may come in and join. In this caſe there being ſome diſagreement about the fact, it was ordered to be tried again. *Vide Mod. Rep. vol.* 12. *p.* 159. *Raym. vol.* 1. *p.* 286.

Hilary, 10 *W.* 3. *Cole* v. *Davis, & al. Aſſignees of Maul, a Bankrupt.*

Per Holt, Chief Juſtice. It was ruled, on the trial of this cauſe at *niſi prius*, that if the goods of *A.* be ſeized on a *fieri facias*, iſſued on a judgment obtained againſt *A.* and after the ſeizure *A.* becomes a *bankrupt*; this act of *bankruptcy* cannot affect the goods levied in execution aforeſaid. But if *A.* was a *bankrupt* before the ſeizure, and after the *bankruptcy* the ſheriff on a writ of *fieri facias* to him directed, on a judgment obtained againſt *A.* ſeizes the goods, and ſells them, and a commiſſion of *bankruptcy* is granted, and the ſaid goods aſſigned by the commiſſioners, the aſſignee of the commiſſioners may maintain an action of *trover* againſt the *vendee* of the goods; but no action will lie againſt the *ſheriff*, becauſe he obeyed the writ. If a *trader*, hearing that a writ of *fieri facias* was iſſued againſt him, to the intent to preſerve his goods from being levied in execution, clandeſtinely conveys them out of his houſe, and conceals them privately, that does not amount to an act of *bankruptcy*. A ſeizure of part of the goods in a houſe, by virtue of a *fieri facias* in the name of the whole, is a good ſeizure of all. It was reſolved in this caſe, that if the goods of *A.* are ſeized on a *fieri facias*, and ſold to *B. bona fide* on a valuable conſideration, though *B.* permits *A.* to have the goods in his poſſeſſion, on condition that *A.* ſhall pay to *B.* the money as he ſhall raiſe it by the ſale of the goods, this will not make the execution fraudulent; and in ſuch caſe a ſubſequent act of *bankruptcy* by *A.* will not defeat the ſale. But though the original debt was juſt, yet if the execution was fraudulent, *viz.* on any truſt, a ſubſequent act of *bankruptcy* will defeat it. *Vide Raym. vol.* 1. *p.* 724.

Hilary, 10 *W.* 3. *Harvey* v. *Williams.*

On an *indebitatus aſſumpſit*, the defendant pleaded that the plaintiff was a *bankrupt*, and therefore the defendant could not pay, for fear a commiſſion ſhould be ſued, *&c.* On demurrer, judgment for the plaintiff. *Vide Raym. vol.* 1. *p.* 496.

Michaelmas, 10 *W.* 3. *The King* v. *Cole.*

The defendant was *indicted*, for that he being a *bankrupt*, and brought before the commiſſioners, refuſed to give them an account of his effects; and his defence on the trial was, that he was an *infant* at the time the debts were contracted, and therefore could not be a *bankrupt*; and of that opinion was *Holt*, Chief Juſtice; for though the debts of an *infant* are only voidable at his election, yet no one can be a *bankrupt* for debts he is not obliged to pay; wherefore the defendant was acquitted. *Vide Mod. Rep. vol.* 12. *p.* 243. *Raym. vol.* 1. *p.* 443.

Michaelmas, 11 *W.* 3. *Huſſey* v. *Fiddal.* Error.

On a writ of error brought on a judgment in the *C. B.* on an *indebitatus aſſumpſit*, by the aſſignee of a commiſſion of *bankruptcy*; the exception was, that for goods ſold after an act of *bankruptcy* committed, the action ſhould be *trover*; and that therefore *debt* would not lie, becauſe *trover* might be brought for it again.

Per. Holt, Chief Juſtice. They may avoid the ſale, if they will, and bring an action of *trover* for the goods; but if they bring the one, they ſhall not afterwards bring the other. By the act of *bankruptcy*, the property of the goods is in the *bankrupt's creditors*; and if it be a *choſe* in action that is aſſigned, the *aſſignee* is to have the ſame remedy for it, as the *bankrupt* himſelf might have had; for example, if it is money received to the uſe of the *bankrupt*, they are to have ſuch remedy as he might have had for it; and without doubt the action lies well in this caſe; nay, a *general indebitatus aſſumpſit* would have been ſufficient. *Vide Mod. Rep. vol.* 12. *p.* 324.

Lent Aſſizes, at Thetford, 12 *W.* 3. *Kirney* v. *Smith & al'.*

Evidence was offered on a trial at *niſi prius*, that a *ſhip carpenter* is within the ſtatutes of *bankrupts*; and the following *caſe* was made, for the opinion of the court; *viz. A.* becomes a *bankrupt*, and then ſells goods to *B. B.* ſells them to *C.* which is a *converſion*; and then a commiſſion of *bankruptcy* is iſſued, and an *aſſignment* made by the commiſſioners to *E.* who brings an action of *trover* againſt *C.*

Per Holt, Chief Juſtice. The action is well brought; if the petition to the *Lord Chancellor*, mentioned in the declaration, *recites*, that the *bankrupt* was indebted in 300 *l.* and the petition produced at his trial *recites*, that he was indebted in 150 *l.* yet that is no *material variance*. There is no need to produce at the trial the petition made to the *Lord Chancellor*, becauſe it may have been by *parol*, though the practice has been otherwiſe. *Vide Raym. vol.* 1. *p.* 741.

Eaſter, 13 *W.* 3. *At niſi prius, before Holt, Chief Juſtice.*

If there be ſeveral joint partners, and a perſon has dealing with one of them in matters concerning their joint trade, whereby a debt becomes due to him, it ſhall charge them jointly; but if in that caſe a perſon had rather deal with one of them on his own account, he muſt make his agreement ſpecially, in which caſe the debt ſhall be only his and his executors, and ſhall not otherwiſe ſurvive.

If one or more joint traders become a *bankrupt*, his or their proportions only are *aſſignable* by the commiſſioners, to be held in *common* with the reſt who were not *bankrupts*.

If there be an act of *bankruptcy* committed, and a creditor obtains judgment ſubſequent to it, and then a commiſſion is taken out; the judgment is thereby avoided.

If there are ſeveral joint traders, payment to one of them is payment to all. So if they all, except him to whom the payment was made, were *bankrupts*, the payment is only unavoidable as to his proportion; and if there be four partners, whereof three are *bankrupts*, and their ſhares aſſigned, and a payment is made to him that was no *bankrupt*, it is a payment to all the *aſſignees*, for they now are all partners. *Vide Mod. Rep. vol.* 12. *p.* 446.

Hilary, 1 *Ann.* *Bird* v. *Major.*

On an iſſue directed from the court of *Chancery*, and tried before *Holt*, Chief Juſtice, at *Guildhall*, at the ſittings after term, the *caſe* was.

A *ſcrivener* who was not liable to be a *bankrupt* before *ſtat.* 21. *Jac.* 1. *cap.* 19. committed an act which was made an act of *bankruptcy* by *ſtat.* 1. *Jac.* 1. *c.* 15. *viz.* abſconding, and he had alſo a ſhare in the ſtationers company. The queſtion was, whether he was not a *bankrupt* by that *ſtat.*

Holt, Chief Juſtice. Since *ſtat.* 21. *Jac.* 1. *cap.* 19. has made a *ſcrivener* liable to be a *bankrupt*, it has ſubjected him to all the old acts, which by former ſtatutes made a man a *bankrupt*, as well as to the acts mentioned in *ſtat.* 21 *Jac.* 1. *cap.* 19. as to his ſhare in the ſtationers company, the *Chief Juſtice* ſeemed inclined to think that would not make him a *bankrupt*, for by *ſtat.* 13 & 14 *Car.* 2. *cap.* 24. *It is enacted*, that having a ſhare in the *Eaſt India Company*, &c. will not make a *bankrupt.* The *Lord Keeper* held the *ſcrivener* to be a *bankrupt* on both the points, but at the inſtance of the *bar* it was reſerved as a caſe, as to both theſe points, for the farther conſideration of the *Chief Juſtice.* *Vide Raym. vol.* 2. *p.* 851.

Hilary, 1 *Ann.* *Gidden* v. *Drury.*

Holt, Chief Juſtice, in a caſe between *Hopkins* v. *Gery*, declared, if a banker or goldſmith, who has many people's money, refuſes payment, yet keeps his ſhop open, and as often as he is *arreſted*, gives bail, and by that means gives a preference of payment to his friends, and when he has done, runs away, yet ſuch payment ſhall ſtand againſt a commiſſion of *bankruptcy.* And this was practiſed in the caſe of *Sheppard* the banker, who was arreſted almoſt every hour in the day for ſeveral days together, before he went off, and yet gave bail as often, and paid his friends, and then went and rendered himſelf in diſcharge of his bail. *Vide Mod. Rep. vol.* 7. *p.* 139.

Michaelmas, 1 *Ann.* *Greenway* v. *Treeman.*

The *ſtat.* directing, that *two thirds* in number and value, &c. was pleaded in bar, and the defendant to bring himſelf within the benefit of the *ſtat.* ſhews, that he abſconded at the time mentioned by the *ſtat.* but did not ſhew for what he abſconded; and for this the plaintiff had judgment on a demurrer to the defendant's plea. *Vide Mod. Rep. vol.* 7. *p.* 83.

Michaelmas, 1 *Ann.* *Nichols's Caſe.*

When a defendant pleads the ſtatute, directing two thirds, &c. if he would take advantage of the *clauſe* of being in *cuſtody*, he muſt ſhew the time when he abſconded; if of the clauſe of *abſconding*, he muſt ſhew that he abſconded for debt at the time of the ſtatute made.

Holt, Chief Juſtice, ſaid, he took the ſtatute to be a *private law*; for though it concerned a great many, yet it concerned a particular ſort of people; and here the plaintiff had judgment, becauſe the defendant did not ſhew in his plea, that he abſconded at the time of the act made, but only ſaid it was on ſuch a day. *Vide Mod. Rep. vol.* 7. *p.* 96.

Trinity, 2 *Ann.* *Smith* v. *Tracy.* *At niſi prius at Guildhall.*

In *trover* the caſe was, *J. S.* was arreſted at the ſuit of *H.* and put in bail; afterwards on a *ſci. fac.* at the ſuit of another perſon, his goods were ſold to the plaintiff; after this *J. S.* renders himſelf in diſcharge of his bail, and goes to priſon.

Holt, Chief Juſtice, inclined (contrary to the caſe of *Duncomb* v. *Walter* in 3 *Lev.* 57. wherein he was of council, but not ſatisfied with the judgment,) that *J. S.* was a *bankrupt* from the *time of the arreſt*, not from the *render only*; for if *H.* is arreſted at the ſuit of *A.* and puts in bail, and pending that ſuit, is afterwards arreſted at the ſuit of *B.* and goes to priſon and lies two months, he is by the act of parliament a *bankrupt* from the time of the *firſt arreſt* by *A.* But it appearing in the caſe that this commiſſion was taken out before the two months were expired from the render, it was held to be ill taken out, *J. S.* not being then a *bankrupt.* And thereon the plaintiff had a verdict. *Vide Salk. vol.* 1. *p.* 111.

Eaſter, 3 *Ann.* *Parkins* v. *Woollaſton.*

Per curiam. In an action by an aſſignee, under a commiſſion, on a ſimple contract, the right way is to lay the promiſe to have been to the *bankrupt*, except there be an expreſs promiſe after the *aſſignment* made to the *aſſignee.* And the way of declaring on a promiſe to the *aſſignee*, is very inconvenient, and a means to *ouſt* the defendant of the benefit of the *ſtatute of limitations*, for if the goods were ſold *five years* before the *aſſignment* by the *bankrupt*, and then the debt is aſſigned, and a *year* paſſes, and the *aſſignee* declares on a promiſe to himſelf, it will not be a good plea to ſay, that the defendant *has not aſſumed within ſix years* to the *bankrupt*, for that does not anſwer to the declaration. And if he pleads *he has not aſſumed within ſix years* to the plaintiff, it will be againſt him, for if there be any promiſe transferred by the act, it is only on the *aſſignment*, and the intent of the *ſtat.* was only to transfer the action, and nothing elſe. Indeed, if after an *aſſignment*, another receives the money, an action will lie for the *aſſignee* on a promiſe to himſelf, becauſe the receipt of money after *aſſignment*, is a contract with him, and ſo is every other contract or agreement.

Holt, Chief Juſtice. It is an *expreſs promiſe*, not in words, but in deed, which is as ſtrong; and there is no ſuch thing as a promiſe in *law*, and *acceptance* of a bill of exchange is an *expreſs promiſe* to pay it. *Vide Mod. Rep. vol.* 6. *p.* 130.

Trinity, 3 *Ann.* *Hopkins* v. *Ellis.* *At niſi prius at Guildhall.*

On an iſſue directed out of *Chancery*, whether the perſon was a *bankrupt* or not at ſuch a time: it was held *per Holt*, Chief Juſtice, that if *H.* commits a plain act of *bankruptcy*, as keeping houſe, &c. though he afterwards goes abroad, and is a great dealer, yet that will not purge the firſt act of *bankruptcy*, but he will ſtill remain a *bankrupt*; but if the act was doubtful, then going abroad and dealing, &c. will be an evidence to explain the intent of the firſt act; for if it was not done to defraud creditors, and keep out of the way, it will not be an act of *bankruptcy* within the ſtatute: alſo, if after a plain act of *bankruptcy* he pays off or compounds with all his creditors, he is become a new man. *Vide Salk. vol.* 1. *p.* 110.

Michaelmas, 6 *Ann.* *Ludlow* v. *Browning.*

One *T. W.* made his will, and thereof made his wife *executrix*, afterwards ſhe intermarried with the defendant, who was a *bankrupt*, the defendant was indebted to *W.* by bond, and the debt becoming due, the commiſſioners *aſſigned* that debt, and it was urged, that this debt is not aſſignable by the commiſſioners of *bankruptcy*; for it is a debt due in *auter droit*, and not to the executrix in her own right, &c. and that it is not forfeitable by her, or her huſband, 10 *E.* 4. 1. *Kelway* 64. *b.* *Cro. Car.* 464. 1 *Jon.* 386. *Cro. Car.* 208. 218. 1 *Lev.* 17. *Raym.* 67, &c.

The council ſaid, the queſtion is, whether the commiſſioners can aſſign a debt due to the *bankrupt*'s wife, as executrix to another? He agreed that ſuch debt was not forfeitable by *outlawry*, &c. of the wife or huſband. But a thing may be grantable or aſſignable, though not forfeitable; his grant can convey away the goods, though he cannot forfeit them. The ſtatute enables him to grant or aſſign *choſes in action.* Whatever the man himſelf can grant, the commiſſioners may; if a man grants *all his goods and chattels*, a term in right of his wife, will paſs by ſuch grant.

Holt, Chief Juſtice. This here is a *choſe in action*, and in *auter droit*, 2 *Cro.* 318. And as to this being a *choſe in action*, there is no difference: for they have the ſame power over theſe, as over goods, *&c.* *Noy* 142. *Palm.* 505.

The council on the other ſide ſaid, there are no words in the *ſtat.* that impower the commiſſioners to aſſign the eſtate of another man, but of the *bankrupt* only.

Holt, Chief Juſtice. This in truth is the eſtate of the teſtator, and they have no authority to aſſign any thing whatever, but the *bankrupt's* eſtate; the power the huſband has of diſpoſing of it, does not make it his till he has diſpoſed of it.

Powell, Juſtice. If a man grants *all his own goods*, ſuch things in action ſhall paſs, becauſe the property muſt be in ſomebody; but the *law* has been ruled otherways ſince, and therefore if he has any other goods the ſtatute is ſatisfied; and by his grant of *all his own goods*, none but what are really his own ſhall paſs; and theſe words ſhall not paſs away thoſe things which would make him a *wrong doer*, and in this caſe commit a *devaſtavit*, (ſee the caſe of *Knight* v. *Goulds* in *Levintz.*) You would have the commiſſioners to be the teſtator's executors, but they are only to pay the debts of the *bankrupt*, but not the debts of the teſtator, *adjourned*. *Vide Mod. Rep. vol.* 11. *p.* 138.

Hilary, 7 *Ann.* *Hull* v. *Holliday.*

An action was brought againſt a *bankrupt*; the defendant pleaded the ſtatute of *bankrupts*, in which it is enacted, that the perſon who conforms to the act may plead the *general iſſue*) and that he manifeſtly became a *bankrupt* before the day, *&c.*

Holt, Chief Juſtice. This plea will not do; for when a ſtatute gives a plea, it muſt be pleaded in the words of the ſtatute; and beſides, by this pleading, it does not appear the perſon was within the act; for the debt might be after he became a *bankrupt*, and before he became a public *bankrupt*, and then he would be out of the priviledge of the act. Therefore, judgment was given for the plaintiff, unleſs cauſe ſhewn before the end of the term. *Vide Mod. Rep. vol.* 11. *p.* 207.

Eaſter, 7 *Ann.* *Kiggil* v. *Player.*

Aſſignees under a commiſſion of *bankruptcy* brought *trover* on their own poſſeſſion, *as of their own proper goods*; and that they came to the hands of the defendant, and he converted them. And on evidence it appeared the converſion was by executing a *fi. fac.* on the goods in the declaration mentioned, *after* the *bankruptcy*, and *before* the aſſignment, and it was not proved that the plaintiff had demanded them; and this being made a caſe, it was argued, that by aſſignment the aſſignee had a property by relation, from the very time of the *bankruptcy*, and there was no meſne interval of time; as where a perſon takes out letters of adminiſtration, he has a property from the death of the inteſtate, and may declare generally, *as of his own proper goods*, even before an adminiſtration ſued out. But *Holt* denied this, and ſaid, he ought to declare ſpecially, and ſo the plaintiff might have done in the principal caſe, and he relied on the caſe of *Perry* v. *Bowyer*; and ſaid, the aſſignee was in by relation from the time of *bankruptcy*, ſo as to avoid all meſne acts, but not ſo as to be actually inveſted with the very property. Adjourned. *Vide Salk. vol.* 1. *p.* 111.

Reſolutions of the Judges, Dec. 3, 1706. *on Stat.* 4 *&* 5 *Ann. c.* 17.

1ſt. That the firſt part of the act extends only to ſuch as ſhall firſt become *bankrupts* after the 24th day of *June*, 1706. who are underſtood to be thoſe againſt whom no commiſſion of *bankruptcy* was ſued out before that time: and if the *certificate* of the commiſſioners does not mention the party to have firſt become a *bankrupt* after that time, it ought to be diſallowed for that cauſe: but it is, however, thought fit and agreed, that before the certificate is diſallowed, ſome proof ought to be made by the creditors of the party's being a *bankrupt* before that time.

2dly. That there ought to be a certificate of the allowance or diſallowance made on the reference, and that remitted to the *Lord Keeper*.

3dly. That the act having impowered the judges to determine *prout*, &c. they have by implication a power given them to examine witneſſes *viva voce*; and that the ſaid method be taken where witneſſes are to be had; but where there are no witneſſes, that the *copies* of *affidavits* filed in *Chancery*, and ſworn before a maſter extraordinary, be received and read; and that the *affidavits* taken before the judges, to whom the maſter is referred, be read.

4thly. That the judges make out *ſummons* for witneſſes.

5thly. That the *ſecond clauſe* in the act extends to thoſe that were *bankrupts* before the 10th *March*, 1705, againſt whom there were commiſſions then ſued out and ſubſiſting: if the matters were determined, and the commiſſion cloſed, or if ſuperſeded or repealed, or the commiſſioners all dead, unleſs the ſame were renewed or revived, or *procedendos* in reaſonable time brought, *viz.* within *half a year* at leaſt, then not within this clauſe, and the *certificate* to be diſallowed. *Vide Salk. vol.* 1. *p.* 112.

Trinity, 13 *Ann.* *Miles* v. *Williams.*

In *debt* on a bond brought againſt the defendant and his wife, they pleaded in *bar*, that the bond was entered into by the wife *when ſole*; that a commiſſion of *bankruptcy*, iſſued out againſt the huſband, who in all points conformed himſelf to the ſeveral ſtatutes relating to *bankrupts*, and that thereby the debt was diſcharged; *and this he is ready to verify.* To this plea the plaintiff demurred *ſpecially*, and ſhewed the following cauſes of demurrer.

1ſt. Becauſe a bond entered into by the wife, *while ſhe was ſole*, is not diſcharged by the *bankruptcy* of the huſband.

2dly. Becauſe they ought to have concluded their plea to the country.

Parker, Chief Juſtice, delivered the reſolution of the court as to the firſt point to be, that ſuch a debt was a debt within *ſtat.* 4. of the *Queen*, and conſequently that it was diſcharged by the *bankruptcy* of the huſband.

The words of the ſtatute are, "*ſhall be diſcharged*
" *from all debts by him, her, or them, due and owing, at*
" *the time that he, ſhe, or they, did become bankrupt.*"

The queſtion therefore will be, whether this is a debt due and owing at the time of the *bankruptcy?*

It has been argued at the bar, and very reaſonably, that if debts due to the *bankrupt*'s wife are aſſignable by the commiſſioners, then it is reaſonable that debts owing by the *bankrupt*'s wife ſhould be diſcharged by the *bankruptcy*.

Now, in order to know whether a debt due to the wife of the *bankrupt* is aſſignable, the intention of *ſtat.* 13 *Eliz. cap.* 7. and 1 *Jac. cap.* 15. muſt be conſidered.

By *ſtat.* 1 *Jac.* which is explanatory of that of *Eliz.* it is provided, that the commiſſioners ſhall have power to grant and aſſign, or otherwiſe to order or diſpoſe of all debts due, or to grow due, to and for the benefit of the *bankrupt*, by what perſon or perſons ſoever, or in what manner or form ſoever, to the uſe of the creditors, *&c.* and that the ſaid aſſignment or diſpoſition, *&c.* ſhall ſo veſt the property, *&c.* in the *aſſignees*, as fully *&c.* as if the ſaid bill, bond, *&c.* whereon the ſaid debts ſhall ariſe and grow due, had been made to, with, or for the uſe of the *aſſignees*.

Now, the intention of this act of parliament is plainly that the *bankrupt* being not conſidered a proper perſon to be intruſted with the management of his own eſtate, for fear he ſhould defraud his creditors, therefore the act puts the commiſſioners in the place and ſtead of the *bankrupt*; and conſequently whatever eſtate the huſband can turn into money, in order to pay his debts, the ſame is aſſignable by the commiſſioners.

The beſt way of interpreting *ſtatutes* is by the rules of *common law* in the like caſes.

It is certainly a very *equitable* interpretation, that whatever may be applied by the *bankrupt* to the payment

ment of his debts, may be aſſignable by the commiſſioners.

The contrary opinion, that it is not aſſignable, promotes no good end in the world.

To the objection, that the *ſtatute* does not extend to debts due to the *bankrupt* as *adminiſtrator* or *executor*, it may be anſwered, that it is nothing to the purpoſe, for he has no intereſt in thoſe debts to his own uſe, and when he recovers them they are *aſſets*, &c.

But it is objected, that this *ſtatute* extends not to debts due to him and another, and for this purpoſe, 1 *Lev.* 17. is quoted.

To this I muſt anſwer, firſt, that there is no judgment in that caſe. 2dly. That I doubt whether it be certain, that the whole debt is not veſted in the *crown*, on the *outlawry* of *one*, where there are *two obligees*.

That as debt due from the *bankrupt* and another is within the act, appears from *ſtat.* 10 *Ann. cap.* 5. a declaratory *law*; but this is his debt, as he is *one* with his wife.

Another objection has been taken, that this debt ſhall ſurvive to the wife if the huſband dies before he recovers it, and this conſtruction will deprive *her* of this *contingency*.

The anſwer is, that the huſband might by his releaſe have diſcharged this debt: now, this is a diſcharge of the legiſlature, applied in eaſe of his debts.

The *aſſignee* has the ſame remedy to recover it that the *bankrupt* himſelf had.

If a note be payable to a *feme ſole*, or order, and ſhe afterwards marries, her huſband is the proper perſon to indorſe it.

Now, that this debt, due from the wife is diſcharged by the *bankruptcy*, ſeems to me to be clearer than that a debt to the wife ſhould be aſſignable, *&c.*

For this conſtruction makes for the benefit and intereſt of the *bankrupt*, creditors, and wife. As to the *bankrupt*, nothing can be harder than that he ſhould be ſtripped of every thing, forced on *oath*, and at peril of *felony*, to make a full diſcovery, and yet, after all, not to be diſcharged.

The diſcharge of the *bankrupt* ſtands on this reaſon, that he is ſtripped of every thing that ſhould enable him to pay.

This reaſon holds equally to all the debts for which he may be ſued.

This expoſition is more beneficial for the creditors; for if this debt is diſcharged, then is a creditor of the wife a creditor within the ſtatute, and to come in for an equal proportion, which is far more eligible than an action, for that is good for nothing, unleſs the wife ſurvives, and perhaps not then neither.

As to the wife, that this expoſition is beneficial to her, is ſo plain, that it has been urged as an objection that it will be too beneficial.

Whether this will be a temporary diſcharge during the *coverture*, or a *perpetual* one, is now the queſtion; but I am inclined to think it a *perpetual* one; nor is this unreaſonable, for the *law* looks on the debt as paid, ſince the creditor is let into the *common fund*.

As to the *objection*, that this may be a fortune to a woman, the anſwer is, it is very reaſonable, that ſhe ſhould ſhare in the advantages as well as diſadvantages of the *bankruptcy*.

If a ſuppoſition be made, that a woman may, precedent to her marriage, put her eſtate into the hands of truſtees, for her ſeparate maintenance; and ſo her debts will be diſcharged by the *bankruptcy*, and her eſtate out of the reach of the creditors; the anſwer is, No; for I am of opinion that ſuch a ſettlement or conveyance againſt the creditors ſhall be deemed void and fraudulent.

As to the *objection*, that this diſcharge is a perſonal privilege, and therefore not communicable to the wife; the anſwer is, that her diſcharge is neceſſarily conſequential on his. Therefore judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 10. *p.* 243.

Eaſter, 5 *Geo.* *Atkin* v. *Berwick*.

See page 190 of this work under the head of *bailment*.

Trinity, 8 *Geo.* *Mayhoe* v. *Archer*.

The caſe found by the jury was, that one *R. B.* rented a farm, for which he paid 300*l.* *per annum*, and planted potatoes on part of the lands, which he farmed, and that he bought great quantities of potatoes to utter and ſell again for profit, and that for ſeveral years then laſt paſt, he dealt with ſeveral perſons in potatoes, at ſeveral times and places, and had employed ſeveral warehouſes, where he put in potatoes, and had ſerved ſeveral markets therewith, and had ſold great quantities thereof for profit, and for his living, *&c.*

On this *ſpecial verdict*, there were two points raiſed for the opinion of the court.

1ſt. If the jury found enough to make *B.* a trader within any of the ſtatutes made againſt *bankrupts*.

2dly. Whether a farmer who ſells potatoes, though he buys ſeveral other great quantities thereof, and gets his living thereby, is within any of the ſaid acts.

The court being divided, no judgment was given, but *two* of the *judges* ſeemed to be of opinion, that where a man bought great quantities of wool, or hops, though he had a farm and ſheep of his own, and ſeveral hop gardens, he ſhall be accounted a trader in theſe commodities, and ſo ſhall an *inn-keeper* if he turns *cornchandler*.

It is true, the jury have not found that *B.* got the chiefeſt part of his livelihood by buying and ſelling potatoes, but it is not the quantity that is material, if it is in proportion to other goods which he buys and ſells; for if a man has an orchard, and buys ſeveral quantities of fruit of other people, though not ſo much as he has in his own orchard; yet this ſhall make him a trader, and conſequently ſubject him to the ſtatutes of *bankruptcy*.

The *two* other *judges* were of a contrary opinion, *viz.* that here was not enough found by the verdict to make *B.* a *bankrupt*; for a farmer is no *trader* within any of the acts before mentioned, *as* a farmer; and though he uſes another trade, yet if that is not the principal means of his livelihood, he is not a trader within thoſe ſtatutes; it is true, if buying and ſelling in any trade is the chiefeſt means of his livelihood, then he is a trader within the acts of *bankruptcy*; but that is matter to be given in evidence, and found by the jury, which was not done in this caſe.

Therefore they held, that this was an inſufficient verdict; becauſe the jury did not find that *B.* by buying and ſelling potatoes, got the chiefeſt part of his livelihood, or that it did exceed his farming trade, for all that the ſtatute requires, is that trading ſhould be the chief matter to make him a *bankrupt*.

Afterwards, in *Trinity* term, the council for the plaintiff finding, that the judges differed in opinion, moved for a *venire facias de novo*, or that the court would give leave to mend this ſpecial verdict on the *affidavit* of one of the witneſſes at the trial, that *B.* bought potatoes ſeveral years, to the value of 500*l.* *per annum*; and thereon a rule was made for the other ſide to ſhew cauſe why the verdict ſhould not be amended, and the cauſe which they ſhewed was, that though this witneſs had ſworn the ſame thing at the trial, yet it was without precedent to have a verdict (which is a record) amended by ſuch an *affidavit*, for though it was the ſame which was given in evidence before, yet the jury did not believe it, or probably there might be other evidence at the trial to diſprove it.

But the court was of opinion, that a ſpecial verdict might be amended by the notes taken by the clerk at the trial, or on proof of the certainty of what was then given in evidence, and the ſame was ruled accordingly on payment of coſts. *Vide Mod. Rep. vol.* 8. *p.* 46.

Trinity, 9 *Geo.* *Grey* v. *Mendez*.

On an *indebitatus aſſumpſit* brought againſt the defendant by an aſſignee under a commiſſion of *bankruptcy*.

The defendant pleaded the ſtatute of limitations, *viz. he did not promiſe within ſix years, and ſo no debt*.

The plaintiff replied, that the aſſignment by the commiſſioners, *&c.* was made on ſuch a day, *anno* 4 *Geo.* &c.

The defendant demurred to the plaintiff's replication, and it was argued for him, that it was ill, becauſe the plaintiff did not ſet forth how the perſon became a *bankrupt*, viz. that he was indebted to any perſon, &c. and abſconded, or had done any other act of *bankruptcy*; but if he had ſet forth this matter, it does not appear by the pleadings that the defendant made any promiſe to the *bankrupt* himſelf within ſix years, or that the caſe of *bankrupts* was within the ſaving of the ſtatute of limitations, by which it is enacted, that *actions on the caſe for ſlander muſt be commenced within two years after the words ſpoken; and all actions of treſpaſs, of aſſault, battery and wounding, and falſe impriſonment, muſt be commenced within four years after the cauſe of ſuit, and all other actions on the caſe, actions for account, (other than ſuch as concern merchandizing) actions of debt, detinue, treſpaſs, trover and replevin, muſt be brought within ſix years after the cauſe of ſuch actions and ſuits, and not after.*

But the right of actions in the caſes aforeſaid is ſaved to *infants, feme coverts*, perſons *non compos mentis*, and perſons impriſoned or beyond ſea, ſo as they commence their ſuits within the times above limited reſpectively, after ſuch impediment removed; but the right of *bankrupts* is not mentioned.

This reaſoning was admitted by the council for the plaintiff, (the aſſignee;) but they inſiſted that the right to this action was a new right, veſted in him by act of parliament.

To which it was anſwered, and ſo reſolved by the court, that the ſtatute of *bankruptcy* transfers the right to the *aſſignee*, but it is no more than the old right which the *bankrupt* held before he had committed any act of *bankruptcy*, and therefore the *aſſignee* muſt take it in the ſame plight and condition as the *bankrupt* himſelf had it; and ſo it had been *adjudged* in the caſe of *Maſon* v. *Plunket*, that the *aſſignee* was in the ſame condition (as to the right) with the *bankrupt* himſelf, and conſequently if he was *barred* by the *ſtatute of limitations*, ſo ſhall the *aſſignee*. *Vide Mod. Rep. vol.* 8. *page* 171.

Michaelmas, 9 *Geo.* *Lock* v. *Major*.

By *ſtat.* 5 *Geo. c.* 24. *ſect.* 30. it is provided, *that a bankrupt's certificate ſhall be given in evidence, and be a full diſcharge of any action that ſhall be brought by any creditor of ſuch bankrupt.* In this cauſe, a point was reſerved at *niſi prius* before *Pratt*, Chief Juſtice, whether it was not ſtill neceſſary to prove an act of *bankruptcy*. And on debate, the court were of opinion that it was, for the word *ſuch* was *relative*, and therefore he muſt be proved to be ſuch a perſon as is before deſcribed. *Vide Stra. vol.* 1. *p.* 533.

Eaſter, 11 *Geo.* *Heavyſide* v. *Davis*.

See page 170. under the head *Bail*. Or *vide Mod. Rep. vol.* 8. *p.* 349.

Eaſter, 12 *Geo.* *Rig* v. *Wilmer*.

An action was brought by the plaintiff as aſſignee under a commiſſion of *bankruptcy*, and the declaration was, that the defendant was indebted to the *bankrupt*, and being ſo indebted, promiſed to pay to the *bankrupt*; but throughout the whole declaration there was no *aſſumpſit* to the plaintiff, the aſſignee.

On demurrer, it was *inſiſted* on by the defendant, that the ſtatute had transferred the promiſe to the aſſignee, and that a promiſe before made to the *bankrupt* was afterwards in point of *law* a promiſe to the aſſignee, and ought to have been declared on as ſuch.

Per curiam. What reaſon is there to vary this from the common caſe of an action by an *executor*, where you always declare on a promiſe to the teſtator, and yet the promiſe is as ſtrongly transferred to the *executor* as it is here to the *aſſignee*. Therefore judgment was given for the plaintiff, *Vide Stra. vol.* 1. *p.* 697.

Hilary, 13 *Geo.* *Swayne et al'* v. *Wallinger*.

A commiſſion of *bankruptcy* iſſued in 1726, and the debt of the petitioning creditor appeared to be a promiſſory note given in 1714.

The Chief Juſtice allowed it to be good, ſaying, that though *ſix years* were elapſed, yet he could not preſume it to be *barred*. *Vide Stra. vol.* 2. *p.* 746.

Hilary, 13 *Geo.* *Toms et al'* v. *Mytton*.

In *trover* brought by the *aſſignees* under a commiſſion againſt *A. B.* it appeared *A. B.* was a *bankrupt* in *January*, 1724. and the debt of the petitioning creditor was a note dated in *September* 1725. The Chief Juſtice was therefore of opinion that the commiſſion was a void commiſſion, becauſe the acts of a man after an act of *bankruptcy* committed are void: ſo the plaintiffs were *nonſuited*. *Vide Stra. vol.* 2. *p.* 744.

Hilary, 2 *Geo.* 2. *Feild* v. *Curtis*.

It was held, that no *releaſe* could make a *bankrupt* a witneſs to prove his own *bankruptcy*. *Vide Stra. vol.* 2. *p.* 829.

Trinity, 2 *Geo.* 2. *Maylin et al'* v. *Eylœ*.

On the 28th *November* one *H.* rode out of town, and returned in the evening, before which a bailiff had been at his ſhop to arreſt him; the next morning he ſent for the bailiff, and told him he went out in order to get the term of the plaintiff, and now the return of the writ was out, if they would take out a new writ he would give bail, which was done accordingly; and this was held to be an act of *bankruptcy* within 1 *Jac.* 1. *c.* 15. which ſpeaks of departing from his houſe with intent, and whereby his creditors may be defeated, or delayed from recovering their juſt debts. *Vide Stra. vol.* 2. *p.* 809.

Michaelmas, 2 *Geo.* 2. *Parker et al'* v. *Godin*.

One *S.* a *bankrupt*, at the time of his going off, left a quantity of plate with his wife, who, in order to raiſe ſome money on it, delivered it to her ſervant, who went with the defendant to the door of *W.* a banker, and there the defendant took the plate into his hands, and went into the ſhop, and pawned it in his own name, and gave his note to repay the money, and immediately on receipt of it went back to the *bankrupt's* wife, and delivered the money to her. And in *trover* for the plate, the jury (conſidering the defendant acted only as a friend, and that it would be hard to puniſh him) found a verdict for the defendant: but on application to the court, a new trial was granted, on the ground of its being an actual *converſion* in the defendant, notwithſtanding he did not apply the money to his own uſe. And on a ſecond trial the plaintiff obtained a verdict for the value of the plate.

N. B. A difficulty aroſe on the motion for a new trial, which was this; there were other things beſides plate in the declaration, and as to them the verdict for the defendant was right; and yet a new trial muſt be granted on the whole. But on conſideration, the court held that could be no reaſon to refuſe a new trial, for if the merits, as to the other things, were with the defendant, it would be found for him as well as to them. But it was agreed on all hands, that if one defendant be acquitted, and the other found guilty, that defendant can have no new trial. *Vide Stra. vol.* 2. *p.* 813.

Michaelmas, 2 *Geo.* 2. *James Tully* v. *Frances Sparks and Chriſtopher May, Executors of W. Donaldſon.*

The plaintiff brought an action of *debt* againſt the defendants for 800 *l.* due on a bond given by the defendants teſtator to the plaintiff, payable at a future day.

The defendants prayed *oyer* of the bond and condition, and then pleaded in *bar* of the action the *bank-*

ruptcy of their teſtator, and that he obtained his certificate: to this plea the plaintiff demurred, and the defendants joined in demurrer, and after hearing council for the plaintiff and defendant,

Per curiam. A creditor on a bond, with a condition to pay money at a future day, ſubſequent to the act of *bankruptcy*, before *ſtat.* 7 *Geo.* 1. *cap.* 31. could not be admitted to prove ſuch debt, or to have any dividend before ſuch ſecurity became payable. It would be hard on the former acts to put ſuch a conſtruction as to bar a man of his debt, when he could come in under the commiſſion, and have the benefit thereof. As to *ſtat.* 7 *Geo.* 1. *cap.* 31. it *enacts*, that any perſon who hath, or ſhall hereafter give credit on ſuch ſecurity as aforeſaid (referring to the ſecurities mentioned in the recital of the act) to any perſon who was or ſhould become a *bankrupt*, on a good and valuable conſideration, *bona fide*, for any ſum of money, or other matter or thing whatſoever, which ſhould not be due or payable at or before the time of ſuch perſon's becoming a *bankrupt*, ſhall be admitted to prove his bond, *&c.* for the ſame, in ſuch manner as if it was payable preſently, and not at a future day, and ſhall receive a proportionable dividend, *&c.* of ſuch *bankrupt's* eſtate, in proportion to the other creditors of ſuch *bankrupt*, deducting only thereout a rebate of intereſt, and diſcounting ſuch ſecurities payable at future times, after the rate of 5 *l. per cent. per ann.* for what he ſhall ſo receive, to be computed from the actual payment thereof, to the time ſuch debt or ſum of money, ſhould or would have become payable in and by ſuch ſecurities as aforeſaid. Then follows a clauſe, that the *bankrupt* ſhould be diſcharged of ſuch ſecurities. Now, it being uncertain whether this bond ſhould ever become due or not, it depending on two contingencies, which, had not both happened at the time of the act of *bankruptcy* committed, it was impoſſible to make ſuch abatement of 5 *per cent.* as the act directs, and therefore this bond, the court held, was not within the act; and therefore they were of opinion to give judgment for the plaintiff. *Vide Raym. vol.* 1. *p.* 1548.

Hilary, 3 *Geo.* 2. *Wilſon* v. *Poulton.*

See this caſe fully ſtated in page 188. under the head of *Bailiff.*

Eaſter, 4 *Geo.* 2. *Grace* v. *Heyham.*

The plaintiff brought an action on a promiſſory note, to which the defendant pleaded, that after the ſaid note was given he became a *bankrupt*, &c. that therefore, by *ſtat.* 5 *Geo.* 1. *c.* 24. he is acquitted and diſcharged of the ſaid debt. The parties having gone to trial, this caſe was made for the opinion of the court.

That the note for which the preſent action is brought was on the defendant's ſeparate account, and that on the *bankruptcy* of the defendant and one *J. S.* his partner, a joint commiſſion was taken out againſt them, *&c.* and whether on this caſe the plaintiff ſhould be barred, was the queſtion then made.

The council for the plaintiff urged, that within the act, *bankrupts* are not to be diſcharged againſt creditors, who could have no benefit under the commiſſions taken out againſt them: now, the plaintiff could have had a dividend of the joint eſtate under this commiſſion, for that is to be applied to the joint debts only. 2 *Chanc. Rep.* 226. 2 *Vern.* 706. 293. But though the commiſſioners under the joint commiſſion might aſſign the joint eſtate to ſeparate creditors, yet the aſſignee of the one trader's part cannot maintain an action without the concurrence of the aſſignee of the other's part, and therefore, ſuch aſſignment might prove fruitleſs to the ſeparate creditors; whereas if ſuch aſſignment had been under a ſeparate commiſſion, a ſeparate right would thereby have been veſted in the aſſignee.

The commiſſioners under a joint commiſſion cannot aſſign the ſeparate eſtate of the *bankrupt*, for their authority is to aſſign the joint eſtate. 1 *Lev.* 17. *Raym.* 6. And beſides, it does not appear in this caſe that the defendant had a ſeparate eſtate to be aſſigned, and that is the only fund out of which the plaintiff might have been intitled to a dividend. If there had been joint and ſeparate commiſſions, the joint and ſeparate creditors would have been equally intitled to the joint eſtate.

The council for the defendant replied; the act does not direct joint and ſeparate commiſſions; but when two partners become *bankrupts*, and a joint commiſſion is ſued out, it is founded on their diſtinct and reſpective acts of *bankruptcy*; and therefore, if one becomes ſo one day, and the other the next day, different relations muſt be had under the joint commiſſion, with regard to the different times of the *bankruptcy*, and the diſtribution under it muſt be the ſame as if ſeparate commiſſions had been taken out; for in both caſes the joint fund is primarily applied to the joint debts, and the ſeparate fund to the ſeparate debts, and then in an average to the joint debts, and ſo *vice verſa*; ſo are the orders of the court of Chancery in the following inſtances; the firſt, between *Stephens* and others, v. *Brown* and *Adlam*, 22d *January*, 1728. *Brown* and *Adlam* were partners; the partnerſhip was diſſolved, after which, *Brown* having ſet up for himſelf, became a *bankrupt*, on which a commiſſion was taken out againſt him, and then *Adlam* having failed, and a commiſſion having gone againſt him, the joint creditors were admitted to prove their joint debts under the ſeparate commiſſions; the ſecond between *Horſey* and others, v. *Heyham* and *Heyham*, 22d *April*, 1729. where it was ordered, that the joint eſtate ſhould firſt go to the joint creditors, and the remaining part of the joint eſtate, which reſpectively belonged to each, to their ſeparate creditors, on a joint commiſſion ſued out againſt the then defendants; and to the ſame purpoſe is the caſe of *Matthews* v. *Alana*, *Michaelmas*, 2 *Geo.* 2. in *C. B.* the rule finally pronounced in the *Hilary* term following, where two having entered jointly into a bond, and then having become *bankrupts*, ſeparate commiſſions were taken out againſt them, under which the ſeparate commiſſioners having refuſed to let in the obligee, he brought an action againſt one of the obligors in the court of *C. B.* whereupon the then defendant having got a certificate under the ſeparate commiſſion, was diſcharged on ſolemn argument in that court, which proves that joint creditors may come in under ſeparate commiſſions; and by the ſame reaſon, that ſeparate creditors may come in under a joint commiſſion; and the law being ſo, every aſſignee may recover by ſetting forth the ſpecial matter; and beſides, if the aſſignee of the other part will not join in an action, he may be ſummoned and ſevered.

The court thought the laſt caſe cited came fully to the point; and therefore inclined for the defendant; but adjourned. *Vide Fitz-Gibbon's Rep. p.* 281.

Michaelmas, 4 *Geo.* 2. *The King* v. *Solomon Nathan.*

The defendant was committed by the commiſſioners of *bankrupts*, who in their warrant recite, that he had been examined before them on his oath, on which examination he had *notoriouſly* prevaricated; they therefore commit him without *bail* or *mainprize*, till he ſhall make a true and full diſcloſure and diſcovery of his eſtate and effects, or otherwiſe be delivered by due courſe of law.

On a *habeas corpus* being brought, it was moved, that the defendant might be diſcharged, for the following reaſons.

1ſt. Becauſe *ſtat.* 1 *Jac.* 1. *c.* 15. requires there ſhould be *interrogatories* exhibited for his examination, that ſo he may have time to conſider of his anſwer, and that it may, can then appear to the court whether he is bound to anſwer, perhaps this prevarication was a matter they had no power to enquire into.

2d. *Prevaricated* is too looſe an expreſſion: he might prevaricate, and yet give a full anſwer at laſt.

3d. *Or be otherwiſe diſcharged*, is wrong. *Salk.* 351. 348.

Per curiam. *Interrogatories* are a term known in *law*, and import that the queſtions are put in writing.

And *Holt*, Chief Juſtice, held that the *bankrupt* ought to have a copy, and time to conſider of his anſwer. It is very dangerous to let people depart from the words of the act, where theſe ſpecial authorities are given. And this commitment not purſuing the words, the priſoner muſt be diſcharged. *Vide Strange, vol.* 2. *p.* 880.

Eaſter, 6 *Geo.* 2. *Macarty* v. *Barrow*.

The defendant in *January*, 1728, drew bills on *Spain*, which in *March* were returned *proteſted* for *non-acceptance*; between the drawing and return he became a *bankrupt*; and being ſued to execution, as the drawer, he moved on *ſtat.* 5 *Geo.* 2. *c.* 30. to be diſcharged, it being a debt contracted before his *bankruptcy*.

The plaintiff's council *inſiſted*, that this cauſe of action aroſe on the *non-acceptance* and *proteſt*; which are both neceſſary to be averred, in order to maintain the action, and the charges thereof are to be recovered.

Per curiam. The principal matter is the drawing the bills, and therefore he muſt be diſcharged. *Vide Strange, vol.* 2. *p.* 949.

Michaelmas, 8 *Geo.* 2. *Howard* v. *Poole*.

There was a joint commiſſion againſt the defendant, and his partner, and the plaintiff was a ſeparate creditor of the defendant's, and arreſted and held him to bail; but on a motion he was diſcharged on common bail; the plaintiff being ſuch a creditor, as might have come in under the joint commiſſion. *Vide Str. vol.* 2. *p.* 995.

Eaſter, 9 *Geo.* 2. *Hockrell or Hockley* v. *Merry*.

The defendant on the 9th of *May*, 1734, was bail on a writ of error, on the 25th of *October*, 1734, he committed an act of *bankruptcy*, and after a commiſſion, obtained his *certificate*. On the 12th of *November*, 1735, the judgment was affirmed. And in an action of debt on the recognizance, he pleaded his diſcharge, and that the cauſe of action aroſe before his *bankruptcy*.

Hardwicke, Chief Juſtice. On the trial held that the defendant was not diſcharged according to the caſe of *Tully* v. *Sparks*, *Eaſter*, 3 *Geo.* 2. for this was but a *contingent* debt, for which the plaintiff could not come in under the commiſſion; *ſtat.* 7 *Geo.* 1. *c.* 15. only letting in thoſe where the payment was certain, though future. There was a verdict for the plaintiff. *Vide Strange, vol.* 2. *p.* 1043. *Caſes Temp. Lord Hardwicke, p.* 262.

Eaſter, 9 *Geo.* 2. *Ambroſe & al. Aſſignees of the Eſtate of Ambroſe, a Bankrupt.* v. *Clendon*.

At *niſi prius* at *Guildhall*, in an action of *trover*, directed by the Lord Chancellor to try whether goods of the *bankrupt*, taken in execution on the 8th of *November*, by the defendant, were rightly taken or not; after having proved the petitioning creditor's debt, and the commiſſion and aſſignment to the plaintiff; the plaintiff entered on proof of an act of *bankruptcy*.

And for that purpoſe a footman of the *bankrupt*'s was firſt produced, to whom the defendant objected, as being a creditor; and being aſked the queſtion, he ſaid he was a creditor formerly, but had none of his debt paid, and relied on the aſſignee's goodneſs, but reckoned himſelf no longer a creditor, and had no promiſe of payment.

Lord *Hardwicke* allowed him to be an evidence, for he is not a creditor.

Then his releaſe was read, which was made to the aſſignees only, and objected it ought to be made to the *bankrupt* likewiſe, for as this creditor will not come in under the commiſſion he has an intereſt in the ſurplus of the eſtate.

Lord *Hardwicke*. There is no occaſion for the releaſe to be to the *bankrupt*, and the intereſt you mention him to have in the ſurplus, rather ſtrengthens his evidence for the aſſignees; becauſe he is thereby rather an adverſary to the ſucceſs of the commiſſion than otherwiſe.

Another witneſs in proving the *bankruptcy*, related what had been ſaid by the *bankrupt* at different times about his bad circumſtance, and fears of being arreſted.

Lord *Hardwicke*. It is not uſual to allow ſuch evidence, unleſs when it is concomitant with facts, as what the *bankrupt* ſays when he is removing his books, or his goods, &c. but not elſe.

And the plaintiff's witneſſes proved him a *bankrupt* very clearly, but it was obſerved by the defendant's council, that they had proved too much, for now the *bankruptcy* appeared to be before the giving the bond to the petitioning creditor, which was the debt proved for him in the beginning of the cauſe; and conſequently that bond being after the *bankruptcy*, was againſt the creditors a void bond, and the petition and commiſſion on ſuch a debt muſt fall to the ground, and the plaintiff be *nonſuited* It appeared likewiſe on the evidence, that this bond creditor was at the time of the bond, and had been long before the *bankruptcy* a ſimple contract creditor for a large ſum, and that the bond was given as a higher ſecurity for that debt.

Lord *Hardwicke*. Here are two queſtions, 1ſt. Suppoſing the act of *bankruptcy* appears to be before the petitioning creditor's debt was contracted, whether that creditor's petition can ſupport the commiſſion. 2dly. Whether in this caſe the petitioning creditor's ſimple contract debt, which was due before any act of *bankruptcy*, makes him ſuch a creditor as to ſupport the commiſſion, notwithſtanding the bond given for the ſame debt; or whether the giving that bond is not ſuch an extinguiſhment of the ſimple contract debt, as that he can now be conſidered as a creditor only from the time of giving the bond.

As to the *firſt*, if there is a clear act of *bankruptcy* proved, and not purged by any ſubſequent acts of the *bankrupt*, and the petitioning creditor's debt ſhould appear to be after ſuch act of *bankruptcy*, a commiſſion iſſuing out on that petition, would iſſue erroneouſly, becauſe ſuch petitioner ought to be a creditor before the act of *bankruptcy*; for as the commiſſion by relation avoids all meſne acts of the *bankrupt*, conſequently the petitioning creditor's debt muſt thereby be avoided; which is to make the commiſſion trip up its own heels, and is an abſurdity; it is true, ſome inconveniences may happen by this means, by ſecret acts of *bankruptcy*, which thoſe who deal with the *bankrupt* cannot have notice of, and therefore it is expected that acts of *bankruptcy* ſhould be fully proved, and beyond poſſibility of being purged; and if any ſubſequent tranſactions have been done by the *bankrupt*, it ſhould be left to the jury whether the act was purged, or was an act within the intent of the ſtatutes of *bankruptcy* or not; but in this caſe here is a very clear proof of an act of *bankruptcy*.

As to the *ſecond* queſtion, I think this petition is ſufficient to ſupport the commiſſion, and that the acceptance of the bond is not an extinguiſhment of the debt as to this purpoſe; for the only queſtion now is, whether there was a debt ſubſiſting, ſufficient to ſupport the commiſſion, and not of what effect it is with regard to the *bankrupt* himſelf? the reaſon why it is an extinguiſhment with regard to the party, is becauſe the bond is a debt of a higher nature; but in this proceeding both debts are the ſame. And it is every day's practice, that if a creditor by ſimple contract ſhould after an act of *bankruptcy* committed, get a judgment confeſſed by the *bankrupt* for the ſame debt, and take the *bankrupt*'s goods in execution, if the aſſignees bring an action of *trover* againſt that creditor to recover, yet that very creditor is afterwards admitted to come in and prove his debt under the commiſſion, notwithſtanding his acceptance of a judgment after the *bankruptcy*; and he comes in, in that caſe, by force of his ſimple contract debt; for all creditors are intitled to relief under the commiſſion; ſo that with regard to the commiſſion, he is ſtill conſidered as a ſimple contract creditor, therefore I think the acceptance of the bond has not, as to this proceeding, extinguiſhed his ſimple contract debt, ſo that I think the commiſſion is well founded.

A verdict was therefore given for the plaintiff. *Vide Caſes Temp.* Lord *Hardwicke*, *p.* 267.

Eaſter, 14 *Geo.* 2. *James Baker's Caſe.*

The ſaid *J. B.* was taken up on an attachment for not performing an award. After which he became a *bankrupt*, and obtained his certificate; and now moved to be diſcharged, but was oppoſed, becauſe (it was ſaid) *bankruptcy* does not purge a *contempt*.

Per curiam. This was a demand for which *debt* would lie, and the act ſays he ſhall not be arreſted, proſecuted, or impleaded for any *debt* due before the *bankruptcy*. It would therefore be hard to keep him in cuſtody, when the duty is diſcharged. And therefore in this caſe he muſt be diſcharged. *Vide Strange, vol.* 2. *p.* 1153.

Trinity, 14 *Geo.* 2. *Wickes* v. *Strahan.*

The defendant and his partner in trade had a joint commiſſion of *bankruptcy* taken out againſt them; under which they obtained their certificate; the plaintiff was a ſeparate creditor, and had obtained judgment before the commiſſion, or act of *bankruptcy:* and having the body of the defendant in execution, the court was moved to diſcharge him, on the authority of *Howard* v. *Poole*, where it was held, that a ſeparate creditor might come in under a joint commiſſion: and alſo in *Abr. Eq. Caſes* 55. 2 *Vern.* 707. 2 *Wil. Rep.* 500. And the court diſcharged him accordingly. *Vide Strange, vol.* 2. *p.* 1157.

Michaelmas, 15 *Geo.* 2. *Crookſhank* v. *Thompſon*

The defendant gave a bond of indemnity, and before any breach, became a *bankrupt*; and being *nonſuited* in the action, moved to be diſcharged on common bail: but the court compared it to the caſe of *Tully* v. *Sparks*, and ordered that he ſhould give ſpecial bail. *Vide Strange, vol.* 2. *p.* 1160.

Eaſter, 17 *Geo.* 2. *Aſhley* v. *Kell.*

On a motion for a new trial, the court held, that tho' under *ſtat.* 5 *Geo.* 2. *c.* 30. the future effects of a *bankrupt*, againſt whom two commiſſions had iſſued, were liable to be ſeized for the benefit of the creditors, yet the *bankrupt* had in the mean time ſuch a property in them, as to enable him to tranſact and ſell to a *real* purchaſer. *Vide Strange, vol.* 2. *p.* 1207.

Trinity, 17 *Geo.* 2. *Swayne* v. *De Mattos.*

On a queſtion touching a *bankruptcy*, the C. J. held, that though the *preamble of ſtat.* 7 *Geo.* 1. *c.* 31. ſpeaks only of bonds given for goods in trade, payable at a future day, yet the *enacting* words extend to all ſort of bonds for the payment of money; and that the words *ſuch ſecurity*, do not mean ſecurity for ſuch ſort of a debt, but ſecurity by *bonds, bills, notes, &c. Vide Strange, vol.* 2. *p.* 1211.

Michaelmas, 17 *Geo.* 2. *Graham* v. *Benton.*

On motion to diſcharge the defendant from an execution, as being a *bankrupt*, on *ſtat.* 5 *Geo.* 2. *c.* 30. it appeared that the debt was contracted before the *bankruptcy*, and ſued for and recovered pending the commiſſion, and before any certificate was obtained, and the judgment was afterwards affirmed on a writ of *error*, and coſts given on ſuch *affirmance*.

The court diſcharged him as to all; for not having his certificate, he could not plead to the action; and theſe coſts were attendant on the *original* judgment; and cannot be conſidered as given for delay of execution, when it appears there ought to have been no execution, though no *writ of error* had been brought. *Vide Strange, vol.* 2. *p.* 1196.

Trinity, 18 *Geo.* 2. *Marſh and others, Aſſignees of May, a Bankrupt,* v. *Chambers.*

On an action of *aſſumpſit*, the defendant was proved to be indebted to the *bankrupt* in 208 *l.* by a ſet off, and bringing money into court, this whole demand would be diſcharged, if the defendant was intitled to be allowed 127 *l.* on a note of the *bankrupt's*, which he claimed as indorſee. The caſe was as follows:

One *S.* who was poſſeſſed of this note at the time of the *bankruptcy*, applied to the defendant, who he knew owed more money to the *bankrupt*'s eſtate, deſiring him to take the note, and claim a credit for it, on ſetling with the aſſignees, according to *ſtat.* 5 *Geo.* 2. *c.* 30. the defendant ſcrupled it, and the *bankrupt* would not conſent; but at laſt, the defendant ventured, on *S.*'s indorſement (who, he ſaid, was a good man) to pay the 127 *l.* and on notice to ſet off, produced the note. The plaintiff's council oppoſed its being allowed, it appearing to be an indorſement after the *bankruptcy*, *whereas* the words of the ſtatute are mutual debts *before*; and as it was an unjuſt attempt in *S.* to get 20 *s.* in the pound. But the Chief Juſtice conſidering it might be dangerous to inquire into the preciſe time of indorſing negotiable notes, directed the jury to allow it; which, with much difficulty, and merely in deference to his opinion, they did. But on a motion for a new trial, the verdict was ſet aſide, with the concurrence of the Chief Juſtice; the words of the ſtatute being as before ſtated, and the defendant having no right to ſtand in a better condition than *S.* who could only come in for a dividend: beſides, it would be of ill conſequence to trade, if debtors to the *bankrupt*'s eſtate ſhould be allowed to buy up debts, and ſet them off in this manner. The court gave no opinion how it would be, if the nature of the tranſaction, and the time of the actual indorſement did not appear. *Vide Stra. vol.* 2. 1234.

Michaelmas, 30 *Geo.* 2. *Cooper, and another, Aſſignees of William Johns, a Bankrupt,* v. *Chitty and Blackiſton, Eſqrs; Sheriffs of London.*

In an action of *trover* brought by the aſſignees againſt the ſheriffs of *London*, for ſelling the *bankrupt*'s goods under a *fieri fac.* at the ſuit of one *W. G.*

On the trial, the following ſpecial caſe was made for the opinion of the court, *viz.*

That *Johns* was regularly declared a *bankrupt* on the 8th *December*, 1753. That on the 5th *December*, 1753, *W. G.* obtained judgment in *C. B.* againſt the ſaid *bankrupt*, and on the ſame day execution was taken out thereon, and the goods ſeized by the ſheriffs: that *Johns* committed the act of *bankruptcy* on the 4th of *December* 1753; and on the 8th *of the ſame December*, a commiſſion iſſued againſt him, and on the very ſame day the aſſignment of the *bankrupt*'s eſtate and effects was made by the commiſſioners, and on the 28th of *Dec.* a bill of ſale of the goods was made by the ſheriffs.

Out of this caſe the queſtion made for the opinion of the court was,

Whether the aſſignees under the commiſſion of *bankruptcy* could maintain an action of *trover* againſt the ſheriffs for ſeizing the goods on the *fieri fac.* iſſued after the act of *bankruptcy* committed, and the goods ſold after the aſſigment was executed?

The court, after hearing council on both ſides, gave judgment:

Lord *Manſfield*. The commiſſion and aſſignment of the *bankrupt's* eſtate and effects are both *notorious* tranſactions, ſo that a *ſheriff* cannot be well hurt by being left liable to this action. If it were otherwiſe, there would be great danger of *colluſion* being practiſed by *ſheriffs* on theſe occaſions, which might be encouraged by a contrary reſolution. The ſeizure in this caſe is after the act of *bankruptcy* committed, and therefore, after the property by *relation* is veſted in the aſſignees; but that tranſaction was innocent and excuſable, and the *ſheriff* ſhall not be liable by relation as a *wrong doer*. The *giſt* of the action is, the *wrongful converſion* by the ſale and falſe return long after the commiſſion and aſſignment.

Per curiam, unanimouſly, this action is maintainable againſt the defendants, and therefore, the plaintiffs muſt have judgment. *Vide Bur. vol.* 1. *p.* 20.

Hilary, 31 *Geo.* 2. *Roſe* v. *Green.*

A queſtion was ſtated for the opinion of the court, *viz.* whether the defendant became a *bankrupt* on the

31ſt of *March*, or on the 6th of *May*, grounded on the following caſe:

The defendant being arreſted for a debt in *Kent*, on the 31ſt of *March*, was afterwards on the 6th of *May* following brought up by *habeas corpus* in order to be turned over; and on his way to the judge's chambers called at his attorney's houſe, which was in the city of *London*, and out of the county of *Kent*, and was carried from thence by virtue of the *habeas* to a judge's chambers to be bailed, where he was bailed, but was inſtantly ſurrendered there by his bail, and committed immediately to the *King's Bench Priſon*, where he lay above *two months*, viz. from the ſaid 6th of *May* till the 15th of *July* next following.

After hearing the council on both ſides, the court gave their opinion as follows:

Lord *Manſfield*. Where *poſitive* laws fix and deſcribe what ſhall be conſidered as acts of *bankruptcy*, they muſt be conſtrued according to their intention, and ſo as to anſwer the ends of public benefit, which the legiſlature had in view.

In conſtruing the act of parliament, he held this caſe not to be ſuch an *eſcape* as that the man ſhould be thereby rendered a *bankrupt* and a *criminal*, for the act clearly intended ſuch an *eſcape* made by a priſoner as ſhews that he means to run away, and thereby defeat his creditors, but this is not ſuch an *eſcape*, and a man ſhall not be made a *criminal* where he had not the leaſt *criminal* intention to diſobey any law whatſoever. There is no *eſcape* at all in the ſenſe of the act, he remained ſubſtantially in cuſtody, notwithſtanding his being thus carried into another *county*.

Where bail is really put in, the *bankruptcy* only relates to the time of the ſurrender; the mere being arreſted is no preſumption of *inſolvency*, the preſumption ariſes from his lying in priſon *two months*. This ſort of bailing is a mere form to turn the defendant over, from one cuſtody, and in ſuch caſe the bail never juſtify.

In caſes of ſuperſeding actions, by reaſon of the plaintiffs not proceeding on them within *two terms*, being merely turned over from one cuſtody to another, is always conſidered as a continuance of the ſame impriſonment. I think, in the preſent caſe, under the preſent circumſtances, the *bankruptcy* has a relation to the firſt arreſt.

Deniſon, *Foſter*, and *Wilmot*, Juſtices, agreed with the Chief Juſtice in opinion.

Per curiam. Let the *poſtea* be indorſed: that the defendant *Green* became a *bankrupt* on the 31ſt of *March*. *Vide Bur. vol.* 1. *p.* 437.

Hilary, 31 *Geo.* 2. *Worſely and another*, *Aſſignees of Richard Slader, a Bankrupt*, v. *De Mattos and Slader*.

The following queſtion came before the court, on a feigned iſſue out of *Chancery*, viz. whether one *Richard Slader*, a trader, was a *bankrupt*, and if he was a *bankrupt* then, on what particular day he became ſo, and that the particular day might be indorſed on the *poſtea*.

The *firſt point* was ſettled, that he certainly became a *bankrupt* on the 13th *November*, 1756.

On the *ſecond point* it was inſiſted for the plaintiffs, that *Richard Slader* became a *bankrupt anterior* to the 13th *November*, viz. on the 23d of *October*, by executing the deed in queſtion, which bore date that day, for they alledged this deed to be fraudulent, and the executing it to be *ipſo facto* an act of *bankruptcy*, within the *ſtatute* of 1 *Jac.* 1. *cap.* 15.

The jury found *Richard Slader* a *bankrupt* accordingly.

By conſent of the parties, the following order was made at *niſi prius*, viz. that either party be at liberty to move the court; and if the court ſhould be of opinion, that the deed of the 23d of *October*, 1756, is fraudulent, and the execution of it an act of *bankruptcy*, then the *poſtea* ſhould be marked on the back thereof: that the ſaid *Richard Slader* became a *bankrupt* on the 23d of *October*, 1756. If the court ſhould be of a different opinion, *viz.* that the execution of the ſaid deed, under all the circumſtances, by the ſaid *Richard Slader* be not an act of *bankruptcy*, then the *poſtea* to be marked on the back: that the ſaid *Richard Slader* became a *bankrupt* on the 13th of *November*.

On this order, a rule was made as follows. *viz.*

It is ordered, that the plaintiffs ſhew cauſe why the *poſtea* in this cauſe ſhould not be indorſed, that *Richard Slader* became a *bankrupt* on the 13th of *November*, 1756.

On this rule, by the direction of the court, the matter was formed into the following caſe, *viz.*

J.D. an agent of *Iſaac De Mattos*, knowing *Slader* to be indebted, and not able to carry on his trade, unleſs ſome perſon in *London*, in the nature of a *banker*, would pay his draughts, negotiated in the month of *July*, 1756, an agreement between the ſaid *Iſaac De Mattos* and *Richard Slader*: that *De Mattos* ſhould pay *Slader*'s draughts on having ſecurity.

After hearing council on both ſides, the court gave their opinion.

Per curiam. Under all the circumſtances of this caſe, we are of opinion, that this conveyance of the *bankrupt's* whole ſubſtance to *De Mattos*, though by way of ſecurity, and for a valuable conſideration, is *fraudulent*, and an act of *bankruptcy*. Therefore, let the *poſtea* be indorſed: that *Richard Slader* became a *bankrupt* on the 23d of *October*. *Vide Bur. vol.* 1. *p.* 407.

Michaelmas, 31 *Geo.* 2. *Cockrell*, *Aſſignee* v. *Owſton*.

The queſtion before the court on this motion was, whether a *bankrupt's* certificate obtained after judgment in an action on a bail bond againſt the *bankrupt* himſelf, ſhould diſcharge the *bankrupt* from this judgment on the bail bond, as well as from the *original* debt.

Per curiam. It was held, that the certificate obtained *ſubſequent* to the bringing of this action on the bail bond (though ſuch certificate was founded on an act of *bankruptcy*, prior to the bringing this action on the bail bond) did not diſcharge the bail bond, although it diſcharged the *original* debt, for that this was a new and diſtinct cauſe of action.

The certificate would be a diſcharge of proceedings depending againſt bail in an action on the old debt, who were not already fixed; therefore the court diſcharged the rule to ſhew cauſe, and ordered that the *ſheriff* ſhould pay the money *levied* to the plaintiff. *Vide Bur. vol.* 1. *p.* 436.

Hilary, 32 *Geo.* 2. *Bailey* v. *Dillon*.

See this caſe fully ſtated in page 174 under the head of *Bail*. *Vide Bur. vol.* 2. *p.* 736.

Hilary, 32 *Geo.* 2. *The King* v. *The Mayor*, *Bailiffs*, *and Common Council of the Town of Liverpool*.

On a *mandamus* brought by *John Clegg*, to reſtore him to his place and office of one of the *common council* of the ſaid *Town*, from which he was removed on account of his having become a *bankrupt*, and not having received his certificate.

After having heard the arguments of council on both ſides, the court gave their opinion.

Lord *Manſfield*. *Clegg*'s merely being a *bankrupt*, is no objection to his continuing a *corporator*. It is no offence againſt the duty of his office, he may become a *bankrupt* without his own fault, and there is no *cenſus* requiſite as a qualification to be a *corporator*. Indeed ſome of the conſequencies of *bankruptcy*, may eventually become a cauſe of a motion, but the *bankruptcy* itſelf is not ſo; a man may be able to pay above 20*s*. in the pound, or he may very ſoon obtain a certificate after the commiſſion is iſſued.

His having become a *bankrupt*, and not having obtained his certificate under the commiſſion awarded againſt him, is not of itſelf alone ſufficient to diſqualify him from being a member of the *common council* of this town, whatever might have been the caſe, if certain eventual conſequences had happened to have followed therefrom.

Deniſon, *Foſter* and *Wilmot*, Juſtices, concurred with the *Chief Juſtice*.

Per curiam. Let there be a *peremptory mandamus* to admit him. *Vide Bur. vol.* 2. *p.* 723.

Hilary, 32 *Geo.* 2. *Tudway* v. *Bourn*.

On a caſe from the court of *Chancery*. *E. C.* by will gave a legacy of 200 *l.* to one *C.* then a *bankrupt*, whoſe certificate had, at the time of her death, been ſigned by four thirds of his creditors in number and value, and alſo by the commiſſioners; but the teſtatrix's death happened before its being confirmed and allowed by the Lord Keeper.

The commiſſioners, ſoon after her death, and after *C.*'s death, and before the allowance of the certificate, aſſigned this legacy to the defendant, *Bourn*, for the uſe of the creditors, after which the certificate was confirmed and allowed by the *Lord Keeper*, without oppoſition: but before the allowance of the certificate, the *bankrupt* himſelf died, having made the preſent plaintiff his executor.

The executor to the *bankrupt* brought his bill in *equity* againſt the executor of the teſtatrix, and againſt *Bourn* the aſſignee under the commiſſion, claiming this 200 *l.* legacy, as belonging to the *bankrupt*, by reaſon of his certificate having been ſigned before the death of the teſtatrix, and afterwards allowed and confirmed.

The creditors *inſiſted*, that it belonged to them, as it was aſſigned to their uſe and benefit by the commiſſioners, before the allowance and confirmation of the certificate by the *Lord Keeper*.

The queſtion for the opinion of the court was,

"Whether ſuch legacy belonged to the *bankrupt*'s executor, or to his creditors?"

After hearing council on both ſides, the court gave their opinion.

Lord *Mansfield*. Certainly creditors are not confined either by *law* or by *practice*, and any creditor whatever may object to the allowance of the *bankrupt*'s certificate. The allowance of the certificate has been ſometimes refuſed, and ſometimes adjourned, even where there has been no oppoſition. Many years may intervene between the ſigning and the allowance of a certificate, and large effects may in the mean time come to the *bankrupt*, and the *future* allowance ought not to over-reach them.

In this caſe the commiſſioners had actually aſſigned this legacy, and for that reaſon the creditors might not perhaps think it worth while to object to the certificate: it is not like the relation of a *bargain* and *ſale*, or the *ſurrender* of a *copyhold*; poſſibly in this caſe the money may have been actually divided out, and it would be very unreaſonable that all the creditors ſhould *refund* their dividends.

Foſter, Juſtice, concurred.

The court certified as follows: Having heard council on both ſides, on this caſe, we are of opinion, that the ſaid 200 *l.* legacy veſted in the aſſignee of the *bankrupt*, and now belongs to him for the benefit of the *bankrupt*'s creditors. *Vide Bur. vol.* 2. *p.* 716.

Trinity, 32 & 33 *Geo.* 2. *Coppendale* v. *Bridgen and another*.

On an action on the *caſe* brought againſt the defendants as *Sheriffs* of *Middleſex*, for a falſe return, *viz.* returning *nulla bona* to a *fieri facias* directing them to levy 2050 *l.* debt, and 6 *l.* 10 *s.* damages, on the goods of *J. D.* recovered againſt him in the court of *C. B.* a verdict was given for the plaintiff for 292 *l.* 7 *s.* damages, ſubject to the opinion of the court on the following caſe:

The plaintiff ſued out a bill of *Middleſex* againſt *J. D.* on the 2d of *May* 1757, returnable on *Wedneſday next after three weeks from the day of Eaſter*. That a warrant was made out thereon, and the party arreſted the ſame day. He being under arreſt on the 4th of *May*, was charged with a proceſs out of the *C. B.* at the ſuit of one *J. S.* and was the ſame day brought by *habeas*, before Mr. Juſtice *Clive*, and committed to the *Fleet*, charged with both actions. The plaintiff in *Trinity* term obtained judgment in the *C. B.* for 2000 *l.* debt, and 6 *l.* 10 *s.* damages. On the 17th of *June*, the plaintiff took out a *fieri fac.* in *Middleſex*, returnable *from the day of the Holy Trinity in three weeks*: and on the 18th of the ſame month, the defendants, the *ſheriffs*, took divers goods of the ſaid *J. D.* in execution, and levied thereout the clear ſum of 292 *l.* 7 *s.* and on the 5th day of *November* following, returned on ſuch proceſs, *nulla bona*.

It was further *ſtated* to the court, that the ſaid *J. D.* was a trader within the intent of the ſeveral ſtatutes concerning *bankrupts*; and that he remained in cuſtody at the plaintiff's ſuit from the time of the firſt arreſt, *viz.* the 2d of *May* 1757, until the 2d of *July* following, when he was diſcharged out of cuſtody, as to the plaintiff's ſuit; but continued in cuſtody as to the ſuit of the ſaid *J. S.* until the *6th day of the ſame July*. That a commiſſion of *bankruptcy*, on the *5th day of July*, iſſued againſt the ſaid *J. D.* and he was declared a *bankrupt* on the ſame day; and on the 21ſt of the ſame month, his eſtate and effects were in due manner aſſigned.

The following queſtion, grounded on the foregoing caſe, was made for the opinion of the court, *viz.*

"Whether, on the whole of this caſe, the plaintiff is entitled to recover againſt the defendants in this action?"

After hearing council on both ſides, the court gave their opinion.

Lord *Mansfield*. The *bankrupt* was firſt arreſted at the ſuit of the man who is the preſent plaintiff againſt the *ſheriff* of *Middleſex*, and was afterwards charged in cuſtody at the ſuit of *J. S.*

The queſtion is, whether the return be *falſe*? That is, whether theſe goods were the property of the *bankrupt*, and that depends on the *bankruptcy* of the defendant in the *original* action.

If *J. D.* was a *bankrupt* on the 2d of *May*, when he was firſt arreſted at the plaintiff's ſuit, or even on the 4th of *May*, when he was charged in cuſtody at the ſuit of *J. S.* the goods could not poſſibly belong to him, but muſt be the property of the *aſſignees* by *relation* backwards to that time.

The words of *ſtat.* 21 *Jac.* 1. *cap.* 19. are plain; being, "that all and every perſon, &c. who ſhall, &c. or being arreſted for debt, ſhall, after his or her arreſt, lie in priſon *two months* or more, on that or any *other* arreſt or detention in priſon for debt, ſhall be accounted and adjudged a *bankrupt* to all intents and purpoſes, from the time of his or her ſaid firſt arreſt."

In this caſe, *J. D.* was arreſted on the 2d of *May*, and on the 4th of *May* was charged in cuſtody with that and another action. It is admitted, that he did lie *two months* in priſon, *viz.* till the 6th of *July*, at *J. S.*'s ſuit, and till the 2d of *July*, before he was diſcharged, at the plaintiff's ſuit.

The lying *two months* in priſon is a ſtrong preſumption that the perſon was *inſolvent* at the time of the arreſt; and the act ſays, that "if he lies in priſon *two months* on that or any *other* arreſt, he ſhall be adjudged a *bankrupt* from the time of the firſt arreſt:" ſo that here is plainly an act of *bankruptcy* on the 4th of *May*, whatever diſpute may be made about there being one on the 2d of *May*. Therefore, the *ſheriff*'s return is true.

Nothing can ſupport the plaintiff's claim but his ſhewing that the *bankruptcy* was not incurred till after the 18th of *June*, which was the time when the goods were taken in execution.

Deniſon, *Foſter*, and *Wilmot*, Juſtices, concurred with the Chief Juſtice.

Per curiam. Let the *poſtea* be delivered to the defendants, in order to have a judgment of *nonſuit* entered thereon. *Vide Bur. vol.* 2. *p.* 814.

Trinity, 32 & 33 *Geo.* 2. *Wilſon* v. *Day*.

On an action of *treſpaſs* for entering the plaintiff's houſe, and taking away his goods, on *not guilty* pleaded, and a juſtification of the taking under a commiſſion againſt one *Lawſon*, the cauſe came on to be tried; and the matter was referred to the opinion of the court, on the following queſtion, which was directed to come on by way of motion,

Whether an aſſignment made by *Lawſon* was in itſelf an act of *bankruptcy*?

Lord *Mansfield* reduced the matter to the following caſe;

One *Lawſon*, a trader, was concerned with one *Titley* in circulating notes, and was really indebted to the plaintiff *Wilſon*, but being in a fright on *Titley*'s going off, ſent for *Wilſon* on *Thurſday* the 16th of *November*, and told him that *Titley* was gone off, and that many notes were ſtanding out againſt him, and that he could not ſtand his ground, and therefore propoſed to ſecure *Wilſon*; and on *Saturday* the 18th of *November* ſent for an attorney, and preſſed him to draw an aſſignment immediately from him the ſaid *Lawſon* to *Wilſon*. The attorney could not do it till the *Monday*, and it was privately executed on that day, though it bore date on the preceding *Saturday*. It was given to *Wilſon* to ſecure money really due to him, and which he was liable to pay on *Lawſon*'s account; and the deed purports it to be only a ſecurity for ſuch money, but does not *liquidate* the ſum due. A day or two after, a defeazance was executed, which was a ſeparate deed, making the former void, on payment of all the money due to *Wilſon*. The defeazance did not ſpecify the particular ſum no more than the aſſignment. After payment of *Wilſon*'s debt, the reſidue was to be in truſt for *Lawſon* himſelf. The aſſignment was a general aſſignment of every thing that *Lawſon* had in the world, and imported, that it was made to ſecure a large ſum, *viz.* 1800 *l.* and upwards, and recited the cauſe of making ſuch deed. There was no counterpart, and the original remained in the cuſtody and keeping of the aſſignor; no other poſſeſſion was delivered, but a letter of attorney given to one *Betham*, clerk to *Lawſon*, a perſon privy to the whole tranſaction, to collect, receive, diſpoſe, *&c.* but the goods continued in *Lawſon*'s houſe; no notice was given to the debtors of *Lawſon*, who owed him money, till *Lawſon* went off, which was a few days after. At the trial it appeared, that the debt really due to *Wilſon* from *Lawſon* was about 1840 *l.* although the deed which recited *Lawſon*'s circumſtances to be bad, and their manner of dealing, recited alſo, that there might be about 3000 *l.* that *Wilſon* might be liable to pay, but mentions only 30 *l.* as actually due; and then aſſigns every thing to *Wilſon*, &c. without any exception whatſoever.

After hearing council on both ſides on this caſe, the court gave their opinion:

Lord *Mansfield*. It is a plain caſe, both on the deed, and on the *collateral* circumſtances.

The *ſyſtem* of the *bankrupt* laws is, that the *bankrupt*'s effects ſhall be taken out of his own poſſeſſion, and be divided equally among all his creditors.

It is not neceſſary that the deed ſhould be fraudulent, as between the parties, nor is this deed at all ſo, for it is a very fair deed as to the parties, but it is made to prefer *Wilſon* to the *bankrupt*'s other creditors.

A trader, before he becomes a *bankrupt*, may prefer one creditor to another, and may pay him his debt, or may make a mortgage, with poſſeſſion delivered, or may aſſign part of his effects to one particular creditor, yet an aſſignment of his whole eſtate is of a very different conſideration, becauſe it tends to defeat the whole ſyſtem of the *bankrupt* laws.

In this caſe he aſſigns *all*, and inveſts his clerk with the management of his effects, inſtead of the commiſſioners.

This deed is an act of *bankruptcy* itſelf. It defeats the whole *bankrupt* law, nothing remains for the creditors in any ſhape, but his whole eſtate is put into the hands of his own truſtees immediately; therefore he is a *bankrupt* the moment he has executed the deed, for there is nothing at all left for his creditors; and this being an *unliquidated* demand, makes the caſe ſtronger.

Thus the matter ſtands on the deed.

The circumſtances confirm it; for in this caſe there is no viſible change of poſſeſſion, and the letter of attorney to receive the debts is a ſecret tranſaction unknown to every body elſe: and according to the caſe of *Ryal* v. *Rowles*, there ought to be notice given to the creditors. I therefore think this deed is in itſelf an act of *bankruptcy*.

Deniſon, *Foſter*, and *Wilmot*, Juſtices, concurred with the Chief Juſtice.

Per curiam, unanimouſly, let a judgment of *nonſuit* be entered for the defendant. *Vide Bur. vol.* 2. *p.* 827.

Hilary, 33 *Geo.* 2. *Foxcroft and another*, *Aſſignees of Satterthwaite*, *a Bankrupt*, v. *Devonſhire and others*.

On a motion for a new trial on ſuppoſition of a *miſdirection* given by the judge who tried the cauſe, the caſe was as follows:

An action on the *caſe* was brought by the plaintiffs againſt the defendants, for monies had and received by the defendants to the uſe of the plaintiffs as aſſignees of the *bankrupt*. To this action the defendants pleaded the general iſſue, that *they did not undertake*, *&c.* and iſſue was joined on this plea.

The cauſe was tried at *Lancaſter* Aſſizes, before *Noel*, Juſtice, and a verdict was found for the plaintiffs, of which verdict the judge then declared himſelf ſatisfied.

At the trial, the defendants council admitted that *Satterthwaite* was a trader; they likewiſe admitted the petitioning creditor's debt, the commiſſion, and the aſſignment of the *bankrupt*'s eſtate and effects to the aſſignees; but they diſputed the act of *bankruptcy* ſuppoſed to have been committed by *Satterthwaite*.

The action was brought for money ariſing from the ſale of goods conſigned by *Satterthwaite* to the defendants, as his *factors*, and ſold by them as ſuch, which money was admitted to be in the hands of the defendants, and amounted to 5314 *l.* 17 *s.* 9½ *d.*

The defendants proved, that they had paid ſeveral ſums on account of *Satterthwaite*'s draughts and otherwiſe, to his uſe, and on his account.

The plaintiffs proved ſome ſecret acts of *bankruptcy*, *viz.* his being denied to his creditors about *Chriſtmas* 1751, after which he appeared again publickly as uſual, till about *Auguſt* following. In *Auguſt* 1752 he totally ſtopped payment, on which the commiſſion of *bankruptcy* was taken out againſt him. Theſe ſecret acts of *bankruptcy* covered the time of the conſignment to the defendants, and alſo the *ſale* and *time* when the money was advanced by them, to the uſe and order of the *bankrupt*.

The defendants council reſted their caſe on *two points*, *viz.*

1ſt. Whether the defendants were not entitled, as *factors* for *Satterthwaite*, to retain for the *general balance* of their account.

2dly. Whether they were not within the protection of ſtatute 19 *Geo.* 2. *cap.* 31. *ſect.* 1.

The plaintiffs council in reply *objected*, that this tranſaction of the defendants was *fraudulent*, for that they knew and were appriſed that *Satterthwaite* was inſolvent at the time when his effects came into their hands.

The jury being of the ſame opinion, gave the plaintiffs a verdict for the whole money, except *commiſſion* and charges of *ſale*.

On this motion, after hearing council on both ſides, the court gave their opinion.

Per curiam. We are all clearly of opinion, that this rule muſt be made abſolute for a *new trial* on payment of *coſts*. *Vide Bur. vol.* 2. *p.* 932.

Hilary, 1 *Geo.* 3. *The King* v. *John Perrot*.

The defendant was brought before this court from *Newgate* by *habeas*, to get diſcharged from a commitment made by commiſſioners under a commiſſion iſſued againſt him, for not ſubmitting himſelf to them, and making a full anſwer to the queſtions put to him, to their ſatisfaction.

The queſtion put to the *bankrupt* by the commiſſioners was in theſe words, *viz.*

“ As you do admit that you have ſpent the laſt
“ week previous to this your examination with
“ Mr. *M.* (one of your aſſignees) to ſettle and
“ adjuſt your accounts, and to draw up a true
“ ſtate thereof, to enable you to cloſe ſuch your
“ examination; and do likewiſe admit, that on
“ ſuch ſtate thereof it appears, that after giving
“ you credit for all ſums of money paid by
“ you, and making you debtor for all goods
“ ſold and delivered to you from your firſt
“ entering into trade to the time of your *bank-*
“ *ruptcy*, there is a deficiency of the ſum of
“ 13,513 *l.* give a true and particular account

"what is become of the ſame, and how and in
"what manner you have applied and diſpoſed
"thereof."

To this queſtion the *bankrupt* gave the following general anſwer, *viz.*

"On the goods ſold this laſt year, I have loſt
"upwards of 2000*l.* and by *mournings*, I have
"loſt upwards of 1000*l.* and for nine or ten
"years I have been *extremely extravagant*, and
"ſpent large ſums of money." *J. P.*

His council *urged* to the court as a ground for his diſcharge,

1ſt. That the anſwer which he had already given before the commiſſioners was a *full*, *ſufficient*, and *ſatisfactory* anſwer, and *the beſt* and *only one* that could be given by an idle extravagant man, who had never kept any accounts, and conſequently, that impriſoning him until he ſhall give a more full and ſatisfactory anſwer to the queſtion, was an impriſonment for life.

2dly. That the *power* and *juriſdiction* of the commiſſioners to take the *bankrupt's* examination, &c. was *temporary*, and *confined* to the time allowed to the *bankrupt* to come in and ſurrender himſelf, and ſubmit to be examined, after which the commiſſioners had no further power over the *bankrupt* at all; and in ſupport of this *objection*, his council relied on the conſtruction of the *bankrupt* acts, and particularly *ſtat.* 5 *Geo.* 2. *cap.* 30. *ſect.* 1, 2, & 3.

The council for the commiſſioners, &c. inſiſted, 1ſt. That the *bankrupt's* anſwer was *nugatory* and *inſufficient*. 2dly. That the conſtruction put by the *bankrupt's* council on the *bankrupt* acts was falſe, and contrary to the genuine ſpirit and conſtruction of thoſe acts; and, if allowed, would pervert their very end and intent.

Lord *Mansfield*. If the queſtion put to the *bankrupt* by the commiſſioners was improper, or if proper, and the anſwer ſatisfactory, he ought to be diſcharged, but this is a proper queſtion, and the anſwer is very *inſufficient* and *unſatisfactory*.

The conſtruction put by the defendant's council in objection to the commitment, is founded on mere arbitrary implication, the *legiſlature* ſay no ſuch thing. *Stat.* 5 *Geo.* 2. *cap.* 30. *ſect.* 16. gives the commiſſioners a power to commit the *bankrupt until* he ſhall ſubmit, and a *full* anſwer make to their ſatisfaction. The 17th *ſect.* of that *ſtatute* gives power to the court, or judge, to re-commit the *bankrupt* to the ſame priſon, there to remain as aforeſaid, *until* he ſhall conform as aforeſaid.

His examination is not *confined* to be within the time limited for the *bankrupt* to come in, *ſurrender*, and *ſubmit* to be examined. The power of the commiſſioners is *general*, and not limited to the compaſs of time given the *bankrupt* to come in.

In this *caſe*, the commiſſioners have, within the *limited* time, required a further anſwer of the *bankrupt* to their queſtion, and committed him for his refuſal; I am clearly ſatisfied that he cannot redeem himſelf from his impriſonment, but by giving a *full* anſwer to the queſtion. If he gives a *full* anſwer, and the commiſſioners are not ſatisfied with it, he will then be entitled to his proper remedy.

Foſter and *Wilmot*, Juſtices, concurred with the Chief Juſtice.

Per curiam, unanimouſly, let the defendant be remanded. *Vide Bur. vol.* 2. *p.* 1122.

Note. The *bankrupt* was brought up again by *habeas corpus* in *Trinity* term following, but remanded, becauſe his anſwer to the commiſſioners was *incomplete* and *unſatisfactory*. *Vide Bur. vol.* 2. *p.* 1215.

Hilary, 3 *Geo.* 3. *Howard, and another, Executors, &c.* v. *Jemmet, Executor, &c.*

On *ſhewing cauſe* againſt ſetting aſide a *fieri fac.* and paying back the money levied thereon, the caſe was:

The defendant was a *bankrupt*, againſt whom a commiſſion had iſſued, and who had afterwards obtained his certificate: that the preſent action was brought againſt him as executor, on a bond entered into by the defendant's teſtator: that the defendant had, between the time of the iſſuing of the commiſſion, and the time of obtaining his certificate, pleaded a falſe plea, *viz.* that he had no *aſſets*, when in fact he had aſſets, which was found againſt him; on which the plaintiff had judgment *de bonis teſtatoris, ſi,* &c. and againſt the defendant himſelf *de bonis propriis* for the coſts.

Per curiam. The pleading a falſe plea was his own act, and his own fault, and the judgment and execution *de bonis propriis* for coſts, was ſingly owing to this his falſe plea, which was ſubſequent to the iſſuing of the commiſſion, conſequently it could not have been proved under the commiſſion, and therefore cannot be diſcharged by the certificate: therefore let the rule be diſcharged.

Lord *Mansfield*. If an executor becomes a *bankrupt*, the commiſſioners cannot ſeize the ſpecific effects of his teſtator, not even in *money*, which ſpecifically can be diſtinguiſhed and aſcertained to belong to ſuch teſtator, and not to the *bankrupt* himſelf. *Vide Bur. vol.* 3. *p.* 1368, 1369.

Trinity, 3 *Geo.* 3. *Brown* v. *Chapman*.

On a writ of *error* brought on a judgment in the *C. B.* on an action on the *caſe*, for falſely and maliciouſly ſuing out a commiſſion of *bankruptcy* againſt him.

The plaintiff in *error's* council *objected* to the action, and ſaid it did not lie, becauſe the ſtatutes of *bankruptcy* have provided a particular remedy, and the thing itſelf meaning *bankruptcy*, did not exiſt at *common law*.

Lord *Mansfield*. There is no clauſe in *ſtat.* 5 *Geo.* 2. *cap.* 30. that takes away the *common law* remedy, nor that ſays, that the party ſhall not recover more than 200*l.* damages.

It never can be for the benefit of trade, that a man ſhould be at liberty to ſue out commiſſions of *bankruptcy* maliciouſly.

Per curiam. Let the judgment of the *C. B.* be affirmed. *Vide Bur. vol.* 3. *p.* 1418.

Michaelmas, 6 *Geo.* 3. *Lavie, and another, Aſſignees of Jane Cox, a Bankrupt,* v. *Phillips and others, Aſſignees of John Cox, a Bankrupt.*

An action of *trover* was brought by the aſſignees of *Jane Cox*, a ſole trader in *London*, and a *bankrupt*, againſt the aſſignees of *John Cox*, her huſband, who was alſo a *bankrupt*, on which a verdict was given for the plaintiffs, ſubject to the opinion of the court, on the following *facts* and *cuſtom*:

1ſt. The commiſſion iſſued againſt *John Cox*, the huſband, on the 13th of *March* 1764 and the commiſſion againſt *Jane* his wife on the 26th of *April* 1764.

2dly. The *cuſtom* of *London*, which is as follows:
"Where a *feme covert* of a huſband uſeth any craft in
"the ſaid city on her *ſole* account, whereof the huſ-
"band meddleth nothing, ſuch a woman ſhall be
"charged as a *feme ſole* concerning every thing that
"toucheth her craft; and if the huſband and wife
"ſhall be impleaded in ſuch caſe, the wife ſhall
"plead as a *feme ſole*: and if ſhe is condemned, ſhe
"ſhall be committed to priſon till ſhe has made ſatiſ-
"faction, and the huſband and his goods ſhall not in
"ſuch caſe be charged or impeached."

3dly. *Jane Cox*, the wife, was a *ſole* trader, and carried on a *ſeparate* trade within the ſaid city, according to the *cuſtom* of the ſaid city of *London*.

4thly. The *fans* for which this action was brought were part of the effects of her *ſole* trade.

5thly. The aſſignees of the huſband's commiſſion ſeized thoſe *fans* the day the commiſſion iſſued againſt him.

The following queſtions were put:

1ſt. Whether the aſſignees of *John* the huſband had a right to take the ſeparate effects of *Jane* his wife, who was a *ſole* trader, and apply them towards ſatiſfaction of the debts of the huſband, under the commiſſion awarded againſt him, in prejudice of the ſeparate creditors of his wife?

2dly. Whether a commiſſion of *bankruptcy* may iſſue againſt a married woman, being a *ſole* trader?

After hearing council on both ſides, the court gave their opinion:

Lord *Mansfield*. I am of opinion that a commiſſion may be taken out againſt her as a *ſole* trader, with reſpect to her ſeparate effects in trade.

Wilmot, *Yates*, and *Aſton*, Juſtices, concurred with the Chief Juſtice.

Per curiam, unanimouſly. Let judgment be for the plaintiffs. *Vide Bur. vol.* 3. *p.* 1776.

Baron and Feme.

Eaſter, 4 *W.* 3. *Hare* v. *White & Ux.*

In an action of *treſpaſs* brought againſt *baron* and *feme*, upon the general iſſue the *baron* was acquitted, and the *feme* found guilty; and the court was moved that the *baron* ſhould have been joined only for conformity, and there is a writ in the regiſter to that purpoſe, 105 *b.* which ought to be purſued; and ſo is *Yelv.* 106.

But *per curiam*. There is no diverſity in the caſe of *baron* and *feme*, and where *treſpaſs* is againſt any other two, and one of them is found guilty. *Vide Mod. Rep. vol.* 12. *p.* 19.

Michaelmas, 4 *W. & M.* *Nelthrop & Ux.* v. *Anderſon.*

In an action of *trover* brought by a *man and his wife*, where the plaintiffs declare, for that whereas they were poſſeſſed, *&c.* the defendant converted to the damage of both, held naught after a verdict; for the poſſeſſion of a wife is the poſſeſſion of her huſband, and ſo is the property; ſo that the converſion cannot be to the damage of the wife, but of the huſband only. *Vide Salk. vol.* 1. *p.* 114.

Michaelmas, 4 *W. & M.* *Buckley* v. *Collier.*

In an action brought by the *huſband* and *wife* on the *caſe*, for work done by the *wife* during the *coverture*; the queſtion was, whether they could join in this action.

Held in *treſpaſs*, they may join for entering on the land, *and carrying away the graſs of them there growing*, *&c.*

So likewiſe where the huſband has land in the right of his wife, as a jointure by a former huſband, and ſhe is to have the lops and ſhrowds of the trees growing thereon, and he who has the inheritance cuts them down; they may join in an action to recover damages, becauſe it ſurvives to her after his death.

But the court was of opinion, that in the principal caſe the declaration was not good, becauſe the action was brought for a *perſonal* thing that could not ſurvive, and in *perſonal* actions, the law is clear they cannot join. *Cro. Eliz.* 133. *Vide Mod. Rep. vol.* 4. *p.* 156.

Eaſter, 6 *W. & M.* *Jones* v. *Morley.*

In *treſpaſs* and *ejectment* for the manor of *Frenſham* in the county of *Surry*, a verdict was found, the ſubſtance whereof was,

That *Ann Bowyer* was ſeized thereof in fee, and by indentures of leaſe and releaſe, bearing date the 22d and 23d day of *January* 1664, and made between *Edward Morley*, who was brother to the defendant, of the firſt part; the ſaid *Ann Bowyer*, of the ſecond part; and the defendant, Sir *William Morley*, and *John Wells*, of the third part; in conſideration of a marriage then intended between the ſaid *Edward* and *Ann*, and of a ſettlement of lands to be made by the ſaid *Edward* in jointure, of the yearly value of 300 *l.* ſhe the ſaid *Ann* did convey the ſaid manor to the defendant Sir *William Morley*, and *John Wells*, and their heirs, *&c.* in truſt for the ſaid *Ann* and her heirs, until the ſaid marriage ſhould take effect, and until ſuch ſettlement in jointure ſhould be made; and from and after ſuch marriage and ſettlement, then to the uſe of the ſaid *Edward Morley* and his heirs.

That afterwards the ſaid marriage was ſolemnized, and then, by indenture, bearing date the 29th of *January* 1665, and made between the *huſband and wife*, of the one part; and *R. Y.* and *J. T.* of the other part; it was recited, that whereas a fine was already acknowledged and agreed to be levied the next *Hilary* term, by the ſaid *Edward* and *Ann*, of the aforeſaid manor, it was declared, that the uſes thereof ſhould be and enure to the ſaid *Edward* and his heirs.

But before the ſaid fine was levied, *viz.* on the 31ſt of *January*, being two days after the date of the former deed, there was another deed made between the *huſband* of the one part, and the *wife* of the other part; by which they did covenant and agree to make void all former agreements, contracts, writings, and deeds, whatſoever, until the ſaid *huſband* ſhould fulfil the covenants in the marriage ſettlement of the 23d of *January*; and for default thereof, the ſaid *Ann* and her heirs ſhould enter and hold the ſaid premiſes.

The fine was levied in the ſame *Hilary* term in which the deed to lead the uſes thereof was dated, *viz.* on the 9th of *February*.

The jury find that 300 *l. per ann.* was not ſettled on the ſaid *Ann* in jointure by *Edward Morley*; but only 250 *l. per annum*, and that charged with an annuity of 15 *l. per annum* to another perſon.

In *July* following, *viz.* 1666. *Edward Morley* mortgaged the premiſes to one *D.* for 600 *l.* and the year following he died without iſſue, and *Ann* ſurvived about twenty-one years, and is ſince dead without iſſue.

Sir *William Morley*, the defendant, as brother and heir at law to *Edward*, entered after the death of *Ann*, and diſcharged the mortgage made to *D.* and now, the plaintiff, *Henry Bellingham*, as couſin and heir to *Ann Bowyer*, brought the ejectment.

The queſtions on this ſpecial verdict were;

1ſt. Whether by the deed dated the 29th of *January*, any uſe was raiſed to *Edward Morley*, becauſe it was dated in *Hilary* term, and it declared the uſes of a fine as of next *Hilary* term following, which muſt be a year afterwards?

The chief queſtion was, whether the deed of the 31ſt of *January* did not revoke and controul that of the 29th preceding, becauſe it was made and executed before the fine was levied?

Per curiam. The ſecond deed is not only evidence, but it actually changes the uſes of the firſt deed; for before the *ſtatute of frauds*, any thing, even a *parol* declaration of the uſes of a fine, was good.

Now, ſuppoſing this to be a deed poll, yet it will have the ſame operation as a deed indented, for they both work by way of *eſtoppel*. And therefore in *Hilary* term, judgment was given for the plaintiff. The matter was afterwards removed by *writ of error* into the Houſe of Peers, and there the judgment was affirmed. *Vide Mod. Rep. vol.* 4. *p.* 261.

Hilary, 7 *W.* 3. *Chamberlain* v. *Huetſon.*

There was a libel, *ex officio*, againſt *Chamberlain* for incontinency, at the promotion of Mrs. *Huetſon*, which is alledged to be with her huſband; whereon a ſentence was given, and penance enjoined; and, according to the courſe of the court, coſts awarded to *Huetſon*, who is not divorced *a menſa & thoro*, i. e. *from bed and board* from her huſband; the huſband releaſes the coſts to *Chamberlain*; ſhe pleads this in the *eccleſiaſtical court*, and the plea being refuſed, ſhe prayed a prohibition.

Holt, C. J. If a *feme covert* ſues for defamation in the ſpiritual court, and there obtains ſentence, and coſts are given, if ſhe cohabits with her huſband at that time he may releaſe them; but if ſhe be divorced *a menſa & thoro*, though the marriage ſtill continues, he cannot; becauſe if there is a divorce, the huſband is to allow the wife *alimony*; and if ſhe has *alimony*, the coſts expended in the ſuit are ſuppoſed to iſſue out of it, and therefore the huſband cannot releaſe it, becauſe ſhe has it ſeparate; which is the reaſon, though not mentioned, of *Motam*'s caſe, 2 *Roll. Abr.* 301. becauſe there is no *alimony*; and if he may releaſe the duty, he may releaſe the coſts: therefore, in this caſe he may releaſe the coſts, there being no divorce; I think a prohibition muſt be granted. But *Rokeby*, on account of the ſcandalouſneſs of the cauſe, was againſt it; and afterwards a propoſal was made for bringing money into court, for Mrs. *Huetſon* to take out as ſhe had occaſion, to carry on the charges of the prohibition, and then to declare; but the matter has not been moved ſince. *Vide Mod. Rep. vol.* 12. *p.* 89.

Hilary, 7 *W*. 3. *Carpenter* v. *Fauſtin*.

An action was brought againſt *Baron* and *Feme* for a *battery* done by the wife; the huſband was a priſoner in the *King's Bench*, before the action brought, and the plaintiff delivered a declaration to the turnkey of the priſon againſt the *huſband* and *wife* for this battery; and upon rules given to plead, judgment was entered by *nil dicit* againſt both, and the wife taken in execution. It was moved, that this was irregular; for upon delivery of the declaration, the plaintiff ſhould have filed common bail for him and his wife; or ſhould have made an attorney for him and his wife, who ſhould have appeared for them.

Per Holt, Chief Juſtice. The plaintiff ought to have ſued out proceſs againſt the *huſband* and *wife*, and the ſheriff ſhould have returned a *non eſt inventus* for the *huſband*, and a *cepi corpus* for the *wife*; and then upon common bail filed for her, there might be judgment againſt both: it was objected, if there be proceſs againſt *baron* and *feme*, and *non eſt inventus* for the *baron*, and a *cepi* as to the *feme*, ſhe ſhall be diſcharged. *Vide* 2 *Cro.* 445. To which *Holt* anſwered, no, ſhe ſhall not be diſcharged but upon common bail, and then new proceſs ſhall go againſt the *baron* with the ſame day given to the *wife*. 1 *Mod.* 8. And becauſe no bail was entered for the wife, the judgment was ſet aſide. *Vide Salk. vol.* 1. *p.* 115.

Hilary, 8 *W*. 3. *Anonymous*.

Per Holt, Chief Juſtice. If an action be brought againſt *huſband* and *wife*, and the *huſband* is arreſted, he ſhall give a bail bond for the appearance of him and his wife, and muſt put in bail for both; but if a perſon brings an action againſt the *huſband* only, he cannot declare againſt *huſband* and *wife*. *Vide Salk. vol.* 1. *p.* 115.

Hilary, 8 & 9 *W*. 3. *Derry* v. *The Dutcheſs of Mazarine*.

Derry brought an action againſt the *Dutcheſs* for wages and money lent; the defendant pleaded *coverture*, and iſſue thereon. And notwithſtanding that there was very ſtrong evidence at the trial, that the Duke of *Mazarine*, the defendant's *huſband*, was alive in *France*, the *jury* found for the plaintiff, becauſe the *Dutcheſs* had lived here for twenty years as a *feme ſole*, and had contracted continually as ſuch; and he who was her *huſband* was an alien enemy. And it was moved on behalf of the *Dutcheſs*, that this verdict was againſt evidence and law, for a *feme covert* cannot be *ſole* charged for debts and contracts, without a divorce and alimony, although the *huſband* be a foreigner.

Holt, Chief Juſtice. When the *huſband* is an alien enemy, and under any abſolute diſability to come and live here, the law perhaps will make the *wife* of ſuch a *huſband* chargeable as a *feme ſole* for her debts and contracts; for this caſe does not differ from the caſe of Lady *Belknap* and Lady *Weyland*, who were allowed to be able to ſue and be ſued on the abjuration or baniſhment of their *huſbands*, as if they had been *ſole*: and afterwards the plaintiff had judgment. *Vide Raym. vol.* 1. *p.* 147.

Eaſter, 9 *W*. 3. *Garbrand* v. *Allen*. *At Guildhall*.

An action of *trover* being brought by the *huſband* for money paid by the plaintiff's *wife* to the defendant for land conveyed by the defendant to the plaintiff's *wife*, by bargain and ſale, without the *huſband*'s knowledge.

Holt, Chief Juſtice. If articles of agreement are made by a *feme covert*, by the order and appointment of her *huſband*, and the money is paid by the *wife* in purſuance of ſuch agreement; or if the *huſband* (tho' not privy at the time of the purchaſe) afterwards conſents to it, the property of the money is altered; and the *huſband* cannot maintain *trover*; but if he is not privy to ſuch purchaſe, nor agrees to it, *trover* will lie for him againſt the vendor, who receives his money of his *wife*. *Vide Raym. vol.* 1. *p.* 224.

Michaelmas, 9 *W*. 3. *Woodyer* v. *Greſham*.

Judgment was recovered by a *feme ſole*, who afterwards married, and her *huſband* and *ſhe* ſued out a *ſci. fa.* and had an award of execution; but before execution executed, the *wife* died: the *huſband* ſued out a new *ſci. facias*, to which, on demurrer, it was objected, that the award on the firſt *ſcire facias* made no alteration, for the execution ſtill muſt be grounded on the firſt judgment, and not on the award; and that this being a *choſe in action*, muſt go to the adminiſtrator of the *wife*, and not to the ſurviving *huſband*.

Per Holt, Chief Juſtice. This caſe differs not from the caſe of *Obrian* v. *Ram*, *Michaelmas*, 3 *Jac.* 2. wherein judgment was recovered againſt a *feme ſole*, who afterwards married; a *ſcire facias* was ſued out againſt the *huſband* and *wife*, and judgment given, *that he ſhould have his execution* againſt the *huſband* and *wife for the debt and damages aforeſaid*. After this award, and before execution executed, the wife died, and after her death a new *ſcire facias* was iſſued againſt the *huſband*, and he was held chargeable; which proves that the award or judgment *of execution* on the *ſcire facias* makes a plain alteration; for the *huſband* ſurviving had not been liable on the firſt judgment only: by the ſame reaſon, the award on the *ſcire facias* is attached in the *huſband*, and ſhall ſurvive, for it is but equal the *huſband* ſhould charge in the ſame meaſure he may be charged. *Vide Salk. vol.* 1. *p.* 117.

Michaelmas, 10 *W*. 3. *Yard* v. *Ellard*.

This was an action on the *caſe*, wherein the plaintiff declares, that whereas the defendant, on the 6th of *June* 9 *W*. 3. was indebted to the plaintiff and *Suſannah*, his wife, as executrix of the teſtament of *S. T.* 6 *l.* for arrears of rent due to *S. T.* in his life-time; and ſo being indebted, in conſideration the ſaid plaintiff would give him time to pay the ſame till *Michaelmas*, then next following, he promiſed to pay the ſaid 6 *l.* to the ſaid plaintiff, at the feaſt of *Michaelmas* then next following; and ſhews that he gave him time till the next *Michaelmas*, but that the ſaid defendant has not paid, and avers the life of his wife; and on *non aſſumpſit* pleaded, and a verdict for the plaintiff, it was moved in arreſt of judgment, that this action ſhould have been brought by the *baron* and *feme*; becauſe the debt, which was the foundation of the promiſe, was due to the wife as executrix; and the money, when recovered would enſue the nature of the debt, and be *aſſets*. But the whole court held the action was well brought by the huſband only; as in the caſe of *Lea* v. *Thinne*, *Yelv.* 84. and it would have been ill if it had been brought by the wife, becauſe the wife was not privy to the contract; but if it is a ſpecial promiſe made to the huſband only, to whom the payment is only to be made; and the recovery on this promiſe muſt be only by him, in his own right; which promiſe does not alter the debt, becauſe it is not of a higher nature, but is a ſort of collateral ſecurity; and the money recovered on this promiſe, is no part of the perſonal eſtate of the teſtator; for if the huſband dies, his executor ſhall have execution thereof; but yet, when it is recovered, it is a *devaſtavit* in the huſband, ſo far as he recovers. *Vide Mod. Rep. vol.* 12. *p.* 207. *Raym. vol.* 1. *p.* 386. *Salk. vol.* 1. *p.* 117.

Michaelmas, 10 *W*. 3. *Tod* v. *Stokes or Stoakes*. *At Guildhall*.

The plaintiff, an *appothecary*, ſued the defendant, a *parſon*, living in *Chicheſter*, for phyſic adminiſtered to his wife in *London*; on *non aſſumpſit* pleaded, it appeared on evidence, that the defendant and his wife had been parted by conſent, for *five years* laſt paſt, and that on a ſeparation, by articles made to truſtees of the wife's naming, the defendant had obliged himſelf to allow the wife 200 *l.* a year; which he did accordingly, and had a covenant from the truſtees to *exonerate* him of all the charges of the wife; and that the plaintiff did not know the wife to be a *feme covert*, at the time the medicines were adminiſtered.

Per Holt, C. J. theſe points were held. 1ſt. That the reaſon why the huſband ſhall pay debts contracted by his wife, is on the credit the *law* gives her by implication, in reſpect of cohabitation; and is like a credit given to a ſervant. 2dly, That if the huſband and wife part by conſent, and the huſband ſecures her an allowance, it is in conſideration that he ſhould not be charged any more by her; and it is unreaſonable he ſhould be charged for victuals or phyſick, or other neceſſaries after. 3dly. That a perſonal knowledge of ſuch agreement is not neceſſary, ſo it be publicly and notoriouſly known. 4thly. That ſuch public knowledge of the agreement need not be at *London*, where the debt was contracted, but is ſufficient if it be where the parties lived, *viz.* in this caſe at *Chicheſter*. 5thly. That if the debt was contracted by the wife, in ſo ſhort a time after the agreement, as it could not be known at *Chicheſter*, in that caſe the huſband would be liable. 6thly. If the huſband turns away his wife, he muſt ſend credit with her for reaſonable expences. 7thly. If the wife goes away without the conſent of her huſband, ſhe ſhall find credit where ſhe goes, without any charge to the huſband, or his giving any perſonal notice of leaving him; and he ſaid, *Scot* and *Manby*'s caſe had been carried too far in this; and he remembred a caſe before him at *Exeter* aſſizes, 10 *W.* 3. between *Lungworthy* and *Huckmore*, where he held, that if a wife elopes from her huſband, and takes up neceſſaries from a tradeſman, who has no notice of the elopement, the huſband ſhould not be liable; and it is ſufficient for the huſband to give general notice, that tradeſmen, *&c.* ſhould not truſt his wife. But Serjeant *Wright*, now Lord Keeper, at the ſame time acquainted his Lordſhip, that *Treby*, Chief Juſtice of the *Common Pleas*, had ruled that point otherwiſe in an action between the ſame parties; to which *Holt*, Chief Juſtice, ſaid, that notwithſtanding, he would adhere to his own opinion in all the points aforeſaid; and the plaintiff was nonſuited. *Vide Mod. Rep. vol.* 12. *p.* 244. and *Raym. vol.* 1. *p.* 444.

Eaſter, 11 *W.* 3. *Cage* v. *Acton*.

In *debt* brought againſt the defendant as adminiſtratrix to her *huſband*, for arrears of rent on a leaſe made to him in his life time; the defendant pleaded, that before the intermarriage between him and her, there was a bond entered into by him to her, to pay ſo much money to her, her executors, adminiſtrators, or aſſigns, on condition, that in caſe ſhe ſhould ſurvive him, he would leave her ſo much money; that he has not performed the condition; that ſhe has not aſſets above 200 *l.* which is a leſs ſum than that which he had bound himſelf to pay her; and that ſhe retained that in part; to which plea the plaintiff demurred generally.

The points in this caſe were two; firſt, whether *debt* on a *bond* was of as high a nature as *rent*; ſo that an execution might give it preference of payment.

2dly. Whether the ſubſequent marriage was a releaſe of the bond.

Gould, Juſtice. Marriage clearly is a releaſe of all bonds and ſpecialties, whether contingent or not, which by any poſſibility may become payable during the marriage. 1ſt. Becauſe *huſband* and *wife* are but one perſon in law, and ſo there can be no payment between them. 2dly. Becauſe the ſuit is once ſuſpended; and then it ſhall be ever ſo. 11 *H.* 7. 15. 10 *H.* 7. 1 *Inſt.* 264. *Dy.* 141.

But the great objection is, how this bond ſhall ſubſiſt, there being now nobody to whom it is due, and every obligation is an *immediate debt*; and a huſband owing a thing to his wife, is owing a thing to himſelf, which is abſurd.

Anſwer. The law very often makes a fiction for the preſervation of a right; and a ſuſpenſion of a perſonal duty, is not always an extinguiſhment. *Lit. ſect.* 646. 647. And this is a neceſſary and prudent proviſion in caſe of ſurvivorſhip; and it would be hard marriage ſhould deſtroy that whereof it was the cauſe; the law by its own operation will do no wrong; and ſure it would be a great wrong to defeat the wife of her proviſion. 1 *Inſt.* 264. 8 *Co.* 136. If a *feme* executrix takes a debtor to huſband, it is no releaſe of the debt, becauſe it would be a *devaſtavit*; and here the law will interpoſe and take away the inconſiſtency of debtor and debtee between *husband* and *wife*, by taking it into its own cuſtody, and he quoted the caſe of *Dorceſter* v. *Web.* 1 *Cro.* & 27 *H.* 8. *f.* 7 *b.* A man obligor, marries a woman obligee, who are afterwards divorced, the debt revives, and the man ſhall be ſued by the woman again; and though there be an *immediate debt*, yet it is qualified *in an action of debt*, and is no more than a proviſion in caſe of chattel, which the law would make in caſe of inheritance. 2 *Cro.* 571. *Hob.* 216. *Smith* v. *Stafford*, though it was urged to be a preſent promiſe and lien, releaſeable by the *wife*, yet judgment was, that ſuch promiſe was not releaſed by the marriage, againſt the opinion of *Hob.* ſo here the juſtice of the law will preſerve the debt for an honeſt intent. *Noy* 26. *Hut.* 17. 18. and in *Lit. Rep.* it is ſaid, that marriage is only a ſuſpenſion.

Turton, Juſtice. This bond was not entered into by any preſent debt or duty, and if it had, it had been extinguiſhed by the marriage; for as bonds given by others to the *wife*, are by marriage given to and releaſeable by the *husband*; ſo bonds which ſhe has from the *husband*, are veſted in him, and ſo releaſed by act in law. 1 *Inſt.* 264. *Dy.* 6. 7. 140. 1 *Ro. Abr.* 184. 8 *Co.* 186. *Mo.* 236. *Cr. Ca.* 333, *&c.* And it is a rule in law, that releaſes in law are more mildly taken againſt the releaſer, than releaſes in deed. 1 *Inſt.* 264. 265. And it is unnatural that marriage ſhould be a releaſe of that which was made by reaſon of the marriage; if the debtee makes the debtor executor, it is a releaſe of the duty; but if a *feme* executrix takes the debtor for her huband, that is only a ſuſpenſion of the action, and the duty remains. *Plow.* 184. *Hut.* 99. 1 *Inſt.* 264. 1 *Ro. Abr.* 194. *Hob.* 10 *Mo.* 855. A bond may be compared to a covenant or promiſe; for no action can be brought on any of them till broke, and a promiſe is not releaſed by marriage, *therefore* bond neither, and quoted *Dy.* 51. *Lit. Rep. Clayton*'s caſe. *Obj.* That though ſtatute be of a higher nature, it is no *devaſtavit* to pay the bond before it, becauſe it is not due till broke. *Vide Mo.* 752. 5 *Co.* 28.

Holt, Chief Juſtice, *contra*. There are two queſtions in the caſe; 1ſt. Whether *rent* be of equal degree with a *bond*, or of higher nature than a *bond*; and if payment of debt on a bond may be pleaded in bar of debt for rent; and a caſe out of 2 *Vent.* was quoted at the bar to prove debt was of an higher nature than a bond. But I hold them to be of equal degree; for if it be a leaſe by parol, it is in the *realty*, and that is in equal degree with a bond, and payment of one by an executor is a good plea in bar of the other; and *Newport* v. *Godfrey*'s caſe does not contradict this; it was *debt* for *rent* on a parol leaſe, the defendant pleaded ſuch a debt on obligation, *beyond which*, he had not aſſets, for being equal in degree, he could not plead the one againſt the other till judgment, or payment of the money; *but otherwiſe*, if one of them be of a higher nature *than the other*; and there is no diverſity between *debt* in the *realty* by *ſpecialty*, and in *realty without ſpecialty*, as to equality of degrees; ſo that if there were no more in this caſe, the plea would be good:

As to the other point, which is of great conſequence, whether the bond is not extinguiſhed by marriage, though given in conſideration of marriage:

I hold the bond to be extinguiſhed by the marriage, and that the bond was a preſent immediate duty from the ſealing and delivery of it; and though it is qualified, that is, no action can be brought on it, till after the death of the *husband*, a releaſe of all actions or all debts will releaſe it, for a releaſe of all demands will diſcharge a debt on a condition ſubſequent, but not on a condition precedent. *Lit. ſect.* 512. The caſe where the executor of the obligee marries the obligor is different, for there are divers rights; but where the obligee marries the obligor, there he is to receive money to his own uſe; and in my opinion, even *Chancery* would not give relief in this caſe, though it may be thought much more proper for *Equity* than law.

The matter, however, went into *Chancery*, where relief was given, the bond being conſidered as a marriage agreement. *Vide Mod. Rep. vol.* 12. *p.* 288.

Eaſter, 11 *W.* 3. *White* v. *Eldridge and his Wife.*

In an action of *treſpaſs* brought againſt *husband* and *wife*, on *not guilty* pleaded, a verdict was given for the plaintiff. And now, the defendant's council moved in arreſt of judgment, that the *wife* could not be charged for the treſpaſs of the *husband*, no more than they can be charged for the converſion of goods *to their uſe*.

But the court over-ruled the exception. *Vide Raym. vol.* 1. *p.* 443.

Michaelmas, 11 *W.* 3. *Machell & Ux'* v. *Garrett.*

In an action on the *caſe* brought by *husband* and *wife*, for a cauſe ariſing to the *wife* before marriage, &c. The defendant pleaded that the plaintiffs *were never lawfully married*. The plaintiffs replied, that they were married at ſuch a time and place, and on a demur to this replication, the plaintiffs had judgment.

Per curiam. In *perſonal* actions (as this was) it was right to lay the matter on the *fact of the marriage*, to make it iſſuable and triable by a jury, and not on the *right of the marriage*, as the defendant has done in his plea, and as it ought to be done in *appeals* and *real actions*. *Salk. vol.* 3. *p.* 64.

Michaelmas, 11 *W.* 3. ——— v. *Harriſon.*

It was ruled *per Holt*, Chief Juſtice, that if *husband* and *wife* jointly ſue for a debt due to the *wife* before marriage, and the *husband* dies, and the *wife* continues the ſuit, the monies, when recovered, ſhall not be *aſſets* to the executor of the *husband*. And that the *husband* alone might bring *debt* for the portion promiſed him with the *wife*; and though land had been ſettled by the *husband* on the *wife*, in conſideration of her fortune, of which this debt was part, yet he having not recovered it during coverture, the *wife* ſhould recover it to her own uſe. *Vide Mod. Rep. vol.* 12. *page* 346.

Eaſter, 12 *W.* 3. *Car* v. *King.*

In an action of *debt* brought againſt the *husband* for the lodging of his *wife*, and proof only made, that he formerly cohabited with her, and owned her as his *wife*; it was held ſufficient to charge him; but that he might diſcharge himſelf, by giving *elopement* in evidence; for they that will truſt a *wife* that has eloped, do it at their peril. *Vide Mod. Rep. vol.* 12. *p.* 372.

Eaſter, 12 *W.* 3. *Maddox* v. *Wynne.* Error.

An *husband* and *wife* were ſued, and afterwards in the pleadings it was ſaid, *the parties aforeſaid came by their attornies aforeſaid*, this was held bad on a writ of *error*, becauſe they are only one perſon in law. *Vide Salk. vol.* 3. *p.* 63.

Eaſter, 12 *W.* 3. *Reignolds* v. *Davis.*

A warrant of attorney was given to confeſs a judgment to a *feme ſole*, who married before judgment was entered; whether it could now be entered, and how, was the queſtion. It was agreed it could not be entered for the *husband*, for that was beyond the authority given. The courſe is, to make affidavit of the debt's not being ſatisfied; and now the wife could not make ſuch an affidavit; for the money might have been paid to the *husband*; nor could the *husband*'s affidavit ſerve, becauſe the money might have been paid to the *wife* before marriage; but *it ſeems* that point may be cleared by a ſeveral affidavit of each in his time.

Holt, Chief Juſtice, ſaid, they had better enter it in the *wife*'s name as a *feme ſole*; but nothing was done. *Vide Mod. Rep. vol.* 12. *p.* 383.

Hilary, 13 *W.* 3. *Ballard* v. *Gerard.*

Per Holt, Chief Juſtice. Though a *feme covert* ſeal and deliver a deed, yet ſhe may plead *non eſt factum*, i. e. *it is not her act*, and give *coverture* in evidence. *Vide Mod. Rep. vol.* 12. *p.* 608.

Eaſter, 13 *W.* 3. *Vezey* v. *Smith.*

In *debt* for goods ſold and delivered, againſt a woman who pleaded in abatement *coverture* at that time; the plaintiff replied, that ſhe was *ſole*, no *feme covert*, and concludes to the country; and it was objected, that the replication was ill; for that it ſhould have been taken with an *abſque hoc* that ſhe was *covert*, and not as here, and *not covert*. And the caſe 1 *Saund.* 21. was quoted, and 6 *W.* 3. *Nicholas* v. *Baw*; in *debt* on a *bond*, the defendant pleaded, that the plaintiff was an alien enemy; replication, that he was born in *England*, and not an alien, without laying any place for *venue*, but as here; but they could not tell the judgment of that caſe.

Per Holt, Chief Juſtice. If ſuch plea be to a writ, it needs no *venue*, but may be tried where the writ is brought; but if it is pleaded in *bar*, there muſt be a replication, and that muſt ſet forth the place of the party's birth in *England*, from whence a *venue* may ariſe; and though precedents be both ways, yet this is a true difference, and according to *Co.*; and he ſaid the defendant muſt ſhew and prove the *coverture*; and ſaying in the replication, that ſhe was *ſole*, implies the negative of a marriage as much as that ſhe was *not covert*; and it is the ſame as pleading of *infancy*. If this had been a *bar*, the marriage muſt have been laid at a certain time and place, but being in *abatement*, it is well generally; but even there the *husband*'s name ought to be ſhewed, that the plaintiff may know whom to have his writ againſt. *Vide Mod. Rep. vol.* 12. *p.* 503.

Michaelmas, 13 *W.* 3. *Anonymous, at niſi prius.*

In *debt* brought by the *husband*; it appearing to have become due to his *wife* as a ſeparate dealer, a diſcourſe of the *wife*'s concerning it was given in evidence for the defendant, with the conſent of *Holt*, Chief Juſtice. *Vide Mod. Rep. vol.* 12. *p.* 566.

Michaelmas, 13 *W.* 3. *At niſi prius, before Holt, Chief Juſtice.*

A woman whoſe *husband* had left her about twelve years before, had carried on a trade in her own name as a widow, and gave receipts in her own name; being ſued for a debt contracted in the courſe of her trade, ſhe gave *coverture* in evidence, and alſo of her *husband*'s being alive in *Ireland*; and the Chief Juſtice directed the jury to find for the defendant, and ſo they did. *Vide Mod. Rep. vol.* 12. *p.* 603.

Hilary, 1 *Ann.* *Taylor* v. *Rains.*

A *woman* before marriage had articles of ſettlement made with her intended *husband* to this purpoſe: ſhe being poſſeſſed of a leaſe for years, the articles were, that ſuch perſon ſhould have the profits of the ſaid term, as the *wife* ſhould by writing under her hand, or laſt will and teſtament appoint. The *woman*, the day before her marriage, makes a will, deviſing the truſt of the term to *B.* and then marries, and after her death the executor appointed in that will, would have proved it in the *Spiritual Court*, and the *husband* moved for a *prohibition*, on ſuggeſtion that ſhe was a *feme covert* at the time of her death, and therefore could not make a will, or appoint an executor. 4 *Co. Forſe* v. *Hemblinge.*

Per curiam. A *feme covert* could make no will, but either as executrix, or by the conſent of her *husband*, or of ſuch goods and chattels as by the marriage are not given to the *husband*, and that likewiſe by conſent of the *husband:* this will, though in purſuance of a ſettlement, or articles before marriage, was not ſuch a will of which they had juriſdiction below, but it amounted to an appointment in equity, who ſhould have the truſt according to the ſaid articles. And it was farther adjudged, that if a perſon has a truſt for a term of years, and dies inteſtate, his next of kin ſhall have the adminiſtration of it, and adminiſtration may be granted *as to*, &c. as well as an executor may be *as to*, &c. and that the way here had been, to grant adminiſtration to them to whom ſhe had appointed the truſt, and not to proceed by way of probate of the will; and a *prohibition* may go after ſentence in this caſe. *Vide Mod. Rep. vol.* 7. *p.* 147.

Hilary, 1 *Ann. Anonymous.*

A warrant of attorney was given to confeſs a judgment to a *feme ſole*, who afterwards married. In this caſe the court gave leave, notwithſtanding the marriage, to enter judgment, for that the authority ſhall not be deemed to be revoked or countermanded, becauſe it is for the *husband*'s advantage; like a grant of a reverſion to a *feme ſole* who marries before attornment: yet the tenant may attorn afterwards: it is otherwiſe, if a *feme ſole* gives a warrant of attorney, and marries; for in that caſe it charges the *husband. Contra Show.* 91. and it ſeems as reaſonable he ſhould be charged in this caſe, as for a bond or other debt, which he is liable for during the *coverture*, though not after. 1 *Rol. Abr.* 351. *F.* 1. *G.* 2. *F. N. B.* 120. *F. Vide Salk. vol.* 1. *p.* 118.

Eaſter, 1 *Ann. Anonymous.*

Per Holt, Chief Juſtice. A *married woman* is to be diſcharged on *common bail* of courſe; but if it is doubtful whether ſhe is *married* or not, ſhe ſhall be held to *ſpecial bail*, if the cauſe requires it. *Vide Mod. Rep. vol.* 7. *p.* 10.

Michaelmas, 1 *Ann. Harwood* v. *Parrot.*

In an action on the *caſe* brought by *husband* and *wife*, for maliciouſly indicting the *wife* for a riot: the firſt count ſhewed the plaintiff's wife was of good reputation, and that the defendant to leſſen it, indicted her for a riot, of which ſhe was acquitted. The ſecond count was the ſame, and that the *husband* was put to great charge: as to the firſt, it was held to be no ſcandal to be guilty of a *treſpaſs*; and as to the other, the court inclined, that the *husband* alone ought to have brought the action; for he alone could be put to the charges; but they delivered no poſitive opinion. *Vide Mod. Rep. vol.* 7. *p.* 104.

Michaelmas, 1 *Ann. The Queen* v. *Bradford.*

The defendant who was a quaker woman, being charged on oath with having publiſhed a book, called the *Dutch Catechiſm*, was bound to appear at the *Old Bailey*, and obliged to give bail, four ſecurities in 200 *l.* each; but being a *feme covert*, ſhe was not bound herſelf. *Vide Mod. Rep. vol.* 7. *p.* 63.

Michaelmas, 1 *Ann. Wittingham* v. *Broderick.* Error.

A judgment in *C. B.* in *treſpaſs* by the *husband* and *wife*, for taking away their goods, on a writ of *error* brought, was reverſed, becauſe the wife ought not to join. *Vide Mod. Rep. vol.* 7. *p.* 105.

Michaelmas, 1 *Ann. The Queen* v. *Buckbridge.*

Per Holt, Chief Juſtice. A *feme ſole* having a warrant of attorney given her to enter a judgment, married before it was entered; a motion was made that the judgment ſhould be entered in the name of the *husband* and *wife*; and a diſtinction was made between ſuch a warrant made by a *feme ſole*, and one made to her; for a marriage in the firſt place would be a countermand of the warrant, as being to the diſadvantage of the *husband*. And for this a caſe in point was quoted, *Eaſter*, 9 *W.* 3. where leave was denied to enter judgment againſt *husband* and *wife*, on a warrant of attorney before marriage; and it was compared to the caſe of a grant of a reverſion by a *feme ſole*, who marries before attornment, whereby the grant is countermanded; but if ſhe had granted it to *A.* and before attornment had married him, an attornment after would be good. 1 *Inſt.* 310. 4 *Co.* 61. *a.* and to this the court inclined. But on reading of the warrant, it appeared to be to enter judgment as of ſuch a term, which was now paſt. *Vide Mod. Rep. vol.* 7. *p.* 52.

Michaelmas, 1 *Ann. Fenwick* v. *Gravenor.*

The plaintiff pretending the defendant was his *wife*, delivered *ejectments* to the tenants, and ſhe denying the marriage, prayed to be made defendant, which was oppoſed by the plaintiff's council; becauſe if ſhe ſhould have a judgment, he would loſe his coſts, ſince he could have none againſt his wife.

Per Holt, Chief Juſtice. It is due of right to the tenant in poſſeſſion, and to the landlord to be made defendants, for otherwiſe the tenants in poſſeſſion might combine with the leſſor of the plaintiff, and *ouſt* the landlord of his rent; and to deny the lady that right, would be on the preſumption of her marriage, which would be directly to determine the point in queſtion; and there is no inconvenience on the other ſide; for if the plaintiff has judgment, he may have coſts againſt the tenants in poſſeſſion. *Vide Mod. Rep. vol.* 7. *p.* 70.

Hilary, 2 *Ann. Etherington* v. *Parrot.*

On a trial before *Holt*, C. J. at *Guildhall*, in an action on the *caſe* for goods, ſold and delivered, the evidence to charge the defendant was, that the goods were taken up by the defendant's *wife* to make her cloaths, and that they cohabited together: but on the defendant's ſide it was given in evidence, that his *wife* was an extravagant woman, and uſed to pawn her cloaths for money to buy drink, and be drunk; that ſhe pawned a ſuit of cloaths, which coſt 7 *l.* for 1 *l.* 8 *s.* and when her huſband redeemed them, pawned them again; that at the time of buying theſe, ſhe had very good cloaths; that ſhe had bought cloaths here before, and her huſband had paid for them; but when he paid for them, he gave notice to the plaintiff's ſervant, who received the money, that his maſter ſhould truſt her no more; which he promiſed not to do.

Per Holt, Chief Juſtice. If a *husband* turns away his *wife*, he gives her credit wherever ſhe goes, and muſt pay for neceſſaries for her; but if ſhe runs away from him, he ſhall not be liable to any of her contracts, for it is the *cohabitation* that is an evidence of the *husband*'s aſſent to contracts made by his wife for neceſſaries: but if the *husband* has ſolemnly declared his diſſent that ſhe ſhall not be truſted, any perſon that has notice of this diſſent, truſts her at his peril after; for the *husband* is only liable on account of his own aſſent to the contracts of his *wife*; of which aſſent *cohabitation* cauſes a preſumption; for the *wife* has no power originally to charge her *husband*, but is abſolutely under his power and government, and muſt be content with what he provides; and if he does not provide neceſſaries, her remedy is in the *Spiritual Court*. But here were ſufficient neceſſaries provided, and alſo the *husband* had forbid the plaintiff to truſt her; and notice to the plaintiff's ſervant uſually employed by him in his trade, was a good notice to his maſter, and therefore he cannot charge the defendant. On which the plaintiff was nonſuited.

It was alſo obſerved by the C. J. that if a *wife* takes up ſilks, and pawns them before they are made into cloaths, the *husband* ſhall not be liable for the ſilks, becauſe they never came to his uſe: but otherwiſe, if they were made into cloaths, and then pawned by her. *Vide Raym. vol.* 2. *p.* 1006.

Hilary, 2 *Ann. Jenkins and Wife* v. *Plombe.*

On an *indebitatus aſſumpſit* brought by *husband* and *wife*, who was executrix, declaring, *for that whereas*, the defendant was indebted to them *as* executor of *J. S.* for ſo much money received by him to their uſe, as executor, he promiſed to pay it, &c. The defendant pleaded *non aſſumpſit*; and on the trial the plaintiffs were nonſuited, and the queſtion was, whether they ſhould pay coſts on *ſtat.* 23 *H.* 8.

Holt, Chief Juſtice. If the receipt was ſince the teſtator's death, and by appointment or conſent of the executor, there the action muſt have been brought by him, not as an executor; for the receipt by his appointment, is a receipt by himſelf. Then if the receipt was without the executor's previous appointment, yet the bringing this action is an aſſent to the receipt, and makes it a receipt in his own right; ſo that in either caſe, the debt ought to be looked on as a new debt, contracted ſince the death of the teſtator. And this receipt muſt be intended to have been in the executor's own time; becauſe the receipt is ſaid to be to the executor's uſe; and he concluded, that there was no room for the executor here to declare as executor: if there is a receipt by appointment of the executor, it is *immediate aſſets* in the executor's hands, and by bringing this action, it is in the ſame manner. And if the executor or adminiſtrator bring an action of *trover* on their own poſſeſſion, they ſhall pay coſts. Yet there, if the adminiſtrator had called himſelf adminiſtrator, and it is ſo entred on record, and has judgment, and after adminiſtration is revoked, the defendant would be relieved by an *audita querela*, becauſe it would appear on the face of the declaration, that he had been ſued under that now repealed adminiſtration; and the naming himſelf executor here is not neceſſary, any further than to ſhew how the original right came. If the executor accounts with the teſtator's debtor, indeed thereby a new action accrues, but ſtill it is in the right of the teſtator; and no new contract is made, but only an aſcertaining of what was due before. If judgment and execution are in the teſtator's life, and an action of eſcape brought in the executor's time, on a nonſuit in this action the executor ſhall not pay coſts; but if he had judgment and execution in his own time, and an eſcape had happened, for which he brings an action, and is nonſuited, he ſhall pay coſts.

Powell, Juſtice. Where the thing ſued for is aſſets in the executors or adminiſtrators before recovery, there they ſhall pay coſts on the nonſuit: or where the entire cauſe of action ariſes in their own time. And it was agreed to have been adjudged, that for the rent accruing in the executors own time, the executors if nonſuited ſhould pay coſts; as alſo, that in covenant with the teſtator, and breach in the time of the executor he ſhould pay coſts. *But it is a quere with me*, if there be any difference on this account, between *covenant* for rent on a covenant made with the teſtator, and *debt* for rent on a leaſe with him?

And it was agreed by the whole court, that the ſtatute, by the words thereof, does not diſtinguiſh the caſe of an executor from any other caſe; but it was, by an equitable conſtruction, reſolved ſo by the judges, for this reaſon, becauſe the nature or cauſe of action does not lie in their privity or knowledge.

Holt, Chief Juſtice, ſaid, that it has been held, that if the plaintiff's declaration was ſo bad, that the plaintiff in caſe he obtained a verdict, could not have judgment there; if he was nonſuited, he ſhould pay no coſts; and therefore this action being by *husband* and *wife*, on the poſſeſſion of the *husband* only, ſo that if there had been a verdict, he could not have had judgment, therefore he could have no coſts; but he ſaid the contrary had been reſolved 1 *Cro.* 175. *Hob.* 219. 284.

And the matter being again moved, the caſe of *Elwis* v. *Mocato* in this court, *Eaſter*, 2 *Ann.* was cited for the plaintiff, which was ſeveral counts by a plaintiff executor, one whereof was an *inſimul computaſſet* who being nonſuited, paid no coſts; which determination was now again agreed to, becauſe there was no new cauſe of action, but a new action on aſcertaining of an ancient cauſe, which aſcertaining leaves it ſtill a debt of the teſtator's.

And it was agreed now by the court, that the caſe of 2 *H.* 7. 15. was a good foundation for this caſe; for there it was agreed, that a *feme* executrix cannot give away the goods of her teſtator, without the conſent of her *husband*, and if he conſents to it, then it is he that gives it, ſo the *wife* here cannot appoint a perſon to receive this money, but if he conſents then it is his appointment.

And if an executor appoints another to receive a debt of his teſtator, and he receives it, it is now the ſame thing as if he had actually received it himſelf, and then it would be aſſets in his hands, and by conſequence appointing another to receive, who will not repay, is a *devaſtavit*.

Holt, Chief Juſtice, ſtrongly inclined, that the bringing of this action was ſuch a ſubſequent agreement, as would make it aſſets in his hands from that time.

But he agreed no more would be aſſets in his hands than he recovered, and not as much as was received or declared for, and even for that he would not be liable till after judgment; but immediately after judgment, and before execution, he is liable; whereas a perſon who ſues as executor, though he has judgment, yet till execution, the thing recovered is not aſſets in his hands; and as if the *husband* had actually appointed the defendant to receive, he alone ought to bring the action in his own name; ſo here the ratihabition amounting to an appointment, he ought to bring it alone: as if a man enter into my land and take the profits thereof, I may, if I pleaſe, charge him in *account* as my bailiff, though there was never any privity between us till the action brought.

And whereas it was objected, that if the bringing the action would amount to an appointment, then by bringing the action, the whole would be aſſets in his hands before any recovery.

He anſwered, that would not follow; for they being nonſuited, the matter is ſet at large again, and he has liberty to ſue the original debtor; but if he had judgment, and no execution, or ever like to have any, yet his bringing the action and having judgment, would diſcharge the firſt debtor, and by conſequence be a *devaſtavit* in him; for by the judgment he makes the defendant his debtor, who never owed any thing to the teſtator.

And he quoted the caſe of *Norden* v. *Levit*, *Anno* 77, which was this: the executor brings an action of *trover* for a converſion in the life of his teſtator, and the party being arreſted, and inſolvent, takes a covenant from him for the payment of ſo much money in ſatisfaction; and it was held, that foraſmuch as this did extinguiſh the original cauſe of action, it was an immediate *devaſtavit*, which judgment was affirmed by the Houſe of Lords: a *fortiori*, in our caſe, the extinguiſhment of the original debt by judgment againſt the preſent defendant, would be a *devaſtavit*, and on judgment, not the adminiſtrator, *de bonis non*, but the adminiſtrator of the executor ſhould ſue execution.

If the executor loſes the teſtator's goods out of his poſſeſſion, and declares that he was poſſeſſed of ſo much goods as executor to *J. S.* and on the evidence, it appears that they were his own proper goods; he ſhall be nonſuited, and pay coſts. *Hut.* 214. 220.

If a perſon as adminiſtrator, brings an action of *trover* on his own poſſeſſion, and is nonſuited, he is condemned in coſts: after the adminiſtration is revoked, he ſhall by an *audita querela*, be relieved againſt the coſts; and this was the caſe of *Turner* v. *Davis*. 16 *Car.* 2.

And it was laid down for a rule, that where an executor brings an action, in which he need not name himſelf executor, there if he is nonſuited, he ſhall pay the coſts. 2 *Cro.* 361. 229.

But *Powell* and *Gould*, Juſtices, were of a different opinion, for this was an action to create aſſets, and not for the recovery of what is ſo already; and immediately after the receipt, were no aſſets accrued to the executor.

Holt, Chief Juſtice, ſaid, that the caſe of *Cro. Car.* 29. reported to be three againſt one, in *Hutton* is two to two, however, he was of opinion, there ought to be no coſts, for the ward never came to the actual poſſeſſion of the executor, and could not therefore be aſſets in him; as if the teſtator's goods is taken and converted after the death of the teſtator, before they come to the actual poſſeſſion of the executor, they are not aſſets; and therefore if it is nonſuited in *trover* for them, it would be hard to make him pay coſts. *Adjourned. Vide Mod. Rep. vol.* 6. *p.* 91.

Hilary, 2 *Ann*. *Ogden* v. *Turner*.

Per curiam. If a *feme covert* is arreſted, and it is clear and notorious that ſhe is *covert*, *common bail* ought to be received; but if it is doubtful, ſhe ought to find *ſpecial bail. Vide Mod. Rep. vol.* 6. *p.* 105.

Hilary, 2 *Ann*. *Ruſſell* v. *Come*.

In *treſpaſs*, *aſſault* and *battery*, brought by *baron* and *feme* for the *battery* of the *wife*; there were ſeveral counts laid in the declaration, which were ſingly for the *battery* of the *wife*. But there was one count for beating her *whereby the buſineſs of the husband had remained undone*, and concludes *to the damage of them both*: on *not guilty* pleaded, a verdict was given for the plaintiff, and intire damages. The defendant's council took an exception on an arreſt of judgment, that the *husband* and *wife* cannot join as this count is laid; for the *wife* cannot join for the damage accruing to the *husband* by the loſs and delay of his buſineſs, in which ſhe has no intereſt.

Per Holt, Chief Juſtice. If it had been, *whereby he had loſt the benefit of her ſociety*, the wife could not have been joined.

Powell, Juſtice. There the *whereby*, *&c.* is the *giſt* of the action, to entitle the *husband* to maintain an action without his *wife*. But now, in this caſe, I will not intend, that the judge allowed any evidence to be given as to the ſpecial damage to the *husband*, but only admitted proof as to the *battery*.

Holt, Chief Juſtice. I remember a caſe where an action of *ſlander* was brought by *baron* and *feme*, for words ſpoken of the *wife*, *by which* the *husband* loſt his trade; and it was held, that if the words could maintain an action without the ſpecial damage, then they ſhould have judgment; but if the words were not actionable without the ſpecial damage, then it was ill; for the *wife* ought not to be joined. See *Lev.* 140. Suppoſe the *husband* was at charge on this occaſion, he may give it in evidence. *Gould*, Juſtice, remembered the ſame caſe.

Another day, *Powell*, ſaid, I do not know what they mean by ſaying, *whereby his buſineſs remained undone*, *&c.* a woman is to comfort *her husband*. In this caſe, the *giſt* of the action is not the *whereby*, but if the *husband* had brought the action, then it would have been the *giſt*.

Gould, Juſtice. There was a caſe, *Eaſter*, 7 *W*. 3. *treſpaſs* brought by the *baron* alone, for breaking his houſe, and beating and wounding his wife, and impriſoning her for three hours, and alſo for detaining the poſſeſſion of the houſe, and for menacing his *wife* and ſervants, *whereby his buſineſs remained undone*.

I moved in arreſt of judgment, becauſe that for ſome of theſe wrongs, as the beating and impriſoning his *wife*, the *wife* ought to be joined; but judgment was given for the plaintiff by *Eyre* and *Rokeby*. *Holt*, doubting, for they held, that the *whereby* went through the whole count.

Holt, Chief Juſtice. Let the plaintiff take his judgment *niſi*, &c. *Vide Raym. vol.* 2. *p.* 1031.

Eaſter, 2 *Ann*. *Warr* v. *Huntley*, *at niſi prius*, *in Middleſex*.

A working man married a woman of the like condition, and after cohabitation for ſome time, left her; and during his abſence the *wife* worked; and this action being brought for her diet, it was held, that the money which ſhe earned ſhould go towards her maintenance. *Vide Salk. vol.* 1. *p.* 118.

Eaſter, 3 *Ann*. *Anonymous*.

Adjudged, that where *baron* and *feme* mortgage the lands of the *wife*, and ſhe dies, the equity of redemption ſhall ſurvive to the *husband*, and not to the adminiſtrator of the wife; and if he dies, the *wife* ſhall have the benefit of redemption, and not the executor of the *husband*. *Salk. vol.* 3. *p.* 64.

Eaſter, 3 *Ann*. *Hutton* v. *Manſell*.

In an action on the *caſe* brought by a *feme ſole*, in which ſhe declared, *for that whereas* ſhe agreed and promiſed to marry the defendant, he, in conſideration thereof, promiſed to marry her; and at the trial ſuch promiſe was proved.

Holt, Chief Juſtice. There is no neceſſity of proving an actual promiſe on the woman's part; for it is ſufficient evidence to ſhew, that ſhe countenanced the promiſe, and behaved herſelf as one who approved and conſented to it. *Vide Salk. vol.* 3. *p.* 64.

Eaſter, 3 *Ann*. *Powell* v. *Maine*.

One *J. M.* entered into a bond to a *feme ſole*, conditioned for payment of ſo much money at a certain day; ſhe afterwards married the plaintiff, who brought an action of *debt* on this bond. On this action being brought, the defendant craved *oyer* of the bond and condition, which was to pay ſo much to the plaintiff's wife. On which the defendant demurred to the plaintiff's declaration.

Per curiam. Judgment was given for the plaintiff. *Vide Salk. vol.* 3. *p.* 64.

Eaſter, 3 *Ann*. *Robinſon* v. *Goſnold*.

A *husband* diſcovering his *wife* to be a very lewd woman, goes away from her, and ſhe, after having lived ſeveral years with an adulterer, was received into the plaintiff's houſe, who entertained her as the *husband's wife*. And this action being on an *indebitatus aſſumpſit* againſt the *husband* for lodging and dieting the *wife*:

Holt, Chief Juſtice, held, that let the woman be ever ſo vicious, yet, while ſhe cohabits with the *husband*, he is bound to provide neceſſaries for her, and is liable to an action from ſuch as furniſh her with them; for his bargain was, to take her *for better for worſe*. In like manner it is, if the *husband* turns his wife away for her wickedneſs, he remains ſtill chargeable for her neceſſaries; but if the *wife* leaves her *husband*, they that truſt her after it is notorious that ſhe has left him, do it at their peril, and ſhall not therefore charge the *husband*.

And he ſeemed to be of opinion, that if a *wife* had run away from her *husband*, and contracted debts, and afterwards the *husband* received her, or came after her, or laid with her for a night, that would make him liable for the debts. Like the caſe where a *wife* elopes with an adulterer, though ſhe thereby forfeits her *dower*, yet, if the *husband* will of his own accord receive her again, ſhe ſhall have her dower again. *Vide Mod. Rep. vol.* 6. *p.* 171.

Eaſter, 3 *Ann*. *Langford* v. *The Adminiſtratrix of Tyler*.

The defendant was adminiſtratrix of *Tyler*, her late *husband*; who in his life-time uſed to deal in tea, and ſold four tubs of tea to the plaintiff at ſo much *per* pound, who took one away, paying for it, and 50 *s.* over towards the payment of the reſt. When ſhe came for the reſt, the vendor would not ſtand to her agreement. on an action brought, and two counts, one on the agreement, and the other on the *indebit.* for 50 *s.* received to the plaintiff's uſe,

It was ruled by *Holt*, Chief Juſtice; 1ſt. If the *husband* and *wife* cohabit, and the *wife* deals ſeparately, her contracts ſhall charge her *husband*, for cohabitation is ſufficient evidence of notice.

2dly. If a bargain be made, and earneſt given, without an expreſs agreement, that payment is to be made at a certain time, the money muſt be paid before the goods are removed.

3dly. A demand of the goods without a tender of the money, is void, becauſe it is not purſuant to the intent of the bargain, and the earneſt is only to bind the bargain.

4thly. After earneſt given, the vendor cannot ſell to another; but if the vendee does not come to pay, and take the goods, the vendor ought to come and requeſt him to come and pay; and if he does not come in convenient time, the agreement is diſſolved, and then he may ſell. *Vide Mod. Rep. vol.* 6. *p.* 162.

Eaſter, 3 *Ann.* *Withers* v. *Kelſey.*

A woman had a portion deviſed to her, and the payment thereof was charged on certain lands; afterwards, on her marriage with *T. S.* he ſettled a jointure on her, and died before he received the portion, having made a will, and appointed an *executor*.

Adjudged, that the executor ſhall have this money, becauſe it is not in the nature of a *choſe* in action, but in the nature of a *rent*, for it is charged on lands, and it is given the huſband by the intermarriage, and for that reaſon it ſhall go to his executor, and not to his *wife* on ſurviving him. *Vide Salk. vol.* 3. *p.* 65.

Eaſter, 3 *Ann.* *Thompſon* v. *Woods.*

On an action of *debt* brought on a bond, conditioned to leave his wife 80 *l.* at his death, in caſe he ſhould ſurvive, ſo that ſhe might receive and take it to her own uſe; the *huſband* died, and in an action of *debt* brought againſt his adminiſtrator, he pleaded, that the huſband made a will, and his wife executrix, and left goods to the value of 100 *l.* and upwards, and directed, that ſhe pay herſelf the ſaid 80 *l.* and on a demurrer to this plea, it was adjudged ill, becauſe the huſband at his death might owe money on judgment and ſtatutes, and ſo ſhe might not be able to pay herſelf, and his eſtate might be ſo incumbered, that it would be better for her to renounce her executorſhip. *Vide Salk. vol.* 3. *p.* 65.

Trinity, 3 *Ann.* *The Queen* v. *Foxby.* Error.

She brought a *writ of error* on a judgment againſt her, on an indictment for being a common ſcold; and on affidavits that ſhe was ſo ill, that without danger of her life, ſhe could not come up out of *Kent*, where ſhe lived, to aſſign *error* in perſon, according to the courſe of the court, it was prayed by her council, that ſhe might have leave to aſſign *error* by her clerk in court.

Per curiam. Scolding is not the offence, but the frequent repetition of it, to the diſturbance of the neighbourhood, makes it a nuiſance, and as ſuch it has always been puniſhable by the leet, *therefore* indictable; and we have of late indulged people on *writs of error*, on judgments on indictments, to appear by attorney; and here the court enlarged the time till the next term, to ſee how ſhe would behave in the mean time: and in *Michaelmas* term ſhe and her huſband came into court, and aſſigned *errors*. *Vide Mod. Rep. vol.* 6. *p.* 213.

Michaelmas, 3 *Ann.* *Anonymous.*

Baron and *feme* came to acknowledge a deed by them both in court; and the court ordered an acknowledgement only of one of them to be entered, *viz.* of the *huſband*. *Vide Mod. Rep. vol.* 6. *p.* 263.

Michaelmas, 3 *Ann.* *Anonymous.*

Per curiam. A *feme covert* may plead *non aſſumpſit*, and give *coverture* in evidence, becauſe coverture makes it no promiſe; ſo ſhe may plead *non eſt factum* to a bond, and give coverture in evidence. *Vide Mod. Rep. vol.* 6. *p.* 230.

Michaelmas, 3 *Ann.* *Linch* v. *Hooke.*

She was arreſted by the name of *Minors*, and gave a bail-bond in that name, and now pleaded a *miſnomer*.

Per curiam. If a perſon is arreſted by a wrong name, and brought into court, he may plead a *miſnomer*: and if a *feme covert* is arreſted by a wrong name, and gives a bail-bond, yet ſhe may plead a *miſnomer*, for her bond being that of a *feme covert*, ſhe may plead *non eſt factum* to it; *therefore* it will not eſtop her. *Vide Mod. Rep. vol.* 6. *p.* 311.

Michaelmas, 4 *Ann.* *Newton & Wife* v. *Hatter.*

The plaintiffs brought an action of *aſſault* and *battery*, for a *battery* committed on them both. Judgment was obtained by default, and a *writ* of enquiry was executed the 17th of *May* 1705, and intire damages, *viz.* 17 *l.* 10 *s.* were given. And on the return of the *writ* of enquiry, judgment was arreſted, becauſe the *wife* cannot be joined in an action with the *huſband* for a *battery* on the *huſband*. After which they brought a new action only for the *battery* committed on the *wife*, and laid it to the *damage of the ſaid John*, the *huſband*, on *not guilty* being pleaded, a verdict was given for the plaintiff: and the defendant's council moved in arreſt of judgment, becauſe it ought to have been *to the damage of them both*; the damages in ſuch caſe ſurviving to the *wife*, if the *huſband* dies before they are received; and cited 1 *Sid.* 387. *Hoffin* v. *Byles*; and of that opinion was the court. *Vide Raym. vol.* 2. *p.* 1208.

Hilary, 6 *Ann.* *Aſher* v. *Wallis.*

A man having a wife in *England*, went to *Jamaica*, and there married a rich woman, and let her lands, reſerving rent to himſelf, and received the ſame divers years. But after ſome time, they both coming into *England*, ſhe perceived he had another wife living; and thereon brings an *indebitatus aſſumpſit* againſt him for the ſaid rents, as ſo much money received by him to her uſe. And at the trial this point was ſaved to be argued by council, whether an *indebitatus aſſumpſit* would lie in this caſe, which was argued this term.

Per curiam. An *indebitatus aſſumpſit* will well lie. But *Holt*, Chief Juſtice, ſaid, that *trover* would not lie in this caſe, becauſe ſhe was never poſſeſſed of the money; and when ſhe married the defendant, ſhe conſented that he ſhould manage her eſtate: and accordingly, the plaintiff had judgment. *Vide Mod. Rep. vol.* 11. *p.* 146.

Eaſter, 7 *Ann.* *Billingſworth* v. *Spearman, &c.*

An action of *debt* was brought againſt the defendants, whoſe *wives* were aſſignees of the term; it was brought only againſt the *huſbands*, to which declaration there was a demurrer.

The defendants council ſaid, the *wives* ſhould have been joined in this action.

Per Holt, Chief Juſtice. If the *huſband* is ſeized of land in right of his wife, which is charged with a rent-charge, the action for the rent in arrear ſhall be brought againſt the *huſband* only; but that differs from this caſe, for that is by reaſon of taking the profits, for the rent is the profits of the land. Then he found a fatal fault, *viz.* that the aſſignee of the term had made an executor, who deviſed the tenements to the *wives* of the defendants, which could not be.

Powell, Juſtice. This action is brought againſt them as aſſignees, in reſpect of their intereſt in the term, and differs widely from the caſe of a rent-charge, for that is only in reſpect of taking the profits.

Judgment was given on the laſt fault of the deviſe by the executor; on the opening of which point, *Holt*, Chief Juſtice, ſaid, he thought an executor could not waive a term; for if he accepted part of the executorſhip, he muſt accept the whole, as he ſtands impowered by the will.

Powell, Juſtice. If the rent be more than the term, he may ſhew it ſpecially, and pray that he may be charged no otherwiſe than in the *detinet*.

Holt, Chief Juſtice, differed in opinion. *Vide Mod. Rep. vol.* 11. *p.* 169.

Trinity, 7 *Ann.* *Thomſon* v. *Pinchell.*

An action was brought by *baron* and *feme* againſt the defendant, for goods taken out of their poſſeſſion; the *wife* was adminiſtratrix.

The defendant's council moved in arreſt of judgment, becauſe the goods having been in their poſſeſſion, the wife ſhould not be joined; and naming her executrix might have been left out of the caſe; and cited a caſe, 10 *W.* 3. where the *wife* was executrix, and the defendant promiſed the *huſband*, that if he would forbear, he would pay; and the *wife* was not joined in that caſe.

Powell, Juſtice. In the caſe of *baron* and *feme*, it is certain the law does give the goods of the *wife* to the *husband*; but not when ſhe is adminiſtratrix, becauſe ſhe has them *in auter droit*; and the *husband* here cannot bring an action on the judgment; wherefore judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 11. *p.* 177.

Hilary, 8 *Ann. Tod and Wife* v. *Redford.*

An action of *aſſault* and *battery* is brought by the *husband* and *wife*; the declaration ſets forth, that the defendant on ſuch a day, *&c. aſſaulted* the *wife*, and driving a coach over her, bruiſed her, *&c. by reaſon whereof* the *husband* laid out *divers ſums of money* for the cure, *&c. and other injuries did, to the great damage of them both*; the defendant pleaded in abatement that his name was *Redborn*, and not *Redford*; and on iſſue, and a verdict for the plaintiff, the defendant's council moved in arreſt of judgment; and objected, that in this caſe the *husband* and *wife* ſhould not have joined, becauſe the damage is laid to be for the money laid out in the cure of the *wife* as well as the *battery*, and intire damages being given, it is bad for the whole; and cited 1 *Sid.* 328. *Yelv.* 106. 2 *Vent.* 29. 2 *Cro.* 625. 1 *Lev.* 3. But the *husband* ſhould have ſued alone for the money laid out in the cure.

Powell, Juſtice, ſaid, that where the *husband* and *wife* join in an action of *aſſault* and *battery* for beating both, it is wrong; but may be helped by a verdict, ſeparating the damages; and here the *giſt* of the action is only beating of the wife, and the *by reaſon whereof*, &c. is only in aggravation of damages. As to the *other injuries*, it is too general to ſuppoſe damages given for it. He ſaid alſo, that *husband* and *wife* cannot join in *aſſault*, and *battery*, *whereby he loſt the benefit of her company*, for the *whereby* in ſuch a caſe is the *giſt* of the action; and in the caſe at the bar, if the *by reaſon whereof* had been left out, the ſurgeon's bill might have been given in evidence, in aggravation of damages. Judgment for the plaintiff. *Holt* abſent. *Vide Mod. Rep. vol.* 11. *p.* 264.

Eaſter, 8 *Ann. Anonymous. At Guildhall, before Holt, Chief Juſtice.*

In an action of *aſſault and battery*, brought by the *husband* againſt the defendant, for an intent to raviſh his *wife*, ſhe was admitted an evidence (which *Holt*, Chief Juſtice ſaid, was becauſe the wife cannot give any conſent, though it is not felony).

Holt, alſo held, that *A.* having laid 5 *l.* of the event of the cauſe, was no objection to the *wife* of *A.* being admitted an evidence; becauſe it ſhall not be in the power of a third perſon to diſqualify one, who otherwiſe would be a good evidence; and thereon ſhe was admitted to give evidence. *Vide Mod. Rep. vol.* 11. *p.* 224.

Trinity, 8 *Ann. Hall* v. *The Wiſe of William Yates, Executrix to her Husband. At Guildhall.*

In this caſe, *Holt*, Chief Juſtice, ſaid, that if a perſon receives a woman who runs away from her *huſband*, and lays out money for her, the *husband* ſhall not be charged; becauſe the *wife* was eloped. But if the *wife* continues to live with her *husband*, if ſhe takes up neceſſary goods, though without the *huſband*'s conſent, the *husband* is obliged to pay for them, unleſs ſhe forbids people to truſt her. *Vide Mod. Rep. vol.* 11. *p.* 241.

Michaelmas, 8 *Ann. Anonymous.*

By a return to an *habeas corpus* it appeared, that in the city of *London*, there was a cuſtom, that if a *feme covert* exerciſes any trade in which her *huſband* does not at all concern himſelf, ſhe may be ſued as a *feme ſole*, for debts contracted in the carrying on that trade; and if ſhe has not goods that are not her *husband*'s, ſhe muſt be impriſoned till ſhe pay them; and as ſhe may be ſued, ſo ſhe may ſue as a *feme ſole*, for debts owing to her, in her way of trade within the city. She has a ſpecial and ſeparate intereſt in the profit of her trade, or elſe it were an unreaſonable cuſtom. *Vide Mod. Rep. vol.* 10. *p.* 6.

Trinity, 10 *Ann*, *Thomlinſon* v. *Dighton.* Error.

On a *writ of error* on a judgment in the court of *Common Pleas*, in an ejectment, the caſe was:

A tenant in fee of the lands in queſtion, deviſed the lands to his *wife* for life, then to diſpoſe of them according to her pleaſure, provided it was to ſome of the teſtator's children. The *husband*, the deviſor, dies, and leaves behind him a ſon and daughter, the wife marries again, and then by leaſe, and releaſe, and a fine levied, covenants to ſtand ſeiſed to the uſe of herſelf for life, without impeachment of waſte, remainder to her daughter by her firſt *husband* in *tail*.

The queſtion was, whether this conveyance of the lands was a good execution of the power, ſo that they ſhould go to the daughter, or elſe being bad, to the heir at law, *viz.* the ſon.

Powell, Juſtice. The main queſtion of the caſe is, whether the power is well executed? A feoffment to a man's own ſon ſhall ſtand as a covenant to ſtand ſeiſed, rather than the intention of the parties ſhould be fruſtrated. Sir *Edward Cleer*'s caſe is expreſs, that where it can paſs no other way than by virtue of the power, it ſhall paſs that way, tho' the intention of the parties were, that it ſhould paſs another. And as for her own eſtate being limited without impeachment of waſte, as to the impeachment of waſte it ſhall be void, becauſe it exceeds the power; the intention of the parties is plain. He therefore gave his opinion for the defendant.

Parker, Chief Juſtice. In Sir *Edward Cleer*'s caſe, it was reſolved, that where, according to the way the parties intended, the conveyance would have no effect at all, there it ſhould paſs another way: but where, ſhould the eſtate paſs the way the parties intended, the conſequence would have ſome effect, though not all that was intended by the parties, there it ſhould paſs no other way than the parties deſigned. But this point ſince has been carried much farther, as that, where it would have ſome effect, but not all intended by the parties; that there, to the end the main deſign of the parties may be obſerved, the eſtate ſhall paſs in another way than the parties intended. For example, ſuppoſe a woman ſeiſed of an eſtate for life, with a power to make a leaſe for three lives, or twenty-one years, marries, and ſhe and her *huſband* join in making the leaſe, and *husband* and *wife* both die before the leaſe is expired; here though the *husband* in right of his *wife*, and ſhe in her own right are poſſeſſed of an eſtate for life, and therefore can as owners make a leaſe, and there appears no intention of the parties, (imagining perhaps they ſhould outlive the leaſe) that this leaſe ſhould be made by virtue of the power; yet becauſe the leaſe, ſuppoſing it to be made by them as owners, cannot have all the effect the parties intended, for ſome it would have, (as it would be a good leaſe during the lives of the *huſband* and *wife*) yet becauſe it cannot have all, it ſhall be eſteemed made by virtue of the power. But in the preſent caſe the conveyance, as intended by the parties, would be wholly void.

So he concurred in opinion with *Powell*, Juſtice, and the judgment in *C. B.* was affirmed. *Vide Mod. Rep. vol.* 10. *p.* 31.

Michaelmas, 10 *Ann. D'aeth* v. *Baux.*

The court was moved for a prohibition to the *ſpiritual court*, for ſuffering a *feme covert* to ſue *ſingly* on the ſtatute of diſtributions, becauſe it was for a property ſo veſted in the *husband*, that it might be releaſed by him.

The court ſaid, no *prohibition* lay; for this was a *choſe in action*, and ſo much the *wife*'s, that ſhe ſhall have it by ſurvivorſhip; and if the *husband* had been joined in the ſuit, it would have been only for conformity. This caſe differs not from the caſe of a legacy, for which it is the courſe of the *ſpiritual court* to admit *feme coverts* to ſue alone; but, ſuppoſing it was not the practice of the *ſpiritual court* to ſuffer a *feme covert* to ſue without her *husband*; the party's remedy is by *appeal*, not by *prohibition*. *Vide Mod. Rep. vol.* 10. *p.* 64.

Michaelmas, 10 *Ann. The Queen* v. *Morgan.*

Per curiam. A wife living with her *husband* ſeven years, may after his death, continue the trade, for the act does not require a man or woman to be actually an apprentice; but the words are as an apprentice. *Vide Mod. Rep. vol.* 10. *p.* 70.

Michaelmas, 10 *Ann. The Queen* v. *Williams.*

A *husband* and *wife* were indicted for keeping a bawdy houſe.

It was moved in arreſt of judgment, that the *husband* and *wife* could not be jointly indicted for keeping a bawdy-houſe. 2 *Roll.* 8 *Brook*'s caſe.

But it was anſwered, the indictment was not for keeping a bawdy-houſe only, but for procuring lewdneſs, *&c.* That theſe crimes are in their nature ſeveral: that *husband* and *wife* may be found guilty of a *nuiſance*, *battery*, or the like: that the reaſon why in *burglary*, *larceny*, &c. the *wife* is excuſed, is, becauſe ſhe could not tell what property the *husband* might claim in the goods, *&c.*

In *Hilary term*, 2 *Ann. James Cook* and his *wife* were jointly indicted for keeping a bawdy-houſe; the *husband* was fined, and the *wife* ſet in the pillory.

Per curiam. The indictment is good; keeping the houſe does neceſſarily import property, but may ſignify that ſhare of government which the *wife* has in a family, as well as the *husband*. *Vide Mod. Rep. vol.* 10. *p.* 63.

Trinity, 1 *Geo. Dix* v. *Brookes.*

In this action the plaintiff declared that the defendant broke and entered his houſe, and aſſaulted his *wife*. After verdict for the plaintiff, it was *objected* in arreſt of judgment, that the *wife* ſhould have joined in this action, becauſe here it was not laid *whereby he loſt the benefit of her ſociety*, to intitle the *husband* only to ſue, and exclude the *wife*. *Yelv.* 89. *Godb.* 369.

Per curiam. The plaintiff may *aver* this matter in his declaration to aggravate the damages, for which he ſingly could not recover, and the party injured have his ſeparate action. As in the common caſe of *treſpaſs* for beating a ſervant, *whereby he loſt the benefit of his ſervice*, both maſter and ſervant may recover. And in the caſe of *Newman* v. *Smith*, it was held, that the plaintiff might alledge the beating his daughter in aggravation of damages. *Salk.* 642. The plaintiff had judgment. *Vide Strange, vol.* 1. *p.* 61.

Michaelmas, 1 *Geo. Clerk* v. *Lee.*

See this caſe fully ſtated, in page 143 of this work, under the head of *Attorney*.

Hilary, 4 *Geo. Strutville* v. ———

Where a woman marries a ſecond *husband* while the firſt is living, and the ſecond is not privy thereto; as to what ſhe acquired during the cohabition,

Parker, Chief Juſtice, ſaid, he would eſteem her as the ſervant of the ſecond *husband*, who is entitled to the benefit of her labour. *Vide Strange, vol.* 1. *p.* 80.

Michaelmas, 5 *Geo. Ramſden* v. *Ambroſe. At Guildhall, before Pratt, Chief Juſtice.*

The *husband* and *wife* lived ſeparate, ſhe boarded in the plaintiff's houſe, who declares againſt the *husband* for meat and drink for him found and provided. On the evidence it appeared to be for the *wife*. And the Chief Juſtice held, it did not ſupport the declaration; for tho' the *husband* is chargeable on his implied contract for what neceſſaries are adminiſtered to the *wife*; and therefore if the goods are delivered to her, the vendor may declare generally for goods ſold and delivered: yet in this caſe the plaintiff fails in his deſcription of the ſubject matter of the contract. So that as he now declares generally, a recovery in this action could not be pleaded to a ſpecial action for meat and drink found and provided for the wife. *Vide Strange, vol.* 1. *p.* 127.

Michaelmas, 6 *Geo. Aleberry* v. *Walby.* Error.

In *error* on a judgment in *C. B.* in an action of *covenant* brought on a leaſe for years, where the breach aſſigned was non-payment of rent; judgment was aſſigned by default, and a *writ of enquiry* executed, general errors, and want of an original aſſigned, and returned accordingly: another original alledged by the defendant of another term, and a *certiorari* prayed, and one returned and ſet forth, and ſome little variances; and *no error pleaded*,

The council for the defendant in *error* urged, that this was an action by a man and his wife, and a third perſon, who is tenant in common with the wife, on a leaſe at will, made during the *coverture*, of lands which are the inheritance of the wife, and that third perſon, for arrears of rent incurred during *coverture*, and therefore the *wife* cannot join in ſuch an action. 1 *Sid.* 224.

Per curiam. The *husband* and *wife* may or may not join in this action at their election, as where a bond is to both of them. 4 *H.* 5, 6. *Cro. Jac.* 77. *Cro. Eliz.* 61.

Second exception. To the manner wherein the plaintiffs have deduced their title. In *covenant* the plaintiffs need not ſet out a title, for *that whereas he had demiſed* is enough, and if he does it wrong it is ſurpluſage.

Per curiam. The introduction, by ſetting out the deſcent, is nothing to the purpoſe here, where they declare on their own demiſe, and therefore there can be nothing in that exception.

Third exception. The breach is not well aſſigned: the *covenant* is in the disjunctive, *to pay, or cauſe to be paid, to them, or any of them*; but as to part of the time, the breach is only that he did not pay; and as to the other part, that he did not pay to them, whereas he may have cauſed the rent to be paid to one of them, which is a performance. And there being two ways, the breach ought to have been ſo large as to exclude both ways, by either of which the act might be done. 25 *Ed.* 3. 29. *b.*

Per curiam. He that cauſes to pay, pays; and if you have paid the money to one of them, you may plead it in your diſcharge.

Then it was moved to quaſh the *writ of error*, which deſcribes the ſuit to be between the plaintiff and one '*John Aleberry, alias dict*' *John Aleberry of Waltham Abey*, and the *alias dict*' is *abby* in the record; one is *b, e, y*, and the other *b, y*. This variance is in the *alias dict*', where the court has always obliged the party to deſcribe the ſpecialty *literatim*. *Michaelmas*, 13 *Ann.* the writ was *Crawley*, and the record *Crowley*. 12. *Aſſ. pl. Annſty* and *Aneſty*, *Eaſter*, 4 *Geo. Shartleſs* and *Sharpleſs*, *Bro. Variance* 26. *Baxſter.* with an (*s*), and *Baxter* without an (*s*). *Salk.* 264. *Grigger* and *Griggure*. All theſe were held to be fatal variances in the deſcription of a record, and yet no body will ſay they might have been taken advantage of by plea of *miſnomer* in abatement.

Per curiam. Theſe caſes cited are of variances in the name of the party, which is more conſiderable than the place of his reſidence. Theſe words are both properly uſed; ſome ſpell it *Abbey*, and ſome *Abby*; and if there is occaſion, we may take the latter as an abbreviation of the former: therefore, the record is well removed, and the judgment muſt be affirmed. *Vide Stra. vol.* 1. *p.* 229.

Hilary, 8 *Geo. Read* v. *Marſhall.*

On an action of *treſpaſs* for breaking the plaintiff's houſe, beating his wife and taking his goods, judgment was obtained by default, and on a writ of enquiry, intire damages were given.

The defendant's council moved in arreſt of judgment, becauſe no damages ought to have been recovered for the beating of the *wife*, ſince ſhe is no party to the action, nor has the plaintiff laid any ſpecial damages, as *whereby he loſt her ſociety, &c.* to entitle him ſolely to this action. If theſe damages ſhould be recovered, there may be two recoveries for one *aſſault*, for this action would be no bar to any action to be brought by the *baron* and *feme* jointly.

The plaintiff's council argued, that the aſſault on the *wife* is only laid as an aggravation of the damages, and not as a diſtinct treſpaſs. *Salk.* 119. *pl.* 12. 2 *Salk.* 640. *pl.* 10. 2 *Lord Raym.* 1031. 11 *Mod.* 265. 10 *Rep.* 131. *a. Cro. Jac* 664. *pl. Dix.* v. *Brooks. Forteſcue Rep.* 378. *Stra.* 61.

The court inclined this declaration was good, *but left the ſame for further conſideration. Vide Mod. Rep. vol.* 8. *p.* 26.

Trinity, 8 *Geo. Anonymous. In Middleſex, before Pratt, Chief Juſtice.*

Pratt, Chief Juſtice, allowed the *wife*'s declaration, that ſhe agreed to pay 4*s. per* week for nurſing a child, was good evidence to charge the *husband*; this matter being uſually tranſacted by the woman. *Vide Stra. vol.* 1. *p.* 527.

Michaelmas, 8 *Geo. Mr. Liſter's Caſe..*

Mr. *Liſter* married Lady *Rawlinſon*, who was a widow, and had before her marriage with *Liſter* ſettled her eſtate in her own power, and out of his controul; and afterwards there being ſome diſagreement between them, he, by a proper writing duly executed, covenanted to allow her ſo much every year for her maintenance, and that ſhe might live ſeparate from him, to which ſhe agreed, and accordingly they lived apart for ſome time; the *husband* pretending a deſire to be reconciled to his *wife*, but in fact only wanting more money of her, ſhe refuſed, whereon he, with the aſſiſtance of another perſon, forced her into a coach as ſhe was coming from church on a *Sunday*, and carried her into the *Mint*, and kept her under ſtrict confinement.

And ſhe being brought into court by *habeas corpus*, her *husband* moved by his council, that the court would not interpoſe between *husband* and *wife*; that ſhe could not deny herſelf to be his *wife*, and that by law the *husband* had a coercive power over the *wife*.

Per curiam. An agreement between *husband* and *wife* to live ſeparate, and that ſhe ſhould have a ſeparate maintenance, ſhall bind them both, till they both agree to cohabit again; and if the *wife* is willing to return to her *husband*, no court will interpoſe or obſtruct her.

But as to the coercive power which the *husband* has over his *wife*, it is not a power to confine her; for by the law of *England*, ſhe is intitled to all reaſonable liberty, if her behaviour is not very bad; and therefore, ſhe ſhall now be ſet at liberty, if it is her pleaſure ſo to be; ſhe anſwered, ſhe deſired to be ſet at liberty; and thereon ſhe was diſcharged out of the cuſtody of her *husband*, and went out of court with her ſon; but that he (the *husband*) ſhould have leave to write to her, and uſe any lawful means in order to a reconciliation, provided ſhe was willing to ſee him, and that her children or ſervants ſhould not hinder him, unleſs by her order; but that whenever ſhe permitted him to come to her, he ſhould not offer any violence or uncivil behaviour to her perſon. *Vide Mod. Rep. vol.* 8. *p.* 22.

Michaelmas, 10 *Geo. King and Wife* v. *Baſingham.* Error.

An action on the *caſe*, &c. was brought in the *Common Pleas* by *husband* and *wife*, in which he declared on ſeveral counts, and one of them was for money lent to the defendant *by him* (the plaintiff) and his *wife*, by his conſent and promiſe made to them both.

On *non aſſumpſit* pleaded, the plaintiff had a verdict; and it was moved in arreſt of judgment, that the declaration was ill, becauſe the *wife was joined* in this action with her *husband*, which ſhe ought not to be; and that the joining her in the action being matter of ſubſtance, was not helped by this verdict; for by this means, if the *husband* ſhould die, then what is recovered would ſurvive to her, when it ought to go to the executor of the *husband*.

But the judgment was affirmed, and a *writ of error* being brought in *B. R.* the ſame objection was made there; and that this action was founded on a contract made by the *wife*, when by law ſhe cannot make any contract during the *coverture*.

The plaintiff in *error*'s council excepted to the declaration, for the money being alledged to be lent by the *husband* and *wife*, muſt be preſumed to be lent during *coverture:* and then the money is the *husband*'s money only, for which he alone ought to have brought his action, for a *wife* can have no intereſt in money during *coverture*. *Cro. Jac.* 644. *pl.*

The defendant in *error*'s council argued, that this objection was too late, it being after a verdict, which ought to be made good, if by any conſtruction it it might; therefore it ſhall be intended, that the *husband* and *wife* are joint traders, and that ſhe lent the money to the defendant before marriage.

Beſides, where a promiſe is made to the *wife*, if the *husband* brings the action for himſelf and his *wife*, he makes that promiſe good by his own conſent.

Chief Juſtice. If the money was lent during *coverture*, the declaration is falſe, becauſe then the *wife* could have no money. *Adjourned.*

In *Hilary* term following, the matter coming on again, the court inclined againſt the plaintiff, for it being laid *to the damage of both*, made the declaration ill; and ſo it was adjudged in *Cro. Jac.* 479. *Vide Mod. Rep. vol.* 8. *p.* 199. & 341.

Trinity, 11 *Geo. The King* v. *Azire.*

On an indictment againſt the *husband* for an aſſault on the *wife*, the Chief Juſtice allowed her to be a good witneſs for the *King*; and cited Lord *Audley*'s caſe, *State Trials, vol.* 1. *Vide Stra. vol.* 1. *p.* 633.

Trinity, 12 *Geo. Manwairing* v. *Sands, at niſi prius, in Middleſex.*

In an action againſt the *husband* for a laced hat ſold to the *wife*, it was proved, that the *wife* lived from her *husband* in adultery, and that ſhe told the plaintiff ſhe had a *husband*, but that ſignified nothing, for ſhe would pay him herſelf. *Raymond,* Chief Juſtice, held the defendant not chargeable, and ſaid, he ſhould have ruled it ſo if there had been no actual notice, which only ſtrengthened the caſe. *Vide Stra. vol.* 1. *p.* 706.

Michaelmas, 12 *Geo. Morris* v. *Martin, at Guildhall.*

In an action for *meat*, &c. provided for the defendant's *wife*, the defendant proved ſhe went away from him with an *adulterer*. *Raymond,* Chief Juſtice, held, that the *husband* ſhould not be charged for neceſſaries for her, though the plaintiff, who provided for her, had no notice; and he ſaid, *Holt,* Chief Juſtice, always ruled it ſo. And he put the caſe of an apothecary, who took a ſick woman into his houſe, being the wife of a country gentleman, from whom ſhe had gone away with an *adulterer:* ſo the plaintiff was nonſuited. *Vide Stra. vol.* 1. *p.* 647.

Michaelmas, 13 *Geo. Huggins* v. *Durham and Wife.* Error.

In *error* on a judgment in *C. B.* in an action of *debt* brought by *husband* and *wife* againſt the warden of the *Fleet* for 464*l.* 6*s.* 2*d.* on the eſcape of *O. R.* who was committed by the *Court of Chancery* for that ſum. The declaration ſet forth, that on the 5th of *February*, 6 *Geo.* there was a decree, reciting the bill againſt *R. et al.*' by the *wife* only, which ſuit abated by her marriage with the other plaintiff, who revived the ſuit, and *R.* put in his anſwer, inſiſting that he had repaid 200*l.* part of the money; and an iſſue being directed thereon, the ſame was tried on a feigned iſſue, and found againſt him; that then the cauſe was heard on the equity reſerved, when it was referred to the maſter to take the account, who reported 464 *l.* 6 *s.* 2 *d.* to be due, and appointed it to be paid to the *husband.* Then the plaintiffs ſet forth, that the report was confirmed, and *R.* proſecuted ſo far, as to be committed for non-payment, when the defendant ſuffered him to eſcape.

After a judgment by default in *C. B.* it was objected on *error* by the plaintiffs council, that the *wife* ought not to have joined in this action; for by *ſtat.* 5 *Ann c.* 9. *ſect.* 4. the action is given *to ſuch perſon to whom the money is paid* by the decree; and this not being an action maintainable at common law, they muſt take it as the ſtatute has given it; and if the *wife* is joined where ſhe ought not, it is *error.* 1 *Roll. Abr.* 782. And this is in the nature of a diſtinction of the firſt cauſe of action, and giving the *husband* a new one in his own right.

Per curiam. Though the order only appoints it to be paid to the *husband*, yet by the firſt decree it is directed, that the maſter ſhould take an account of what is due to the *husband* and *wife*, which ſhews ſhe was intereſted in the cauſe, and therefore proper to join in the action. The judgment of *C. B.* was affirmed. *Vide Stra. vol.* 2. *p.* 726.

Trinity, 2 *Geo.* 2. *King and Wife* v. *Jones.*

See page 8 of this work, under the head *abatement.*

Trinity, 4 *Geo.* 2. *Child & al.* v. *Hardyman. At niſi prius Guildhall.*

On an action brought for linen ſold to the defendant's *wife*, on *non aſſumpſit* pleaded, the delivery was proved, and that ſhe lived in a very lewd manner; one Mr. *N.* frequently coming to her at her *husband*'s houſe, and they were locked up together in a bed-chamber; and that other indecencies paſſed between them. And it was alſo proved, that ſhe ſeveral times went to the houſe of this Mr. *N.* a gentleman in *Wiltſhire*, who lived within three miles of the defendant's houſe. It did not appear farther than that he diſliked her going and ſtaying at Mr. *N.*'s, but under theſe circumſtances, they continued to live together. Afterwards ſhe went away from him, and went to *Marlborough*, where ſhe reſided ſome time. But after the leaving her *husband*'s houſe, it did not appear that ſhe ever ſaw Mr. *N.* or lived in a lewd manner. After ſome time ſhe ſent *L.* an attorney to her *husband*, to deſire that he would receive her again; the *husband* told him, that if ſhe came again, ſhe ſhould never ſit at the upper end of his table, nor have the government of the children, but ſhould live in a garret. Then *L.* propoſed to him, to make her an allowance, and propoſed about 80 or 100 *l. per annum*, he being worth about 500 or 600 *l. per annum*; but that was not complied with: and afterwards ſhe came to *London*, and bought linen to the amount of 53 *l.*

Raymond, Chief Juſtice, was of opinion, that the plaintiff ſhould be called; and accordingly he was nonſuited. He held, if a woman elopes from her *husband*, though ſhe does not go away with an adulterer, or live in an adulterous manner; the tradeſman truſts her at his peril, and the *husband* is not bound. And this had been ſo adjudged in two or three caſes; indeed if he refuſes to receive her again, from that time it may be an anſwer to the elopement. In this caſe he does not abſolutely refuſe to receive her again; but that ſhe ſhould neither ſit at his table, nor have any government of the children, but ſhould be kept in a garret; and ſhe deſerved no better uſage, ſo the plaintiff was nonſuited. *Vide Strange, vol.* 2. *p.* 875.

Eaſter, 7 *Geo.* 2. *Dobſon* v. *Dobſon, et al.'* Error.

A writ of *dower unde nihil habet*, was brought in the Dutchy court of *Lancaſter*, and judgment was given for the demandant. A writ of *ſeiſin* was awarded accordingly, and a writ of *inquiry*, and on the return of it damages were given to the widow to the full value of the dower, from the death of her *husband* to the return of the writ of *inquiry*. A writ of *error* was brought in this court and the following exceptions taken on the ſide of the plaintiff in *error.*

1ſt. That no damages will lie in this caſe. 2dly. That ſuppoſing damages will lie, yet not from the time they are awarded. 3dly. That as damages are given too ſoon, ſo they are carried too far.

The court over-ruled all the exceptions on the anſwers given, but that which is that here does not appear to be any default, becauſe the words in the entry are, *quod ipſe exact' non ven.* i. e. *that he being called, did not come*, ſince the words ſeem naturally to refer to no more than one, and it did not ſeem on default of one tenant, the court ſhould give judgment againſt all; therefore, they ordered this exception to be argued again.

In *Michaelmas,* 8 *Geo.* 2. this caſe was moved for again.

Hardwicke, Chief Juſtice. In caſes of this nature, which wholly turn on the critical conſtruction of words, it is incumbent on the court to make them good if poſſible, in order to maintain the right of the party.

Theſe words cannot be amended in this court, but it ſeems they might have been in the court below, *Trinity,* 2 *Geo.* 2. *Mutty* v. *Dennis.* 2 *Stra.* 807. *Barnard, B. R.* 53. In *ejectment* againſt two defendants; the plaintiff declared that *they entered, expelled, and amoved*, the court thought it ill, but ordered it to be amended, according to the authority of *Cro. Jac.* 306. *Salk.* 48.

It cannot be rejected, for the rule is, that words cannot be rejected unleſs they make an inconſiſtency, but if they have a ſenſe as they ſtand, though it vitiates the thing, they cannot be rejected, otherwiſe according to that rule, any thing may be right that is wrong.

The ſtatute for the amendment of the law will not help this, for that only aids judgment by confeſſion, *nil dicit* and *non ſum informatus*, which are after appearance, and writs of *enquiry* executed thereon, but no judgment by default before appearance.

But at laſt, the court ruled it good, by taking the word *ipſe* (as there are no diphthongs in court-hand) in the plural number, and ſuppoſing it to agree with the word *perſonæ*, underſtood.

The judgment was affirmed. *Vide Caſes Temp. Lord Hardwicke, p.* 19.

Trinity, 7 *Geo.* 2. *Smith* v. *Hixon.*

In an action on the *caſe* for maliciouſly proſecuting the plaintiff and his *wife* for receiving ſtolen goods, knowing them to be ſtolen, *by which* they were both ſcandalized; the *husband* interrupted in his trade, and put to expence; on *not guilty* pleaded, the jury find for the defendant as to proſecuting the *husband*; and for the plaintiff, as to the proſecution of the *wife.* And it was moved in arreſt of judgment, that what concerns the *husband* being out of the caſe, the *wife* ſhould have joined in the action, as to the matter for which the plaintiff would recover, and the other action would ſurvive her; and the council cited *Cro. Eliz.* 884. 1 *Sid.* 5.

Per curiam. In *Savil* v. *Roberts, Salk.* 13. it was indeed held, that expence alone without ſcandal would not be a ground for ſuch an action: but afterwards, in the caſe of *Jones* v. *Gwynne, Hilary,* 12 *Ann*, that opinion was exploded. Here it is laid down, that the *husband* was put to expence, and this being an action founded on a *tort*, the plaintiff was not bound to prove all the declaration, as he is in the caſe of *contracts*: and though this action, as to the ſcandal, may ſurvive to the *wife*, yet that is no reaſon, for he may undoubtedly maintain *treſpaſs* for beating her, *whereby he loſt the benefit of her company*, and yet no doubt the action for beating will ſurvive. The plaintiff muſt have judgment. *Vide Stra. vol.* 2. *p.* 977.

Eaſter, 8 *Geo.* 2. *Gordon* v. *Halpen and Wife.*

It was moved, that the *wife* may have leave to plead ſeparately from her *husband*; the caſe was, that her eſtate was ſettled on her, which ſettlement was confirmed by a decree in the Houſe of Lords to be for her ſeparate maintenance, only her eſtate was made liable to anſwer all actions brought againſt the *husband* on her account: and the council ſuggeſted, that this was a fictitious demand in the plaintiff ſet up by connivance of the *husband*, and that he will let judgment go by default, and ſo ſhare with the plaintiff in what ſhall be recovered.

Lord *Hardwicke*. We cannot allow you to ſever in pleading: your beſt way will be to plead in the name of *husband* and *wife*, and if the *husband* ſhould diſavow, and that ſhould be contrary to the order of the Houſe of Lords, you will know how to enforce that order; but we can do nothing in it. *Vide caſes Temp. Lord Hardwicke, p.* 101.

Eaſter, 8 *Geo*. 2. *Bern and Wife* v. *Mattaire.*

Lord *Hardwicke*. This is an action of *replevin*, wherein the plaintiff declares for taking fourteen ſkimmers and ladles, and three pots and covers, the goods and chattels of him the ſaid —— *Bern* and —— his wife; the defendant avows the taking for arrear of rent on a demiſe; the plaintiff pleads in *bar* to the avowry, and traverſes the demiſe; and iſſue is joined on that traverſe of *non demiſit*, and a verdict for the plaintiffs, that no ſuch demiſe was; and thereon it is moved in arreſt of judgment in behalf of the avowant, and three exceptions taken to the declaration:

Firſt exception. That a declaration in *replevin* cannot be maintained by a *husband* and *wife* jointly for taking the goods of the *husband* and *wife.*

Second exception. That it is a bad declaration for laying it to be to the damage of both.

Third exception, that it is ill for the uncertain deſcription of the goods taken, it ſaying fourteen ſkimmers and ladles, and for not ſaying how many of each ſort.

As to the firſt exception, it depends on this foundation, that *husband* and *wife* cannot have a joint property in chattels, and in general that is true, becauſe marriage is a gift of all chattels to the *husband*: but in this it does not appear that the taking was during the *coverture*, nor can we preſume it was, and the plaintiffs, for ought that appears, might be jointly poſſeſſed of theſe goods before marriage, and if that was the caſe, that they were ſo jointly poſſeſſed before marriage, and thoſe goods taken before marriage, they may after coverture join in the replevin, and declare for taking the goods of *husband* and *wife*, and if there can be ſuch a caſe, we muſt take it to be ſo here, becauſe the avowry allows a a property in them both, if it may be, by not diſputing the property as the avowant might have done; ſo in the year book of *Michaelmas, Ed.* 2. *fo.* 44. 175. this exception was over-ruled; ſo in *Bro. Abr. tit. Baron* and *Feme, pl.* 85. He ſays *baron* and *feme* ſhall not join in replevin; but *quere*, as to goods which ſhe has as executrix, for there it ſeems ſhe ſhall join in replevin *for the goods of the wife taken when ſhe was ſole*, ſo in *Ventris* 260, *Batmore and Wife* v. *Greams*, in *trover* brought by *husband* and *wife*, though the converſion was laid after the marriage, it was held that in regard the *trover* was laid to be before the marriage, which was the inception of the cauſe of action, the *wife* might be joined; as if a man has the cuſtody of a woman's goods, and afterwards marries her, ſhe may join in *detinue* with her *husband*; and *Hale* ſaid in ſuch caſe the *husband* may bring the action alone, or jointly with his *wife*; and ſo I take the law to be in this caſe, that the *husband* might have declared in this replevin alone, or jointly as he has done. The material authorities that have been cited againſt this doctrine are *F. N. B. fo.* 69. *Let. K.* But is only, that the goods of a *feme ſole* taken, who afterwards marries, the *baron* alone may ſue a replevin, and 1 *Sid.* 172. *Powis and wife* v. *Marſhall*, where it was held by *Twiſden* and *Wyndham*, that a replevin ſo brought, is well brought, and that actions which affirm property, ought to be brought by the *husband* alone; and that I muſt confeſs is contrary to the opinion now given, but it is alſo contrary to the year book of *Ed.* 2. and to the *plea* in *Brd. Abr.* and eſpecially to the caſe of *Batmore* v. *Greams* in *Ventris*, for actions of *detinue* are a much ſtronger affirmance of property than *replevin*.

As to the *ſecond exception*, it will follow the fate of the other, for if there was ſuch a joint poſſeſſion before marriage; the taking muſt be laid *to the damage of them*, becauſe the damage ſurvives to the wife, *Cro. Eliz.* 259. *Gurney and Wife* v. *Sir Ed. Clere.*

As to the *third exception*, the uncertain deſcription of the goods taken, it was ſaid, that though ſuch a general deſcription may be well enough, by the later caſes in *trover* and *treſpaſs*, yet that it is otherwiſe in *replevin*, which is an action which affirms property, and where the goods taken ought to be particularized, for a direction to the ſheriff to know what goods to return if a *retorn habend.* ſhould be awarded.

That it is well enough in *trover* and *treſpaſs*, cannot be doubted, though there are ſome old caſes to the contrary; yet the modern caſes are otherwiſe, as *Harford* v. *Jones*, and *Harriſon* v. *Bottom.* 1 *Salk.* 654. *Trinity*, 2 *Geo* 2. This very point came in queſtion, and was very fully conſidered in *Eaſter*, 1 *Geo. Kempſter* v. *Nelſon*, the caſe was a *replevin* for taking *his goods and chattels*, viz. *a certain parcel of linen, and a certain parcel of paper, the property of the plaintiff*; and the avowry was as a diſtreſs for rent, and it was excepted in arreſt of judgment, that a *certain parcel of paper and linen* was too general and uncertain a deſcription; and though it might be well enough in *trover* and *treſpaſs*, yet in *replevin* it was ill, as not being a ſufficient direction to the jury to aſſeſs damages, nor to the ſheriff for redelivering the goods: but Lord *Parker*, in giving his opinion, ſaid, that ſuch a declaration would be ill on demurrer, but that the pleadings had ſupplied the defect, becauſe the avowant having avowed the taking, had thereby taken on himſelf the knowledge of what the goods are; and the only controverſy is, who ſhall have them; and it would be no manner of benefit to the defendant to have them particularized; for if the plaintiffs had demanded five hundred reams of paper, though he proved but one, yet, if he proves one, he muſt recover; for in *torts*, if the plaintiff proves any part of his caſe, it is ſufficient; and as to the ſheriff's delivering the goods on a *retorn habend.* in caſe the avowant prevailed; he ſaid, the ſheriff may require either the plaintiff or defendant to ſhew him the goods; and it is a good return to make, that no one appeared on the part of the defendant to ſhew, &c. and there is ſuch a return in *Raſtal's Entries*, 570. *b.* and *Dalton's Sheriff*, 274. which in this caſe of *Kempſter*, was conſidered; and the court took it to have been determined on the point of an immaterial *traverſe*, for they ſaid it would be a ſtrange reſolution to ſay, that the addition of circumſtances ſhould make it more uncertain than it was before; and we think the reaſon of that caſe of *Kempſter* v. *Nelſon* governs this caſe: ſo the plaintiff muſt have judgment. *Vide Caſes Temp. Lord Hardwiske, p.* 119.

Michaelmas, 8 *Geo*. 2. *The King* v. *Brotherton.*

Articles of peace were exhibited againſt the defendant by his *wife*, and he was bound in 1000 *l.* to keep the peace, and his ſureties in 500 *l.* each.

In *Trinity*, 9 *Geo.* The Earl of *Stamford* on his Lady's ſwearing articles of the peace againſt him, was bound himſelf in 4000 *l.* and his ſureties in 2000 *l.* each. *Vide Caſes Temp. Lord Hardwicke, p.* 74.

Eaſter, 9 *Geo*. 2. *Barker v. Sir Woolſton Dixie, Baronet.*

In an action for a malicious proſecution, the defendant was willing his *wife* ſhould be examined, (the plaintiff's *wife*, I ſuppoſe.)

Lord *Hardwicke*. The reaſon why the law will not ſuffer a *wife* to be a witneſs for or againſt the *husband*, is, to preſerve the peace of families; and therefore, I ſhall never encourage ſuch a conſent; and ſhe was not examined. *Vide Temp. Lord Hardwicke, p.* 264.

Trinity, 11 *Geo*. 2. *Smalley* v. *Kerfoot and Wife.*

In an action of *treſpaſs* againſt *baron* and *feme*, for entering the plaintiff's houſe, taking his goods, and converting them to their own uſe. After a verdict for the plaintiff, and general damages, it was moved in arreſt of judgment, that the *feme* could not convert to her own uſe; and *Salk.* 114. was cited, where in *trover* it was held ill.

But on conſideration, the Chief Juſtice delivered the reſolution of the court, that this being *treſpaſs*, it was well enough; for the converſion here is not the *gift* of the action, as it is in *trover*; this action being maintainable for entering the houſe and taking the goods: and we muſt take it, the damages are given only for that, as where words are joined that are not actionable, (10 *Co. Oſborn*'s caſe) the court in tends they were only added to ſhew the malice of the party: and it is the ſame in *trover*, where part is ill deſcribed, we will not intend damages given for that: *Cro. Jac.* 665. Therefore the plaintiff muſt have judgment. *Vide Stra. vol.* 2. *p.* 1094.

Trinity, 11 *Geo.* 2. *The King* v. *Frederick and Tracy*.

The defendants were indicted for a joint aſſault, and at the trial in *Middleſex*, it was inſiſted to examine the *wife* of the defendant *Tracy*, as a witneſs for the other defendant, but there having been material evidence given againſt the *husband*, and it being a *joint treſpaſs*, and impoſſible to ſeparate the caſes of the two defendants in the account given of the tranſaction; the *Chief Juſtice* refuſed to let her be examined. *Vide Strange*, *vol.* 2. *p.* 1095.

Trinity, 12 *Geo.* 2. *The King* v. *Dr. Betteſworth*.

On a *mandamus* brought to grant adminiſtration to Mr. *Bridgen*, the late *husband* of Lady *Bellamont*, deceaſed, the Dean of the arches returned, that a ſuit had been commenced before him, between Mr. *Bridgen*, and a ſon of the deceaſed, who claimed to be her executor, under a will made by her, purſuant to a deed executed before marriage, whereby the *husband* agreed ſhe ſhould have power to make a will, and diſpoſe of her eſtate, which deed Mr. *Bridgen* had confeſſed, and thereon ſentence had been given for the validity of the diſpoſition, but not for any executorſhip created thereby; and thereon a new ſuit was inſtituted by the daughter againſt the ſon and Mr. *Bridgen*, for adminiſtration with the will annexed, which is ſtill depending.

And on conſideration the court declared, that no peremptory *mandamus* ought to go; for though generally the *husband* is intitled to the adminiſtration as next of kin, yet that is in reſpect of the intereſt he has in the eſtate, and becauſe no body is in *an equal degree*, and that is the reaſon why adminiſtrations are ſo often granted to a reſiduary legatee. The matter is properly under the conſideration of the *ſpiritual court*, to whom to grant adminiſtration, and there is no reaſon for us to interpoſe, and therefore the return muſt be allowed. *Vide Strange*, *vol.* 2. *p.* 1111.

Michaelmas, 13 *Geo.* 2. *Fowles* v. *Sir John Dinely. At niſi prius in Middleſex.*

The defendant's *wife* having been convicted of a conſpiracy to charge her *husband* with ſubornation of perjury, was committed in execution for a year. The plaintiff kept a ſpunging houſe within the rules, and received the defendant's *wife* into his houſe, and found her neceſſaries, for which this action was brought. The Chief Juſtice ruled, that it would not lie; for her being there was illegal, ſhe being ſuch a priſoner as was not intitled to the benefit of the rules, and in ſuch a caſe the law will not raiſe an implied promiſe to charge the *husband*. *Vide Strange*, *vol.* 2. *p.* 1122.

Michaelmas, 13 *Geo.* 2. *The King* v. *Crofts*.

The defendant being convicted on *ſtat.* 9 *Geo.* 2. *cap.* 23. for ſelling gin, it was objected by her council, that it appeared the defendant was a *feme covert*, and therefore as ſhe could make no contract, it muſt be taken to be her *husband*'s ſale; or if ſhe could be convicted, he ought to have been joined for conformity. And 2 *Keb.* 468. 479. 634. and 1 *Sid.* 410. were cited.

The council on the other ſide argued, that where the crime is of ſuch a nature, as can be committed by the *wife* alone, ſhe may be indicted without her *husband*; which being a proceeding grounded merely on the breach of the law, he ſhall not be included unleſs privy. *H. P. C.* 65. 1 *Hawk.* 3. 147. 6 *Mod.* 213. 239. In this caſe there may be impriſonment and whipping.

Per curiam. We think the conviction is right; for this is not like the caſes that ſound only in damages: the wife may be convicted alone for recuſancy. *Hob.* 96. 11 *Co. Forſter's caſe*, and though ſhe cannot have the benefit of the contract, yet ſhe as well as a ſervant may do the act of vending. *Salk.* 384. *Cro. Jac.* 482. Beſides, there would be a plain way to evade the act, if *feme coverts* could not be convicted. *Vide Strange*, *vol.* 2. *p.* 1120.

Trinity, 15 *Geo.* 2. *Pitts* v. *Meller and Wife*.

In an action of *trover* againſt both, and judgment and execution againſt both, the court refuſed to diſcharge the *wife* out of cuſtody, unleſs it could be ſhewn that there was colluſion between the plaintiff and her *husband* to keep her there. *Vide Strange*, *vol.* 2. *p.* 1167.

Eaſter, 17 *Geo.* 2. *Sims's Caſe*.

He exhibited articles of peace againſt his *wife*, and the court received the ſame without any objection. *Vide Strange*, *vol.* 2. *p.* 1207.

Michaelmas, 18 *Geo.* 2. *Bolton* v. *Prentice*.

In *aſſumpſit* for goods ſold and delivered to the defendant's *wife*, the caſe appeared to be, that the defendant and his *wife* had formerly lodged at the plaintiff's houſe, and the plaintiff furniſhed her with goods; and the defendant finding the plaintiff had helped her to pawn her watch, and ſuſpecting he confederated with her, left the lodgings, after paying the plaintiff his bill, forbidding him ever to truſt her again.

After this, the defendant and his *wife* cohabited together for a year, when, without any cauſe appearing, he left her, locked up her cloaths, and on her finding him out, refuſed to admit her, and ſtruck her, and declared he would not maintain her, or pay any body that did. In this diſtreſs, ſhe borrowed cloaths of her friends, and applied to the plaintiff, who furniſhed her with neceſſaries, according to the defendant's degree, which the defendant refuſing to pay for, this action was brought; and on the trial, the jury found for the plaintiff.

On a motion for a new trial, the court held the verdict was right; for whilſt they were at the plaintiff's, there was a particular reaſon for the particular prohibition; yet the turning her away deſtitute afterwards without cauſe gave her the general credit again: and if a *husband* ſhould be allowed under the notion of a particular prohibition, to deſtroy her obtaining credit in one place, he may in the ſame manner prevent it with all people ſhe is acquainted with. He appears to be a wrong doer, and therefore has no right to prohibit any body. They diſtinguiſhed this caſe from the caſe of *Manby* v. *Scott*, 1 *Sid.* 109. for there the *wife* was guilty of the firſt wrong, in eloping. *Vide Stra. vol.* 2. *p.* 1214.

Michaelmas, 19 *Geo.* 2. *Finch and Wife* v. *Duddin and Wife*.

In an action for *battery* of the plaintiff's *wife* by the defendant's *wife*, there was judgment for the plaintiffs, and the *wife* of the defendant was only taken in execution. She moved to be diſcharged; but on affidavits of endeavours to take the *husband*, and it not appearing there was any deſign to ſcreen him, the court refuſed it, on the authority of *Pitts* v. *Meller* and *wife*. *Vide Stra. vol.* 2. *p.* 1237.

Trinity, 21 *Geo.* 2. *Harriſon* v. *Bearcliffe and Wife*.

Both were arreſted for the debt of the *wife* when *ſole*: and the court diſcharged her, and ſaid, the *husband* muſt lie till he puts in bail for both. 1 *Lev.* 51. 216. and 1 *Ven.* 49. denied to be law. *Vide Stra. vol.* 2. *p.* 1272.

Eaſter, 31 *Geo.* 2. *The King* v. *Mead.*

On a *habeas corpus* brought by *J. W.* Eſq; to bring up the body of *M. W.* his *wife*, before *Deniſon*, Juſtice:

The ſubſtance of the return was, that her *husband*, (having uſed her very ill) in conſideration of a great ſum which ſhe gave him out of her ſeparate eſtate, had conſented to her living alone, executed *articles of ſeparation*, and therein *covenanted* never to diſturb her, or any perſon with whom ſhe ſhould live: that ſhe lived with her mother, and that this writ was brought with a view of ſeizing her by force.

The court held the *deed of ſeparation* to be a formal *renunciation* by the *husband* of his *marital right* to ſeize his *wife*, or force her back to live with him. *Vide Bur. vol.* 1. *p.* 542.

Michaelmas, 31 *Geo.* 2. *Windham, Eſq*; v. *Chetwynd, Eſq*;

Per curiam. In matters of evidence, *husband* and *wife* are conſidered as one, and they cannot be witneſſes the *one* for the *other*. The *husband* cannot be a witneſs for his *wife* in a queſtion touching her ſeparate eſtate. *Vide Bur. vol.* 1. *p.* 414.

Michaelmas, 31 *Geo.* 2. *Jenkins* v. *Whitehouſe and another.*

On a motion for a *prohibition* to ſtay proceedings in a cauſe relating to the will of a *married woman.*

Lord *Manſfield.* If the queſtion be, " whether the *wife* had a power to make an appointment in the nature of a will, and thereby to deprive the *husband* of any benefit which by law would devolve on him in conſequence of her death?" That would be a proper queſtion to be conſidered here, and if it was found that ſhe had no ſuch power, this court would grant a *prohibition.* On which the court granted a *rule to ſhew cauſe* why there ſhould not be a *prohibition*, but the matter never came on again. *Vide Bur. vol.* 1. *p.* 431.

Eaſter, 4 *Geo.* 3. *Marder and Wife* v. *Lee.*

On a motion to ſhew cauſe why the judgment and writ of *fieri fac.* executed thereon, ſhould not be ſet aſide with *coſts*, and the ſum of 172 *l.* 2 *s.* 6 *d.* levied by the *ſheriff* of *Devon*, be paid to the aſſignees of the defendant, under a commiſſion of bankruptcy iſſued againſt him on the 12th day of *May* laſt.

The caſe appeared to be, that *Lee*, the defendant, had entered into this *warrant of attorney* to confeſs a judgment to the *woman* plaintiff, *while ſole*, and ſhe afterwards married *Marder*, the *man* plaintiff, after which marriage the judgment was entered up by the *husband* and *wife*.

On this caſe the queſtion before the court was, " whether this judgment thus entered up by the *huſband* and *wife* be regular or not?"

After hearing council on both ſides,

The court declared their opinion to be, that the judgment was *irregular* for want of a previous leave of the court to enter it up. They held that in order to warrant this entry of the judgment, there ought to have been an application to the court for leave to enter it *up*, founded on a proper *affidavit*, proving the marriage between the plaintiffs, on which a rule of court ſhould have been obtained, giving leave to enter *up* judgment accordingly, but as this previous ſtep was not taken, the judgment was *irregular* for want of it: the conſequence of which was, that the rule was made *abſolute* without *coſts*. *Vide Bur. vol.* 3. *p.* 1468.

Eaſter, 5 *Geo.* 3. *The King* v. *Ellen Taylor late Bent.*

The defendant was brought up by *habeas corpus* from *Lancaſhire*, having been committed to the houſe of correction for diſobeying an order of two juſtices, who adjudged her child to be a *baſtard*, and ordering her to pay the pariſh 8 *d.* a week for the maintenance of the ſaid child, while it remained chargeable.

Lord *Manſfield.* A *feme covert* is liable to be proſecuted for crimes committed by her. This woman has diſobeyed the order of the juſtices, and *ſtat.* 18 *Eliz. cap.* 3. preſcribes the puniſhment here inflicted on her. There is no need to ſummon the *husband* in a *criminal* proſecution againſt the *wife*.

Wilmot, *Yates*, and *Aſton*, Juſtices, concurred with the Chief Juſtice in opinion.

Per curiam, unanimouſly, let the defendant be remanded. *Vide Bur. vol.* 3. *p.* 1679.

Michaelmas, 6 *Geo.* 3. *Lavie and another, Aſſignees of Jane Cox, a Bankrupt*, v. *Phillips and others, Aſſignees of John Cox, a Bankrupt.*

See this caſe fully ſtated in page 203. of this work, under the head of *bankrupt.*

Baſtards.

Hilary, 6 *W.* 3. *Pride* v. *The Earls of Bath and Montague.*

In *ejectment* brought by *Pride* againſt the Earls of *Bath* and *Montague*; *Pride* the plaintiff made title, as heir to *George* Duke of *Albermarle*, proving himſelf the ſon of the brother to the Duke, and that the Duke died without iſſue. The defendants gave evidence, that Duke *George* had iſſue Duke *Chriſtopher*, who conveyed to them: the plaintiff proved that Duke *Chriſtopher* was a *baſtard*, begotten of a woman who, at the time of her marriage with the ſaid *George* Duke of *Albermarle*, was married to another man, then, and ſtill living. To this it was objected, that ſince Duke *George* and this woman lived together as man and wife, and were now dead, the plaintiff could not be admitted to *baſtardize* the iſſue, who was dead alſo; and who, during his whole life, was reputed and taken to be the legitimate ſon of the Duke, and ſtyled by the Duke himſelf in his deed of ſettlement, and in his laſt will and teſtament, his ſon and heir; *and that it is not juſt to baſtardize any one after his death.* The court held this true of ſuch a *baſtard* as is meant by *Lit.* in his caſe of *baſtard eigne* and *mulier puiſne*, i. e. ſuch a *baſtard* as is born before the eſpouſals of a father and mother who marry afterwards; and ſaid, the rule extended only to that caſe. If *H.* marries a woman, and that woman marries again during the life of *H.* the laſt marriage is void without any divorce; and the jury ſhall try the fact which proves it no marriage: and the reaſon why the ſpiritual court cannot give ſentence to annul a marriage after the death of the parties is, becauſe the ſentence is given only *for the ſalvation of the ſoul*, and after death it is too late to effect that. *Vide Salk. vol.* 1. *p.* 121.

Hilary, 6 *W.* 3. *The King* v. *Barebaker.*

An order of Juſtices to pay ſo much money *per* week till the child is fourteen years of age, is naught; for the juſtices have no power but to indemnify the pariſh; and that is only to oblige the father to maintain the child as long as it is, or may be chargeable. *Vide Salk. vol.* 1. *p.* 121.

Eaſter, 8 *W.* 3. *The King* v. *The Inhabitants of Liſley.*

An order of ſettlement was made by two juſtices of peace to remove one *E. S.* and *W.* her ſon, to the pariſh of *Morton-Hampſtead*; in which order the cauſe aſſigned was, becauſe by fraud and colluſion of the pariſh of *Liſley*, ſhe was delivered of the ſaid *baſtard* child in the pariſh of *Morton.*

It was *objected* againſt this order, that it did not appear therein that the mother was legally ſettled in the pariſh of *Liſley*, or that ſhe was a pariſhioner there at the time ſhe was delivered at *Morton*; it only ſaid *E. S.* late of *Liſley*, *ſingle* woman, which is but the deſcription of the perſon, and an addition of the place, and not a ſufficient allegation that ſhe was an inhabitant there, or that the child was ſettled there.

Now, it appears by the order, that the child was born at *Morton*, and the birth at *firſt view* makes a ſettlement in that place, nothing appearing in the order to make him an inhabitant elſewhere, and they cannot ſend him back to a place where he never was.

The reaſon of the removal is too general, to wit, that ſhe was delivered at *Morton*, by the fraud and colluſion of the pariſh of *Liſley*.

As to the firſt *objection*, it was anſwered, that the order recites her to be late of the pariſh of *Liſley*, *ſingle* woman; which is a ſufficient taking notice, that ſhe was an inhabitant of that pariſh.

As to the ſecond *objection*, it was ſaid, that the juſtices are not bound to ſhew reaſon why they make ſuch an order to remove her; and therefore if they aſſign a cauſe uncertainly, that ſhall not quaſh an order.

The court inclined that ſhe ought to be alledged to be a legal inhabitant of the pariſh of *Liſley*; but would not quaſh the order, becauſe it was *nine years* ſince it was made. *Vide Mod. Rep. vol.* 5. *p.* 204.

Hilary, 10 *W.* 3. *Maſters* v. *Child.*

Adjudged, that the birth of a *baſtard* child *prima facie* ſettles it in the place where it was born; but if a woman big with child of a *baſtard*, and *ſettled in one pariſh*, is perſuaded to go into another, there to be delivered, this fraud will make the pariſh chargeable where the mother was ſettled, though the child was not born there: but if a woman with child of a *baſtard* comes *accidentally into one pariſh*, and is perſuaded by ſome of the pariſhioners to go into another pariſh, which ſhe does, and is there delivered, this ſhall not charge that pariſh which perſuaded her. *Vide Salk. vol.* 3. *p.* 66.

Michaelmas, 10 *W.* 3. *The King* v. *The Inhabitants of Riſlip, Hendon, and Harrow.*

Several orders being removed into the *King's Bench* by *certiorari*,

Holt, Chief Juſtice, cited a caſe between *Thornton* and *Pickering*, where it was adjudged, that if a man be *adjudged* to be the father of a *baſtard* by two juſtices, he is *eſtopped* againſt all the world to ſay the contrary, and a man may juſtify the calling him ſo. *Vide Raym. vol.* 1. *p.* 394.

Michaelmas, 10 *W.* 3. *The King* v. *Albert Alberton.*

An order was made by two juſtices, that *A.* ſhould maintain a *baſtard* child, where the caſe was thus: A *feme covert*, during the abſence of her huſband at *Cadiz*, was brought to bed of a *baſtard*, and her huſband was not in *England* from the time of her conception till ſhe was brought to bed. The order being removed into the *King's Bench* by *certiorari*; the queſtion was, whether this child was a *baſtard* within *ſtat.* 18 *Eliz. c.* 3.? the words of which ſtatute are, "children begotten and born out of lawful matrimony," which cannot be ſaid in this caſe, the mother being married at the time of the birth of the child, ſo that there is a father bound to provide for it; and if ſuch mother ſhould kill ſuch child, ſhe would be guilty of murder within *ſtat.* 21 *Jac.* 1. *c.* 27. *But not allowed.*

Per cur. He is a *baſtard*, who is begotten and born of a *feme covert* whilſt her huſband is beyond the four ſeas. And in a real action, if general *baſtardy* was pleaded, the biſhop ought to certify ſuch a one, *baſtard*: indeed, in caſe of *baſtard eigne*, the *baſtardy* muſt be pleaded ſpecially; becauſe ſuch a one is *mulier* by the canon law, and the biſhop would certify him ſuch. And where a man is a *baſtard*, he is ſuch to all purpoſes, and why not within *ſtat.* 18 *Eliz.?* for though *ſtat.* 21 *Jac.* 1. is a penal law, yet this act is a remedial law.

Then exception was taken to the form of the order, becauſe it ſaid that the huſband at the time of the begetting and birth was beyond the four ſeas; but it is not ſaid that he was not within them in the mean time, for if he was, the child was not a *baſtard*. And for this exception, the order was quaſhed: but the defendant was bound in a recognizance to appear at the next ſeſſions.

Per curiam. The conſtant practice has been ſo ever ſince the reign of *Charles* 1. *Vide Raym. vol.* 1. *p.* 395.

Michaelmas, 10 *W.* 3. *Wood's Caſe.*

A woman big with child was removed by order of two juſtices, from *A.* to *B.* and was there brought to bed; *B.* appealed, and on the appeal the *woman* was ſent back to *A.*

Per curiam. So ought the *child*, for all was ſuſpended by the appeal; and now, the mother's right of ſettlement in *B.* is avoided from the beginning. *Vide Salk. vol.* 1. *p.* 121.

Michaelmas, 10 *W.* 3. *Alinſon* v. *Spence.*

A motion was made to quaſh an order that was made for maintaining a *baſtard child*, when it was born in lawful wedlock; for it is ſaid that the huſband was at *Cadiz*.

Then here is a ſum in groſs ordered, which is ill; beſides, we ſay, it is a contrivance.

Chief Juſtice. The order muſt be quaſhed; for it muſt appear that he was not here during the whole ſpace. If he was here either at the begetting or birth of the child, it is ſufficient. Let the reputed father be bound over to appear in this court. *Vide Mod. Rep. vol.* 5. *p.* 419.

Eaſter, 11 *W.* 3. *Dr. Groenvelt* v. *Dr. Burwell Cenſor of the College of Phyſicians, and others.*

In this caſe, *Holt*, Chief Juſtice, obſerved, that if two juſtices adjudge *A.* to be the father of a *baſtard*; if the child is a *baſtard*, *A.* is concluded by the judgment of the juſtices, and cannot falſify it, and ſay, that he is not the father; but his only remedy is by appeal: but if the child was born in wedlock, then the judgment was *not before the court*, and void, and conſequently no perſon concluded by it. *Vide Raym. vol.* 1. *p.* 471.

Hilary, 2 *Ann.* *The Queen* v. *Daniell.*

Per Holt, Chief Juſtice. A conſpiracy to charge one with a *baſtard* child, is indictable; but if one ſhould adviſe another to do it without more, it would not. *Vide Mod. Rep. vol.* 6. *p.* 100.

Eaſter, 2 *Ann.* *The Queen* v. *Chaffey.*

Several orders made by the juſtices of peace in *Wilts* againſt the defendant, for being the putative father of a *baſtard* child, were removed into this court by *certiorari*. It was moved to quaſh one of them, which was made by the juſtices, that the churchwardens and overſeers of the poor ſhould ſeize on the defendant's goods, what they ſhould judge proper, to ſecure the pariſh from the maintenance of the child; becauſe by *ſtat.* 13 & 14. *Car.* 2. *c.* 12. they have only authority to make an order to empower the churchwardens and overſeers, *&c.* to ſeize what the juſtices ſhould judge proper, and not what the churchwardens, *&c.* ſhould judge proper, *&c.* and for this reaſon it was quaſhed. Then an exception was taken to the original order, becauſe it ordered, that the defendant ſhould give ſecurity for the payment of the ſum by them impoſed for the maintenance of the child; when it did not appear that the defendant had diſobeyed the order in point of payment. And by *ſtat.* 18 *Eliz. c.* 3. an order for ſecurity cannot be made, till after contempt; and for this reaſon the order was quaſhed as to that part, and was confirmed as to the reſidue.

Per curiam. When an order is confirmed in this court, an attachment lies for non-performance of it; and therefore this court will not take ſecurity of the party for the performance of it. But if the original order had been at the ſeſſions, and not removed hither, the court would have taken ſecurity of him to appear there. *Vide Raym. vol.* 2. *p.* 858.

Trinity, 3 *Ann.* *Between the Pariſhes of Weſtbury and Coſtham or Corſham.*

A poor woman with child, being *unmarried*, was by order of two juſtices, removed from *Weſtbury* in *Wilts* to *Corſham*, and brought to bed there: *Corſham* appealed at the next ſeſſions, and the order was reverſed; afterwards, by order of two juſtices, the *child* was ſent to *Corſham*, they appealed, and the order was confirmed. At laſt the whole matter was removed into this court by *certiorari*.

Per curiam. The birth of the child at *Corſham* did not ſettle it there, becauſe it was under an *illegal order*, procured by *Weſtbury*, which order being reverſed, the matter amounts to no more, than that they unjuſtly procured the woman to go there, and therefore ſhall not take advantage of a wrong act of their own. *Vide Forteſcue, p.* 315. *Mod. Rep. vol.* 6. *p.* 213.

Michaelmas, 3 *Ann.* *The Queen* v. *Murray*.

On a ſpecial order of ſeſſions, the queſtion was, if the *husband* be beyond ſea, and during the time the *wife* is got with child, whether this child be a *baſtard*, within *ſtat.* 18 *Eliz. c.* 3?

Per curiam. If the *husband* was out of the four ſeas during all the time of the *wife*'s going with child, the child is a *baſtard*; but if he was here at all within the time, it is *legitimate*, and *not a baſtard*. And accordingly, as it did not appear by the order, that the *husband* was abſent *all the time*, the order was quaſhed. *Vide Salk. vol.* 1. *p.* 122.

Eaſter, 4 *Ann.* *The Queen* v. *Weſt*.

The defendant had an order made on him by two juſtices of peace, for the maintenance of a *baſtard* child; he appealed to the general quarter ſeſſions, who confirmed the order, and committed him for diſobedience to their order. He was brought into this court by *habeas corpus*, and it was moved that he might be diſcharged; for that the juſtice ought not to have committed him, but to have proceeded on his recognizance; and of that opinion the court ſeemed to be. 2 *Bulſt.* 341. There was a fault in the order, which was, Dr. *Fuller* and another, two of her Majeſty's juſtices of the peace, *doth* adjudge, &c: *Cro. Eliz.* 108. *Cro. Car.* 464. But the court thought this not ſufficient to quaſh the order: but they quaſhed it, becauſe it appeared the juſtices ordered him to pay an exceſſive ſum. And though they quaſhed the order, they ordered him to appear at the next ſeſſions. *Vide Mod. Rep. vol.* 11. *p.* 59. *Raym. vol.* 2. *p.* 1157.

Trinity, 4 *Ann.* *The Queen* v. *Weſton*.

The defendant was adjudged by two juſtices of the peace to be the father of a *baſtard* child; and the order being removed into this court by *certiorari*; ſeveral exceptions were taken to it:

1ſt. That the juſtices had ordered the weekly payments to be made on a particular day, *viz.* on every *Monday*, in which they had gone beyond the power given them by the ſtatute; for computing the time from the making the order, the week was not up on the *Monday*.

Holt, Chief Juſtice, held that it was well; and if it was before the day the week was up, yet payment before the day was payment at the day.

2dly. That the money was ordered to be paid to the overſeers of the poor, whereas it ought to have been ordered to be paid to the inhabitants of the pariſh generally.

Holt, Chief Juſtice, held it was well enough.

3dly. But the great objection which ſtuck long with the court was, that after the recital of the order, when it came to the adjudication, it was, we the ſaid juſtices *doth* adjudge, inſtead of *do*, the ſingular number for the plural. And to maintain this objection, *Fullwood*'s caſe, 1 *Cro.* 489. where *F.* and others were indicted on *ſtat.* 3 *H.* 7. *cap.* 2. for aſſaulting and taking a woman away by force, and marrying her againſt her will; and the indictment was *cepit*, inſtead of *ceperunt*; and notwithſtanding that exception taken, yet judgment of death was given againſt the defendants. But *Holt*, Chief Juſtice, ſaid, that the anſwer which is reported in the book to have been given to the objection, is not adequate to it, and is ſo very odd, that he feared the reporter was miſtaken, and ordered the roll to be ſearched: and on ſearching, the roll was produced in court, and was not *cepit*, as it was reported to be in the book, but *ceperunt*: and ſo that caſe being removed out of the way, after the matter had depended two terms, and been ſeveral times ſtirred, the court, for that exception, the laſt day of the term, quaſhed the order.

And afterwards, the ſame juſtices made another order, with the very ſame fault in it, *viz. doth* adjudge, and on a *certiorari*, that was quaſhed, *Hilary*, 4 *Ann. Vide Raym. vol.* 1. *p.* 1197.

Michaelmas, 4 *Ann.* *Bridge* v. *The Pariſh of St. Mary le-Bone.*

On certifying an order of juſtices, on *ſtat.* 4 *El. c.* 6. an exception taken to the order was, that the judgment ought to have been, that inaſmuch as they had ordered him to pay the money, and he had refuſed to pay, that he ſhould ſtand commited; but in this caſe it was, that they ordered him to pay ſo much, and in caſe he refuſed, then, &c.

Holt, Chief Juſtice, ſaid, the act directs in what manner the money ſhall be levied; that is, firſt, an order or a judgment that he is in arrear; then if he makes an actual refuſal, an award of a diſtreſs; and if a return is made that he has nothing to be diſtrained by, then a commitment.

The court confirmed that part of the order relating to the payment of the money, and quaſhed the order for the commitment, *niſi* in a week. *Vide Mod. Rep. vol.* 11. *p.* 65.

Hilary, 5 *Ann.* *Between the Pariſh of Budworth and the Townſhip of Dumply in Lancaſhire.*

On an order made thirty years ago, on the pariſh of *Budworth*, for the maintenance of a *baſtard* child, born in the townſhip of *Nether Dumply*, within that pariſh, which order was now removed before the court by *certiorari*: it was held,

1ſt, That an order made on the overſeers of any pariſh by two juſtices, for raiſing a ſum towards the maintenance of a *baſtard* or poor perſon, does not determine the ſettlement of that perſon in that pariſh; for the right of ſettlement is not conteſted, but preſumed.

2dly, That the clauſe in ſtatute 13 & 14 *Car.* 2. *c.* 12. which provides that diſtinct townſhips of large pariſhes in the northern counties, ſhall reſpectively provide for their poor, under the penalty mentioned in *ſtat.* 43 *Eliz. c.* 2. muſt be underſtood with reſpect to the maintenance of poor and impotent perſons, and not with reſpect to *baſtards* who are provided for by other ſtatutes: but if a *baſtard* be grown up, and by accident grows impotent, he may be relieved as a poor perſon within that ſtatute. *Vide Salk. vol.* 1. *p.* 123.

Michaelmas, 5 *Ann.* *St. George, Southwark* v. *St. Margaret's, Weſtminſter.*

Three children being born in *Saint George*'s pariſh, on the body of *M. B.* wife of *G. B.* an inhabitant of *Saint Margaret*'s, *Weſtminſter*; the inhabitants of *Saint Margaret's* alledged, that the mother was a lewd woman, and was divorced from her huſband, and had the children a long time after the divorce; but the juſtices ſent them by an order of ſeſſions to *Saint Margaret's, Weſtminſter*, on being informed that the huſband lived there; ſuppoſing that to be the place of their laſt legal ſettlement. It was moved to quaſh the order, for that the children were *baſtards*.

Per curiam. They are *baſtards*, being begotten by an adulterer after a divorce.

It was objected, it did not appear by the order but that the huſband got them.

Holt, Chief Juſtice. We will intend the contrary, unleſs you can prove their cohabitation. But being of great conſequence, the matter was *adjourned*. *Vide Mod. Rep. vol.* 11. *p.* 106.

Michaelmas, 6 *Ann.* *The Queen* v. *Simmons.*

On a motion to diſcharge a perſon committed by the juſtices at their ſeſſions on *ſtat.* 18 *Eliz. c.* 3. The ſtat. ſays, *that the two juſtices, if they order a perſon to keep a baſtard child, may commit him, unleſs he gives ſecurity*, 2 *Hulſt.* 341. and it was objected, that the juſtices, and not the ſeſſions, have the power in this caſe to commit, &c.

Powell, Juſtice. Suppoſe he gives ſecurity to abide the order of the juſtices, and that this order is confirmed at the ſeſſions, cannot they commit him for diſobeying it?

Holt, Chief Juſtice. No, they cannot; they muſt proceed on the ſecurity.

Anſwer. But here is no ſecurity given. In this caſe, the man kept out of the way, ſo the two juſtices could neither commit him, nor take ſecurity of him; but they make this order on him, and then he appeals to the ſeſſions, and the juſtices order him to be committed. The order was quaſhed; but the court bound him over to appear at the next quarter ſeſſions. *Vide Mod. Rep. vol.* 11. *p.* 136.

Eaſter, 7 *Ann.* *The Queen* v. *Atkins.*

An order of two juſtices was made on the father of a *baſtard child*, that he ſhould pay 1*s.* 6*d. per* week, from the time of the birth of the child till it ſhould be ten years old, and then to pay 5*l.* for the putting it out apprentice; it was objected, that the order was not according to the ſtatute, for 'tis uncertain whether it will be chargeable ſo long as till ten years of age. It ought to have been to pay ſo much, &c. ſo long as the child is chargeable to the pariſh. To which the court agreed, and therefore quaſhed the order. *Vide Mod. Rep. vol.* 11. *p.* 172.

Trinity, 7 *Ann.* *The Queen* v. *Collins.*

An order of two juſtices was made on *Collins*, the reputed father of a *baſtard child*; it was ordered, he ſhould pay 20*d. per* week, and the woman 4*d. per* week, for ten years. It was moved to quaſh it, becauſe it ſhoud have been, as long as the child is likely to become chargeable, and not for a certain term of years; and the *King* v. *James* was cited, for it might be that an eſtate might come to the child in the mean time, and it hinders the father from keeping it himſelf if he has a mind to it.

Accordingly, the order was quaſhed. *Vide Mod. Rep. vol.* 11. *p.* 178.

Michaelmas, 10 *Ann.* *The inhabitants of Southwell* v. *The inhabitants of Sneedon in Nottingham.*

In an order of removal of a *baſtard* child to the place of its birth, it was ſtated, that a certain woman was brought to bed at *Sneedon*, of a *baſtard* child, and that ſhe came immediately and dropped it in the pariſh of *Southwell*, there to be chargeable to the pariſh, and ſhe cannot be found, though endeavours have been uſed to that purpoſe; therefore it was removed from the pariſh of *Southwell*, to the pariſh of *Sneedon*, that being the place of its birth.

The order was quaſhed, becauſe they had not named the woman; the *C. J.* declaring they muſt either name her, or ſay, that ſhe is a perſon unknown, as is ſaid in an indictment. *Vide Forteſcue*, *p.* 313.

Eaſter, 11 *Ann.* *Anonymous.*

An exception was taken to an order of two juſtices for the maintenance of a *baſtard* child, that it was ſet forth in the order, that the *baſtard* child was likely to become chargeable to the pariſh, which is the very foundation of the juriſdiction of the juſtices of peace.

But not allowed; for the law preſumes that *baſtard* children will become chargeable, becauſe nobody is bound to provide for them, and therefore this need not appear in the order.

Another objection was, that the order was for the reputed father to pay ſo much a week for the maintenance of the child, until the child ſhould come to the age of 8 years; whereas the order ought to have been conditional, if the child continue ſo long chargeable.

But not allowed; for ſuch orders in the very ſame form have often been allowed; and the words of the order, *towards the maintenance of the child*, imply ſuch a condition.

N. B. In caſe of *baſtards* a complaint is not neceſſary to the giving juſtices of the peace juriſdiction, as in the caſe of *poor*. *Vide Mod. Rep. vol.* 10. *p.* 85.

Hilary, 12 *Ann.* *The inhabitants of Sandridge* v. *The inhabitants of Luton.*

An order for the removal of a *baſtard* child ſaid, that a *baſtard* male child about three months old was brought into *Sandridge*, and that ſuch child was a baſtard, and born and ſettled in *Luton*; it was objected, they did not name the mother, nor ſay unknown, and quoted the caſe of *Southwell* v. *Sneedon*; and it was held a good exception, and the order was quaſhed. *Vide Forteſcue*, *p.* 314.

Michaelmas, 12 *Ann.* *The Queen* v. *Odam.*

An order for maintenance of a *baſtard child* was excepted to, becauſe the defendant was on ſight of the order to pay 9*l.* in groſs, and after that ſo much weekly.

Per curiam: By the ſtatute the juſtices are to *take order for the relief of the pariſh, and keeping of the child, by payment of money weekly, or other ſuſtentation*; and this may be only indemnifying the pariſh for money laid out before the reputed father was found. *Vide Salk. vol.* 1. *p.* 124.

Michaelmas, 1 *Geo.* *The King* v. *Miles.*

This was a motion to quaſh an order of *baſtardy*.

The *firſt objection* againſt the order was, that it ſhould have been ſet forth what place the child was born at; becauſe that gives the juſtices their juriſdiction.

Per curiam: The adjudging ſuch a one the father of a *baſtard* child, which was born in ſuch a town, is a ſufficient ſetting forth the place of his birth.

Second objection: The pariſh being out of time; the child being 14 years of age.

Per cur. The pariſh is not confined to any time by the ſtatute; and a good reaſon is ſet forth in the order, why the pariſh did not complain ſooner, *viz.* that the father ran away, and could not be found ſooner; and having no eſtate, nothing could be done in his abſence.

Third objection: Awarded by the order, that the father ſhall give ſecurity both for the performance of the order, and likewiſe for indemnifying the pariſh for the future.

Per curiam: The giving ſecurity is a thing very reaſonable in itſelf; but ſince there have been former opinions of the court, that the juſtices have not a power to award the giving ſecurity for the due performance of their order, until ſuch time as their order has been contemned, (but then they have) the order muſt be quaſhed for that: but as for giving ſecurity for indemnifying the pariſh, it is right. *Vide Mod. Rep. vol.* 10. *p.* 271.

Eaſter, 3 *Geo.* *The pariſh of St. Andrew* v. *The Pariſh of St. Bride.*

On an order of ſeſſions for the removal of a wife and three children from the pariſh of St. *Andrew* to the pariſh of St. *Bride*, ſetting forth that *A.* about twenty-three years ſince married *B.* and lived with her five years in the pariſh of *St. Bride*, and had by her four children, two whereof were dead, and the other two provided for. That at the end of five years he went away from her, and married another woman, with whom he lived ſomewhere in *England*; but that he never ſaw his firſt wife *B.* from the time of his going away.

B. after the ſeparation (having heard nothing for a long time of *A.*) married a ſecond huſband, by whom ſhe had eight children in the pariſh of St. *Andrew*, who all went by the name of the ſecond huſband, five of them are dead, and the other three ſurvive. And the ſeſſions preſuming that the ſecond marriage is void *from the beginning*, adjudge, that her ſettlement, and that of the three children, is in the pariſh of St. *Bride*, where the firſt huſband lived, as deeming the children the legitimate iſſue of the firſt marriage.

The court quaſhed the order as to the children, and confirmed it as to the wife.

Firſt, Becauſe the ſecond marriage, and living with the ſecond huſband in St. *Andrew*'s, was void *from the beginning*; and therefore the place of her ſettlement was where the firſt huſband lived.

Secondly, It being adjudged that the firſt huſband had no acceſs to her for *ſeventeen years*, no preſumption ſhall be admitted but that theſe are the children of the ſecond marriage; and they not being born in the pariſh of St. *Bride*, nor having ever inhabited there *forty days*, can have no ſettlement in St. *Bride's*. 1 *Roll. Abr.* 351. *lib.* 1. 8. *pl.* 4. 5. *Bract. lib.* 5. *fo.* 417. *Co. Litt.* 123. 2 *Roll. Abr.* 356. *Cro. Jac.* 541. *Fleta, lib.* 1. *c.* 15, 4, 5. *Bracton, lib.* 1. *c.* 9, 4. *Co. Litt.* 244. *a. Salk.* 123, 483. 7 *H.* 4. 9. All theſe caſes were cited to prove, that improbability will *baſtardize* the iſſue; and therefore it was argued *a fortiori* that impoſſibility, which was found in this caſe, would *baſtardize* alſo. *Vide Strange. vol.* 1. *p.* 51.

Hilary, 8 *Geo.* *The King* v. *England.*

Two orders of *baſtardy* were returned, one made by two juſtices, and another original order made at the ſeſſions; and both were quaſhed. The order of the two juſtices, becauſe neither the ſex of the *baſtard*, or the name of it was mentioned, only a certain *baſtard* child born of the body of *A.*; and the order of the ſeſſions, becauſe there being an order of two juſtices before, the ſeſſions had no juriſdiction but on appeal. *Vide Stra. vol.* 1. *p.* 503.

Eaſter, 10 *Geo.* *The King* v. *Godfrey.*

An order made on the defendant to maintain a *baſtard* child was quaſhed, becauſe though in the complaint it was alledged, the child was born in the pariſh of *Hitchin*, in *Hertfordſhire*, yet there was no adjudication by the juſtices, nor no words of the juſtices from whence it could be collected, in what pariſh the child was born. And a caſe was cited. *The Queen* v. *Beddington*, *Eaſter* 10 *Ann.* where ſuch an order was quaſhed for this very exception. *Vide Raym. vol.* 2. *p.* 1363.

Michaelmas, 11 *Geo.* *The King* v. *William Chandler.*

The defendant was indicted at the general quarter ſeſſions of the peace for the county of *Wilts*, for that *Alice Hunt being pregnant with an illegitimate child*, which ſhe affirmed to be, by the ſaid *William Chandler*, of *Uphaven*, in the ſaid county, begotten; he the ſaid *William Chandler being not ignorant of the premiſes, with intention to prevent and obſtruct the evidence* of the ſaid *Alice*, of and *concerning the premiſes, and to elude the execution of juſtice for the crime aforeſaid, on the* 8th *of November, in the tenth year of the reign of our Lord the King, with force and arms*, at Uphaven *aforeſaid, in the county aforeſaid, carried away, and cauſed to be carried away*, the ſaid *Alice to a place unknown, and hitherto has ſecreted the perſon of the ſaid Alice, and the ſaid Alice, ſtill continues to ſecrete, to the bad example of others and againſt the peace of our Lord the King, his crown and dignity*, &c. To this indictment removed into this court by *certiorari*, the defendant demurred; and judgment was given in his favour, that this indictment was not maintainable; it being no offence, for which an indictment would lie, as the fact was charged. *Vide Raym. vol.* 2. *p.* 1368.

Michaelmas, 12 *Geo.* *The King* v. *Warne.*

On an indictment for taking a *baſtard* child born out of the pariſh of *A.* and bringing it into that pariſh, and there keeping it privately without notice to the churchwardens, and with intent to charge the pariſh; the court quaſhed the indictment, becauſe it appeared the pariſh could not be burthened, the *baſtard* being born out of the pariſh of *A.* *Vide Strange, vol.* 1. *p.* 644.

Michaelmas, 13 *Geo.* *The King* v. *Tenant.*

Several orders of baſtardy were removed into this court by *certiorari*: the firſt order was made by two juſtices of the peace for the *Weſt-Riding* of *Yorkſhire*, on the defendant to keep a *baſtard* child, as being the reputed father. From this order the defendant appealed to the quarter ſeſſions; and the juſtices at the quarter ſeſſions on a full hearing of the merits, diſcharged the order of the two juſtices; but bound the defendant by recognizance to appear at the next quarter ſeſſions, as it was ſuppoſed, under apprehenſion, that better evidence might be procured againſt him. After this the ſame two juſtices made a new order againſt him for keeping this *baſtard* child. And all theſe orders being removed into this court *November* 10, 1726, the court quaſhed the laſt order of the two juſtices; for they having made an order on the defendant to keep the child as reputed father, and that order being regularly diſcharged on an appeal, on hearing the merits, the defendant was legally acquitted, and cannot be drawn in queſtion again for the ſame fact. *Vide Raym. vol.* 2. *p.* 1423. *Strange, vol.* 2. *p.* 716.

Michaelmas, 1 *Geo.* 2. *The King* v. *Street.*

An order was made, to pay ſo much weekly till the child was nine years old, or if it ſhould live ſo long.

Per curiam. It is a good order, for we cannot intend it able to provide for itſelf ſooner. *Vide Strange, vol.* 2. *p.* 788.

Trinity, 2 *Geo.* 2. *The King* v. *Browne.*

On an order of *baſtardy*, it was ſtated, that the huſband had been abſent ſix years, and that during his abſence the defendant had carnal knowledge of his wife, and therefore they adjudged him to be the putative father.

Per curiam. That order muſt be quaſhed, for his lying with her is not a ſufficient reaſon to infer him the father of this child: and though the juſtices need not ſhew the grounds they go on, yet if they do, and it appears no ſufficient ground, their order will be bad. *Vide Strange, vol.* 2. *p.* 811.

Hilary, 5 *Geo.* 2. *Pendrell* v. *Pendrell.*

On an iſſue out of *Chancery*, to try whether the plaintiff was the heir at law of one *Thomas Pendrell*, it was agreed, that the plaintiff's father and mother were married, and cohabited for ſome months, that they parted, ſhe ſtaying in *London*, and he going into *Staffordſhire*; that at the end of three years the plaintiff was born; and there being ſome doubt on the evidence, whether the husband had not been in *London* within the laſt year, it was ſent to be tried here. And the plaintiff reſted at firſt on the preſumption of law in favour of *legitimacy*, which was encountered by ſtrong evidence of no acceſs. And it was agreed by the court, that the old doctrine of being within the four ſeas was not to take place; but the jury were at liberty to conſider the point of acceſs, which they did, and found againſt the plaintiff.

The *Chief Juſtice* allowed the defendant to prove the mother to be a woman of ill fame. *Salk.* 120. *Cro. Jac.* 541. but he would not allow the mother's declarations to be given in evidence, till ſhe had been called, and denied them on the croſs examination. *Vide Strange, vol.* 2. *p.* 925.

Michaelmas, 6 *Geo.* 2. *On the demiſe of Lomax* v. *Holmden and others.*

In *ejectment* the queſtion on a trial at bar was, whether the leſſor was ſon and heir of *Caleb Lomax*, Eſq; deceaſed, which depended on the queſtion of his mother's marriage. And that being fully proved, and evidence given of the huſband's being frequently at *London*, where the mother lived, ſo that acceſs muſt be preſumed, the defendants were admitted to give evidence of his inability from a bad habit of body. But their evidence not going to an impoſſibility, but an improbability only, that was not thought ſufficient, and a verdict was given for the plaintiff. *Vide Strange, vol.* 2. *p.* 940.

Eaſter, 7 *Geo.* 2. *The King* v. *Heſlop.*

An order of *baſtardy*, made by two juſtices of the borough of *Richmond* in *Yorkſhire*, was quaſhed for want of *one of the quorum*, though *ſtat.* 3 *Car.* 1. *c.* 5. was inſiſted on, where juſtices in precincts have power to execute *ſtat.* 18 *Eliz. c.* 3. as juſtices in the county do.

Per curiam. It muſt be in the ſame manner. The reporter however doubts the legality of this determination, as many charters have no *quorum*. *Vide Strange, vol.* 2. *p.* 974.

Eaſter, 8 *Geo.* 2. *The King* v. *The inhabitants of St. Peter's, in Worceſterſhire.*

On a motion made to quaſh an order of *ſeſſions*, made for vacating an original order of two juſtices for the removal of a *baſtard*.

Lord Hardwicke. The firſt order goes too far in calling him a *baſtard*, and the ſon of *J. H.* for ſtrictly ſpeaking a *baſtard* is *nobody's child*, but this is only an impropriety, and the order is well enough.

As to the order of *ſeſſions* the man does ſwear to diſcharge himſelf, for whether he be the *legitimate* or only the *natural* father of the child, he is equally bound to maintain him. *Vide Bur. S. C. vol.* 1. *p.* 25.

Michaelmas, 8 *Geo.* 2. *The King* v. *Reading.*

It was moved to quaſh an order of two juſtices, and two orders of ſeſſions made thereon, whereby the defendant was adjudged father of a *baſtard child.*

The firſt order of ſeſſions was a ſpecial one, ſetting forth the particular circumſtances of the caſe, and charging the defendant, on the oath of a *feme covert*, with begetting a *baſtard child* on her. This order adjourned the matter, to take the advice of the judges of aſſize, but they declined giving their opinion in it: and the ſecond order reſumes the affair, and adjudges the defendant to be the father of the child. There were other witneſſes who ſaid, that the *huſband* was reſident about ſeven miles from the wife's habitation.

Exception was taken to theſe orders, that the *wife* was the only evidence, and that ſhe is not a competent witneſs in law to exonerate her *huſband* of the charge and burthen of this child.

Hardwicke, Chief Juſtice. There are in the preſent caſe two queſtions; one on the form of the order, and the other on the merits.

The objection to the form is, that the firſt order of ſeſſions makes no determination, and that the ſecond order is wholly ſuperfluous, as there appears no adjournment on the firſt, ſo as to enable the ſeſſions to reſume the conſideration of the cauſe.

Where an appeal is lodged in the ſeſſions, it is neceſſary that they ſhould make a direct and final judgment, and they cannot refer it to the judges of aſſize for their judgment. *Salk.* 480. and the caſe of the *King* v. *Willey* this term; and therefore, had the matter reſted on the firſt order, it would undoubtedly have been bad, but then, it cannot be doubted, but that they may continue over the determination on the appeal by a proper adjournment, either to take the advice of the judges, or for any other reaſon.

Therefore, the matter reſts on this, that there is on the firſt order a reference to the judges of aſſize for their advice; and no formal adjournment made after it. It does not ſeem there was ever any determination, that it is neceſſary for the juſtices in their quarter ſeſſions, in the execution of any juriſdiction given by the ſtatute, to make formal and regular continuances, as the courts above do. It muſt, indeed, be agreed, that on indictments, where they proceed as a court of record at common law, they muſt make regular continuances. But it ſeems that on orders no ſuch formal adjournment is neceſſary; and the matter ſufficiently imports, that, there was in fact an adjournment in the preſent caſe, by referring it to the judges for their advice, when they ſhould come the circuit.

Then the queſtion will ariſe, whether the laſt order's being adjudged bad on the merits of the firſt order, can be abſtracted from them, and made good? It has always been taken as a rule in this caſe, that where there is a general order of the two juſtices good on the face of it, and the party appeals from it to the ſeſſions again, and they make an order ſpecially, ſtating the caſe as it appeared on evidence before them, the court will take the ſpecial caſe in the laſt order, to be the foundation on which the firſt order of the two juſtices was made, and therefore, if the evidence ſet out on the laſt order is not ſufficient to maintain their judgment thereon, the court will not only quaſh the laſt, but the firſt order likewiſe.

It has been ſaid, that if the orders of ſeſſions ſhould be bad on any account, the court will not take notice of any thing appearing on them; but though this is the rule of pleading, yet it does not hold in orders; for in orders of ſettlement, where on appeal from two juſtices, the ſeſſions ſtate the caſe ſpecially, and conclude with quaſhing the order of the two juſtices; this court will ſometimes make uſe of the fact appearing on the laſt order to quaſh it, and conſequently affirm the order of the two juſtices.

Then, as to the merits: the *wife* is not a competent evidence in point of *law* in this caſe, that is, to prove the whole fact, though it ſeems ſhe may be a competent witneſs to prove the criminal converſation between the defendant and herſelf, by reaſon of the nature of the fact, which is uſually carried on with ſuch ſecrecy, that it will admit of no other evidence; therefore, as to the fact of the defendant's converſation with her, ſhe may be a good witneſs; but this is only from the neceſſity of the thing. But then, in the preſent caſe, it is carried further, for the wife is the only evidence to prove the abſence and want of acceſs of her *huſband*, whereas this might be made appear by other witneſſes, and therefore the *wife* ſhall not be admitted to prove it, ſince there is no neceſſity that can juſtify her being an evidence in this caſe.

In the caſe of *Pendrell* v. *Pendrell, Hilary*, 5 *Geo.* 2. there was the ſtrongeſt evidence imaginable to prove the want of acceſs of the *huſband*, it was made appear by ſeveral of the huſband's relations, who watched him for that purpoſe, that he was in *Staffordſhire* all the time his *wife* went with child; and that ſhe reſided in *London* the whole time.

The wife is therefore not to be admitted an evidence to prove that her *huſband* had no acceſs to her; and the teſtimony of the other witneſſes, that he reſided about ſeven miles diſtant, ſhews an apparent poſſibility of acceſs.

It muſt be of very dangerous conſequence to lay it down in general, that a *wife* ſhould be a ſufficient ſole evidence to *baſtardize* her child, and diſcharge the *huſband* of the burthen of its maintenance.

But the opinion of the court at preſent will not be a precedent to determine any other caſe wherein there are other ſufficient witneſſes as to the want of acceſs: but the foundation that is now gone on is, the *wife's* being ſole witneſs.

Page, Juſtice. This is ſomething ſimilar to the caſes of *hue and cry*, where by ſtatute in an action againſt the hundred, the perſon robbed is admitted an evidence from the neceſſity of the thing, as to thoſe matters which generally can be proved by none but himſelf, as the particular ſum of which he is robbed, and in what place; but of all other things, which may poſſibly be proved as well by other evidence, he is no witneſs in law, nor does the ſtatute extend to it, as whether the place is within the hundred, &c.

Probyn, Juſtice. In caſes of violence committed by the huſband againſt the wife, ſhe herſelf is admitted an evidence, as in the caſe of Lord *Audley*, and in caſes of exhibiting articles of the peace, from the neceſſity of the thing, ſince it may be done at a time when no one elſe can prove or know it.

Lee, Juſtice. In the caſe in *Salk.* where a child born in lawful wedlock was proved to be a *baſtard*, no ſuch exception was taken as in the preſent caſe, but the defendant merely inſiſted on the old notion of the *huſband*'s being within the four ſeas.

On *ſtat.* 3 *H.* 7. *c.* 2. in the caſe of *Ramſay* for forcibly taking away a woman, and marrying her; the wife was admitted an evidence, becauſe none elſe, except the defendant, was preſent; and therefore, it is very proper to admit this woman to prove what was done in ſecret, and what it cannot be preſumed there are other witneſſes to prove; but then, it muſt be admitted, no farther than neceſſity warrants; and in all other caſes, the rule of law is to be adhered to.

But he doubted, as to the order of ſeſſions being good in form; for the words of 18 *Eliz.* ſeem to confine that to the next ſeſſions; and if they then and there do nothing, then the act of the two juſtices is to ſtand.

At length, the court ordered it to ſtand over as to this ſingle point, of which Mr. Juſtice *Lee* doubted; but that all the reſt were fully determined. *Vide Caſes Temp. Lord Hardwicke, p.* 79.

Trinity, 9 *Geo.* 2. *The King* v. *Jenkin or Jenkins.*

An order made by two juſtices, ſetting forth that the defendant had been charged with being the father of a *baſtard child*, and that on examination into the matter they were of opinion he was not ſo, and do therefore *adjudge* that he be acquitted thereof, being removed hither.

The court were of opinion, that the juſtices had gone too far; for their whole authority is under ſtat. 18 *Eliz. c.* 3. whereby they are only impowered to take order for the relief of the pariſh, and the puniſhment of the offender; but have no power to acquit the party, or convict him *finally*: which appears likewiſe from their proceedings being always in *Engliſh*, where they are not required to ſet out the evidence, or ſhew a ſummons. The *ſeſſions* indeed on *ſtat.* 3 *Car.* 1. *cap.* 4. § 15. may make a final order, and after a man is diſcharged by one *ſeſſions*, a ſubſequent *ſeſſions* cannot take it up again, as was held *Mich.* 13 *Geo.* 1. *The King* v. *Tenant*. And it would be greatly inconvenient, that the juſtices ſhould have ſuch a power; becauſe the pariſh cannot appeal: the defendant indeed may, not by virtue of the expreſs words, but in conſequence of the *clauſe* about giving ſecurity to abide the order of *ſeſſions*, if the party does not ſubmit to the order of the two juſtices. And tho' a man may thereby be liable to be harraſſed in being carried before ſeveral juſtices, that is a leſs evil than the other: this court being always open for redreſs, if any thing ſhould be done to the manifeſt oppreſſion of the party. The order was quaſhed. *Vide Strange, vol.* 2. *p.* 1050. *Caſes Temp. Lord Hardwicke, p.* 302.

Trinity, 9 *Geo.* St. *Giles's Pariſh in Reading* v. *The Pariſhes of Everſly and Blackwater.*

Per curiam. *Baſtard children* gain a ſettlement only *prima facie*, till the legal ſettlement is known, and no longer, and the reaſon is, becauſe the children ſhould not become *vagrants*. *Vide Mod. Rep. vol.* 8. *p.* 170.

Trinity, 10 *Geo.* 2. *The King* v. *The inhabitants of Bedall, in Yorkſhire.*

An order was made on one *M.* as the *putative father* of *two baſtards* born of the body of *E.* the wife of *R. S.* in which it is ſet forth, that for *ſeven years* before the huſband had no acceſs to her, ſhe having never ſeen or heard from him during all that time, and not knowing whether he was alive or dead, which the juſtices *adjudge* to be true, and that *M.* is the father of the ſaid *two baſtards*, and order him to provide for them accordingly.

On appeal to the *ſeſſions*, the caſe was *ſtated* with ſome variation, *viz.* That in 1728. *E.* was married to *R. S.* then a *ſoldier* in *Mullins*'s troop, in a barn, by a perſon not in the habit of a clergyman: that there had been no acceſs for *ſeven years*: but it appearing by a certificate from the commiſſary general's office, dated 7th of *April* 1737, and from the evidence of one *S. C.* that one *R. S.* who he was told was formerly in *Mullins*'s troop, was muſtered as a private gentleman in the *third troop of horſe guards*, from the 25th of *June*, 1733, to the 23d of *Feb.* 1736, though *C.* ſaid he could not take on him to ſwear that it was the ſame *R. S.* pretended to be married as aforeſaid: on this ſuppoſition of the huſband's being alive, the *ſeſſions* were of opinion the children were not *baſtards*, and reverſed the order made by the two juſtices.

And now on debate the order of *ſeſſions* was quaſhed, and the order of the two juſtices confirmed: for it being ſtated in both orders, that there was no acceſs, according to the caſe of *Pendrel* v *Pendrel*. *Hil.* 5 *Geo.* 2. it was immaterial whether the huſband was alive or not, but if it was material, here is no evidence to prove it, the *identity* not being ſworn to; or if it was ſworn to, yet the evidence of his being alive was improper to have been received, and even the marriage itſelf doubtful. *Vide Strange, vol.* 2. *p.* 1076.

Hilary, 15 *Geo.* 2. *The King* v. *Cornforth et al'.*

The court granted an *information* againſt the defendant for taking away a *natural* daughter not *ſixteen* years of age, then under the care of her *putative father*: being of opinion it was within the *third ſect.* of *ſtat.* 4 & 5 *P* & *M. c.* 8. *Vide Stra. vol.* 2. *p.* 1162.

Eaſter, 15 *Geo.* 2. *The King* v. *Moravia.*

An order of *baſtardy* ſet forth, that the woman was *delivered of a child, baptized in the pariſh of* A. and it was *objected*, that this does not *import* ſuch child to have been born there, which is the only circumſtance to warrant the pariſh's applying for relief. But the court ſaid, that by a reaſonable conſtruction it may be ſo underſtood; and therefore confirmed the order. *Vide Stra. vol.* 2. *p.* 1166.

Trinity, 15 *Geo.* 2. *The pariſh of Lydlynch* v. *the Pariſh of Hilton.*

The caſe of *New Windham* v. *White Waltham*, *Trinity*, 5 *Geo.* 1. turning chiefly on the certificate being concluſive to the pariſh which gave it, and certified two perſons, as *man* and *wife*; it now came before the court, and was determined, that the *baſtard* of a certificate perſon is ſettled where born, and is not a *child* to be ſent back within the meaning of the ſtatute. *Vide Stra. vol.* 2. *p.* 1168.

16 *Geo.* 2. *The King* v. *The Inhabitants of Hilton.*

On a motion to quaſh an order of two juſtices for the removal of a *baſtard* child of a certificate woman, which had been confirmed by the ſeſſions.

The queſtion was, whom the pariſh have a right to remove as children under *ſtat.* 8 & 9 *W.* 3. *cap.* 30.

Lee, Chief Juſtice. I know of no caſe that conſiders *baſtards* as the children of any one. I think the act cannot be conſtrued into ſuch a meaning, and that the preſent removal cannot be maintained, which ſends the *baſtard* away from the place where born, under the notion of being the child of a certificate perſon.

Chapple, *Wright*, and *Deniſon*, Juſtices, concurred with the Chief Juſtice.

Per curiam. Let the rule be made abſolute to quaſh both *orders*. *Vide Bur. S. C. vol.* 1. *p.* 187.

Trinity 19 *&* 20 *Geo.* 2. *The King* v. *The inhabitants of Wyke.*

On a motion to quaſh an order of two juſtices made to remove *J. G.* his wife and children, in which order the wife was ſtated to be pregnant with a *baſtard* child, and the certificate expreſsly undertakes to provide for her and her child.

Lee, Chief Juſtice, and Wright Juſtice, agreed that they muſt take the child referred to by the certificate to be a *legitimate* child then in being.

Foſter, Juſtice, obſerved (which the other two Juſtices agreed to) that it did not appear that the pariſh which gave the certificate knew that the woman was then with child; and he added that there were many inſtances where women were near their time, without being known to be ſo.

Per curiam: Let the rule be made abſolute, whereby the order of *ſeſſions* was quaſhed, and the *original* order was affirmed. *Vide Bur. S. C. vol.* 1. *p.* 264.

Eaſter, 5 *Geo.* 3. *The King* v. *Ellen Taylor, late Bent.*

See this caſe fully ſtated in page 218. of this work, under the head of *Baron* and *Feme,* and in *Bur. vol.* 3. *p.* 1670.

Bills of Exchange, and Promiſſory Notes.

3 *W. & M.* *Clark* v. *Mundal.*

A. having a *bill of Exchange* payable to him, and he being indebted to *B.* in a ſum of money, indorſes this bill to *B.* Afterwards *B.* brought an action of *aſſumpſit* againſt *A.* for the money, to which the defendant pleads *non aſſumpſit.* *A.* gave in evidence this *bill of exchange* indorſed, and that it had lain ſo long in *B.*'s hands after it was payable, and reckoned it as money paid and in his hands; but not allowed; for a bill ſhall never go in diſcharge of a *precedent* debt, except it be part of the contract that it ſhould be ſo. For example, if *A.* ſells goods to *B.* and *B.* is to give a bill in ſatisfaction, *B.* is diſcharged though the bill is never paid, for the bill is payment; for otherwiſe a bill would never diſcharge a *precedent* debt or contract: but if part be received, it ſhall be only a diſcharge of the old debt for ſo much. *Vide Salk. vol.* 1. *p.* 117.

Eaſter, 5 *W. & M.* *Hodges* v. *Steward.*

In an action on the *caſe* on a *Bill of Exchange,* the plaintiff declared on the cuſtom of *London,* that where one merchant draws a *bill* on himſelf, payable to another, or bearer, and the perſon, to whom it is payable, indorſes it to a third man, the indorſee, on refuſal of payment, may bring an action againſt the drawer; and ſaid, the defendant drew ſuch a *bill* to *F.* who aſſigned it to the plaintiff, *from whence has accrued,* &c.

Per curiam, There is a difference between a *bill* payable to *J. S.* or bearer, and a *bill* to *J. S.* or order; there is no authority given to aſſign by the one, by the other there is. 2dly. This is a good bill between the indorſor and indorſee, for the indorſement is in nature of a new *bill.* 3dly. Though there is no averment of the defendant's being a merchant at the time of drawing the *bill,* yet the drawing the *bill* was a ſufficient trading and negotiation to this purpoſe; and *Holt,* Chief Juſtice, cited *Sarsfield* v. *Witherley's* caſe; where, in an action againſt *Witherley,* on a *bill of exchange,* he pleaded *no trader,* but a gentleman ſent into *France* to travel, and for the conveniency of a remittance, drew this *bill, &c.* and judgment *for the defendant in this court;* but it was reverſed in the *Exchequer Chamber,* becauſe his drawing a *bill* made him a trader within the cuſtom of merchants, as to a *bill of exchange.* 4thly. The plaintiff having declared on a ſpecial cuſtom for a bearer to have an action, and the defendant having demurred, inſtead of traverſing it, though in truth there is no ſuch cuſtom, has confeſſed it; and ſo judgment *for the plaintiff.* For though the court will take notice of the law of merchants, and if an action had been brought on it, that demurrer would not have concluded the court to give judgment for the plaintiff, or have forced them to determine a thing otherwiſe than the law directs; yet they cannot take notice of the cuſtoms of particular places; and the cuſtom in the declaration being ſufficient to maintain the action, the defendant, by confeſſing it by demurrer, has given judgment againſt himſelf. 5thly. A general *indeb. aſſumpt.* will lie on a *bill of exchange* for want of conſideration; the bill is but an evidence of a promiſe, and ſo only a void agreement, and therefore he ought to bring a ſpecial action on the *caſe,* on the *bill* and cuſtom of merchants, or elſe a general *indeb.* for money received to his uſe. *Vide Mod. Rep. vol.* 12. *p.* 36. *Raym. vol.* 1. *p.* 181.

5 *W.* 3. *Williams* v. *Field.*

Adjudged, that where a bill is drawn payable to *W. R. or order,* and he indorſes it to *B.* who indorſes it to *C.* and he indorſes it to *D.* the laſt indorſee may bring an action againſt any of the indorſors, becauſe every indorſement is a new credit, and implies a warranty by the indorſor, that the money ſhall be paid. *Vide Salk. vol.* 3. *p.* 68.

Michaelmas, 5 *W. & M.* *Pearſon* v. *Garrett.*

See page 20 of this work, under the head *Actions.*

Trinity, 7 *W.* 3. *Taſſell and Lee* v. *Lewis.*

The cuſtom with regard to *foreign bills of exchange* is, that three days are allowed for payment of them; and if they are not paid on the laſt of the three days, the party ought immediately to proteſt the *bill,* and return it, and by this means the drawer will be charged: but if he does not proteſt it the laſt of the three days, which are called *the days of grace;* there, although he on whom the *bill* is drawn fails, the drawer will not be chargeable, for it ſhall be reckoned the holder's folly that he did not proteſt, *&c.* But if it happens that the laſt day of the ſaid three days is a *Sunday,* or a great holiday, as *Chriſtmas* day, *&c.* on which no money is uſually paid, there the party ought to demand the money on the ſecond day; and if it is not paid, he ought to proteſt the *bill* the ſaid ſecond day; otherwiſe it will be at his own peril, for the drawer will not be chargeable. The evidence in this cauſe being merchants, ſwore the cuſtom of merchants to be ſuch, which was approved by *Holt,* Chief Juſtice. 2dly. There is no cuſtom for the proteſt of *inland bills of exchange,* nor any certain time aſſigned by the cuſtom for the payment of them; therefore the money ought to be demanded in a reaſonable time after it is payable; and then, if it is not paid, the drawer will be charged. *Stat.* 9 *W.* 3. *c.* 17. 3dly. If the indorſee of a bill accepts but twopence from the acceptor, he can never after reſort to the drawer. 4thly. The *notes* of goldſmiths (whether they are payable to order or to bearer) are always accounted among merchants as ready caſh, and not as *bills of exchange.* 5thly. The time of receiving money on a goldſmith's *note* is immediately, or elſe it will be at the peril of him who has the *note.* He who delivers over the *note* will not be charged, if the goldſmith fails, as the drawer of a *bill of exchange* would be; but the receiver is ſuppoſed to give credit to the goldſmith, and the *note* is looked on as ready money, payable immediately; and if he does not like it, he ought to refuſe it; but having accepted it, it is at his peril. But *note,* if the party to whom the note is delivered demands the money of the goldſmith in a reaſonable time, and he will not pay it, it will charge him who gave the *note.* *Hopkins* v. *Geary, Hilary,* 1 *Ann,* in this court. 6thly. A goldſmith's *note* indorſed is a *bill of exchange* againſt the indorſor. *Vide Raym. vol.* 1. *p.* 743.

Michaelmas, 8 *W.* 3. *Hackſhaw* v. *Clerke*.

An action on the *caſe* was brought on a *bill of exchange*; to which the defendant pleaded, that after the acceptance of the *bill*, he gave a bond in diſcharge thereof; and on demurrer to the plea, it was objected, that this amounted to the general iſſue, for the debt on the bill being extinguiſhed by the bond, the defendant ought to have pleaded *non aſſumpſit*, and to have given the bond in evidence; and the court ſeemed of that opinion; but by conſent, the defendant was permitted to plead the general iſſue. *Vide Mod. Rep. vol.* 5. *p.* 314.

Michaelmas, 8 *W.* 3. *Yeoman* v. *Bradſhaw*.

Per curiam. A *bill of exchange* is only a ſimple contract debt, and aſſets only where the debtor lives, and therefore adminiſtration is to be granted where the perſon who pays it reſides. *Vide Mod. Rep. vol.* 12. *p.* 107.

Hilary, 8 & 9 *W.* 3. *Soper* v. *Dible*.

On an *aſſumpſit* brought on a *bill of exchange*; the plaintiff declared, that *according to the cuſtom and uſage of merchants*, the acceptor is bound to pay, &c. without ſhewing the cuſtom at large. On demurrer, it was adjudged for the plaintiff.

Per curiam. It is a better way than to ſhew the whole at large. *Vide Raym. vol.* 1. *p.* 175.

Hilary, 8 & 9 *W.* 3. *Pinkney* v. *Hall*.

In an action on the *caſe*, the plaintiff declared, that whereas *within this kingdom of England*, there is, and time whereof, &c. has been a cuſtom, that if two merchants are partners, jointly merchandizing together, and one of them ſubſcribes a *bill* for the payment of money by him and his partner mentioned therein, to another, or his order, that then both the partners are bound by the ſubſcription of that ſingle perſon; and that if the perſon to whom this *bill* is payable, indorſes it payable to any other perſon, that then thoſe partners ought to pay ſuch bill on notice to him to whom it was made payable; then the plaintiff ſhewed that *J. S.* and the defendant *Hall* were partners, jointly merchandizing; and that *J. S.* ſubſcribed a *bill* of 100 *l.* payable to *Hall* or his order, by himſelf and his partner, and that *Hall indorſed the bill aforeſaid, payable* to the plaintiff, that the defendant had notice thereof, and on demand did not pay, &c. The defendant demurred.

Firſt exception. That the declaration being *by the cuſtom of England*, &c. was ill, becauſe the cuſtom of *England* is the law of *England*, of which the judges ought to take proper notice without pleading. *But not allowed:* For though heretofore this has been allowed, yet, of late time, it has always been overruled; and in an action againſt a carrier, it is always laid *on the cuſtom of England*, &c.

Second exception. Though *the law of merchants* is part of the law of *England*, yet it is but a particular cuſtom among merchants; and therefore it ought to be ſhewn in *London*, or in ſome other particular place. *But not allowed:* for the cuſtom is not reſtrained to any particular place. And in *Hardr.* 485. it is laid as here.

Third exception. It is not ſaid, that the ſaid *J. S.* promiſed for the defendant and himſelf on the account of trade, and it may be, that it was for rent, or ſome other thing, for which the partner is not liable. *But not allowed:* for the plaintiff having declared ſo ſpecially on the cuſtom, it ſhall be intended this was for merchandizing, eſpecially ſince the defendant has demurred generally; and if the caſe had been otherwiſe, the defendant might have pleaded it.

Fourth exception. That the declaration is, that *Hall indorſed the bill aforeſaid, payable* to the plaintiff, which is nonſenſe, for it ought to be, that he indorſed the *bill*, that the defendant ſhould pay, &c. *But not allowed.* And judgment was given for the plaintiff. *Vide Raym. vol.* 1. *p.* 175.

Michaelmas, 9 *W.* 3. *Woolvil* v. *Young*.

The plaintiff declared on the cuſtom of *England*, to wit, *that if any perſon ſigns a bill to pay money at a day, that by cuſtom he ought to pay it on that day*; and then ſets forth, that the defendants were *reſident and negotiating within this kingdom of England*, and that they had ſigned ſuch a *bill*, but did not pay the money; on demurrer to the declaration, it was held ill, for this way of declaring ſo generally will exclude all conſiderations which muſt be averred.

Every man is *negotiating* in the kingdom, and if the plaintiff would have brought this caſe within the cuſtom of merchants, he ought to have ſaid *having commerce*, or have ſhewed, that the *bill* ſigned was a bill *of exchange*.

It is true, in the caſe of *Sarsfield* v. *Witherley*, the declaration was, that the defendant *Witherley was reſident in, and negotiating at* London, &c. without ſaying, *having commerce*, but it appeared on the whole frame of the declaration, that it was a *bill of exchange*. *Vide Mod. Rep. vol.* 5. *p.* 367.

Eaſter, 10 *W.* 3. *Clerk* v. *Pigot*, *before Holt, Chief Juſtice. At Guildhall.*

In an *aſſumpſit*, on a *bill of exchange*, the caſe was: *D.* drew a *bill of exchange* at *Briſtol*, on *Pigot* in *London*, payable to *Clerk*, or order, at twenty-eight days ſight. *Clerk* living at *Briſtol*, ſends the *bill* with one *K.* to *London*, and his name indorſed thereon, but a blank ſpace over his name; *K.* preſented it to *Pigot*, who accepted it, and for non-payment *Clerk* brought this action; it was alledged, the action ſhould have been brought by *K.* becauſe by *Clerk*'s indorſing his name, the property was transferred from him to *K.* But the *Chief Juſtice* held, that there being a blank ſpace left over the name of *Clerk*, as is uſual in *bills of exchange*, it was at the election of *K.* either to make uſe of it as his ſervant, or order; if he had filled up the blank ſpace, and made it payable to him, as he might have done if he would, then the property of the *bill* had been transferred to him, and he only could have maintained this action againſt the acceptor; but ſeeing he has not filled up the blank ſpace, he thereby declares his intention to act only as a ſervant of *Clerk*'s, whoſe name was put there, that, on payment thereof, a receipt might be wrote for the money over his name; *otherwiſe* this action would not be maintainable by *Clerk*. *Vide Mod. Rep. vol.* 12. *p.* 192.

Michaelmas, 10 *W.* 3. *Hawkins* v. *Gardner*.

In an action on the *caſe* on a *bill of exchange*; whereby the defendant promiſed to pay to *R. A.* or order 460 *l.* who indorſed 44 *l.* thereof to the plaintiff, who as indorſee brought this action for the ſaid 44 *l.* part of the ſaid 460 *l.* The defendant pleaded an inſufficient plea, and the plaintiff demurred; and it was held, that this perſonal contract is intire, and cannot be apportioned and multiplied into ſeveral accounts: ſo that if *A.* draws a *bill* of 100 *l.* payable to *B.* or order; *B.* cannot aſſign 50 *l.* thereof, ſo as his aſſignee ſhall have an action for the ſame; and if *B.* himſelf brings an action for part, he muſt acknowledge ſatisfaction for the reſidue. *Vide Mod. Rep. vol.* 12. *p.* 213.

Michaelmas, 10 *W.* 3. *Hawkins* v. *Cardy*.

The plaintiff brought an action on the *caſe* on a *bill of exchange* againſt the defendant, and declared on the cuſtom of merchants, which he ſhewed to be, that if any merchant ſubſcribes a *bill*, by which he promiſes to pay a ſum of money to another man or his order, and afterwards the perſon to whom the *bill* was made payable, indorſes the ſaid *bill*, for the payment of the whole ſum therein contained, or any part thereof, to another man, the firſt drawer is obliged to pay the ſum ſo indorſed, to the perſon to whom it is indorſed payable; and then the plaintiff ſhewed, that the defendant *Cardy*, being a merchant, ſubſcribed a *bill* of 46 *l.* 19 *s.* to *B.* or his order; that *B.* indorſed 43 *l.* 4 *s.* of it payable to the plaintiff, &c. the defendant pleaded an inſufficient plea. On demurrer, the declaration was adjudged ill. For a man cannot apportion ſuch a perſonal contract, for he cannot make a man liable to two actions, when by the contract he is liable but to one. But if in the principal caſe the plaintiff had acknowledged the receipt of the 43 *l*. 4 *s*. the declaration had been good. And though it was objected that the plaintiff has made payment of a part to be part of the cuſtom, and therefore it was well enough by the cuſtom,

Holt, Chief Juſtice, anſwered, this is not a particular *local* cuſtom, but the *common* cuſtom of merchants, of which the law takes notice, and therefore the court cannot take the cuſtom to be ſo; and the court were unanimouſly of opinion, that judgment ought to be entered for the defendant: but on the importunity of the plaintiff's council, he was permitted to *diſcontinue* on payment of coſts. *Vide Raym. vol.* 1. *p.* 360.

Michaelmas, 10 *W*. 3. *The Governor and Company of the Bank of England* v. *Newman*.

B. gave a *bill of exchange*, payable to *N*. or bearer; *N*. negotiated it with the bank, at the uſual rate of intereſt; after this the bank received 100 *l*. of *B*. and after that demanded the money due on the *bill* of a ſervant of *B*. who did not pay it; and after *B*. failed, the *bank* brought an *aſſumpſit* againſt *N*. for the money; and on the general iſſue a verdict was given for the plaintiff, but a new trial was granted, the verdict being againſt law; for whatſoever may be the practice among bankers, the law is, that if a *bill* or *note* be payable to a perſon or bearer, and he negotiates the *bill*, and delivers it for ready money paid to him, without any indorſement on the *bill*, this is a plain buying of the *bill*; as of tallies, bank-bills, *&c*. but if it is indorſed, there is a remedy againſt the indorſor.

Per Holt, Chief Juſtice. If a man gives ſuch a *bill* for money not due before, *without indorſement*, it is a ſale of the bill; and a demand of a ſervant of the drawer, who uſed to pay money for him, is a good demand. *Vide Mod. Rep. vol.* 12. *p.* 241.

Michaelmas, 10 *W*. 3. *Anonymous*.

A bank bill payable to *A*. or bearer, being given to *A*. and loſt, was found by a ſtranger, who transferred it to *C*. for a valuable conſideration; *C*. got a new bill made out in his own name.

Per Holt, Chief Juſtice, *A*. may have an action of *trover* againſt the ſtranger who found the *bill*, for he had no title, though the payment to him would have indemnified the bank; but *A*. cannot maintain *trover* againſt *C*. by reaſon of the courſe of trade, which creates a property in the aſſignee or bearer. *Vide Salk. vol.* 1. *p.* 126.

Michaelmas, 10 *W*. 3. *Anonymous*.

A *bill of exchange* being made payable to *A*. or order, if *A*. indorſes it to *B*. *B*. cannot ſue *A*. unleſs he firſt endeavours to find out the firſt drawer to demand it of him; for the indorſor is only a warranter for the payment of the drawer, and therefore liable only on his default; and ſuch endeavour to find the drawer muſt be ſhewn in evidence. *Vide Salk. vol.* 1. *p.* 126.

Michaelmas, 10 *W*. 3. *Jackſon* v. *Pigot*.

On an *aſſumpſit* on a *bill of exchange* brought againſt the acceptor; wherein the plaintiff declares, that one *D*. of *Briſtol*, on the 25th of *March*, 1696, drew a *bill of exchange* on the defendant, payable to the plaintiff within a month; that on the 16th day of *May*, 1697, the defendant accepted the *bill*, and promiſed to pay *according to the tenor and effect of the bill*: on *non-aſſumpſit* pleaded, and a verdict *for the plaintiff*, it was moved in arreſt of judgment, that the *aſſumpſit* was impoſſible, becauſe made a year after the time the *bill* became due. But judgment was given for the plaintiff, for it appearing on the declaration, that the acceptance of the *bill* was after the day of payment, the *according to the tenor and effect*, muſt be underſtood to pay the *bill* preſently; but if it had appeared on the declaration, that the acceptance was before the day of payment by the *bill*, there, on the evidence, an acceptance after would not have maintained the action. *Vide Mod. Rep. vol.* 12. *p.* 211.

Michaelmas, 10 *W*. 3. *Hart* v. *King*.

A *bill of exchange* being proteſted, and loſt, an action was brought againſt the drawer; and it was proved, that the defendant owned that he had drawn the *bill* and it was held good.

Per Holt, Chief Juſtice. This being a foreign *bill*, the drawer is made liable by the proteſt, but no proteſt is neceſſary is the caſe of an inland *bill*: and to make the *bill* payable to a perſon's order, is the ſame as if it was to him or order; and if the defendant can make it appear, that he is at any damage for want of notice of the proteſt, as if the drawee has failed in the mean time, *&c*. it would be incumbent on the plaintiff to prove, that notice was given of the proteſt in convenient time. *Vide Mod. Rep. vol.* 12. *p.* 309.

Hilary, 11 *W*. 3. *Starke, or Starkey* v. *Cheeſeman*.

In an action on the *caſe* brought on a *bill of exchange*, the plaintiff declared thereon, and that he offered it to the perſon on whom it was drawn, and he refuſed to pay it, *whereby* the firſt drawer *became chargeable by the cuſtom*, *&c*. there was an *indebitatus aſſumpſit*, and a *quantum meruit*, in the declaration, judgment went by default, and on the *writ of enquiry* intire damages were given. And now it was moved in arreſt of judgment, that as the matter ſtood on the firſt count, this action was founded on a deceit, the *bill* not being paid according to the warranty, every one who draws a *bill*, warranting the payment of it; and therefore being in the nature of an action for deceit, which is a *tort*, it cannot be joined with an *aſſumpſit*, which is founded on a contract; and therefore for want of laying an expreſs promiſe it was ill, intire damages being given. The plaintiff's council argued, that the action was founded on the cuſtom, and that the obligation aroſe by that, and therefore the action is maintainable without ſhewing a promiſe. *Cro. Car*. 302. A declaration on a *bill of exchange* without ſhewing any promiſe, and the roll is ſo. 2dly, This holds in all contracts, for the cuſtom raiſes a promiſe in law, that the drawer will pay the money, if the perſon on whom it is drawn, refuſes to pay it. And 2 *Cro*. 307. ſays, that if a merchant accepts a *bill*, it has by cuſtom the force of a promiſe to compel him to pay the money.

Holt, Chief Juſtice, at the beginning ſeemed to agree with the objection, and ſaid, he who draws the *bill*, warrants the payment of it, and if he does not, it is a deceit, and an action may be had on it; but then they ought not to join it with an action on a promiſe. This is the reaſon of the caſe of Sir *John Dalſton* v. *Janſon*, *Michaelmas*, 7 *W*. 3. in this court. In the time of 2 *Cro*. this way of declaring on *bills of exchange* was not the practice.

Gould, Juſtice, cited 1 *Sid*. 366, that if a man brings *aſſumpſit* for arrears of an account, where the action formed is *debt*; he ought to lay an expreſs promiſe to maintain the action.

Holt, Chief Juſtice, ſaid, that the notion of promiſes in law was a metaphyſical notion, for the law makes no promiſe, but where there is a promiſe of the party. And afterwards in this term judgment was given for the plaintiff, becauſe the drawing of the *bill* was an actual promiſe. *Vide Raym. vol.* 1. *p.* 538.

Eaſter, 11 *W*. 3. *Lambert* v. *Pack or Oakes*.

In an action on the *caſe* brought on a *bill of exchange* againſt the indorſor; it was ruled by *Holt*, Chief Juſtice, 1ſt, That there is no need to prove the drawer's hand, becauſe, though it be a forged *bill*, the indorſor is bound to pay it. 2dly, The plaintiff muſt prove that he demanded it of the drawer, or of the perſon on whom it was drawn, and that he refuſed to pay it, or elſe that he ſought him and could not find him; 3dly, That this was done in convenient time; for if they ſtand and are reſponſable a convenient time after the aſſignment, and no demand made, the indorſee ſhall not charge the indorſor. The time for *foreign bills* is *three days*, and no allowance is to be made for *Sundays* or *Holidays*. The caſe of one *Tracy* was cited which remained a week after the indorſement, and the indorſee loſt his money; which *Holt*, C. J. thought was too ſtrait; but ſuch matters muſt be left to the jury. 4thly, It is a queſtion whether notice muſt be given, or not; but it is the faireſt way to give notice. 5thly, That the demand muſt be proved *ſubſequent* to the indorſement; for if it was *precedent*, he could only act as ſervant to the indorſor; and ſo the demand was inſufficient to charge the indorſor. 6thly, If a man indorſes his name on the back of a *blank bill*, he puts it in the power of the indorſee to make what uſe of it he will, and he may uſe it as an acquittance to diſcharge the *bill*, or as an aſſignment to charge the indorſor. 7thly, In caſes of *bills* purchaſed at a diſcount, there is this diſtinction; if it be a *bill* payable to *A.* or bearer, it is an abſolute purchaſe; but if to *A.* or order, and it is indorſed in blank, and filled up with an aſſignment, the indorſor muſt warrant it as much as if there had been no diſcount. *Vide Salk. vol.* 1. *p.* 127. *Mod. Rep. vol.* 12. *p.* 244.

Michaelmas, 11 *W.* 3. *At niſi prius, before Holt, Chief Juſtice.*

On an *indebitatus aſſumpſit* brought on a *bill of exchange*, by *D. F.* it appeared on the declaration, that there were ſeveral indorſements, and the action was brought by the firſt indorſor, who ſtruck off the ſeveral indorſements, and brought an action for non-payment; the *bill* ſpecified value received of the plaintiff.

Per Holt, Chief Juſtice. If the action had been on the cuſtom, in this caſe the way had been, for the plaintiff to have got the laſt indorſee to indorſe it with him, for him to bring the action as indorſee, but this action will lie, for the *bill* was given as a ſecurity for money, and, without doubt, it was *debt*.

And here the plaintiff, to ſhew a proteſt, produced an inſtrument, atteſted by a notary public; and tho' it was inſiſted on, that he ſhould prove this inſtrument, or at leaſt give ſome account how he came by it,

Holt, Chief Juſtice, ſaid, it is not neceſſary, for that would deſtroy commerce and public tranſactions of this nature. A *bill of exchange* may be accepted on parol, though the uſual way is to do it by writing; and if a *bill* is drawn on two, and one of them accepts it, it is an acceptance of both.

Then it was *urged*, that the declaration ſhews a proteſt for want of payment, when it was in truth for want of acceptance, as appeared by the proteſt; yet it was ruled to be well; becauſe this was not on the cuſtom, but a plain debt; and *debt* might be brought on *indebitatus aſſumpſit*, or on a *bill of exchange*, becauſe it is in the nature of a ſecurity.

The original drawer was offered as an evidence in an action brought on a *bill of exchange*, to prove that he did not draw the bill, but was denied, becauſe at laſt the burthen muſt fall on him; but the party giving him a releaſe in court, that was deemed ſufficient. *Vide Mod. Rep. vol.* 12. *p.* 345.

Michaelmas, 11 *W.* 3. ——— v. *Harriſon.*

A ſervant had power to draw *bills of exchange* in his maſter's name, and after was turned out of the ſervice.

Holt, Chief Juſtice. If he draws a *bill* in ſo little a time after, that the world cannot take notice of his being out of ſervice; or if he was a long time out of his ſervice, but that kept ſo ſecret, that the world cannot take notice of it, the bill in thoſe caſes ſhall bind the maſter. *Vide Mod. Rep. vol.* 12. *p.* 346.

Eaſter, 12 *W.* 3. *Jordan* v. *Barloe.*

Adjudged, that where a bill is drawn payable to *W. R. or order*, it is within the *cuſtom of merchants*, and ſuch a bill may be negotiated and aſſigned by cuſtom, and the contract of the parties, and an action may be grounded on it, though it is no ſpecialty; but if it is made payable to *W. R.* or *bearer*, it is not within the *cuſtom of merchants*, and therefore, when, upon ſuch a bill, the plaintiff declared, that the defendant being a merchant, had drawn a bill according to the cuſtom of merchants, but had not paid the money; this declaration was held ill; as was reſolved in the caſe of *Hodges* v. *Steward*. *Vide Salk. vol.* 3. *p.* 68.

Eaſter, 12 *W.* 3. *Carter* v. *Palmer.*

Palmer had given a *note* of hand in this form: *I promiſe to pay the bearer ſo much money on demand.* The plaintiff brings his action, grounded on the cuſtom of merchants, as if it was a *bill of exchange*, and avers no conſideration. After a verdict, on a motion in arreſt of judgment, *Holt*, Chief Juſtice, ſaid, we will take ſuch a *note* on firſt view as evidence of money lent, and though they have declared on the cuſtom of merchants, yet we muſt take care that by ſuch a ſtep the law of *England* is not changed by making all *notes bills of exchange*. But all ſeemed to agree, if it was made payable to him, or order, the defendant by that form had made it negotiable, and by conſequence he would be liable to the action of the aſſignee in his own name; for if a man who is no merchant will draw a *bill of exchange*, he is ſuable on it according to the cuſtom of merchants, for he makes himſelf a merchant for ſo much. 2 *Vent.* 295. And *inland* bills were not known till trade grew to a great height; and when they came in uſe, they received the ſame law with *foreign bills*; and he ſaid, he remembered at a trial on an *inland bill* being before *Hale*, the defendant's council would put the plaintiff to prove the cuſtom; but *Hale* ſaid, they had a hopeful point of it. Adjourned. *Vide Mod. Rep. vol.* 12. *p.* 380.

Trinity, 12 *W.* 3. *Mitford* v. *Walcot.*

A. draws a *bill of exchange* at *Madrid* in *Spain* on *B.* at *Amſterſtam*, payable at two uſances. *B.* after the two uſances, *viz.* on the 4th day, which was the laſt day of grace, accepts the *bill* at *London*; and for non-payment, an action is brought againſt him; and the declaration ſtated the days of drawing and acceptance, by which this fact appeared.

Per curiam. 1ſt. An acceptance is an actual promiſe to pay: the doubt then was on the variances of the days of grace at *Amſterdam* and in *England*, for there they have *eight*, and only *four* here; and that as it was urged by the *cuſtom of merchants*, an acceptance at *Amſterdam* after the time of payment was void, and that the days of grace are no part of the uſance; and the acceptance here being to pay *according to the tenor of the bill aforeſaid*; it muſt be underſtood the ſame as if it was at *Amſterdam*, for there it was directed and payable. But it was agreed here, that an acceptance or negotiation in *England*, after a *bill* becomes payable, ſhall bind the acceptor or indorſor, though not perhaps the original drawer. And for this was quoted *Pigot* v. *Jackſon's* caſe in this court, *Hilary*, 9 *W.* 3. though it was an acceptance to pay *according to the tenor of the bill aforeſaid*, as here. 2dly. It was reſolved an uſance is a month conſiſting of 28 days. 3dly. If a *bill* is accepted at *Amſterdam*, and no houſe named where the payment is to be, the party need not acquieſce to it, but may proteſt the *bill*; but if he acquieſces; it is well enough. 4thly. If *A.* draws a bill on *B.* and *C.* offers to accept it for the honour of the drawer, the drawee need not acquieſce, but may proteſt; but if he does acquieſce, *C.* is bound. 5thly. If a bill is drawn on a perſon at *Amſterdam*, and he does not care to accept it, but gets a perſon here to do it, the party need not acquieſce; but if he does, the party here is bound. The plaintiff had judgment *niſi*. *Vide Mod. Rep. vol.* 12. *p.* 410.

Trinity, 12 *W.* 3. *Lord* v. *Francis.*

Per Holt, Chief Juſtice. If a man contracts for goods, and after carrying them away gives the ſeller a goldſmith's note for the money, it does not amount to a payment; but if it was given at the very time of the contract, it would be *at firſt ſight* evidence that it was taken in payment. And if a man, on a contract made before, take ſuch a *bill*, and keeps it till the party on whom it was drawn becomes inſolvent, in an action brought by him againſt the buyer on that *bill*, he ſhall be barred; but he ſhall recover the debt on the original contract. *Vide Mod. Rep. vol.* 12. 408.

Michaelmas, 12 *W.* 3. *Mendez* v. *Carreroon.*

In an action on the *caſe* on a *bill of exchange*, on the evidence at the trial at *Guildhall*, the caſe was thus: *A.* drew a *bill of exchange* on *B.* payable to *C.* at *Paris*; *B.* accepted the *bill*, *C.* indorſed it, payable to *D. D.* to *E. E.* to *F.* and *F.* to *G. G.* demanded the bill to be paid by *B.* and on non-payment, *G.* proteſted within the time, *&c.* and then *G.* brought an action againſt *D.* and it was well brought, and he recovered. Afterwards *D.* brought an action againſt *B.* and tho' *D.* produced the *bill* and the proteſt, yet, becauſe he could not produce a receipt for the money paid by him to *G.* on the proteſt, as the cuſtom is among merchants, as ſeveral merchants on their oaths affirmed, he was non-ſuited: but *Holt* ſeemed to be of opinion, that if he had proved payment by him to *G.* it had been well enough. *Vide Raym. vol.* 1. *p.* 742.

Eaſter, 13 *W.* 3. *Spurraway* v. *Rogers, at niſi prius, before Holt, Chief Juſtice.*

Per Holt, Chief Juſtice. If *A.* purchaſes goods of *B.* and gives him a goldſmith's *bill* in payment, which the vendee accepts without exception; if the goldſmith was worth nothing, and *A.* did not know it, it is a good payment; *otherwiſe*, if *A.* knew him to be in a failing condition. *Vide Mod. Rep. vol.* 12. *p.* 517.

Eaſter, 13 *W.* 3. *Ward* v. *Sir Peter Evans.*

Per Holt, Chief Juſtice. If *A.* owes *B.* money, and he gives him a goldſmith's *note* in payment, the debt is not diſcharged till *B.* receives the money, if it was not his fault that it was not paid, or if he does not, at the receipt of the *note*, give an acquittance for the debt to *A.* but if *B.* had an election to receive the money, or a goldſmith's *note*, and he choſe the *note*, it may be otherwiſe; and more eſpecially if he gives up his former ſecurity that he had for the original debt.

If *A.* and *B.* be two goldſmiths, and *B.* gives a *note* to *C.* for 100*l.* *A.* gets poſſeſſion of it, and brings it to *B.* and takes a new note for it, giving up his former, it is no payment. *Vide Mod. Rep. vol.* 12. *p.* 521.

Michaelmas, 13 *W.* 3. *At niſi prius, before Holt, Chief Juſtice.*

If a man has a *bill of exchange*, he may authorize another to indorſe his name on it by parol; and when that is done, it is the ſame as if he had done it himſelf. *Vide Mod. Rep. vol.* 12. *p.* 564.

Eaſter, 1 *Ann.* *Potter* v. *Pearſon.*

On a writ of *error* brought on a judgment from the *C. B.* on a *note of hand*; the plaintiff declared, that there was a cuſtom within the city of *London* among merchants trading there, that if a merchant ſigned a *note*, promiſing to pay to *J. S.* or order, *&c.* that he became bound by the cuſtom to pay, *&c.*

Per Holt, Chief Juſtice. The cuſtom to oblige one to pay a *note* without conſideration is void and againſt law. The judgment was accordingly reverſed. *Vide Salk. vol.* 1. *p.* 129. *Raym. vol.* 2. *p.* 759.

Eaſter, 1 *Ann.* *Clerke* v. *Martin.*

In an action on the *caſe* brought againſt the defendant, the plaintiff declared on ſeveral promiſes, as follows: *one count* was on a general *indebitatus aſſumpſit*, for money lent to the defendant; *another count* was on the *cuſtom of merchants*, as alſo on a *bill of exchange*; and ſhewed that the defendant gave a *note*, ſubſcribed by himſelf, by which he promiſed to pay —— to the plaintiff, or his order, *&c.* On *non aſſumpſit* pleaded, a verdict was given for the plaintiff, with intire damages. And it was moved in arreſt of judgment, that this *note* was not a *bill of exchange* within the *cuſtom of merchants*, and therefore the plaintiff having declared on it as ſuch, the declaration was ill, but that the proper way in ſuch caſes is, to declare on a general *indebitatus aſſumpſit* for money lent, and the *note* would be a good evidence of it. But it was *argued* for the plaintiff, that this *note* being payable to the plaintiff or his order, was a *bill of exchange*; inaſmuch as by its nature it was negotiable, and that diſtinguiſhes it from a *note* payable to *J. S.* or bearer, which is not a *bill of exchange*, becauſe it is not aſſignable or indorſable by the intent of the ſubſcriber, and conſequently not negotiable, and therefore it cannot be a *bill of exchange*, becauſe it is incident to the nature of a *bill of exchange* to be negotiable: but here this bill is negotiable, for if it had been indorſed, payable to *J. N. J. N.* might have brought his action on it as on a *bill of exchange*, and might have declared on the *cuſtom of merchants*. Why then ſhould it not be before ſuch indorſement a *bill of exchange* to the plaintiff himſelf; ſince the defendant by his ſubſcription has ſhewn his intent to be liable to the payment of this money to the plaintiff or his order; eſpcially ſince he has thereby agreed, that it ſhall be aſſignable over, which is by conſequence that it ſhall be a *bill of exchange*. There is no difference in reaſon between a *note* which ſays, "I promiſe to pay to *J. S.* or order, *&c.*" and a *note* which ſays, "I pray you to pay to *J. S.* or order, *&c.*" they are both equally negotiable; and to make ſuch *note* a *bill of exchange*, can be no wrong to the defendant, becauſe he, by ſigning the *note*, has made himſelf to that purpoſe a merchant, 2 *Vent.* 292. *Sarsfield* v. *Witherly*, and has given his conſent that his *note* ſhall be negotiated, and thereby has ſubjected himſelf to the *law of merchants*. But *Holt*, Chief Juſtice, ſaid, this *note* could not be a *bill of exchange*: that the maintaining theſe actions on ſuch *notes* were innovations on the rules of *common law*; and that it amounted to the ſetting up a new ſort of *ſpecialty* unknown to the *common law*, and invented in *Lombard-ſtreet*, which attempted in theſe matters of *bills of exchange* to give laws to *Weſtminſter-Hall*: that the continuing to declare on theſe *notes* on the cuſtom of merchants proceeded from obſtinacy, ſince he had always expreſſed his opinion againſt them, and ſince there was ſo eaſy a method as to declare on a general *indebitatus aſſumpſit* for money lent, *&c.* As to the caſe of *Sarsfield* v. *Witherly*, he ſaid, he was not ſatisfied with the judgment, and that he adviſed the bringing of a *writ of error*.

Gould, Juſtice, ſaid, he did not remember it had ever been adjudged that a *note* in which the ſubſcriber promiſed to pay, *&c.* to *J. S.* or bearer, was not a *bill of exchange*: that the bearer could not ſue an action on ſuch a *note* in his own name, is without doubt; and ſo it was reſolved between *Horton* v. *Coggs*, 3 *Lev.* 299. but that it was never reſolved that the party himſelf (to whom ſuch note was payable) could not have an action on the cuſtom of merchants on ſuch a *bill*: but *Holt*, Chief Juſtice, anſwered, that it was held in the ſaid caſe of *Horton* v. *Coggs*, that ſuch a *note* was not a *bill of exchange* within the cuſtom of merchants; and afterwards, in this term it was moved again, and the court continued to be of opinion againſt the action: and then the plaintiff's council *urged*, that if this *note* was not a *bill of exchange* within the cuſtom of merchants, then the promiſe founded on it was void; and then it could not be intended, that any damage was given by the jury for the breach of it, but all the damages muſt be intended to have been given on the general *indebitatus aſſumpſit*. *Holt*, Chief Juſtice, ſaid, that would be true, if it had been void by reaſon of its being inſenſible; but this matter is ſenſible enough, though not ſufficient to raiſe a promiſe; and therefore it cannot be intended, but that damages were given for it; and conſequently that judgment muſt be arreſted: wherefore judgment was given, *that the plaintiff have nothing by the bill*, &c. by the opinion of the whole court. *Vide Raym. vol.* 2. *p.* 757.

Michaelmas, 1 *Ann. Eaſt* v. *Eſſington.*

In an action on the *caſe* brought on a *bill of exchange*; the plaintiff declared on the *cuſtom of merchants*, on a bill directed to the defendant in this manner: *Pray, Sir, pay this my firſt bill of exchange, the ſecond and third not being paid*; and then ſhews, that the bill was indorſed by the drawee to himſelf, in this manner, *viz.* that the drawee *indorſed on that bill, the contents thereof are to be paid* to the plaintiff, *&c.* On *non aſſumpſit* pleaded, the plaintiff had a verdict. And on a motion in arreſt of judgment, it was objected, 1ſt. That it is not *averred* in the declaration, that the *ſecond* and *third bills* were not paid, and without ſuch averment the plaintiff is not intitled to have his action; for if the *ſecond* or *third bill* was paid, the defendant is not bound to pay this *bill*; and the non-payment of it is, as it were, a *condition precedent*, which ought to intitle the plaintiff to this action; and therefore it ought to be averred. *But not allowed.*

Per curiam. Though this had been ill on a demurrer, yet it is aided by the verdict; for if the *ſecond* or *third* bill had been paid, the jury would have found on the *non aſſumpſit.*

The ſecond *exception* was, that the indorſement ſhewn in the declaration was not ſuch as would transfer the property of the *bill*, and therefore the plaintiff was not intitled to his action. *But not allowed*, for it is aided by the verdict, as want of attornment in *debt* for rent by the aſſignee of the reverſion, is aided by the verdict: and therefore judgment was given for the plaintiff. *Vide Raym. vol.* 2. *p.* 810.

Eaſter, 2 *Ann. Anonymous.*

A *bill of exchange* was drawn on *W. R.* for 40 *l.* payable to *C. W.* or order, *W. R.* accepts the ſaid *bill*, and afterwards *C. W.* the drawer indorſes part of it to the plaintiff, who brought an action againſt the acceptor. *Adjudged*, that ſuch action would not lie, becauſe by his accepting the *bill*, he made himſelf liable only to one action for the whole, and not to ſeveral actions for part of the money. *Vide Salk. vol.* 3. *p.* 70.

Eaſter, 2 *Ann. Lucas* v. *Haynes.*

In *trover* for a *bill of exchange*, the caſe upon evidence was, that the plaintiff had a *bill of exchange* drawn upon the defendant, and ſent it by *J. S.* to the defendant to get it accepted; *J. S.* left it with the defendant, and afterwards the *bill* being loſt, the plaintiff brought *trover* for it, and *J. S.* was now the plaintiff's witneſs for this matter, and becauſe the plaintiff had indorſed the *bill*, it was objected that *J. S.* could not be a witneſs; and this point being ſaved, the court were all of opinion, that the bare indorſement, without other words purporting an aſſignment, does not work an alteration of the property; for it may ſtill be filled up, either with a receipt or an aſſignment, and conſequently *J. S.* is a good witneſs. *Vide Salk. vol.* 1. *p.* 130. *Raym. vol.* 2. *p.* 871.

Trinity, 2 *Ann. Butler* v. *Crips.*

Per Holt, Chief Juſtice. The words *pay to me or my order ſo much*, is a *bill of exchange*, if accepted, and this is the only way to make a *bill of exchange* without aid of a *third* perſon. *Vide Mod. Rep. vol.* 6. *p.* 29.

Michaelmas, 2 *Ann. Brough or Borough* v. *Perkins.*

On a *writ of error* brought on a judgment by default in *C. B.* in an action brought againſt the drawer of an inland *bill of exchange*; it was objected in arreſt of judgment, that ſince *ſtat.* 9 *W.* 3. no damages ſhould be recovered againſt the drawer on a *bill of exchange*, without a *proteſt*, and therefore the action could not lie, here being none.

Per Holt, Chief Juſtice. The ſtatute never meant to deſtroy the action for want of a *proteſt*, but only to deprive the party from recovering intereſt and coſts, on an inland *bill* againſt the drawer, without notice of non-payment by *proteſt*; for that before the *ſtat.* there was this difference between foreign and inland *bills of exchange*, if the *bill* was *foreign*, one could not reſort to the drawer for non-acceptance, or non-payment, without a *proteſt*, and reaſonable notice thereof; but in caſe of an *inland bill* there was no occaſion for a proteſt; but if any prejudice happened to the drawer for want of notice of the non-payment, which the perſon to whom the *bill* is made ought to give, the drawer was not liable; and the word *damage* in the *ſtatute*, was meant only of the damages the party is at in being longer out of his money than the tenor of the *bill* purported, and not of damages for the original debt; and the *proteſt* was ordered for the benefit of the drawer; for if any damages accrue to the drawer for want of a *proteſt*, that ſhall be borne by him to whom the *bill* is made; and if no damages accrue to him, then there is no harm done him; and a *proteſt* is only made to give formal notice that the *bill* is not accepted, or accepted and not paid, and if in ſuch caſes the damage amounts to the value of the *bill*, there ſhall be no recovery, but otherwiſe he ought not to loſe his debt; but that ought to appear either in evidence on *non-aſſumpſit*, or by ſpecial pleading; and the act is very obſcurely and doubtfully penned, and we ought not by conſtruction on ſuch an act to take away a man's right. *The whole court concurred*, and the judgment was affirmed. *Vide Mod. Rep. vol.* 6. *p.* 80.

Eaſter, 3 *Ann. Kent* v. ————

Per cur. Intereſt on a *bill of exchange* commences from the time the demand was made; and therefore if there was no demand made till an action was brought, the defendant may plead tender and refuſal, and *ſtill ready*, and ſo diſcharge himſelf of intereſt; but if it was the defendant's fault that a demand could not be made, as if he was out of the kingdom, there want of demand ought not to prejudice the plaintiff. *Vide Mod. Rep. vol.* 6. *p.* 138.

Hilary, 7 *Ann. Buckley* v. *Campbell.*

In this action the plaintiff declared on a *bill of exchange* drawn at *Amſterdam*, payable at *London* at *two uſance*, and did not ſhew what the *two uſance* were; therefore judgment was given for the defendant, for the court could not take notice of *foreign uſances* which vary, being longer in one place than another. *Vide Salk. vol.* 1. *p.* 131.

Hill & al. v. *Lewis.*

In an action on the *caſe* brought for 170 *l.* 10 *s.* the plaintiff declared on ſeveral counts, *viz.* 1ſt, On two *bills of exchange* againſt the indorſor. 2dly, On a *mutuatus.* 3dly, On an *indebitatus aſſumpſit* for money laid out for the uſe of the defendant. To this action the defendant pleaded *non aſſumpſit:* the caſe on evidence appeared to be, that one *Moor* a goldſmith ſubſcribed two notes payable to the defendant; the defendant on the 19th of *October* indorſes theſe two notes, and gives them and *eight* others to one *Zouch*, to whom he was indebted: *Zouch* on the 19th of *October*, betwixt the hours of *eleven* and *twelve*, brought theſe notes to the plaintiffs, being goldſmiths, and they accepted them, and gave to *Zouch* other bills, and ſome money; afterwards on the ſame day, the plaintiffs received money on other *bills* of the ſaid *Moor*, and might have had the money due on theſe two *bills*, if they had been demanded; but in the night following about midnight, *Moor* became inſolvent, and ran away, and the queſtion was, whether the plaintiffs or indorſor ſhould loſe this 170 *l.* 10 *s.*

The *firſt* queſtion was, whether the acceptance of theſe *bills* in ſatisfaction for ſo much money, was a good diſcharge of the indorſor?

Holt, Chief Juſtice, held, that goldſmiths *bills* were governed by the ſame laws and cuſtoms as other *bills of exchange*; and every indorſement is a new *bill*, and ſo long as a *bill* is negotiating, and ſuch indorſements are made, all and each of the indorſors are liable as a new drawer. That by the *law generally*, every indorſor is equally liable as the firſt drawer, and cannot be diſcharged without an actual payment, and is not diſcharged by the acceptance of the *bill* by the indorſee; but by the cuſtom it is reſtrained, *viz.* The acceptance is intended to be on this agreement, *to wit*, that the indorſee will receive it of the firſt drawer, if he can, and if he cannot, then that the indorſor will anſwer it; as for example, if the firſt drawer be *inſolvent* at the time of the indorſement, or on demand refuſes to pay it, or cannot be found. And the indorſor is not diſcharged without actual payment, till there is ſome neglect or default in the indorſee, as if he does not endeavour to receive it in convenient time, and then the firſt drawer becomes *inſolvent*.

The *ſecond* point was, what ſhall be thought convenient time to endeavour to receive ſuch a *bill?*

Per Holt, Chief Juſtice. In caſe of *foreign bills*, he on whom the *bill* is drawn has *three days* to pay it, and the indorſee of ſuch *foreign bill* need not demand payment till the ſaid *three days* are expired; and if he on whom the *bill* is drawn becomes *inſolvent* in the ſaid time, the indorſor is chargeable, and after the *three days*, the indorſee may *proteſt* it; and it ſeems the ſame time ought to be allowed for *inland bills*, though it was *urged* that for *foreign bills* a longer time was required, in reſpect the drawee was to receive advice from the drawer.

The *Chief Juſtice* in his charge to the jury ſaid, that what ſhould be thought convenient time, ought to be according to the uſage among traders in ſuch caſes, and on all the circumſtances. That the plaintiffs had *ten bills* delivered to them together; and that perhaps they had other affairs that hindered them from going preſently to receive theſe two *bills*, and that they received two other *bills* the ſame day. It was left to the jury to conſider, whether the time in this caſe was a convenient time or not; and if the plaintiff had convenient time to receive his money, then to find for the defendant, otherwiſe for the plaintiff. And they on conſideration found for the plaintiff; on which the plaintiff prayed to take the verdict on the *indebitatus aſſumpſit*.

Per Holt, Chief Juſtice, You cannot take the verdict on any part of the declaration, but that to which evidence was given, and here it will be good, if found on the *bills of exchange*; but if the evidence be applicable to any other part of the declaration, you may take it on any ſuch part to which the evidence is applicable. And becauſe *Zouch* had ſworn that he received the benefit of, and had been ſatisfied with the *bill* he took of the plaintiff, by which the defendant was diſcharged againſt *Zouch*, the verdict was taken on the *indebitatus aſſumpſit* for money laid out for the defendant's uſe; and it ſeems the indorſement by the defendant to the plaintiff was good evidence of a requeſt to pay the ſaid money to *Zouch*. An *exception* was taken that one *bill* was payable to the defendant only, without the words, *or his order*, and therefore not aſſignable by the indorſement; the *Chief Juſtice* agreed, that the indorſement of this *bill* did not make him that drew the *bill* chargeable to the indorſee; for the words, *or to his order*, give authority to the plaintiff to aſſign it by indorſement; and it is an agreement by the firſt drawer that he would anſwer it to the aſſignee: but the indorſement of a *bill* which has not the words, *or to his order*, is good, or of the ſame effect betwixt the indorſor and indorſee, to make the indorſor chargeable to the indorſee. *Vide Salk. vol.* 1. *p.* 132.

Michaelmas, 7 *Ann.* *Walker* v. *Atwood.*

An action was brought on a *bill of exchange*; the *bill* was drawn the 8th of *April*, 1707, on *Atwood*, to pay 15 *l.* to *Godfrey*; the *bill* being ſhewn to *Atwood*, he promiſed to pay it the 18th of *April*, 1707. Afterwards this *bill* was aſſigned to *Walker*, who brings this action, and declares on the cuſtom, *&c.* On a demurrer to the declaration, the defendant's council argued, that the *bill* being to pay a ſum of money, and no day mentioned when it ſhould be paid, it muſt be paid on ſight; *therefore*, this promiſe to pay four or five months after, *viz.* on the 8th of *September*, is a new agreement, and conſequently the action muſt be founded on the new agreement, and not on the cuſtom of merchants.

Powell, Juſtice. The cuſtom of merchants is by the acceptance, and a promiſe to pay at ſuch a time is good, and he is bound by the cuſtom of merchants, by acceptance, to pay at the time appointed, and therefore the plaintiff has declared well on the cuſtom of merchants; and if it ſhould not bind him on the cuſtom, it would not at all, becauſe no *indebitatus aſſumpſit* lies on the acceptance. Judgment was given for the plaintiff *niſi*, by *Powell*, *Powis* and *Gould*. *Holt*, Chief Juſtice being abſent. *Vide Mod. Rep. vol.* 11. *p.* 190.

Trinity, 9 *Ann.* *Harvey* v. *Perrit.*

On an action on a *promiſſory note* brought againſt the ſecond indorſor, the plaintiff declared without an averment, that the money was demanded of the drawer, or of the firſt indorſor. *Adjudged* good on a motion in arreſt of judgment, for the indorſor charges himſelf in the ſame manner, as if he had originally drawn the *bill*. *Vide Salk. vol.* 1. *p.* 133.

Trinity, 10 *Ann.* *Louviere* v. *Laubray.*

At *niſi prius* in *London*, the caſe was thus: *Louviere* uſed to furniſh *Laubray* with great quantities of ſtockings: *Louviere* drew a *bill* on *Laubray*, payable to ſuch a one; *Laubray* accepted the *bill*, but ſome time after refuſed to pay it. On this the bill was indorſed to *Louviere*, the drawer, who brings an action as indorſee.

The queſtion was, whether the drawer of a *bill* could maintain an action as indorſee?

Parker, Chief Juſtice. On the evidence given to the court, there were effects of the plaintiff's in the hands of the defendant ſufficient to anſwer the *bill*; and conſequently the acceptance of the bill was not on the honour of the drawer, the action is therefore well brought: for when a merchant draws a *bill* on his correſpondent, who accepts it, this is payment; for it makes him debtor to another perſon, who may bring his action: this therefore is ſuch a payment as may be ſet off againſt a former account, and pleaded in bar of ſuchan action: but if there were no effects, then the action would not lie; for it would have been an acceptance on honour only, and the money would be recovered only to be recovered again.

N. B. It was ruled, that intereſt ſhould be paid from the time of the proteſt. *Vide Mod. Rep. vol.* 10. *p.* 37.

Michaelmas, 11 *Ann.* *Nickſon* v. *Brohan.* *At niſi prius at Guildhall.*

The caſe was; a maſter ſent his ſervant, who was uſed to tranſact affairs of that nature for him, on *Saturday* morning, with a *note* drawn on Sir *Stephen Evans*, with orders to get from Sir *Stephen* either bank *bills*, or money, and to turn them into *Exchequer notes:* but the ſervant having other buſineſs of his maſter's to tranſact, to ſave himſelf the trouble of going to Sir *Stephen*, goes to *B.* and prevails on him to give him a bank *bill* for a *note* on Sir *Stephen*; and then inveſted it in *Exchequer notes*, which he brought to his maſter, not letting him know but that he had gone to Sir *Stephen*.

Sir *Stephen Evans* failing on the *Monday* following, the queſtion was, whether this loſs ſhould light on *B.* or on the maſter.

Parker, Chief Juſtice, who tried the cauſe, was at firſt of opinion it ſhould fall on *B.* becauſe the ſervant had acted directly contrary to his maſter's order, and *B.* by furniſhing the ſervant with a bank *bill*, did the maſter no ſervice, for if he had not done it, the ſervant muſt in obedience to his maſter's order, have gone and received the money from Sir *Stephen*; and cited the caſe of *Ward* v. *Evans*, where it was reſolved, that if a ſervant ſent to receive money, takes a *bill* inſtead of it, the maſter is not bound by the act of the ſervant, unleſs the *bill* is anſwered.

But one of the jury informing him that he took the Practice to be otherwiſe, (for whether a ſervant, who uſed to act on the credit of his maſter, went againſt the orders of his maſter, was a fact that could not be known to a third perſon) he quitted his opinion; but directed the council to move the court, which was accordingly done.

And the court were of opinion, that the verdict was well given, and that the maſter was chargeable, and he only, for a ſervant by tranſacting affairs for his maſter, does thereby derive a general authority, and credit from him, and if this general authority ſhould be liable to be determined for a time, by any particular inſtructions or orders, to which none but the maſter and ſervant were privy, there would be an end of all dealing but with the maſter.

It was alſo agreed, that the property of the *note* was not transferred and veſted in *B.* but was only in nature of a *depoſit* or ſecurity to him, for there was no indorſement; nor could he have ſued on the *bill*; and though practice cannot alter the law, yet it may explain an agreement.

They were likewiſe of opinion, that the maſter could not recover it of the ſervant, the loſs being occaſioned by a mere accident, and not by either folly or negligence. *Vide Mod. Rep. vol.* 10. *p.* 109.

Hilary, 1 *Geo.* ——— v. *Ormſton.*

In an action brought on a *bill of exchange* made payable to the order of the plaintiff, the declaration ſet forth, that the defendant by his acceptance became liable to pay it to the plaintiff, *according to the cuſtom of merchants.* To this declaration the defendant demurred.

It was *urged* for the defendant, that the plaintiff had only an authority to indorſe the *bill*, and then the indorſee might maintain an action; but that the plaintiff was not intitled to receive the money. It was compared to the caſe of a deviſe that the executors ſhall ſell land, where the executors have only an authority to ſell, but no intereſt; and therefore immediately on ſale, the vendee is in, not from the executors, but under the will.

On the other ſide it was ſaid, if this was law, a multitude of *bills of exchange* muſt be overthrown: that by the cuſtom of merchants, there is no difference between payable to the order of ſuch a one; or payable to ſuch a one or order; and that the cuſtom is confeſſed by the demurrer.

Per curiam. Even in the caſe of land, a grant or deviſe of the profits of land, carries the land: order implies property; there is no difference between having a power to diſpoſe of money, and having the money itſelf. What is an order, but an authority to appoint the payment of it, which the plaintiff here does to himſelf: therefore the plaintiff had judgment. *Vide Mod. Rep. vol.* 10. *p.* 287.

Eaſter, 1 *Geo. Joſſelyn or Joſceline* v. *Lacier or Laſſerre.* Error.

On *error* brought on a judgment recovered in *C. B.* in an action on the *caſe* brought againſt the acceptor of a *bill of exchange*, which bill was made to pay 28 *l.* at 7 *l.* a month at monthly payments out of the drawer's growing ſubſiſtence, the firſt payment to be made in *September* following the date of the ſaid draft: it was inſiſted this was no *bill of exchange*; for if the acceptor receives no pay, then he will not be liable; the court will take notice of *the cuſtom of merchants*, and it makes no difference whether the action is brought againſt the acceptor or the drawer. Now, it is eſſential to a *bill of exchange* to be negotiable, which this cannot poſſibly be, becauſe it is to pay on a contingency, *viz. out of the growing ſubſiſtence*; and 4 *Mod.* 244. was cited as a caſe in point to prove the above aſſertion, and that the declaration on this, as a *bill of exchange*, was erroneous.

The council for the defendant in *error* argued, that even ſuppoſing this not to be a good *bill of exchange*, there was an expreſs promiſe laid, and a ſufficient conſideration to ſupport it: that the drawing the *bill* was a requeſt and authority to demand the money, and that the trouble the plaintiff was at in demanding the money, was a good conſideration.

Per curiam. We are all of opinion it is not a bill within the *cuſtom of merchants*; it concerns neither trade nor credit; it is to be paid *out of the growing ſubſiſtence* of the drawer; and is not to be paid if he dies, or his ſubſiſtence is taken away.

It may never be paid, and yet the credit of the acceptor unimpeached, and it is neither made payable *to order*, nor ſaid to be *for value received*; beſides, it does not appear, whether the party who is to receive it is to receive it on account of a former debt, or as a gratuity.

As to the ſecond point, whether, if the *bill* by the *cuſtom of merchants* is not a good *bill of exchange*, it may not be ſupported by the promiſe? We are unanimouſly of opinion that it cannot. For that matter ſtands thus: *by reaſon of which premiſes*, &c. and *in conſideration thereof*, he promiſed to pay, *&c.* the word *thereof* plainly refers to the *bill* as ſupported by the *cuſtom*, and conſequently if that fails, the conſideration muſt do ſo likewiſe.

The judgment of the *C. B.* was therefore reverſed. *Vide Mod. Rep. vol.* 10. *p.* 294, 317. *Forteſcue, p.* 281.

Hilary, 3 *Geo. Andrews* v. *Franklin.*

In an action on the *caſe* brought on a *promiſſory note* to pay within two months after a ſhip is paid off, the declaration was on the ſtatute.

It was inſiſted for the defendant, that this is not negotiable, it being on a contingency that may never happen. *Jocelyn* v. *Laſerre, Eaſter,* 11 *Geo.* on a *writ of error*, was a bill to pay out of the drawer's growing ſubſiſtence, and that was held not to be negotiable as a *bill of exchange*.

Per curiam. The paying of the ſhip is a thing of a public nature, and this is negotiable as a *promiſſory note.* The plaintiff had judgment. *Vide Stra. vol.* 1. *p.* 24.

Hilary, 3 *Geo. Cole* v. *Hawkins.*

See this caſe fully ſtated in p. 117. of this work, under the head *Arreſt of Judgment.*

Hilary, 4 *Geo. Butler* v. *Maliſſy.*

In an action on the *caſe* brought on a *promiſory note*, the declaration ſet forth, that the defendant and another did *jointly or ſeverally* promiſe to pay, *&c.* on a *demurrer* it was inſiſted for the defendant, that the action ſhould have been brought againſt both.

Per Parker, Chief Juſtice. The plaintiff might have brought it againſt either or both, for he had his election. If the action had been againſt both, he ſhould have declared as he now does; but that is not right in the action againſt one only. For he ſhould have declared generally, that this defendant by his *note* promiſed to pay, and a ſeveral *note* by two, would have been good evidence. And where there are ſeveral obligors, and one only is ſued, no mention is made in the declaration of the other obligors. Suppoſe the *note* had been to pay 50 *l.* or 100 *l.* the plaintiff is intitled to either, but which is uncertain, till he has made his election; for he that ſpeaks in the disjunctive ſays true, if either member of the disjunctive is verified; whereas he that ſpeaks in the affirmative affirms both parts to be true.

The plaintiff had leave to diſcontinue on payment of coſts, but was refuſed to amend. *Vide Stra. vol.* 1. *p.* 76.

Hilary, 6 *Geo. Popplewell* v. *Wilſon.* Error.

In an action on the *caſe* on a *promiſory note*, entered into by *A.* to pay ſo much to *B.* for a debt due from *C.* to the ſaid *B.* it was objected, that this *note* being for value received, was not within the ſtatute; and on *firſt ſight*, the debt of another is no conſideration to raiſe a promiſe. But the court held it to be within the ſtatute, being an abſolute promiſe, and every way as negotiable as if it had been *generally* for value received. And the judgment was affirmed. *Vide Strange, vol.* 1. *p.* 264.

Michaelmas, 6 *Geo.* *Wegersloffe* v. *Keene*.

In an action on the *caſe*, on the *cuſtom of merchants*, brought by a perſon to whom a *foreign bill of exchange* was made payable, againſt the acceptor, the declaration ſet forth, that one *J. C.* being a merchant, reſiding at *Chriſtiana* in *Norway*, according to the cuſtom of merchants, drew his *firſt bill of exchange* on the defendant, requeſting him to pay the plaintiff ſuch *firſt bill* (his *ſecond* not being paid) of 127 *l.* 18 *s.* 4 *d.* which *bill* was afterwards, *viz.* on the 9th day of *December* 1717, ſhewn to the defendant, who accepted to pay 100 *l.* part thereof on the 8th day of *February* following, by virtue whereof he became chargeable, *and in conſideration thereof the ſame day and year laſt aforeſaid, aſſumed on himſelf* to pay the ſame on the ſaid 8th day of *February then next following*, which he has not done according to his undertaking. There was likewiſe a count for monies had and received, and an *inſimul computaſſet*. The defendant, as to thoſe two counts, pleads *non aſſumpſit*; and as to the count on the *bill*, he pleads that the ſaid *J. C.* drew another *bill* for 100 *l.* only, wherein he countermands the payment of the odd 27 *l.* 18 *s.* 4 *d.* by virtue whereof the defendant paid the 100 *l.* in ſatisfaction of the firſt *bill*, and the plaintiff accordingly received it in ſatisfaction. The plaintiff *proteſted*, that the defendant did not pay it in ſatisfaction; and for plea ſaid, that he never received it in ſatisfaction. And to this replication the defendant demurred.

Powys, Juſtice. Either party might have refuſed this partial acceptance, and they were at the ſame liberty to take it, neither could force the other to it, but if they agree, *there is no injury done to a perſon who is willing*. The drawer truſts all to the diſcretion of the perſon to whom he gives the *bill*, and if that perſon leads him into inconveniencies, who can help it.

Eyre, Juſtice. I think the declaration is well enough; we will reject *next following*, then all is right: there is no difference between the caſe of the drawer and acceptor, for if he pays either of the *bills*, the drawer is liable. Acceptance of one is ſo of both, though in fact it amounts to no more than an acceptance to pay the contents of one of them, and payment of one is a diſcharge of both: ſo that the averment that the money was not paid on the firſt, goes to the ſecond alſo. I ſearched, but could not find the record of *Eaſt* v. *Eſſington*; and by my notes I find it went off immediately on the anſwer, that the verdict had cured it. The precedents are, as this declaration. *Vidians Ent.* 31, 67.

Forteſcue, Juſtice. I think there is a difference between the caſe of drawer and acceptor, for the drawer is bound to pay all, the drawing being an actual promiſe; but the acceptor is bound to pay but one, and no action can be maintained but on the very *note* which he accepts. There is another anſwer to the objection, that the action is brought too ſoon; and that is, that the plaintiff need not have ſet out any promiſe at all. 10 *W.* 3. *Starke* v. *Cheeſeman*, *Salk.* 128. *Lowther* v. *Conyers*, which was on a *promiſſory note*, and they had left out *he aſſumed on himſelf*, and yet it was held well enough; for the law creates a promiſe. And this is likewiſe an anſwer to the want of requeſt. In *Molloy*, and the other books, there is a whole paragraph about the partial acceptance of a *bill of exchange*; and they allow it to be good: ſo judgment was given for the plaintiff. *Vide Stra. vol.* 1. *p.* 214.

Hilary, 7 *Geo.* *Moore* v. *Warren*. *Holmes* v. *Barry*.

The defendants in each of theſe actions, at two of the clock in the afternoon, gave the plaintiffs goldſmiths notes in payment, which were tendered the next morning at nine, when the goldſmith had a quarter of an hour before ſtopped payment. The Chief Juſtices directed the juries, that the coſts ſhould fall on the defendants, there being no *laches* in the plaintiffs, who had demanded their money as ſoon as was uſual in the courſe of dealing, and that keeping the *notes* till the next morning could not be conſtrued a giving a new credit to the goldſmiths: and both juries found accordingly. *Vide Stra. vol.* 1. *p.* 415.

Hilary, 7 *Geo.* *Turner* & *al.* v. *Mead* & *al.*

The defendant paid the plaintiffs, who were the *ſword-blade* company, two goldſmiths *notes*, at three in the afternoon; the plaintiffs ſervant next morning leaves the *notes* with the goldſmiths, in order to have the money ready for him as he came back a clearing; it being as they proved cuſtomary for the *bank* and *ſword-blade* company to ſend out their *notes* in a morning, and then call for the money as their ſervant returned in the evening; and the goldſmiths on receiving the *notes* always cancelled them, and got the money told out againſt the time it was uſually called for. The *notes* in this caſe were brought early in the morning, and received and cancelled; and between *four* and *five* in the afternoon, the ſervant who left them called again for the money, when the goldſmiths had juſt ſtopped payment: on which the ſervant takes new *notes* of the ſame tenor and date as the cancelled ones he left in the morning. And becauſe the plaintiffs ſervant had done nothing but what was uſual in leaving the *notes*, inſtead of taking the money when he firſt called in the morning,

Pratt, Chief Juſtice, directed the jury to find for the plaintiffs, which they did. *Vide Strange vol.* 1. *p.* 416.

Trinity, 7 *Geo.* *Bromley* v. *Frazier*.

In an action on the *caſe* brought on a *foreign bill of exchange*, by the indorſee againſt the indorſor; on a general demurrer it was objected, that they had not ſhewn a demand on the drawer, on whoſe default only it is that the indorſor warrants: and becauſe this was a point unſettled, the court took time to conſider of it.

And on the ſecond argument, they delivered their opinion, that in the caſe of a *foreign bill of exchange*, a demand on the drawer is not neceſſary to make a charge on the indorſor, but the indorſee has his liberty to reſort to either for the money; and conſequently the declaration is well enough, and the plaintiff muſt have judgment. *Vide Strange, vol.* 1. *p.* 441.

Michaelmas, 7 *Geo.* *Taylor* v. *Dobbins*.

In an action on the *caſe*, on a *promiſſory note* the declaration ran, that the defendant made a *note with his own hand*. Exception was taken, that ſince the ſtatute he ſhould have ſaid, that the defendant *ſigned* the *note*; but the court held it well enough, becauſe ſaid to be wrote with his own hand, and there needs no ſubſcription in that caſe, for it is ſufficient that his name is in any part of it. I *A. B. promiſe to pay*, is as good as *I promiſe to pay*, ſubſcribed *J. S.* *Vide Strange, vol.* 1. *p.* 399.

Hilary, 8 *Geo.* *Manwaring* v. *Harriſon*.

On the 17th of *September*, (being *Saturday*) about two in the afternoon, *Harriſon* gave to *Manwaring* in payment, a *note* for 100 *l.* ſigned by *Mitford* and *Mertins*, goldſmiths, dated the 5th of *September*, payable to *Harriſon* or order. The ſame afternoon, *Manwaring* pays away the *note* to *J. S.* *Mitford* and *Mertins*, paid all *Saturday* and *Monday*, and on *Tueſday* morning as ſoon as the ſhop was opened, and before any money was paid, *J. S.* came and demanded the money, but *Mitford* and *Mertins* ſtopped payment. *Manwaring* paid back the money to *J. S.* and demanded it again of *Harriſon*; who refuſing to pay it, an action was brought. And on *non aſſumpſit* pleaded, *Pratt*, C. J. told the jury, that giving the *note* is not immediately payment, unleſs the receiver does ſomething to make it ſo, by neglecting to receive the value in a reaſonable time, by which he gives credit to the maker of a *note*. He left it to them whether there had been any neglect, and obſerved, that the *note* was payable to *Harriſon*, who had kept it eleven days, and probably would not have demanded it ſooner than *Manwaring* did, it appearing the goldſmiths were in full credit all the while. The jury deſired they might find it *ſpecially*, and leave it to the court, whether there was a reaſonable time; but the *Chief Juſtice* told them they were judges of that: whereon they found for the defendant, and declared it as their opinion, that a perſon who did not demand a *goldſmiths note* in two days, took the credit on himſelf. *Vide Strange, vol.* 1. *p.* 508.

Eaſter, 8 *Geo.* *Windham* v. *Wither.* *Idem* v. *Trull.*

The plaintiff brought two actions on a *promiſſory note*, one againſt the drawer, and another againſt the indorſor, and recovered in both. And it was moved, that they having tendered the principal in one, and the coſts in both actions, no execution might be taken out; which the court ordered accordingly, and ſaid they would have laid the plaintiff by the heels, if he had taken out execution in both. *Vide Strange, vol.* 1. *p.* 515.

Eaſter, 8 *Geo.* *Lawrence* v. *Jacob.*

In an action brought by the ſecond indorſee of a *bill of exchange* againſt the firſt indorſor, it was held ſufficient to ſay the drawer had not paid it, without ſhewing a demand. *Vide Strange, vol.* 1. *p.* 515.

Michaelmas, 8 *Geo.* *Smallwood* v. *Vernon.*

In an action on the *caſe* by original in this court, the plaintiff declared againſt the defendant as indorſor of a *promiſſory note*, and after ſetting out the *note* and indorſement, he goes on, that *by virtue thereof*, the defendant became chargeable with the payment of the money *according to the tenor* of the indorſement. The defendant on *oyer* of the original, pleads in abatement, that the charge againſt him ought to be according to the tenor of the *note*, and not of the indorſement: and the defendant's council inſiſted, that it might be, that the indorſement appointed the money to be paid at a different time from what is mentioned in the *note*, which are terms that the indorſor cannot lay on the party who made the *note*.

Per curiam. There is no occaſion to pray in aid of that objection here, where the action is againſt the indorſor; it is true he cannot lay a charge on the giver of the *note* in a manner different from the terms of it; but he may charge himſelf if he pleaſes, for every indorſement is the ſame as making a new *note*; and if the *note* is payable the 1ſt of *May*, and the indorſement appoints it to be the 1ſt of *April*, as to the indorſor this is a *promiſſory note*, payable on the 1ſt of *April*. If this was an action againſt the giver of the *note*, there might be more in the objection. Let the defendant anſwer over. *Vide Strange, vol.* 1. *p.* 478.

Eaſter, 9 *Geo.* *Hayward* v. *The Bank of England.*

The plaintiff who kept caſh with the *bank*, on *Saturday* left a *note* with them for 50 *l.* on *C.* and they on *Monday* gave it to the runner, who left it at the ſhop in the morning, where they cancelled the *note*; but when he called in the afternoon for the money according to his uſual practice, he found the bankers had ſtopped payment; whereon he took a new *note* of the ſame tenor and date. And *King*, Chief Juſtice, told the jury, that it would be dangerous to ſuffer perſons to deal with *notes* in this manner, and ſaid the *Common Pleas* were of that opinion in the like caſe. But however, he adviſed them only to find the value of the *note* when cancelled, on which the jury found 25 *l.* the goldſmiths having paid 10 *s.* in the pound. *Vide Strange, vol.* 1. *p.* 550.

Trinity, 9 *Geo.* *Acheſon* v. *Fountain.* *At niſi prius, before Pratt, Chief Juſtice.*

In an action on the *caſe*, it appeared, that the plaintiff had declared on an indorſement, made by *William Abercrombie*, whereby he appointed the payment to be to *L. A.* or order, and on producing the *bill* in evidence, it appeared to be payable to *Abercrombie*, or order; but the indorſement was only in theſe words, "Pray pay the contents to *L. A.*" and therefore it was objected, that the indorſement not being to order, did not agree with the plaintiff's declaration.

But on conſideration, the whole court were of opinion, it was well enough, that being the legal import of the indorſement, and that the plaintiff might on this have indorſed it over to another, who would be the proper order of the firſt indorſor. Therefore judgment was given for the plaintiff. *Vide Strange, vol.* 1. *p.* 557.

Eaſter, 10 *Geo.* *Jenney and others* v. *Herle.* Error.

In an action on the *caſe* brought on ſeveral promiſes, there were 5 ſeveral counts laid in the declaration; as to 4 of them, the defendants pleaded *non aſſumpſit*, and iſſue was joined on it; but afterwards the plaintiff entered a *nolle proſequi* as to them: but the other was on a *bill of exchange*, wherein the plaintiff *Herle* in the *Common Pleas* declared that the defendants on the 27th day of *Sept.* 1720, at, *&c.* according to the cuſtom of merchants, made a *bill of exchange*, ſigned with their own hands, directed to *J. P.* by which the defendants required the ſaid *J. P.* to pay to the plaintiff *Herle* 1945 *l.* on demand, *money by the ſaid bill mentioned to be* in his hands, belonging to the *proprietors of certain hereditaments, called* the *Devonſhire* mines and quarries being part of the conſideration money for the purchaſe *of the manor of Weſt Buckland*: that *P.* refuſed to accept the *bill*, whereby the defendants became liable to pay that ſum of money, and being ſo liable, promiſed to pay, *&c.* To this *count* the defendants demurred in the *Common Pleas*, and an interlocutory judgment was given for the plaintiff *Herle*, a *writ of enquiry* was executed, and 1945 *l.* damages found, and final judgment in the *Common Pleas* for *Herle*. On which the defendants brought a *writ of error*: and after argument by council on both ſides, the judgment of the *Common Pleas* was reverſed by *Pratt*, C. J. and *Forteſcue* and *Raymond*, Juſtices, *Powys* being abſent; they being of opinion, that this was not a *bill of exchange*, but a bare appointment to pay money out of a principal fund, with a view of having it paid, out of which fund, the defendants probably drew the *bill*, and never deſigned the *bill* ſhould be payable at all events, but only out of the particular money mentioned in the bill, ſuppoſed to be in Mr. *P.*'s hands. And it would be very miſchievous to make ſuch notes as theſe, which are but appointments, *bills of exchange*; for at that rate, if a tradeſman applies to a gentleman for money for his *bill*, ſays the gentleman, "I will direct my ſteward to pay you," and writes to him, "pay to *J. S.* the money mentioned in his *bill* out of my rents in your hands;" the ſteward has no rents in his hands, it never can be imagined the gentleman ſhould be liable to be ſued on this as on a *bill of exchange*. And the caſe of *Jocelin* v. *Laſerre*, *Eaſter* 1 *Geo.* was cited, where a bill was drawn on an agent of a regiment, "pray pay out of my growing ſubſiſtance," *&c.* and adjudged no *bill of exchange*. And though the council objected, the reaſon of that caſe was, becauſe it depended on a contingency; yet *Forteſcue*, Juſtice, ſaid, the reaſon was, becauſe it was payable out of a particular fund; and if that was the reaſon of it, it is a caſe in point. There was alſo cited the caſe of *Smith* v. *Boheme*, *Michaelmas* 1 *Geo. B. R.* where the *note* was, "I promiſe to pay to *J. S.* ſo much money, or render the body of *J. N.* to priſon before ſuch a day; and it was adjudged to be no negotiable *note* within the act of parliament, and that an action could not be maintained on that *note* within that law, becauſe the money was not abſolutely payable, but depended on a contingency, whether he would ſurrender *J. N.* to priſon, or not. The judgment was reverſed. *Vide Raym. vol.* 2. *p.* 1361.

Trinity, Geo. 11 *Morris* v. *Lee.*

In an action on the *caſe*, brought by the plaintiff as ſecond indorſee of a *note*, ſigned by the defendant, whereby the defendant promiſed to be accountable to

A. or order, for 100*l.* value received; the plaintiff declared on the *note*, and alſo on an *inſimul computaſſet*, and on *non aſſumpſit* pleaded, a verdict was given for the plaintiff, and intire damages. It was moved in arreſt of judgment, that this action could not be maintained by the plaintiff as indorſee of this *note*, becauſe it was not negotiable by *ſtat.* 3 & 4 *Ann. cap.* 9. for a *note* within that ſtatute muſt neceſſarily and originally import a promiſe to pay the money; and therefore it was held, *Michaelmas* 1 *Geo.* in the caſe of *Smith* v. *Boheme*, that a *note* ſigned by the defendant, whereby he promiſed to pay ſuch a ſum of money, or render the body of *J. S.* to priſon, was not ſuch a *note* as that an action would lie on it by the ſtatute, after failure of rendering the body to priſon, becauſe it was not neceſſary and originally for payment of money, but by matter *after the act*, became a *note* for payment of money only, *viz.* by the body not being ſurrendered to priſon. So here, the defendant is not obliged to pay the money to the perſon to whom it was firſt given, or to the indorſee; but may account for it another way, by having laid it out in goods for the party as a factor. If a man receives money for a ſpecial purpoſe, as to account, or to merchandize, (which may be, in this caſe, for any thing appearing to the contrary) it cannot be demanded as a duty, till he has neglected or refuſed to apply it according to the truſt. 1 *Salk.* 9. *Poulter* v. *Cornwall*, though it was held there good after a verdict, becauſe the court would intend, there was proof to the jury that the defendant had done ſomething to make himſelf an abſolute debtor; and therefore, an *indebitatus aſſumpſit* for money received *to account* was held good after a verdict for the plaintiff. It was inſiſted likewiſe, that it would bemore for the benefit of trade, that the form of this ſort of notes ſhould be certain.

Per curiam. There are no preciſe words neceſſary to be uſed in a promiſory *note*, or *bill of exchange*. *Raſt.* 338. Deliver ſuch a ſum of money, makes a good *bill of exchange*. But if the *promiſory note* is within the intent of the ſtatute, it is ſufficient, though it does not follow the very words of the ſtatute. Now, by receiving the value, the defendant became a debtor; and when he promiſes to be accountable for it to *A.* it is the ſame thing as a promiſe to pay to *A.* And it is the ſtronger, becauſe it is to be accountable to *A.* or order, which is the proper expreſſion uſed in ſuch *notes*, and mentioned in the ſtatute, where it is intended the *note* ſhould be indorſable or negotiable. But it would be an odd conſtruction, to expound the word *accountable*, to give an account, when there may be ſeveral indorſees. But if this *note* had been value received on account, it might have had a very different conſideration.

Powys, Juſtice, relied much on the verdict in this caſe; but *Forteſcue*, Juſtice, *Reynolds*, Juſtice, and *Raymond*, Chief Juſtice, were of opinion, that if the *note* was not within the ſtatute, the verdict could not help it; but the *note* would be within the ſtatute, or not, on the words of the *note*. Judgment was given for the plaintiff. *Vide Raym. vol.* 2. *p.* 1396.

Michaelmas, 11 *Geo.* *Elliot* v. *Cowper.*

See this caſe fully ſtated in page 155. of this work, under the head *Averment*.

Trinity, 12 *Geo.* *Pepys* v. *Sir John Lambert.*

The third indorſee of a *promiſſory note* kept it from the 1ſt of *November* to the 7th of *January*, without receiving the value from the maker of the *note*; and in an action againſt the firſt indorſee, without notice, the plaintiff was nonſuited for this neglect. *Vide Stra. vol.* 1. *p.* 707.

Hilary, 12 *Geo.* *Welſh* v. *Craig.*

In an action of *debt* on two *promiſory notes* and on a *mutuatus*, on a demurrer to the declaration, it was objected that an action of *debt* would not lie: that before the ſtatute no action at all lay on the *note*, (*Salk.* 129.) nor did an *indebitatus aſſumpſit* lie on a *bill of exchange*. And the only remedy given on the *note* by the ſtatute is the ſame that was before on an *inland bill of exchange*. And of this opinion was the court, and pronounced judgment for the defendant. But then it was obſerved by the plaintiff's council, that there was one good count on the *mutuatus*, and the demurrer was to the whole. Whereupon judgment was given for the plaintiff. *Vide Strange, vol.* 1. *p.* 680.

Trinity, 12 *Geo.* *Chadwick* v. *Allen.*

On a demurrer to a declaration on the following *note*, it was held to be a *note* within the ſtatute, "I do acknowledge that Sir *Andrew Chadwick* has delivered me all the goods and *notes* for which 400*l.* were paid him on account of Colonel *Synge*, and that Sir *Andrew* delivered me Major *Graham's* receipt and bill on me for 10*l.* which 10*l.* and 15*l.* 5*s.* ballance due to Sir *Andrew*, I am ſtill indebted, and do promiſe to pay. Judgment was given for the plaintiff. *Vide Strange, vol.* 1. *p.* 706.

Michaelmas, 12 *Geo.* *Wilkinſon* v. *Lutwidge.*

In an action on the caſe brought on a *bill of exchange* againſt the acceptor, it was objected, that the plaintiff ſhould not be admitted to prove the acceptance, until the hand writing of the drawer was proved. And a difference was taken between this caſe, and the caſe of an action againſt the indorſor, who is liable, though the *bill* is not ſigned by the perſon who is ſuppoſed to draw it; becauſe an indorſor is in the nature of a new drawer, whereas an acceptor is not liable, unleſs the *bill* was fairly ſigned by the drawer. But as to this *Raymond C. J.* was of opinion, that the proof of an acceptance was a ſufficient acknowledgment on the part of the acceptor, who muſt be ſuppoſed to know the hand of his own correſpondant: but he ſaid it would not be concluſive evidence, and therefore if the defendant could ſhew the contrary, the reading the *bill* on behalf of the plaintiff ſhould not preclude him.

Whereupon the *bill* was read, and the queſtion came on the validity of the acceptance, as to which the caſe was thus: the *bill* was drawn from *New England*, for a ſum of money advanced there, to fit out a ſhip that had put in there, after having been taken by pirates. The *bill* was drawn on the defendant, who was the freighter, and he living at *Whitehaven*, the plaintiff applied to a merchant in *London*, who was his correſpondant, to get him to ſend this *bill* and another of 150*l.* drawn by the ſame perſon, and on the ſame account. He ſent both *bills* incloſed to the defendant, who by letter acknowledged the receipt of them, and writes thus: "The two *bills of exchange* which you ſent me, I will pay them in caſe the owners of the *Queen Anne* do not; and they living in *Dublin* muſt firſt apply to them; I hope to have their anſwer in a week or ten days. I do not expect they will pay them, but I judge it proper to take their anſwer before I do; which I requeſt you will acquaint Mr. *Wilkinſon* with, and that he may reſt ſatisfied of the payment." In another letter he writes, "I have not had an opportunity of ſending the *bills* you ſent me, to the owners of the *Queen Anne* to *Ireland*, but will take the firſt opportunity, and then ſhall remit to the gentleman concerned, according to my promiſe."

The defendant on this paid the 150*l.* *bill*; but in this action inſiſted, that it did not amount to any acceptance, being only conditional, to pay it in caſe the owners of the *Queen Anne* did not; and his promiſe to procure it from them was in favour of the plaintiff. But *Raymond C. J.* was of opinion, that it was rather in favour of himſelf, and he having undertook to write to them, it was not incumbent on the plaintiff to ſhew any application to them; and as to the acceptance, it was in his opinion a very ſtrong one. *Vide Strange, vol.* 1. *p.* 648.

Eaſter, 13 *Geo.* *Angus Macleod* v. *J. Snee and others.*
Error.

In *error* on a judgment given againſt *Macleod* in *C. B.* in an action on the *caſe*, brought on ſeveral promiſes againſt him by *Snee*, *Pargiter*, and *Becker*; wherein they declared, that they and one *J. D.* and *C. S.* were merchants, &c. and that the ſaid *J. D.*

on the 25th of *May*, 1724, at *London*, *&c.* drew his *bill of exchange* according to the cuſtom of merchants, dated at *Edinburgh*, and the ſame day directed it to the defendant by the name of Captain *Macleod*, of the late Brigadier *Douglas*'s regiment of foot, and *by that bill required the defendant* "one month after date, to pay to the ſaid *Charles Severs* or order, 9*l.* 10*s.* for his quarter's half-pay from the 24th day of *June*, 1724, to the 25th day of *September* following in advance, as by advice from the aforeſaid *John Dundas*," that *C. S.* indorſed the *bill* payable to the plaintiffs *Snee &c.* for value received, of which *afterwards, viz. on the 5th day of June*, 1724, the defendant *Macleod* had notice, and afterwards on the ſame day and year accepted it, *&c.* The defendant pleaded *non aſſumpſit*, and on a trial before *Eyre C. J.* in *C. B.* the jury found a verdict for the plaintiff, and 9*l.* 10*s.* damages beſides coſts; on which *Macleod* brought this writ of *error*. And the plaintiff in error's council argued, that the judgment ought to be reverſed, becauſe this was not a *bill of exchange*, but was an appointment, authority, or order for the defendant to pay the 9*l.* 10*s.* as if a perſon deſires the caſhier of the bank to pay money which will grow due for a dividend before hand, for this is only an appointment by an half-pay officer to the defendant, to pay by way of advance. In this caſe the drawer never intended to make himſelf chargeable by this *bill*, for it is not ſaid to be for value received; ſo that (they inſiſted) this could not be a *bill of exchange* as to the drawer; and if not, it cannot be ſuch as to the acceptor: for it muſt be a *bill of exchange*, if at all, both to drawer and acceptor. And they compared it to the caſe of *Joceline* v. *Laſerre*, and the caſe of *Jenney* v. *Herle*, 10 *Geo.*

Per curiam: This *bill* was not payable on a contingency, nor out of a particular fund, and is made payable at all events, and payable to order, and is drawn on the general credit of the drawer, not out of the half-pay, for it is payment as ſoon as the quarter begins for the half pay mentioned in the *bill*, which was not to be due till three months after; accordingly the judgment was affirmed. *Vide Raym. vol.* 2. *p.* 1481.

Trinity, 13 *Geo.* & 1 *Geo.* 2. *Smith* v. *Jarves and Baily.*

In an action on the *caſe* brought by the plaintiff as indorſee of a promiſſory *note*, againſt the defendants, the plaintiff declared that on the 28th day of *February*, 1725, and long before *and continually afterwards hitherto*, the defendants were partners *in the way of merchandizing and jointly trading* for their common advantage, and that on the ſaid 28th day of *February*, 1725, at *&c.* the ſaid *William*, for himſelf and the ſaid *James* his partner, made his promiſſory *note* in writing with his own hand ſubſcribed according to the ſtat. *&c.* bearing date the ſaid day and year, and delivered it then and there to one *P. R.* by which *note* the ſaid *William* for himſelf and the ſaid *James Baily*, promiſed to pay to the ſaid *P.* or order ſeven months after date of the ſaid *note* 36*l.* 5*s.* for value received, *&c.* To this count (there being ſeveral other counts in the declaration to which the defendants pleaded *non aſſumpſerunt*) the defendants demurred generally. And the defendants council inſiſted, that this *note* was not a negotiable *note*, nor indorſable to the plaintiff within ſtat. 3 & 4 *Ann. c.* 9. becauſe the plaintiff had not charged in the declaration, that the defendant *William* had ſigned the *note* for him and the other defendant *Baily* his partner.

Per curiam: It is very good, for the plaintiff has ſaid, the defendant *William* made it for himſelf and his partner, and ſubſcribed it with his own hand, whereby he promiſed for himſelf and partner to pay, which ſhews ſufficiently he ſigned it for himſelf and partner. And judgment was given for the plaintiff. *Vide Raym. vol.* 2. *p.* 1484.

Hilary, 2 *Geo.* 2. *Coleman* v. *Sayer.*

A *bill* was drawn payable at ſix days ſight, and preſented and accepted on the 8th of *February*, which made it payable the 14th, and the three days of grace, brought it to the 17th, which was on a *Saturday*, and the acceptor ſtopt payment on the *Tueſday* following, before which the bill was not tendered. And on this evidence it was left to the jury, who were of opinion, that the drawer was diſcharged at the end of the three days of grace. *Vide Stra. vol.* 2. *p.* 829.

Michaelmas, 2 *Geo.* 2. *Neale* v. *Ovington. Idem* v. *Waller.* Error.

The plaintiff declared on a *promiſſory note*, by which the defendant and one *A. B. jointly or ſeverally*, promiſed to pay. There was a verdict and judgment in *C. B.* for the plaintiff. But on a *writ of error*, the judgment was reverſed for want of the plaintiff's ſhewing a title to bring a ſeparate action againſt one of the makers of the *note*; for by the preſent declaration he only ſays he has this, or ſome other cauſe of action. *Vide Stra. vol.* 2. *p.* 819. *Raym. vol.* 2. *p.* 1544.

Michaelmas, 2 *Geo.* 2. *J. Burchell*, *Adminiſtrator of William Burchell*, v. *Oliver Slocock.*

The plaintiff brought an action on the *caſe* againſt the defendant on a *promiſſory note*, wherein the plaintiff declared, that the defendant *O. S.* and one *T. J.* on the 24th of *May* 1725, *&c. made their certain note in writing, called a* promiſſory note, *ſubſcribed with their names*, bearing date the ſame day and year, and delivered the ſaid *note* to the inteſtate *W. B.* by which *note* the ſaid *O.* and *T. jointly and ſeverally promiſed to pay* to the ſaid *W.* 101 *l.* 12*s.* in three months after the date of the ſaid *note for value received of premiſes in Roſemary-lane*, late in the poſſeſſion of one *T. R. S. by reaſon of which premiſes, and alſo by force of the ſtatute*, &c. and in the declaration there were three other counts, but to this count the defendant demurred, and ſhewed for cauſe, that the *note* ſet out in this count is not a *promiſſory note* within the ſtatute. And the plaintiff joined in demurrer. But the court held it clearly to be a *promiſſory note* within *ſtat.* 3 & 4 *Ann. c.* 9. And judgment was given for the plaintiff. *Vide Raym. vol.* 2. *p.* 1545.

Michaelmas, 2 *Geo.* 2. *Sir John Ereskine* v. *Murray*, Error.

William Murray, brought an action againſt the defendant Sir *John Ereskine* on an *inland bill of exchange*; wherein he declared, that he on the 1ſt of *March*, 1727, at *Weſtminſter* in the county of *Middleſex*, made his *bill of exchange* in writing to the ſaid Sir *John* directed, and by the ſaid *bill* requeſted the ſaid Sir *John* on the 10th day of the ſaid month of *March*, to pay to the ſaid *William Murray*, or order, at his manſion-houſe in *Edinburgh*, 200*l.* ſterling, *for value in the hands of him the ſaid John, out of monies lent by the ſaid William*, that the defendant Sir *John* accepted the *bill*, *and by reaſon thereof, according to the cuſtom* of *merchants*, became liable to pay, *&c.* and being ſo liable, promiſed to pay the ſaid 200*l.* to the plaintiff *Murray*, *&c.* The defendant *Ereskine*, let judgment go againſt him by *default*, and after execution of a *writ* of enquiry, and final judgment given againſt him, brought this writ of error.

The firſt exception taken by the council for the plaintiff in *error* was, that it was not alledged, that the bill was drawn according to the cuſtom of merchants.

But to this it was anſwered by the council for the defendant in *error*, and ſo reſolved by the court, that the law takes notice of the cuſtom of merchants, without ſetting it out *ſpecially*; and if the bill as ſet out in the declaration appeared to be within the cuſtom of merchants, it was ſufficient. Beſides, after ſetting out the *bill* and acceptance, it is ſaid, *by reaſon whereof according to the cuſtom of merchants* the defendant below became liable, which they held was ſufficient.

The *ſecond exception* was, that it was not averred the *bill* was ſigned by Mr. *Murray*: the *third*, that the defendant had not accepted the *bill* by under-writing the ſame under his hand. And *ſtat.* 9 *W.* 3. *c.* 17. and 3 & 4 *Ann, c.* 9. *par.* 4 & 5, were quoted.

As to the ſigning, it was anſwered, that it is alledged that the plaintiff made his *bill of exchange* in writing to the ſaid Sir *John Ereſkine* directed, and by the ſaid *bill* requeſted; which of neceſſity implies the plaintiff's name was wrote in the *bill*, elſe he could not requeſt; and ſaying he made the *bill* in writing, imports he wrote on ſome body by his authority, which will be the ſame thing, and imports a ſigning if it is neceſſary in caſe of *inland bills of exchange*. And ſuch a way of declaring was held ſufficient in caſes of *promiſory notes*, where the *ſtat.* 3 & 4 *Ann. c.* 9. requires that the party who makes the *bill*, or ſome perſon intruſted by him, ſhould ſign it. *Mich.* 7 *Geo. B. R. Taylor* v. *Dobbins*, and *Mich.* 11 *Geo. B. R. Elliot* v. *Cooper*.

The fourth and laſt exception was, that the *bill* was not laid to be for value received.

But the court held, *for value in the hands of him the ſaid John*, had been ſufficient; and the other words might be rejected as ſurpluſage. And the judgment of the *C. B* was affirmed. *Vide Raym. vol.* 2. *page* 1542.

Michaelmas, 3 *Geo.* 2. *Henry Haydock* v. *Roger Lynch.*

In an action on the *caſe* on ſeveral promiſes, the plaintiff in his firſt count declared that one *T. R.* on the 8th day of *Aug.* 1728, *&c.* according to the cuſtom of merchants made a certain *bill of exchange*, with his own hand, with the name of the ſaid *T.* thereto ſubſcribed, dated the ſame day and year, and directed the ſaid *bill of exchange* to the ſaid *Roger*, and thereby requeſted the ſaid *Roger* to pay to the ſaid *Henry* or his order 14*l.* 3*s.* out of the fifth payment, when it ſhould become due, and it ſhould be allowed by the ſaid *T.* which was afterwards accepted by the defendant, *by reaſon of which premiſes*, the defendant became liable to pay the 14*l.* 3*s.* to the plaintiff *Henry*, and ſo being liable promiſed to pay *&c.* Then there were other counts in the declaration, to which counts the defendant pleaded *non aſſumpſit*, *&c.* and to this count the defendant demurred; and it was inſiſted on by the defendant's council that this action was not maintainable on this *bill* as a *bill of exchange*, according to the reſolutions in the caſes of *Jocelin* v. *Laſerre*, *Eaſter*, 1 *Geo.* 1. *B. R.* and *Jenny* v. *Herle*, 10 *Geo.* 1. *B. R.* And of that opinion was the court, and *November* 20, 1729, gave judgment for the defendant. *Vide Raym. vol.* 2. *p.* 1563.

Trinity, 5 *Geo.* 2. *Hoar* v. *Dacoſta.*

The *note* of one *W.* was paid to the plaintiff at twelve o'clock on the *Friday*, who put it into the bank at one, and the next morning at ten o'clock, the runner of the bank carried it to the ſhop with other *notes* to the value of 2600*l.* and left them (as uſual) to call again for the money: he called at eleven o'clock, and they ſaid their ſervant was gone to the bank. He called again at two o'clock, and they ſaid they were going to ſhut up, and refuſed to pay: but paid ſmall *notes* for two hours, and then ſtopped. And the next morning notice was given to the defendant who had paid the *note* to the plaintiff. And now in an action for the money, the queſtion was, whether this was payment to the plaintiff. It was inſiſted for the defendant that he ſhould not ſuffer by the plaintiff's paying it into the bank, who ſent it with other *notes*; whereas if the *note* had been tendered by itſelf it would have been paid. On the contrary it was inſiſted, that if there had been no demand, there would have been no *laches*, being within a day after the receipt, that the goldſmith ſtopt payment. *Raymond*, *C. J.* ſaid, there was no ſtanding rule, but left it to the jury, who found for the plaintiff to the value of the *note*. *Vide Strange*, *vol.* 2. *p.* 910.

Trinity, 5 *Geo.* 2. *Harris* v. *Benſon.*

In an action brought againſt the drawer of an *inland bill* after an acceptance, *Raymond*, C. J. ruled, that for want of a proteſt, according to *ſtat.* 9 & 10 *W.* 3. *c.* 17. the drawer could not be charged with intereſt. Then the plaintiff would have had it as for money lent, and that appeared to be the conſideration of the bill; but the *C. J.* ſaid, it had never been allowed barely for money lent, without a *note*; ſo the plaintiff had no intereſt allowed him. *Vide Strange*, *vol.* 2. *p.* 910.

Hiliary. 6 *Geo.* 2. *Jenys* v. *Fawler* & *al'* *before Raymond C. J. at Guildhall.*

In an action brought by the indorſee of a *bill of exchange* againſt the acceptor, it was held not to be neceſſary, to prove the hand of the drawer: and the plaintiff reſted on the proof of the acceptance. The defendant offered to prove it a forged *bill*, by calling perſons who were acquainted with the hand of the drawer, and would ſwear they did not believe it to be his hand. But the *C. J.* would not admit this, from the danger to negotiable *notes*, and becauſe a man might with deſign write contrary to his uſual method. And he ſtrongly inclined, that even actual proof of a forgery would not excuſe the defendants againſt their own acceptance, which had given credit to the indorſee. Therefore a verdict was found for the plaintiff. *Vide Strange*, *vol.* 2. *p.* 946.

Michaelmas, 7 *Geo.* 2. *Thomas* v. *Biſhop.*

See this caſe fully ſtated in page 44 of this work under the head *Actions*.

Michaelmas, 8 *Geo.* 2. *Lumley* v. *Palmer.*

The defendant was ſued as acceptor of a *bill of exchange*, And on the evidence it appeared to be a parol acceptance only, which the *C. J.* ruled to be ſufficient, that being good at common law, and *ſtat.* 3 & 4 *Ann. c.* 9. which requires it to be in writing in order to charge the drawer with damages and coſts, having a proviſo that it ſhall extend to diſcharge any remedy that any perſon may have againſt the acceptor. On this direction the jury found for the plaintiff. But the *C. J.* of *C. B* having lately ruled it otherwiſe in the caſe of *Rea* v. *Meggot*, the court was moved for a new trial. And in order finally to ſettle this point, it was ordered to be argued: and after argument the court was of opinion, that the direction in the preſent caſe was right and agreeable to conſtant practice, and therefore ordered the *poſtea* to be delivered to the plaintiff. *Vide Strange*, *vol.* 2. *p.* 1000.

Eaſter, 9 *Geo.* 2. *Ambroſe* & *al. aſſignees of the eſtate of Ambroſe a bankrupt* v. *Clendon.*

See this caſe fully ſtated in page 198 of this work under the head *Bankrupts*.

Trinity, 9 *Geo.* 2. *Moore* v. *Paine.* Error.

On *error* brought on a judgment by *default* in the *C. B.* in an action on the *caſe*, on a *promiſſory note*, the following exceptions were taken by the plaintiff in *error*.

1ſt. That the declaration is on the ſtatute, and yet ſets out a *note* within the ſtatute, for it is only a *note* payable to the plaintiff, and not to his order.

2dly. That no *venue* is laid in this caſe, where the promiſe was made; to ſupport which exception, *Chapman* v. *Fothergill*, 2 *Lev.* 227. *Knighton* v *Moreton*, 3 *Lev.* 311. and *Anger* v. *Brower*, 1 *Vent.* 340. were cited.

Hardwicke, Chief Juſtice. The firſt exception has been often over-ruled; and as to the ſecond, the ſtatute of *jeofails* of *Charles* helps this defect after a verdict, and the ſtatute for amendment of the law extends the ſtatute of *jeofails* to judgments on writs of enquiry.

The judgment was affirmed. *Vide Caſes Temp. Lord Hardwicke*, *p.* 288.

Trinity, 9 *Geo.* 2. *Cooper* v. *Le Blanc*, *at Guildhall.*

The defendant was ſued as indorſor of a *note*, and it was proved, that a diſcounter ſent the *note* to the defendant, who looked on it, and ſaid it was his hand, and the *note* (which had ſome months to run) would be paid when due.

Hardwicke, Chief Juſtice, refuſed to let the defendant in to ſhew a forgery by ſimilitude of hands, ſince it would tend to deſtroy all negotiation of *notes* and *bills*. But he ſeemed inclined to allow proof of an actual forgery, if the defendant could have ſhewn it, which he could not: and the plaintiff obtained a verdict. *Vide Stra. vol.* 2. *p.* 1051.

Michaelmas, 10 *Geo.* 2. *Hamilton* v. *Mackrell.* Error.

On a *writ* of *error* brought on a judgment by *default* in the *C. B.* in an action on the *caſe* againſt an indorſor of a *promiſory note*; exception was taken to the declaration, for that the plaintiff had not averred that the indorſor had notice of the drawer's refuſing to pay it, for ſuch a demand is neceſſary, in order to charge the indorſor. *Salk.* 127.

Hardwicke, C. J. It is here ſaid, that the defendant was *indebted,* and in conſideration thereof, he promiſed to pay it; therefore, on the face of the declaration, it is certainly well enough; for it does not appear to the court, but that the plaintiff may prove an actual promiſe, and not merely rely on the *aſſumpſit* in the law; the time to make ſuch an objection is at the trial of the cauſe; and Ld. *Holt* always held it neceſſary, to prove a demand on the drawer, for he took the indorſor to be only a warrantor; but the Lords *Macclesfield, Pratt,* and *King,* held a demand not neceſſary, for they looked on every indorſor to be as a maker of a new *note,* ſo that it is a point in much doubt, and wants to be ſettled; but, however, as it now ſtands before us on the face of this declaration, I think it is well enough. *Vide Caſes Temp. Lord Hardw. p.* 322.

Hilary, 11 *Geo.* 2. *Collins* v. *Butler.* *At Guildhall.*

A *note* was payable on the 27th of *December,* 1732. The drawer ſhut up his houſe, and went away the *November* before. And the queſtion was, whether a general demand on the drawer is neceſſary before the indorſor can be charged, and if it was, whether in this caſe the plaintiff had ſhewn ſufficient, in proving the ſhutting up the houſe.

As to the firſt point, *Lee,* C. J. ſaid, that a demand on the drawer was neceſſary, as was determined in *C. B. Eaſter,* 4 *Geo.* 2. on great debate; and in this particular caſe, he held the plaintiff had not gone far enough, but ought to ſhew, that he had inquired after the drawer, or attempted to find him out. *Vide Strange, vol.* 2. *p.* 1087.

Michaelmas, 12 *Geo.* 2. *Theed* v. *Lovell.* *At Guildhall.*

When the *note* was delivered in, the plaintiff's name was on it, and the *Chief Juſtice* permitted it to be ſtruck out in court, it being only an indorſement in blank. *Vide Strange, vol.* 2. *p.* 1103.

Hilary, 14 *Geo.* 2. *Bevis* v. *Lindſell.*

In an *aſſumpſit* on a *promiſory note,* there was judgment by *default,* and on executing a *writ of enquiry,* the plaintiff did not produce the ſubſcribing witneſs, but offered other evidence of its being the defendant's hand. And the court held, this was ſufficient, for the *note* being ſet out in the declaration is admitted, and the only uſe of producing it is to ſee whether any money is indorſed to be paid on it. *Vide Strange, vol.* 2. *p.* 1149.

Eaſter, 14 *Geo.* 2. *Smith* v. *Abbot.*

The defendant accepted a *bill of exchange* to pay it when the goods conſigned to him, and for which the *bill* was drawn, were ſold: and the plaintiff declared on the cuſtom of merchants. After a verdict for the plaintiff, it was moved in arreſt of judgment, that this acceptance depending on the contingency of the ſale of the goods, was not within the cuſtom of merchants, or negotiable. But the court (on conſideration) held it good; for though the plaintiff might have refuſed to take ſuch an acceptance, and have proteſted the *bill*; yet nobody can ſay he might not ſubmit to it. And it will affect trade, if factors are not allowed to uſe this caution, when *bills* are drawn before they have an opportunity to diſpoſe of the goods: a man who is drawn on to pay at ten days ſight, may accept for thirty: *Molloy* 304. though the other might proteſt the *bill. Salk.* 129. *Cumb.* 452. *Vide Strange, vol.* 2. *p.* 1152.

Eaſter, 14 *Geo.* 2. *Beardeſley* v. *Baldwin.*

A *promiſory note* to pay money within ſo many days after the defendant ſhould marry, was (on conſideration) held not to be a negotiable *note* within the ſtatute. *Vide Strange, vol.* 2. *p.* 1151.

Trinity, 14 *Geo.* 2. *Bowyer* v. *Bampton.*

On a caſe ſtated at *niſi prius* in an action brought by the plaintiff as indorſee of ſeveral *promiſory notes,* it appeared that the *notes* were given by the defendant to one *J. C.* for money by him knowingly advanced to the defendant to game with at dice, and that *C.* indorſed them to the plaintiff, for a full and valuable conſideration, and that the plaintiff was not privy to, or had any notice, that any part of the money for which the *notes* were given, had been lent for the purpoſe of gaming.

On this a queſtion aroſe on *ſtat.* 9 *Ann. c.* 14. *ſect.* 1. which ſays, "That all *notes,* where the whole or any part of the conſideration is money knowingly lent for gaming, ſhall be void to all intents and purpoſes whatſoever," Whether the plaintiff could maintain the action againſt the defendant. And after two arguments, the court were of opinion he could not; for it is making it of ſome uſe to the lender, if he can pay his own debts with it; and it will be a means to evade the act, it being ſo very difficult to prove notice on an indorſee. And though it will be ſometimes inconvenient to an innocent man, yet that will not be a ballance to thoſe on the other ſide. And the plaintiff is not without remedy, for he may ſue *C.* on his indorſement. *Vide Strange, vol.* 2. *p.* 1155.

Trinity, 16 *Geo.* 2. *Biſhop* v. *Chitty.* *At Guildhall.*

In an action on the *caſe* brought on a *bill of exchange* againſt the defendant as acceptor, who, on a tender of the *bill,* wrote, "Meſſrs. *Caſwal* and *Mount,* pay this *bill* when due for *Thomas Chitty.*" The *bill* fell due on the 2d of *January,* 1741, the bankers paid till the 19th, and on the 21ſt of *January,* the money was demanded of the defendant.

For the defendant it was inſiſted, that the plaintiff had given ſuch credit to the bankers, as to make it his loſs; and they compared it to the common caſe of a *note* or draught kept.

For the plaintiff it was ſaid, there was no limited time, but that of the ſtatute of limitations, to ſue the acceptor; and that the plaintiff cannot come in as a creditor of the goldſmiths, becauſe they have done nothing to make themſelves liable.

Lee, Chief Juſtice, held, that it was the loſs of the plaintiff, who though he might have refuſed to take ſuch an acceptance, yet had now agreed to it: and it was to all purpoſes in nature of a draught, which is always conſidered as actual payment, when a reaſonable time to receive is elapſed. *Vide Strange, vol.* 2. *p.* 1195.

Mich. 16 *Geo.* 2. *The Eaſt India Company* v. *Chitty.*

At half an hour after eleven in the morning of the 18th of *January,* the defendant being indebted to the plaintiffs, paid to their caſhier a *note* of *C.* and *M.* goldſmiths, in *Lombard ſtreet,* they continued to pay all *notes* till the next day at two; and immediately after they had ſtopped payment, the company's ſervant came with the *note.* The queſtion was, who ſhould bear the loſs? And on examining merchants, it was held, that the company had made it their own, by not ſending it out in the afternoon of the 18th, or at furtheſt the next morning; ſo the jury found for the defendant. *Vide Strange, vol.* 2. *p.* 1175.

Trinity, 17 *Geo.* 2. *Banbury* v. *Liſſet et al'.*

The plaintiff declared on the cuſtom of merchants againſt the defendants as acceptors of a *bill of exchange*; and the inſtrument ran in theſe words:

Meſſrs. G. and Co. 4th *February*, 1741
Pray pay to Mr. Richard Banbury one month after date, two hundred pounds on account of freight of the Veale Galley, Edward Champion; and this order ſhall be your ſufficient diſcharge for the ſame. *J. Gibſon.*
Accepted for Liſſet *and* Gilly *of* Leghorne, *to pay as remitted from thence at uſance.*
18th *March* 1741. *H. Gilly.*

And two objections were made by the defendant; 1ſt. That this was not a *bill of exchange*, for it is not payable to order, ſo as to be negotiable; nor is it ſaid to be for value received. And it is only an order on a particular fund, like the caſe of *Jenny* v. *Herle*, and ſeveral merchants proved, that they did not look on it to be a *bill of exchange*; and others were of a contrary opinion.

Lee, Chief Juſtice, held it not to be a *bill of exchange.* He ſaid, it was not in the power of the parties to make what form they pleaſe paſs for ſuch a *bill*, it ought to be agreeable to the *law of merchants*: the privilege ariſes from the convenience to trade, which is not conſulted in this caſe. And he thought it bad on the objection to the fund out of which it was to be paid: however, being a mercantile tranſaction, he left it to the ſpecial jury of merchants, who found it to be no *bill of exchange* on the objection for want of value received.

The ſecond objection was, that the plaintiff (ſuppoſing it a *bill of exchange)* had not ſhewn there was any remittance to the defendants: and that this was not an abſolute acceptance, but only conditional: and ſo *Lee*, Chief Juſtice, declared he underſtood it, and left it to the jury. But they, finding for the defendants in the firſt point, gave no opinion as to this. *Vide Stra. vol.* 2. *p.* 1211.

Trinity, 18 *Geo.* 2. *Marſh et al' Aſſignees of May, a Bankrupt*, v. *Chambers.*

See this caſe fully ſtated, in page 199. of this work, under the head *Bankrupts.*

Michaelmas, 18 *Geo.* 2. *Cooke* v. *Colehan.*

On *error* from *C. B.* a *note* to pay *A.* or order, ſix weeks after the death of the defendant's father, for value received, was held to be a negotiable *note* within *ſtat.* 3 *Ann*, *c.* 9. for there is no contingency whereby it may never become payable, but it is only uncertain as to the time, which is the caſe of all *bills* payable at ſo many days after ſight. *Vide Stra. vol.* 2. *p.* 1217.

Hilary, 19 *Geo.* 2. *Vaughan* v. *Fuller.*

In an action brought on a *promiſory note* by the indorſee againſt an indorſor, it was proved that the defendant had paid part of the money. And *Lee*, Chief Juſtice, held that ſufficient, to diſpenſe with the proving a demand on the maker of the *note.* *Vide Stra. vol.* 2. *p.* 1246.

Hilary, 19 *Geo.* 2. *Fletcher* v. *Sandys.*

A banker's *note* for 500 *l.* was paid to the plaintiff after dinner, who ſent it the next morning at nine, when the banker had ſtopt payment: and it was held, that there was no *laches* in the plaintiff, ſo as to fix the loſs on him; and that in all theſe caſes, there muſt be a reaſonable time allowed, conſiſtent with the nature of circulating paper-credit. *Vide Stra. vol.* 2. *p.* 1248.

Michaelmas, 20 *Geo.* 2. *Robinſon* v. *Stone.*

On a *writ of error*, it appeared to be an action brought by an indorſee of a *promiſory note*, indorſed by a woman as adminiſtratrix: the defendant demurred to the declaration, and judgment was given for the plaintiff.

It was objected, that an adminiſtratrix was not within the cuſtom of merchants in the caſe of *bills of exchange*: and *ſtat.* 3 *Ann*, *c.* 9. makes *notes* aſſignable only in the ſame manner as *bills of exchange* are.

Per curiam. We cannot ſay this on a demurrer. It ſhould have been pleaded, or found not to be within the cuſtom: and it is every day's practice to have indorſements made by executors. *Vide Stra. vol.* 2. *p.* 1260.

Trinity, 21 *Geo.* 2. *Martin* v. *Chauntry.*

The court held on *error* brought from *C. B.* that a *note* to deliver up horſes and a wharfe, and pay money at a particular day, could not be declared on as a *note* within the ſtatute; and therefore reverſed the judgment. *Vide Stra. vol.* 2. *p.* 1271.

Michaelmas, 32 *Geo.* 2. *Heylyn and others* v. *Adamſon.*

In an action on the *caſe* brought on an *inland bill of exchange*, drawn by *R. C.* and directed to *W. D.* dated the 13th of *March*, 1756, by which *bill* the ſaid *R. C.* required the ſaid *W. D.* to pay to the defendant, or his order, 100 *l.* at *forty days* after date, value received as adviſed by the ſaid *R. C.* which *bill* was indorſed by the defendant to the plaintiffs, and was accepted by the defendant, but not paid by him:

On the trial the plaintiffs proved, that the ſaid *R. C.* made the *bill*, and that the defendant indorſed it to the plaintiffs, that the ſaid defendant *accepted* the *bill*, and afterwards refuſed payment, and that on the day it became payable, the plaintiffs carried it to be *proteſted* for *non-payment*, and ſoon after brought this action.

It not being proved on the trial, that the *drawer* of the *bill* had any notice of ſuch *non-payment*, or that any demand of the money was made on him before the commencement of this action; the defendant's council *objected*, "that the action would not lie againſt the defendant (who was the *indorſor* of the *bill)* till a demand of payment had been made on the *drawer*, and as no ſuch demand was proved by the plaintiffs, they ought to be *nonſuited.*

The court gave a verdict on the *firſt count* for the plaintiffs for 100 *l.* damages, and 40 *s.* coſts, ſubject to the opinion of the court on the following caſe, *viz.*

Whether in an action brought on an *inland bill of exchange*, by the *indorſee* againſt an *indorſor*, no evidence being given of notice to the *drawer* of the *bill*, or of making any inquiry after him, was a ground of *nonſuit.*

After hearing council for the plaintiff and defendant, the court gave their opinion.

Per curiam. We are all clearly of opinion, that in actions on *inland bills of exchange*, brought by an *indorſee* againſt an *indorſor*, the plaintiff muſt prove a demand of, or due diligence to get the money from the *drawee* (or *acceptor)* but need not prove any demand of the *drawer.* And that in actions on *promiſory notes*, brought by an *indorſee* againſt the *indorſor*, the plaintiff muſt prove a demand of, or due diligence to get the money from the maker of the *note.* Therefore a rule was made to deliver the *poſtea* to the plaintiff. *Vide Bur. vol.* 2. *p.* 669.

Trinity, 1 *Geo.* 3. *Edie and another* v. *The Eaſt India Company.*

On an action brought by the *indorſees* on two *foreign bills of exchange*, drawn by Colonel *Clive*, on the company, and accepted by them, payable to Mr. *C.* or order, and indorſed by Mr. *C.* to Mr. *O.*

One of theſe *bills* was by ſuch indorſement directed to be paid to *R. O.* or order, in the cuſtomary way of indorſements.

The other was indorſed by Mr. *C.* to Mr. *O.* but the words, *or order*, were originally omitted in this indorſement, and afterwards put in by another hand.

Theſe *bills* ſo indorſed, were by Mr. *O.* indorſed to the plaintiffs, *Edie* and *Lard*, or order.

Mr. *O.* became *inſolvent*, and the queſtion then was, who was to bear the loſs, whether Mr. *C.* or the plaintiffs, as the *India* company were only ſtakeholders in the buſineſs.

At the trial, the defendants council gave up their *objection* to the firſt *bill*, and a verdict was taken for the plaintiffs thereon.

On the ſecond *objection* as to the *ſecond bill*, a verdict was found for the defendant.

The plaintiffs moved for a new trial, and obtained a rule to ſhew cauſe, and after hearing council on both ſides, the court gave their opinion.

Lord *Mansfield*. There ought to be a new trial, as to the coſts, I think there ſhould be none given in the preſent caſe, for the verdict muſt be ſet aſide *generally*, not in part only. The merits were always clear for the plaintiffs on the *firſt count*, and it now appears, that nothing remained to be tried on the *ſecond*.

Deniſon and *Wilmot*, Juſtices, concurred in opinion with the *Chief Juſtice*.

Per curiam. Let the former verdict be ſet aſide, and a new trial be granted without coſts. *Vide Bur. vol.* 2. *p.* 1216.

Michaelmas, 3 *Geo*. 3. *Price* v. *Neale*.

See this caſe fully ſtated in page 52 of this work, under the head *actions*.

Trinity, 4 *Geo*. 3. *Grant* v. *Vaughan*.

On ſhewing cauſe why a verdict given for the defendant ſhould not be ſet aſide with coſts, and a new trial be granted; the *caſe* appeared to be,

That the defendant, a merchant in *London*, gave a *caſh note* on his banker to one *Bicknell*, a huſband of a ſhip of his. The note was dated, *London*, 22d *October* 1763, and directed to *Sir Richard Aſgill*, who was *Vaughan's* banker, and was worded thus:

"Pay to the ſhip *Fortune* or *bearer*" ſo much: *Bicknell*, by ſome accident, loſt this note, the perſon who found it, or who at leaſt was in poſſeſſion of ſuch note, (however the ſame might be obtained) came four days after the note was payable in *London* to the ſhop of *Grant* the plaintiff, and bought 5 *l.* worth of tea of him, and gave him this note in payment for the ſame, and deſired the change thereout. The plaintiff ſtepped out to make enquiry who this *Vaughan* might be, and being informed he was a *good man*, and that it was his *hand-writing*, changed the ſame.

Vaughan being apprized that *Bicknell* had loſt the note, ſent to *Sir Charles Aſgill* not to pay it, and *Grant* being refuſed payment, brought his action on the *caſe* againſt *Vaughan*; and in his declaration inſerted *two counts*, viz. *one* on an *inland bill of exchange*, the *other* on an *indebitatus aſſumpſit*, for money had and received to his uſe. The cauſe was tried by a ſpecial jury, and a verdict found for the defendant.

On hearing council on both ſides, the court gave their opinion.

Lord *Mansfield*. On the *ſecond count* in the declaration, the preſent caſe is quite clear beyond all diſpute, for an action, for money had and received to the plaintiff's uſe, may be brought by the *bona fide* bearer of a note made payable to *bearer*. There is no caſe to the contrary. It was certainly money received for the uſe of the *original* advancer of it; and if ſo, it is for the uſe of the perſon who has the note as *bearer*. In the preſent caſe, *Bicknell* himſelf might certainly have brought this action. *Bicknell* and the plaintiff are *both innocent*. The *law* muſt determine which of them is to ſtand to the loſs, by *law* it falls on *Bicknell*, therefore there ought to be a *new trial*.

Wilmot, Juſtice. On the whole, I think this to be a verdict againſt law, and am of opinion that it ought to be ſet aſide.

Yates, Juſtice. On the whole, I think the jury have done wrong, and therefore the *verdict* ought to be ſet aſide.

Per curiam. Let the rule be made abſolute for a new trial. *Vide Bur.* 3. *p.* 1516.

Eaſter, 5 *Geo*. 3. *Pillan and Roſe* v. *Van Mierop and Hopkins*.

On a rule to ſet aſide a verdict obtained againſt evidence, the evidence given on the trial was thus ſtated to the court:

One *White*, a merchant in *Ireland*, deſired to draw on the plaintiffs, who were merchants at *Rotterdam* in *Holland*, for 800 *l.* payable to one *Clifford*, and propoſed to give them credit on a good houſe in *London* for their reimburſement, or any other method of reimburſement.

The plaintiffs deſired a confirmed credit on a houſe of rank in *London*, as the condition of their accepting the bill; *White* names the houſe of the defendants, as this houſe of rank, and offers credit on them: on which the plaintiffs honoured the draught, and paid the money, and then wrote to the defendants, deſiring to know whether they would accept ſuch bills, as they the plaintiffs ſhould in about a month's time draw on the ſaid defendants for 800 *l.* on the credit of the ſaid *White*. The plaintiffs having received an aſſent from the defendants, accordingly drew on them. In the *interim*, *White* failed before their draught came to hand, or was ever drawn: the defendants gave the plaintiffs notice of the failure of *White*, and forbid their drawing in conſequence; but the plaintiffs did notwithſtanding draw, and the defendants refuſed to pay their bill.

On the trial, a verdict was given for the defendants.

After hearing council on both ſides on this rule, the court gave their opinion.

Lord *Mansfield*. This is juſt the ſame thing as if *White* had drawn on the defendants payable to the plaintiffs. It had been nothing to the plaintiffs, whether the defendants had effects of *White's* in their hands or not, if they had *accepted* his bill. And this amounts to the ſame thing, "I will give the bill due honour," is in effect *accepting* it. If a man agrees to do the formal part, the *law* conſiders it (as in the caſe of an *acceptance* of a bill) as if actually done. This is an engagement to *accept* the *bill*, if there was a neceſſity to *accept* it, and to pay it when due, and they could not afterwards *retract*. It would be very deſtructive to trade, and to truſt in *commercial* dealings, if they could. There was nothing of *nudum pactum*, i. e. *a void contract*, mentioned to the jury; nor was it, I am perſuaded, in their idea or contemplation, on their giving their verdict. I therefore think the point of *law* is with the plaintiffs.

Wilmot, Juſtice. I am of opinion that there ought to be a *new trial*.

Yates, Juſtice, concurred with his *brethren*.

Aſton, Juſtice. I am of opinion that there ought to be a *new trial*. If there be ſuch a *cuſtom* of merchants, as has been *alledged*, it may be found by a jury; but it is the *court*, not the *jury*, who are to determine the *law*.

This muſt be conſidered as a *commercial* tranſaction, and is a plain caſe; the defendants have undertaken to honour the plaintiff's draught, therefore they are bound to pay it.

Per curiam. Let the rule to ſet aſide the *verdict*, and for a *new trial*, be made abſolute. *Vide Bur. vol.* 3. *p.* 1663.

Bonds.

Eaſter, 5 *W.* & *M.* *Bowden* v. *Shaw*.

One *Twyford* was indebted to the plaintiff *Bowden* in 70 *l.* for which he was arreſted, and being in the cuſtody of a ſerjeant of the mace in *London*, was diſcharged at the inſtance of the defendant *Shaw*, by giving a *bond* to the ſaid ſerjeant for the uſe of the plaintiff; that *Twyford* ſhould either render himſelf, or put in bail at the return of the writ, or pay the plaintiff

70 *l.* which not being done, the plaintiff brought an action of *debt* againſt *Shaw* on this *bond.*

The defendant pleaded, that the officer took the *bond under colour of his office*, *abſque hoc*, &c. that *Twyford* was at large at that time; and on a demurrer, it was ſaid, this was an immaterial traverſe.

But admiting it to be ſo, the plaintiff ſhall take no advantage of it on a *general* demurrer; he ought to have demurred *ſpecially*, and ſhewed it for cauſe.

Then as to the matter, it was held, that the officer having taken ſuch a *bond* to enlarge a perſon, without the privity of the plaintiff, who had a power either to confine or let him go, it is void; and though it is taken to his uſe, it is within the equity of the ſtatute; but it might be otherwiſe if the *bond* had been made to the plaintiff himſelf. *Vide Mod. Rep. vol.* 4. *p.* 187.

Michaelmas, 7 *W.* 3. *Stayner* v. *Baker.*

Per curiam. A *bill* imports it to be under the hand and ſeal, and not a note in writing only; a *promiſe* cannot be extinguiſhed by a bill under hand alone, becauſe in law it is of no higher nature. A *bond* is no ſatisfaction of money due, though it may be of money before it is due. *Vide Mod. Rep. vol.* 12. *p.* 86.

Eaſter, 10 *W.* 3. *Cromwell or Crumwell* v. *Grumſdale or Grunſdale.*

In an action of *debt* brought againſt the defendant adminiſtrator of *R. Urlin* for 40 *l.* for that the ſaid *Roger*, the 10th of *July*, 1674, *by his writing obligatory, dated the day and year aforeſaid, acknowledged himſelf to be held and firmly bound to the aforeſaid* George, *in the aforeſaid* 40 *l. by theſe words quadrans libr.* payable on requeſt, the defendant pleaded, *that it was not the act of the aforeſaid* R. Urlin; the jury found *that one* R. Urlin *the inteſtate of the aforeſaid* Grumſdale, did ſeal and deliver a certain writing in the form of an obligation, *in theſe words*; by which he bound himſelf to the ſaid *Geo. Cromwell* per *mid viginti in quadrans libr. of good and lawful money of* England, to which payment he bound himſelf, his executors, adminiſtrators, and aſſigns, *firmly by theſe preſents, ſealed with his hand and ſeal*, dated the 1ſt day of *July*, in the year of the reign of King *Charles* the 2d, 1674, conditioned for the payment of 20 *l.* 12 *s.* on the 25th day of *December* next enſuing the date thereof, *&c.*

And *Holt*, Chief Juſtice, who delivered the opinion of the court, ſaid, that the *bond* was ſilly and inartificial as could be; yet the intention of the parties being apparent, the plaintiff muſt have judgment; as for the *quadrans libris*, if there had been nothing further to explain it, we ſhould have made nothing of it, but the word *quadrans* here being ſomething of four, and it appearing by the condition to be for the payment of 20 *l.* we cannot underſtand it to be meant of any other ſum than 40 *l.* and if the meaning does ſufficiently appear, we ought to conſtrue *bonds* and agreements not according to the ſtrict words, but according to the intention of the parties. *Seſſanta* is as unintelligible as this; and ſo is *quantoginta. Th. Jo.* 48. We have ſearched the *Rolls* for *Dobſon* v. *Key*'s caſe, and find it exactly the ſame as reported in *Yelv.* 193. As to the *per mid viginti*, that is inſenſible, and therefore cannot hurt. Then as to the *cujus dat.* in the declaration, there is no ſuch date, as *in the year of the reign*, 1674, it is a void date, and the plaintiff may alledge the bill to be made when he will; and though by the *profert in this court*, he has confined himſelf, yet the *cujus datus* ſhall be underſtood of the delivery, and not the date; *cujus datus* ſhall be the giving of which was, *&c.* if it had been *gerent'* date, it might have been otherwiſe, but here it is good enough; therefore judgment for the plaintiff. *Vide Mod. Rep. vol.* 12. *p.* 193.

Michaelmas, 10 *W.* 3. *Roe* v. *Needham.*

Per curiam. Judgment is a good plea in ſatisfaction of a *bond. Vide Mod. Rep. vol.* 12. *p.* 248.

Michaelmas, 10 *W.* 3. *Neſſon* v. *Finch.*

In an action of *debt* brought on a *bond* conditioned, that whereas the plaintiff became bound to the defendant in a *bond* of 52 *l.* conditioned for the true payment of 26 *l.* on the 29th of *September* following; if after the diſcharge of the ſaid *bond* by the plaintiff, the defendant ſhould make the plaintiff free of the clothworkers company on requeſt, that then this *bond* ſhould be void.

The plaintiff ſhewed, that he had paid the 26 *l.* but the payment was not on the 29th of *September*, but afterwards, and that he requeſted the defendant, but that he had not made him free. And on demurrer, judgment was given for the defendant, becauſe that payment of the 26 *l.* could not diſcharge the firſt *bond*, being after the day; and therefore, the plaintiff had no title to ſue this *bond* as yet, becauſe the defendant was not bound to make him free of the cloth-workers company before the firſt *bond* was diſcharged. *Vide Raym. vol.* 1. *p.* 382.

Hilary, 11 *W.* 3. *Cage* v. *Acton.*

See this caſe fully ſtated in page 206. of this work, under the head *Baron and Feme.*

Michaelmas, 11 *W.* 3. *Pierce* v. *Hutcheſon.*

An action of *debt* was brought on a *bond* for performance of covenants, the defendant pleaded in *bar*, that for all the breaches till ſuch a time, he had brought *covenant*, and recovered damages, and that there was no breach ſince that time; and on demurrer, judgment was given for the plaintiff: for by the very plea, the *bond* was forfeited. Though it was objected, a perſon might waive the benefit of a forfeiture of a *bond*, as well as the forfeiture of a copyhold eſtate, *&c.* and the bringing of *covenant* was a waiver of the forfeiture of the *bond*, and ſo a *bar*.

Per curiam. Even in equity, it would be no *bar* till ſatisfaction; as if two perſons are bound in a *bond*, judgment againſt one is no diſcharge to the other, before ſatisfaction. *Vide Mod. Rep. vol.* 12. *p.* 321.

Michaelmas, 11 *W.* 3. *The Duke of Ormond* v. *Ireland.*

A *bond* was given to an officer, conditioned, that the plaintiff in *replevin* would follow the ſuit with effect; afterwards he obtained an injunction in the *Exchequer*, whereby the proceedings were delayed.

Per curiam. That is no forfeiture of his *bond*; nor is any thing elſe, but an abſolute determination of ſuit, as *nonſuit*, *non proſ.* &c. *Vide Mod. Rep. vol.* 12. *p.* 320.

Eaſter, 12 *W.* 3. *The Duke of Ormond* v. *Brierly.*

A *bond* was taken by the bailiff of *W.* conditioned, that if the obligor, being plaintiff in *replevin*, ſhould proſecute the ſuit with effect, *&c.* On *oyer*, the defendant pleads that he did declare and proſecute the action till ſuch a time, as may *appear by the record*; and that pending the ſuit, the defendant died, whereby it did abate by the act of God. The plaintiff replied and confeſſed the plea; but ſaid further, that the defendant ſued an *Engliſh bill* in the *Exchequer*, and there obtained an injunction to ſtay proceedings; whereby the ſuit was delayed, ſo as judgment could not be had till the defendant's death; and on demurrer it was urged for the plaintiff, that by obtaining the injunction; the defendant had diſabled himſelf for a time, to proſecute the ſuit for a time; and a temporal diſability of performing a condition is *tantamount* to a forfeiture. *Mo.* 400.

Per curiam. He cannot be ſaid to continue the ſuit with effect till *nonſuited*, *retraxit*, or ſome other act, by which there is an end of the ſuit; this *bond* is in lieu of pledges, which the ſheriff is bound to find, and take, by *ſtat. W.* 2. and if he failed to find pledges according to that ſtatute, he would be liable to the avowant's damages, to be recovered by action againſt him; and where ſuch pledges would not be liable, the obligor that is in lieu of them, would not be liable. Judgment for the defendant. *Vide Mod. Rep. vol.* 12. *p.* 380.

Eaſter, 12 *W.* 3. *Nicols* v. *Bride Bridge.*

Per curiam. If a man makes a bond to *A.* in truſt for *B.* and *A.* dies, and his executor receives the money; it ſhall not be aſſets. *Vide Mod. Rep. vol.* 12. *p.* 381.

Michaelmas, 12 *W.* 3. *Wall* v. *Grovet.*

Per curiam. If a perſon binds himſelf in a *bond* to go to a place not in being, or to do any other impoſſible thing, the obligation is ſingle; and here the caſe was, one laid a wager that he would walk in ſuch a time to *High Park* corner, and the place being *Hyde Park* corner, and no ſuch place as *High Park* corner, he loſt his wager. *Vide Mod. Rep. vol.* 12. *p.* 418.

Michaelmas, 12 *W.* 3. *Caweth* v. *Phillips.*

In an action of *debt* on a *bond* brought by the plaintiff as executor of the obligee; the defendant pleaded, that the obligee made the defendant executor during the minority of the plaintiff, and that the plaintiff became executor at his age of *ſeventeen.* The plaintiff demurred.

Per curiam. This cannot be a ſuſpenſion of the action, becauſe the defendant was only executor in truſt for the plaintiff, during his minority. See *W. Jones* 345. *Dorcheſter* v. *Webb.* Adjourned. *Vide Raym. vol.* 1. *p.* 605.

Eaſter, 13 *W.* 3. *Holmes* v. *Barneham.*

In an action of *debt* brought on a *bond*, conditioned for the payment of 20 *l.* on *oyer* it appeared to be *firmly bound in forty liberis*, inſtead of *libris*; yet the plaintiff had judgment. *Vide Mod. Rep. vol.* 12. *p.* 495.

Trinity, 13 *W.* 3. *Ball* v. *Smith.*

In *debt* on a *bond*, where the defendant pleaded that no ſuch perſon as the plaintiff was in being, a *reſpond. ouſter* was awarded; for after an attorney is made and entered on record, the defendant cannot plead ſuch a plea. *Vide Mod. Rep. vol.* 12. *p.* 539.

Trinity, 13 *W.* 3. *May* v. *King.*

Holt, Chief Juſtice. In *debt* on a ſimple contract, it is a good plea, that the defendant has given his *bond* for that *debt*, and that the plaintiff did accept it in ſatisfaction; or where on a general iſſue that matter may be given in evidence; for the *bond* is no payment of the original debt, but a thing of a higher nature, which extinguiſhes it. *Vide Mod. Rep. vol.* 12. *p.* 537.

Trinity, 13 *W.* 3. *Between the Pariſhes of Caiſter and Eccles.*

See this caſe in *page* 128. of this work under the head *Aſſignments.*

Michaelmas, 13 *W.* 3. *Baſs* v. *Firmen.*

In an action of *debt* on a *bond*, made in this manner. *Know all men by theſe preſents, that I* ——— Firmen *of* Perth Amboy, *in the province of* Weſt Jerſey, *am held and firmly bound* to the plaintiff in 80 *l. of lawful money aforeſaid*, &c. The plaintiff demanded 80 *l.* of the money of *England*; and on the defendant's pleading *it was not his deed*, at the trial before *Holt*, Chief Juſtice, at *Guildhall*, *Eaſter*, 13 *W.* 3. the plaintiff was nonſuited; the *Chief Juſtice* held, that this *bond* bound the defendant in the money of *Weſt Jerſey*, not of *England*; the condition of the *bond* being alſo for the payment of 40 *l.* of the ſaid province. And now the plaintiff brought a new action on this *bond* in the *detinet* as of foreign coin, *to the value* of ſo much of the money of *England*; and this term it was moved by the defendant's council, that the plaintiff might not proceed before he had paid the coſts of the former nonſuit, which was oppoſed by the council for the plaintiff, and denied by the court; becauſe the merits did not come in queſtion on the trial, on which he was nonſuited, but he was nonſuited only on the variance. And the ſaid rule is grantable *generally* only in *ejectment.* *Vide Raym. vol.* 1. *p.* 697.

Michaelmas, 1 *Ann.* *Lord Wharton* v. *Sir John Robinſon.*

Per Holt, Chief Juſtice. If *A.* is bound in a *bond* to *B.* to pay him 20 *l.* when *B.* puts in his anſwer in *Chancery*, there *B.* to bring an action, ought to give *A.* notice of his having put in his anſwer. *Vide Mod. Rep. vol.* 7. *p.* 63.

Hilary, 2 *Ann.* *Orchard* v. *Ireland.*

The plaintiff brought an action of *debt* againſt the defendant on a *bond*, conditioned for the payment of money at a day long ſince paſt; on which the defendant's council moved, that on payment of principal, intereſt, and ſuch coſts as the maſter ſhould tax, proceedings ſhould be ſtaid in this action. The plaintiff's council oppoſed it, becauſe the defendant was indebted to the plaintiff on a ſimple contract, to which the defendant threatened he would plead the ſtatute of limitations, it being above ſix years ſince the debt was contracted, and no revivor ſince; and therefore ſince this motion was not for a matter of right, but for a favour, it was in the diſcretion of the court, whether they would grant it or not; it was alſo inſiſted, that if the defendant would have equity, he muſt do equity, and therefore hoped the court would not refer this action, unleſs the defendant would waive his plea of the ſtatute of limitations, or refer that cauſe of action to the maſter as well as the other. But the court granted the motion, and ſaid the debts were diſtinct, and the plaintiff by his own negligence had loſt the ſimple contract debt, and it was not in their power to deprive the defendant of the benefit of the ſtatute, which the law had given him. *Vide Raym. vol.* 2. *p.* 1033.

Michaelmas, 2 *Ann.* *Hotherſhell* v. *Bows.*

Per Holt, Chief Juſtice. If a *bond* is of *twenty* years ſtanding, and no demand proved thereon, or good cauſe of ſo long forbearance ſhewn, on *he paid it at the day* pleaded, I ſhall intend it paid; *a fortiori*, on a note, if it be for any conſiderable ſum. *Vide Mod. Rep. vol.* 6. *p.* 21.

Hilary, 3 *Ann.* *Wangford Legatee of Shelly* v. *Wangford Debtor and Executor to Shelly.*

The obligee made his obligor, executor, who accepted of the executorſhip, by his adminiſtring, but died before the probate; and if this was a releaſe of the debt was the queſtion: judgment had been given in the *C. B.* that it was; on which *error* was brought here, where the judgment in the *C. B.* was affirmed. *Vide Mod Rep. vol.* 11. *p.* 38.

Eaſter, 3 *Ann.* *Oates* v. *Bromel*, *Bromil or Brombil.*

See this caſe fully ſtated in page 102. of this work, under the head, *Arbitration and Award.*

Eaſter, 3 *Ann.* *Neal* v. *Goulſton.*

In *debt* on a *bond*, conditioned for payment of money, and therefore to ſpecify in taxation according to the late ſtatute.

Per Holt, Chief Juſtice. On evidence, if the certificate produced bears date in due time, I will not doubt but that it was then delivered, or now, that it bears but a very late date; yet if it is proved that it was taxed in due time, it will ſuffice: or *laſtly*, if it has not been taxed in due time, yet if a tally is produced that a double tax has been paid for penalty, it will do: and the plaintiff failing in all, was nonſuited. *Vide Mod. Rep. vol.* 6. *p.* 167.

Trinity, 3 *Ann.* *At Niſi Prius.*

Per Holt, Chief Juſtice. If a *bond* is for 400 *l.* with a condition to pay 200 *l.* on ſuch a day, without mentioning any intereſt to be paid for the ſame, if the 200 *l.* is paid at the day, the *bond* is ſaved; and though the money is not then paid, the obligor cannot be relieved againſt the penalty without paying intereſt, yet ſuch *bond* needs no ſpecification by the late act of parliament. *Vide Mod. Rep. vol.* 6. *p.* 184.

Michaelmas, 3 *Ann.* *Woodcock* v. *Morgan.*

In *debt* on a *bond*, ſhewing, that ſuch a day the defendant became indebted to the plaintiff, *by an obligation in writing*, without ſhewing the date of the *bond*, or ſaying it was ſealed and delivered.

Per curiam. Becoming indebted by *an obligation in writing*, is enough; but the plaint being *W.* complains of *Morgan*, *of a plea*, *&c.* without ſaying, *which he owes, and unjuſtly detains.* It was held ill. *Vide Mod. Rep. vol.* 6. *p.* 306.

Michaelmas, 3 *Ann.* *Robert* v. *Harnage.*

The plaintiff declared, that the defendant became bound to him at *Fort St. David*'s in the *Eaſt Indies*, at *London*, in a *bond* of *F.* for the payment of *F.* to him, his attorney, or aſſigns: on *oyer*, the *bond* appearing to bear date at *Fort St. David*'s in the *Eaſt Indies*; and the *payment* was to the plaintiff's attorney or aſſigns, without mentioning himſelf: and on demurrer to the declaration, two exceptions were taken.

1ſt, That the *bond* declared on, and that ſet out on the *oyer*, varied; the one being payment to him, his attorney, or aſſigns, and the other to attorney or aſſigns.

To which it was anſwered, that the declaration muſt not be according to the letter of the obligation, but according to the operation of the law thereon: as if *A.* binds himſelf in a ſum to *B.* payable to *C.* who is a ſtranger, a payment to *C.* is a payment to *B.* and in an action on it, the *count* muſt be on a *bond* payable to *B.* 4 *Ed.* 4. *c.* 19. 2 *Keb.* 81. 1 *Sid.* 295.

Per curiam. If *A.* makes a *bond* to *B.* payable to ſuch perſon as he ſhall appoint; if *B.* does appoint one, payment to him, is payment to *B.* and if *B.* appoints none, it ſhall be paid to *B.* himſelf.

The *ſecond exception* was, that the *bond* is ſet forth to have been ſealed and delivered at *Fort St. David*'s in the *Eaſt Indies*, and therefore the date made it local; and by conſequence, the declaration ought to have been of a *bond* made at *Fort St. David*'s in the *Eaſt Indies*, at *Iſlington* in the county of *Middleſex*, or in ſuch a ward or pariſh in *London*, *&c.* And of that opinion was the court. *Vide Mod. Rep. vol.* 6. *p.* 228.

Michaelmas, 3 *Ann.* *Selby* v. *Greene.*

The obligee made a conſiderable erazure in the condition of a *bond*, and after brought an action on the *bond*, and the defendant having had *oyer*, and the *bond* being in court, and the erazure diſcovered, the defendant pleaded *it was not his deed*, and notice of trial was given; but when the plaintiff underſtood the defendant had found out the cheat, and could prove it, he countermanded the notice.

And it was moved on affidavits of this matter, that the *bond* ſhould remain in the cuſtody of the officer of the court till the cauſe ſhould be tried, for otherwiſe the plaintiff would ſtay till the defendant's witneſſes were dead, and put this forged *bond* in ſuit againſt him, when he could by no poſſibility relieve himſelf againſt it; and now, if he would try it by *proviſo*, the plaintiff would be nonſuited, and might begin again.

Per curiam. If you had denied the deed according to *Weymark*'s caſe, it is to remain in court till the cauſe is tried; *otherwiſe* it ſhall only remain for the term in which it was brought in; but the moſt it goes to is, that on an imparlance granted, it ſhould remain in court till the defendant pleads: if it is by bill, the defendant after imparlance may crave *oyer*; and therefore it muſt remain in court till the party is put to plead, that he may in that caſe have *oyer* of it.

Holt, Chief Juſtice, recollected Sir *Solomon Swale*'s caſe, where a deed on evidence was found not to be the defendant's deed, and by conſequence forged; and it was inſiſted on, that the court ought to cancel it: yet the court denied it, becauſe there might be error in the proceedings for which the verdict might be ſet aſide, and then the *bond* would ſtand unimpeached, and ſo the matter be brought in queſtion again: and therefore it was reſolved it ſhould not be cancelled, but remain in the court uncancelled: and they ſaid, here the defendant's beſt way would be, to carry the cauſe down by *proviſo*; and if the plaintiff would ſuffer himſelf to be nonſuited, whereby the ſuit will be at an end, and the plaintiff entitled to take his *bond* out of court, yet that nonſuit would be ſtrong evidence againſt him in another action to be brought thereon; or elſe he might have his witneſs's teſtimony perpetuated in Chancery. *Vide Mod. Rep. vol.* 6. *p.* 233.

Michaelmas, 3 *Ann.* *Fitz-Hugh* v. *Dennington.*

See this caſe fully ſtated in page 89. of this work, under the head *Apprentice.*

Eaſter, 4 *Ann.* *Luttin* v. *Benin.*

Per curiam. Dating of a *bond* to be at a certain place, makes it local; and ſhould the city of *London* hold a plea, if it was dated at *York* it would be erroneous: but the making of a *bond* without dating, makes it tranſitory, and it may be ſaid to be made all over *England*. *Vide Mod. Rep. vol.* 11. *p.* 52.

Michaelmas, 5 *Ann.* *Hacket* v. *Tilly.*

In an action of *debt* brought on a *bond*, conditioned to ſave harmleſs againſt any actions brought for any eſcapes, a difference was taken between a general condition, and a condition only to ſave harmleſs any eſcapes ſuffered by the party himſelf.

Per Holt, Chief Juſtice. A *bond* to ſave a man harmleſs from an unlawful act already done, is not void, but is an undertaking to bring him off: there is a difference between ſaving a man harmleſs from an action, and a judgment: for in ſaving harmleſs from an action, he muſt take care it does not go to a judgment; for then it is no longer an action.

Powell, Juſtice. If a gaoler takes a *bond* from a ſervant, to ſave him harmleſs from all eſcapes to be ſuffered by the ſervant, it is good. A condition may be good for part, and void for part; but a condition againſt a ſtatute, if void in any part is void in the whole. *Stat.* 23 *H.* 6. *cap.* 10. *Vide Mod. Rep. vol.* 11. *p.* 93.

Hilary, 7 *Ann.* *Sumner* v. *Ferryman.*

See this caſe fully ſtated in page 184. of this work, under the head *Bail-bond.*

Michaelmas, 7 *Ann.* *Wells* v. *Ferguſon.*

A *bond* was given for 100 *l.* with a condition, that if he did not pay 50 *l.* by ſuch a day, the *bond* ſhould be void. The court *adjudged* the condition to be repugnant, and the *bond* to be ſingle. *Note*, in this caſe, *Holt*, Chief Juſtice, denied the caſe 39 *H.* 6. *fol.* 10. *a.* to be law. *Vide Mod. Rep. vol.* 11. *p.* 199.

Hilary, 8 *Ann.* *Biſhop* v. *Morgan.*

In an action of *debt* on a *bond*, on *oyer* thereof the defendant demurred, and ſhewed for cauſe, that the *bond* was void, being *Know all men*, &c. *that I. J. S. am held and firmly bound* to Richard—— *of* Woodſtreet, &c. *to pay to the ſaid* Richard Biſhop. But the court held the *bond* to be good, notwithſtanding the blank; and gave judgment for the plaintiff. *Vide Mod. Rep. vol.* 11. *p.* 275.

Michaelmas,

Michaelmas, 8 *Ann.* Bull v. *Clifton.*

See this caſe fully ſtated in page 181. of this work, under the head *Bail in Error.*

Hilary, 11 *Ann.* *Mitchell* v. *Reynolds.*

See this caſe fully ſtated in page 90. of this work, under the head *Apprentice.*

Michaelmas, 12 *Ann.* *Turner* v. *Goodwin.*

See this caſe fully ſtated in page 129. of this work, under the head *Aſſignments.*

Hilary, 13 *Ann.* *Mitchell* v. *Reynold.*

In an action of *debt* brought on a *bond* conditioned, that he nor his aſſigns ſhould keep a victualling-houſe, or vend liquor therein, or in any other place within a mile of *Roſemary-lane*, during twenty-one years; the conſideration was, the plaintiff had aſſigned his intereſt in this houſe, then a public-houſe to the defendant.

Per curiam. The queſtion is, whether theſe *bonds* in reſtraint of trade are good, or void? We are all of opinion they are good, if they are grounded on a ſpecial conſideration ſet down in the *bond*, which makes it a reaſonable contract, and the true diſtinction is not between a *bond* and a *promiſe*, but between *contracts*, whether by *bond*, *covenant*, or *promiſe*, in ſuch a conſideration as makes them reaſonable and uſeful; and ſuch *contracts* as are without any juſt reaſon or conſideration; where no conſideration is to balance the reſtraint of trade, thoſe are void, in what form ſoever the *contract* appears.

Yet there is this difference between *bonds*, not to ſet up a trade in a particular place, and not to ſet up a trade generally in any other place; ſuch are void, not becauſe one is a *bond*, and the other a *promiſe*, but becauſe nothing appears in the one but a bare reſtraint of trade, which may be of no uſe on one ſide, and ſerve only the purpoſe of oppreſſion. *Vide Forteſcue, p.* 296.

Trinity, 4 *Geo.* *Turner* v. *Hawkins.*

In an action of *debt* on a *bond* of 500*l.* entered into by the defendant, who was the parſon, to the plaintiff, who was the patron of *Water-Newton* church, in *Huntingtonſhire*, on condition that the defendant, on the requeſt of the plaintiff, his heirs or aſſigns, patrons of this living, made to the defendant, ſhould abſolutely reſign ſuch rectory into the hands of the biſhop of *Lincoln*, which then ſhould be; the defendant pleaded, that the *bond* was given to compel him to reſign, in caſe he would not permit the plaintiff to enjoy part of the glebe; and iſſue was tendered, and a demurrer.

Per curiam. Theſe *bonds*, though to reſign generally, are good, and have been allowed ſo conſtantly, and there are many determinations thereon, becauſe they may be for a good and valuable conſideration, and not ſimonical; as in caſe he takes a ſecond benefice, or for non-reſidence, and a court of equity will inſiſt on theſe *bonds*, where made for a good conſideration. *Vide Forteſcue, p.* 351.

Michaelmas, 6 *Geo.* *Stibbs* v. *Clough.*

In an action of *debt* brought on a *bond*, conditioned to perform articles, which on the plea appeared to be an agreement, that the plaintiff ſhould furniſh the defendant with ale and beer, to be ſold in his houſe at ſuch prices, and that he ſhould take of nobody elſe, but might be at liberty to take any other liquors, (malt-liquors only excepted): and that what ſhould not be paid for at the breaking up of the trade, and were undrawn, ſhould be taken back. And the defendant pleaded performance. The plaintiff replied, that by the ſame articles, it was further agreed, that what ſhould be drawn ſhould be paid for, and that there was ſuch a quantity of liquors unpaid for. On demurrer,

It was argued for the plaintiff, that by the *breach* it did not appear that the liquors unpaid for were malt-liquors; and as other ſorts are mentioned, the plaintiff ſhould have been more particular, eſpecially in the caſe of a *bond*, where he is to ſubject the defendant to the penalty.

Per curiam. The replication is likewiſe ill, for the plaintiff can only alledge new matter in the articles, by ſetting them out on *oyer*. The caſe of the *African Company* v. *Maſon*, was a *bond*, conditioned, reciting, that the defendant was their receiver at *Briſtol*, if therefore he does well and truly account for all ſums by him received, then the *bond* to be void. The breach was, that he received ſo much money, and did not account for it; and becauſe it appeared by the recital in the condition, to be only about tranſactions of a particular nature, the general aſſignment of the breach was held ill: ſo is 2 *Saund.* 411. Therefore, judgment for the defendant. *Vide Stra. vol.* 1. *p.* 227.

Eaſter, 10 *Geo.* *Cloud* v. *Nicholſon.*

The caſe was, two were jointly bound in a *bond*; and in an action brought againſt one alone, the plaintiff had a verdict; and it was moved in arreſt of judgment, that though this might have been pleaded in abatement of the action, yet, ſince it appears on the face of the record in which the *bond* was entered, that the plaintiff had no right againſt one alone, he cannot have judgment.

The court were of opinion that it did not appear on the record, that the other ſigned, ſealed, or delivered this *bond*; but admitting it did appear that he ſigned and ſealed it, yet it does not appear that he *delivered it*, it is the *bond* of the defendant alone, though another is named therein with him, for it is not his deed without the delivery. *Vide Mod. Rep. vol.* 8. *p.* 242.

Trinity, 10 *Geo.* *Serle or Searle*, v. *Barrington.*

This was an action of *debt* brought by an executrix on an old *bond*, for money due to the inteſtate; and on *oyer* of the *bond*, and the condition thereof, it appeared to be dated the 9th year of *W.* 3. (which was thirty-five years ago, and thereon the defendant pleaded *he paid it at the day*, on which iſſue was joined; and at the trial, the defendant offered to prove the iſſue by preſumption, *i. e.* this being a *bond* of more than twenty years ſtanding, and no intereſt being paid in all that time, it muſt be preſumed that the principal was paid on the day.

Now, to encounter this preſumption, the plaintiff offered to give another preſumption in evidence, and that was, an indorſement of one year's intereſt after the *bond* was nine years old, which indorſement was written with the inteſtate's own hand; and whether that ſhould be given in evidence at the trial, was the queſtion. It was proved, that after the death of the teſtator, this *bond* was found amongſt his papers; and that the teſtator was eſteemed an honeſt man. No evidence was given to prove whether the indorſement was made by the obligee or obligor, or that this indorſement was ever ſeen by any perſon; on which the plaintiff was nonproſſed; and the Chief Juſtice ordered, that this matter ſhould be referred by way of a caſe ſtated for the opinion of the court.

Forteſcue, and *Raymond*, Juſtices, were of opinion, that this caſe ought to be judicially brought into court by demurrer, or by ſome other proper method; for the plaintiff being nonſuited, there is no cauſe now in court; ſo, whatever judgment is given will be extrajudicial; and becauſe ſuch judgment would not determine the caſe, they were at firſt unwilling to give any judgment.

It is true, the indorſement made by the obligee charges himſelf, but if the obligor ſhould get the *bond* into his poſſeſſion, he may make as many indorſements as he will, and by that means wrong the obligee of all the intereſt; and they were of opinion that this indorſement might be admitted in evidence; for it is the daily practice to make ſuch indorſement on *bonds*, and generally at the requeſt of the obligor; and this is the beſt and ſureſt evidence of the payment of the money, becauſe acquittance and notes may be loſt, whereas indorſements will continue as ſo many brands on the *bond*, into whoſe hands ſoever it falls, as long as the original *lien*, which creates the juſt charge, ſhall continue.

Pratt, Chief Juſtice, ſaid, that at the trial he was of opinion, that the indorſement ought not to be received as evidence, becauſe it would leave too great a power in an obligee (in whoſe cuſtody the *bond* always remains) to make ſuch indorſements whenever he thinks proper: they may be made at any time, and ſo no *bond* can ever be preſumed ſatisfied.

The court ſeemed clearly of opinion, that the *non-proceſs* could not be ſet aſide, but ordered precedents to be ſearched. *Vide Mod. Rep. vol.* 8. *p.* 297.

Michaelmas, 10 *Geo.* *Whitley* v. *Loftus*.

See this caſe in page 90. of this work, under the head *Apprentice*.

Michaelmas, 10 *Geo.* *Crofts, Executor of Curtis,* v. *Butel, the Bail of Harris.*

See this caſe fully ſtated in page 169. of this work, under the head *Bail*.

Michaelmas, 12 *Geo.* *Moreland* v. *Bennet, before Raymond, Chief Juſtice, in Middleſex.*

In an action of *debt* on a *bond* of *thirty* years ſtanding, the defendant pleaded *he paid it at the day*, and relied on the preſumption: the plaintiff in anſwer could only prove payment of intereſt two years after the time mentioned in the condition, but gave no evidence of any receipt or demand for *twenty-eight* years paſt. The Chief Juſtice was of opinion, that this plea of payment at the day was to be taken as ſtrictly in this caſe, which went only on the preſumption, as in any other caſe; and the plaintiff having falſified the plea, by ſhewing a payment of intereſt two years before, it was not enough to ſay, the other twenty eight years were ſufficient to let in that preſumption, becauſe to have taken advantage of that, the defendant ſhould have pleaded on the act for amendment of the law, that he paid the money after the day, in which caſe it would have been with him on this evidence. *Vide Stra. vol.* 1. *p.* 652.

Hilary, 13 *Geo.* *Cheeſman* v. *Ramby*. Error.

On a *writ of error* brought on a judgment in *C. B.* on a *bond* conditioned not to ſet up a trade within *half a mile* of the plaintiff's now dwelling-houſe, or any other houſe that ſhe, her executors, or adminiſtrators, ſhould think fit to remove to, to carry on the trade of a *linen-draper*, nor inſtruct or aſſiſt any other, under any pretence whatſoever; this was in conſideration, that the plaintiff was to take the defendant's wiſe as a hired ſervant to her, to aſſiſt her in the trade of a linen-draper, for *three* years, without any money, whereas ſhe reaſonably deſerved 100 *l.* with ſuch a ſervant; this was a *bond* for 100 *l.* only, with condition to pay 100 *l.* in caſe the condition was broken.

Per curiam. This is a good conſideration for this *bond*, taking a ſervant without money, and in effect is no more than an agreement to pay what ſhe ought to have paid at firſt, in caſe ſhe ſet up trade, and does not amount to a *general reſtraint*, becauſe it extends to executors, and adminiſtrators; yet, if it did, the *breach* aſſigned was, that the defendant inſtructed her huſband in the ſaid trade, &c. and a *bond* may be good as to one part of the condition, and void as to the other part, being at common law. The judgment was affirmed. *Vide Forteſcue, p.* 297.

Hilary, 2 *Geo.* 2. *Serle or Searle*, v. *Barrington*.

A new action was brought on the former caſe, (ſee page 244. of this work) and tried at *Guildhall* before *Raymond*, C. J. who ſuffered the indorſement to be read, and the jury found for the plaintiff. The defendant tendered a bill of exceptions; and a *writ of error* was brought in the *Exchequer Chamber*, and the bill of exceptions returned as parcel of the record; and the judgment of this court was affirmed.

In *February* 1730, this judgment was alſo affirmed in parliament. *Vide Stra. vol.* 2. *p.* 826.

Michaelmas, 2 *Geo.* 2. *James Tully* v. *Francis Sparks and Chriſtopher May, Executors of William Donaldſon.*

See this caſe fully ſtated in page 196. of this work, under the head *Bankrupt*.

Hilary, 6 *Geo.* 2. *Lambert* v. *Branthwaite*. Error.

On a *writ of error* brought in an action of *debt* on a *bond*; on *oyer* thereof, it appeared to be *held and firmly bound in twenty pounds, payable to the ſame Richard Lambert*. The defendant pleaded *it was not his deed*, and objected that there was no perſon to whom he was ſaid to be bound, or to whom *the ſame* can refer. 1 *Lev.* 235. But on the authority of 3 *Lev.* 21. the judgment was affirmed. *Vide Stra. vol.* 2. *p.* 945.

Hilary, 13 *Geo.* 2. *Turner* v. *Criſp*.

In this caſe the Chief Juſtice refuſed to let the indorſement of a receipt of part of the *bond*, after the preſumption had taken place, to be given in evidence, ſaying, it differed from the caſe of *Serle* v. *Barrington*, where the indorſement appeared to be made before it could be thought neceſſary to be made uſe of to encounter the preſumption. *Vide Stra. vol.* 2. *p.* 827.

Eaſter, 3 *Geo.* 3. *Bonafous* v. *Rybot*.

On a rule to ſhew cauſe why it ſhould not be referred to Mr. *Owens* to compute what was due to the plaintiff of the ſeveral *inſtalments* ſtipulated by articles of agreement, dated the 28th of *January*, 1758, made in the *defeazance* of the *bond*, whereon this action is brought, and why on payment of what ſhall appear to be due with intereſt for the *inſtalment* unpaid, together with the plaintiff's *coſts* to be taxed, all further proceedings in this action ſhould not be ſtaid.

This rule was obtained on the ground of *ſtat.* 4 & 5 *Ann. cap.* 16, which *enacts*, that if at any time pending an action on any ſuch *bond* with a penalty, the defendant ſhall bring into the court where the action ſhall be depending, "all the principal money and intereſt due on ſuch *bond*," and alſo all ſuch *coſts* as have been expended in any ſuit or ſuits in *law* or *equity* on ſuch *bond*, the ſaid money ſo brought in ſhall be deemed and taken to be in *full ſatisfaction* and *diſcharge* of the ſaid *bond*, and the court ſhall and may give judgment to *diſcharge* every ſuch defendant of, and from the ſame accordingly.

The *bond* on which this action was brought, was a *bond* conditioned for the payment of a *groſs* ſum of money *abſolutely* at a *day certain*, viz. in *April* 1759, but no notice was taken in ſuch *bond* of paying the money by *inſtalments*, nor was that any part of the *original* agreement, which *original* agreement is dated the 13th of *January*, 1758.

On the 26th of *January*, 1758, the parties came to a *ſubſequent* agreement, and entered into articles dated on that day, by which articles it is agreed between the ſaid plaintiff and defendant, "that the money ſhall be paid by inſtalments," *four* of which *inſtalments* were fixed to *Midſummer*, 1759, *Midſummer*, 1760, *Midſummer*, 1761, and *Midſummer*, 1762, and the laſt at *Midſummer*, 1769.

In theſe articles was contained a *defeazance* to the *bond* of the 13th of *January* 1758, in caſe the ſum mentioned in the condition thereof, to be payable in *groſs* at a *certain day* therein fixed, ſhould be paid by *inſtalments*, on the particular days ſpecified in the *defeazance* for making the ſaid payments, if the defendant ſhould live till all the ſaid days be paſt, otherwiſe the *defeazance* was to be void.

The defendant paid the *two firſt* payments at *Midſummer*, 1759 and 1760, and part of the *inſtalment* due at *Midſummer*, 1761, but *totally* neglected to pay that which became due at *Midſummer*, 1762, or even any part of it at *Michaelmas*, 1762, (*ſubſequent* to the laſt mentioned *inſtalment)* the defendant paid to the plaintiff, and the plaintiff received of him the whole intereſt then due on the whole debt, up to that time, including intereſt for the ſum payable at the *preceeding Midſummer*, as well as for all the remaining ſums not yet become payable.

After hearing the council on both ſides, the court gave their opinion.

Lord *Mansfield*. The *proviſo* in the *defeazance* makes the whole money due on the failure of any of the payments by *inſtalments*.

The *ſtatute* meant that in caſes of penalties by way of ſecurity, the clear final juſtice of the caſe ſhould be attained in the courts of *law*.

The *defeazance* being dated at a *ſubſequent* time, and written on a diſtinct ſeparate paper from the *bond*, makes no difference, the difference is, the *bond* here is conditioned for the payment of a *groſs* ſum then due to be paid at a certain fixed day, then there is a *ſubſequent* agreement, made in favour of the *debtor*, eaſing him of that ſtipulated ſingle payment at that fixed day, and allowing him to pay it by *inſtalments*, *provided* that he pays it punctually on the days agreed on, and that he lives till they ſhall be all paſt, otherwiſe the *agreement* and *defeazance* to be void, and conſequently as the *debtor* has not paid the money *punctually*, they are void, and the *groſs* ſum is due to the obligee.

Unleſs the defendant pays the whole money, he cannot be relieved from the penalty, however, this rule muſt certainly be diſcharged, there being no ground to make it abſolute.

Wilmot and *Deniſon*, Juſtices, concurred with the *Chief Juſtice*, and the rule was diſcharged, with coſts to be paid by the defendant to the plaintiff. *Vide Bur. vol.* 3. *p.* 1370.

Michaelmas, 5 *Geo.* 3. *Walker* v. *Perkins Adminiſtrator*.

The plaintiff brought an action on a *bond*; on *oyer* being prayed, the *bond* appeared to be made from *William Perkins* the *inteſtate*, to the plaintiff, in a penalty; the *bond recited*, that *William Perkins* the *inteſtate*, and the plaintiff had agreed to live together; therefore he had agreed to find her meat, drink, waſhing, and lodging, *&c.* and to leave her an annuity of 60 *l.* a year, if he quitted her, or ſhe outlived him, and if they had any child, he was to take care of, and provide for it; but if ſhe ſhould leave him, or go to another man, then he ſhould not be obliged to provide for her any longer, or to leave her any annuity.

The defendant pleaded that this was an agreement between the plaintiff and his inteſtate, to live together in a ſtate of *fornication*, and that ſuch a *bond* is void in *law*. The plaintiff replied, that ſhe was a *virgin*, and was *ſeduced* by the inteſtate, and in conſideration thereof, this *bond* was given to her by the inteſtate, and that it was *a reward of her virtue:* to this replication the defendant demurred, and the court gave judgment on the demurrer.

Lord *Mansfield*. This *bond* is the price of proſtitution, for if ſhe becomes *virtuous*, ſhe is to *loſe* the annuity, it appears clearly on the condition, that the *bond* is *illegal* and void. Therefore judgment was given for the defendant. *Vide Bur. vol.* 3. *p.* 1568.

Breach.

Michaelmas, 1 *W. & M.* *Coleman* v. *Sherwin*.

In an action of *covenant*, the plaintiff declared, that the defendant and one *J. S.* demiſed to the plaintiff for *ſeven years*, *by virtue whereof* he entered, and was poſſeſſed; and the defendant and one *A.* by his command, entered on the plaintiff; and that neither the defendant nor the ſaid *J. S.* had or ought to have demiſed the premiſes, but at the time of the demiſe, one *R.* was ſeized in *fee*; the defendant pleaded that *J. S.* was ſeized, and had power and right to demiſe, *abſque hoc* that *R.* was ſeized, *&c.* And *abſque hoc* that the defendant entered, and kept him out; to this plea the plaintiff demurred.

Per curiam. 1ſt, There being no expreſs covenant, the action is founded on the covenant in *law* implied in the word *demiſerunt*; and therefore as the intereſt granted by that word is joint, ſo is the covenant imported by it: and then the action as to this *breach* of their being not ſeized at the time of the demiſe, ought to have been againſt both the leſſors, and cannot be maintained againſt the defendant alone: but as to the other *breach*, *viz.* that the defendant and one *A.* entered, the action is well enough brought againſt him only; for it is his own act, and in conſtruction each did demiſe, and it is a ſeveral covenant as to their own acts ſubſequent. 2dly, *The court held*, that as the plaintiff might well aſſign *ſeveral breaches*, the defendant might as well purſue and traverſe them; but judgment was given for the defendant, becauſe the action was not againſt both the leſſors, and the plea was good. *Show.* 79. *Meſme caſe.* *Vide Salk. vol.* 1. *p.* 138.

Eaſter, 2 *W. & M.* *Meredith* v. *Alleyn*.

In an action of *debt* on a *bottomree bond*; the defendant craved *oyer*, and the condition was, that if ſuch a ſhip returned within *ten weeks*, and gave an account of the profits, then, *&c.* The defendant pleaded, that the ſhip was loſt, and did not return; the plaintiff replied, the ſhip was not loſt, *and this he prays may be inquired of by the country.* The defendant *demurred*, and ſhewed for cauſe, that no *breach* was aſſigned in the replication: for the defendant's council urged, that without a *breach*, the plaintiff had no cauſe of action, and the condition, by craving *oyer*, is become part of the record. And he relied on 1 *Saund.* 102. But the court gave judgment in this caſe for the plaintiff.

Per Holt, Chief Juſtice. In all caſes (that of a bond to perform an award *excepted)* if the defendant pleads a *ſpecial* matter that admits and excuſes a non-performance, the plaintiff need only anſwer and falſify the *ſpecial* matter alledged; for he that excuſes a non-performance, ſuppoſes it; and the plaintiff need not ſhew that which the defendant has ſuppoſed and admitted: but if the defendant pleads a performance of the condition, though it be not well pleaded, the plaintiff in his replication muſt ſhew a *breach*; for then he has not a cauſe of action unleſs he can ſhew one. The reaſon of the caſe touching the award is ſingle; it is becauſe, though an award be made, yet it may be void in whole or in part: and therefore the plaintiff muſt not only ſhew the award, that the court may ſee that there was an award, but muſt alſo ſet forth the *breach*, that it may appear likewiſe that the non-performance was of a good part of the award, and not of a void part thereof; for in that it need not be performed. 2 *Cro.* 472. But if the defendant pleads *he did not ſubmit*, and to force the plaintiff to iſſue, there need be no breach ſet out. 1 *Sid.* 290. *Vide Salk. vol.* 1. *p.* 138.

Eaſter, 5 *W. & M.* *Knight* v. *Keech*.

On a *writ of error* brought on a judgment in *C. B.* grounded on mutual promiſes and agreements between the plaintiff and defendant, which were ſpecially ſet forth in the declaration; the plaintiff aſſigned for *error*, that the *breach* was too general, which being a matter of ſubſtance, the right of the action could not be tried; and therefore it was not within any of the ſtatutes of *jeofails:* and to prove this, many caſes were cited. But the court, after hearing council on both ſides, affirmed the judgment. *Vide Mod. Rep. vol.* 4. *p.* 188.

Trinity, 6 *W.* & *M.* *Stagg* v. *Hind.*

In an action of *covenant* the plaintiff declared, that the defendant covenanted to pay yearly, during the plaintiff's life, at the two feaſts of *Michaelmas* and *Lady-day*, 3 *l.* 6 *s.* 8 *d.* by equal portions, and for *breach* aſſigned, that 3 *l.* 6 *s.* 8 *d.* for a year at *Lady-day* laſt was in arrear and unpaid: the defendant *demurred*, and *objected*, that it does not appear when the money became due; for it might be behind and unpaid at *Lady-day*, and yet might become due at *Michaelmas*, or the *Lady-day* before. But the court held this well enough upon a general *demurrer*, and gave judgment for the plaintiff. *Vide Salk. vol.* 1. *p.* 139.

Michaelmas, 7 *W.* 3. *Smith* v. *Sharp.*

In an action of *debt* for 500 *l.* on articles in *C. B.* and judgment by *nil dicit*, a writ of *error* was brought in this court, and the plaintiff aſſigned for *error*, that *whereas* the defendant was to tender a conveyance to the plaintiff, his heirs, or aſſigns, the *breach* aſſigned was, that the defendant had not tendered a conveyance to the plaintiff, and ſo had not acted purſuant to the covenant, by which he is to tender to the plaintiff or his aſſigns. 3 *Cro.* 348.

Per curiam. The difference is between doing a thing to a man, or his aſſigns, and by a man or his aſſigns; if a thing be to be done by him or his aſſigns, the *breach* muſt be in the *disjunctive*, that it was not done by him or his aſſigns. But where a thing is to be done to a man or his aſſigns, it is ſufficient to aſſign for *breach*, it was not done to him; for an aſſignment ſhould be intended to be done to the plaintiff himſelf, and if he aſſigns his intereſt, then to the aſſignee; and if he did aſſign over his intereſt, that ought to be ſhewed on the other ſide; therefore the judgment of *C. B.* was affirmed. *Vide Salk. vol.* 1. *p.* 139.

Michaelmas, 8 *W.* 3. *Lockey* v. *Darby.*

In an action of *debt* brought on a bond, on *oyer* thereof, the condition appeared to be, that if the defendant ſhould ſave the plaintiff harmleſs from all damage that might accrue to him, by the executing a *writ of execution*, that then, &c. The defendant pleaded, that the plaintiff did not execute the *writ*, &c. The plaintiff replied, iſſuably. The defendant demurred. And the defendant's council argued, that the replication was ill, becauſe it had not aſſigned any *breach*, and therefore the plaintiff could not have judgment, for he ſhould have ſhewn in his replication, that ſome action was ſued againſt him for the execution of this writ, or how he was damnified by it. *But not allowed.*

Per curiam. The point here in iſſue is a collateral matter, to which the defendant, by his plea, has inveigled the plaintiff; and therefore the plaintiff is not obliged to ſhew a *breach*: for the defendant has admitted that the plaintiff was damnified by offering this plea of a collateral matter. Beſides that, if the plaintiff had aſſigned a *breach* in the replication, the defendant could not have traverſed it, becauſe it would have been a departure from his *bar*: therefore, judgment was given for the plaintiff. *Vide Raym. vol.* 1. *p.* 186.

Eaſter, 10 *W.* 3. *Shales* v. *Seignoret.*

See this caſe fully ſtated in page 150. of this work, under the head *Averment*.

Trinity, 11 *W.* 3. *Farrow* v. *Chevalier.*

In an action of *covenant* brought by the maſter againſt the ſervant, on a *covenant* not to buy or ſell without the maſter's leave within *two years*; and *breach* aſſigned that he had, at divers days and times, between ſuch a day and ſuch a day, ſold to *H.* and to ſeveral other perſons unknown, goods to the value of 100 *l.* on iſſue being joined, a verdict was given for the plaintiff, and the defendant moved in arreſt of judgment, that the *breach* was uncertain as to times and perſons; and cited caſes *pro & con. viz.* 3 *Cro.* 916. 2 *Cro.* 567. *Ray.* 8, 9, 10. *Sty.* 420. 428.

Per Holt, Chief Juſtice. In *debt* on a *bond* to perform *covenants*, the replication muſt ſhew a *certain breach*; but in *covenant* it is enough to aſſign a *general breach*. And this is certain enough; for it is ſo deſcribed, that if another action be brought, the defendant may plead a former recovery for the ſame cauſe, and aver this to be the ſame ſelling.

Gould, Juſtice, agreed, and ſaid, that in *debt* for a penalty on a *ſtatute*, it is enough to aſſign a *breach* in this manner, becauſe every offence intitles the party to a diſtinct penalty; but here the action being only for damages, it is well enough; therefore judgment was given for the plaintiff. *Vide Salk. vol.* 1. *p.* 140.

Michaelmas, 11 *W.* 3. *Pierce* v. *Hutcheſon.*

See this caſe fully ſtated in page 241. under the head *Bonds*.

Michaelmas, 11 *W.* 3. *Hamley* v. *Hendon.*

In an action of *covenant* brought on a deed of demiſe by the plaintiff's teſtator to the defendant of ſeveral parcels of land, reſerving rent and ſuit of court; in which the leſſee covenanted to grind all his corn and grain, that he ſhould ſpend in domeſtic uſe, at the mill of the leſſor's manor; and *breach* aſſigned that there were 500 barrels of wheat ground and uſed in the defendant's houſe, which he did not grind at the ſaid mill, or any part of them; and to this a demurrer.

It was objected, *firſt*, that this *covenant* by the operation of law, extends only to ſuch corn as ſhould grow on the premiſes, and it is not averred to be ſo; and 1 *Sid.* 374 was quoted.

Per curiam. The *covenant* is expreſs and general of all his corn, which he ſhould grind for the uſe of his houſe, and nothing appears to reſtrain it againſt the words. But on another *exception*, *viz.* that it was not averred, that the corn was his at the time of the grinding, and it might be another's at the time of grinding, and after bought by the defendant, and ſo not within the *covenant*, the meaning and words whereof were, that he ſhould grind all *his* corn which he ſhould uſe at his own houſe, at the plaintiff's mill; for the defendant might have a mill of his own, and grind another's corn there, and afterwards buy it for his houſe. Judgment was given for the defendant. *Vide Mod. Rep. vol.* 12. *p.* 327.

Michaelmas, 12 *W.* 3. *Harman* v. *Owden.*

See this caſe fully ſtated in *page* 151 of this work, under the head *averment*.

Michaelmas, 1 *Ann.* *Tompkins* v. *Pincent.*

In an action of *debt* for *rent*; the plaintiff declared on a demiſe made the 24th day of *Auguſt*, 11 *W.* 3. of a meſſuage, *habendum* for ſeven years, to begin on the 24th day of *January*, the rent to be paid quarterly, at the feaſt days of *St. Michael*, *St. Thomas*, *Lady Day*, and *Midſummer*, at the rent of —*l. per annum*; the firſt payment to be made at *Michaelmas* next; and ſhewed, that —*l. of the aforeſaid rent for one year, ending the 24th day of December*, 13 *W.* 3. *was in arrear*, &c. *whence an action*, &c. The defendant demurred: and this exception was taken to the declaration, that there is no year ending the 24th day of *December*, but it ends at *St. Thomas's Day*, according to the *reddendum*, which is the 21ſt day of *December*, *which the court allowed*; for where ſpecial days of payment are limited by the *reddendum*, the rent muſt be computed according to the *reddendum*, and not according to the *habendum*; and the computation of rent according to the *habendum* is only where the *reddendum* is general, *viz.* yielding and paying quarterly ſo much rent; on which the plaintiff prayed leave to *diſcontinue*, which was granted. *Vide Salk. vol.* 1. *p.* 141.

Michaelmas, 3 *Ann. Arnote or Armit,* v. *Breame.*

See this caſe fully ſtated in page 103. of this work, under the head *Arbitration and Award.*

Eaſter, 4 *Ann. Vivian* v. *Campion.*

The plaintiff, as heir, declared, that his anceſtor, *by indenture, the counterpart whereof, with the ſeal* (omitting the word *ſealed) of the leſſee, he brings here into court,* did demiſe; and that the leſſee covenanted *to repair from time to time, and to leave in repair,* &c. and then ſhewed, that his anceſtors died in the 10th year of *W.* 3. and for breach aſſigned, that on the 1ſt of *April,* in the third year of the Queen, *now, and for ten years before then,* the premiſes were out of repair. After a verdict for the plaintiff, it was moved in arreſt of judgment, 1ſt. That the word *ſealed* is wanting. 2dly. That part of the ten years incurred in the life of the anceſtor, and that this was a hard action.

Per Holt, Chief Juſtice. 1ſt. The want of *ſealed* is cured by the verdict, and the pleading over. 2dly. If the premiſes were out of repair in the time of the anceſtor, and continued ſo in the time of the heir, it is a damage to the heir: and the jury give as much damages as will put the premiſes in repair; but hereby no damages are given in reſpect of the length of time they continued in decay; but in reſpect of what it will coſt at the time of the action brought to put the premiſes in repair; therefore, *for ten years,* is frivolous; and this is not a hard action; and good damages were always given in theſe caſes, becauſe the damages recovered ought to be applied to the repair of the premiſes. *Vide Salk. vol.* 1. *p.* 141.

Hilary, 11 *Ann. Thornicraft* v. *Barns.*

See this caſe in page 154. of this work, under the head *Averment.*

Hilary, 11 *Ann. Shepherd* v. *Maidſtone.*

See this caſe fully ſtated in page 90. of this work, under the head *Apprentice.*

Hilary, 11 *Ann. Hacket* v. *Glover.* Error.

On a *writ of error* brought on a judgment obtained in *C. B.* on an action of *covenant,* the plaintiff declared, that the defendant ſold him goods for ſo much money, and covenanted to defend and warrant the goods to the plaintiff *againſt all perſons* whatſoever, and aſſigned for *breach,* that at the time of the ſale the defendant had neither the poſſeſſion nor the property of the goods; to this the defendant demurred, and the plaintiff had judgment in the *C. B.*

It was inſiſted for the plaintiff in *error,* that this was no *breach* of the covenant; for the intention and deſign of the covenant was only to ſecure the poſſeſſion; and therefore, until an *eviction,* the covenant was not broken. *Co. Lit.* 365. *a. Fitz.* 134. *a.* 2 *Saund.* 175. *Hobart,* 51. 1 *Rolle Rep.* 519. *Moore,* 175. *Hobart,* 34, 35. *Dyer,* 328.

It was argued on the other ſide, that ſince it was confeſſed by the demurrer, that he that ſold them had neither the poſſeſſion nor the property, the buyer could not take poſſeſſion of them, without expoſing himſelf to an action of *trover.*

The word *dimiſi* in a leaſe, imports a covenant in law; and in ſuch an action, it had been enough to aſſign for *breach,* that the *leſſor* had no title at the time of the leaſe, without ſhewing an *eviction.* 2 *Cro.* 274. 3 *Mod.* 261. 1 *Siderf.* 178.

Parker, Chief Juſtice. The plaintiff cannot uſe the goods without being liable to an action, which is a damage. If the caſe had been, that the defendant had had the equitable right, but another the legal one, it had been proper to have laid it before the court by pleading it.

Eyre. Juſtice. *Warranty,* in the nature of it, imports as well warranty of the property as poſſeſſion. 1 *Rolle* 90. *Warner* v. *Tallard.* The caſe on the word *dimiſi* is a ſtrong caſe; for *that* is a covenant in law; and if it is not neceſſary *there* to ſet forth *eviction,* a *fortiori* not *here.* Therefore the judgment was affirmed. *Vide Mod. Rep. vol.* 10. *p.* 142.

Eaſter, 12 *Ann. Sail* v. *Kitchingham.*

In an action of *covenant,* ſeveral *breaches* were aſſigned; but that covenant on which moſt ſtreſs was laid was, that the leſſee ſhould lime and dung the land *during the term,* which was *ſix* years.

This action was brought by the plaintiff as heir at law to the leſſee, and the *breach* of the covenant was thus aſſigned, that after the deſcent of the land, he did not, *during the term,* lime and dung the land.

It was objected for the defendant, 1ſt. That *covenant* is a perſonal action, and therefore the executors were the proper perſons to have brought this action; though they on recovering ſhall be truſtees for the heir at law.

2dly. That the *breach* was not well aſſigned, becauſe the not dunging and liming ſince the deſcent is no breach of the covenant, if it was limed and dunged ſo ſufficiently before that it did not need it.

As to the firſt objection, the court were of opinion that this was a covenant relating to the land, and for the advantage of the *reverſion:* that it would have gone to an aſſignee without his being named in the covenant, which proves it to be a covenant that runs with the land, and attends on the *reverſion;* and by conſequence, a covenant to which the heir at law will be intitled, as he is to the reverſion. As to the ſecond objection, the court were of the ſame opinion. *Adjourned. Vide Mod. Rep. vol.* 10. *p.* 158.

Eaſter, 13 *Ann. The African Company* v. *Maſon.*

See this caſe in page 244. of this work, cited in *Stibbs* v. *Clough,* under the head *Bonds.*

Trinity, 5 *Geo. Anonymous.* Error.

On a *writ of error* brought on a judgment obtained in *C. B.* on a *ſcire facias,* on a recognizance taken in an action of *debt:*

The plaintiff in *error*'s council inſiſted that the *breach* was not well aſſigned; for though it is a general rule, that a *breach* aſſigned in the very words of the condition is a good aſſignment: yet that rule does not hold where the words are by law interpreted contrary to their natural ſignification, which is the caſe here. For the words of the condition are, that he ſhould render himſelf in execution of the judgment; which words, in their natural ſenſe, import an act, which it is impoſſible for the bail to do, for it is the principal only that can render himſelf in execution of the judgment; ſo that the meaning of the words in this caſe muſt be, to render himſelf in order to execution. And therefore, the pleading ſhould not have been in the very words of the condition, but in ſuch words as are expreſſive of that ſenſe, in which the words of the condition are, by operation of law, to be underſtood.

This objection was over-ruled by the court, who were all of opinion, that the words in the pleading muſt be underſtood in the ſame ſenſe as when uſed in the condition of the recognizance.

It was then urged for the plaintiff in *error,* that there were variances between the *ſcire facias* and the recognizances.

The council for the defendant acknowledged, that there were variances, and material ones; but inſiſted that the plaintiff could not now take advantage of them, becauſe he had not, by demanding *oyer* of the recognizance in the court below, made it part of the record, and ſo brought it before this court; and as it ſtands now, the recognizance is no part of the record.

And of this opinion was the court, and gave judgment *niſi* for the defendant in *error. Vide Mod. Rep. vol.* 10. *p.* 444.

Michaelmas, 6 *Geo. Stibbs* v. *Clough.*

See this caſe in page 244 of this work, under the head *Bonds.*

Michaelmas, 6 *Geo.* *Aleberry* v. *Walby.* Error.

See this caſe fully ſtated in page 213. of this work, under the head *Baron and Feme.*

Eaſter, 10 *Geo.* *Knight* v. *Cambridge.*

On a *writ of error* brought on a judgment in *C. B.* in an action brought on a policy of inſurance *againſt the perils of the ſea*, *winds*, *pirates*, and *barratry* of the maſter.

The declaration laid for *breach*, that the ſhip was loſt by the *fraud and negligence of the maſter*; on *non aſſumpſit* pleaded, a caſe was made at the trial for the opinion of the court, which ſhewed the policy of inſurance which inſured the ſhip againſt all loſſes and misfortunes, and againſt *barratry*; and then ſhewed that the ſhip was loſt by the wilful fraud and direct negligence of the maſter; and whether ſuch loſs was within the policy was the queſtion?

Per curiam. Every neglect of the maſter is not within this policy; and if he had run away with the ſhip, or embezzled the goods, the merchant may have his action againſt him: but yet, he may provide againſt him in another manner, *viz.* by inſuring his ſhip and goods to ſecure himſelf againſt all acts of barratry; for it is reaſonable that merchants, who venture a large ſhare of their ſtocks, ſhould ſecure themſelves in what manner they think proper againſt the barratry of the maſter, and all other frauds.

" *Barratry* is a word of more extenſive ſignification " than only to include the maſter's running away " with the ſhip: it may well include the loſs of the " ſhip by his fraud *or* negligence."

" A *breach* aſſigned in the words of the *covenant* is " good, as here *by the barratry of the maſter* had been " good: but it is equally good to aſſign the *breach* in " words tantamount. Where is the difference be- " tween running away with the ſhip, and ſinking it?" The judgment was affirmed. *Vide Mod. Rep. vol.* 8. *p.* 230.

Michaelmas, 11 *Geo.* *Andrews* v. *Paradiſe.*

On a *writ of error* brought on a judgment in *C. B.* in an action of *covenant* in an indenture to lead the uſes of a fine, wherein the cognizor covenanted, that the cognizee ſhould quietly enjoy, &c. and that he would not do any thing to *moleſt*, *hinder*, *or prevent* him, (the cognizee) or his wife, or any occupiers of theirs, in the quiet poſſeſſion or enjoyment of the lands, &c. but that the defendant had moleſted him, &c.

The defendant pleaded, that he had done nothing to moleſt, hinder, or prevent the cognizee, or his wife, &c.

The plaintiff replied, and aſſigned a *breach*, for that he was ſeized of a cloſe in ſuch a field, being parcel of the lands purchaſed under this fine and conveyance, and that there was a *lane* leading through this cloſe, through which *lane* the plaintiff had a way to the cloſe, and that the defendant, *to wit*, *afterwards*, did erect a gate a croſs that way, *whereby* the plaintiff's tenant was obſtructed in the quiet poſſeſſion and enjoyment of the aforeſaid cloſe, &c.

On *demurrer* to this replication, the plaintiff had judgment in *C. B.* and on this *writ of error*, it was inſiſted, that the judgment ſhould be reverſed, for that the replication was only argumentative of an obſtruction, *viz.* *whereby* the plaintiff's tenant was obſtructed; whereas the pleading ſhould have been certain.

Per curiam. This appearing to be a neceſſary way for the enjoyment of this cloſe, then, whether the gate is ſet up by right or wrong, it is not material as to the defendant; for in either caſe, if it is an obſtruction, it ought not to be erected there. The judgment was therefore affirmed. *Vide Mod. Rep. vol.* 8. *p.* 319.

Carrier.

Michaelmas, 2 *W.* & *M.* *Elliot* v. *Danby.*

Per curiam. An action lies againſt a *common carrier* for refuſing to carry money, if he does not aſſign a particular reaſon for it. *Vide Mod. Rep. vol.* 12. *p.* 3.

Trinity, 7 *W.* 3. *Dalſton* v. *Janſon.*

See this caſe fully ſtated in page 21 of this work, under the head *Actions.*

Eaſter, 13 *W.* 3. *Lane* v. *Sir R. Cotton and Sir T. Frankland*, *Poſtmaſters General.* *Entered Eaſter*, 10 *W.* 3. *Roll.* 403.

In this caſe, *Holt*, Chief Juſtice, ſaid, a *common carrier* may refuſe to admit goods into his warehouſe before he is ready to take his journey; but an action will lie againſt him if his horſes are not loaded, and he refuſes to take a packet proper to be ſent by a *carrier*. But if the *carrier*'s horſes are loaden, the action would not lie for ſuch refuſal; for one that has made profeſſion of public employment, is bound by the utmoſt extent of that employment to ſerve the public.

A *carrier* is liable in reſpect of his reward, and not of the hundred's being anſwerable over to him; for the hundred is liable by the *ſtatute* of *Wincheſter*, but he was ſo at common law; and the reaſon why robbery did not excuſe him, was becauſe it might be by conſent and combination, carried on in ſuch a manner, that no proof could be had of it. *Vide Raym. vol.* 1. *p.* 652. *Mod. Rep. vol.* 12. *p.* 484.

Eaſter, 1 *Ann.* *Skinner* v. *Upſhaw*, *At Guildhall.*

The plaintiff brought an action of *trover* againſt the defendant, who was a *common carrier*, for goods delivered to him to carry, &c. On not guilty pleaded, the defendant gave in evidence, that he offered to deliver the goods to the plaintiff, if he would pay him his hire; but that the plaintiff refuſed, &c. and therefore he retained them. And it was ruled by *Holt*, Chief Juſtice, that a *carrier* may retain the goods for his hire; and on direction, the defendant had a verdict given for him. *Vide Raym. vol.* 2. *p.* 752.

Trinity, 1 *Ann.* *Taylor* v. ———.

It was ruled by *Holt*, Chief Juſtice, on a trial at *niſi prius*, at *Hertford*, on the 4th of *Auguſt*, 1 *Ann*, that if goods are delivered to a *carrier*, and he does not deliver them according to the direction given him; on a demand of the goods from him, and refuſal by him to deliver them, *trover* lies againſt him; or an action on the *caſe* lies againſt him on the cuſtom. But if the goods are delivered to a ſervant of the *carrier*, or to his warehouſe keeper, and they are not delivered, &c. an action of *trover* does not lie againſt the *carrier*, &c. without an actual converſion by him. *Vide Raym. vol.* 2. *p.* 792.

Eaſter, 2 *Ann.* *York* v. *Greenaugh.*

In this caſe which was an action of *replevin*, *Holt*, Chief Juſtice, cited the caſe of the *Exeter carrier*, where *A.* ſtole goods and delivered them to the *carrier*, to be carried to *Exeter*, the right owner finding the goods in poſſeſſion of the *carrier*, demanded them of him, on which the *carrier* refuſed to deliver them, without being paid for the carriage. The owner brought an action of *trover*, and it was held he might juſtify the detaining againſt the right owner for the carriage; for when *A.* brought them to him, he was obliged to receive and carry them; and therefore ſince the law compelled him to carry them, it will give him remedy for the premium due for the carriage. *Vide Raym. vol.* 2. *p.* 866.

Trinity, 2 *Ann.* *Coggs* v. *Bernard.*

See this caſe fully ſtated in page 189. of this work, under the head *Bailment.*

Trinity, 6 *Ann.* *Savage* v. *Walthew.*

See this caſe in page 36. of this work, under the head *Actions.*

Michaelmas, 5 *Geo.* *Amies* v. *Stevens.*

The plaintiff put goods on board the defendant's hoy, who was a *common carrier,* coming through bridge, by a ſudden guſt of wind the hoy ſunk, and the goods were ſpoiled. The plaintiff inſiſted that the defendant ſhould be liable, it being his careleſſneſs in going through at ſuch a time; and offered ſome evidence, that if the hoy had been in good order, it would not have ſunk with the ſhock it received, and from thence inferred the defendant anſwerable for all accidents, which would not have happened to the goods in caſe they had been put into a better hoy.

But the Chief Juſtice held the defendant not anſwerable, the damage being occaſioned by the act of God. For though the defendant ought not to have ventured to ſhoot the bridge, if the general bent of the weather had been tempeſtuous: yet this being only a ſudden guſt of wind, had intirely differed the caſe: and no *carrier* is obliged to have a new carriage for every journey; it is ſufficient if he provides one, which, without any extraordinary accident, (ſuch as this was) will probably go the journey. *Vide Stra. vol.* 1. *p.* 128.

Hilary, 12 *Geo.* *The Eaſt India Company* v. *Pullen.*

In an action brought againſt the defendant as a *common carrier,* on an undertaking to carry for hire on the River *Thames* from the ſhip to the company's warehouſes; on the evidence it appeared, the defendant was a common lighterman, and that it was the uſage of the company on the unſhipping of their goods, to put an officer, who is called a *ſurveyor,* on board the lighter, who, as ſoon as the lading is taken in, puts the company's lock on the hatches, and goes with the goods to ſee them ſafe delivered at the company's warehouſe. It appeared to be done ſo in this caſe, and part of the goods were loſt.

The Chief Juſtice was of opinion this differed from the common caſe, this not being any truſt repoſed in the defendant; and the goods were not to be conſidered as ever having been in his poſſeſſion, but in the poſſeſſion of the company's ſervant, who hired the lighter to uſe himſelf. He thought therefore the action was not maintainable, ſo the plaintiffs were nonſuited. *Vide Stra. vol.* 1. *p.* 690.

Certificate.

Trinity, 1 *Ann.* *The Queen* v. *Clerk.*

Per Holt, Chief Juſtice. If a judge who tried a cauſe, be ſince put out, on a motion made for a new trial, he may *certify* the court what his opinion was when he tried the cauſe. *Vide Mod. Rep. vol.* 7. *p.* 47.

Trinity, 5 *Geo.* *The Pariſh of White Waltham.* v. *The Pariſh of New Windſor.*

An order was made to remove *A. P.* widow of *J. P.* and ſix of the children of the ſaid *J. P.* by his ſaid wife, and ſo names them, to the pariſh of *White Waltham*; and on appeal brought by that pariſh, it appeared that they cohabited as man and wife two years in the pariſh of *White Waltham,* and then got a *certificate* in 1702. from *White Waltham* to the pariſh of *New Windſor,* whereby they undertook to receive again the ſaid *J. P.* his wife and family, whenever he or they ſhould become chargeable, and they went into the pariſh of *New Windſor,* and there cohabited as man and wife till the death of *J. P.* which was a little before the order of the two juſtices, and children were born in *New Windſor,* and chriſtened there by the name of *P*; and then goes on and ſays, and it further appearing on the oath of the ſaid *A. P.* that ſhe was never married to the ſaid *J.* and therefore the ſaid ſix children are baſtards, and we do hereby diſcharge the order of the two juſtices.

Per cur. Let the order of the ſeſſions be quaſhed, for the pariſh which gave the *certificate* is bound by it, and cannot diſpute the marriage after having allowed them to be man and wife, and baſtard children are not within the act; for though the act ſays, *ſhall receive his or her children,* yet in law they cannot be children of either father or mother, if baſtards, and the *certificate* is given to indemnify the pariſh. *Vide Forteſcue, p.* 304.

Hilary, 15 *Geo.* 2. *The King* v. *The Inhabitants of St. Nicholas, in Harwich.*

On a rule to ſhew cauſe why an order of two juſtices made for the removal of *T. P.* his wife and ſix children, from *Woolverſtone* in *Suffolk,* to *St. Nicholas* in *Harwich* in *Eſſex,* and which was confirmed by an order of ſeſſions, ſhould not be quaſhed.

On ſhewing cauſe on this rule, after hearing council on both ſides, the court gave their opinion.

Chapple, Juſtice. As to the validity of the *certificate,* there are two objections. The juſtices ſay, that they believe it be ineffectual to the pariſh of *St. Nicholas*; they ſtate that there is but one pariſh in *Harwich,* via. *St. Nicholas,* and the *certificate* is addreſſed to the pariſh of *Harwich* near *Dover Court,* whereas there is no ſuch pariſh.

I do not think any direction at all to be neceſſary, and a miſdirection is as a void direction; beſides, if it was neceſſary, I am doubtful if the miſtake would make it bad.

As to the delivery of the *certificate,* it was given to an *inhabitant,* though it does not appear that he was a *pariſh officer*; if it had been a removal to *Harwich,* a delivery to the officer had been neceſſary, but the *ſtatute* does not make it a *condition* that the *certificate* ſhall be delivered to the pariſh officers: therefore he held, that the man had not gained a ſettlement in *Harwich,* and was of opinion that the order ought to be quaſhed.

Wright, Juſtice, concurred; and it was admitted by the court that *ſtat.* 8 & 9 *W.* 3. *cap.* 30. does not require any direction of a *certificate,* and that the ſame is good without; and in this caſe, the pariſh of *Woolverſtone* has by their *certificate* acknowledged him to be an inhabitant legally ſettled in their pariſh, and they are thereby bound againſt all the world.

Per curiam. Let the rule be made abſolute for quaſhing both orders. *Vide Bur. S. C. vol.* 1. *p.* 171.

Eaſter, 17 *Geo.* 2. *The King* v. *The Inhabitants of Hilperton.*

On a rule to ſhew cauſe why an order of two juſtices made for the removal of *R. H.* his wife and daughter, from *Charterhouſe Hinton,* in the county of *Somerſet,* to *Hilperton,* otherwiſe *Hilprington,* in the county of *Wilts,* and which on appeal to the *ſeſſions* was confirmed, ſhould not be quaſhed.

On the motion, it was obſerved, that the *certificate* was good within *ſtat.* 8 & 9 *W.* 3. *cap.* 30. conſequently by *ſtat.* 12 *Ann, cap.* 18. the ſervice of the apprentice to a *certificate* man is not available to gain a ſettlement.

The only *exception* that can be taken to the *certificate* is, that the words *legally ſettled* are not inſerted therein, but there are words *tantamount.* The *certificate* admits them to be inhabitants of the pariſh of *Charterhouſe Hinton,* and therefore to be taken ſtrongly againſt the makers.

Note. This being a new caſe, no caſes were cited on either ſide, and the parties made no defence.

Per curiam. Let the rule be made abſolute. *Vide Bur. S. C. vol.* 1. *p.* 227.

Hilary, 22 *Geo.* 2. *The King* v. *The Inhabitants of St. George's, Southwark. The King* v. *The Inhabitants of St. Olave's, Southwark.*

On a rule to ſhew cauſe why an order of *ſeſſions*, made to diſcharge an order of two juſtices made on appeal for the removal of *J. P.* from *St. George*'s to *St. Olave*'s, both in *Southwark*, ſhould not be quaſhed.

On ſhewing cauſe, the court ordered, that the appeal be diſcharged, and the order be confirmed.

On which the council for *St. Olave*'s moved to quaſh the *laſt* order of *ſeſſions*, and to *affirm* the *firſt* order of *ſeſſions*, on which they obtained a rule to ſhew cauſe.

On ſhewing cauſe, the court gave their opinion.

Lee, Chief Juſtice. The queſtion is, whether this be a *certificate* within the ſtatute? The thing neceſſary to infer the obligation, is owning the *pauper* to be a perſon legally ſettled in their pariſh.

The *paper writing* which is not produced, is only ſaid to bear the form of a *certificate*; the order ſtates what was done on this *writing*, and it is ſtated, that it was *ſigned*, *atteſted*, and *allowed* according to the *ſtatute*.

It does not appear, that this was a *certificate*, owning the man to be an inhabitant ſettled in *St. George*'s pariſh, it rather by the ſtate of the caſe appears otherwiſe, it was delivered back again when the *lunatic* was diſcharged. This matter was all before the *ſeſſions*, and no other pretence of a ſettlement in *St. George*'s pariſh appeared to the juſtices; therefore we cannot determine that the *ſeſſions* have done wrong, on the contrary, it rather ſeems that they have done right.

The other three juſtices on the bench concurred with the *Chief Juſtice*, that this could not be ſupported as a *certificate* under *ſtat.* 8 & 9 *W.* 3. *cap.* 30.

Per curiam. Let the original order of the two juſtices, and the *laſt* order of *ſeſſions* be affirmed. *Vide Bur. S. C. vol.* 1. *p.* 283.

Note, The *firſt* order of *ſeſſions* was conſidered by the court as out of the caſe, and it was ordered, that the *recognizance* entered into by the pariſh of *St. George*'s on their removing the *original* order of the juſtices, and the *firſt* order of *ſeſſions* by *certiorari*, ſhould be diſcharged.

Trinity, 28 *Geo.* 2. *The King* v. *The Inhabitants of High and Low Biſhopſide.*

See this caſe fully ſtated in page 94. of this work, under the head *Apprentice*.

Trinity, 29 & 30 *Geo.* 2. *The King* v. *The Inhabitants of Taunton, St. Mary Magdalen.*

On a rule to ſhew cauſe why an order of *ſeſſions* made to quaſh an order of two juſtices made for the removal of *R. B.* his wife and three children from *Taunton, St. Mary Magdalen*, to *Taunton, St. James*'s (both in *Somerſetſhire*) ſhould not be quaſhed, and the *original* order affirmed.

On ſhewing cauſe, the court gave their opinion.

Deniſon, Juſtice. We are inclined to think, that the rule which was prayed for quaſhing the order of *ſeſſions*, ought to be diſcharged on the particular circumſtances of this caſe, and the *ſeſſions order* confirmed.

Two matters have been diſputed,

1ſt, Whether *ſtat.* 8 & 9 *W.* 3. *cap.* 30. extends to the *grandchildren* of a *certificate* perſon, or is confined to immediate children.

2dly, Whether the ſon of this *certificate* man was *emancipated* from his father's family or not?

We are unwilling to give our opinion on either of theſe points, as we hold that the *certificate* itſelf was of no force at the time of the grandſon's being put apprentice in *Taunton, St. Mary*'s; but was then totally at an end. At the time the order was made, it was abſolutely waived, and the *father* and *grandfather* of the *pauper* could not have gone to *St. Mary*'s again without a new *certificate*, conſequently the juſtices were miſtaken in ſending this man and his family to *St. James*'s, and the *ſeſſions* did right in diſcharging the order of the two juſtices: therefore let the order of *ſeſſions* be affirmed. *Vide Bur. S. C. vol.* 2. *page* 402.

Trinity, 1 *Geo.* 3. *The King* v. *Darbyſhire.*

On an indictment brought againſt the defendant, at the *quarter ſeſſions* at *Warwick*; the indictment ſet forth, that at a *court leet* holden in and for the manor of *Birmingham*, the defendant was duly elected by the jury, one of the conſtables for the ſaid manor for the year enſuing; that the defendant had notice of ſuch election, &c. that the ſteward of the manor *certified* his appointment to the juſtice of peace by whom he was ſummoned to appear, &c. to take the oath of office as conſtable, &c. and that although ſummoned, &c. he refuſed to take on the ſaid office, &c.

The defendant removed the indictment into this court by *certiorari*, and it was tried at *Warwick aſſizes* before *Parker, C. J.*

It appeared on evidence, that the facts charged againſt the defendant were true, and that the defendant was eligible to ſerve the ſaid office, unleſs *exempt* by reaſon of a *certificate*, &c.

That the defendant had a *certificate* according to *ſtat.* 10 & 11 *W.* 3. *c.* 23. diſcharging one *P. J.* from all pariſh offices within the ſaid pariſh of *B.* and an *aſſignment* thereof duly executed and inrolled.

On this ſtate of the cauſe, a ſpecial caſe was made for the opinion of this court, on the following queſtion.

"Whether the ſaid *J. D.* on the circumſtances of this caſe, is, notwithſtanding the *certificate*, guilty of the indictment, or not guilty."

After hearing council on both ſides, the court gave their opinion as follows:

Lord *Mansfield*. The only queſtion here is, whether the conſtable of the manor of *B.* is a *pariſh officer* of the pariſh of *B.*

The term *pariſh officer* does not include every office exerciſed in the pariſh, if it did, it might even take in the office of *high ſheriff* of the county.

It is an office relative to the pariſh only; but this man has a much larger juriſdiction than the pariſh only, for he has a juriſdiction over the whole manor; the act does not intend the *certificate* to be a diſcharge from an office whereof the functions are to be exerciſed out of the limits of the pariſh.

The defendant cannot be eſteemed a *pariſh officer* either from the *origin* of his office, or the nature of the exerciſe of it.

Deniſon and *Wilmot*, Juſtices, gave their opinion to the ſame effect as the Chief Juſtice.

Per curiam. Let the *poſtea* be delivered to the proſecutor, and judgment be entered for the King. *Vide Bur. vol.* 2. *p.* 1182.

Hilary, 8 *Geo.* 3. *The King* v. *The Inhabitants of Wooton, St. Lawrence.*

On a rule to ſhew cauſe why an order made by two juſtices for the removal of *T. P.* his wife, and ſix children, *viz. M. T. H. J. G.* and *J.* from *Wooton St. Lawrence* to *Mitcheldever* in *Hants*, and which on an appeal to the *ſeſſions* was quaſhed as to *M.* and *T.* two of the ſaid children for *inſufficiency*, there being no *adjudication* therein as to their ſettlement, ſhould not be confirmed as to the ſaid two children.

On ſhewing cauſe on this rule, the council againſt quaſhing the order of *ſeſſions* gave up the *certificate* as regularly executed under the *certificate acts*, but alledged the ſame to be good at *common law* before *ſtat.* 8 & 9 *W.* 3. as it was a full acknowledgement that the *pauper* was their pariſhioner.

Lord *Mansfield*. A *certificate* cannot conclude the pariſh unleſs properly ſigned. The *certificate act* ſpecifies certain *checks* and *guards* on *certificates*. The juſtices are not obliged *miniſterially* to allow and ſign a *certificate*: they are not bound at all events to allow and ſign it: they have a *diſcretionary* power to allow it, or not to allow it, if it be liable to objection. The *act* requires a *concluſive certificate* to be under the *checks* and *guards* ſpecified in *ſtat.* 8 & 9 *W.* 3. *cap.* 30. This *certificate* wants them, therefore it is no *certificate* within that ſtatute, and if ſo, it cannot *conclude* the *pariſh*.

Yates and *Aſton*, Juſtices, agreed with the Chief Juſtice, and ſaid it muſt be a *certificate purſuant* to the *ſtatute*, or it could not *conclude* the pariſh that gave it.

Per curiam. Let the order of *ſeſſions* be quaſhed, *except* as to the two children, *M.* and *T.* *Vide Bur. S. C. vol.* 2. *p.* 581.

Michaelmas, 10 *Geo.* 3. *The King* v. *The Inhabitants of Ipſley.*

On a rule to ſhew cauſe why an order of *ſeſſions* made to quaſh an order of two juſtices made for removing *M. C.* the wife of *J. C.* and her two ſons, from *Ipſley* in *Warwickſhire*, to *Studley* in the ſame county, ſhould not be quaſhed.

On ſhewing cauſe to this rule, the court were clearly of opinion, that the pariſh of *Studley* were bound by this *certificate*, which takes notice of the woman's being then *unmarried*, and with *child*, and acknowledges the child ſhe then went with to be legally ſettled with them in their pariſh.

Lord *Mansfield* ſaid, that the woman was very big with child, which was known to both pariſhes; and *Studley* expreſsly promiſed to provide for the infant ſhe then went with: therefore they ought to be bound by their *certificate*, an infant *en ventre ſa mere* may be to a variety of purpoſes conſidered as born, and cited a variety of caſes in ſupport of his doctrine.

Per curiam. Let the order of *ſeſſions* be *quaſhed*, and the *original* order be affirmed. *Vide Bur. S. C. vol.* 3. *p.* 650.

Certiorari.

Eaſter, 4 *W.* & *M.* *Barſdale* v. *Drew.*

On a *writ of error* brought on a judgment in the *C. B.* the judgment was affirmed in this court.

The plaintiff brought a *certiorari* to remove the recognizance itſelf here, which was given in *C. B.* on the allowance of the *writ of error*, ſo that he might ſue out a *ſci. fac.* againſt the bail.

But it was alledged, that this court could not grant ſuch a *writ*, becauſe the recogizance is a record, which is not to be removed by a *certiorari*; for that only removes *the tenor of the record*, and not the *record itſelf*.

Per curiam. In the courts at *Weſtminſter*, the recognizance is taken by itſelf, and is no part of the record on the roll; and therefore a *certiorari* may be to remove it, though it cannot remove the record itſelf: and it was allowed accordingly. *Vide Mod. Rep. vol.* 4. *p.* 104.

Hilary, 8 *W.* 3. *The King* v. *North.*

The defendant was indicted before juſtices of the peace, and pleaded *not guilty*; and after the jury were gone out to conſider of their verdict, he delivered in a *certiorari*; and the juſtices returned the verdict, and it was held well; for a *certiorari* cannot be delivered after the jury is ſworn. *Vide Salk. vol.* 1. *p.* 144.

Eaſter, 9 *W.* 3. *Anonymous.*

A motion was made for a *certiorari* to remove an indictment of barratry, found at the ſeſſions of gaol-delivery; and one *Nurſe*'s caſe was cited, wherein ſuch a motion was granted.

Per curiam. It is never granted to remove an indictment found before juſtices of gaol-delivery, without ſome ſpecial cauſe; ſo it is of the *Old Baily*; and if ſuch a *certiorari* ſhould be granted, and the cauſe ſuggeſted ſhould afterwards appear falſe, a *procedendo* ſhould be awarded. *Vide Salk. vol.* 1. *p.* 144.

Eaſter, 9 *W.* 3. *Guilliam* v. *Hardy.*

A record may be removed into this court, as well by a *certiorari* out of this court, as by a *certiorari* out of the *court of Chancery*, and removal hither by *mittimus*. *Vide Raym. vol.* 1. *p.* 216.

Eaſter, 10 *W.* 3. *Dr. Sand's Caſe.*

The oaths appointed by *ſtat.* 1 *W.* & *M. cap.* 8. were tendered to Dr. *Sands* by two juſtices of the peace, and he refuſing to take them, it was certified to the judge of aſſize, and by him into the Exchequer, according to ſtat. 7 & 8 *W.* 3. *c.* 27. And now a *certiorari* was prayed to remove it hither, and a ſurpriſe and trick on Dr. *Sands* was ſuggeſted. Alſo the caſe of *James* Duke of *York* was cited, who being preſented, on *ſtat.* 3 *Jac.* 1. *cap.* 4. for not coming to church, at the quarter ſeſſions, it was removed hither by *certiorari.*

Holt, Chief Juſtice, held it could not be granted, becauſe it would perfectly evade the ſtatute; for when it is once in this court, it cannot be ſent back again, which would render the ſtatute of no effect, becauſe the party cannot be proceeded againſt here; and ſaid, that the caſe of the Duke of *York* was the only caſe wherein it was ever done. *Vide Salk. vol.* 1. *p.* 145.

Eaſter, 10 *W.* 3. *The King* v. *Haggard.*

On an indictment at *Kirby* in *Weſtmorland*, on *ſtat.* 5 *Eliz.* for uſing a trade, not having been apprentice thereto ſeven years, a *certiorari* was prayed; but the court doubted whether to grant it or not, becauſe the ſtatute is, that it muſt be tried in the proper county; ſo that if it is removed hither, it muſt be ſent down again by *procedendo*, and not filed here, ſo as to be quaſhed; but there having been ſeveral ſuch *certiorari*'s granted, they granted one in this caſe; and afterwards granted another in a like caſe in *Trinity* term following, in the caſe of *Woods* of *Norfolk*. *Vide Mod. Rep. vol.* 12. *p.* 188.

Trinity, 10 *W.* 3. *The King* v. *James.*

On an indictment in the grand ſeſſions in *Wales*, and a *certiorari* granted to remove it, at the prayer of the defendant, a *ſuperſedeas* was alſo prayed to the writ; becauſe a *certiorari* does not lie in *Wales*; or if it does, it is only when the King directs or deſires it, and not at the deſire of the defendant: but the court held, that a *certiorari* lies either at the deſire of the King, or of the party, according as the court ſhall think fit; and accordingly, a rule was given for the return of the *certiorari*, and that the indictment ſhould be tried in the next *Engliſh* county. *Vide Mod. Rep. vol.* 12. *page* 197.

Michaelmas, 10 *W.* 3. *The King* v. *Dutton, and others.*

On an indictment being found againſt them in *London*, for printing and publiſhing a paper, intitled, the *Black Ram*, wherein certain perſons were ſcandalouſly deſcribed, ſo as any body that knew them might know them to be the perſons deſcribed; and among others, that the Recorder of *London* was ſcandalized; and a *certiorari* being moved for, inſinuating that it would be a hardſhip to be tried at the *Old Baily*, where ſome of the judges might take themſelves to be ſcandalized by that paper: the court ſaid, they ſeldom did grant a *certiorari* to the *Old Baily*, yet they granted one here, though it could not be tried here this term; for a *certiorari* into a foreign county ought to have fifteen days between its *teſte* and return; and though by *conſent* it may be returned *immediately*, yet ſtill there muſt be fifteen days between the *teſte* of the writ, and return of jury; which could not be within this term. *Vide Mod. Rep. vol.* 12. *p.* 250.

Michaelmas, 11 *W.* 3. *The King* v. *Patting.*

Per Holt, Chief Juſtice. On a *writ of error* from the *C. B.* if the record certified is faulty, of common right a *certiorari* may go to *certify* the right record. *Vide Mod. Rep. vol.* 12. *p.* 317.

Eaſter, 12 *W.* 3. *Dr. Grenville, or Groenvelt*, v. *The College of Phyſicians.*

Per curiam. Where a court in its nature is a court of record, a *certiorari* will lie to it, by reaſon of the great ſuperiority of this court, which may command them to ſend their proceedings before them up hither, that it may be ſeen whether they confine themſelves to their juriſdiction; which, if they exceed, this court may correct them. *Vide Mod. Rep. vol.* 12. *p.* 386.

Eaſter, 12 *W.* 3.

Per curiam. If a *certiorari* iſſues to remove a record, the judge below is not in contempt for proceeding on the record till ſervice of the writ; but all proceedings on it after the *certiorari* is teſted, are void. *Vide Mod. Rep. vol.* 12. *p.* 384.

Trinity, 12 *W.* 3. *The Crown* v. *The Inhabitants of Glamorganſhire.*

An order of ſeſſions was made for aſſeſſing the inhabitants for the repair of a bridge in that county, purſuant to *ſtat.* 23 *Eliz.* which was ſaid to be a private law, and therefore the order being removed up by *certiorari*, it was moved that it ſhould not be filed, for that, as it was ſaid, a *certiorari* did not lie, being a private law; and for this was quoted 1 *Sid.* 296. 1 *Keb.* 318. 2 *Keb.* 43. 88. 90.

Per curiam. Wherever there is a particular juriſdiction ſet up by act of parliament, this court may command the execution thereof by *mandamus*, and remove their proceedings hither by *certiorari*, to ſee whether they have obſerved their authority. Indeed we do not eaſily grant a *certiorari* in the caſe of commiſſioners of ſewers, for the danger that may befal the country in the *interim*; yet, if good reaſon appears, the court will grant it; and the reaſon of 1 *Sid.* 296. is not becauſe it was a private act of parliament.

Gould, Juſtice, remembered a caſe where a *certiorari* was denied, to remove the orders of commiſſioners of ſewers on this reaſon; if the order was wrong, the party aggrieved had his action; if it was right, it ought not to be ſtopt or delayed; and that is the reaſon it has been ſometimes denied, in caſe of orders of juſtices on an authority by a private act of parliament.

Holt, Chief Juſtice, anſwered, if they meddle with a thing out of their juriſdiction, you ſay well; otherwiſe it is when they have conuſance of the ſubject matter, but do not purſue their authority; and we often ſtay the filing of ſuch an order, to the intent, that if it be not well removed, to grant a *procedendo*; but if it appears well removed and faulty, we file and quaſh it. And there may be a diverſity between a private act of one ſingle perſon, and an act concerning the inhabitants of a whole county; and it was ruled they ſhould make a return, and recite the *ſtatute* in it. *Note*, This was before the judgment in the caſe of Dr. *Grenville* and the college of phyſicians.

Holt, Chief Juſtice, further ſaid, it is the conſtant practice to grant *certiorari*'s into *Wales*, as alſo into the counties palatine of *Durham* and *Lancaſter*, which yet have original juriſdiction, and the ſame courts among themſelves. And if the law was otherwiſe, the great ſeſſions were held ſo ſeldom, that a man might be ruined, before a great ſeſſions met. *Vide Mod. Rep. vol.* 12. *p.* 403. *Raym. vol.* 1. *p.* 580.

Trinity, 12 *W.* 3. *The King* v. *Levermore.*

A *certiorari* iſſued to remove a conviction of deer-ſtealing, and the juſtices returned two affidavits, and a warrant to diſtrain; and the return was quaſhed as imperfect. *Vide Salk. vol.* 1. *p.* 146.

Michaelmas, 12 *W.* 3. *The King* v. *Lamb.*

The defendant was indicted for having ſaid maliciouſly, *the magiſtrates of the city of Litchfield are a pack of aſſes.* The indictment was moved by *certiorari* into this court, and a motion was made to quaſh it, becauſe it was inſenſible, there being no ſuch word as *magiſtratos* the *Latin* word uſed in the indictment. And for this reaſon it was quaſhed. *Vide Raym. vol.* 1. *p.* 609.

Michaelmas, 12 *W.* 3. *The King* v. *Browne, & al.*

A *certiorari* was granted to remove all indictments againſt *B. C.* and *D.* and they returned one indictment againſt *B.* another againſt *C*, and another againſt *D.* in which they were indicted *ſingly.* And on a motion to quaſh the indictment in which *B.* was indicted; it was held, that it was not removed before this court; becauſe the indictment in which *B.* was indicted alone, was not the indictment intended by the *certiorari*, which means indictments in which *B. C.* and *D.* were jointly indicted. It would have been otherwiſe, if the *certiorari* had been *or for other matters in the indictment mentioned. Vide Raym. vol.* 1. *p.* 609.

Hilary, 13 *W.* 3. *The City of London* v. *Wood.*

Per Holt, Ch. J. The courts in *Weſtminſter-Hall* will amend nothing but what is amendable by law, or at leaſt it muſt be preſumed they will not do it; beſides, when in thoſe courts they amend the matter below, they come into this court and alledge diminution; and thereon the record is certified up, and then the court above can never tell whether they have amended or not; if they certify it upon diminution alledged, it will do well enough, and we ſhall not ſuppoſe they have done amiſs; but no *certiorari* lies to the court of the Mayor of *London*, and that is the caſe of *Green* v. *Cole* in 2 *Saund.* 252. 1 *Lev.* 310. *Vide Mod. Rep. vol.* 12. *p.* 669.

Hilary, 13 *W.* 3. *Croſſe* v. *Smith.*

See this caſe fully ſtated in page 161 of this work, under the head *Bail.*

Michaelmas, 13 *W.* 3. *Sir Richard Leving* v. *Lady Calverley.* Error.

On a *writ of error* from the *C. B.* the *error* aſſigned, was, for want of an original, and on a *certiorari* ſued out, the return was, that no original, *&c.* On which the defendant in *error* ſuggeſted, that there was an original of another term; and on a *certiorari* ſued out by him, an original was returned, and an entry made thereof on the roll. And it was moved by the plaintiff in *error*'s council, that this was irregular, becauſe the defendant ſhould have given notice in writing to the plaintiff's attorney, before he ſued out the *certiorari*. That the practice was ſo; and that in the caſe *Nayden* v. *Winterbottom, Michaelmas*, 10 *W.* 3. ſuch a rule had been granted.

Holt, Chief Juſtice, ſaid, that it could be no prejudice in the *writ of error*; to which it was anſwered by the plaintiff in *error*'s council, that the *writ of error* was brought for this reaſon, and therefore he ought to have his coſts, which he would loſe if the judgment ſhould be affirmed: but to that the *Chief Juſtice* replied, that if the *Lord Keeper* had been of opinion, that the plaintiff ought to have had his coſts, he would not have granted the liberty of filing an original, before the coſts were paid by the defendant, and the motion was denied. *Vide Raym. vol.* 1. *p.* 695.

Michaelmas, 13 *W.* 3. *The King* v. *Worſenholm and Weeks.*

They being indicted, one of them removed the indictment by a *certiorari*, entering into a recognizance to carry it down to trial. And it was reſolved, that the indictment was removed as to both, and that the defendant who removed it, ſaves his recognizance, by trying it as to himſelf, for that the acquittal of one, is not an acquittal of the other, nor *vice verſa*; neither can it be exacted of him to enter into a recognizance to try againſt both. And that notwithſtanding the other defendant had appeared below, and now by the removal is put *without day*; wherefore if he does not come in above *gratis*, proceſs of *outlawry* ſhall go againſt him; and for this cauſe it was, that before the *ſtatute*, the courſe was to grant no *certiorari* to remove indictments from *London* to *Middleſex*, without the defendant gave bail to try it. And the *Chief Juſtice* ſaid, it is always indorſed on the back of the *certiorari*, at whoſe requeſt it is granted; for though it is the King's command, yet it is at the prayer of the party; and the end of *certiorari*'s is to do juſtice, and prevent vexation and oppreſſion; and if two people are indicted jointly, and join in plea, there ſhall go but one *venire fac. otherwiſe*, if they ſever. *Vide Mod. Rep. vol.* 12. *p.* 601.

Hilary, 1 *Ann.* *Smith* v. *Croſs.*

Per curiam. Whereas a *certiorari* iſſued to the court of *Ely*, teſted the 12th of *March*, in the eleventh year of the late King, returnable in *Eaſter* term to certify up all pleas *then lately levied*, and the plea was levied after the *teſte*, and before the return.

Per curiam. It was well removed; for a *certiorari*, as well as a *recordare*, ſhall remove all plaints pending at the time of their return. *Vide Mod. Rep. vol.* 7, *p.* 138.

Eaſter, 1 *Ann.* *Opinion of the Court.*

The court will not incline to grant a *certiorari* to juſtices of the peace when a perſon is convicted; but the juſtices ought to give judgment: for a *certiorari* to juſtices, is rather to aid them, when a man would creep out of their juriſdiction, and ſo bring him into this court, which has a more extenſive power to puniſh. *Vide Mod. Rep. vol.* 11. *p.* 3.

Eaſter, 1 *Ann*, *The Queen* v. *Whittle.*

A *certiorari* to remove an *order of ſeſſions*, was ſuperſeded, becauſe *it iſſued two days before the fiat* was ſigned by a judge.

Per curiam. If it be to remove an indictment, both *certiorari* and *fiat* ought to be ſigned; if to remove an order, the *certiorari* need not be ſigned, but the *fiat* muſt. *Vide Salk. vol.* 3. *p.* 80.

Eaſter, 1 *Ann.* *The Caſe of the Pariſh of St. Mary in the Devizes.*

On a *certiorari* to remove an order, the return was, *the tenor of which follows in theſe words*, when it ſhould have been, *which order follows in theſe words*, and for this reaſon it was quaſhed, and on motion, a new *certiorari* was granted. *Vide Salk. vol.* 3. *p.* 80.

Eaſter, 1 *Ann.* *The Queen* v. *Eiwer.*

On a *ſci. fac.* on a recognizance entered into before the *Chief Juſtice*, conditioned, that one *J. S.* ſhould appear to an indictment againſt him, and carry it down to trial, according to the late ſtatute; the defendant demurred to it for the following reaſons.

1ſt. There is a variance between it and the recognizance: the recognizance cited is, that on iſſue joined, the defendant ſhall give notice to the proſecutor *and* his clerk; and the true recognizance entered into, is, to give notice to the proſecutor *or* his clerk. 2dly, It is in a greater ſum than the ſtatute requires, which is only 20 *l.* each.

Per Holt, Chief Juſtice. The recognizance varies from the ſtatute, and therefore cannot be good by the ſtatute; yet it may be good by the common law: it is true, the recognizance, if not according to the ſtatute, cannot make the *certiorari* a *ſuperſedeas*, for by the ſtatute, no *certiorari* ſhall be a *ſuperſedeas*, without recognizance of 20 *l.* &c. But before that ſtatute the judges of this court had power to take recognizance, which is not taken away by the ſtatute; but only that they ſhould not be ſuch as will make a *certiorari* a *ſuperſedeas.* Therefore the writ was quaſhed for the firſt exception. *Vide Mod. Rep. vol.* 7. *p.* 9.

Michaelmas, 1 *Ann.* *The Queen* v. *Plint.*

A *certiorari* iſſued out of this court, to remove all convictions of the defendant for having removed foreign ſalt, &c. without having a permit, &c. The order removed was, for removing of ſalt *generally.* And adjudged that this order was not removed by the *certiorari*; and therefore the *certiorari* was quaſhed. *Vide Raym. vol.* 2. *p.* 820.

Michaelmas, 1 *Ann.* *Dr. Watſon's Caſe.*

Per Holt, Chief Juſtice. It is unuſual to ſend a *certiorari* to aſſizes without ſpecial cauſe. *Vide Mod. Rep. vol.* 7. *p.* 117.

Michaelmas, 1 *Ann.* *Ode* v. *Norcliff.*

A *certiorari* was granted to remove orders made concerning foreign ſalt, and the orders returned, were concerning ſalt in general: the court held they were not well removed; for a ſpecial *certiorari* cannot remove general orders, though a general *certiorari* will remove ſpecial ones. *Vide Mod. Rep. vol.* 7. *p.* 97.

Hilary, 2 *Ann.* *The Queen* v. *Knatchbull.*

A motion was made for a *certiorari* to remove an indictment found at the aſſizes in *Kent*, againſt Mr. *Knatchbull* and others, but denied, though earneſtly preſſed for; alſo the ſame thing was done in Mr. *Thornbury*'s caſe, who with others, was indicted at the *Old Baily* for a jacobite conventicle, and it was preſſed by him in perſon to have a *certiorari*, intimating partiality and prejudice in the Lord Mayor and Aldermen againſt him; but at laſt it was denied for this particular reaſon, *viz.* That the motion happened in the end of *Hilary* term, ſo that it would occaſion a delay of juſtice; otherwiſe it ſeems the court would have granted it. *Vide Salk. vol.* 1. *p.* 150.

Eaſter, 2 *Ann.* *Anonymous.*

A *certiorari* to remove an indictment ran *for feloniouſly ſtealing two horſes*, and the indictment was *for ſtealing an horſe.*

Per curiam. Nothing is before the court, neither have they any warrant to proceed in this caſe, for there is a variance between the indictment and the writ. *Vide Salk. vol.* 3. *p.* 80.

Trinity, 2 *Ann.* *The Queen* v. *Potter et al'.*

An indictment was preferred againſt the defendants before juſtices of peace on *ſtat.* 12 *Car.* 2. *cap.* 24. for *aſſaulting* and *beating* a cuſtom-houſe officer. On a traverſe of the indictment, the defendants were convicted, but before judgment was given, they obtained a *certiorari* to remove the *record* of *conviction.* The *Attorney General* moved for a *procedendo*, for they cannot remove the *record* of *conviction* only, for by that means they prevent the juſtices from giving judgment; they ought to ſtay till judgment is given, and then bring their *writ of error.* There is a *capias* out againſt the defendants to bring them in, for the juſtices cannot give judgment and ſet a fine on them in their abſence, unleſs they appear, no more than this court can, as was held in the caſe of *Mead* the quaker on the *conventicle act.*

The defendants council argued, that ſuch *certiorari's* had been allowed to remove *records* of *convictions*, and that a *certiorari* was the only method in this caſe, for a *writ of error* does not lie here no more than on a conviction before juſtices by virtue of any particular authority.

Per Holt, Chief Juſtice. Without queſtion we may award a *certiorari* after conviction, and before judgment, though it be founded on an indictment; and it may be reaſonable to do it in ſome caſes, as was done on an indictment for murder in *Liſle* v. *Armſtrong*; and in the time of *Scroggs*, Chief Juſtice, on a conviction on an indictment for words in *Glouceſter*, a *certiorari* was awarded, to the end that this court might give the judgment for the greater example. We uſually grant a *certiorari* where it appears to us to be a conviction, on which no *writ of error* lies. And it was the old practice of the *Crown Office*, firſt to remove the whole *record* and proceedings on an indictment by *certiorari*, and then bring a *writ of error*, *quod coram vobis reſidet*, even after judgment was given on the indictment. But though we may grant a *certiorari*, yet we will conſider whether it is proper or not; and therefore, ſince the defendants have ſtood a trial before the juſtices, it is reaſonable the juſtices ſhould give judgment alſo; therefore, take a *procedendo*, and let the defendants bring their *writ of error*, if they think fit. *Powell*, Juſtice, agreed. *Vide Raym. vol.* 2. *p.* 937.

Michaelmas, 2 *Ann.* *Anonymous.*

A *certiorari* was directed to juſtices of the peace to remove an indictment of forcible entry, and the return was void.

Per curiam. The juſtices names need not be ſubſcribed to it, but it ſhould be by the *anſwer of the juſtices*, &c. *it appears*, and *Dominæ Reginæ*, i. e. *our Lady the Queen*.

But before the error was diſcovered, it was filed, and the recognizance into which the party had entered, for laying the cauſe in purſuance of the ſtatute, was eſtreated.

Per curiam. If the party that removes an indictment by *certiorari* does not enter into a recognizance to try it the next aſſize or term, or at the ſitting within the term, the *certiorari* is no *ſuperſedeas*. 2dly. That failing of trying is a forfeiture of the recognizance, after which no motion will be heard in arreſt of judgment; but they doubted whether this, for want of due return, being a kind of *blank* writ, they ſhould order the juſtices to make a return, and reſpite the recognizance in the mean time.

Note. After a *certiorari* returned and filed, no *procedendo* can go. *Vide Mod. Rep. vol.* 6. *p.* 42.

Michaelmas, 2 *Ann.* *The Queen* v. *George.*

Per Holt, Chief Juſtice. If an order is removed by *certiorari*, on which an appeal lies, before the appeal it ought not to be filed till the court is informed of the matter, and then they will grant a *procedendo*, notwithſtanding the *certiorari*. *Vide Mod. Rep. vol.* 6. *p.* 40.

Michaelmas, 2 *Ann.* *The Queen* v. *Dixon.*

Dixon was indicted for ſelling five yards of muſlin, and affirming it to be worth 4 *s.* a yard, when in fact it was really worth but 2 *s.* 6 *d.* a yard, and a *certiorari* was brought to remove it, but not ſerved till after conviction; and though the court had no opinion of the indictment, yet they ſaid they did not like *certiorari*'s after a verdict, and that whenever an indictment, on which there is a conviction, is removed, then the *certiorari* ought to give a *day above*, which was not done here, and therefore it was altogether irregular; and that by this *certiorari* they could by no means remove the indictment; for if a perſon takes out a *certiorari* to remove an indictment, and will not uſe it till after conviction, or the jury has been ſworn, he loſes the benefit of it: and for that the writ was quaſhed, and a new one granted to remove the indictment, and conviction thereon, and it was ordered to be made ſpecial, and to give the proſecutor a day above. *Vide Mod. vol.* 6. *p.* 61.

Michaelmas, 2 *Ann.* *The Queen* v. *Bothell or Porter.*

The defendant was convicted on an indictment before juſtices of the peace, and not being preſent, no judgment could be given, but a *capias pro fine* was awarded; and then he, by *certiorari*, removed up the conviction, and the *Attorney General* moved for a *procedendo*; 1ſt. Becauſe *certiorari*'s uſually went to remove indictments, *&c.* before trial, but not to remove convictions; for the conſequence of that would be miſchievous; that this court which not having tried the cauſe, could not be truly apprized of its nature, ſhould ſet the fine, which ought by law to bear ſome proportion to the *nature of the offence*. On the other ſide it was argued, that it was very frequent to remove convictions before judgment, and that in this caſe there could be no inconvenience in point of ſetting the fine; for it being on *ſtat.* 14 *Car.* 2. the fine is aſcertained thereby, *viz.* a year's impriſonment.

Holt, Chief Juſtice. This writ iſſues every day to remove convictions, on which a *writ of error* does not lie, for that is the party's only remedy, and the reaſon regularly why convictions are removed by *certiorari*; but *certiorari*'s have alſo gone where a *writ of error* would have lain, to remove a conviction, plead a pardon, or for ſome other ſpecial reaſon. And he remembered a caſe in Chief Juſtice *Scrogg*'s time, where a *certiorari* iſſued out of this court to remove a conviction on an indictment before judges of aſſize, and that the court gave judgment. It was for words, and there a *writ of error* would have lain; for wherever a conviction is on an indictment, a *writ of error* will lie: and he ſaid, the practice of the *Crown Office* was, to remove judgments of attainder, *&c.* by *certiorari*, and afterwards bring a *writ of error*, *coram vobis*, &c. And ſo it was in the caſe of Mr. *Hambden*, and ſeveral others; but here being no ſuch ſpecial reaſon in this caſe, let a *procedendo* go. And here the court ſaid, that where a ſtatute takes notice of a *common offence*, and adds a further penalty, an indictment thereon may well be laid to be *contrary to the form of the ſtatute*; and where the act gives juſtices power *generally* to determine a matter at the *ſeſſions*, it muſt be according to law, and as a court. *See page* 177. *of this work.* *Vide Mod. Rep. vol.* 6. *p.* 17.

Trinity, 3 *Ann.* *Carleton* v. *Mortagh.* Error.

On a *writ of error* brought on a judgment in *debt* by confeſſion in the *C. B.* and want of an original being aſſigned for *error*, and certified; the defendant pleaded a releaſe, but no *venue* was laid; whereon the plaintiff demurred, and the great queſtion was, whether the court, being informed that there was no original below, could by law award a *certiorari* to *ſatisfy their conſciences*, &c. before they reverſed a judgment for a juſt debt.

Gould, *Powys*, and *Powell*, Juſtices, agreed that it might be done, for that this caſe ſtood on its own ground, and diſtinguiſhed from all other caſes.

Holt, Chief Juſtice, was of a different opinion, for theſe reaſons, 1ſt. Becauſe the queſtion before the court is not, whether there is *error* or not? but whether the plea in *bar* is good as pleaded? 2dly. This is a demurrer to the plea in *bar*, and the whole event of the cauſe is put in judgment on the demurrer. 3dly. The want of an original is confeſſed here as clearly as can be: indeed, the aſſignment of *error* is not compleat till a *certiorari* is returned for the plaintiff. *Vide Mod. Rep. vol.* 6. *p.* 206.

Eaſter, 4 *Ann.* *The Queen* v. *White.*

A *certiorari* was granted to remove an order of *ſeſſions*, made in *Northamptonſhire*, for removing a high conſtable, and putting in another: on which a *procedendo* was moved for, becauſe the writ was made out on the *Saturday* before the term, *teſted* the 12th of *Feb.* and the *fiat* was not ſigned till the 1ſt day of this *Eaſter* term, and a *procedendo* was granted for this irregularity; and it was held, that in writs of *certiorari* granted to remove *orders*, the *fiat* for making out the writ muſt be ſigned by a judge, but the writ itſelf need not; but in the caſe of *certiorari's* to remove *indictments*, both the *writ* and the *fiat* muſt be ſigned, and that the former is required by the late *ſtatute*.

Holt, Chief Juſtice, ſaid, if the *fiat* had been ſigned on the ſame day the *writ* was taken out, that would have been well, becauſe it was before the *eſſoign* day; but a *fiat* ſigned in this term, cannot warrant a *cer-*

tiorari teſted the laſt day of the preceding term; alſo they held high conſtables might be removed as well as petty conſtables, and the juſtices at ſeſſions were the beſt judges of that matter. *Vide Salk. vol.* 1. *p.* 150.

Eaſter, 4 *Ann*. *Nehuff's Caſe*.

A *certiorari* being moved for to remove an indictment at the *Old Baily* for a fraud: the caſe was, that the defendant borrowed 600 *l.* of a *feme covert*, and promiſed to ſend her fine cloth and gold duſt as a pledge, and ſent no gold duſt, but ſome coarſe cloth worth little or nothing. The defendant offered to try it the ſame term, which would be a benefit to the proſecutor, who by the courſe of the *Old Baily* could not try it ſo ſoon; and the court granted a *certiorari*, becauſe the fact was not a criminal matter, but it was the proſecutor's fault, for repoſing ſuch confidence in the defendant, and becauſe it was an abſurd proſecution, and the defendant offered to try it that term. *Vide Salk. vol.* 1. *p.* 151.

Michaelmas, 4 *Ann*. *The Caſe of the Inhabitants of Shellington*.

In *Eaſter*, 1 *Ann*, a rule was made that no *certiorari* ſhould be granted to remove orders of juſtices, from which the law has given an appeal to the *ſeſſions*, before the matter be determined on the appeal, becauſe it hinders the privilege of appealing; and that if any order be removed before appeal, it ſhould be ſent down again: but if the time of appeal be expired, that caſe is not within the rule. But in this cauſe it was held, that advantage muſt be taken of this rule upon the motion to file the order, for that after it is filed, it is too late. *Vide Salk. vol.* 1. *p.* 148.

Michaelmas, 4 *Ann*. *The Queen* v. *Naſh*.

The defendant was convicted of deer-ſtealing, and a warrant was awarded to the conſtable to levy, *&c.* he accordingly diſtrained, and then a *certiorari* iſſued to remove the conviction; and after the record was removed, the conſtable ſold the goods, but would not part with the money, or return the warrant. And the court held,

1ſt, That the conſtable might well proceed in the execution after the *certiorari*, becauſe it was begun before, and the *certiorari*, no more ſtays it than a writ of *error* on a judgment in *C. B.* ſtays the execution of a *fieri facias* already begun to be executed. And in that caſe, if the ſheriff returns want of buyers, *C. B.* may award a *venditioni exponas*, notwithſtanding the writ of *error* pending.

2dly, That this court had no power over the warrant, being granted before the *certiorari* iſſued, and therefore they refuſed to make a rule on the conſtable to return it; comparing it to the caſe of a writ of execution delivered, *&c.* before a writ of *error*. But they ſaid the juſtices might fine him, if he would not return his warrant, or deliver up the money to the proſecutor. *Vide Raym. vol.* 2. *p.* 389.

Michaelmas, 4 *Ann*. *The Queen* v. *Bains*.

An order was made againſt *A.* and the *certiorari* was to remove all orders againſt *A.* and *B.*

Per curiam. This ſhall not remove the order againſt *A.* alone, but it ought to be for all orders againſt *A.* and *B.* or either of them. *Vide Raym. vol.* 2. *p.* 1199.

Eaſter, 5 *Ann*. *Sir Godfrey Kneller's Caſe*.

If there be a forcible detainer, and an inquiſition taken, and then a *certiorari* to remove the inquiſition, and afterwards a new forcible detainer, the juſtices may, notwithſtanding the *certiorari*, record the force; but they cannot proceed to award reſtitution: ſo if after the inquiſition, and before the *certiorari*, there had been a forcible detainer, the juſtices might have recorded the force; but all proceedings upon ſuch inquiſition are ſtopped by this writ. *Vide Salk. vol.* 1. *p.* 151.

Eaſter, 7 *Ann*. *The Queen* v. *Jay*.

In the beginning of this term, a *writ* of *certiorari* was quaſhed, becauſe it was directed to the *juſtices aſſigned to the peace*, omitting the word *keep*. *Vide Mod. Rep. vol.* 11. *p.* 172.

Eaſter, 7 *Ann*. *Between the Pariſhes of Oakham and Whittleſea*.

An order was made by two juſtices to remove a poor man, *except he found ſecurity to be allowed by them*, (*i. e.* the two juſtices.) And it was excepted to for that reaſon; and alſo, that it did not ſay he was likely to become chargeable, or that he came there to ſettle, not having 10 *l. per annum*.

Per Holt, Chief Juſtice. They cannot make a conditional order; for an order of removal is an adjudication, and ought to be abſolute. And they have nothing to do with the ſecurity, for that belongs to the pariſh, and it is not to be allowed or diſallowed, at the juſtices diſcretion.

It was then moved to ſet aſide the *certiorari*, by which the order was removed, becauſe in the order, the town was ſpelled *Oakham*, but in the *certiorari Okeham*.

But not allowed; and the *certiorari* was confirmed. *Vide Mod. Rep. vol.* 11. *p.* 171.

Trinity, 8 *Ann*. *The Queen* v. *Layton or Leighton*.

A conviction of a forcible entry was removed by *certiorari*, and the judgment given on the conviction was, *that a fine be laid*, &c. and the queſtion was, whether the fine ſhould be entered ſo, or *therefore it is conſidered and adjudged?* The court held either way good, there being precedents both ways.

If the entry be, *that a fine be laid*, then it is removeable by *certiorari*; if it is, *therefore it is conſidered and adjudged*, then it muſt be removed by *writ of error*; and *Greſly's* caſe, 10 *Co. K*—— v. *Chandler*, 1 *Keble*, 1 *Siderf.* were cited by the court.

And judgment was given on the *certiorari*, that the conviction ſhould be affirmed. *Vide Mod. Rep. vol.* 11. *p.* 236. *Forteſcue*, *p.* 173.

Michaelmas, 8 *Ann*. *Anonymous*.

A *certiorari* iſſued to remove an inquiſition of *felo de ſe*, and they returned an inquiſition *nuper captam*, i. e. *lately taken*, and on the return it appeared to be taken after the *teſte* of the *writ* of *certiorari*: and it was urged that it was well removed, though taken after the *teſte* of the writ, as a *writ of error*, &c.

Powell, Juſtice. A *writ* of *certiorari* removes any order or conviction, though they are made or taken after the *teſte* of the *writ*, ſo they are taken before the return.

Then the following *exceptions* were taken to the inquiſition; 1ſt. Becauſe it is ſaid to be taken *before the coronation of our Sovereign Lady the Queen*, and does not ſay for what place. 2dly. It is ſaid *by the oath of twelve*, &c. and does not ſay *true and lawful men*,— nor for what place: and on theſe *exceptions* the inquiſition was quaſhed. *Vide Raym. vol.* 2. *p.* 1305.

Hilary, 12 *Ann*. *Barnardiſton* v. *Fowler*.

See this caſe fully ſtated in page 105. of this work, under the head *Arbitration and Award*.

Hilary, 1 *Geo*. *The King* v. *Tomb*.

Per curiam. No inſtance can be produced of any *certiorari* to remove a recognizance for appearance from judges of *oyer* and *terminer*; and it would be, to take away a juriſdiction that properly belongs to them. *Vide Mod. Rep. vol.* 11. *p.* 278.

Michaelmas, 5 *Geo.* *Anonymous.*

A *certiorari* was awarded to remove a conviction of a forcible entry, and detainer againſt *A.* and his wife: the conviction rerurned was againſt *A.* only: and for this variance the *certiorari* was quaſhed. *Vide Stra. vol.* 1. *p.* 116.

Michaelmas, 7 *Geo.* *The Caſe of May and Parſons.*

By *ſtat.* 12 *Ann. c.* 2. *It is provided*, that if any malt happens to be burnt after the duty is paid, the proprietor may apply to the next quarter ſeſſions, who are to adjuſt the *quantum*, and give him a certificate, which intitles him to receive back the duty. *May* and *Parſons* were two brewers, and had a great quantity of malt that had paid duty, burnt in a fire at *Wapping*; but the ſeſſions being then very near, they could not remove the rubbiſh ſo as to make an eſtimate of their loſs before the ſeſſions was over. The following ſeſſions they made their application, where the *quantum* of the loſs was adjuſted; but then the entry of the act of ſeſſions goes on, that the juſtices being of opinion, that the juriſdiction was given only to the next quarter ſeſſions after the fire, and there having one quarter ſeſſions intervened, therefore, for that reaſon, they denied the certificate.

On this a *certiorari* was moved for to remove theſe proceedings, and the caſe of *Limehouſe* was cited, where an entry of a refuſal to proceed on an appeal, under pretence of its being too late, was brought up, and quaſhed: but the Attorney General ſhewing cauſe againſt the *certiorari*, objected, that this was no order of ſeſſions, and a *certiorari* goes only to fetch up their orders: and of his opinion was the court, and denied the *certiorari*; and *Eyre*, Juſtice, cited the caſe of the Biſhop of St. *David*'s, where an entry that he had prayed a prohibition for ſuch and ſuch reaſons, which was not granted, was held to be no judgment, ſo as to be looked into and corrected on a *writ of error*. *Vide Stra. vol.* 1. *p.* 391.

Michaelmas, 8 *Geo.* *The King* v. *The Inhabitants of Warminſter.*

The ſeſſions returned an order of two juſtices for the removal of *J. S.* whereby it appeared, that after *ſtat.* 1 *Jac. c.* 17. and before *ſtat.* 3 & 4 *W.* & *M. c.* 11. *J. S.* had been hired in the pariſh of *Warminſter*, and had lived there as a ſervant for forty years, which the two juſtices adjudged had gained him a ſettlement. And it was moved to quaſh the order, becauſe it did not appear that *J. S.* had given notice, and that *ſtat.* 1 *Jac.* 2. is expreſs, that the forty days are to be accounted from giving notice in writing; and, beſides, the *certiorari* ſhould have gone to the two juſtices, and not to the ſeſſions, becauſe it did not appear any act had been done at the ſeſſions, either to confirm or reverſe the order. As to this laſt matter, the court held that the order was well returned by the ſeſſions.

Eyre, Juſtice, ſaid, it had been ſo determined already, for the juſtices are ſuppoſed to return all orders they make to the ſeſſions, where they are to be recorded. And as to the other part of the caſe, it was held well enough without notice, for the intent of that was only to give the pariſh an opportunity of ſending away perſons that were removeable; but that is not the caſe of hired ſervants or apprentices, who are irremoveable, ſo that requiring them to give notice, is requiring them to do a vain thing, for as to themſelves it can be of no benefit in making it a better or ſtronger ſettlement; and as to the pariſh, they can do nothing on it either to eaſe or diſcharge themſelves. *Vide Stra. vol.* 1. *p.* 470.

Eaſter, 9 *Geo.* *The King* v. *Wells.*

The court granted a *certiorari* to the defendant to remove an indictment for *forgery*, from the *Old Baily*; the defendant appearing to be a man of good repute, and the proſecution on ſlight grounds. *Vide Stra. vol.* 1. *p.* 549.

Trinity, 9 *Geo.* *The King* v. *Atho*, *Father and Son.*

In *Eaſter* term laſt, the Attorney General moved for a *habeas*, directed to the goaler of the common goal in the county of *Pembroke*, to return the bodies of *Thomas Atho* the father, and *Thomas Atho* the ſon, from the goal in *Pembroke*, to the keeper of the goal in the county of *Hereford*, that being the next *Engliſh* county to *Pembroke*, and likewiſe for a *certiorari* to be directed to the proper officer, to *remove the indictment* found againſt them in *Wales*, and to the *coroner* of *Pembrokeſhire*, to remove the inquiſition taken by him on the view of the body of *G. M.* who was murdered by the father and ſon in a barbarous manner, and for which an indictment was found againſt them in *Wales*.

On a motion to ſet aſide the former rule, it was ſaid, that Mr. Attorney founded his motion on *ſtat.* 26 *H.* 8. by which it is enacted, that juſtices of the peace and of *goal delivery in the counties next adjoining to Wales, where the King's writ runneth, may hear and determine all felonies, and their accuſers, committed in Wales, or the marches thereof*; but this clauſe extends only to *lordſhips marches*, and not to any of the antient counties in *Wales*.

Beſides, the aforeſaid ſtatute was altered about eight years after it was made; for by *ſtat.* 34 & 35 *H.* 8. by which *Wales* was divided into twelve counties, and juſtices appointed to keep their ſeſſions in the ſaid counties, it was enacted, that theſe *judges might hold pleas of the crown in as large a manner as the juſtices in* Weſtminſter Hall; *and that they ſhall enquire, hear, and determine all criminal offences whatſoever committed within their ſeveral limits, and adminiſter common juſtice to all the King's ſubjects there, according to the laws of England.*

The court took time to conſider theſe ſtatutes, and at another day declared, that it would be better only to grant the *habeas corpus* without the *certiorari*, for if both ſhould be granted, it would delay the proſecution, becauſe if the indictment and inquiſition ſhould be removed, they both would come into court next term, and not before; and they muſt both be ſent down by *mittimus* to the next aſſizes in *Hereford*, which would not be till *March* following, ſo that the defendants could not be tried before that aſſizes; but if the Attorney General would enter a *nolle proſequi* as to the indictment already found in *Pembrokeſhire*, then the defendants might be indicted again for the ſame fact in *Herefordſhire*, and tried at the ſummer aſſizes, which would be the beſt and moſt ſpeedy method.

Thereon a *nolle proſequi* was entered, and an *habeas* granted, and the defendants were indicted and tried in the county of *Hereford*, and both found guilty of murder; but becauſe their council inſiſted, that this was a *miſ-trial*, the judge who tried the defendants would not give ſentence to execute them.

Whereon the Attorney General moved in the beginning of *Eaſter*, 9 *Geo.* for an *habeas* to bring up their bodies to this court, that they might receive ſentence of death, and for a *certiorari* to remove the record, ſo that the court might have all before them to give judgment; all which was granted.

And accordingly, about a fortnight afterwards, both father and ſon were brought to the bar, and their council objected, that their trial in an *Engliſh* county, and by a jury of *Engliſhmen*, was a *miſ-trial*.

And after this point had been fully argued, the court declared they were bound by expreſs and plain words in this act of parliament, the preamble whereof complains of great offences *in Wales*, which are general words, and comprehends *all Wales*; and in the enacting part it is declared, that the miſchiefs were *all over Wales*, but greater in the *lordſhip marches*: ſo that it is plain, parliament intended to give ſome remedy to the whole, that it might be adequate to the miſchief, and meet it in as large a manner as poſſible.

Now, thoſe general words in the enacting part ſhall never be reſtrained by any words introducing that part; for it is no rule in the expoſition of ſtatutes to confine the general words of the enacting part to any particular words either introducing it, or to any ſuch words even in the preamble itſelf: it is true, Lord *Coke* recommends a conſtruction, which agrees with the preamble, but not ſuch as may confine the enacting part to it.

Whereon the priſoners were ordered to be brought up to receive ſentence, and accordingly, being brought to the bar, it was moved in arreſt of judgment, that the court could not proceed to give ſentence, but that they ought to be remanded into *Herefordſhire*, to receive judgment at the aſſizes, becauſe by this ſtatute that power is given to the judge of aſſize who tried the cauſe, and to him only; but on reading the ſtatute, the words were, viz, *that the priſoner ſhould be tried and condemned, as if the fact had been committed in the next Engliſh county*; and certainly this court may paſs ſentence on a criminal convicted in an *Engliſh* county.

So the motion was over-ruled, and ſentence given, and the priſoners were accordingly executed on *Friday* the 5th day of *July*. *Vide Mod. Rep. vol.* 8. *p.* 136.

Eaſter, 10 *Geo.* *The King* v. *Gunſton.*

The defendant's council moved for a *certiorari* to remove an indictment from the *Old Baily*, brought againſt a perſon of credit, for faliely pretending that a perſon of no reputation was Sir *John Thornycraft*, by *which* the proſecutor was induced to truſt him.

Per curiam. As you move on behalf of the defendant, we muſt have a more particular reaſon: which not being given, the motion was over-ruled. *Vide Stra. vol.* 1. *p.* 583.

Michaelmas, 11 *Geo.* *The Caſe of the Commiſſioners of Sewers for Yorkſhire.*

The court held, that a *certiorari* to bring up an order made by the commiſſioners for the removal of their own clerk, was of common right, and not diſcretionary, as in the caſe of other orders, where great inconveniencies may follow by inundations in the mean time. *Vide Stra. vol.* 1. *p.* 609.

Michaelmas, 13 *Geo.* *The King* v. *Puſey.*

The defendant was indicted at the *Old Baily* for *perjury*; and to avoid appearing there, he moved for a *certiorari*; and cited Sir *H. Mackworth*'s caſe, *Eaſter* 9 *Geo.*

Per curiam. This was not for perjury, but affixing the ſeal of a company in his cuſtody without their authority, which was a conteſt of a civil nature: we muſt make no diſtinction of perſons, and therefore cannot grant a *certiorari* for a defendant without the conſent of the proſecutor. *Vide Stra. vol.* 2. *p.* 717.

Michaelmas, 13 *Geo.* *The King* v. *Fawle.*

The defendant's council moved for a *certiorari* to remove an indictment, found againſt the defendant for *felony*, in ſtealing hay, from the quarter ſeſſions of the peace held for the town and corporation of *Chippington-Norton*, on affidavits that the defendant could not have a fair trial there; and cited a caſe, *The King* v. *Powell*, where a *certiorari* was granted to remove an indictment from the quarter ſeſſions of the peace for *Salop*, for the like reaſon. And a rule was made for the proſecutor to ſhew cauſe, which was afterwards made abſolute. *Vide Raym. vol.* 2. *p.* 1452.

Hilary, 1 *Geo.* 2. *The King* v. *Sir Edmund Elwell & al.*

The defendants were convicted on view of three juſtices of the peace in *Kent*, of a forcible detainer; and were committed by them to *Maidſtone* gaol, till they ſhould pay a fine to the King. On which they ſued out a *certiorari*, to remove the conviction into this court, and an *habeas corpus* to bring up their bodies.

Exception was taken to this conviction, that it was ill, becauſe the commitment was of the defendants to goal, *there to remain* till each ſhould have paid a fine to the King; and the juſtices of the peace have aſſeſſed no fine; ſo that it amounts to an indefinite commitment to priſon, which is illegal. Againſt which it was argued for the King, that this court might aſſeſs the fine, and the caſe of the *King* v. *Chaloner.* 1 *Keb.* 585. was cited.

As to that caſe the court ſaid, the party ſubmitted to a fine, a very ſmall one being ſet on the circumſtances of the caſe; and all the judges were of opinion, that the juſtices might and ought to ſet the fine, they being the beſt judges, from their view, of the nature of the offence, and that they need not *inſtantly* ſet it, but might adjourn for a little time to conſider of the fine. And *Page* Juſtice ſaid, Lord *Holt*, Chief Juſtice, held ſo in the caſe of *The Queen* v. *Layton.* They held alſo, that if a *certiorari* came to them, they might proceed to ſet a fine, and compleat their judgment, and it would be no contempt. And therefore they held, that this commitment being, that the defendants ſhould lie in priſon till they paid their fine, and no fine being ſet, the conviction was nought, it was accordingly quaſhed, and the defendants were diſcharged. *Vide Raym. vol.* 2. *page* 1514.

Michaelmas, 2 *Geo.* 2. *Bowers* v. *Mann.* Error.

On a *writ of error* brought on a judgment in *C. B.* the plea was of *Michaelmas*, 13 *Geo.* and the judgment was of the ſame term: the *writ of error* was teſted the 18th of *October*, 1 *Geo.* 2. and the aſſignment of *errors* was of the *Trinity* term following; to verify the *error* as to want of an original, the plaintiff took out a *certiorari*, *teſted* the 21ſt of *June*, 1 *Geo.* 2. on which there was a return, that there was no original; and the defendant in *error*, on that return pleading *no error*, his council objected, that the *error* was not verified, for the late King died the 11th of *June*, and therefore the *teſte* of the *certiorari* being the 21ſt of *June*, 1 *Geo.* 2. and *the writ of error* in *October* the 1ſt, makes it to be four months before the bringing the *writ of error*, and a year before an aſſignment of *errors*; the conſequence of which is, that it cannot be taken as verifying the *errors*; nor indeed to be the *certiorari* which the court awarded, for they awarded one *after* the *error* was aſſigned, and this appears to be taken out before.

The court thought the objection good, and affirmed the judgment, after they had refuſed a ſecond *certiorari*, becauſe it was in order to reverſe a judgment; according to the caſe of *Merryfield* v. *Berry.* *Vide Strange, vol.* 2. *p.* 819.

Trinity, 3 *Geo.* 2. *The King* v. *Hayes.*

Per curiam. A *certiorari* to remove an indictment, need not deſcribe whether the offence is laid *againſt the form of the ſtatute*; but a *certiorari* to remove all indictments, will remove one for forgery on the ſtatute. *Vide Strange, vol.* 2. *p.* 843.

Michaelmas, 3 *Geo.* 2. *The King* v. *Greenſhaw.*

A *certiorari* was granted to remove an indictment for not doing the ſtatute labour on the highway, on producing a precedent where it was done, in the caſe of the *King* v. *Eachard.* 12 *Geo.* *Vide Strange, vol.* 2. *p.* 849.

Eaſter, 4 *Geo.* 2. *The King* v. *The Inhabitants of Hamworth in the County of Stafford.*

On a motion to quaſh a *certiorari*, to remove an indictment againſt the defendants at the ſeſſions, for not repairing a bridge; it was inſiſted, that by *ſtat.* 1 *Ann. c.* 18. the *certiorari* is taken away. To which it was anſwered and reſolved by the court, that this act extended only to bridges where the county is charged to repair; and that where a private perſon or pariſh is charged, and the right will come in queſtion, the *ſtat.* 5 & 6 *W. & M. c.* 11. had allowed the granting a *certiorari*. And therefore the court refuſed to quaſh it. *Vide Strange, vol.* 2. *p.* 900.

Michaelmas, 4 *Geo.* 2. *The King* v. *Elford.*

After a *mandamus* was taken out under the ſeal of the court, the defendant (being an attorney) found fault with it, and altered it, before he delivered it to the party to whom it was directed. And for this an attachment was granted; and on his ſubmiſſion and paying coſts, he was diſcharged. After this he was indicted before the judges of aſſize at *Exon* for a forgery, and moved for a *certiorari*, but the proſecutor not conſenting, the court refuſed to grant it. *Vide Strange, vol.* 2. *p.* 877.

Eaſter, 5 *Geo.* 2. *The King* v. *The Inhabitants of Uttoxeter in the County of Stafford.*

On great debate, and ſearch of precedents, it was held, that a *certiorari* would not lie to remove the poor's rate itſelf, the remedy being to appeal, or by *action* when a diſtreſs is taken, which will anſwer all the ends of juſtice in aſcertaining an unequal rate; whereas if the rate itſelf ſhould be required to be ſent up, great inconveniencies and delay would follow, and a caſe was cited. *Mich.* 10 *Ann. The Queen* v. *The Inhabitants of St. Mary the Virgin* in *Marlborough*, where it was ſo reſolved. *Vide Strange, vol.* 2. *p.* 932.

Michaelmas, 6 *Geo.* 2. *The King* v. *The Inhabitants of Eckerſhall.*

An order was made on *ſtat.* 7 & 8 *W.* 3. *c.* 29. for the pariſh at large to repair the highways, the 6 *d.* in the pound levied on the in-ſhip not being ſufficient; and a *certiorari* being moved for, it was objected, that *ſtat.* 3 & 4 *W.* & *M. c.* 12. had taken it away; to which it was anſwered, that this was an order founded on a ſubſequent law.

Per curiam. They muſt both be taken together: the rate muſt be made in aid of the in-ſhip, by virtue of the former law. Therefore a *certiorari* was denied. *Vide Strange, vol.* 2. *p.* 944.

Eaſter, 7 *Geo.* 2. *The King* v. *The Juſtices of Shrewſbury.*

On an appeal to the ſeſſions the poor's rate was quaſhed, and the ſeſſions made a new one. To remove which, a *certiorari* was moved for, becauſe in this caſe no appeal could be had, which was one reaſon given in the caſe of the *King* v. *The Inhabitants of Uttoxeter*; but the court ſaid, that was not the only reaſon they went on, and denied the *certiorari*. *Vide Strange, vol.* 2. *p.* 975.

Michaelmas, 8 *Geo.* 2. *The Caſe of the Borough of Warwick.*

On an appeal from a poor's rate, the ſeſſions ordered the churchwardens to produce the books on an adjourned day, before which a *certiorari* was brought to remove that order; and held to lie, though the appeal is depending; otherwiſe, the order muſt be obeyed before the validity of it can be determined.

It was alſo held, that an appointment of overſeers may be removed before an appeal to the ſeſſions; for the rule laid down in *Salk.* 147. exteuds only to the caſe where there is a limited time for appealing, as to the next quarter ſeſſions; but *ſtat.* 43 *Eliz. c.* 2. is not ſo reſtrained; and conſequently it can never be ſaid, that the time for appealing is out: and if the appeal from an appointment is lodged, there can be no *certiorari*, till the ſeſſions has made a determination, and a *certiorari* brought pending ſuch appeal ſhall be ſuperſeded. *Vide Strange, vol.* 2. *p.* 991.

Trinity, 9 *Geo.* 2. *The King* v. *Morgan*,

A *certiorari* was granted to remove an indictment of perjury from the *Old Baily*, on the part of the defendant, on an affidavit that he had paid coſts twice for not going to trial, the judges being gone away; which the court allowed to be a ſpecial reaſon, that diſtinguiſhed this from the common caſe, where *certiorari's* are denied. *Vide Strange, vol.* 2. *p.* 1049.

Trinity, 9 *Geo.* 2. *The King* v. *Burnaby.*

On a motion for a *certiorari* to remove an indictment for a murder committed in *Angleſea*, on an *affidavit*, that the proſecutor feared ſome partiality in *Wales*, and therefore that it might be tried in the next *Engliſh* county; for the defendant was bailed, and had made ſome valuable preſents to the gentlemen of that county, as the proſecutor was informed by his ſolicitor: thereon a rule was made for the defendant to ſhew cauſe why a *certiorari* ſhould not iſſue.

And at another day it was ſhewed for cauſe, that if trials ſhould be moved out of *Wales* into the next *Engliſh* counties, on ſuch uncertain allegations, there could never be any trials there. And 1ſt, as to ſaying he was bailed, that could be no reaſon for the proſecutor to fear any partiality; for the defendant was bailable by law, becauſe by the coroner's inqueſt, the fact was only found *chance medley*; and as to the preſents made to the gentlemen of the county, the *affidavit* was only, that he was told ſo by his ſolicitor, who probably might tell him falſe; therefore he ought to make a poſitive oath of that matter, otherwiſe a *certiorari* ought not to be granted.

Beſides, in this caſe, both the priſoner and deceaſed were natives of *Holland*, and had no manner of intereſt in *Wales*; ſo that there is no colour or fear of any partiality, but that juſtice will be equally diſtributed.

Per curiam. Where there is a juſt reaſon to induce the court to believe partiality will be ſhewed on either ſide, there indictment ſhall be removed into an *Engliſh* county; but the truth of that matter will be ſuſpected, where it is on the motion of either the priſoner or proſecutor, and in ſuch caſe there muſt be a full and clear *affidavit* to induce the court to grant a *certiorari*; but where it is at the inſtance of the Attorney General in behalf of the crown, it ſhall be granted without an *affidavit*; therefore this rule ſhall be ſet aſide for want of a ſufficient *affidavit*, but the proſecutor ſhall have leave to move it again on a better. *Vide Mod. Rep. vol.* 8. *p.* 146.

Hilary, 10 *Geo.* 2. *The King* v. *Webb.*

A *certiorari* was granted to remove an indictment for perjury, from the *Old Baily*, *at the defendant's requeſt*, on an *affidavit*, that the proſecutor's attorney was Under Sheriff of *Middleſex*, and attended the grand jury on finding the bill. *Vide Strange, vol.* 2. *p.* 1068.

Eaſter, 10 *Geo.* 2. *The King* v. *Ferguſan.*

This court was moved for a *certiorari* to remove an indictment for perjury againſt the defendant, from the ſeſſions at the *Old Bailey*; but the court would not grant it.

Lee, Juſtice. It was done indeed in the caſe of the *King* v. *Morgan*, 2 *Strange*, 1049, but that was on the extraordinary circumſtances of the caſe, for he had been there two ſeſſions, and had uſed his utmoſt endeavours, and could not get the indictment tried, tho' he was ready, and had paid coſts twice; but if we do it for aſking, we ſhall have all indictments come up hither. *Vide Caſes Temp. Lord Hardwicke, p.* 369.

Trinity, 12 *Geo.* 2. *The King* v. *Lewis.*

On an indictment in the grand ſeſſions of *Angleſea*, for *embracery*, the court was moved on the part of the defendant for a *certiorari*. It was admitted, that in capital caſes a *certiorari* lies by *ſtat.* 26 *H.* 8. *c.* 6. *ſect.* 6. But it was contended for the proſecutor, that in caſes of miſdemeanor it never had been granted; of which the court would adviſe. And on another day, ſeveral precedents were produced, and *poſteas*, where the indictment removed from the grand ſeſſions had been ſent down to be tried in an *Engliſh* county, and returned up to this court, therefore in this caſe there being an *affidavit*, to induce a ſuſpicion that a fair trial could not be had in *Wales*, a *certiorari* was granted. *Vide Strange, vol.* 1. *p.* 704.

Trinity, 13 *Geo.* 2. *Merryfield* v. *Berry*. Error.

The plaintiff in *error* took out a *certiorari* of a wrong term, which did not verify his *error*; and now he moved for a ſecond *certiorari*, which was denied.

Per curiam. It may be granted to affirm, but not to reverſe a judgment. *Vide Strange, vol.* 1. *p.* 765.

Hilary, 17 *Geo.* 2. *The King* v. *Beſtland*.

The court refuſed to grant a *certiorari* to remove an indictment for a miſdemeanor from *Dorſet* aſſizes. *Vide Strange, vol.* 2. *p.* 1202.

Eaſter, 17 *Geo.* 2. *The King* v. *Farewell*.

The proſecutor of an indictment for a nuiſance in the highway, took out a *certiorari*; and the defendant moved to quaſh it, there having been no *affidavit* made, according to *ſtat.* 5 *W. & M. c.* 11. nor any recognizance given, according to that, and former ſtatutes of 13 & 14 *Car.* 2. *c.* 6. 22 *Car.* 2. *c.* 12. and 3 *W. & M. c.* 12.

But the court on conſidering thoſe acts, held, that they related only to *certiorari*'s applied for by defendants, and not to one *for the King*, as this was. And many precedents were ſhewn of *certiorari*'s for the proſecutor, taken out in the manner this was, and therefore the *certiorari* was allowed. *Vide Strange, vol.* 2. *p.* 1209.

Michaelmas, 17 *Geo.* 2. *The King* v. *The Inhabitants of Madley in the County of Stafford*.

A man, his wife, and daughter were removed by the order of two juſtices of the peace, which on appeal to the ſeſſions, was confirmed, and being removed by *certiorari* into this court, the order was quaſhed, as to the daughter, her age not being ſtated, nor the place adjudged to be the place of her ſettlement; but as to the man and his wife the orders were confirmed. *Vide Strange, vol.* 2. *p.* 1198.

Eaſter, 18 *Geo.* 2. *The King* v. *Elizabeth Niccolls*.

The defendant was indicted at *Hicks*'s *Hall* for conſpiring with *E. B.* unjuſtly to charge *W. F.* with a robbery, and for that purpoſe going before a juſtice of peace, where *B.* ſwore it on him; *Niccolls only* came in, and pleaded *not guilty*. And the jury found that ſhe was guilty, but that *B.* died before the indictment was preferred. Before any judgment was given at the ſeſſions, ſhe brought a *certiorari*, and the cauſe was ſet down to be argued.

The firſt thing determined was, that this being in the nature of a *ſpecial verdict*, there was no occaſion for the defendant's appearing in court on the argument; for ſhe is not conſidered as convicted till after the court have determined on the verdict. And it was therefore not within the reaſon of the caſe of moving for a new trial, or in arreſt of judgment; where there being a general verdict, it created ſuch a preſumption of guilt, that the party cannot move without being preſent in court.

An exception was then taken, that *one* alone cannot be guilty of a *conſpiracy*, and that here was but *one* convicted: but the court over-ruled this, on the authority of *Kinnerſley's* caſe, where the judgment was given againſt him before the other had pleaded; ſo that here was a poſſibility of contradictory verdicts, which cannot be here: and 1 *Vent.* 234. 24 *Ed.* 3. *c.* 34. *b.* 24 *Ed.* 3. *c.* 73. *a.* were cited as caſes in point.

But then a doubt aroſe, what the court could do, the *certiorari* being brought before judgment: and this court not being apprized of the circumſtances of the offence, could not tell what judgment to give: A rule was therefore made to ſhew cauſe why the *certiorari* ſhould not be quaſhed, ſo as to remit it back to the ſeſſions; which was afterwards made abſolute. *Vide Stra. vol.* 2. *p.* 1227.

Hilary, 31 *Geo.* 2. *The King* v. *Wakefield & al.*

On a rule to ſhew cauſe why an order of two juſtices made on ſeveral *quakers*, (for payment of tithes, under the value of 10 *l.* to the curate of a *chapel*) and confirmed at the *ſeſſions* on an appeal from it, ſhould not be quaſhed, together with the order of ſeſſions confirming it.

Note. The order of the juſtices was removed into this court by *certiorari*, on which the council took the following *exception* to the ſame:

That no *certiorari* could iſſue by the expreſs proviſion of the act to remove the proceeding from before the juſtices into any other court, becauſe the title was not in queſtion.

After hearing council on both ſides, the court gave their opinion:

Per curiam. We are all clearly of opinion, that the rule for the *certiorari* having been made abſolute, and the return thereto having been filed, ought not now to ſtand in the way and prevent our coming at the real juſtice and merits of the caſe; for if the *certiorari* iſſued *improvide*, we can order it to be *ſuperſeded*, and the return to be taken off the file: and we do therefore order, that the writ of *certiorari* be *ſuperſeded*, the return taken off the file, and the order remanded. *Vide Bur. vol.* 1. *p.* 485.

Hilary, 32 *Geo.* 2. *The King* v. *Gwynne & al.*

Three Judges (on a defended motion) on this indictment, granted a *procedendo* at the inſtance of the defendant, to the *quarter ſeſſions* of *Brecon*, on an indictment for an *aſſault*, removed up hither, becauſe the *certiorari* had not iſſued till after the defendants had confeſſed the *aſſault* below, though the conviction was after a trial; and though ſeveral of the juſtices were ſworn to be near relations of the defendant *Gwynne*, namely, his *father*, two *brothers*, and an *uncle*. *Vide Bur. vol.* 2. *p.* 749.

Trinity, 32 & 33 *Geo.* 2. *The King* v. *Cowle*.

On a rule to ſhew cauſe why a *ſuperſedeas* ſhould not iſſue to a *certiorari* directed to the mayor, and corporation-juſtices of *Berwick*, to remove an indictment; the queſtion before the court on this rule was,

Whether this court have juriſdiction over *Berwick*, where the proceedings are not according to the laws of *England*, but according to the laws of *Scotland*.

After hearing council on both ſides, the court gave their opinion:

Lord *Manſfield*. There is no doubt as to the power of this court, where the place is under the ſubjection of the crown of *England*. There is no inſtance of a doubt ever having been made, before the preſent caſe, concerning the authority of this court to ſend a writ of *certiorari* to *Berwick*, and we are all clearly of opinion, that the court by *law* has ſuch a power: therefore the rule to ſhew cauſe why a *ſuperſedeas* to the writ of *certiorari* ſhould not iſſue, muſt be diſcharged. *Vide Bur. vol.* 2. *p.* 834.

Trinity, 33 & 34 *Geo.* 2. *The King* v. *Moreley, and others*.

On a rule to ſhew cauſe why a writ of *certiorari* ſhould not iſſue to remove ſeveral orders made by Mr. *M.* a juſtice of peace of the county of *Kent*, on the *conventicle act*, viz. *ſtat.* 22 *Car.* 2. *cap.* 1. by which orders the ſaid juſtice had convicted a methodiſt preacher, and ſeveral others, in different penalties, under the ſaid *ſtatute*.

After hearing council on both ſides, the court gave their opinion on the following queſtion, *viz.*

“ Whether a *certiorari* would lie where the parties had another remedy?”

Per curiam. We are clearly of opinion, that a *certiorari* ought to iſſue. A *certiorari* does not go to try the merits of the queſtion, but to ſee whether the *limited* juriſdiction have exceeded their bounds. The *juriſdiction* of this court is not *taken away* unleſs there be *expreſs words* in the *ſtatute* to take it away. This is a ſettled point, therefore a *certiorari* ought to iſſue, and after a return ſhall be made, the parties will be at liberty, and it will be open to them to move for a *ſuperſedeas*, if there ſhould appear ſufficient reaſon to the court for ſo doing: therefore let the rule be made *abſolute* for a *certiorari*. *Vide Bur. vol.* 2 *page* 1040.

Trinity, 33 & 34 *Geo.* 2. *Hewſon* v. *Brown.*

On a motion for an order on the proper officer of the *C. B.* to attend this court with the record of the ſaid court in a cauſe, *Watſon* v. *Hewſon*, in order for its being inſpected by this court.

The caſe was: The defendant in this court, who was ſued here on a bond to indemnify the preſent plaintiff, had pleaded *non damnificatus*, i. e. *he is not injured*; to which plea the plaintiff *replied* a *recovery* in the *C. B.* againſt him by one *T. W.* whereby he was damnified. To this *replication* the defendant here had *rejoined, nul tiel record*, and the plaintiff *ſurrejoined, that there is ſuch a record.*

The plaintiff's council owned, that the practice in theſe caſes was, to iſſue a *certiorari*, and have it *certified*, but *urged* that it would ſave time and expence, and that this court by their *general juriſdiction*, had ſuch a power over all *inferior* juriſdictions.

The court were very clear, that in this caſe there was no ſort of reaſon to go out of the common and ordinary practice, and therefore denied the motion. *Vide Bur. vol.* 2. *p.* 1034.

Hilary, 4 *Geo.* 3. *The King* v. *The Inhabitants of St. Andrews, Holborn, and St. George the Martyr.*

On a motion for a *certiorari* to be directed to the juſtices of peace for the county of *Middleſex*, to remove into this court an order of *ſeſſions* made by them at *Hicks's-Hall ſeſſions*, for quaſhing a *ſcavenger's rate*, and making a *new one*. This *certiorari* was prayed, notwithſtanding the *clauſe* in *ſtat.* 2 *W. & M. cap.* 8. which ſays, "that perſons aggrieved may have recourſe to the *general quarter ſeſſions* of the peace, to be "holden for the place wherein the matter of grievance doth ariſe: and that their determination and "order thereon ſhall be *final*, without any appeal to "any other court whatſoever." A rule to *ſhew cauſe* was obtained, and no cauſe being ſhewn, the rule was made *abſolute*: the court being clearly of opinion, that the juſtices at their *quarter ſeſſions* had no power to make this *new rate*, and therefore quaſhed the *order* of *ſeſſions in toto*. *Vide Bur. vol.* 3. *p.* 1458.

Trinity, 5 *Geo.* 3. *The King* v. *Midlam.*
Idem v. *Eundem.*

On a rule to ſhew cauſe why the *maſter* of the *Crown Office* ſhould not be ordered by the court to forbear and not proceed to *tax* the proſecutor's *coſts* in thoſe cauſes relative to the affirmance of the convictions againſt the defendant in theſe cauſes. *And alſo*, why the *bond* entered into by, or on the behalf of the defendant, on allowing the *certiorari*, ſhould not be delivered up to the ſaid defendant, or his clerk in court, to be cancelled; a rule to *ſhew cauſe* was obtained.

On ſhewing cauſe to this rule, after hearing council on both ſides, the court gave their opinion.

Lord *Mansfield*. This is not a caſe within the intention of *ſtat.* 5 *Ann. cap.* 14. For this *certiorari* was not brought for vexation, or out of obſtinacy or perverſeneſs, but an action being brought for the ſame offence, the defendant in that action could not obtain (though he ought to have had it) a copy of the conviction from the juſtice of peace who made the conviction, and therefore he was obliged to bring a *certiorari* to remove it, and he removed it for that purpoſe only. The proſecutor had no occaſion therefore to be at any expence about it, for the defendant did not object to it. But the proſecutor ſet it down in the paper only to increaſe expence, and merely for vexation, ſuppoſing that the defendant would have been obliged to pay for it. The plaintiff in the action was *nonſuited*; and, I think, the defendant (inſtead of paying coſts) ought to have had an allowance of the *coſts* he was put to in removing the conviction, as it was a neceſſary part of his defence; therefore the preſent rule ought to be made *abſolute*.

Wilmot, *Yates*, and *Aſton*, Juſtices, concurred with the Chief Juſtice in opinion.

Per curiam. Let the *rule* be made *abſolute*, and let the proſecutor pay the defendant the *coſts* out of pocket of this application. *Vide Bur. vol.* 3. *p.* 1720.

Challenge.

Hilary, 1 *W. & M.* *Anonymous.*

On a trial at *bar* the queſtion was, whether the fair called *Wey-Hill* fair, ſhould be kept at *Wey-Hill*, or at *Anderry*? And one of the jury was *challenged*, becauſe he lived at *Wey-Hill*; and the objection was, that the Fair occaſioned manure to improve the ground. On the other ſide it was conſidered, that the Fair occaſioned trampling of the graſs: this being a *challenge* to the *favour*, two of the jurors were ſworn to be triers, and their oath was, *You ſhall well and truly try whether* A. *(the juryman challenged) ſtands indifferent between the parties to this iſſue.* *Vide Salk. vol.* 1. *p.* 152.

Eaſter, 3 *W. & M.* *The King and Queen* v. *Warrington & al.*

On an *information* for a riot committed in *Cheſter*. It was ſuggeſted on the roll, that one of the ſheriffs was a defendant, on which the *venire facias* was prayed and directed to the other ſheriff. On not guilty pleaded, the jury found the defendants guilty; after which it was moved in arreſt of judgment, that the *venire* ſhould have been awarded to the coroner, becauſe both ſheriffs make but one officer, or rather that both perſons make but one ſheriff; *but not allowed*: for though one be *challenged*, the other may execute the writ, but he does it in the name of both; as where one arreſts a man, or neglects to arreſt a man, the arreſt or neglect is the act or neglect of both. The coroners are not the proper officers of the court, in any other caſe but where the ſheriff is abſolutely improper; not where there is no ſheriff at all. If the ſheriff die, the coroner cannot execute, *&c.* In the caſe of two coroners, if one be *challenged*, the other muſt act, and yet both make but one officer; ſo in this caſe one ſheriff is *challenged*, therefore the other muſt act. *Vide Salk. vol.* 1. *p.* 152.

Charnock's Caſe.

Charnock, *King*, and *Keys* were indicted for *high treaſon*, in conſpiring the death of the King; they were denied council, but allowed pen, ink, and paper, and having ſeverally pleaded *not guilty*,

Holt, Chief Juſtice, told them, that each of them had liberty to *challenge thirty-five* of thoſe who were returned on the panel to try them, without ſhewing any cauſe; but that if they intended to take this liberty, then they muſt be tried ſeparately and ſingly, as not joining in the *challenges*, but if they intended to *join in the challenges*, then they could *challenge* but *thirty-five* in the whole, and might be tried jointly on the ſame indictment; accordingly they all three joined in their *challenges*, and were tried together and found guilty. *Vide Salk. vol.* 3. *p.* 81.

Michaelmas, 11 *W.* 3. *The King* v. *The Warden of the Fleet.*

On a trial at *bar* of the iſſues joined in pleading on a *monstrans de droit*, i. e. *ſhewing of a right* in *Chancery*, to an inquiſition returned there, finding ſeveral miſdemeanors in the warden in the duty of his office, which office is found to be an antient office, exerciſeable in *Middleſex*; whereby the ſaid office, and the priſon houſe in *London*, which were found to be appendant to the office, were forfeited; there were two iſſues, one on the eſcapes, the other on the appendancy in *London*; and a jury of *Middleſex* being come to the *bar*, the defendant's council *challenged* the *array*, and had it drawn up on parchment in *French*, and read by council; the cauſe was, that the jury ought to come from *London*, where the houſe was, and not from *Middleſex*, and be returned by a *London* ſheriff; and concluded, *and this he is ready to verify*, &c. *and therefore prays judgment that the array be quaſhed.*

It was inſiſted on, the inquiſition was in nature of an information, declaration, or indictment; and the council took notice that the priſon was in *London*, and that ſuppoſe the office be in *Middleſex*, yet that only made it like a *common* in one county, appendant to a *manor* in another, in which caſe both counties ought to join; and if it is a good *challenge* to a jury, that they are not indifferent, though of legal *venue*; a *fortiori*, it is good when they have no legal capacity at all. 3 *Cro*. 646. was quoted, where cattle diſtrained in one county, and drove into another, and adjudged that the jury to try the fact ſhould come from both counties; and though in truth *London* cannot join with another county; yet that ought to be ſuggeſted on the roll, and the court cannot otherwiſe take notice of it; beſides if the *venire* was awarded into both the counties, and a *London* jury came to the *bar*, and did not inſiſt on the privilege, the trial would be regular; but if they inſiſted on their privilege, then perhaps the court for neceſſity might award a *venire facias* to *Middleſex* only.

And it is no reaſon to ſay, that becauſe we may have advantage of this in arreſt of judgment, we may not offer it now; for though we waive what we may move in arreſt of judgment, yet we may aſſign it after for error on a *writ of error*.

The Attorney General on the other ſide, argued, that the cauſe of *challenge* to the *array*, is the want of indifference in the officer; and the reaſon why they may *challenge* the pannel is, becauſe that cauſe does not appear on record, and therefore they have no other way to take advantage of it, and that too is the reaſon of *challenge* to polls.

Per Holt, Chief Juſtice. The matter of *challenge* ought not to be to the court, as in this caſe; for you ſay we have awarded a writ to a wrong officer, for the *array* is rightly made according to the writ. If the pannel was returned by a ſheriff, being a party concerned, or being a member of a body politic concerned, it would be a good cauſe of *challenge*; but we do not take notice on the awarding the *venire facias* of any ſuch thing, if we are not appriſed of it by the ſuggeſtion of the party, and want of a proper *venue* was never yet a *challenge* to the *array*; if he were a kin to either party, or intereſted, or not qualified by law to make a return, or had made it at the requeſt of either party; or if the cauſe concerned the corporation of *London*, the *venire* ought to go to the coroner at firſt; *but if you inſiſt on it*, you muſt demur for the King, and they join in demurrer; then all appearing to us on record, we may give judgment immediately, or take time to conſider.

And a demurrer was ordered to be drawn inſtantly, and a joinder in demurrer and the *challenge* was overruled. And *Holt*, C. J. ſaid, it had been proper for them to move to quaſh the *venire facias* before; but now the jury was at the *bar*. *Vide Mod. Rep. vol.* 12. *p.* 337.

Hilary, 12 *Ann. The Queen* v. *Delme.*

This was an information againſt *Delme*, for exerciſing the office of Alderman in the city of *London*, not being duly choſen. When the trial came on, the council for the Queen *challenged* the *array*, becauſe one of the ſheriffs was one of thoſe returned by the court of Aldermen: this *challenge* being allowed, a *venire facias* was directed to the other ſheriff; and then the council for the defendant *challenged* the *array*, becauſe returned by a ſheriff, that was concerned in intereſt, as he was a freeman of the city of *London*; on this a *venire* was directed to the coroner.

But before any return, the council for the Queen entered a ſuggeſtion on the record, ſetting forth, that the queſtion to be decided on this trial, being, whether the right of election was in the freemen only, or in all thoſe who paid ſcot and lot, (freemen or not freemen) it appearing from the nature of the thing, that it was impoſſible for an impartial jury to come out of *London*, and therefore they prayed a *venire* to the ſheriff of *Surrey*, the adjacent county.

The court was moved to ſet aſide this ſuggeſtion, as being out of time, and inconſiſtent with what they before admitted on the record.

But after hearing council on both ſides, the matter was adjourned, *Vide Mod. Rep. vol.* 10. *p.* 199.

Michaelmas, 4 *Geo. Blewett* v. *Bainard.*

On a *writ of error* brought on a judgment obtained in *C. B.* it was aſſigned for *error*, that *A. S.* who on the firſt trial was withdrawn in order for a *view*, was ſworn on the ſecond pannel; and *no error* pleaded.

The plea of *no error* was agreed to be a confeſſion of the fact, and a demurrer to the matter of law; and at firſt the court inclined this was *error*, becauſe it muſt be taken he was withdrawn as a perſon admitted by both parties to be improper to try the cauſe. But afterwards, on conſideration, the court held it to be right enough; and that if it was an exception, it ſhould have been taken before he was ſworn. But being withdrawn only for a *view*, they held it would be no objection, and affirmed the judgment. *Vide Strange, vol.* 1. *p.* 70.

Michaelmas, 8 *Geo.* 2. *The King* v. *Johnſon & al.*

The defendants on an information in nature of a *quo warranto*, obtained the common rule for a ſpecial jury, which was drawn up as uſual, for the ſheriff to attend with the freeholders book, and that he ſhould return the twenty-four ſtruck by the maſter. The proſecutor took out the *venire* to the ſheriff of *Cheſhire*, and the defendant *challenged the array*, on account of an intereſt the ſheriff had, as being a freeman of *Cheſter*, whoſe rights were to be tried. And on arguing this *challenge* before the *Cheſter* judges, they were of opinion to allow the *challenge*; though it was much inſiſted on, that ſince the late act the ſheriff had no influence, he being only to return the liſt brought him as ſtruck; but the right of *challenging* not being taken away, nor his power of *Marſhalling* the pannel, and putting which he pleaſed firſt, it was determined to be a good *challenge*, and the *array* was quaſhed.

It was then moved, that an attachment might iſſue againſt the defendants for a contempt in *challenging* contrary to the rule of court; and the caſe of *Burridge* was cited; but the court did not ſeem to reliſh that caſe, and ſaid, it might be an authority in one exactly circumſtanced as that was, but in no other. That in the preſent caſe, though the ſheriff is mentioned in the rule, yet that is only as being the uſual officer; but it did not preclude the proſecutor from taking the *venire* to the coroner. And the court remembered in what manner the motion was made, *viz.* that wherever the proſecutor thinks fit to take his *venire*, there may be a ſpecial jury. *Vide Strange, vol.* 2. *p.* 1000.

Trinity, 10 *Geo. The King* v. *Burridge.*

See this caſe fully ſtated in page 136 of this work under the head *Attachment*.

Michaelmas, 12 *Geo. Parker* v. *Thoroton.*

A juror on the principal *pannel* was *challenged*, and afterwards ſworn on the *tales* by a wrong name; and though no fault was found with the verdict, yet the court granted a new trial. *Vide Stra. vol.* 1. *p.* 640.

Hilary, 6 Geo. 3. Heſketh v. Braddock.

Per curiam. We are clearly of opinion, that the ſmalleſt degree of intereſt or influence in a witneſs, juror, or the officer by whom the jury is returned, is a deciſive objection to all or any of the ſaid perſons being qualified for thoſe reſpective purpoſes. *Vide Bur. vol. 3. p.* 1847.

Commitment.

Eaſter, 7 W. 3. The King v. *Bethel.*

The defendant was convicted at the *Old Baily* for buying of broad money, and was fined 1000 *l.* and being arreſted at the ſuit of a private perſon, ſome time before his proſecution for that offence, or before any knowledge of it, (two perſons being bail for him in this court) he moved for an *habeas corpus*; and being brought up by the keeper of *Newgate*, it was moved on behalf of his bail, that he being now in court, may ſurrender himſelf in diſcharge of his bail, and be *committed* to the *Marſhal* of this court.

Per Holt, Chief Juſtice. it does not appear to us that *Bethel* was in execution, for a *commitment* to the gaoler, is not any *commitment* in execution; but it muſt be to the ſheriff, for the goaler is but an under-officer; and it makes no difference that this *commitment* was in court; for the *commitment* there was in lieu of proceſs. We in this court cannot *commit* to the goaler, but to the ſheriff; for though we have a *Marſhal* and a priſon of our own, yet we may *commit* to the ſheriff; and we have often *committed* to the *gate-houſe*, and the ſheriffs of *London* have often taken away a priſoner from this *bar* for a fine. It is true, the goaler muſt take notice of a *commitment* to him, but it is no otherwiſe good, but as he is a ſervant to the ſheriff; his ſhort notes are not a good return to an *habeas corpus*. All men condemned at the *Old Baily*, are hanged by this ſhort note, and yet that would never be a good return to a *writ of error*; but here is the matter, the offender knowingly gets a *habeas corpus* to the goaler, who haſtily makes a return to it, and ſo the ſheriff ſhall be made liable to his ſervants fault or negligence.

But now the queſtion is, whether we ſhall avoid the *commitment* on an *habeas corpus*; or whether you are not put to your *writ of error?* And truly I think we cannot avoid it on an *habeas corbus*.

This word *remain* is an improper word; it ſhould have been *committed*; but indeed they could not make him *remain* there, unleſs there had been a *commitment*.

Beſides, ſince it appears he was *committed* for the *fine*, I think he muſt be remanded.

Eyre, Juſtice, agreed with the *Chief Juſtice*, and he was accordingly remanded. *Vide Mod. Rep. vol.* 5. *p.* 19.

Michaelmas, 7 W. 3. The King v. *Row and Kendall.*

On a motion to diſcharge the defendants, who were *committed* by the ſecretary of ſtate, being charged with *high treaſon*, in being privy to, and aſſiſting the eſcape of Sir *J. Montgomery* out of the cuſtody of one of the King's meſſengers, in ordinary, charged with *high treaſon*.

Per Holt, Chief Juſtice. The power of the ſecretary was never queſtioned till lately; and as for his *commitment* to a meſſenger, it is good; for he may be committed for a time to any body, while he is under examination; but though for that cauſe this *commitment* had been irregular, it is a queſtion if it would not have been void.

Rokeby, Juſtice, ſaid, that the meſſenger may be taken as a carrier of him to priſon, and ſo good.

Then it was excepted that the warrant does not ſhew for what treaſon Sir *J. Montgomery* had been *committed.*

Per Holt, Chief Juſtice. If a ſtatute makes a *felony*, acceſſaries before and after are *felons*, though not mentioned; and here the defendants are affected with the treaſon of Sir *J. M.*

Per Eyre and *Rokeby*, Juſtices. The ſpecies of Sir *J. M.*'s treaſon ought to be expreſſed; and for want of that, they ſhall be bailed, and they were bailed accordingly. *Vide Mod. Rep. vol.* 12. *p.* 82.

Michaelmas, 8 W. 3. Swinſted v. *Lydall.*

An action of *treſpaſs* and *falſe impriſonment* was brought by the plaintiff for detaining him in *cuſtody* until he had paid 11 *s.* for his deliverance.

The defendant pleads the juriſdiction of the *Court of Conſcience* in *London*, that they had power to make orders, and exact obedience to them. That an order was made by that court for the plaintiff to pay 10 *s.* 4 *d.* *&c.* which he not performing, the defendant took him by virtue of a precept of that court, and ſo juſtifies the impriſonment, and detaining him till he had paid that ſum.

To this plea the plaintiff demurred, becauſe the juriſdiction did not go to the whole ſum of 11 *s.* but only to 10 *s.* and 4 *d.*

After hearing council on both ſides, the court gave their opinion as follows:

Per curiam. This is a ſpecial authority given by act of parliament to this *Court of Conſcience* to *commit*, &c. but the officer is not to detain the perſon in cuſtody till the money is paid to him; for neither he nor the ſheriff ſhould receive it, unleſs it is on a *fi. fa.* and afterwards in *Hilary* term, for this reaſon judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 5. *p.* 295.

Michaelmas, 8 W. 3. Clark's Caſe.

This caſe came before the court on a return to an *habeas corpus*, they ſet forth the charter of the city of *London*, &c. and farther ſay, that in the ſaid city there are ſeveral companies, *&c.* and that the company of *vintners* is one of them, *&c.* and that thoſe companies are under the government of the mayor and aldermen: and they ſay alſo, that if a man refuſes to take on him the office of a liveryman of any company, he might be thereof convicted and impriſoned by the mayor and aldermen; and they ſay, that *Clark* refuſed to take on him the office of a liveryman of the company of *vintners*, tho' he was a citizen and freeman of *London*, and ſubject to the ſame; and that therefore the mayor and aldermen *committed* him to *F.* the keeper of *Newgate*, until he ſhould take on him the ſaid office.

After hearing council on both ſides, the court gave their opinion as follows:

Holt, Chief Juſtice. We ought, as far as we can by law, to ſupport the government of all ſocieties and corporations, and eſpecially this of the city of *London*; and if the mayor and aldermen ſhould not have power to puniſh offences in a ſummary way, then farewell to the government of the city.

But what ſticks moſt with me is, that it is not ſet out that *F.* is an officer of the city; and indeed I think he is not an officer, though I confeſs he is an officer to the ſheriffs, as he keeps the county goal; but it ought to have appeared, that he was *committed* to an officer of the mayor and aldermen.

Clark was afterwards diſcharged by the *whole court*, who declared their opinion, that the cuſtom was a good cuſtom, and was for the advantage and good government of the city, and therefore they would always ſupport it. *Vide Mod. Rep. vol.* 5. *p.* 319.

Michaelmas, 8 W. 3. Bracey v. *Harris.*

The plaintiff was ſummoned before the commiſſioners of bankrupts, to give an account of a bankrupt's eſtate; and on his refuſing to anſwer the queſtions put to him, he was *committed*; and having brought an *habeas corpus*, it appeared on the return, that the warrant of *commitment* concluded that he ſhould be *committed until he conformed to the authority of the commiſſioners*; which was now alledged to be a void *commitment*, becauſe they have a ſpecial authority given them by act of parliament, *that if the party ſhall refuſe to be ſworn, and to anſwer ſuch queſtions as ſhall be adminiſtered to him, that then the commiſſioners, or the greateſt number of them, may commit the perſon refuſing to priſon, there to remain without bail*, &c. *until he ſubmit to the commiſſioners to be examined*, and not till he conform to the authority of the commiſſioners: and therefore it was moved, that he might be diſcharged.

The court ſeemed to incline, that the party need not pay an univerſal obedience to the commiſſioners, ſo as to anſwer all queſtions, but only to examine him to what he knows concerning the carrying away any part of the bankrupt's eſtate by any perſon, but not by himſelf.

But for that fault in the concluſion of the *commitment*, *Bracey* was diſcharged. *Vide Mod. Rep. vol.* 5. *p.* 308.

Eaſter, 9 *W.* 3. Dr. *Groenvelt's Caſe.*

Dr. *Groenvelt* being *committed* laſt *vacation* by the cenſors of the College of Phyſicians, was this term brought into court by *habeas corpus*, on which the goaler returned, that the ſaid Doctor being examined laſt *vacation*, and convicted by the cenſors of the College of Phyſicians for his ill practice on the body of *J. S.* in the year 1692, by which the ſaid *J. S.* died, was fined by the ſaid cenſors 20 *l.* and *committed* to goal, until he ſhould be delivered by the ſaid college, or otherwiſe by due courſe of law.

On which return the court reſolved, that the ſentence or judgment was too general, for the cauſe of *commitment* ought to be certain, to the end that the party may know for what he ſuffers, and how he may regain his liberty; if he was *committed* for the fine, it ought to be until he paid the fine; but if the intent of the cenſors was to puniſh him, not only by fine, but alſo by impriſonment, they ought to have made them two diſtinct parts of the Judgment, by condemning him to priſon for ſo long, and from thence until he ſhould pay the fine. *Vide Raym. vol.* 1. *p.* 213.

Michaelmas, 9 *W.* 3. *Gregory's Caſe.*

Gregory was *committed* by the commiſſioners of bankrupts, for not anſwering and making a diſcovery of his eſtate; and being brought into court by an *habeas corpus*, it was moved that it might be filed, and that he might be diſcharged, on producing affidavits that he had made a diſcovery.

But the court would not diſcharge him; for if the *commitment* was void, he may bring an action for falſe impriſonment; and the court ſaid, that the commiſſioners need not aſk the party whether he will be examined or not; for the ſtatute gives them power to examine him on interrogatories, which they muſt prepare, and tender him ready drawn; and this not being returned on the *habeas corpus*, the warrant of *commitment* was for that reaſon held void. *Vide Mod. Rep. vol.* 5. *p.* 368.

Hilary, 10 *W.* 3. *The King* v. *Fell.*

Fell, the keeper of *Newgate*, was indicted for the eſcape of *B.* who was committed for *high treaſon*, in conſpiring the death of the King. On not guilty pleaded, a verdict was given for the King: And it was moved in arreſt of judgment, that it was ſaid in the indictment only that *Fell* ſuffered *B.* to eſcape, being in his cuſtody, *charged with high treaſon*, &c. and does not ſhew, that he was *committed* for *high treaſon* to the cuſtody of the defendant. And on this exception judgment was arreſted.

Per Holt, Chief Juſtice. If a man be in the cuſtody of *Fell* for *treſpaſs*, and another perſon goes before a juſtice of peace and ſwears *high treaſon* againſt him, he will be in the cuſtody of *Fell*, and alſo charged with *high treaſon*; but ſince he was not *committed* to *Fell* for *high treaſon*, he ſhall not anſwer for his eſcape. The precedents are, *for which cauſe he was committed.* And in the caſe on the eſcape of Lord *Grey*, the *mittimus* was ſet out; and though error in the *commitment* will not excuſe the goaler (as if a man be *committed* for *high treaſon* there to continue till further order) if he permits the man to eſcape, yet the goaler ſhall never be charged for the eſcape of the man, as *committed* for an offence, for which he never was *committed* to him.

Another exception was, that it was ſaid, *B.* was *committed to the priſon of Newgate under the cuſtody of the ſheriff*, ſo that it did not appear that he was *committed* to the cuſtody of *Fell*; and alſo that to ſay, *that he was committed to the priſon*, &c. was inſenſible, becauſe a man cannot be *committed* to a place, but to a perſon, &c. To the firſt point, the court held, that it was well enough. For if *B.* was *committed* to the ſheriff, and the goaler permits him to eſcape, the goaler is liable; for the priſoner is in the cuſtody of both. And though ſome ſcruple has been made, whether the ſheriff is in ſuch caſe chargeable, (ſee *Hale, P. C.* 114.) The ſheriff ſhall not be charged criminally, *viz.* to extend to life or limb; though he is liable to payment of damages in an eſcape for a civil cauſe) without doubt he is; for by *ſtat.* 14 *Ed.* 3. *c.* 10. the ſheriff ought to put in ſuch a goaler as he will be anſwerable for; and *ſtat.* 19 *H.* 7. *c.* 10. which reſtores the goals to the ſheriff, ſays, that in all caſes where the goals belong to the ſheriff, he ſhall be chargeable for eſcapes.

And as to the ſecond point, *Holt*, Chief Juſtice, ſaid, it was according to the precedents; for *commitments* to *priſon*, and the *Tower of London*, are frequent, and ſuch *commitment* is a good *commitment* to the Lieutenant of the *Tower*. A third exception was, that it did not appear (admitting *B.* to have been *committed* to the priſon for high treaſon) that he was under ſuch *commitment* at the time of the eſcape; for it may be he was pardoned, &c. But this was over-ruled; for *Holt*, Chief Juſtice, held, that ought to come from the other ſide. And if a man was pardoned, yet the ſheriff ought not to take notice of it until his pardon was allowed in this or ſome other court; for the ſheriff cannot allow the King's pardon; and it is criminal in him to permit a priſoner to eſcape before ſuch allowance had. *Vide Raym. vol.* 1. *p.* 424.

Michaelmas, 10 *W* 3. *Anonymous.*

An attachment was granted againſt a man, and he was reported in contempt: and being fined, and *committed* in execution for it, he eſcaped.

And on a motion being made for a new attachment, *Holt*, Chief Juſtice, was of opinion it could not be granted, but a ſpecial *ſcire facias* ought to be ſued out, reciting the whole matter, why the King ſhould not have execution for the fine. But at another day (*Holt* being abſent) an attachment was granted. *Vide Raym. vol.* 1. *p.* 396.

Hilary, 11 *W.* 3. *The King* v. *Chandler.*

The defendant was brought into this court on an *habeas corpus*, to which the warrant of his *commitment* was returned. And on two exceptions taken to his *commitment*, he was diſcharged.

The firſt was, that it did not ſufficiently appear that the defendant had not ſufficient diſtreſs, (he being *committed* on a conviction on the new act againſt deer-ſtealing) and therefore it was ill; for if he had ſufficient diſtreſs, the juſtices of peace had not any power to *commit* him to priſon; but the warrant of *commitment* only recited, that *Chandler*, of the pariſh of *Hadley* in the county of *Middleſex*, was convicted, &c. and becauſe he did not pay the forfeiture, the juſtice iſſued his warrant, directed to all conſtables, &c. and that the conſtable of *South Mims* in the ſaid county had made return, that the defendant had no goods in *Hadley*, theſe are therefore, &c.

Per Holt, Chief Juſtice, and *Gould*, Juſtice. The ſtatute is not purſued, for the return of the conſtable is nothing to the purpoſe.

The ſecond exception was, that the conſtable of *South Mims* could not return a matter of fact done in *Hadley*, becauſe it was out of his juriſdiction. And the whole court was of that opinion. *Vide Raym. vol.* 1. *p.* 545.

Michaelmas, 13 *W*. 3. *The King* v. *Symonds*.

The defendant was brought into this court on an *hab. corp.* directed to the keeper of *New Priſon*: and at the return thereof it appeared, that ſhe was committed by Mr. *P.* a juſtice of peace, to *New Priſon*, becauſe ſhe was a lewd, idle, and diſorderly perſon, for that ſhe was found in a reputed bawdy houſe: and it was moved that ſhe might be diſcharged, becauſe the *commitment* was illegal; 1ſt. Becauſe the bare being found in a bawdy-houſe was no cauſe of *commitment*. 2dly. Becauſe the juſtices of the peace could not *commit* to *New Priſon*.

Per Holt, Chief Juſtice. The barely being in a ſuſpected houſe at a time not unſeaſonable, ſhall never be a cauſe of *commitment*; but the juſtices may commit a lewd, idle, diſorderly perſon; therefore, a general *commitment*, that ſhe was an idle and diſorderly perſon, had been good. But here the juſtice of peace aſſigns that for cauſe of idleneſs and diſorderlineſs, which is no cauſe, *viz.* the being found in a houſe of ill repute; and therefore this *commitment* ſeems ill.

But on reading ſeveral *affidavits* concerning the debauchery and obſcene actions of the defendant, the court refuſed to diſcharge her without bail, which ſhe not being able to find, was *committed* to the *Marſhalſea*. *Vide Raym. vol.* 1. *p.* 699.

Michaelmas, 13 *W*. 3. *Pollard* v. *Gerrard*.

A motion was made for a prohibition to be directed to the court of the Archdeacon of *Middleſex* to ſtay a ſuit brought there by *Gerrard* againſt the plaintiff for fees, *viz.* 4 *s.* due to him as Regiſter from *Pollard*, who had been ſworn before him, churchwarden of the church of, *&c.* on ſuggeſtion, that the office of Regiſter is a temporal office, and all profits and fees due to it ſuable at common law. And a rule was made to ſhew cauſe why a prohibition ſhould not be granted. And the plaintiff's council ſhewed cauſe againſt it, but agreed prohibitions had been granted to ſtay ſuits there for fees due to proctors; but in this caſe the Spiritual Court may make a better judgment, whether the fees in demand are due and reaſonable. Beſides, that they are ſo ſmall, that it would not be worth while to bring an action at common law for them; and in ſuch caſe, this court will not drive the party to the tedious and expenſive remedy of an action. In this court, the door-keepers claim fees by cuſtom, and fees are due to the marſhal, cryer, *&c.* at the aſſizes; and in ſuch caſes, if the parties who ought to pay the fees refuſe to do it, this court, or the judge of aſſize, reſpectively exert their authority, and *commit* perſons refuſing to pay their fees, and do not drive the party aggrieved to bring an action; and this is the conſtant practice.

Holt, Chief Juſtice, ſaid, he knew of no ſuch practice; and *he* could not commit a man for not paying his fees. If there is a right, there is a remedy; and an *indebitatus aſſumpſit* will lie, if the fee is certain; if uncertain, a *quantum meruit*. It was held, 15 *Car.* 2. in the *Exchequer*, that a Regiſter cannot ſue for his fees in the Spiritual Court. And therefore a prohibition ſhall be granted, and if the plaintiff pleaſes he may declare on it, to the end that the matter may be determined more judicially. *Vide Raym. vol.* 1. *p.* 703.

Hilary, 1 *Ann.* *Hollingſhead's Caſe*.

Hollingſhead was brought into this court on an *habeas corpus*; and the return was, that ſhe was *committed* by the commiſſioners of bankruptcy for refuſing to be examined by them; and the concluſion of the warrant of *commitment* was, that ſhe ſhould remain in cuſtody, until ſhe ſhould be otherwiſe diſcharged by due courſe of law. And by reaſon of this concluſion, the court held the *commitment* to be ill, and diſcharged the defendant; becauſe the power given by *ſtat.* 1 *Jac.* 1. *cap.* 15. is to *commit* the party until he ſubmits himſelf to the commiſſioners, and ſhall be by them examined. And there is no mention made of being diſcharged by due courſe of law. *Vide Raym. vol.* 2. *p.* 851.

Hilary, 2 *Ann.* *The Queen* v. *Langley*.

The defendant was indicted for ſpeaking certain words of the mayor of *Saliſbury*, viz. "You, Mr. "mayor, I care not a fart for you," at one day; and on another day, "You are a rogue and a raſcal." And to this indictment the defendant demurred.

Per Holt, Chief Juſtice. Theſe words do not tend more to the breach of the peace, whether ſpoken in his preſence or abſence, to himſelf or to ſome other perſon. A magiſtrate may *commit* the party for ſpeaking ſuch words, if he refuſes to find ſureties for his good behaviour; but ſuch *commitment* muſt be made preſently.

Per curiam. Let the indictment be quaſhed. *Vide Raym. vol.* 2. *p.* 1029.

Michaelmas, 2 *Ann.* *Elderton's Caſe*.

Elderton was committed by the *Board of Green Cloth*, for executing a *fi. fa.* in *Whitehall*, and on the return of a *habeas corpus* it was argued to be lawful, and not at all prejudicial to the privilege of the *palace*, and that they had no power to commit for breach of the peace, having a power only over the Queen's family, for the government of the menial ſervants, and that the privilege of *Whitehall* was by *ſtat.* 28 *H.* 8.

The Attorney General on the other ſide argued, that there is a ſtanding commiſſion of the peace for the *verge and palace*, and that the officers of the *Green Cloth* are always commiſſioners; and that *ſtat.* 28 *H.* 8. did not create the privileges of a *palace*, but only aſcertained the boundaries thereof, for the Queen may declare any houſe to be her palace without the parliament; and ſuch declaration being made under the great ſeal, it afterwards continues a palace, though the Queen does not reſide there.

Powell, Juſtice. The privilege of the *palace* is by *common law*, and that in reſpect of the King's preſence: breaking the Exchequer hath been held to be *burglary*, though none of the King's money was there; and one *Jones* had his hand cut off for a murder *committed* by him in the Tower, and was afterwards executed.

Holt, Chief Juſtice, doubted the caſe of *burglary* in breaking the *Exchequer*, *&c.* and denied *Jones*'s caſe, becauſe the ſame fact cannot be a *miſpriſion* and a *murder*, for the one will extinguiſh the other; he ſaid, that it was true, his hand was cut off, but it was without any manner of authority, for he had ſeen the roll, and there was no judgment for it; he was of opinion, that where the *Queen* was totally abſent, and neither preſent by herſelf, or by any of her domeſtics or family, the place has no privilege; but it is otherwiſe where it was only a perſonal abſence for a little time: the *Queen* at this time was at *Windſor*; now whilſt ſhe was there, ſuppoſe a murder had been *committed* in *Whitehall*, ſhall the fact be tried before the Lord Steward? and he held that it ſhould not. *Vide Raym. vol.* 2. *p.* 978.

Eaſter, 4 *Ann.* *Laiton*, or *Layton's Caſe*.

The defendant was brought into court by a *habeas corpus*, having been *committed* by the *Lord Mayor* of *London* on his own view, for a forcible entry into the *Fleet priſon*, and a forcible detainer thereof. The title *Layton* claimed by was, that this priſon was by a judgment of this court, ſeized in the Queen's hands, under whom he claimed. And the exception taken was, that it did not appear that the *commitment* was made by a juſtice of peace; for the ſubſcription was by *Owen Buckingham*, mayor, and did not ſay juſtice of peace; it is neceſſary that the perſon who *commits* for a forcible entry ſhould entitle himſelf to a juriſdiction, by ſubſcribing himſelf a juſtice of the peace. 2dly. A juſtice cannot ſet a fine by virtue of the *ſtatute*, but ought to refer to the *quarter ſeſſions*. 2 *Cro.* 41. *Keilway*. What power the juſtices have ought to be executed *inſtantly*. Another *exception* was, that it was held to be within the *liberties*, and not within the *city itſelf*; for the *Lord Mayor* has not juriſdiction every where within the liberties. The *Attorney General*, in anſwer to the *objection*, obſerved, that the *Lord Mayor* did not ſhew himſelf to be a juſtice, and ſaid, the court would couple the warrant to the conviction; for that, he ſaid, was the reaſon of removing it hither by *certiorari*, whereby it would appear to the court, that there was a judgment to ground the warrant of *commitment* on. And it was further *argued*, that the *Lord Mayor*, *by virtue of his office*, before any acts of parliament for juſtices of the peace, was a *conſervator of the peace*; and thereof the court would take notice, and alſo on account of *ſtat.* 8 *H.* 6. which makes all *mayors* juſtices of the peace; and the warrant has a reference to the conviction; and as long as the conviction ſtands, the warrant ſhall be ſupplied by a reference to that. By the record it appeared to be all done *inſtantly*. The council for the Queen ſaid, this is a *commitment* in execution. *Stat.* 15 *Rich.* 2. is founded on *ſtat.* 5 *R.* 2. and ſo is *ſtat.* 8 *H.* 6.

Per cur. A juſtice of peace may ſet a fine, but he ought immediately to *commit* the perſon, where by his own view he finds a forcible detaining: and then, as he is a judge of record, he may adjourn his court, and then ſet a fine on him, and *commit* him in the mean time. As for the *objection* of his ſigning *mayor*, and not *juſtice*, it was ſufficiently anſwered, for that defect was ſupplied by the ſtatute, which makes all mayors juſtices. *Vide Mod. Rep. vol.* 11. *p.* 46.

Eaſter, 4 *Ann.* *The Queen* v. *Weſt.*

See this caſe fully ſtated in page 220 of this work, under the head *Baſtards*,

Eaſter, 4 *Ann.* *Anonymous.*

A man brought to this court by a *habeas corpus* on a *commitment* by juſtices of peace, who have cognizance of the cauſe, is not bailable till the order is quaſhed; becauſe till then he is in execution. *Vide Mod. Rep. vol.* 11. *p.* 45.

Eaſter, 4 *Ann.* *Cockcroft* v. *Smith.*

On the ſtatute of forcible detainer, where the juſtice finds it on his own view, he muſt immediately *commit*, and cannot adjourn the *commitment*, but it muſt be done *inſtantly*; as in the caſe of auditors on account; the ſame if he has recorded the force: but *Holt*, Chief Juſtice, ſaid, ſo long as the matter is under examination, he may adjourn.

When a perſon comes to this court on an *habeas corpus*, and this court thinks fit to turn him over to the *Marſhal*, they *commit* him for no other matter than for the cauſe or cauſes returned on the *habeas corpus*.

Per Holt, Chief Juſtice. A juſtice that has power to ſet a fine, has power to bail; for he is not obliged and bound to *commit*; but after the perſon is once *committed* in execution, it is too late to move for bail. *Vide Mod. Rep. vol.* 11. *p.* 52.

Michaelmas, 6 *Ann.* *The Queen* v. *Simmons.*

See this caſe fully ſtated in page 221. of this work under the head *Baſtards*.

Michaelmas, 8 *Ann.* *The Queen* v. *Tooley & al.*

An indictment was found againſt the defendants for the murder of one *D.* and on *not guilty* pleaded, the jury found a ſpecial verdict.

The court being of opinion it was only *manſlaughter*, refuſed to give judgment, and on account of the late general act of pardon, the priſoners were diſcharged as to the indictment; but there being a writ of *appeal* delivered to the ſheriff, the court held, that they were in cuſtody on the appeal, by the delivery of the writ to the ſheriff. *Vide Raym. vol.* 2. *p.* 1296.

Hilary, 13 *Ann.* *The Queen* v. *Green.*

The defendant was convicted on the ſtatute for killing hares, &c. and hunting againſt that ſtatute; and being *committed*, was brought into this court by an *habeas corpus*, and the commitment appeared to be, till he ſhould be diſcharged by due courſe of law, when by the act he ought to have been *committed* for *three months*.

Per curiam. The *commitment* is wrong, therefore let him be diſcharged, for he is *committed* in execution, which is his puniſhment, and therefore ought to ſay how long, for he is not now to pay the 5 *l.*

Per Parker, Chief Juſtice. By *due courſe of law*, is, when ſome officer has ſomething further to do, but here is a determined puniſhment for ſuch a time, *The Queen* v. *Bracy* was a *commitment* by the commiſſioners of bankrupcy in this manner, when the act ſays he is *committed* till he be examined; Dr. *Groenvelt*'s caſe was ſo, when the *commitment* ſhould have been till he pay his fine. *Vide Forteſcue, p.* 274.

Trinity, 2 *Geo.* *The King* v. *Wyndham.*

See this caſe fully ſtated in page 178 of this work, under the head *Bail*.

Hilary, 5 *Geo.* *Anonymous.*

The *habeas corpus* act directs, that if a perſon *committed* for *high-treaſon* or *felony*, expreſſed in the warrant of his *commitment*, ſhall make his prayer and petition in open court, the firſt week of the term, or day the ſeſſions, to be brought to his trial, and ſhall not be indicted in the next term or ſeſſions after ſuch *commitment*, he ſhall be bailed.

Now, it was doubted, whether perſons *committed* by rule of court are intitled to the benefit of this act? And it was reſolved by two juſtices, viz. *Eyre* and *Forteſcue*, (abſent *Powys*, diſſentient, *Pratt*) that none are intitled to make their prayer but ſuch as are *committed* by a warrant of a juſtice of peace, or ſecretary of ſtate, and not thoſe *committed* by rule of court; for *that* is not within the meaning of the act of parliament, a *commitment* by *warrant*. *Vide Mod. Rep. vol.* 10. *p.* 429.

Hilary, 6 *Geo.* *The King* v. *Whitlock.*

The defendant being brought from *Newgate* by an *habeas corpus*; it appeared on the return, that he was *committed* for *deer-ſtealing*, as *ſtat.* 3 & 4 *W.* & *M. c.* 10. directs, not having ſufficient *diſtreſs*; and that this was done by one juſtice, under *ſtat.* 5 *Geo.* on which two exceptions were taken to the warrant.

1ſt. Becauſe it does not appear the conviction was ever affirmed in this court, or that the rule for confirmation was delivered to the juſtice; and the words of the ſtatute are, “ that *after* the confirmation of any “ conviction, and *delivering the rule* to the juſtice, it “ ſhall and may be lawful,” &c. Now, the word *after* makes what comes under it to be in the nature of a condition precedent, and imports ſomething previous to found the juriſdiction.

2dly. The juſtice only ſays, that it has been certified to him by the conſtable, that there was no *ſufficient diſtreſs*, whereas there ought to have been a warrant to levy, and a return to that, that there was *no diſtreſs*, it may be the conſtable only told him ſo.

Per Pratt, Chief Juſtice. The warrant is well enough; for as to the laſt objection, the word *certified* imports it to be in a legal manner. Then as to the other objection, we take notice of our own records, and by them it appears the conviction is confirmed. The ſtatute does not give the juſtice a new juriſdiction, but only revives his old ones, which was ſuſpended by the *certiorari*, and therefore this differs widely from the caſe of an order of removal, for there the overſeers are in nature of truſtees for the pariſh, and unleſs they complain, it is to be ſuppoſed there is no grievance, and it is likewiſe to give an original juriſdiction.

Eyre, Juſtice, was of a contrary opinion; however, the defendant was remanded. *Vide Stra. vol.* 1. *p.* 263.

Michaelmas, 10 *Geo.* *The King* v. *The Bail of Strudwick.*

See this caſe fully ſtated in page 197. of this work, under the head *Bail*.

Michaelmas, 10 *Geo*. *Lord Conningſby* v. *Steed*.

See this caſe fully ſtated in page 145. of this work, under the head *Attorney*.

Eaſter, 4 *Geo*. 2. *The King* v. *Catteral*.

On the return of an *habeas corpus*, the *commitment* was by juſtices of the peace, (authorized for that purpoſe by act of parliament) *for refuſing to account for toll by him received, and until he do account, and pay, what ſhall be due to the proprietors of the ſaid toll*.

Per curiam. The *commitment* is illegal, for no certain ſum is thereby appointed to be paid, and then the defendant may remain in priſon for life.

It was then moved to amend the *commitment*.

Per curiam. That cannot be allowed after the return is filed: therefore the defendant was diſcharged. *Vide Fitz-Gibbons, p*. 266.

Eaſter, 5 *Geo*. 2. *The King* v. *Smith*.

The defendant was brought up from *Oxford* goal by an *habeas corpus*, and appeared to be *committed* for want of ſureties in an action in the vice-chancellor's court, of injury and damage, to the value of 1000*l*. and by warrant, the beadles of the univerſity were required to carry him to priſon; and now, on motion, he was diſcharged. 1ſt. Becauſe the warrant was not directed to any goaler, but was only generally to carry him to priſon; and, 2dly. Becauſe it did not appear that the plaintiff had made any affidavit of a debt, without which the court below could not hold to bail. *Vide Stra. vol*. 2. *p*. 934.

Michaelmas, 5 *Geo*. 2. *The King* v. *Barns*.

The defendant being brought up on an *habeas corpus*, it appeared that he was *committed* by the vice-chancellor of *Oxford*, for carrying goods between *Oxford* and *London*, without an univerſity licence, there to remain till he gives ſecurity to carry no more, and to obſerve the ſtatutes of the univerſity for life.

Per curiam. It is an illegal *commitment*; therefore he muſt be diſcharged. *Vide Stra. vol*. 2. *p*. 917.

Hilary, 5 *Geo*. 3. *The King* v. *Joſeph Hall*.

The defendant was *committed* by two juſtices, on being convicted under *ſtat*. 17 *Geo*. 2. *cap*. 5. of being a *rogue* and a *vagabond*, and running away from his wife and family, whereby they became a burthen to the pariſh, on which he brought his *habeas corpus* in this court, and when brought up, his council made the following *objections* to the *commitment*, viz.

1ſt. That he was not convicted, which he ought to have been.

2dly. That it was not alledged that his wife and children were chargeable to the pariſh.

3dly. He was not *committed* for any limited time, but "till he ſhould be diſcharged according to the laws "and cuſtoms of this realm."

After hearing council on both ſides,

Lord *Manſfield* obſerved, that the *ſecond* and *third objections* were ſufficient to invalidate the *commitment*, and thought it was better not to give any haſty opinion about the neceſſity of a formal conviction; therefore the defendant was diſcharged. *Vide Bur. vol*. 3. *page* 1636.

Eaſter, 5 *Geo*. 3. *The King* v. *Ellen Taylor, late Bent*.

See this caſe fully ſtated in page 218. of this work, under the head *Baron and Feme*.

Common.

Eaſter, 4 *W*. & *M*. *Bruges* v. *Leer*.

On a right of *common* for ſheep; the jury find, he had *common* for ſheep *according as* he declared, and *further ſay*, he had *common* for cows too; and the court was moved, that the verdict did not warrant the preſcription, becauſe intire; and another is found than that on which the plaintiff declared.

Per curiam. The *common* is *ſeveral, diſtinct*, and *different*, for he that preſcribes for ſheep, cannot therefore preſcribe for cows.

Holt, Chief Juſtice, cited the caſe of *Johnſon* v. *Thoroughgood*. *Brown*. 177. 178. which is the very caſe in point. Therefore judgment was given for the plaintiff. *Vide Mod. Rep. vol*. 12. *p*. 25.

Eaſter, 5 *W*. & *M*. *Anonymous*.

Per Holt, Chief Juſtice. Where a *common* or *way* is claimed, the title ought to be ſet forth in the declaration; but for a fair, or franchiſe, which is no charge to another's ſoil, there the words *ought to have* are good with out any thing further. *Vide Mod. Rep. vol*. 12. *p*. 35.

Michaelmas, 6 *W*. & *M*. *The King* v. *Fox*.

The inhabitants of one pariſh had *common* appendant in certain waſte grounds which lay in another pariſh; and the queſtion was, whether the *commoner* ſhould pay taxes for this, and ſhould be aſſeſſed in the pariſh where the waſte lay, or in the pariſh where his farm lay? And it was held, that he ought to be aſſeſſed where his farm lay; for it is incident, and will paſs by the grant of the farm, &c. So that it is to be conſidered as a part of the farm, and the farm to be taxed higher. *Vide Salk. vol*. 1. *p*. 169.

—— 10 *W*. 3. *Richards* v. *Squibb*. *At Dorcheſter Lent Aſſizes*.

Per Holt, Chief Juſtice. If a man *preſcribes* for a certain number of cattle, as *appurtenant*, &c. it is not neceſſary, nor material to ſhew, that they were *levant* and *couchant*; becauſe it is no prejudice to the owner of the ſoil, the number being aſcertained. *Vide Raym. vol*. 1. *p*. 726.

—— 10 *W*. 3. *Hockley* v. *Lamb*. *At Wincheſter Lent Aſſizes*.

Per Holt, Chief Juſtice. 1ſt. A man may preſcribe for *common* for cattle *levant* and *couchant* on a meſſuage. 2dly, A man cannot preſcribe for *common* appurtenant to a farm; becauſe it is uncertain, of what a farm conſiſts, perhaps of ten acres, or of an hundred acres; but the preſcription ought to be laid, to a meſſuage and ſo many acres of land. But if there is an ancient farm, and the ſame lands always occupied with it; a man may have *common* of paſture, to depaſture his cattle tilling that farm. *Vide Raym. vol*. 1. *p*. 726.

Hilary, 12 *W*. 3. *Hockley* v. *Lamb*.

In an action of *treſpaſs* for taking of the plaintiff's cattle; the defendant juſtified the taking of them *damage feaſant* in his freehold. The plaintiff replied, and made title to *common* in the place where, &c. *a tempore fractionis campi* (it being a *common* field) till, &c. And on traverſe of the *common* taken by the defendant, and iſſue joined on it, a verdict was found for the plaintiff for the *common*. And it was ſeveral times moved in arreſt of judgment, that it was inſenſible and uncertain what *common* was here claimed; for *a fractione campi* is a word of the country perhaps, but the law does not underſtand what it means. And of that opinion was *Holt*, Chief Juſtice. But *Gould*, Juſtice, held, that on demurrer it would have been ill, but now it is good after a verdict.

Per Holt, Chief Juſtice. The verdict cannot aid a thing unintelligible; for it has only found the *common*, as the plaintiff has replied. But adjourned. *Vide Raym. vol*. 1. *p*. 645.

Woolſton v. *Slater*.

In *replevin*, the defendant avowed for *damage feaſant* on his *common*; and on demurrer to this *avowry* it was adjudged not good, becauſe he did not ſhew ſome particular damage to himſelf, or that he could not have his *common:*

For a *commoner* cannot juſtify diſtraining the beaſt of a ſtranger, without ſhewing he is damnified in his *common*. *Vide Salk. vol.* 2. *p.* 94.

Hilary, 2 *Ann.* *Emerton* v. *Selby*.

The defendant avowed a right of *common*, ſetting forth a preſcription of *common* for cattle *levant* and *couchant*, on ſuch a cottage.

Per curiam. It is good to a meſſuage or cottage, for cattle *levant* or *couchant*; but it has been queſtioned in the year 1653, whether it could be good of *common ſans* number; and the ſame has been of late in the *C. B.* but nothing done in it. And a cottage implies a court and backſide, for a cottage with leſs than four acres of land, is againſt *ſtat.* 31 *El. c.* 7.

Holt, Chief Juſtice, ſaid, he had known *levancy* and *couchancy* tried in an iſſue before *Hale*, and that *Hale* ſaid, the foddering of cattle in the backſide would ſuffice; and judgment was here given for the avowant.

Per curiam. It would be hard to defeat it, in caſe it was preſcribed to *common ſans* number. *Vide Mod. Rep. vol.* 6. *p.* 114.

Eaſter, 4 *Ann.* *Crowther* v. *Oldfield*. Error.

See this caſe fully ſtated in page 28 of this work, under the head *Actions*.

Eaſter, 4 *Ann.* *The Mayor of Winton* v. *Wilks*.

In this caſe, *Holt*, Chief Juſtice, ſaid, it has been held, that in an action of *treſpaſs* againſt a *commoner*, he may plead *not guilty*, and give his right of *common* in evidence; but I cannot think ſo, but he ought to plead *ſpecially*, and ſhew his title: it is otherwiſe of the Lord of the waſte, he may plead *not guilty*, and give his title in evidence. *Vide Raym. vol.* 2. *p.* 1129.

Eaſter, 4 *Ann.* *Anonymous*.

Per Holt, Chief Juſtice. A man who claims *common* in another man's land muſt ſet forth a title: but a man, who is in poſſeſſion, need not ſet out a title. *Vide Mod. Rep. vol.* 11. *p.* 53.

Trinity, 4 *Ann.* *Follet* v. *Troake et al'*.

In an action of *treſpaſs* for chaſing the plaintiff's ſheep, that were feeding on, and uſing *his common*; the following exceptions were taken to the defendant's plea.

1ſt. That the cuſtom was unreaſonable, for the drift to be made at the diſcretion of the ſteward; it ought to be on a ſurcharge, or at ſome certain times. 2dly. That theſe cuſtomary tenants muſt be taken to be copyholders, and then the preſcription is ill; for copyholders cannot preſcribe in a *que eſtate*. 3dly. That the cuſtom and preſcription were confounded. 4thly. That it was ſaid *by the cuſtom aforeſaid*, where it ought to be *by the cuſtom of the manor aforeſaid*.

But notwithſtanding, the court gave judgment for the defendant *niſi*, agreeing it was a reaſonable cuſtom for the Reeve to make a drift by the appointment of the ſteward. In caſe of *common ſans nombre*, if there is a ſurcharge, it muſt be remedied by a *writ of admeaſurement*. But where the *common* is for a certain number, there the drift is very reaſonable; for until a drift is made, it is hard to know whether there is a ſurcharge or not; and for that reaſon, drifts of *commons* may be by cuſtom, and there are ſuch cuſtoms in all waſtes. And it is unreaſonable to ſay, the drift ſhall not be, unleſs there is a ſurcharge, becauſe till the drift is made, it is not poſſible to know whether there is a ſurcharge or not; and the intent of the drift was, to diſcover the ſurcharge. This is alſo more reaſonable than a cuſtom to drive the *common* at a certain time; becauſe if that was the cuſtom, the *commoners* would ſurcharge the *common* all the reſt of the year, except at thoſe times; and ſo the cuſtom would be ineffectual for the purpoſe intended. As to the ſecond exception, it was reſolved, that cannot be taken by the copyholders, for they are *at the will of the lord*; and therefore they muſt be taken to be cuſtomary freeholders, and conſequently the preſcription in a *que eſtate* is good. Indeed, if they had been laid to be copyhold tenements, then they muſt have laid a cuſtom for the *common*, and the preſcription would have been ill. As to the third, they reſolved that the cuſtom and the preſcription were diſtinct, the preſcription for the *common*, and the cuſtom for the drift. And it might well be, that the freehold tenants have a *common* by preſcription, and a drift of that *common* by cuſtom. As to the fourth, they reſolved, that it was very fully laid before, that there was a cuſtom within the manor, *&c.* and that the words *by the cuſtom aforeſaid*, related to that.

Another exception was taken, that the cuſtom was ill, to impound them any where within the manor, for that they ought to be impounded ſomewhere within the waſte, and ought not to be drove out of that.

But the court reſolved, that it was good to impound them any where within the manor. *Vide Raym. vol.* 2. *p.* 1187.

Eaſter, 5 *Ann.* *Bromfield* v. *Kirber*. Error.

On a juſtification of a *treſpaſs* by the cuſtom of a manor, for *common* of *vicinage*. The extent of the word *vicinus*, 2 *Inſt.* on the ſtatute of *Morton*. *F. N. B.* 127. *b.* 128. *a.* 22 *H.* 6. *c.* 89. *Dier*, 47. *b.* was taken into conſideration, and *argued*, that no *common* can be of this kind, unleſs between two townſhips, manors, *&c.* next adjoining, and not where there is intermediate land; and that this *tort* originally was nothing but an excuſe of *treſpaſs*.

Per Holt, Chief Juſtice. People ought to take care to keep their cattle under their own inſpection, and not let them ſtray beyond their bounds. In pleading this kind of *common*, it ought to be pleaded mutual. If a man goes into the *common* of *vicinage* to drive his cattle off into his own *common*, (for he ought not to keep them in the *common* of *vicinage*,) he may juſtify this *treſpaſs*; but if they go into a third *common*, ſuch excuſe will not hold. *Vide Mod. Rep. vol.* 11. *p.* 72.

Trinity, 13 *Geo.* *Woadſon* v. *Nawton*.

In an action of *treſpaſs*, for taking and diſperſing a load of fern-aſhes; the defendant pleaded, that he was an occupier of land in *A.* the tenant whereof had right of *common*, and cutting fern on the *places in which*, &c. and that the plaintiff wrongfully came and cut fern, and burnt it, whereon the defendant came, and ſcattered it about, *as he lawfully might*, and on demurrer thereto; the defendant's council cited 1 *Roll. Abr.* 405. *pl.* 5. that a *commoner* may juſtify taking the cattle of a ſtranger, *damage-feaſant*, or abate hedges, 9 *Co.* 112. *b.* 2 *Mod.* 65. and the difference is, where it is the act of the lord, and the act of a ſtranger. *Lutw.* 1240, *Sti.* 428.

The court judged otherwiſe; for if the plaintiff did him any damage, he has his action: but after the plaintiff had burnt the fern, and thereby converted it to his uſe, the *commoner* had no right to come and diſperſe it: therefore judgment for the plaintiff. *Vide Stra. vol.* 2. *p.* 771.

Eaſter, 30 *Geo.* 2. *Cooper* v. *Marſhall*.

In an action of *treſpaſs* for breaking, entering, and digging up the plaintiff's cloſe, and filling up and ſpoiling the coney-burrows there, *&c.* the plaintiff laid a *ſecond count* in his declaration for doing the like in his *free warren*. The defendant, by leave of the court, pleaded ſeveral matters.

As to the *firſt count*, he pleaded a juſtification under a *right of common* in *twenty acres*, &c. and that the *coney-burrows* were wrongfully, *&c.* now erected, and kept up, whereby the ſaid *common* was ſurcharged and ſpoiled, ſo that he could not enjoy ſufficient *common* in the ſaid *twenty acres*, as of right he ought, therefore he juſtifies, *&c.*

To the *ſecond count* he pleaded *two juſtifications*, &c.

To theſe pleas the plaintiff demurred, and the defendant joined in demurrer; and on arguing the ſame, the court gave judgment as follows:

Lord *Mansfield*. The lord, by his grant of *common*, gives every thing incident to the enjoyment of it, (as *ingreſs*, *egreſs*, &c.) and thereby authorizes the *commoner* to remove every obſtruction to his cattle grazing the graſs which grows on ſuch a ſpot of ground, becauſe every ſuch obſtruction is directly contrary to the terms of the grant.

In the preſent caſe, the lord has done nothing contrary to the grant. He has not obſtructed the *commoner* from entering and putting in his cattle.

The lord has a right to put *conies* on the *common*; the *conies* themſelves naturally make the *burrows*, ſo that they are incident to the right of putting on the *conies*.

If the lord *ſurcharges*, the *commoner* is injured in his right of *common:* then what is his remedy? Not to *abate*, not to be his own judge in the matter. There is a certain line to be drawn; the lord has a right *ſo far*, and *no farther*. The *commoner* cannot deſtroy or drive off the *conies*, nor deſtroy the *burrows*. It being a *free-warren*, does not alter the caſe, ſo that the matter comes to this queſtion, whether it is *abateable?* And I think it is a clear caſe.

Deniſon, Juſtice, concurred with the Chief Juſtice.

Foſter, Juſtice, was of the ſame opinion, and ſaid, the defendant's juſtification is clearly bad, being founded on a *claim of right*, which cannot be maintained.

Per curiam, unanimouſly, let judgment go for the plaintiff. *Vide Bur. vol.* 1. *p.* 259.

Eaſter, 30 *Geo.* 2. *Cope* v. *Marſhall*.

The court in this cauſe gave the like judgment as in *Cooper* v. *Marſhall*, viz. judgment for the plaintiff. *Vide Bur. vol.* 2. *p.* 268.

Compoſition.

Eaſter, 1 *Ann.* *Feltham* v. *Cudworth*.

The plaintiff ſued out a *ſcire facias*, on a judgment for 817 *l.* 13 *s.* recovered by him as executor to *F. F.* in an action of *debt* brought by him againſt the defendant. The defendant, at the day of the return of the ſecond *ſcire facias*, (which, as well as the firſt, was returned *nihil*, &c.) pleaded the *ſtatute of compoſition*, 8 *W.* 3. averring that this *compoſition* was made for the equal benefit of all his creditors, in proportion to their debts, without any fraud, *&c.* and that the plaintiff had notice thereof, the day and place aforeſaid, and was requeſted to ſign it, but that he refuſed, *&c.*

On a demurrer, this caſe was argued ſeveral times at the bar; and the firſt exception taken by the plaintiff's council to the plea was, that the defendant had pleaded this *compoſition* to have been made by a *certain writing* of his creditors, ſubſcribed and ſealed by them, which is in judgment of law a *deed*; as when a perſon declares on a bond, he ſays, that the defendant by his *writing obligatory, ſealed with his ſeal*, &c. and then the defendant ſhould have pleaded with a *profert*; for all deeds made to the defendant himſelf, and pleaded by him, ought to be pleaded with a *profert*; and therefore, in this caſe, for want of pleading this deed of *compoſition* with a *profert*, it is ill.

2dly. That the *ſtat.* as it is pleaded, is, that every *compoſition* made for the equal benefit of all the creditors, in proportion to their reſpective debts, and ſubſcribed and ſigned by two-third parts in number and value, ſhall bind, *&c.* then the *compoſition* pleaded in the defendant's plea does not appear to be made for the equal benefit of all the creditors; for it is pleaded to have been made by two-thirds in number and value, and that they agreed to accept *two-pence* for every *pound* due to themſelves; ſo it was made for their benefit only, and not for the benefit of the other creditors; and, conſequently, the *compoſition* is not ſuch as will oblige the other creditors by the ſtatute.

3dly. That this act extended only to perſons impriſoned, or who abſconded for debt, before the 17th day of *November*, &c. but the defendant has not ſhewn that he abſconded for debt; for he has ſaid only, after ſhewing of his debts, that he was unable to pay his debts, *and being ſo unable*, he abſconded, *&c.*

4thly. That this *compoſition*, pleaded by the defendant, was not any *compoſition* within the meaning of the act, becauſe it does not appear that the defendant would be at any time obliged to perform it, *viz.* by payment of *two-pence* in the pound, *&c.*

Per curiam. This is no *compoſition* within the act, becauſe it may happen that the defendant ſhall never be obliged to perform it. For the agreement is, to pay *two-pence* in the pound, *ſo that* it be paid within *five* years next after, *&c.* which makes this circumſtance of time when the money ſhall be paid, a *condition precedent* to the *compoſition*; ſo that if that never be performed, there will be no *compoſition*. An agreement and *compoſition* within the act muſt be intended a final agreement, ſuch as the defendant ſhall be bound to, and from which he cannot vary. Therefore, until the money is paid, in this caſe, this will not be a *compoſition*; for if the money is not paid within the *five* years, the defendant will be at large from his agreement, and not obliged to pay the two-pence at all. And *Holt*, Chief Juſtice, (who pronounced the opinion of the court) ſaid, that although *(ſo that)* is held in *Lyttleton* to make a *condition ſubſequent*, yet that is in caſe of eſtates executed, but it is otherwiſe in caſe of things executory. Judgment was given for the plaintiff. *Vide Raym. vol.* 2. *p.* 760. *Mod. Rep. vol.* 7. *p.* 10.

Michaelmas, 1 *Ann.* *Greenway* v. *Freeman*.

In *debt* brought on a judgment; the defendant pleaded a *compoſition* made with two-third parts of his real creditors, *&c.* and the *ſtatute*; and in his plea averred, *that he withdrew himſelf, and abſconded from his uſual place of abode*, on ſuch a day, being unable to pay his *debts*, but does not ſay he abſconded *for debt*. And for this fault, judgment was given for the plaintiff, as it had been before in this court, in the caſe of *Southouſe* v. *Rutter*. *Vide Raym. vol.* 2. *p.* 810.

Michaelmas, 1 *Ann.* *Nicholls* v. *Tirrett*.

In *debt* brought on a *bond*, the defendant pleaded the ſtatute of *compoſition*, &c. an exception was taken to the plea, that the defendant only ſays, that he abſconded the 17th day of *November* 1696, and does not ſay, that he abſconded at the time of the making of the act. For the 17th day of *November* extends only to the being a priſoner for *debt*, but the abſconding ought to be at the time of the act, *&c.* and for this reaſon the plea was held ill, and judgment given for the plaintiff. The ſame point was reſolved in this court, *Trinity*, 2 *Ann*, in the caſe of *Couſins* v. *Calcutt*. *Vide Raym. vol.* 2. *p.* 811.

Trinity, 2 *Ann.* *Clarkſon* v. *Buſſey*.

In an action of *debt* brought on a bond, the defendant pleaded in *bar* a *compoſition* made with his creditors according to *ſtat.* 8 *W.* 3. to which the plaintiff demurred; and the following exceptions were taken by his council to the plea.

Firſt exception, The plea is, that he abſconded for debt on ſuch a day before the making of the *ſtatute*, but does not ſay that he abſconded at the time of making the *ſtatute*. And though he might be an inſolvent perſon before the making of the *ſtatute*, yet he may have recovered, and become ſolvent when the act was made.

Per Holt, Chief Juſtice. This is a plea in *bar*, and is ſufficient if it is good to a common intent; and in this caſe it ſhall be intended, that the defendant continued inſolvent to the time of the making of the *ſtatute*; and if he became ſolvent after the time alledged, and before the ſtatute, that ought to come on the plaintiff's ſide; for as it is pleaded, it is within the words of the *ſtatute*, *viz.* ſuch as have abſconded.

Powell, Juſtice. Agreed.

Second exception. The defendant has pleaded the agreement as a deed under ſeal; but does not produce it in court by a *profert*, as he ought to do.

Holt, Chief Juſtice. The *ſtatute* ſays an agreement ſubſcribed and ſealed, &c. and that does not import it to be by deed, for it may be under ſeal, and yet no deed, and therefore a *profert* is not neceſſary.

Third exception. By this agreement the defendant is to pay —— *per* pound, at a certain day, which is ſix months after the making of the *ſtatute*; and it is further agreed, that on payment thereof, the creditors ſhall give to the defendant general releaſes. Now this agreement cannot be within the meaning of the *ſtatute* to bind the non-ſubſcribing creditors, becauſe it obliges them to give releaſes for debts which have accrued to them ſince the act, and it will be unreaſonable to oblige the other creditors to releaſe them.

Per Holt, Chief Juſtice. This agreement muſt be underſtood to extend only to debts within the meaning of the *ſtatute*, *viz.* to debts due before the making of the *ſtatute*, and the agreement of two thirds of the creditors does not oblige the non-ſubſcribing creditors, with reſpect to any debt contracted after the making of the *ſtatute*; and although the ſubſcribing creditors may have obliged themſelves by this agreement to give releaſes to all matters to a day after the *ſtatute*, yet they cannot oblige the reſt as to any matter accruing after. Judgment for the defendant *niſi*, &c. *Vide Raym. vol.* 2. *p.* 967.

Michaelmas, 2 *Ann.* *Claxton* v. *Baſty.*

The ſtatute of *compoſition* of two thirds, &c. was pleaded in *bar*, and it was averred, that the defendant had abſconded at ſuch a time before the *ſtatute*; but did not ſay, that he had abſconded, or was in goal, at the time mentioned in the *ſtatute*; and the exception taken was, that for any thing that appeared in this plea, the defendant was ſolvent at the time of the *ſtatute*, and therefore not capable of the benefit thereof.

Per curiam. This being a *bar*, ſhall be good to a common intent; and if the defendant became ſolvent after the failure, it ought to come on the plaintiff's ſide by *replication*.

Second exception. That the defendant pleaded the *compoſition*, as a writing under hand and ſeal, *therefore* a deed, and by conſequence to be produced with a *profert*.

Per curiam. He only pleads it is ſigned and ſealed, but not to have been delivered as a deed ought to have been; and the *ſtatute* does not require a delivery, *therefore* no neceſſity for a *profert*.

Third exception. It is pleaded to have been made the 12th of *February* after the *ſtatute*, ſo it may have included debts become due after the *ſtatute*.

Per curiam. It ſhall only be a *compoſition* for the debts underſtood by the *ſtatute*, at leaſt as to the non-ſubſcribers, though it may be otherwiſe to ſubſcribers: *therefore* judgment for the defendant, *niſi*. *Vide Mod. Rep. vol.* 6. *p.* 58.

Eaſter, 3 *Ann.* *Smith* v. *Bartlett.*

In *debt* brought on a bond, and the late act of *compoſition* of two thirds in number and value of the creditors, pleaded in *bar*, averring, that he was indebted to the plaintiff in 49 *l.* the 17th of *November* 1667, and did abſcond, there was a replication, and rejoinder.

And an *exception* was taken to the declaration, that the abſconding ought to be averred on the 1ſt of *October*, being the time on which the ſeſſions began, and to which the act as to this part relates; and this appears plainly by the word *have* in the clauſe of abſconding in the *ſtatute*. Accordingly judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 6. *p.* 156.

Condition.

Trinity, 4 *W.* & *M.* *Thomas* v. *Howell.*

A perſon deviſed to his eldeſt daughter, on condition ſhe ſhould marry his nephew, on or before ſhe attained the age of twenty-one. The nephew died young, and the daughter never refuſed, and indeed never was required to marry him: after the death of the nephew, the daughter being about ſeventeen years of age, married *J. S.* And it was *adjudged* in *C. B.* that the condition was not broken, being become impoſſible by the act of God; and the judgment was afterwards affirmed in *error* brought in this court. *Vide Salk. vol.* 1. *p.* 170.

Eaſter, 7 *W.* 3. *Avery* v. *White.*

In *debt* on a bond *conditioned* to pay money; on *oyer* thereof it appeared, that the uſual concluſion of a *condition*, viz. *that then this obligation ſhall be void*, &c. was omitted: and therefore the plaintiff's council argued, that the bond was ſingle. *But not allowed.*

Per curiam. The *condition* being to pay money, is a good defeazance of the bond; and if the obligor pays the money, the obligation ſhall be void. But no judgment was given, becauſe the parties agreed. *Vide Raym. vol.* 1. *p.* 38.

Michaelmas, 8 *W.* 3. *Hulbert* v. *Watts and Wife.*

In *debt* on a bond brought againſt the defendant and his wife, as executrix of *C. C.* The defendant prayed *oyer* of the *condition*, which was, to perform certain *covenants* contained in an indenture, bearing the ſame date with the bond, in which *C. C.* covenanted with *R. Hulbert*, &c. for himſelf, his heirs and executors; that if the ſaid *R. Hulbert* ſhould pay to *C. C.* his heirs or aſſigns, 100 *l.* within *five* years after the date of the indenture, that then *C. C.* his heirs and aſſigns, at the proper charges of the ſaid *R. Hulbert*, ſhould transfer to him, &c. the tenements, &c. free from all incumbrances by *C. C.* his heirs and aſſigns. The defendants plead, that *C. C.* was ſeized of the tenements, &c. in *fee*, and being ſo ſeized, the 19th day of *Nov.* 3 *W.* & *M.* by his will in writing, deviſed them to his daughter *K. B.* in *tail*, remainder to the defendant's wife in *fee*; that *K. B.* died without iſſue, whereby the lands came to the defendant's wife, who is ſeized of them in *fee*; and that the plaintiff did not pay the ſaid 100 *l.* neither to *C. C.* in his life-time, nor to *K. B.* in her life-time, nor to the defendant's wife, &c. The plaintiff replied, that *K. B.* at the time of the death of *C. C.* was within the age of twenty-one years. The defendant demurred.

Per curiam. The deviſe to a perſon who was incapable to convey, within the *five* years, was a breach of the covenant; and it would be in vain to compel the plaintiff to pay the 100 *l.* to a man who was incapable to perform his part. For, as to the objection, that an infant may ſuffer a common recovery; though the King grant a privy ſeal, yet it is in the diſcretion of the court, whether they will permit it to paſs: and the court will not permit it, but when it will be advantageous to the infant; and though it is paſſed, yet it is avoidable by *error*. Judgment for the plaintiff *niſi*, &c. *Vide Raym. vol.* 1. *p.* 112.

10 *W.* 3. *Clerk* v. *How.*

It was ruled by *Holt*, C. J. at *Brentwood* ſummer aſſizes, on evidence given at *niſi prius*, that if copyhold land is ſurrendered to the uſe of a will, &c. and afterwards the will deviſes this land to *B.* and his heirs, on *condition* that he pays 100 *l.* within ſix months after the death of the deviſor to *J. S.* if the money is not paid, *J. S.* ought to be admitted, and then he muſt make an actual entry before he can ſurrender. And therefore, in the preſent caſe, a ſurrender made by *J. S.* before actual entry, was held ill. *Vide Raym. vol.* 1. *p.* 726.

Trinity,

Trinity, 12 *W.* 3. *Levintz* v. *Randolph.*

In *debt* on a bond for 40 *l.* brought by Mr. Serjeant *Levintz*, as late treaſurer of *Gray's Inn*, againſt the defendant, a counſellor at law, and member of the ſame ſociety; the defendant craved *oyer* of the *bond* and *condition*, which was, "that if the above bounden "*Herbert Randolph* ſhall from time to time, and at all "times hereafter, well and truly pay, or cauſe to "be paid, all ſuch ſum and ſums of money as ſhall "become due by him for commons, vacations, pen-"ſions, dues and duties whatſoever, belonging unto "*Gray's Inn*, and ſhall obſerve all ſuch order and "orders of penſions as ſhall be made from time to "time, and at all times hereafter, in *Gray's Inn* "aforeſaid, that then, *&c.*" On which the defendant pleaded a *general* performance.

On demurrer, the following exceptions were taken to the plaintiff's replication:

1ſt. That in the aſſignment of the breach, no demand was alledged, which ought to be, becauſe it was an uncertain payment. 2dly. The breach is not poſitively alledged, for it may be the defendant has paid his penſions to the treaſurer, and the treaſurer did not pay them to the ſociety, and then they will be arrear to the ſociety, and yet not due from the defendant. *But not allowed.*

Per Holt, Chief Juſtice. No demand is neceſſary for this ſum, being a ſum in groſs.

Per Gould, Juſtice. The defendant here, after pleading a general performance, is *eſtopped* to ſay that there was no demand. To which the Chief Juſtice agreed. *Cro. Car.* 76. *Chapman* v. *Chapman.* 2dly. The alledging that ſo much was in arrear for penſions from the defendant, is a ſufficient breach; for if they had been paid to the treaſurer, that had been payment to the ſociety, and ſo they had not been in arrear. But it had been better pleading, to have ſaid, that the defendant had not paid, *&c.* And judgment was given for the plaintiff *niſi*, &c. *Vide Raym. vol.* 1. *page* 594.

Eaſter, 13 *W.* 3. *Atkinſon* v. *Morrice.*

In an action on the *caſe* brought for a certain ſum of money for the uſe of a coach and horſes for a year; it appeared on the evidence, that *M.* agreed to give *A.* ſo much for the uſe of a coach and horſes for a year; and *A.* agreed further with *M.* to keep the coach in repair; it was averred, that the coach and horſes were delivered to *M.* but nothing ſaid as to the repair.

Holt, Chief Juſtice, held, on this evidence, that repairing was not a *condition precedent*, and therefore need not be averred; but if the agreement had been, that *A.* had agreed to lend *M.* a coach and horſes for a year, and to repair the coach, and for that *M.* had promiſed ſo much money, then the repairing would have been a *condition precedent*, neceſſary to be averred. And though in this caſe it was not expreſsly averred, that *M.* had the uſe of the coach for a year; yet it being ſaid, it was delivered to him, it ſhall be ſo intended, if the contrary is not ſhewn on the defendant's ſide. Accordingly judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 12. *p.* 503.

Eaſter, 13 *W.* 3. *Thorpe* v. *Thorpe.*

In an action on the *caſe*, the plaintiff declared on a diſcourſe concerning a mortgage, whereon the plaintiff agreed to releaſe his equity of redemption in two cloſes, and in conſideration thereof the defendant promiſed to pay him 7 *l.* and to acquit him of all money due on the mortagage; and that the defendant, in conſideration of the ſaid agreement, and that the plaintiff had promiſed to perform every thing on his part, and in fact ſays, that tho' he had performed all on his part, the defendant had not paid him the 7 *l.* The defendant pleaded, that after the promiſe made, the plaintiff gave him a releaſe of all actions; the plaintiff craved *oyer* of the releaſe, and by the *oyer* it appeared to be a releaſe of the equity of redemption, and thereon the plaintiff demurred.

The court held, that the plaintiff was not intitled to the 7 *l.* nor to an action for it, till he made a releaſe of the equity of redemption, and therefore the promiſe being not broken at the time of the releaſe, is not diſcharged by the releaſe, though it be a releaſe of all demands. *Vide Cro.* 171. 5 *Co.* 70. As to the mutual promiſes, they related to an agreement, which makes the releaſe a *condition precedent.*

Holt, Chief Juſtice, laid down this rule, that in executory contracts, if the agreement be, that the one ſhall do an act, and for the doing thereof the other ſhall pay, *&c.* the doing of the act is a *condition precedent* to the payment, and the party who is to pay ſhall not be compelled to part with his money, till the thing be performed for which he is to pay. *Vide* 15 *Hen.* 7. 10. *b.* 1 *Vent.* 177. 214. But on this rule he made theſe diſtinctions:

1ſt. If a day be appointed for payment of the money, and the day is to happen before the thing can be performed, an action may be brought for the money before the thing be done; for it appears the party relied on his remedy, and intended not to make the performance a *condition precedent.* 48 *E.* 3. *c.* 3. 7 *Co.* 100. *b.* 1 *Vent.* 147. 1 *Saund.* 319.

2dly. Where a certain day of payment is appointed, and that day is to happen ſubſequent to the performance of the thing to be done by the contract, in ſuch caſe performance is a *condition precedent*, and muſt be averred in an action for the money, and ſo is 1 *Jones* 218. to be underſtood. *Vide Dyer* 76. *pl. contra.* and 1 *Ro.* 414, 415. But theſe and ſome other books, which are contrary, are not law; for every man's bargain ought to be performed as he intended it: when he relied on his remedy, it is but juſt that he ſhould be left to it according to his agreement; but on the contrary, there is no reaſon a man ſhould be forced to truſt where he never meant it. *Vide Mod. Rep. vol.* 12. *p.* 455. *Raym. vol.* 1. *p.* 662. *Salk. vol.* 1. *p.* 171.

Eaſter, 1 *Ann.* *Feltham* v. *Cudworth.*

See this caſe fully ſtated in page 269 of this work, under the head *Compoſition.*

Trinity, 2 *Ann.* *Pullerton* v. *Agnew.*

On a *ſci. fac.* againſt bail, reciting a recognizance taken in the time of the late King *William* 3. wherein the condition was, that the defendant ſhould render his body *to the priſon of the Marſhal of the Marſhalſea of our Lady the now Queen.* It was urged that the *condition* was impoſſible, and in conſequence the recognizance ſingle.

Per Holt, Chief Juſtice. Where the *condition* is under-written or indorſed, there that is only void, and the obligation is ſingle; but where the *condition* is part of the *lien* itſelf, and incorporated therewith, if the *condition* be impoſſible, the obligation is void; and the court inclining that it was ill, the plaintiff prayed his writ might be abated for his own expedition. *Vide Salk. vol.* 1. *p.* 172.

Michaelmas, 3 *Ann.* *Fitzhugh* v. *Dennington.*

See this caſe fully ſtated in page 89 of this work, under the head *Apprentice.*

Trinity, 4 *Ann.* *Page* v. *Hayward.*

In this caſe there were two general queſtions, 1ſt. Concerning the eſtate the ſiſters take. 2dly. Whether the recovery ſuffered is ſufficient to dock the *entail.* and reſolved *by the court.* 1ſt. *M.* takes an eſtate-*tail* in poſſeſſion, and the other an eſtate-*tail* in remainder.

Holt, Chief Juſtice, alſo ſaid, the ſtatute *de bonis* is not to be taken ſtrictly; but all limitations, within the meaning of the *ſtatute*, ought to be ſupported: words of an *expreſs condition* ſhall not be ordinarily conſtrued as a *limitation:* but where an eſtate is to remain over for a *breach* of a *condition*, which is by expreſs words a *condition*, yet it ought to be intended as a *limitation.* Suppoſe a *præcipe* is brought againſt a tenant in *tail*, and a ſtranger, is this a flaw?

Surely no; ſuch a recovery I hold good. 2dly, I hold a *tenant* in *tail* may well make a tenant to the *præcipe*. *Vide Mod. Rep. vol.* 11. *p.* 61.

Trinity, 6 *Ann. Hardwicke* v. *Gamball.*

A ſpecial verdict finds a ſettlement, in conſideration of natural love and and affection, to himſelf for life, then to truſtees to preſerve contingent remainders; remainder in tail male. *Provided*, if the tenant for life die without iſſue male of the body of his wife, and having daughters, the truſtees ſtand ſeized for thirty-one years, with intent to raiſe ſuch and ſuch legacies to the daughters. *Provided alſo*, that if the next iſſue male in remainder, within the *five years* pay the legacies, that then the truſtees ſhall ſtand ſeized to ſuch iſſue male as ſhould pay the legacies, with remainders over; the tenant for life dying without iſſue male or female, it was objected, that if the term never accrued, the remainders are void. 3 *Cro.* 465. *Dyer* 34. *b.*

Per Holt, Chief Juſtice. Though the *contingent term* never aroſe, yet the remainders are good, if the *precedent eſtate* to the term of years is ſufficient to ſupport the remainders.

It was then argued, that this remainder can never ariſe, it being a *condition precedent*, and not found that the legacies were paid; and that the remainders were void in their creation.

Per Holt, Chief Juſtice. The payment of the money was to let the iſſue male into poſſeſſion, notwithſtanding the term; and no payment was intended, unleſs there was a dying without iſſue male, leaving daughters. The clauſe, "and for default of iſſue male, remainder to the iſſue male," ſhould have been heirs male in remainder, and then there had been no doubt. And it was adjudged, that the remainder was good, and well veſted. *Vide Mod. Rep. vol.* 11. *p.* 119.

Michaelmas, 6 *Ann. The Archbiſhop of Canterbury* v. *Willis.*

In an action of *debt* on a bond, with *condition* to make an inventory, and exhibit the ſame in the *eccleſiaſtical* court before ſuch a day, it is not enough for the defendant to plead, that there was no court held, but he muſt plead alſo, that he was there ready, &c. for he muſt ſhew he has done all that could be done on his ſide towards a performance: thus, if the *condition* of a bond be to levy a fine *in eight days of St. Hilary*, by which *condition* the plaintiff is to ſue out the writ of *covenant*, it is not enough for the defendant to plead, that no writ of *covenant* was ſued out; but he muſt plead, that he was there ready at the day, &c. and no writ of *covenant* was ſued out; and ſo if a perſon be bound to pay money to *J. S.* at a certain time and place, it is not enough for the defendant to ſay, that the obligee came not, without ſaying, that he was there ready. *Per Holt*, Chief Juſtice. *Vide Salk. vol.* 1. *p.* 172.

Michaelmas, 7 *Ann. Wells* v. *Ferguſon.*

See this caſe fully ſtated in page 243 of this work, under the head *Bonds*.

Michaelmas, 12 *Ann. Turner* v. *Goodwin.*

See this caſe fully ſtated in page 129 of this work, under the head *Aſſignments*.

Michaelmas, 1 *Geo. Weddall* v. *The Bail of Jocar.*

See this caſe fully ſtated in page 182 of this work, under the head *Bail in Error*.

Eaſter, 3 *Geo. Freſhwater* v. *Eaton.*

On a *ſci. fa.* brought on a recognizance in the *Marſhalſea* court, to ſurrender the principal to the gaoler of the *Palace* court, if he ſhould be condemned in *error* of that judgment, by an affirmance on which the bail rendered the principal to the *King's Bench*, the whole proceedings being removed thither.

It was inſiſted, that this was no performance of the *condition*.

Parker, Chief Juſtice. On the ſurrender to the *Marſhalſea* court, *it is not known* to the officer that there is any charge againſt him there, and by that means he will be diſcharged; and if he is ſurrendered there, he muſt be removed to this court; it will therefore be leaſt trouble to ſurrender him here.

Eyre, Juſtice. The render ought to be where it will be moſt effectual.

Pratt, Juſtice. A *condition* to re-enfeoff is performed by leaſe and releaſe. *Co. Lit.* 207. *a.* 1 *Roll. Abr.* 426. *Carter* 88. *Plowd.* 7. *a.* 156. *b.* A *condition* to pay money, is performed by cauſing it to be paid. The intent of the *condition* in this caſe is anſwered by the defendant's being in priſon to anſwer the plaintiff's demand; and there are many caſes of *conditions*, where the law has never required a ſtrict performance according to the letter of the *condition*, provided the intent of the *condition* is anſwered.

Per curiam. The render is good, and a good performance of the *condition*. *Vide Strange, vol.* 1. *p.* 49.

Hilary, 6 *Geo. The King* v. *Whitlock.*

See this caſe fully ſtated in page 258 of this work, under the head *Commitment*.

Trinity, 7 *Geo. Merrit* v. *Bane.*

In an action brought on a *ſpecial* agreement to transfer ſtock, &c. the *Chief Juſtice* held, that an *aſſign* ſignifies no more than a perſon appointed to accept; and the payment of money is not a *condition precedent*, but a concurrent act. *Vide Strange, vol.* 1. *p.* 458.

Michaelmas, 9 *Geo. Blackwell* v. *Naſh.*

In *debt* brought for a penalty, the plaintiff declares, that he covenanted to transfer to the defendant, on or before the 21ſt of *September*, ſo much ſtock, and that the defendant *in conſideration of the premiſes*, covenanted to accept and pay *for it*; and then avers that he was at the books on the 21ſt of *September*, *and was ready and offered to transfer the ſame* to the plaintiff, who then and there refuſed to accept or pay.

On a demurrer it was objected, that the words *for it*, made it a *condition precedent*; 14 *H.* 4. *c.* 19. 5 *Co.* 21. 15 *H.* 7. 118. *Dy.* 76. 2 *Saund.* 352. and therefore to intitle himſelf to this action, the plaintiff ſhould have ſhewn an actual transfer of the ſtock; and particularly in this caſe, becauſe the covenant was not to pay the money till the day of transfer, which brings this caſe out of the diſtinction laid down in *Thorpe* v. *Thorpe*.

Per curiam. *In conſideration of the premiſes*, is in conſideration of the covenant to transfer, and not of an actual transfering, for which the defendant has his remedy; or if it was, a tender and refuſal would amount to a performance: in all theſe caſes, the great queſtion is, who is to do the firſt act? But when the transfer is to be *on payment*, there is no colour to make the transfer a *condition precedent*.

Therefore judgment was given for the plaintiff, *niſi*, but enlarged to next term, at the inſtance of the defendant's council: in *Hilary*, 9 *Geo.* the plaintiff had judgment without further argument, and in *Trinity*, 10 *Geo.* the judgment was affirmed in the *Exchequer Chamber*. *Vide Strange, vol.* 1. *p.* 535. *Mod. Rep. vol.* 8. *p.* 106.

Trinity, 9 *Geo. Lock* v. *Wright.*

The plaintiff declared, that the defendant by his writing indented, agreed with the plaintiff, that he (the defendant) would accept of the plaintiff 500 *l.* fourth ſubſcription, as ſoon as the receipt ſhould be delivered out by the company, and would pay for the ſame 950 *l.* on the 5th day of *November* next, after the date of the writing, and averred that the money was not paid at the day.

The defendant demurred *generally*; and his council objected, that the plaintiff had not ſhewn the delivery of any receipts, or an impoſſibility of doing it; and cited 1 *Lutw.* 245. *Salk.* 171.

The matter having been twice argued before, this term, *Pratt*, Chief Juſtice, delivered the opinion of the court.

This is an action on a *deed poll*, made by the defendant, and whereby he covenants to accept ſo much ſtock, and to pay for the ſame; and the plaintiff, in an action for the money, has not averred a delivery or tender of the ſtock, and for this fault, we are all of opinion the declaration is not good.

The intent of the parties appears to be, that one ſhould have the money, and the other the ſtock; and not that either ſhould perform his part of the agreement, and lay himſelf at the mercy of the other for the equivalent. This is not a *covenant* entered into by both parties, on which each will have his mutual remedy; but is the *deed poll* of the defendant only; and therefore, on delivery or tender of the ſtock, the plaintiff will have his remedy for the money; yet the defendant, on the other ſide, on payment of the money, will have no remedy to compel the delivery of the ſtock; and having no ſuch remedy, he ſhall not be obliged to pay the money till the conſideration for which it is payable is performed.

The word *for* will be either a *condition precedent* or *ſubſequent*, as will beſt anſwer the intent of the parties: in this caſe, it muſt be a *condition precedent*, becauſe otherwiſe the intention of the defendant to have the ſtock for his money can never take effect, and this is proved by 17 *Co.* 10. and 1 *Inſt.* 204. where the annuity *for one acre*, ſays the book, ſuppoſes the acre to be firſt granted.

The caſe of *Callonel* v. *Briggs* (*Salk.* 112.) was not ſo ſtrong, for there was a promiſe to transfer, which gave a mutual remedy; but yet, *Holt*, Chief Juſtice, held, the plaintiff muſt ſhew a tender, becauſe that was the conſideration for the plaintiff's tender of the money. And the caſe he there puts of the ſale of a horſe for 10 *l.* is exactly the ſame with this.

The reſolutions that were mentioned at the bar of the caſe of *Thorpe* v. *Thorpe*, are all founded on great reaſon, and the firſt of them is agreeable to the reſolution of this caſe, which is an executory contract, where one is to do the act, and for the doing thereof, the other is to pay.

And this difference between a *mutual covenant* and a *deed poll*, is likewiſe taken and allowed in the caſe of *Pordage* v. *Cole*, 1 *Saund.* 320. where the court were of opinion the defendant had his remedy; it would have been, (ſays the book) "otherwiſe, if the deed had "been the words of the defendant only," which is this caſe.

For theſe reaſons, we are unanimouſly of opinion the defendant muſt have judgment. *Vide Stra. vol.* 1. *p.* 569. *Mod. Rep. vol.* 8. *p.* 40.

Eaſter, 11 *Geo.* *Griffith's Caſe.*

In an action of *debt* on a bottomry bond *conditioned*, that ſuch a ſhip ſhould go from *London* to *Buenos Ayres*, and return thither within eighteen calendar months, without any *deviation*, (the danger of the ſeas excepted) and that then the obligor ſhould pay ſo much money, *&c.* within twenty days after ſuch return, or at the end of eighteen months.

The defendant in his plea did not anſwer the *deviation*, but pleaded that the ſhip did return within eighteen months, and that he paid the money within twenty days.

The plaintiff did not demur to this plea, (as he might, for not anſwering the *deviation*) but replied, and traverſed the return of the ſhip within eighteen calendar months. To which replication the defendant demurred, and the plaintiff joined in demurrer.

And it was now inſiſted for the plaintiff, that the *condition* being in the *disjunctive*, viz. to pay ſo much money within twenty days after the return of the ſhip, *or* at the end of eighteen months, the defendant might have pleaded performance of either part of the *condition*; and here he pleaded performance of one part, *viz.* that the ſhip did return within eighteen months: which being traverſed by the plaintiff, was confeſſed by the demurrer; ſo that one part of the *condition* being falſified by this demurrer, the plaintiff muſt have judgment; and by the opinion of the court, judgment was given for him accordingly. *Vide Mod. Rep. vol.* 8. *p.* 349.

Hilary, 12 *Geo.* *White* v. *Cleaver.*

In *debt* on a bond *conditioned* to indemnify the plaintiff, the defendant on *oyer* thereof, pleaded generally, *that he had ſaved him harmleſs*, without ſhewing *how*. And on a general demurrer it was agreed, the plea was ill before the *ſtatute* for the amendment of the law, for that no iſſue could be joined on it. 2 *Cro.* 165. *Hob.* 296. 2 *Cro.* 4. 2 *Cro.* 363. 503. 634. But then it was objected, that this ſhould have been ſhewn for cauſe of demurrer; and of that opinion was the court, for the ſubſtance is the *ſaving harmleſs*, and how that was done, is but a matter of form; ſo the plaintiff prayed leave to diſcontinue on payment of coſts, which was accordingly granted. *Vide Strange, vol.* 1. *p.* 681. *Raym. vol.* 2. *p.* 1416.

Hilary, 13 *Geo.* *Cheeſman or Cheſman & Ux.* v. *Nainby or Ramby.*

See this caſe fully ſtated in page 245 of this work, under the head *Bond.*

Michaelmas, 8 *Geo.* 2. *Tryon* v. *Carter.*

A bond was *conditioned* for the payment of money, on or before 5th of *December.* The defendant pleaded payment on the 5th of *December*, to which there was a *replication*, and a verdict for the plaintiff; but a repleader awarded, as being an immaterial iſſue: for it finds no breach of the *condition*, becauſe it might be paid before the 5th of *December*, and then the *condition* is performed: and it is not like the caſe where a *condition* is to pay on ſuch a day, for then there can be no legal payment till that day, an actual payment before being but in the nature of a depoſit till the day. But here it would be a legal payment at any day. 1 *Saund.* 102. *Vide Strange, vol.* 2. *p.* 994.

Michaelmas, 10 *Geo.* 2. *Fletcher* v. *Richardſon.*

In an action of *debt* on a bond, which on *oyer* appeared to be, that a receiver of rents of an eſtate ſhall account duly, and ſhall in all reſpects behave himſelf as a ſteward or receiver ought to do; the defendant pleaded, that he never received but one penny; which he paid to the obligee. The plaintiff demurred to the plea, and ſhewed for cauſe, that he had not pleaded, that he did in all reſpects behave himſelf as a ſteward ought.

Lord *Hardwicke.* The plea is bad, and what is ſhewn for cauſe of demurrer need not, for it is ſubſtance; for the rule in pleading *conditions* performed, is that where there is a negative and an affirmative, the pleader muſt not only ſhew, that he has not performed the negative; but likewiſe, that he has performed the affirmative.

The defendant's council then moved, that here is a diſcontinuance, the declaration being of *Hilary* term, and an imparlance to *Trinity* term.

Lord *Hardwicke.* But it is the courſe of this court to give the imparlance on the declaration till the day of pleading. Judgment for the plaintiff. *Vide Caſes Temp. Lord Hardwicke, p.* 322.

Eaſter, 13 *Geo.* 2. *Fitchet* v. *Adams.*

In *ejectment* on the demiſe of *R. H.* the jury found a ſpecial verdict to this effect; that *R. H.* (ſince deceaſed) being ſeized in fee of the premiſes in queſtion, and having a wife *M.* and a daughter *E.* of the age of ſix years, by his will, dated the 16th of *May*, 1722, deviſed to his wife and her heirs, but if ſhe marries again, then he appoints two truſtees to receive the rents, and apply them to the education of his daughter till ſhe comes of age, and in caſe of ſuch marriage of the mother, he deviſes to the daughter in fee. That *R. H.* died in *June*, 1722, and the wife entered and married a ſecond huſband, the 15th of *April*, 1723, and the daughter continued to live with, and was educated by her, till her, (the daughter's) death, the 5th of *May*, 1734, when ſhe died without iſſue, and unmarried; and the leſſor of the plaintiff was her couſin and heir. That the 22d of *May*, 1738, *J. W.* on behalf of the leſſor of the plaintiff did, without any previous authority, make an actual entry on the premiſes, claiming the ſame as the eſtate of the leſſor by virtue of his heirſhip to *E.* and that the leſſor having notice thereof, did the 5th of *June*, 1738, aſſent thereto.

On this caſe two points aroſe, 1ſt. Whether an *actual entry* was neceſſary. And 2dly, if it was, whether this was a ſufficient one?

The firſt of theſe depended on two queſtions, 1ſt. Whether this deviſe over was a *condition* or a *limitation*; for if it was the latter, an actual entry undoubtedly was not neceſſary. 2dly. That if it was a *condition*, then whether it would be neceſſary, this not being to avoid a fine.

Theſe were ſpoken to at the *bar*, but the court gave no opinion on them; being very clear on the ſecond point, that what was found, did amount to an *actual entry*, to ſupport an *ejectment*, being aſſented to before the day of the demiſe in the declaration. *Co. Lit.* 247. 258. 9 *Co.* 106. 1 *Roll. Abr.* 738. *pl.* 2, 3, 4. And they alſo held, that there was no occaſion, for its being by deed, or in writing. Wherefore the plaintiff had judgment. *Vide Strange, vol.* 2. *p.* 1128.

Michaelmas, 33 *Geo.* 2. *Collins* v. *Gibbs.*

See this caſe fully ſtated in page 158 of this work, under the head *Averment.*

Conſideration.

Hilary, 3 *W.* & *M.* *Potter* v. *James.*

An *aſſumpſit for money owing and unpaid* is not good, without ſetting forth a *contract*, or ſhewing for what the money is due. *Vide Mod. Rep. vol.* 12. *p.* 16.

Hilary, 6 *W.* & *M.* *Walker* v. *Walker.*

On an *indebitatus aſſumpſit* for money won at play; it was moved in arreſt of judgment, that an *indebitatus aſſumpſit* does not lie; for though the caſt of a die may alter the property, for where money is ſtaked it is given on a *condition precedent*, viz. the caſt of a die; yet this is not a *conſideration* to raiſe a *debt* or *promiſe*; but is only a *promiſe* againſt a *promiſe*, for which the ſole remedy is a ſpecial action on the *caſe* on the mutual promiſe; and to that opinion the court ſtrongly inclined. But becauſe the point in queſtion was depending in the *Exchequer Chamber*, in the caſe of *Jackſon* v. *Cotgrave*, judgment was ſtaid here; and it was held by the barons of the *Exchequer* on conſultation with the judges of this court, that an *indebitatus aſſumpſit* would lie: and *Holt*, Chief Juſtice, allowed it would lie by the *winner* againſt them who held *ſtakes*. *Vide Mod. Rep. vol.* 12. *p.* 69.

Hilary, 9 *W.* 3. *Taylor* v. *Jones.*

On an action of *aſſumpſit*, the plaintiff declared that he was a captain of a company of foot ſoldiers, and that one *T. J.* was a ſoldier in his company, and that the defendant, in *conſideration* that the plaintiff would permit the ſaid *T. J.* to be abſent from duty *ten days*, promiſed to bring the ſaid *T. J.* back, or to pay the plaintiff 20 *l.* The plaintiff in his declaration *averred*, that he permitted the ſaid *T. J.* to be abſent, &c. The defendant pleaded, that *T. J.* died within the *ten days*, *viz.* in *ſix days*, &c. The plaintiff replied, that he did not die within the time mentioned in the plea, and tenders an iſſue, to which the defendant demurred.

On arguing the demurrer, the defendant's council *urged*, that in this caſe there is no *conſideration* to maintain the action, for that the captain of a company has not any property in a ſoldier, to give him liberty to abſent himſelf from the *King's ſervice*. *But not allowed.*

Per curiam. When the captain ſees that he has not occaſion to uſe a ſoldier in the *King's ſervice*, he may give him leave of abſence, and it is lawful, and is a benefit to the ſoldier, but without the *captain*'s leave he cannot be abſent. Therefore judgment was given for the plaintiff *niſi*. *Vide Raym. vol.* 1. *p.* 312.

Michaelmas, 9 *W.* 3. *Weſt* v. *Cole.*

The plaintiff declared, that the defendant, on the 6th day of *May* 1695, in *conſideration* that the plaintiff had provided him *diet* for the ſpace of *one hundred and twenty weeks, then paſt*, *promiſed* to pay him 7 *s. per week*; and that the defendant *afterwards, to wit*, on the 6th day of *May* 1695, in *conſideration* that the plaintiff had found him *diet* for the ſpace of *one hundred and twenty weeks*, *then paſt*, *promiſed* to pay him, the plaintiff, *as much as he ſhould deſire*, for the ſaid time. It was moved in arreſt of judgment, that the defendant was twice charged for the ſame thing, the *one hundred and twenty weeks*, in the *quantum meruit*, being not ſaid to be *others* from thoſe in the ſpecial promiſe, as is uſually ſaid in thoſe caſes. But the court held, that though *(others)* is *generally* ſaid, yet ſeeing it did not appear they were the ſame, for there is no preciſe time laid when theſe *one hundred and twenty weeks* were, they will not intend them ſo as to deſtroy a *promiſe*, otherwiſe well laid: and therefore the plaintiff had judgment. *Vide Mod. Rep. vol.* 10. *p.* 157.

Michaelmas, 10 *W.* 3. *Auſtin* v. *Baker.*

On an *indebitatus aſſumpſit* againſt *B.* on a *promiſe* ſuppoſed to be made by him to pay for goods delivered by the plaintiff to *A.* *Holt*, Chief Juſtice, made this diſtinction, *viz.* if *B.* deſires *A.* to deliver goods to *C.* and *promiſes* to ſee him paid, there an *aſſumpſit* lies againſt *B.* though in that caſe, he ſaid, he always required the plaintiff to produce his books, to ſee to whom credit was given. But if after the goods are delivered to *C.* by *A.* *B.* ſays to *A.* "you ſhall be paid "for the goods," it will be hard to ſaddle him with the debt. *Vide Mod. Rep. vol.* 12. *p.* 250.

Michaelmas, 10 *W.* 3. *Harriſon* v. *Cage* & *Ux.*

See this caſe fully ſtated in page 23 of this work, under the head *Actions.*

Michaelmas, 10 *W.* 3. *Yard* v. *Ellard or Eland.*

See this caſe fully ſtated in page 205 of this work, under the head *Baron and Feme.*

Michaelmas, 10 *W.* 3. *Waters* v. *Glaſſop.*

The plaintiff declared, that the defendant's ſon was indebted to him in —*l.* and that he had a deſign to arreſt him; that the defendant, in *conſideration* that the plaintiff, at the ſpecial inſtance and requeſt of the defendant, would forbear to arreſt his ſon till the 23d day of *October*, aſſumed on himſelf to pay to the plaintiff, on, or before the ſaid 23d day of *October*, ſo much as the defendant's ſon ſhould be indebted to him on the balance of the account, to be ſtated between the defendant's ſon and the plaintiff; and the plaintiff averred, that an account was ſtated of all debts owing by the defendant's ſon to the plaintiff, and on that account the defendant's ſon was found indebted to the plaintiff in 20 *l.* and avers, that he forbore to arreſt the defendant's ſon from the time of the *promiſe hitherto*; and that the defendant did not pay the 20 *l.* On *non aſſumpſit* pleaded, a verdict was found for the plaintiff. And the defendant's council moved in arreſt of judgment, that the *conſideration* was not good; becauſe, ſince the plaintiff was to forbear till after the 23d day of *October*, and the defendant was to pay the money on or before, it might be, that after the defendant had paid the money, the plaintiff would not perform his part, but arreſt the defendant's ſon before the time agreed on by the *promiſe*. *But not allowed.*

Per curiam. The *conſideration* is well enough, for the defendant has till the laſt inſtant of the 23d day of *October* to pay the money, and the next inſtant for forbearance the plaintiff has performed his part, for he is not bound to forbear but only one inſtant after the 23d day of *October*, and therefore it is well enough.

A *ſecond exception* was, that the defendant aſſumed to pay all that ſhould appear to be due by the defendant's ſon to the plaintiff on the balance of the account to be ſtated between them, which is to be intended of all debts, due as well of the one ſide as of the other, here is only an averment, that an account was made of all debts due by the defendant's ſon to the plaintiff, but perhaps if an account had been ſtated of all debts due on both ſides, the plaintiff might have been found debtor to the defendant's ſon, and not *vice verſa*; and therefore the defendant aſſumed to pay only what ſhould be due on ſuch account; and therefore, for want of ſhewing that ſuch an account was ſtated, the plaintiff has not intitled himſelf to his action againſt the defendant. *But not allowed.*

Per curiam. We will not ſuppoſe after a verdict, that any thing was due from the plaintiff to the defendant's ſon. Therefore the plaintiff muſt have judgment. *Vide Raym. vol.* 1. *p.* 357.

Michaelmas, 12 *W*. 3. *Harman* v. *Owden*.

See this caſe fully ſtated in page 151 of this work, under the head *Averment*.

Eaſter, 13 *W*. 3. *Thorpe* v. *Thorpe*.

See this caſe fully ſtated in page 271 of this work, under the head *Condition*.

Eaſter, 1 *Ann*. *Sir George Tuke's Caſe*.

See this caſe fully ſtated in page 26 of this work, under the head *Actions*.

Eaſter, 1 *Ann*. *Meredith* v. *Chute*.

See this caſe fully ſtated in page 26 of this work, under the head *Actions*.

Michaelmas, 1 *Ann*. *Gould* v. *Johnſon*. Error.

See this caſe fully ſtated in page 27 of this work, under the head *Actions*.

Trinity, 2 *Ann*. *Coggs* v. *Bernard*.

Per Holt, Chief Juſtice. Truſting a perſon with goods is a ſufficient *conſideration* to oblige him to a careful management thereof. See this caſe fully ſtated in page 29 of this work, under the head *Actions*, and in page 189 under the head *Bailment*.

Michaelmas, 3 *Ann*. *Strong* v. *Courtney*.

See this caſe fully ſtated in page 34 of this work, under the head *Actions*.

Michaelmas, 3 *Ann*. *Thornborough* v. *Whitacre*.

See this caſe fully ſtated in page 34 of this work, under the head *Actions*.

Hilary, 4 *Ann*. *Moverley* v. *Lee*.

On an *aſſumpſit*, in *conſideration* that the plaintiff would provide meat and drink, *&c.* the defendant promiſed to pay him ſo much as the plaintiff *has deſerved*, and *avers*, that in fact he *has deſerved* ſo much, *&c.* On *non aſſumpſit* pleaded, and iſſue joined, a verdict was given for the plaintiff.

The defendant's council moved in *arreſt of judgment* on this ground, *viz.* that the promiſe was void to pay ſo much as the plaintiff *has deſerved*, which is the *præterfect tenſe*, and refers to the time paſt, and therefore could be nothing, for a man could not have deſerved any thing for a matter to be done *in future*; and *entire damages* being given, ſuch judgment ought to be arreſted.

On hearing the council on both ſides on this motion, the court affirmed the judgment. *Vide Raym. vol.* 2. *p.* 1223.

Trinity, 6 *Ann*. *Squire* v. *Yendon*.

In an action on the *caſe*, the plaintiff declared, that the defendant being indebted to him 10 *l.* for horſemeat, in *conſideration* thereof, promiſed to pay to the plaintiff as much as he ſhould deſerve. And after a verdict for the plaintiff, it was moved in arreſt of judgment; and excepted, that a ſum certain could not be a *conſideration* for an uncertainty. Suppoſe the jury had given 11 *l.* 10 *s.* that could not have been a good *conſideration* for more.

Per curiam. It is well enough, though the plaintiff has his election to bring his action on either. *Vide Mod. Rep. vol.* 11. *p.* 134.

Eaſter, 4 *Geo*. *Wallis* v. *Scott*.

The plaintiff declared, that the defendant, in *conſideration* that the plaintiff would make him a ſet of ſails, worth 45 *l.* promiſed to pay ſo much for them on requeſt; and avers that he made the ſails; and the defendant, although often requeſted, refuſed to pay. On demurrer, the defendant's council argued, that this being a ſpecial compact, the plaintiff muſt ſhew a performance of all on his part, which he has not done; for he has not averred that he made the ſails worth 45 *l.* and if they were not worth it, the defendant is not chargeable.

Powys, Juſtice, (*Parker* and *Pratt* being abſent) tho' the *value aforeſaid* was ſufficient.

Per Eyre, Juſtice. I do not think the value need to be alledged; but if it need, yet the *aforeſaid* takes it in, for if the value is part of the deſcription, then it is averred that the plaintiff made ſuch a ſet of ſails as was agreed on, (that is) a ſet of ſails which anſwers every part of the deſcription. Therefore judgment was given for the plaintiff. *Vide Stra. vol.* 1. *p.* 88.

Eaſter, 4 *Geo*. *Lloyd* v. *Lee*.

A married woman gave a promiſory note as a *feme ſole*; and after her huſband's death, in *conſideration* of forbearance promiſed to pay it. And now in an action againſt her, it was inſiſted, that though ſhe being under *coverture* at the time of giving the note, it was voidable for that reaſon; yet by her ſubſequent promiſe when ſhe was of ability to make a promiſe, ſhe had made herſelf liable, and the forbearance was a new *conſideration*. But the *C. J.* held the contrary, and that the note was not barely voidable, but abſolutely void; and forbearance, where originally there is no cauſe of action, is no *conſideration* to raiſe an *aſſumpſit*. But he ſaid it might be otherwiſe where the contract was only voidable, and ſo the plaintiff was called. *Vide Stra. vol.* 1. *p.* 94.

Michaelmas, 7 *Geo*. *Anonymous*.

A perſon paid money on a *contract* for the *old* ſtock of a company, and the party gave him ſo many ſhares in the *additional* ſtock; on this ground an action was brought thereon, as for ſo much money had and received to his uſe.

Per curiam. This action will lay becauſe the thing *contracted* for was not delivered. It would have been otherwiſe if the thing *contracted* for had been delivered, though to a leſs value. *Vide Strange vol.* 1. *p.* 407.

Michaelmas,

Michaelmas, 7 *Geo.* *Dutch* v. *Warren.*

In an action on the *caſe* for money had and received to the plaintiff's uſe, the caſe was. The plaintiff had paid a certain ſum of money to the defendant on a *promiſe* to transfer ſtock to him at a *future* day, which not being done by the defendant, the plaintiff brought this action.

On the trial it was doubted whether the plaintiff had brought a proper action, becauſe at the time the money was paid, the plaintiff never intended to have it again, and the *promiſe* to transfer the ſtock was a ſufficient *conſideration* for his parting with the money.

Per curiam. The action is well brought, not for the whole money paid, but for the *damages* in not transferring the ſtock at the time, which was a loſs to the plaintiff, and a benefit to the defendant, who was receiver of the difference money to the uſe of the plaintiff. *Vide Strange vol.* 1. *p.* 406.

Trinity, 10 *Geo.* *Crow* v. *Rogers.*

In *aſſumpſit* the plaintiff declared, that whereas one *J. H.* was indebted to the plaintiff in 170 *l.* on a diſcourſe between *H.* and the defendant, it was agreed, that the defendant ſhould pay to the plaintiff the ſaid 170 *l.* and that *H.* ſhould make the defendant a title to a houſe. Then he averred, that *H.* was always ready to perform his part of the agreement, and that the defendant in *conſideration* thereof promiſed to pay the plaintiff.

On demurrer it was inſiſted, that there was no *conſideration* moving from the plaintiff to ſupport this promiſe, and the caſe of *Bourne* v. *Maſon*, 1 *Vent.* 6. 2 *Keb.* 457, 527, was cited, where *A.* being ſeverally indebted to *B.* and *C.* and having a debt due to him from *D. C.* in *conſideration* that *A.* would permit him to ſue *D.* in his name promiſed to pay *B.* And it was held that this being a matter of no trouble to the plaintiff, or benefit to the defendant, he was a ſtranger to the *conſideration*, and could not maintain an action.

The court gave no opinion this term. But in *Eaſter*, 12 *Geo.* this matter being moved again, the court held the plaintiff was a ſtranger to the *conſideration*; and gave judgment for the defendant. *Vide Strange, vol.* 1. *p.* 592.

Michaelmas, 12 *Geo.* *Weaver* v. *Boroughs.*

The plaintiff declared on a ſpecial agreement for the hire of a horſe at 2 *s.* 6 *d. per day*, and to keep him ſo many days, and to return him ſafe at the end of that time. There was likewiſe an *indeb. aſſump.* for the hire. And on the trial the plaintiff could not prove the ſpecial agreement in the manner he had laid it; and therefore his council would have had recourſe to the *indebit. aſſump.* to recover only the hire: but *Raymond* Chief Juſtice was of opinion, that the agreement of 2 *s.* 6 *d. per day* being laid as part of the ſpecial agreement, which was not proved, he could not let them ſeparate that clauſe and recover for the hire, as they might have done on the general *indeb. aſſump.* it not being a debt, unleſs the agreements had been proved. And he put the caſe of a contract for goods at a certain price, where the plaintiff is never ſuffered to recover on the *quantum meruit*, ſo the plaintiff was called. *Vide Strange, vol.* 1. *p.* 648.

Michaelmas, 13 *Geo.* *Oſborn* v. *The Governors of Guy's Hoſpital.*

The plaintiff brought a *quantum meruit for work and labour* in tranſacting *Mr. Guy*'s ſtock affairs in the year 1720. It appeared that he was no broker, but a friend; and it looked ſtrongly as if he did not expect to be paid, but to be *conſidered* for it in Mr. *Guy*'s will; and *Raymond*, Chief Juſtice, directed the jury, that if that was the caſe they could not find for the plaintiff, though nothing was given him by the will; for they ſhould conſider how it was underſtood by the parties, at the time of doing the buſineſs; and a man who expects to be made amends by a legacy, cannot afterwards reſort to his action. *Vide Strange, vol.* 1. *page* 728.

Eaſter, 5 *Geo.* 2. *Hayes* v. *Warren.*

On a *writ of error* brought on a judgment in *C. B.* in an action on the *caſe* on ſeveral promiſes; after judgment by default, and entire damages, it was objected, that the 4th count was for work and labour done by the plaintiff for the defendant, in *conſideration* whereof he promiſed to pay. And it was objected, that this was a paſt *conſideration*; and not being laid to be done at the requeſt of the defendant, it could be no *conſideration* to raiſe an *aſſumpſit*; and 1 *Roll. Abr.* 11. *Pl.* 1. *Cro. El.* 442, 741. 3 *Leon.* 91. *Dyer* 272. were cited.

Per curiam. It does not appear that this work was for the benefit of the defendant, and we muſt take it to be a paſt *conſideration*, being laid that *afterwards* he promiſed to pay: if this was after a verdict, we ſhould think the inferences from the words *for*, and *meruit of the defendant*, would be immaterial; but the ſtatutes of *jeofails* do not protect judgments by default againſt objections that are cured by a verdict at common law; but ſuch as are remedied after a verdict by the ſtatutes. Therefore the judgment of the *C. B.* was reverſed. *Vide Strange, vol.* 2. *p.* 933.

Trinity, 5 *Geo.* 2. *Gordon* v. *Martin.*

On an *indebitatus aſſumpſit*, the plaintiff declared, that the defendant being indebted to him in the ſum of 300 *l.* for work, *&c.* did *promiſe* to pay him the ſaid ſum. The defendant pleaded the *general iſſue*, and the plaintiff gave in evidence a letter wrote by the defendant to the following purport.

"If *L. S.* ſhall go through the purchaſe (the defendant's brother having been then in treaty with the ſaid *L. S.* for the ſale of an eſtate) my brother will give you a handſome gratuity for the trouble and pains you ſhall be at, in tranſacting that affair, which I promiſe and aſſure you ſhall not be leſs than 300 *l.*

In the *poſtſcript* to this letter, were theſe words, *viz.* "my meaning is, you ſhall be paid when the conveyances ſhall be executed."

It was likewiſe proved on the trial, that the plaintiff had forwarded the ſaid purchaſe, and that *L. S.* was greatly induced thereto, by the good opinion he had of the plaintiff's veracity and judgment.

It was held by the whole court, that though the *promiſe* was, that the defendant's brother ſhould pay the gratuity, yet it bound the defendant as much as if he had *promiſed* for himſelf; the work, *&c.* being at his *requeſt*, and on his *credit*: and judgment was given for the plaintiff. *Vide Fitz-Gibbons, p.* 302.

Hilary, 33 *Geo.* 2. *Stoteſbury* v. *Smith.*

Per curiam. A *promiſe* of money made by bail to a *ſheriff's officer* to induce him to accept ſuch bail is void, being grounded on an *illegal conſideration*. *Vide Bur. vol.* 2. *p.* 924.

Conſtable.

Michaelmas, 7 *W.* 3. *Fletcher* v. *Ingram.*

In an action of *replevin* for taking the plaintiff's mare, the defendants made conuſance, that the *place in which*, is within the manor of *Shewſton*, where there is a court leet, and that the jury of the ſaid leet, time out of mind, have choſen one of the inhabitants within the manor to be *conſtable*, and that the perſon ſo choſen, by the ſaid cuſtom is to ſerve, or forfeit a reaſonable penalty, to be impoſed by the jury at the ſaid leet; that the plaintiff was elected accordingly, and ordered to take on him the office on penalty of 40 *s.* and thereof had notice, but neglected; which was preſented at the next leet, and he had thereby forfeited 40*s.* for which the defendant, as bailiff to the Lord, took diſtreſs.

Per curiam. Of common right, the *conſtable* is to be choſen by the jury in the leet, and if the party choſen is preſent, and refuſes, the ſteward may fine him; if abſent, the homage muſt preſent his refuſal at the next court, and then he ſhall be amerced; alſo if the party choſen is preſent, he ſhall take the oath in the leet; if abſent, before the juſtices of the peace, who ſtill adminiſter the oath to him as conſervators of the peace at common law: but a cuſtom ought to be alledged for diſtraining for the penalty, which is not done here. Therefore judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 12. *p.* 87. *Mod. Rep. vol.* 5. *p.* 127. *Raym. vol.* 1. *p.* 69. *Salk. vol.* 1. *p.* 175.

Hilary, 8 *W.* 3. *The King* v. *Bernard.*

An indictment at the ſeſſions held for the town of *Southampton* ſet forth, that at the general quarter ſeſſions for the town and county of *Southampton,* in *September, T. Bernard* of that city, grocer, then and there reſident, was by the Mayor, Bailiffs, and Burgeſſes of the ſaid town *in lawful manner, according to the cuſtom of the ſaid town, elected* to be *conſtable* for the year enſuing whereof he had notice on the 4th of *October,* and *then and there was required* by two juſtices of the peace, *to take the oath of the office aforeſaid,* but that he not minding his duty, *from the 4th day of October aforeſaid, to the time of the exhibition of this bill,* obſtinately refuſed to take on himſelf the ſaid office. The defendant demurred. 1ſt. Becauſe by common law, *conſtables* were only choſen by leets, and in default of them, at the torn; and if there is a cuſtom in a corporation to chuſe them otherwiſe, it muſt be averred, that they had ſuch a cuſtom immemorial; it not being ſufficient to ſay, *in lawful manner according to the cuſtom.* 2dly. Suppoſing ſuch a cuſtom in a corporation to chuſe them otherwiſe, it can only bind the members, and not others; and therefore they ſhould have averred *Bernard* to have been a member, 3dly. Suppoſing him to be duly elected, it does not appear that he took on himſelf the office; for notice of his election, and requiring him to take the office, was on the 4th of *October,* and the refuſal is laid to be on the *4th day of October* too.

Per curiam. The laſt objection is material, for he might have taken the oath the 4th of *October,* which would have been an aſſumption of the office, after which he is only indictable for a *ſpecial neglect,* i. e. the neglect muſt be *ſpecially* laid. As for the *ſecond,* ſuppoſing ſuch a cuſtom within a corporation, they may without doubt, not only meddle with their own members, but alſo with the reſiants within their precincts. But the firſt is moſt conſiderable. At common law they are elected at the leets, and in default, at the ſheriffs torn, the leet of the county. But by cuſtom, a corporation might chuſe its own officers; and this cuſtom was reaſonable, becauſe when an incorporated town has the government thereof committed to them, it is but reaſonable they ſhould chuſe their officers that are neceſſary to ſecure the public peace; but then it ſhould have been particularly ſet forth, which is not done here, Therefore judgment for the defendant. *Vide Mod. Rep. vol.* 12. *p.* 115.

Hilary, 9 *W.* 3. *The King* v. *Hewſon, or the Caſe of the Village of Charley or Chorley.*

The village of *Chorley* having no *conſtable,* the juſtices of peace, by order of the ſeſſions, appointed one to ſerve there.

Per Holt, Chief Juſtice. A *conſtable* may be choſen in the torn, or leet. A village and a *conſtable* are co-relatives, and we will intend they have a ſufficient authority for it; but *ſtat.* 13 *&* 14 *Car.* 2. *c.* 12. gives them authority to do it only in particular caſes therein mentioned; and as to the authority of a *conſtable* out of his pariſh, if a warrant is directed to the *conſtable* by name, commanding him to execute it, though he is not compellable to go out of his precinct, yet he may if he will, and ſhall be juſtified by the warrant for ſo doing; but if the warrant is directed to *all conſtables, &c.* generally, it ſhall be taken reſpectively, and no *conſtable* can execute the ſame out of his precinct. *Vide Mod. Rep. vol.* 12. *p.* 180. *Salk. vol.* 1. *p.* 176. and *vol.* 3. *p.* 99.

Hilary, 10 *W.* 3. *Parkhouſe* v. *Forſter.*

In an action of *treſpaſs,* on a ſpecial verdict, the caſe was: the plaintiff was an houſe-keeper at *Tunbridge,* and let out lodgings to ſtrangers, and alſo furniſhed them with ſtable room for their horſes, *&c.* and the defendant being a *conſtable,* quartered a *dragoon* at the plaintiff's houſe, for which this action was brought.

Now the queſtion before the court was, whether the defendant can juſtify this? And whether he has acted in purſuance of *ſtat.* 9 *W.* 3.

Holt, C. J. If a *conſtable* places a *dragoon* where it is unlawful for him ſo to do, he muſt make ſatisfaction for the *conſequential damages*; for example, if the *dragoon* ſhould, out of a frolick, let the drink about the cellar, or do any other prejudice, the *conſtable* is anſwerable for all the damage that enſues, for ſince the placing him there was unlawful, it ſhall be taken as if the *conſtable* had placed him there on purpoſe to do an unlawful act; but the court deferred giving judgment.

In *Trinity* term following, the court gave judgment, when they were of opinion, that the action was well brought, and therefore gave judgment for the plaintiff. *Vide Mod. Rep. vol.* 5. *p.* 427. *Salk. vol.* 1. *p.* 387.

Michaelmas, 10 *W.* 3. *The King* v. *Beechcroft.*

An order for making a *conſtable* was quaſhed, for that it did not appear by the order that he was an inhabitant of the liberty, though of the pariſh. The late *conſtable* is not diſcharged till the new one is ſworn; becauſe the pariſh cannot be without an *officer.* *Vide Mod. Rep. vol.* 12. *p.* 255.

Michaelmas, 11 *W.* 3. *At Niſi Prius.*

Per Holt, Chief Juſtice. A perſon may take a warrant to ſearch a ſuſpicious houſe, *on a felony committed*; but muſt at his peril execute it *in due time,* and at *ſuſpected houſes only*; and though a *conſtable* may, by virtue of ſuch warrant, ſearch the houſe, and all other things that his warrant authoriſes him to do; yet, if he goes beyond his warrant, by which any body is damaged, he is anſwerable for it. *Vide Mod. Rep. vol.* 12. *p.* 344.

Michaelmas, 11 *W.* 3. *The King* v. *Chaloner.*

See this caſe fully ſtated in page 264 of this work, under the head *Commitment.*

Eaſter, 12 *W.* 3. *Normand* v. *Mills.*

An action of *falſe impriſonment* was brought againſt a *conſtable* for executing a warrant of Sir *J. B.* after he was out of the commiſſion of the peace.

Holt, Chief Juſtice. The *conſtable* at his peril is to take notice, that his warrant is by one in commiſſion; but all the favour we can do him is, ſince it was a warrant executed a day or two after Sir *J.* was out of the commiſſion, if he has behaved himſelf honeſtly and civilly in the buſineſs, to be mild to him: and he ſaid, the *conſtable* ought to ſhew the juſtice of peace's commiſſion, tho' heretofore it was held common reputation, would be enough; and here the *conſtable,* coming out of his own pariſh, to execute the warrant, betrays his officiouſneſs. *Vide Mod. Rep. vol.* 12. *p.* 347.

Michaelmas, 13 *W.* 3. *Elizabeth Claxton's Caſe.*

In this caſe, *Holt,* Chief Juſtice, declared, that by *ſtat.* 13 *H.* 7. *c.* 10. a *conſtable* may commit lewd women till they find ſureties, and neighbours are bound to aſſiſt. See p. 265 of this work, under the head *Commitment.*

Michaelmas, 2 *Ann.* *The Queen* v. *Dyer.*

Per Holt, Chief Juſtice. No man that keeps a public houſe ought to be a *conſtable*. *Vide Mod. Rep. vol.* 6. *p.* 41.

2 *Ann.* *Anonymous.*

Per curiam. The *high conſtable* was an officer at *common law* before the ſtatute of *Winton*, as well as the *petty conſtable*, and they are both deemed officers to the juſtices of peace in the ſame manner as the ſheriff is to this court. *Vide Salk. vol.* 1. *p.* 175.

Eaſter, 4 *Ann.* *The Queen* v. *Wiatt or Wyatt.*

Several perſons were indicted in the county of *Suſſex*, and convicted for killing deer, and being aiding and aſſiſting thereto; and a warrant was iſſued to levy a diſtreſs, which warrant, by a clauſe in it, was to be returned; the warrant was delivered to the defendant, who levied the money, but made no return of the warrant, for which he was alſo indicted; and on its being removed here by *certiorari*, the defendant's council argued, that the not returning the warrant is not an offence to be indicted on; and finding the money to be levied, makes for the defendant. He excepted, that there ought to have been time and place, when and where he ſhould have returned this warrant to them, for he is not bound to travel all over *England* to find them. Again, his warrant is his juſtification and indemnity, in caſe he ſhould be ſued for a *treſpaſs*.

On the other ſide it was argued, that by the ſtatute it is the duty of a *conſtable* to make a return to his warrant.

Per Holt, Chief Juſtice. There is a difference between returning the warrant itſelf, and returning what he has done. The not fixing a time when and where is no fault; for he ſhould have done it forthwith, and any where within the county ſuffices.

Powell, Juſtice. The return is neceſſary, becauſe he may levy only part, and then further proceſs ſhould iſſue: for if the whole cannot be levied, then the juſtices muſt go on another part of the ſtatute.

Per curiam. It is an offence indictable for not returning what he has done.

This matter was adjourned for further conſideration; and on the firſt day of *Trinity* term, judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 11. *p.* 53. *Raym. vol.* 2. *p.* 1189.

Eaſter, 8 *Ann.* *The Queen* v. *Jennings.*

The defendant was indicted for refuſing to take on him the office of *high conſtable* for the hundred of *Farnham*, *having been in a due and lawful manner elected*, &c. to which the defendant pleaded *not guilty*, and the jury found a ſpecial verdict.

The queſtion ariſing on the ſpecial verdict was, whether the defendant, being in a particular leet, is excuſed from ſerving as *high conſtable* of the hundred, and the court held that *he was not excuſed*.

The court gave judgment for the Queen, on the ſpecial verdict. But exception being taken to the indictment, it was put off to *Trinity* term following, when the exceptions taken were,

1ſt. That it was not ſaid to what he was elected, only *in due and lawful manner elected*, &c. But not allowed.

Per curiam. It ſhall be preſumed that it was an *high conſtable*.

2dly. It is ſaid, *the election was* at a court-leet held the 16th day of *September*. Now, *Magna Charta*, *c.* 5. enacts, that all leets ſhall not be held *but only twice in a year*, one within a month after *Eaſter*, and the other within a month after *Michaelmas*, and this court is ſaid to be held the 16th day of *September*, and they have not laid any preſcription to hold it at that time, contrary to *ſtat.* 3 *Keb.* 192. 230. 255. *The King* v. *Bernard*, 8 *W.* 3. *Deckin*'s caſe, 2 *Saund.*

The council for the indictment argued, that it was ſo in the caſe of *the King* v. *King*, but there the court held the indictment good notwithſtanding.

To which the defendant's council anſwered, that the reaſon of that caſe was, becauſe, by pleading over they had admitted it, but here we have pleaded *not guilty*.

Per Holt, Chief Juſtice. An admittance by pleading to an indictment does not make the inidctment good, as it would a declaration.

The council for the indictment then argued, that a perſon may preſcribe to hold a court-leet at another time than is named in *Magna Charta*; and it ſhall be preſumed that this was ſo.

Per curiam. Indeed a perſon may preſcribe ſo, but unleſs that preſcription appears, it ſhall not be preſumed: alſo, when a preſentment in a leet is removed by *certiorari*, the ſtile of the court muſt be ſet out exactly; but there needs no ſuch nicety in pleading, 2 *Cro.* 43. *The King* v. *Hill*; therefore the indictment was quaſhed. *Vide Mod. Rep. vol.* 11. *p.* 215. 227.

Michaelmas, 8 *Ann.* *The Quecn* v. *Tooley et al.*

An indictment was found againſt the defendant, for the *murder* of one *D.* and on *not guilty* pleaded the jury found a ſpecial verdict; *viz.* that by *ſtat.* 27 *El.* for the good government of *Weſtminſter*, it is enacted, that for reformation of diſorders in that city, the dean, high-ſteward or his deputy, or two capital burgeſſes, may hear and puniſh incontinencies, according to the cuſtom of *London*: that by the cuſtom of *London*, any *conſtable* of any ward, pariſh, or precinct, may execute his office throughout the whole city: that within the city, borough, and liberty of *Weſtminſter*, it has been uſed, that any perſon duly appointed *conſtable* of any pariſh within the liberties of the city, borough, and *ville* of *Weſtminſter*, his office of *conſtable*, in and thro' the whole city and borough of *Weſtminſter*, and liberties thereof, has executed, and uſed to execute: that on the 8th day of *March*, 8 *Ann*, &c. three commiſſioners, duly appointed by virtue of the ſtatute for recruiting the army, for putting the act in execution, by virtue of that act, made their warrant under their hands and ſeals, directed to the *conſtables* of the pariſh of *St. Margaret's*, *Weſtminſter*, within the city of *Weſtminſter*, thereby commanding the *conſtables* to make ſearch within the ſaid city and liberty, for perſons within the deſcription of that act; which warrant, after that day, was delivered to the *conſtables* of the pariſh of *St. Margaret's*, to be executed: that after that day, *S. B.* into the pariſh of *St. Paul, Covent Garden*, in the city and liberty of *Weſtminſter*, to execute this warrant did come, and was: that within the pariſh of *St. Paul, Covent Garden*, there was and is a *conſtable* belonging to that pariſh: that *S. B.* before ſent to *J. D.* to aſſiſt him to execute the warrant: that after the ſaid 8th day of *March*, between 8 and 9 at night, in the ſaid pariſh of *St. Paul, Covent Garden*, the ſaid *S. B.* ſtaying to execute that warrant, one *Ann Dekins*, in the ſtreet, between the Play-houſe and the Roſe Tavern, he then and there found, whom he ſuſpected to be a diſorderly perſon, and then and there, as a diſorderly perſon, took her into his cuſtody, as *conſtable* of the city and liberty of *Weſtminſter*, to carry her to priſon for her ſafe cuſtody: that *Ann Dekins* had been before taken up by *B.* as *conſtable*, as a diſorderly perſon; and that at her being taken up by *B.* on the 8th day of *March*, ſhe had not miſbehaved herſelf; that *B.* had no warrant to take or detain her: that after the taking of the ſaid *Ann Dekins*, the priſoners (*B.* then having her in cuſtody) in another place, called *Covent Garden*, did meet, (they being all ſtrangers to *Ann Dekins*) drew their ſwords, and aſſaulted *B.* to reſcue her from his cuſtody: that *B.* ſhewed his *conſtable*'s ſtaff, and declared he was about the Queen's buſineſs, and intended the priſoner no harm; whereon they put up their ſwords, and *B.* carried the woman to the round-houſe: that the priſoners a little after, the ſaid *Ann Dekins* being in the ſaid priſon in *Covent Garden* aforeſaid, drew their ſwords again, and aſſaulted the ſaid *B.* on account of the impriſonment of the ſaid *Ann Dekins*, and to get her diſcharged: that *B.* called ſome perſons to his aſſiſtance, to keep her in cuſtody, and to defend himſelf from the violence of the priſoners; that *D.* came to his aſſiſtance:

ance: that while *D.* was in the *conſtable*'s aſſiſtance, and before any ſtroke, one of the priſoners gave *D.* the mortal wound in the indictment mentioned, of which he died, as in the indictment, *&c.* that the two others were aiding and aſſiſting him that gave the ſtroke; but whether the defendants were guilty, *&c.*

This term the matter was argued before all the judges at *Serjeant's Inn*, on which argument the judges were divided in their opinion, viz. *Holt*, Chief Juſtice, *Powell*, *Powys*, and *Gould*, Juſtices of this court; Baron *Price*, Baron *Bury*, and Baron *Lovell*, that it was *manſlaughter*; and *Trevor*, Chief Juſtice, *Blencow*, *Tracy*, and *Dormer*, Juſtices of the *C. B.* and *Ward*, Lord Chief Baron, that it was *murder*. And the laſt day of the term, *Holt*, Chief Juſtice, delivered the opinion of all the judges in this court. He ſaid, that thoſe judges who were for *manſlaughter*, founded their opinions on the following reaſons; 1ſt. That it was a ſudden action without any *precedent* malice, or apparent deſign of doing hurt, but only to prevent the impriſonment of the woman, and to reſcue her, who was unlawfully reſtrained of her liberty; and if the woman was unlawfully impriſoned, then it cannot be *murder*; and cited 4 *Co.* 40. *Young*'s caſe; 9 *Co.* 65. *Mackalley*'s caſe, where it was held, that if a *conſtable* is killed in the execution of his office, it is *murder*; but it is otherwiſe, where he is doing a wrongful and oppreſſive act: it is not only neceſſary, that the *conſtable* is in the execution of his office, to make the killing of him *murder*, but he muſt give notice that he is come to keep the peace. *Thomſon*'s caſe, *Kel.* 66. and ſo is *Young*'s caſe, and *Mackalley*'s caſe, to be underſtood; for if he does not give notice, the party may reaſonably ſuppoſe that he came to aſſiſt his adverſary.

The ſecond point to be conſidered is, whether *B.* was in the execution of his office? *Stat.* 27 *Eliz.* does not mention a *conſtable*, only a power given to the dean, high-ſteward, and two capital burgeſſes of *Weſtminſter*, but it does not follow from thence, that the *conſtable* has ſuch a power; we all agree, that the power of the *conſtable* is no greater than it was before this act. One of the judges held, that *B.* was *conſtable de facto*, but that cannot be, ſince there was a *conſtable* at that time in *Covent Garden*. Now, if the *conſtable* of one pariſh has not power over the whole liberty, then *B.* had no more authority than if he had been no *conſtable* at all. Suppoſe, for argument's ſake, that *B.* was *conſtable* of *Covent Garden*, I take it, that the taking up the woman was illegal, though ſhe had been in his cuſtody before; and if ſo, he did not act as a *conſtable*, but as a common oppreſſor: the verdict does not find that ſhe was guilty of any diſorderly act when ſhe had been in his cuſtody before; and it is not a *conſtable*'s ſuſpecting that will juſtify his taking up a perſon, but it muſt be juſt grounds of ſuſpicion, for that is traverſable; 2 *Inſt.* 52. as for example, if a felony is committed, it is good cauſe of ſuſpicion; that is, if *J.* ſuſpect a perſon where a felony is done, it is warrant enough for me to arreſt him; but it would be hard, that the liberty of the ſubject ſhould depend on the will of the *conſtable*; and ſhall his not liking a woman's looks be any cauſe of ſuſpicion?

The priſoners in this caſe had ſufficient provocation; for if a perſon is impriſoned on an unlawful authority, it is a ſufficient provocation to all people out of compaſſion; much more where it is done under a colour of juſtice, and where the liberty of the ſubject is invaded, it is a provocation to all the ſubjects of *England*. He ſaid, that a *conſtable* cannot arreſt but when he ſees an actual breach of the peace; and if the affray is over, he cannot arreſt. 3 *Cro.* 372. *ſtat.* 3 *H.* 7. *c.* 10. *conſtables* have an authority by the ſtatute to arreſt perſons, but it muſt be by warrant from the juſtices of peace; but in this caſe there was no warrant.

The reaſons of the five judges, who were of opinion it was *murder*, were theſe: four of them agreed, that *B.* had no authority; but one was of opinion, that ſhewing his ſtaff was ſufficient; but I never knew that a *conſtable*'s ſtaff was of ſo much efficacy, when the *conſtable* himſelf had no authority: four of them held, that ſhe, being a ſtranger to the priſoners, it could be no provocation to them; otherwiſe, if ſhe had been a friend or ſervant: but ſure, a man ought to be concerned for *Magna Charta* and the laws; and if any one againſt the law impriſons a man, he is an offender againſt *Magna Charta*. We ſeven held this to be a ſufficient provocation, and we have good authority for it. In *Hopkins Hugget*'s caſe, (and this caſe is ſtronger than that) the judges that were of opinion that the caſe was only *manſlaughter*, did not found their opinion on the fight between them, but the provocation by the unlawful impriſonment; and the four who were of opinion that it was *murder*, conformed and gave judgment according to the opinion of the eight: the five judges in this caſe, who think this caſe *murder*, ſay, that to a relation or friend, it is a provocation, but not to a ſtranger; but this is a diſtinction not to be met with in our books. He cited *Plowd.* 101. where two fought on *malice prepenſe*; the ſervant of the one not knowing of the malice, comes to aſſiſt his maſter, and kills the other; this was held but *manſlaughter* in the ſervant; which caſe is abridged in *Hale* 51. the reaſon of which caſe is not becauſe he was a ſervant, but becauſe he knew not of the malice. *Hopkins Hugget*'s caſe is of good authority, being given on mature conſideration, and reſolved by eight of the judges. They ſay likewiſe, that in the caſe at the bar, it could not be a provocation to the priſoners, becauſe they knew not that ſhe was illegally arreſted; but ſurely *ignorance of the fact* will excuſe, but never condemn a man. Indeed, he acts at his peril in ſuch a caſe, but he muſt not loſe his life for his ignorance, when he happens to be in the right; and cited Sir *Henry Ferrer*'s caſe, where he was arreſted by a warrant, which named him *knight*, when he was a baronet, and his ſervant killed the bailiff, and adjudged only *manſlaughter*, becauſe he was arreſted on an illegal warrant. Suppoſe a man having judgment againſt him goes abroad, and on his return is informed that there are bailiffs in his houſe, and he goes in and kills one of them; but it proves that they are thieves that came to rob him; in this caſe he is in no fault. They objected, that it is dangerous to allow ſuch a power to the mob; but a provocation does not make it an allowing the offence, but only a mitigation of the puniſhment, and for this the law makes a diſtinction between *murder* and *manſlaughter*. They ſay, that the priſoners came after the impriſonment of the woman was over; but certainly the putting her in priſon, and not carrying her before a juſtice, as he ſhould have done, is an aggravation: and why ſhould *B.* call *D.* to his aſſiſtance after ſhe was in priſon? They agreed that he was not *conſtable* of *Covent Garden*, and if ſo, it cannot be a *murder*. If a writ is delivered to the ſheriff of *Middleſex*, and the man goes into the county of *Bucks*, and the ſheriff follows and arreſts him, and he kills the ſheriff; this is only *manſlaughter*. I am as much for reformation as any perſon, but in a legal manner. Therefore the priſoners were diſcharged as to the indictment. See page 266 of this work, under the head *Commitment*. *Vide Raym. vol. p.* 1296.

Hilary, 3 *Geo.* *The King* v. *Hunt & al.*

The court granted a *mandamus* on *ſtat.* 1 *Geo. c.* 34. directed to the defendants being juſtices of the peace, to allow their *conſtables*, the extraordinary charges in providing carriages in the late expedition into *Scotland*. *Vide Strange, vol.* 1. *p.* 42.

Eaſter, 5 *Geo.* *Hudſon and Wife* v. *Aſh.*

The plaintiff's wife was taken up by a warrant of a juſtice of peace, for aſſaulting the overſeer of a pariſh, and aſſiſting the eſcape of a woman delivered of a baſtard child. When ſhe came before the juſtice, ſhe could not find bail; but at her requeſt he gave leave for her to lie that night at the *conſtable*'s houſe, in order to get bail againſt the morning. Then a perſon on her behalf demanded a copy of the commitment, which not being delivered, an action was brought on the *habeas corpus* act.

Pratt, Chief Juſtice. The queſtions are two, whether the defendant is an officer, and whether the plaintiff's wife was detained by virtue of any warrant within the meaning of the *ſtatute*. As to the defendant,

dant, there is no doubt but a *conſtable* is within the *ſtatute*, but I do not think this action well brought; for the woman was not in his cuſtody, by virtue of any warrant, what warrant there was, was only to bring her before the juſtice, and that was fully executed by ſo doing; and the time ſhe ſtaid at the *conſtable*'s after that, was not by any warrant or commitment, but at her own conſent and deſire, to remain under a voluntary cuſtody: neither is this caſe within the miſchief of the ſtatute, which was *indefinite commitments.* The plaintiff was called, then the defendant moved for treble coſts, being a *conſtable*. But the *Chief Juſtice* would not certify, becauſe this cuſtody was not in the execution of his office. *Vide Strange, vol.* 1. *p.* 167.

Trinity, 7 *Geo.* *Anonymous.*

In an action of *treſpaſs* and *aſſault*, on the evidence it appeared, that the defendant was a *conſtable*, and lived at *Dover*, and that being ordered to take the plaintiff and carry him before the Mayor, he executed his warrant, and the Mayor diſcharged the plaintiff. Soon after which a diſpute happening between the plaintiff and defendant, the defendant beat the plaintiff, for which this action was brought.

It was inſiſted for the defendant, that he being a *conſtable*, they ſhould have brought the action in the proper county, according to *ſtat.* 21. *Jac.* 1.

Pratt, Chief Juſtice. That is only where it is for a matter relating to the execution of his office; but if after his authority is expired, he abuſes the party; or if he meets a man and knocks him down, he may be ſued for it as well as another. *Vide Strange, vol.* 1. *p.* 446.

Eaſter, 1 *Geo.* 2. *The Caſe of the Conſtables of Lymington.*

They were choſen and ſworn in at the leet, and the ſeſſions on pretence that the election was not made according to the particular uſage of the place, made an order to diſcharge the appointment. And now the order of ſeſſions was quaſhed, for at common law they have nothing to do with the election of *conſtables*, and *ſtat.* 13 & 14 *Car.* 2. *c.* 12. gives it them only in the caſe of death, or removal within the year. *Vide Strange, vol.* 2. *p.* 798.

Michaelmas, 5 *Geo.* 2. *The King* v. *Lone.*

The indictment ſet forth, that at a wardmote, held according to the cuſtom of the city of *London*, for the ward of *Langborne*, the defendant being an inhabitant and paying *ſcot* and *lot*, was choſen *conſtable*, and had refuſed to execute the office. After a verdict *for the King*, it was moved in arreſt of judgment, that this was not an offence indictable, but the proper remedy was, for the ſteward to fine him, and *The Queen* v. *Daſey*, *Hil.* 10. *Ann.* *Salk.* 175 was cited.

It was inſiſted for the King, that they might proceed either way. 3 *Keb*, 197. 230. *Cro. Car.* 557. 1 *Sid.* 272. *Cumb.* 416. *Skinner* 669. and *Eaſter*, 8 *Ann.* *Queen* v. *Jennings.* 5 *Mod.* 96. 1 *Vent.* 344. *Trin. Ent.* 221.

Per curiam. There is no expreſs determination, that it is ill, for *Daſey*'s caſe had many other faults: this is an office concerning the public juſtice; and if the party be abſent, he cannot be fined; and it will be inconvenient to ſtay till the next court day, for a preſentment of his refuſal.

Lee, Juſtice, ſaid, he had ſeen a manuſcript report of the caſe cited from *Salk.* 175. wherein *Holt*, Chief Juſtice, ſays, the party may be indicted. Therefore judgment for the King. *Vide Stra.* 920.

Michaelmas, 6 *Geo.* 2. *Park* v. *Bourne.*

Per curiam. A *conſtable* may make a deputy: and the common diſtinction is between a judicial and a miniſterial officer. *Vide Stra. vol.* 2. *p.* 942.

Trinity, 9 *Geo.* 2. *The King* v. *Davis & Goſling.*

The ſeſſions of *Monmouthſhire* made an order, reciting, that *A.* and *E.* had complained that they had ſerved as *conſtables* of *Chepſtow* a year, and that though four perſons were returned by the homage to the ſteward, he had appointed no new ones; and therefore they prayed to be diſcharged, whereon it was ordered that the defendants ſhould be appointed in their ſtead.

And on conſideration, on *ſtat.* 13 & 14. *Car.* 2. *c.* 12. which only impowers ſeſſions to appoint *conſtables* till the lord ſhall hold a court, this order was quaſhed, becauſe it was in the diſjunctive, for a year, *or* till others were choſen. Beſides, there was no adjudication that the others had ſerved a year. *Vide Stra. vol. p.* 1050.

Hilary, 14 *Geo.* 2. *The King* v. *Dr. Franchard.*

The defendant was choſen *conſtable* of *Milborne-port* at the leet, which immediately adjourned, and he was afterwards ſworn in before a ſingle juſtice of the peace; and on a motion for an information, as not being duly ſworn, the court held it a good ſwearing. *Salk.* 175. Sir *T. Jones*, 212. 2 *H. P. C.* 88. *Vide Stra. vol.* 2. *p.* 1149.

Michaelmas, 18 *Geo.* 2. *The King* v. *Goudge.*

The court granted an information in the nature of a *quo warranto* againſt the defendant, to ſhew by what authority he exerciſed the office of *conſtable* for the pariſh of *White-Chappel* under a pretence of an election at the veſtry, and a ſwearing in at the ſeſſions.

Per curiam. The right of appointing is in the leet, and the ſeſſions have no power by *ſtat.* 13 & 14. *Car.* 2. *c.* 12. except there is a default at the leet. And this office of *conſtable* is of ſuch a nature, that informations have been granted to try the right, particularly *Hilary* 14 *Geo.* 2. *The King* v. *Franchard*, where the court made no difficulty on that head, though they diſcharged the rule on the merits. *Vide Stra. vol.* 2. *p.* 1213.

Trinity, 32 & 33 *Geo.* 2. *The King* v. *Bootie.*

On a motion in arreſt of judgment after a verdict for the King, on an indictment againſt a *conſtable* for a *miſdemeanor*, in letting a woman eſcape out of cuſtody, who was charged as a *ſtreet walker*, &c.

The *objection* taken on the rule to ſhew cauſe was, that it is not charged that the defendant knew that the woman taken into cuſtody was a *ſtreet-walker*, &c. as the indictment deſcribed her to be, and if ſhe was not a *ſtreet-walker*, ſhe was not liable to be detained by him, and he would by ſuch detainer have ſubjected himſelf to an action for *falſe impriſonment.*

After hearing council on both ſides, the court gave their opinion.

Foſter, Juſtice. The preſent caſe is a *miſdemeanor*, and ſufficiently charged on the defendant. The peace of this city can never be preſerved unleſs watchmen are ſupported in doing their duty.

Wilmot, Juſtice. I think it is a *miſdemeanor* in the *conſtable* to diſcharge an offender brought to the watch-houſe by a watchman in the night, though without any poſitive charge. In the preſent caſe, I think that this is a *ſufficient allegation* of the fact of her being ſuch a perſon, and of her being delivered to the defendant as ſuch a perſon.

Per curiam. Let the rule to ſhew cauſe why the judgment ſhould not be arreſted, be diſcharged. *Vide Bur. vol.* 2. *p.* 864.

Trinity, 1 *Geo.* 3. *The King* v. *Derbyſhire.*

See this caſe fully ſtated in page 251 of this work, under the head *Certificate.*

Michaelmas, 2 *Geo.* 3. *Medhurſt* v. *Waite.*

On an action brought by the plaintiff againſt the defendant, who was *deputy high-conſtable*, for billetting *ſoldiers* on him; and the *high-conſtable* being at a diſtance, appointed the defendant his deputy by *parol* only.

On a motion for a new trial, the queſtions on which the motion was grounded were,

1ſt. Whether a *high-conſtable* is a *common law* officer?

2dly. Whether a *high-conſtable* is within the word “*conſtable*” in the annual *mutiny act*, ſo as to impower him to billet ſoldiers?

3dly. Whether a *high-conſtable* can appoint a deputy for this purpoſe?

Wilmot, Juſtice, acquainted the court, that at the trial of the cauſe, he was of opinion in the *affirmative* on all the *three points*.

After hearing council on both ſides, the court gave their opinion.

Lord *Mansfield*. It is impoſſible to maintain, that a *high-conſtable* is not within the *mutiny act*.

The ſtatute certainly comprehends a *high-conſtable*, and he may appoint a deputy for this particular *miniſterial act*.

Deniſon and *Foſter*, Juſtices, concurred with the Chief Juſtice.

Wilmot, Juſtice, continued of the ſame that he gave on the trial of the cauſe.

Per curiam, unanimouſly, let the rule be diſcharged. *Vide Bur. vol.* 3. *p.* 1257.

Contempt.

Eaſter, 12 *Will.* 3. *Toler's Caſe.*

See this caſe fully ſtated in page 77 of this work under the head *Appeal.*

Michaelmas, 2 *Ann. Elverton's Caſe.*

See this caſe fully ſtated in page 265 of this work under the head *Commitment.*

Michaelmas, 2 *Ann. The Queen* v. *Croſſe.*

The defendant confeſſed on *interrogatories*, that a copy of a writ being ſerved on him, and the writ ſhewed, and before he new the contents of it, or out of what court it was, he had ſpoken with *contempt*; and this was adjudged a *contempt*. *Vide Mod. Rep. vol.* 6. *p.* 43.

Trinity, 4 *Geo. Henchcliffe* v. *Payne.*

Payne, the defendant's father being under a *contempt* of the court of *chancery* for non payment of money, an order was made on him. The defendant reſiſted the ſervice of ſuch order, for which *contempt* he was committed to the *Fleet*, and turned himſelf over to the *King's Bench*, and went at large till he was taken up by an *eſcape warrant*, and committed to *Newgate*. He then moved for a *ſuperſedeas* to the *eſcape warrant*, the *contempt* not being ſuch a one as is within *ſtat.* 1 *Ann. c.* 6. which ſpeak only of *contempts for not performing an order*, which defendant *the ſon* was not obliged to do.

Per curiam. The father would have been within the *ſtatute*, but the defendant is not. This *ſtatute* is not to be extended by *equity*, becauſe it is againſt the liberty of the ſubject, and this is a new power given only in particular caſes; this is not one of them, and therefore not within the *ſtatute*. Whereupon the warrant was *ſuperſeded*, and the *Marſhal* directed to go to *Newgate* and take him into his cuſtody again, as was done in Sir *Thomas Tippin's* caſe. *Vide Strange, vol.* 1. *p.* 99.

Michaelmas, 4 *Geo. Cork* v. *Baker.*

The defendant having brought a *writ of error* on a judgment in *C. B.* aſſigned for *error* a *clauſum fregit original*, and took out a *certiorari* to verify his *errors*. The *cuſtos brevium* of the *C. B.* inſtead of certifying the *original*, returned that there was ſuch a writ in his office, but that the plaintiff in the original action, having entered a *ne recipiatur*, he could not file the original, and conſequently could not return it.

The plaintiff in *error* applied to the court by motion for Mr. *Yates* the deputy *cuſtos brevium* to attend, and after hearing council on both ſides the court gave their opinion.

Parker, Chief Juſtice. The practice of entering a *ne recipiatur* is very new, and in my opinion very abſurd. There may be ſome colour to ſay that if the plaintiff neglects to file his *original*, to warrant the judgment, then the defendant may refuſe filing it, but that reaſoning will not hold in this caſe which is a *ne recipiatur*, entered by the plaintiff againſt filing his own writ, after he had had the benefit of ſuch writ.

Powys, Juſtice. To deny the means is to deny the thing.

Eyre, Juſtice. This court having power to redreſs has, as incident thereto, a power to come at every thing which is neceſſary for their information.

Pratt, Juſtice. In vindicating our own *juriſdiction*, we only act up to the rules of *law* and our own oaths. This court is ſuperior to the *C. B.* and they ought not to have laid an *inhibitien* on the officer from filing this writ. When we iſſue a *certiorari* to return up the *original*, ſhall the officer ſay, there is ſuch a one, but I will not file it, Mr. *Yates* has refuſed to acknowlege our *juriſdiction*, and therefore ought to be *committed* unleſs he obeys *immediately*.

Mr. *Yates* refuſing to alter the return was *committed*, and afterwards brought a *habeas corpus* to the *C. B.* where on reading the return it appeared he was committed by this court *for a contempt*.

On a motion in the *C. B.* for the diſcharge of Mr. *Yates* on the *habeas corpus*, the court took time to conſider the matter, and the cauſe being afterwards ſetled, on a motion to this court for leave to enter a *nolle proſequi* it was granted, and Mr. *Yates* was diſcharged on paying a ſmall *fine*. *Vide Strange, vol.* 1. *p.* 63.

Hilary, 8 *Geo. Hammond* v. *Stewart.*

The defendant *ſubpœnaed* one *T.* a witneſs to attend the trial of the cauſe, who on the ſervice of the *ſubpœna* ſaid, he would not attend but run the hazard of forfeiting the 100*l.* penalty; and on *affidavit* of this matter the defendant's council moved for an attachment, that they might not be forced to bring their action on the ſtatute. And in the principal caſe the court made a rule to ſhew cauſe.

In this term the rule for an attachment *niſi* againſt the witneſs was diſcharged, it appearing that the *ſubpœna* was not ſerved till *two* in the afternoon in the city, to attend the ſittings that day in *Middleſex*, which the court ſaid was too ſhort a notice, and that witneſſes ought to have a reaſonable time to put their affairs in ſuch order, that their attendance on the court may be of as little prejudice to themſelves as poſſible. *Vide Strange, vol.* 1. *p.* 510.

Trinity, 9 *Geo. The King* v. *Unitt.*

The court declared that a declaration in *ejectment* was ſo far a proceſs of this court, that they would puniſh *contemptuous words* on the delivery of it, as a *contempt* of this court. *Vide Strange, vol.* 1. *p.* 567.

Trinity, 10 *Geo. The King* v. *Burridge.*

See this caſe fully ſtated in page 136 of this work under the head *Attachment.*

Michaelmas, 10 *Geo. The King* v. *Burchett, His attorney, and the town clerk of Guildford.*

The court would not ſet aſide the *replevin* made in this caſe, ſee page 137 of this work under the head *Attachment*, but granted a rule to ſhew cauſe why an attachment ſhould not go; which was afterwards diſcharged by *Eyre*, Juſtice, then alone on the bench, becauſe it was only a *contempt* of the inferior juriſdiction of the juſtices, and in that caſe this court never interpoſes. *Vide Mod. Rep. vol.* 8. *p.* 209. *Strange, vol.* 1. *p.* 567.

Trinity, 2 *Geo.* 2. *Wyat* v. *Winkford, or Winkworth.*

See this caſe fully ſtated in page 137 of this work under the head *Attachment.*

Eaſter, 4 *Geo.* 2. *Moore* v *Goodwright.*

On a *writ of error corum vobis, &c.* it was aſſigned for *error,* that the plaintiff in *ejectment* died before the day of *niſi prius.* And it being in *ejectment* the court ſet it aſide, and ordered the attorney to ſhew cauſe, why there ſhould not be an attachment againſt him; for they ſaid it was to defeat the proceedings inſtituted by the court to try the right; and every body knows the plaintiff is but *nominal,* or if a *real* perſon, yet his releaſe is a *contempt.* *Vide Strange, vol.* 2. *p.* 899.

Michaelmas, 8 *Geo.* 2. *The King* v. *Johnſon, et al.*

See this caſe fully ſtated in page 262 of this work under the head *Challenge.*

Eaſter, 9 *Geo.* 2. *Cox* v. *Phillips.*

The plaintiff brought an action againſt the defendant on a promiſory note ſigned by her, to which ſhe *pleaded,* that ſhe was married to *M.* the plaintiff *replied* that the marriage to *M.* was void becauſe of a prior marriage, and ſhe *rejoined* that it was good becauſe the prior marriage was void, and when the cauſe came on for *trial,* *M.* applied to the court, and repreſented this to be a *fictitious action,* by connivance between the plaintiff and defendant to burthen him with actions and to impoſe on the court.

After hearing council on both ſides the court gave their opinion.

Lord *Hardwicke.* Here are *two queſtions,* 1ſt. Whether *M.* is a proper perſon to make this complaint, and I think as this is a *contempt* of the court, and may be of prejudice to *M.* he may, for the court does not always expect that complaints of a *contempt* ſhould be made to them by the party, for there is a colluſion between all the parties, and a ſtranger may lay it before the court as a *friend to the court;* and beſides in this caſe *M.* is particularly concerned to do it, for though the verdict if it had paſt againſt him, could not have been given in evidence againſt him not being party to the ſuit, yet it is a prejudice to a man to have a report on a verdict that he is married in this way. The ſecond queſtion is. Whether here are ſufficient grounds of complaint; now this is a mere fictitious action, not to determine a right of controverſy, but to deceive the court, and raiſe an evil fame of *M.* and ſurely that cannot be ſaid to be no offence. That ſuch practices are not lawful, is plain from the old ſtatute of *Ed.* 1. and I cannot ſee how there can be a ſtronger inſtance than the preſent, and it is incumbent on courts of juſtice to keep the ſtreams of juſtice clear, or they will be made uſe of as means of ſcandal.

On the whole the court thought this a *contempt,* even though the action was on a real demand, becauſe it had been made ill uſe of; and therefore ordered that the plaintiff and defendant and one *Hudſon,* who was the acting attorney for both ſhould ſtand committed, to anſwer on *interrogatories;* and that the proceedings on the action be ſtaid, and for the honour of the court *vacated,* but that was ſuſpended till the examination was over.

And the parties being afterwards examined on *interrogatories* and not being able to purge themſelves of the *contempt* were committed. *Vide Caſes Temp. Lord Hardwicke, p.* 237.

Michaelmas, 10 *Geo.* *Smalt* v. *Whitmill.*

An attachment was moved for againſt a witneſs, for not attending being *ſubpœnaed,* and having a *ſhilling* left. But it not appearing to be a perſonal ſervice, the court held it not ſufficient to warrant a proceeding againſt him criminally: but whether it would do in an action they would not declare. It was alſo ſaid, that though a *ſhilling* is what is conſtantly given with a *ſubpœna,* yet if the witneſs comes far, there ought to be a tender of reaſonable charges. *Vide Strange, vol.* 2. *p.* 1054.

Trinity, 11 *Geo.* 2. *Cole* v. *Hawkins.*

A copy of a *bill of Middleſex,* was ſerved on the defendant whilſt he was attending the ſittings, in a cauſe wherein he was defendant. And on a motion againſt the attorney for a *contempt;* it was inſiſted on to be right, becauſe it was not an arreſt, which reſtrained him of his liberty. But the court ſaid, that the privilege was well deſigned, in order to prevent any interruption of the buſineſs of the court, and it was equally a *contempt.* And the court would have committed the attorney, if he had not conſented to waive the proceedings, and pay coſts. *Vide Strange, vol.* 2. *p.* 1094.

Michaelmas, 17 *Geo.* 2. *Dyſon* v. *Iremonger and his Wife.*

On a complaint againſt one *S.* for ſerving a writ, where the plaintiff had diſowned employing any body: a rule was made on *S.* to anſwer the matters of the *affidavits,* and at the ſame time to attend the court in perſon. On his attendance, and reading his *affidavit,* the defendant's council deſired leave to aſk him ſome queſtions, which the court allowed, but would not put him to his oath to anſwer. *Vide Stra. vol.* 2. *page* 1197.

Hilary, 18 *Geo.* 2. *Hand* v. *Lady Dinely.*

In *aſſumpſit,* the defendant brought 8 *l.* into court on the uſual terms of paying coſts to that time; the plaintiff took it out, and taxed his coſts, and ſerved the defendant's attorney; and they not being paid, went on to trial, and obtained a verdict for 7 *l.* 18 *s.* The defendant inſiſted, that he ſhould have no coſts for his ſubſequent proceedings, ſince it appeared that he was over-paid: but the court held, that as to the coſts, it was to be conſidered as if no motion had been made, the defendant not having fulfilled the terms of her own rule, in which caſe it is not uſual to grant an attachment of *contempt;* but the plaintiff goes on, it being only a conditional rule. *Vide Stra. vol.* 2. 1220.

See **Attachment,** *Page* 131.

Conviction.

Trinity, 12 *W.* 3. *The King* v. *Chandler or Chaloner.*

See this caſe fully ſtated in page 264 of this work, under the head *Commitment.*

Trinity, 2 *Ann.* *The Queen* v. *Burnaby.*

On a *conviction* on *ſtat.* 43. *Eliz. c.* 7. ſetting forth, *whereas complaint has been made unto us,* &c. *by Sir R. B. that the defendant in the night-time cut down divers lime-trees of the ſaid Sir R. B.* &c. The juſtices awarded that he ſhould pay ſo much for damages. The defendant was ſtyled gentleman in the order, and it was objected, 1ſt. That a gentleman was not within the ſtatute which ſpeaks of vagabonds and ſuch like people, and inflicts a baſe puniſhment, *viz.* whipping, which the law did never intend for a gentleman. 2dly. That the *conviction* is uncertain, for want of ſhewing the number of trees.

Per curiam. 1ſt. Whether the defendant be a gentleman or not, is not material; for if a man of quality will do a baſe or mean thing, there is no reaſon why he ſhould be exempted from the puniſhment: the quality of the offender is rather an *aggravation* than a *leſſening* of the offence. 2dly. The number as well as the nature of the trees ſhould be expreſſed, for this is like an action of *treſpaſs* in this reſpect, that the plaintiff is to recover damages, of which the number and nature of the trees is to be the meaſure: and if an action of *treſpaſs* ſhall hereafter be brought for theſe trees, this *conviction* ought to be a plea in *bar*. 3dly. The defendant in this caſe pretended he had title, and offered to plead it to the *conviction*, as was done in 3 *Cro.* 821. and in 5 *Co. St. John*'s caſe.

Powell, Juſtice, held, that could not be done, for if the defendant had title, and the property was in queſtion, then the juſtices had no juriſdiction, and then he is not without remedy; for he may have his action on the *caſe* againſt the juſtices, or him that executes the ſentence: the council on the other ſide *urged*, that if the juſtices had a juriſdiction, we have no power to queſtion their judgment, and this is a new thing without precedent.

Powys and *Gould* agreed.

Holt, Chief Juſtice, (who indeed ſtarted this point) ſaid, that *St. John*'s caſe was a *precedent* for this way of pleading to a *conviction*, and that it was and muſt have been done ſo there, or elſe the point of the dagger could not have come in queſtion: he obſerved, that it was as reaſonable to falſify the proceedings before juſtices in this manner, as by an action againſt them; and as to what *Powell*, juſtice, ſaid of a remedy by action, he anſwered, that if this order was confirmed, no action would lie againſt the juſtices, or him that executes the ſentence, for then it is ſupported by the authority of the court; and he ſaid, it was hard that this court ſhould by their judgment give an authority to that which ought not to have been done. In this caſe the *conviction* was quaſhed on the ſecond point. *Vide Salk. vol.* 1. *p.* 181. *Raym. vol.* 2. *p.* 900.

Michael. 2 *Ann.* *The Queen* v. *Bothell or Porter*.

See this caſe fully ſtated in page 255 of this work, under the head *certiorari*.

Michaelmas, 2 *Ann.* *The Queen* v. *Dyer*.

The defendant was *convicted* on *ſtat.* 7 *Jac.* 1. *c.* 7. for embezzling yarn delivered to him to be woven, and the *conviction* ſet forth, *that whereas complaint hath been made before us*, A. B. *&c. juſtices of the peace in* C. *by* J. S. *that on ſuch a day*; and then ſets forth the charge: it further ſets forth a ſummons made by them, to bring him in; and by virtue thereof, he appeared before them on *Friday* the 17th day of *April* 1702.

An *objection* was made, that a ſummons is eſſential in this caſe; and that here it appeared on the face of the *conviction*, that there was no ſummons, for the ſummons ſhew it impoſſible, there being no ſuch a day as *Tueſday* the 17th of *April* that year; for the 17th day of *April* that year was on a *Friday*. To which it was anſwered, that the order had been good without ſetting that matter forth.

Holt, Chief Juſtice. Of common right the party ought to be ſummoned, if poſſible; and it would be well to ſet forth, that he was ſummoned and appeared, or did not appear, or could not be found to be ſummoned; and though the ſtatute orders that the offender ſhould be *convicted*, yet that muſt be intended after ſummons, that he may have an opportunity of making his defence; and this ſummary juriſdiction ought to be governed ſtrictly by form, and every thing ought to appear regular in them; and they ought to make a *memorandum*, that ſuch a day complaint had been made, that thereon a ſummons was iſſued, returnable on ſuch a day, and that the party being ſummoned did, or would not appear, or could not be ſummoned, *&c.* and it is abominable to *convict* a man behind his back.

And the court agreed, that of common right there ought to be a ſummons; and that the almanack is part of the law of *England*, of which the court muſt take *judicial* notice; and that nothing could make this good but an intendment, that the juſtice could not *convict* a perſon without a ſummons.

Powell, Juſtice, ſaid, that if an action was brought againſt an officer, for executing of this *conviction*, it would not lie, for an erroneous *conviction* would juſtify him: indeed, if no ſummons had been ſhewn, perhaps he would intend one, according to precedents; but here you ſhew a ſummons, and an appearance at a day impoſſible: and for the ſaid objection, the *conviction* was quaſhed by the whole court on the laſt day of the next *Hilary* term. *Vide Mod. Rep. vol.* 6. *p.* 41.

Hilary, 4 *Ann.* *The Queen* v. *Highmore*.

The defendant was *convicted* before the Lord Mayor of *London* on *ſtat.* 16 & 17 *Car.* 2. *c.* 2. for ſelling coals contrary to that *ſtatute*, *viz.* leſs than thirty-ſix buſhels to the chaldron, *&c.* And the *conviction* being removed into this court by *certiorari*, it was quaſhed, becauſe there was no place mentioned where the coals were ſold; which ought to have been, in regard that the power of the Lord Mayor is only, in caſe of coals expoſed to ſale in the city of *London*, and *liberties* thereof. If the coals were expoſed to ſale in any other county, then the power of *convicting* is in the juſtices of peace of that reſpective county. And therefore the Lord Mayor to have intitled himſelf to a juriſdiction, ought to have ſhewn in the *conviction*, that the coals were ſold within the city of *London*, or the *liberties* thereof; and for want of that, the *conviction* is naught. *Vide Raym. vol.* 2. *p.* 1220.

Hilary, 10 *Ann.* *The Queen* v. *King & al.*

A *conviction* for deer-ſtealing was removed againſt *A.* and *B.* wherein judgment was given that each ſhould forfeit 30 *l.* and it was objected, that there ought to be but one 30 *l.* forfeited: *but not allowed*, for the words of the *ſtatute* are, that they ſhall *reſpectively forfeit* 30 *l.* *Cro. El.* 480. *Mo.* 453. *Noy* 60. And this penalty is not in nature of a ſatisfaction to the party aggrieved, but a puniſhment on the offender, and the crimes are ſeveral, though the debts are joint, which *Powell*, Juſtice, ſaid, diſtinguiſhes this from the caſe of *Partridge* v. *Naylor* in *Cro. El.* 480. and *Noy* 62. *Vide Salk. vol.* 1. *p.* 182.

Trinity, 10 *Ann.* *The Queen* v. *Mathews*.

The defendant was *convicted* on *ſtat.* 4 & 5 *Ann*, for the preſervation of the game.

Two *exceptions* were taken to this *conviction*; 1ſt. That the charge ſetting forth, that the defendant not being a perſon ſo and ſo qualified, and enumerating diſtinctly the ſeveral qualifications in the *ſtatute* of *Car.* 2. for the preſervation of the game, omitted a new qualification allowed by this act, *viz.* that he was not a perſon authoriſed by a Lord or Lady of a Manor, to kill game for their uſe.

2dly. That the defendant was here charged with as many *five pounds*, as he had killed hares in the ſame day; whereas the offence in the *ſtatute* was for keeping of dogs, engines, *&c.* and not killing hares.

The court were of opinion, that had it been laid *generally* thus, that he not being a perſon qualified according to the law, it had been enough; but the qualifications being diſtinctly and ſeverally mentioned, omiſſion of one is fatal.

As to the *ſecond point*, the court were of opinion, that the offence for which the *ſtatute* gave forfeiture, was the keeping of dogs and engines, and not killing hares. If a man not qualified, goes a hunting and kills ever ſo many hares on the ſame day, he would forfeit but one 5 *l.* for it is but one offence; but if a man keeps dogs, and goes a hunting ſeveral days, and kills hares; if it had been thus laid, that he had ſuch a day kept dogs and killed, *&c.* and then again on ſuch a day; by laying it thus ſeverally, the offence is ſevered, and he ſhall forfeit 5 *l.* for each offence. Adjourned. *Vide Mod. Rep. vol.* 10. *p.* 27.

Hilary, 12 *Ann.* *The Queen* v. *Green*.

See this caſe fully ſtated in page 84 of this work, under the head *Appearance*.

Eaſter, 12 *Ann.* *The Queen* v. *Bradley*.

The defendant was convicted on *ſtat.* 8 *Ann*, concerning the aſſize of bread.

In this caſe there were two *exceptions* taken: 1ſt, Whether the crime was certainly enough charged in the indictment on the defendant? 2dly, Whether the ſame perſon could be both informer and witneſs?

The crime was thus charged, that the bread wanting ſo much weight of, *&c.* was bought in the ſhop of *Bradley*, a common baker.

And the court were of opinion, the crime was not certainly enough charged; for the whole charge may be true, and yet the defendant innocent; for it is poſſible it might be the bread of another perſon, ſold in the defendant's ſhop; that therefore he ought to have been charged *directly* with the ſale of ſo much bread.

It is true indeed, that when a ſervant ſells it in his maſter's ſhop, it is good evidence of its being the maſter's bread: but it is ſtill but evidence, and it is a conſtant rule, that what is but evidence cannot be laid in an indictment.

As to the *ſecond point*, the court ſeemed to be of opinion, that the ſame perſon could not be both informer and witneſs; for as to the objection, that this would render *convictions* impoſſible, unleſs perſons were ſo fortunate as to have witneſſes with them, there was nothing in it; for an informer is only nominal, and any perſon's name may be made uſe of. *Vide Mod. Rep. vol.* 10. *p.* 156.

Trinity, 13 *Ann*. *The Queen* v. *Simpſon*.

See this caſe fully ſtated in page 84 of this work, under the head *Appearance*.

Hilary, 1 *Geo*. *The King* v. *Weſton*.

The defendant was *convicted* before juſtices for killing of *conies* in a warren incloſed.

It was moved to quaſh this *conviction*: 1ſt, Becauſe *ſtat*. 3. *Jac*. 1. *c*. 13. which relates to warrens incloſed, does not give this ſummary way of proceeding by *conviction*; and *ſtat*. 22 *Car*. 2. *c*. 25. which authoriſes that way of proceeding, relates not to warrens incloſed.

Per curiam. The *conviction* is well warranted by this latter *ſtatute*; for whereas the former was partial, this is an univerſal law, *into any warren*, this ſatisfies the preamble. There is a vaſt difference between the words *not incloſed*, and *though not incloſed*; the former are reſtrictive, but not the latter.

Unleſs this *ſtatute* extends to *warrens incloſed*, they would be in a worſe caſe, than thoſe *not incloſed*; becauſe then offences in the latter would be puniſhable by this ſhort way of *conviction* before juſtices, but not the former. *Vide Mod. Rep. vol.* 10. *p.* 279.

Michaelmas, 5 *Geo*. *The King* v. *Beck*.

Adjudged, that there muſt be a formal *conviction* on the *ſtatute* of hawkers and pedlars, though it mentions nothing of it; and that a *certiorari* lies to bring it up hither. *Vide Strange*, *vol*. 1. *p*. 127.

Hilary, 6 *Geo*. *The King* v. *Johnſon*.

See this caſe fully ſtated in p. 85 of this work, under the head *Apprentice*.

Trinity, 6 *Geo*. *The King* v. *Baker*.

The defendant was *convicted* for taking pilchards, *contrary to the form of the ſtatute*, and the *conviction* was quaſhed, becauſe the witneſs ſwore generally, that the defendant was guilty of the premiſes, and that is taking on himſelf to ſwear the law. *Vide Strange*, *vol*. 1. *p*. 316.

Trinity, 6 *Geo*. *The King* v. *Tilly*.

The defendant was *convicted* for deer ſtealing, and becauſe the ſame perſon was both informer and witneſs, and being intitled to a part of the penalty: the *conviction* was quaſhed. *Vide Strange*, *vol*. 1. *p*. 316.

Trinity, 7 *Geo*. *The King* v. *Landen*.

A *conviction* of a forcible entry was moved to be quaſhed, becauſe taken before juſtices *aſſigned to keep the peace in the county aforeſaid*, without ſaying *for the county*. *Salk*. 474.

Per curiam. Let it be quaſhed for another fault, that it is in the *præter perfect tenſe*, *we have came and viewed*, *whereas* it ſhould have been in the preſent tenſe. *Vide Strange*, *vol*. 1. *p*. 443.

Eaſter, 8 *Geo*. *The King* v. *Selfe*.

See this caſe fully ſtated in page 118 of this work, under the head *Arreſt of Judgment*.

Hilary, 9 *Geo*. *The King* v. *Gage*.

The defendant was *convicted* on *ſtat*. 5 *Ann*, *c*. 14. for uſing a greyhound in killing four hares, *whereby* he forfeited 20 *l*.

The defendant's council excepted to the *conviction*, that the ſtatute had only given the juſtices juriſdiction to *convict* on the oath of one or more credible witneſſes, *whereas* this was by his own confeſſion, which he inſiſted the juſtices had no power to take; and it follows in the ſtatute, that the perſon ſo *convicted* ſhall forfeit, *&c.* which word *ſo* is relative to the former method by oath of one or more credible witneſſes.

Per curiam. The *conviction* muſt be confirmed. The intent of mentioning the oath of one witneſs was only to direct the juſtices, that they ſhould not *convict* on leſs evidence: ſuppoſe the confeſſion had not been before the juſtices, but before two witneſſes, who had ſworn to it; that would be *convicting* him on the oaths of two witneſſes, and yet the evidence could not be ſo ſtrong as this. By the *civil law*, the confeſſion is eſteemed the higheſt evidence, and in ſome caſes, tho' there are an hundred witneſſes, the party is tortured to confeſs. Here the juſtices had a better evidence than the oath of any ſingle witneſs, and it is a monſtrous thing to ſay, that a better ſort of evidence ſhall not do. The *conviction* was accordingly confirmed. *Vide Stra*. *vol*. 1. *p*. 546. *Mod. Rep. vol*. 8. *p*. 64.

Hilary, 9 *Geo*. *The King* v. *Watſon*.

On a motion to quaſh a *conviction* for a forceable detainer on the view of the juſtices of peace, the objection was, that it was ſet forth, that the defendant *held a chamber in an houſe in ſuch a ſtreet in the pariſh of* St. Margaret, Weſtminſter, *by force*; but did not alledge whoſe houſe it was, or where it was ſituate, nor whether the chamber was forward or backward, or how many pair of ſtairs up to it; ſo that if there ſhould be two chambers in this houſe, the ſheriff could not know of which to deliver the poſſeſſion.

Beſides, the commitment of the defendant was to *Newgate*, and did not alledge that *Newgate was the county goal*, and if not, then the juſtices have no power to commit thither, becauſe the ſtatute expreſsly requires that the commitment ſhall be to the county goal.

But on reading the record, the words in the adjudication were all in the *præter perfect tenſe*, when they ought to have been in the *preſent*, and for that reaſon, the *conviction* was quaſhed; and in *Trinity* term following, in the caſe of *the King* v. *Morgan*, there was the like judgment for the ſame fault. *Vide Mod. Rep. vol*. 8. *p*. 66.

Trinity, 9 *Geo*. *The King* v. *Ford*.

The defendant was *convicted* on *ſtat*. 3 *Car*. 2. by which it is enacted, *that none ſhall keep an alehouſe without licence*, on pain of forfeiting 20 *s*. to the poor, *&c.*

It was moved to quaſh this *conviction*, becauſe alehouſe-keepers ſelling ale without a licence are puniſhable by former ſtatutes, particularly by *ſtat*. 5 & 6 *Ed*. 6. *viz*. that none ſhould keep alehouſes without a licence granted, either in ſeſſions or by two juſtices, (one to be of the *quorum*) on pain of three days impriſonment, without bail.

Now, it does not appear in this caſe, but that the defendant might be licenced by two juſtices of peace, according to that ſtatute; and if ſo, then this *conviction* ought to be quaſhed.

Per curiam. Stat. 5 & 6 *Ed.* 6. is intirely out of the caſe, becauſe it is alledged in the indictment, that the defendant ſold ale contrary to *ſtat.* 3 *Car.* and it being likewiſe averred, that he ſold it *without any licence whatever*; the objection, that he might be licenced by two juſtices, is of no weight. *Vide Mod. Rep. vol.* 8. *p.* 175.

Trinity, 9 *Geo. The King* v. *Aſhton.*

The defendant's wife was *convicted* by two juſtices, on *ſtat.* 1 *Geo.* for deſtroying fruit-trees, the puniſhment for which offence is, to be ſent to the houſe of correction for three months, and to be publickly whipped once every month during that time; and it was moved to quaſh this *conviction*, becauſe it did not ſpecify the puniſhment inflicted by that *ſtatute*, for that being a particular puniſhment, *viz.* to be ſent to the houſe of correction for three months, *&c.* ought to be ſet forth in the *conviction*, ſince the offence is to be heard and finally determined by the juſtices.

The court ſeemed clear to quaſh the *conviction*, for there ought always to be a judgment, *quod foris faciat*, or *that the perſon be committed*, for the *ſtatute* gives no pecuniary forfeiture. *Vide Mod. Rep. vol.* 8. *p.* 175.

Trinity, 9 *Geo. The King* v. *Thorogood.*

The defendant having made an affidavit in *C. B.* and the truth thereof being controverted, he was ſummoned to appear in court, and accordingly appeared in *Eaſter* term laſt, and confeſſed that he had made the affidavit, and that it was falſe.

Whereon that court recorded his confeſſion, and ordered that he ſhould be taken into cuſtody, and put in the pillory for *perjury*.

And now it was inſiſted by his council, that this could not be done on his own confeſſion, becauſe it was not a *conviction*, but only matter of evidence, for he ought judicially to be brought before the court by indictment, and therefore his confeſſion ought not to have been recorded.

Beſides, the court of *C. B.* has no juriſdiction in *criminal* caſes, and therefore if it had appeared on record, that the defendant was perjured, that court could not have puniſhed him.

But notwithſtanding what was ſaid by the defendant's council, he was put in the pillory the laſt day of the term. *Vide Mod. Rep. vol.* 8. *p.* 179.

Michaelmas, 9 *Geo. The King* v. *Gibbs.*

The defendant was indicted for ſelling beer without paying the duty, and found guilty.

And it was moved in arreſt of judgment, that this indictment was inſufficient, becauſe it ſet forth, that the defendant ſold beer without paying the duty; but did not ſhew to whom, or at what time it was to be paid, nor what quantity of beer he ſold, and conſequently a *conviction* on ſuch an uncertain indictment cannot be pleaded to any other for the ſame offence; neither can the defendant make any tolerable defence to ſuch an uncertain charge.

Beſides, in criminal caſes, the utmoſt certainty is required; therefore the quantity of the offence ſhould have been ſet forth in the indictment, ſo as a *conviction* thereon might have been a *bar* to all other actions and proſecutions for the ſame offence; and for this reaſon the judgment was arreſted. *Vide Mod. Rep. vol.* 8. *p.* 58.

Michaelmas, 9 *Geo. The King* v. *The Mayor and Aldermen of Carliſle.*

On a *mandamus* to reſtore one *J. S.* to the office of capital citizen of the city of *Carliſle*, the return made was, that he gave a bribe of 60 guineas, together with a promiſe to his ſon to get him an exciſeman's place, if he would vote for one *P.* to be Mayor of that city; he and one *T.* ſtanding candidates for the ſame; and in their return they ſhewed a power to remove, and that they removed him *for the cauſes aforeſaid*, having firſt of all ſet out before, that an information was exhibited *to the following effect*, and then ſet out, that articles were exhibited againſt him to the effect in the information, and ſhew the offence as before mentioned, and the oath of the informer poſſitively to the offence.

Per curiam. This is a good return, without any *conviction* at law, though he might have been *convicted* firſt at law; for though it is an offence indictable at common law, yet being ſo great an offence againſt the duty of his office, the corporation have a juriſdiction, there being an expreſs power to remove; and the caſe of *The King* v. *Lane*, went on that difference, where it was ſaid, that to libel another was purely at common law, and was no breach of his oath: and as to the form of the return, the whole court, after ſome little doubt, held it well; becauſe on the whole return, there ought to be a good cauſe of removal. *Vide Forteſcue, p.* 200. *Mod. Rep. vol.* 8. *p.* 99.

Michaelmas, 9 *Geo. Or according to Strange, Hil.* 8 *Geo. The King* v. *Sparling.*

The defendant was *convicted* on *ſtat.* 6 & 7 *W.* 3. *c.* 11. made againſt profane curſing and ſwearing, by which the offender forfeits 2 *s.* for every oath (other than a *ſervant, labourer, common ſoldier, or ſailor*;) and it was moved in arreſt of judgment, that this information was too vague and uncertain, becauſe it did not ſet forth, that the defendant was not a *ſervant, labourer, common ſoldier, or ſailor*; for this being in a criminal caſe, it ſhall be intended that he was one of thoſe perſons, if it does not appear that he was not; and therefore the matter ought to have been ſpecially ſet forth.

It was argued on the other ſide, that this information was good, for if the defendant was either *a ſervant, labourer, common ſoldier, or ſailor*, he ought to have pleaded it, or to have given it in evidence on the trial.

And for the above reaſons, and becauſe the curſes and oaths were not ſet forth, the *conviction* was quaſhed. *Vide Mod. Rep. vol. p.* 59. *Strange, vol.* 1. *p.* 497.

Michaelmas, 10 *Geo. The King* v. *Burchet, His Attorney, and the Town Clerk of Guildford.*

See this caſe fully ſtated in page 137 of this work, under the head *Attachment*.

Eaſter, 11 *Geo. The King* v. *Tuck or Tucke.*

The defendant was *convicted* before a juſtice of peace on the *ſtatute* made againſt *profane curſing and ſwearing*; and on a motion to quaſh this *conviction*, the objections were as follows:

1ſt. By the *ſtatute*, the perſon *convicted* is to pay 2 *s.* for every oath, if he is not a *common labourer, ſoldier, or ſailor*; now it did not appear on the oath of the informer, that the defendant was a *gentleman*, and neither *a common labourer, ſoldier, or ſailor*.

2dly, It does not appear by this *conviction*, of what age the defendant was, when he did profanely ſwear; for by the *ſtatute* he muſt *be above* 16 *years old*.

3dly, This *conviction* is uncertain, for after the nature of the oath is ſet out, the witneſs ſwears, that the defendant repeated it ſixteen times, for which he is *convicted* to forfeit 32 *s.* whereas a *repetition* preſuppoſes a former act done; ſo *he ſwore ſeventeen times*; therefore the *conviction* does not agree with the evidence.

Per curiam. It ſhall be intended, that the defendant *was of age and a gentleman*, if ſo charged by the informer; and it is not neceſſary to aver, that he is not a *ſoldier, ſailor, or common labourer*, ſince he is charged with 2 *s.* for every offence; and as to the not charging him with more than *ſixteen times*, when it ſhould be *ſeventeen times* ſwearing, it is but giving one oath free, and there muſt not be too much nicety in theſe *convictions*. Therefore the *conviction* was confirmed, *niſi, &c.* and no cauſe was afterwards ſhewn. *Vide Mod. Rep. vol.* 8. *p.* 367. *Raym. vol.* 2. *p.* 1386.

Michaelmas, 11 *Geo. The King* v. *Chaveney.*

The defendant was *convicted* before a juſtice of peace of the county of *Leiceſter*, for curſing and ſwearing a great number of oaths; and the *conviction* being removed into this court by *certiorari*, it was quaſhed; firſt, becauſe it was in *Engliſh*, and, ſecondly, becauſe the number of oaths was not ſet forth in the *conviction*. *Vide Raym. vol.* 2. *p.* 1368.

Michaelmas, 11 *Geo. The King* v. *Roberts.*

A *conviction* for *profane ſwearing* was quaſhed, being *preſtitit ſacramentum*, i. e. *he has ſworn*, in the *præterperfect tenſe*. It was held good in ſubſtance, being for ſwearing 150 oaths in theſe words, to wit, *by God*, and curſing 150 curſes, *in theſe words*, to wit, *God damn you*, without repeating theſe words 150 times. *Vide Strange, vol.* 1. *p.* 608.

Michaelmas, 11 *Geo. The King* v. *Thead or Theed.*

By *ſtat.* 8 *Ann*, it was enacted, that *the officer*, &c. *may enter the houſe*, &c. *by day or by night, where candles are made, and if in the night, it muſt be in the preſence of a conſtable, and may weigh the candles, the maſters whereof muſt keep juſt ſcales and weights where they are made, and permit and aſſiſt the officers in uſing them, under the penalty of* 10 *l.*

The defendant was *convicted* on this ſtatute, for not aſſiſting the exciſe officer in weighing the candles; and now it was objected, that the *conviction* was wrong, becauſe the ſtatute directs, that if the entry is in the night-time, it muſt be in the preſence of the conſtable; and it is not ſpecified in this *conviction*, whether the entry was by day or night.

Per curiam. That ſhould have been ſhewn by the defendant, and then he would not have been *convicted*. It is enough, that this *conviction* does not appear to be wrong: we will preſume the entry to have been in the day, or elſe it would have been ſaid *in the night of the ſame day*. The *conviction* was therefore confirmed. *Vide Mod. Rep. vol.* 8. *p.* 320. *Stra. vol.* 1. *p.* 608. *Raym. vol.* 2. *p.* 1375.

Hilary, 12 *Geo. The King* v. *Popplewell.*

The defendant was *convicted* for *profane curſing* and *ſwearing*, and for want of the particular oaths and curſes being ſet out in the *conviction*, it was quaſhed. *Vide Stra. vol.* 1. *p.* 686.

Eaſter, 13 *Geo. The King* v. *Philip Wyatt.*

The defendant was *convicted* by Lord *Barrimore*, a juſtice of peace of the county of *Cheſter*, for that he not being qualified according to the ſtatute, on the 2d *Jan.* 13 *Geo.* at the *ville* of *Mottram Andrews* in the ſaid county, two greyhounds, for the killing and deſtroying game, *unlawfully had in his cuſtody, and then and there uſed* to deſtroy the game, contrary to the ſtatute; for which he was *adjudged* to forfeit 5 *l.* This *conviction* being removed by *certiorari* into this court, the defendant's council took an exception to it, that by *ſtat.* 5 *Ann, c.* 14. for the better preſervation of the game; on which ſtatute this *conviction* is grounded, by *Sect.* 4. one-half of the 5 *l.* forfeited is to be paid to the informer, and the other half to the poor where the offence is committed. But in this caſe it does not appear, that the offence was committed in any pariſh, for both the informations alledge the offence to have been at the *ville of Mottram Andrews in the county of Cheſter*, and the judgment of the juſtice is, *it appears to me, the juſtice aforeſaid, that the ſaid* P. W. *is guilty of the premiſes aforeſaid, in the information aforeſaid ſpecified, and charged on him in manner and form, as in and by the information aforeſaid, is above alledged againſt him.*

But there does not appear to be any ſuch pariſh as *Mottram Andrews*, and conſequently the poor will be deprived of their moiety of the 5 *l.* forfeited. *But not allowed.*

Per curiam. If there was no ſuch pariſh as *Mottram Andrews*, it ſhall be at *firſt ſight* intended to be coextenſive with the *ville*. But if the offence was committed in a *ville*, which was extra-parochial, (which may be) then the informer will have the whole penalty: therefore the *conviction* was affirmed. *Vide Raym. vol.* 2. *p.* 1478.

Hilary, 1 *Geo.* 2. *The King* v. *Sir Edmund Elwell, et Al.*

See this caſe fully ſtated in page 258 of this work, under the head *Certiorari.*

Michaelmas, 2 *Geo.* 2. *The King* v. *Thomas Stone.*

The defendant was *convicted* by a juſtice of peace of *Dorſetſhire*, for killing a fallow deer of the King's in *Cranborn Chace*; and the *conviction* was quaſhed, becauſe the informer was the witneſs; divers *convictions* having been quaſhed for the ſame reaſon before. *Vide Raym. vol.* 2. *p.* 1545.

Michaelmas, 2 *Geo.* 2. *The King* v. *Kent.*

The defendant was *convicted* for keeping a gun for deſtroying game, not being qualified by law, *&c.* and the *conviction* being removed into this court by *certiorari*, was quaſhed, becauſe the information was ſet out to be exhibited on the 2d of *November*, 1 *Geo.* 2. and the witneſs was ſworn, and made his oath of the truth of the facts contained in the information, the ſaid 2d of *November*, 1 *Geo.* 2. But the ſummons for the defendant's appearance and making defence, and the *conviction* was laid to be on the 2d of *October* 1 *Geo.* 2. which was before the information and examination of the witneſs, *&c.* *Vide Raym. vol.* 2. *p.* 1546.

Hilary, 3 *Geo.* 2. *The King* v. *Hawks.*

A *conviction* for killing a deer was quaſhed, becauſe it was only *he is convicted*, without any judgment *quod foris faciat*. *Vide Strange, vol.* 2. *p.* 858. *Fitz-Gibbons, p.* 24.

Eaſter, 4 *Geo.* 2. *The King* v. *Catherall.*

The defendant was *convicted* on the *Kenſington* turnpike act, for refuſing to account, and pay over the money by him received, as collector. And being committed, and a *habeas corpus* brought, the defendant was diſcharged, and the *conviction* quaſhed; becauſe no particular ſum was ſpecified, or the time when the money was charged to be received, ſo as to enable him to defend himſelf on a ſecond charge. And tho' the council for the truſtees would have had the commitment ſtand good as to the not accounting; yet the court ſaid it was one intire non-feaſance charged both in the *conviction* and commitment, and they would not ſever them. *Vide Strange, vol* 2. *p.* 900.

Michaelmas, 5 *Geo.* 2. *The King* v. *Heber.*

The court would not hear a motion againſt a juſtice for *convicting* without a ſummons, till the *conviction* was removed before them. *Vide Strange, vol.* 2. *p.* 915.

Trinity, 5 *&* 6 *Geo.* 2. *The King* v. *Roberts.*

The defendant being a bricklayer, was *convicted* for not building party walls according to the *ſtatute*; and having brought a *certiorari*, died before the argument. Notwithſtanding which the court would go on, and affirm the *conviction*. *Vide Strange, vol.* 2. *p.* 937.

Michaelmas, 12 *Geo.* 2. *The King* v. *Bryan.*

The defendant was *convicted* on the gin act, and an exception was taken, that there was no *averment*, that it was not ſold to be uſed in medicine; and the caſes on the game act were mentioned, where in *convictions* it is neceſſary to exclude all the qualifications for killing game.

On the other ſide it was inſiſted, that the reaſon of that was, becauſe thoſe were in the enacting clauſe; whereas this about medicine comes in by way of *proviſo*, and is by way of defence to be ſhewn on the defendant's part, and **The King* v. *Theed*, *Michaelmas*, 11 *Geo.* was cited.

Per curiam. This is brought within the general enacting clauſe; and the true diſtinction is, where the extenuation comes in by way of proviſo, or exception. The *conviction* was therefore affirmed. *Vide Strange*, *vol.* 2. *p.* 1101.

Hilary, 16 *Geo.* 2. *The King* v. *Sergiſon*, *Eſq.*

An information was moved for againſt the defendant, for not condemning a horſe taken out of a team under *ſtat.* 5 *Geo. c.* 12. which requires proof to be made before a juſtice, of the cauſe of forfeiture; and the party who ſeized tendering his own oath, the defendant ſcrupled to take it, or determine the affair, in the abſence of the owner or driver.

Per curiam. They were both reaſonable objections, why is not the perſon who ſeized, and is to have the benefit of the forfeiture, within the reaſon of excluding informers where there is a penalty? *Making proof* muſt mean *legal proof.* The other alſo but natural juſtice. There are exceptions in the *ſtatute* as to one ſtone, or one piece of timber, though drawn by ever ſo many horſes; and ought not the owner to have an opportunity of ſhewing it? The rule was therefore diſcharged with coſts. *Vide Strange*, *vol.* 2. *p.* 1181.

Eaſter, 16 *Geo.* 2. *The King* v. *Monkhouſe*.

The court granted an attachment againſt the under ſheriff of *Cumberland*, for granting a *replevin* of goods diſtrained on a *conviction* of *deer-ſtealing*. *Vide Stra.* *vol.* 2. *p.* 1184.

Michaelmas, 19 *Geo.* 2. *The King* v. *Baker*.

In a *conviction* for keeping a lottery-office contrary to the late ſtatute, it was ſtated, that *J.* gave information before two juſtices, and *M.* a credible witneſs, proved the fact, whereon due ſummons iſſued, and the defendant appeared; and the information aforeſaid, and the ſaid evidence thereon given, being now here *read unto*, *and fully underſtood by the ſaid F. Baker*, he is aſked what he has to ſay.

It was objected, that it ſhould appear, the evidence was given *in the hearing* of the defendant, whereas it was only read, whereby the defendant loſes the benefit of a croſs examination: but the court held it well enough, for all is a ſtory in the preſent tenſe, and ſuppoſed to paſs at the ſame time; and if it had been *heard*, it might be ſaid to be only *hearing it read.* In theſe caſes it is enough that it does not appear to be wrong; and it is laid to be fully underſtood by him. In the caſe of *Theed* on the *candle act*, it was held not to be neceſſary to aver the entry of the officer in the day-time, and not in the night, when a conſtable's preſence would be neceſſary. The *conviction* was therefore confirmed. *Vide Stra. vol.* 2. *p.* 1240.

Hilary, 30 *Geo.* 2. *The King* v. *Maurice Jarvis*.

On a *conviction* under *ſtat.* 5 *Ann*, *cap.* 14. for keeping *ſetting dogs* and *nets* for killing game, the following *exceptions* were taken to the ſame:

1ſt. Two juſtices have not ſhewn that they had juriſdiction over the defendant, for they have not ſufficiently ſhewn his defects of qualification, which ought to have been ſpecifically particularized, with an allegation that he had not any one of the qualifications mentioned in *ſtat.* 22 & 23 *Car.* 2. *cap.* 25.

2dly. The witneſs to the *conviction* was examined privately and apart, prior to the appearance of the defendant, and in the abſence of the defendant, ſo that the defendant had no opportunity of *croſs* examining ſuch witneſs.

3dly. The time when the defendant was unqualified is not at all aſcertained in the adjudication of his being guilty, for it only averred, that he was then unqualified.

After hearing council on both ſides, the court gave their opinion.

Lord *Mansfield.* It is not ſettled that the qualifications muſt be all *negatively* ſet out, otherwiſe two juſtices have no juriſdiction over the perſons killing game, or keeping dogs, or engines for the deſtruction of it.

On this *conviction* the witneſs ſwears *only generally*, that the defendant was not qualified, &c. The juſtices adjudge it *generally* only. Therefore I am of opinion that the *conviction* ought to be quaſhed.

Deniſon and *Foſter*, Juſtices, concurred with the Chief Juſtice.

Per curiam, unanimouſly, let the *conviction* be quaſhed. *Vide Bur. vol.* 1. *p.* 148.

Trinity, 31 *Geo.* 2. *The King* v. *Little*.

On a *conviction* for offering to ſell goods, &c. as a *hawker* and *pedlar*, without licence, contrary to the ſtatute; the following *exceptions* were taken by the defendant's council to the *conviction*,

1ſt. That the defendant is not brought within the deſcription of the ſtatute relating to *hawking* and *pedling*, viz. going from town to town, &c. and travelling, &c. but he is only *generally* deſcribed to be a perſon that traded as a *hawker* and *pediar*, and offered to ſell a parcel of ſilk handkerchiefs to the informer.

2dly. There is no evidence at all of his guilt, for it is a *conviction* on a confeſſion; and the confeſſion extends no further than barely to the ſimple fact of offering to ſale ſilk handkerchiefs to the informer, but that charge is not ſufficient.

After hearing council on both ſides, the court gave their opinion.

Lord *Mansfield.* *Stat.* 3 & 4 of *Ann* refers to the deſcription in thoſe of *W.* 3. A ſingle act of ſelling a parcel of ſilk handkerchiefs to a particular perſon is not a proof that he was ſuch a *hawker*, *pedlar*, or *petty chapman*, as ought to take out a licence by virtue of the ſtatutes.

The confeſſion is only of the fact, that he ſold the handkerchiefs to the informer, not that he traded as a *hawker*, &c.

Convictions ought to be taken ſtrictly, becauſe they muſt be taken as true againſt the defendant. It is not neceſſary to define exactly what a *hawker*, *pedlar*, or *petty chapman* is, but it is neceſſary to alledge and ſhew that he ſold the goods, or traded as *one*.

Deniſon and *Wilmot*, Juſtices, were of the ſame opinion as the Chief Juſtice.

Per curiam, unanimouſly, let the *conviction* be quaſhed. *Vide Bur. vol.* 1. *p.* 609.

Michaelmas, 32 *Geo.* 2. *The King* v. *Mallinſon*.

On a *conviction* for killing *ten trouts*, the following *exceptions* were taken to the *conviction*.

1ſt. The ſummons is bad, being to appear *immediately*, which is not a reaſonable ſummons.

2dly. In this *conviction*, there is not a full negative adjudication of the defendant's want of qualification, for it is not ſet forth, that the defendant had not the licence or conſent of the owner.

3dly. It might be his own fiſh, and in his own pond, for aught that appears to the contrary, for it is only alledged, that he killed *ten trouts* at ſuch a place.

After hearing council on both ſides, the court gave their opinion.

Ld. *Mansfield.* This *conviction* is clearly bad, the offence provided againſt by *ſtat.* 22 & 23 *Car.* 2. *cap.* 25. is *ſtealing fiſh*, but it may be his own pond, and his own fiſh, for any thing that appears to the contrary on this *conviction*; therefore if there was no other fault, it is *eſſentially* bad, for this reaſon alone.

Deniſon, *Foſter*, and *Wilmot*, Juſtices, were of opinion, that the *conviction* was bad, for the ſame reaſons as alledged by the Chief Juſtice.

Per curiam, unanimouſly, let the *conviction* be quaſhed. *Vide Bur. vol.* 2. *p.* 679.

Eaſter, 1 *Geo.* 3. *The King* v. *Bell.*

On a *conviction* for *importing Iriſh butter* from *Liſbon* into *England*, *contrary to ſtatutes* 18 *Car.* 2. *cap.* 2. 20 *Car.* 2. *cap.* 7. and 32 *Car.* 2. *cap.* 2.

After hearing council on both ſides, the court gave their opinion.

Per curiam. Let the *conviction* be quaſhed. *Vide Bur. vol.* 2. *p.* 1173.

Eaſter, 1 *Geo.* 3. *The King* v. *Vipont & others.*

On a *conviction* under *ſtat.* 12 *Geo.* 1. *cap.* 34. againſt the defendants, for combining together to raiſe their wages in their buſineſs of woolcombers; their council took the following *exceptions* to the *conviction.*

1ſt. That no evidence is ſtated to have been given in the preſence of the defendants, only the charge was read to them, *&c.*

2dly. The fact as charged is not an offence within the ſtatute, *&c.*

3dly. Here is no judgment. It is only ſaid that they are *convicted* for unlawfully entering into ſuch combination, *&c.*

After hearing council on both ſides, the court gave their opinion.

Lord *Mansfield.* The *firſt* and *third exceptions* are fatal.

1ſt. The evidence ought to be taken over again in a defendant's preſence, unleſs he confeſſes. In the preſent caſe, the defendants do not confeſs before the juſtices, and the evidence only is, that they had formerly confeſſed this combination to a witneſs.

In a *conviction*, the evidence muſt be ſet out, that the court may judge of it, and the ſame muſt be given in the preſence of the defendant, that he may have an opportunity of *croſs* examining the witneſſes.

2d. On this *conviction*, the puniſhment is *diſcretionary*, as to the time of impriſonment. There is no judgment at all, only a *conviction.* They ought to have gone on, and adjudged the *forfeiture.* Therefore on both thoſe objections, this *conviction* ought to be quaſhed, for however uſeful a ſtatute may be for the benefit of trade, yet the juſtices muſt *convict* according to *law.*

Deniſon and *Wilmot*, Juſtices, concurred with the Chief Juſtice.

Per curiam, unanimouſly, let the *conviction* be quaſhed. *Vide Bur. vol.* 2. *p.* 1163.

Eaſter, 4 *Geo.* 3. *The King* v. *Robotham.*

The defendant being *convicted* before a juſtice of the peace on *ſtat.* 9 *&* 10 *W.* 3. *cap.* 27. relating to *hawkers* and *pedlars* travelling the country,

This *conviction*, on being removed into this court by *certiorari*, was quaſhed for a manifeſt miſtake of the juſtice of peace, who had *convicted* him, becauſe he travelled with *two horſes*, and had not a licence to produce for each horſe with which he ſo travelled.

The court have ſome doubts as to the wording of the *ſtatute*; on enquiry, found it had been uſual only to require a ſingle licence for a number of horſes. *Vide Bur. vol.* 3. *p.* 1472.

Eaſter, 4 *Geo.* 3. *The King* v. *Smith.*

The defendant was *convicted* before a juſtice of peace for trading as a *hawker*, *pedlar*, and *petty chapman*, without having a licence. On the *conviction* being removed into this court by *certiorari*, the defendant's council took the following *exception* (among others) to the *conviction*, viz.

That the evidence which the juſtice had ſtated in his *conviction* was not ſufficient to ſupport his *adjudication*, that the defendant had no licence; the charge was, that the man had traded as a *hawker*, &c. in ſelling a piece of *muſlin*, &c. without having a licence.

The evidence ſtated by the juſtice in the *conviction* is, that the man refuſed to produce any licence, *whereas* the trading without having any licence, and the refuſing to produce his licence, (if he has any) are quite diſtinct offences, and are ſo conſidered by *ſtat.* 9 *&* 10 *W.* 3. *cap.* 27. which gives quite diſtinct and different penalties for them; *viz.* 12 *l.* for the former, and 5 *l.* for the latter. Refuſing to produce a licence, which a man has, is in its nature a very different thing from not having one to produce. The man having confeſſed that he traded as a *hawker*, &c. is no ground for *convicting* him for trading as ſuch without a licence, notwithſtanding his refuſal to produce it; and though *ſect.* 8. of this *ſtat.* as well as *ſtat.* 3 and 4 *Ann*, *cap.* 4. gives the ſame forfeiture for not producing, as for not having one, yet that cannot alter the nature of the offence.

After hearing council on both ſides, the court gave their opinion.

Lord *Mansfield* ſaid, he could ſee no doubt of the *conviction*'s being good under 9 *&* 10 *W.* 3. *ſect.* 8.

Per curiam. Let the *conviction* be *confirmed.* *Vide Bur. vol.* 3. *p.* 1475.

Michaelmas, 6 *Geo.* 3. *The King* v. *Hann and Price.*

On a motion for a rule to diſpenſe with the perſonal appearance of the defendants, on the undertaking of ther clerk in court to anſwer for their fines, who were *borough juſtices* of *Corfe Caſtle*, and had confeſſed themſelves guilty of an *information*, charging them with a great miſbehaviour in the execution of their office, *viz.* refuſing a licence to a public-houſe keeper, *&c.*

The court on full debate were unanimous in refuſing the motion, *&c.* *Vide Bur. vol.* 3. *p.* 1786.

Coroner.

Michaelmas, 1 *W. & M.* *The King and Queen* v. *Bunney.*

If a *coroner*'s inqueſt be quaſhed, the *coroner* muſt take a new inqueſt *on view of the body*; but if a *better enquiry* be granted, on aſſertion that the *coroner* had miſbehaved himſelf, the *new enquiry* muſt be before the ſheriff or commiſſioners, not *on view of the body*, but on affidavits; for none but the *coroner* can enquire *on view of the body*, and he is not to be truſted again: but when an inquiſition is quaſhed, it is as if no inquiſition had been taken. *Vide Salk. vol.* 1. *p.* 190.

Hilary, 8 *W.* 3. *Anonymous.*

The court was moved to quaſh an inquiſition taken before a *coroner*, whereon the jury find, that a poſt in the highway, was *the only cauſe that occaſioned his death*, and an exception was taken, becauſe it was, *we believe it to be the cauſe of his death*, whereas it ought to be certain; and therefore it was quaſhed. *Vide Mod. Rep. vol.* 12. *p.* 112.

Eaſter, 13 *W.* 3. *The King* v. *Stukely.*

The defendant was *coroner* of *Dorſetſhire*; and a perſon having killed himſelf, there was ſome reaſon to believe feloniouſly, he having made a formal will juſt before; and this *coroner* having ſworn the jury to enquire, finding the evidence very ſtrong, took off ſome of the inqueſt.

Per Holt, Chief Juſtice. It is not in a judge's power to take off a juryman after he is ſworn; and though this *coroner* is a weak ſilly man, yet that is no reaſon why there ſhould not be an information againſt him: for ſuch muſt learn, they muſt not thruſt themſelves into offices; and the return of the inquiſition, finding the deceaſed *non compos*, not being filed, it was quaſhed. And *Holt* cited *Tomb*'s caſe, who had killed himſelf at *Highgate*, in the year 1655, and the inqueſt was ſet aſide for practice; and he ſaid, it muſt be by thoſe that had the view of the corpſe. *Vide Mod. Rep. vol.* 12. *p.* 493.

Eaſter, 13 *W.* 3. *The King* v. *Atkinſon.*

Per curiam. There cannot be a better inquiſition made than that made *officially.* An indictment was brought againſt the *coroner* for mal practice, in finding a *felo de ſe, inſane*, and iſſue joined on the fact; and the inquiſition being brought hither, the court ſtayed the filing thereof till the iſſue on the indictment was tried.

Per curiam. It is a crime in a perſon to take on himſelf an office he does not underſtand. *Vide Mod. Rep. vol.* 12. *p.* 496.

Eaſter, 1 *Ann.* *Anonymous.*

Holt, Chief Juſtice. It is a matter indictable to bury a man that dies of a violent death, before the *coroner's inqueſt* have ſat on him. *Vide Mod. Rep. vol.* 7. *p.* 10.

Eaſter, 1 *Ann.* *The Queen* v. *Clerk.*

On an inquiſition taken before the *coroner on view of the body* of one who had killed himſelf; it firſt was ſaid by the whole court, that ſuch an inquiſition is traverſeable.

Objection firſt. That it wanted the word *murdravit*, i. e. *he murdered.*

Per Holt, Chief Juſtice. Moſt ſurely the great defect in this inquiſition is, that it is not ſaid he died of the wound ſet forth in the inquiſition: for to what purpoſe has the Queen a view of the dead body, but to ſhew the jury that the wound is mortal? And for this fault the inquiſition was quaſhed; for it is not enough to ſay, that it was *felony*, but alſo it ought to be ſhewn how it was *felony*. *Vide Mod. Rep. vol.* 7. *p.* 16.

Hilary, 3 *Geo.* *The King* v. *Bond.*

An inquiſition was taken *on view of the body* of a man that had hanged himſelf; and the jury finding him poſſeſſed of a meſſuage, which as a *felo de ſe* he had forfeited.

The court was moved to ſtay the filing of this inquiſition, on an affidavit that the man died *five years* before, and the *coroner* dug up a ſkull, which he aſſured the jury he knew by a particular mark was the ſkull of the deceaſed; and thereon the inquiſition was taken: which was inſiſted ought to have been of the whole body, that the marks, if any, may appear. *The Queen* v. *Clerk*, the court held that *ſeven months* was too late. *Salk.* 377. 2 *Mod. Car.* 16.

Per curiam. Stay the filing till further motion. *Vide Strange, vol.* 1. *p.* 22.

Michaelmas, 4 *Geo.* *The King* v. *Wakefield.*

The defendant was *coroner* of *Litchfield*, and as ſuch took an inquiſition *on view of the body* of a man that hanged himſelf, whereby he was found *felo de ſe*; it fully appeared to the jury that the man was a *lunatic*; but the defendant in order to cover the goods, told them that the finding him *felo de ſe*, was only matter of courſe, with which they were contented and found accordingly. But being afterwards better informed, what the conſequence would be; they applied to the *coroner*, and told him they were fully ſatisfied, the man was a *lunatic*, and deſired he would take the verdict ſo; and thereon he drew up the inquiſition, and they all ſet their hands and ſeals to it. A *certiorari* being brought, he returned the firſt inquiſition, and that he might ſtill cover the goods; and the court ſtayed the filing of it, and committed him. 2 *Sid.* 90. 101. 144. *Michaelmas*, 1 *Geo.* *The King* v. *Keddington*, The filing ſtayed on the ſame account. *Vide Strange, vol.* 1. *p.* 69.

Eaſter, 5 *Geo.* *The King* v. *Saunders.*

The court was moved for leave for the *coroner* to take up the body, and take a new inquiſition, according to 2 *Sid.* 101. *Salk.* 377 which was granted; and it was ſaid the *coroner* could not do it without leave of the court. *Vide Strange, vol.* 1. *p.* 167.

Michaelmas, 9 *Geo.* *Anonymous.*

The court granted a rule for the *coroner* of *Wenlock* in the county of *Salop*, to take up a body, in order for a new inquiſition, the former having been quaſhed. *Vide Strange, vol.* 1. *p.* 533.

Michaelmas. 10 *Geo.* *Lord Coningſby* v. *Steed.*

See this caſe fully ſtated in page 145 of this work, under the head *Attorney.*

Eaſter, 10 *Geo.* 2. *The Caſe of the Coroner of Weſtminſter.*

He returned an inquiſition, finding a *felo de ſe, inſane.* And it was moved, that he might be obliged to return the depoſitions; but the court refuſed to make any ſuch rule, there being nothing depending before them, to make it neceſſary. *Vide Strange, vol.* 2. *p.* 1073.

Trinity, 11 *Geo.* 2. *The King* v. *Solgard.*

The defendant being captain of a man of war in commiſſion, and lying within the harbour of *Portſmouth*, and the liberties of the borough, had a ſailor who hanged himſelf on board: and the *coroner* of *Portſmouth* having impannelled a jury, went to the ſhip with his jury to view the body, but was refuſed admittance by the defendant, who offered to ſend the body to them on ſhore.

On this an information was moved for, inſiſting that as this was not a death *on the high-ſea*, the land *coroner* had the juriſdiction; and cited 4 *Inſt.* 141. *Ow.* 122. *Mo.* 892. the *ſtat.* 4 *E.* 1. of the *Office of Coroners*, *H. P. C.* 171. *Fleta, lib* 1. *c.* 25. *Bract.* 121. 33. *H.* 8. *c.* 12. and *Articles on the Charter*, and 2 *Hale's H. P. C.* 16. 54.

On the other ſide it was inſiſted for the admiralty, that they had a *coroner* of their own; and it might be of ill conſequence to admit ſo many perſons on board a man of war. But the court took notice they did, not pretend their *coroner* ever took inquiſitions, ſo it was contending that none ſhould be taken. And tho' there have been variety of opinions as to the admiralty juriſdiction, yet it was never carried further than a pretence to a concurrent juriſdiction; and when an officer is ready to do his duty, and is oppoſed without the duty being done, public juſtice is concerned, and there ought to be an information. *Vide Stra. vol.* 2. *p.* 1097.

Michaelmas, 30 *Geo.* 2. *The King* v. *Killinghall.*

On a motion to quaſh a preſentment or inquiſition, found by the grand jury of the county of *York.*

The fact found by the jury on the inquiſition was, that the mare of the defendant was the cauſe of the death of one *W. S.* and was of the value of 10*l.*

The *coroner* had not taken any inquiſition at all on this death, ſo that the lord of the manor finding himſelf likely to loſe his *deodand*, had made this application at the *aſſizes*, where the inquiſition was found, and removed into this court by *certiorari.*

On this motion, the defendant's council *objected* to the inquiſition, as being *not before the court*, for the *grand jury* had no authority to make ſuch preſentment, *&c.* under their *general charge* from the judge of *aſſize.*

After hearing council on both ſides, the court gave their opinion.

Lord *Manſfield.* I think this inquiſition cannot be ſupported.

Deniſon and *Foſter*, Juſtices, concurred with the Chief Juſtice in opinion.

Per curiam. Let the rule to quaſh the *preſentment* be made *abſolute.* *Vide Bur. vol.* 1. *p.* 17.

Corporations.

Michaelmas, 3 *W.* & *M.* *Sir James Smith's Caſe.*

He brought a *mandamus* to be reſtored to the place of an alderman of the city of *London*.

The queſtion was, whether Sir *James Smith* was an alderman at the time of making *ſtat.* 1 *W.* 3.? and whether he continued ſo to be, until the firſt day of *Auguſt* 1689?

And this depended on the judgment in the *quo warranto* againſt the city of *London*: for if the *corporation* was diſſolved by that judgment, then by conſequence Sir *James Smith* was no alderman at the time of making *ſtat.* 1 *W.* 3. and was not obliged to take the oaths, *&c.*

Per curiam. A *corporation* may be diſſolved; for it is created on a truſt, and if that is broken, it is forfeited; but a judgment of ſeizure cannot be proper in ſuch a caſe; for if it is diſſolved, to what purpoſe ſhould it be ſeized?

Therefore by this judgment in the *quo warranto*, the *corporation* was not diſſolved; for it neither extinguiſhes or diſſolves a body politic.

Wherever any judgment is given for the king for a *liberty which is uſurped*, It is, *that it be extinguiſhed*, and that the perſon who uſurped ſuch a privilege *libertat.* &c. *nullatenus intromitat*, &c. which is the judgment of *ouſter*; but the *quo warranto* muſt be brought againſt particular perſons.

But where it is for a liberty claimed by a *corporation*, there it muſt be brought againſt the body politic, in which caſe there may be a ſeizure of the liberties, which will not warrant either the ſeizing or diſſolving of the *corporation* itſelf.

Therefore the *corporation* being not diſſolved, Sir *James Smith* was ſtill an alderman, and ought to take the oaths before the 1ſt day of *Auguſt*; and therefore judgment was given in *Hilary* term following, that no peremptory *mandamus* ought to iſſue.

Dolben, Juſtice, doubted on the main point, for it ſeemed to him, that if the liberties of the city were ſeized, then Sir *James Smith* was no alderman, *&c.* and that the parliament of 2 *W.* did affirm the judgment to be of force, by not declaring it to be void *from the beginning*, but illegal. *Vide Mod. Rep. vol.* 4. *p.* 52.

Trinity, 7 *W.* 3. *Robinſon* v. *Groſcourt.*

The Chamberlain of *London* brought an action of *debt* againſt the defendant for a forfeiture on the breach of a *bye-law*, which being removed into this court by *hab. corpus*, the Lord Mayor, *&c.* made this return, *viz.* That the city *London* is an ancient city, and that there had been a cuſtom there time out of mind, for the Mayor and Aldermen for the time being, *with the conſent of other faithful people*, to make *bye-laws* for the common good of the citizens, as often as there ſhould be occaſion: that their cuſtoms were confirmed by act of parliament; that at a common council held at *Guildhall*, the 11th of *September*, *&c.* a *bye-law* was made, *viz. That whereas the Maſter, Wardens, Aſſiſtants, and Commonalty, of the art and ſcience of muſic, freemen of the ſaid city, had been an ancient brotherhood, and that no perſon, not being a freeman, ought to uſe any art or occupation within the ſaid city for gain; that many foreigners did take on them the art of dancing, not being free of the ſaid city, nor members of any fraternity, &c. For remedy whereof, it was enacted by the Mayor, Aldermen and Commons, that every perſon uſing the occupation of* muſic *and* dancing, *within the ſaid city, who ſhall have a privilege to be made free by patrimony, ſhall at the next court of aſſiſtants of the* company of muſicians *after notice, accept and take on himſelf* the freedom of the ſaid company; *and that every perſon who has ſerved an apprenticeſhip to the myſtery of* muſic *and* dancing, *and not made free, and ſhall yet exerciſe his trade, ſhall forfeit* 10 *l. for every offence, to be recovered by action of debt or plaint, in the name of the Chamberlain in the Mayor's court, one moiety thereof after conviction to be paid to the chamber of* London, *the other moiety to the maſter, warden, and aſſiſtants of the ſaid company, for the uſe of the poor thereof.*

After hearing council on both ſides, the court gave their opinion as follows:

Per curiam. Though the cuſtom is, that whoever is free of the city, muſt be free of ſome company; yet that cuſtom does not oblige a man to be of any particular company, for if it ſhould, then, though the defendant by birth is entitled to be free of ſuch a company, yet he muſt be alſo free of this; otherwiſe he cannot exerciſe this art, which is unreaſonable.

They may make him take his freedom, but cannot direct in what company; for if they had ordered the defendant to be admitted of the *Blackſmith*'s company, it had not been good.

It may be a queſtion, whether the city has a power to enforce men of no trades to be free of thoſe companies, which are ſuitable to their profeſſions? As *dancing* is no trade, but it may be called a profeſſion. It is true muſic is ſuitable to it; but it is not abſolutely neceſſary that a dancing maſter ſhould be free of the *muſicians* company: there is no fellowſhip of *refiners*; but the court of Aldermen cannot order them to be free of the *goldſmith*'s company, which is moſt ſuitable to them.

So that this cannot be a good *bye-law*, becauſe the defendant cannot be compelled to be free of that particular company, and it is ſufficient that he is of any other, which he may for any thing that appears on this return; It is in nature of a monopoly to the company of *muſicians*, who cannot be compelled to make him free of that company, in caſe they had refuſed it. Therefore in *Trinity* term, 8 *W.* 3. judgment was given accordingly. *Vide Mod. Rep. vol.* 5. *p.* 104.

Eaſter, 8 *W.* 3. *Burghill* v. *The Archbiſhop of York, Biſhop of Carliſle, Gibbons, and the Univerſity of Cambridge.*

On a writ of *quare impedit* brought againſt the defendants, the eſſoign was quaſhed by the court, becauſe a *corporation* cannot appear, and therefore cannot caſt an eſſoign, nor enter into a recognizance. *Bendl.* 121. 21 *Ed.* 4. *c.* 79. *Vide Raym. vol.* 1. *p.* 79.

Eaſter, 8 *W.* 3. *Knight and his Wife* v. *The Mayor, Maſters, and Burgeſſes of Wells.*

In an action of *debt* on a bond made to the plaintiff's wife *when ſole* by the *corporation* of *Wells*, by the name of the *Mayor, Aldermen, and Burgeſſes*. On the defendant's pleading *it was not their deed*, the jury found a ſpecial verdict, *viz.* that Q. *Eliz.* in the 31ſt year of her reign, created them a *corporation*, by the name of *the Mayor, Maſters, and Burgeſſes of Wells*, and that K. *Charles* 2. in the 35th year of his reign, by his letters patent, granted to them, that they ſhould be known by the name of *the Mayor, Aldermen, and Burgeſſes*, *&c.* and by this laſt name they entered into the bond; and if this be the bond of the *Mayor, Maſters, and Burgeſſes of Wells*, then, *&c.* and adjudged for the defendants, becauſe by taking the ſecond letters patent, the firſt name is intirely extinguiſhed; but it was agreed that a *corporation* might have two names, the one by *preſcription*, the other by *grant*, or both by *preſcription*, but not two by *grant*. *Hardw.* 504. The *Attorney General* v. *The Town of Farnham*. *Vide Raym. vol.* 1. *p.* 80.

Michaelmas, 8 *W.* 3. *Clark or Clerk's Caſe.*

See this caſe fully ſtated in page 263 of this work, under the head *Commitment*.

Michaelmas, 8 *W.* 3. *Newton* v. *Travers.*

Adjudged, that a *dean and chapter*, or a *warden and fellows of a college*, may grant or leaſe by the name of *dean and chapter*, &c. and without ſhewing their proper names; and ſo they may plead or be impleaded, becauſe in their *corporate* capacity they have no name of baptiſm, or any other name than that by which they are *incorporated*; but it is otherwiſe in the caſe of a parſon and vicar, for they muſt uſe their name of baptiſm. *Vide Salk. vol.* 3. *p.* 103.

Michaelmas, 8 *W.* 3. *The Company of Framework-Knitters* v. *Green.*

In an action of *debt* on a *bye-law*; the plaintiffs declare, that King *Charles* 2. by his letters patent, bearing date the 19th day of *Auguſt*, in the 15th year of his reign, *incorporated* them by the name of the *Maſter, Wardens, Aſſiſtants, and Company of Framework-knitters*, with power to make *bye-laws* for the benefit of the *corporation*, and to inflict penalties for the enforcing the performance of them; and then they ſhew a *bye-law*, that the maſter, wardens, and aſſiſtants, or the maſter and the greater part of them, ſhall aſſemble together annually on the feaſt of *St. John the Baptiſt*, and chuſe two perſons, members of the *corporation*, to be ſtewards for the year enſuing, who, on the day after the feaſt of *St. Michael* next enſuing, if it were not *Sunday*, and if it ſhould be *Sunday*, then the next day after, ſhould provide a dinner for the *Maſter, Wardens*, and *Aſſiſtants*, under the penalty of 10 *l.* or ſuch leſs ſum as the *Maſter* and *Wardens* ſhould judge fitting, to be levied by diſtreſs, *&c.* or recovered by action of *debt*, to be paid to the *Maſter* and *Wardens*, *&c.* then they ſhew, that the defendant was elected ſteward, being one of the *corporation*, and had notice thereof, but did not provide a dinner for the *Maſter*, *&c.* nor pay the 10 *l.* to the *Maſter*, *&c. from whence an action accrued* to the plaintiffs, for the 10 *l.* On *nil debet* pleaded, and a verdict for the plaintiffs. And on a motion in arreſt of judgment, the chief *exception* was, that the *bye-law* itſelf was ill, becauſe it is not ſaid that this dinner was appointed to the end that the company ſhould aſſemble, and conſult of matters beneficial to the *corporation*. For it does not appear, but that this was only for luxury: then the *bye-law* is unreaſonable, to compel a man to make a dinner, only for the luxury of others, without any benefit to himſelf, or the reſt of the company.

Per curiam. Members of *corporations* are not bound to perform *bye-laws*, unleſs they are reaſonable, and the reaſonableneſs of them is examinable by the judges. Then this *bye-law* to make the dinner cannot be good in this caſe of a new *corporation*, becauſe it does not appear to what purpoſe the dinner was made, and it may be only for good fellowſhip. But if it had been to make the dinner, to the end that the company might aſſemble and chuſe officers, or any other thing for the benefit of the *corporation*, it had been well enough. But in the caſe of old *corporations* by preſcription, a *bye-law* to make a cuſtomary feaſt has been held good. Therefore judgment was arreſted *niſi*, &c. *Vide Raym. vol.* 1. *p.* 113.

Hilary, 10 *W.* 3. *The King* v. *The Mayor and Aldermen of Hertford.*

After ſeveral motions and debates at the bar, leave was given to file an information in nature of a *quo warranto*, in the name of Sir *Samuel Aſtrey*, againſt the mayor and aldermen of *Hertford*, to know by what warrant they admit perſons who do not reſide within the borough, to the freedom of the *corporation*.

Holt, Chief Juſtice, ſaid, if the defendants were found guilty they ſhould be fined. And the difference of judgments in this caſe, and in the writ of *quo warranto* is, that in the latter caſe the judgment is to ſeize the franchiſe in the King's hands, but in the other caſe only an *ouſter* of the particular franchiſe. That the firſt proceſs in this caſe is a *ſubpœna*, and afterwards a *diſtringas*; and it being a foreign county, there ought to be *fifteen days* between the *teſte* and return. *Vide Raym. vol.* 1. *p.* 426.

Michaelmas, 10 *W.* 3. *Anonymous.*

On argument on a *mandamus* directed to a college at *Oxford*, the council ſaid, that on a return to a *mandamus*, they never make a *profert in curia*, becauſe the party has never *oyer*, or any plea to make to it; and that it is a rule in *corporations*, *that a Mayor repreſents the whole body*, and that the maſter muſt be named in all *corporate* acts; becauſe without him nothing can be done but that his vote is included in that of the majority. If a man by will gives lands to a college already founded, with charge to take in more into the *corporation*, that cannot be but by ſurrender of the former charter, and taking a new one, for *corporations* cannot be at this day without a charter; before *ſtat.* 13 *Eliz.* they might take a new charter, and that had been a ſurrender of the old one: but they cannot do it now without an act of parliament, becauſe it is a kind of alienation; for it is giving part of the right of the firſt members away.

Holt, Chief Juſtice. The *corporation* is by name of *Maſter, Fellows*, and *Scholars*; and they are, as it were, common council of the college; and though the King made the *corporation*, yet the founder has power to diſpoſe and order it as he thinks fit. And I take this to be altogether a lay *corporation*, and then the viſitations belongs to the founder and his heirs; and if he dies without heirs, I take the viſitation ſhall go to the King; of which *Vide* 5 *Ed.* 4. *Simon de Monford*'s caſe; and this is my private opinion; and whether the right of viſitation ſhould *eſcheat*, was a point that divided the court in Dr. *Patrick*'s caſe; and there is a great diverſity between abbot and convent, and maſter and fellows, mayor and commonalty, *&c.* For in the caſe of abbot and convent, there muſt be the major part, and the abbot beſides; and the reaſon is, becauſe the abbot only acts *with the conſent* of the major part of the reſt; but in the caſe of maſter and fellows, *&c.* the maſter himſelf is but part of the acting part, and he is one of the grantors juſt as the reſt. If it be a *donative*, and a private *corporation*, though it be *ſpiritual*, I am of opinion that the viſitation belongs to the *founder*, though he does not by expreſs words reſerve it to himſelf: for why ſhould it of common right belong to the *ordinary*? And whether the King may grant the inheritance of a viſitation, may be a queſtion; for it may be ſaid to be privy to his perſon; but without he may grant to whom he pleaſes to be a viſitor for a time. *Vide Mod. Rep. vol.* 12. *p.* 232.

Michaelmas, 10 *W.* 3. *Piper* v. *Dennis.*

On a *quo warranto* brought againſt the town of *Liſkard*, in *Car.* 2. time, they ſurrendered their charter, which was not enrolled till *Jac.* 2. who, in conſideration of the ſurrender, granted a new charter to them. It was held by the court, that the ſecond charter being in conſideration of a void ſurrender, was alſo void. And where by the charter ſurrendered, none could be mayor if he was not a capital burgeſs; and one was made a capital burgeſs by the charter of King *James*, and after made mayor, or according to the old charter. A queſtion was ſtarted, whether he was a legal mayor?

Per curiam. You ſhould firſt have moved him from being a capital burgeſs; for if we find one in actual poſſeſſion of an office, we ſhall intend him to be the rightful officer till the contrary appears; as for example, if a *mere laic* be preſented to a benefice, we ſhall take him for a clerk till the firſt ſteps be annulled. *Vide Mod. Rep. vol.* 12. *p.* 253.

Michaelmas, 10 *W.* 3. *Bully or Butler*, v. *Palmer.*

The plaintiff brought an action on the *caſe* for a falſe return to a *mandamus*, commanding him to ſwear *H.* to be mayor of the town of *Dartmouth*, and a peremptory *mandamus* being moved for. It was reſolved by the court, that if there was an old charter ſurrendered, *but* the ſurrender not enrolled, and a new charter in conſideration of the ſurrender granted, that the ſecond *charter is void*; and if there are any other perſons in the new charter than were in the old, any law made by them *is void*, becauſe they act under a void charter: but *otherwiſe*, if it be the ſame members in the old charter, becauſe then they act by their firſt charter, which is ſtill good. So if in the firſt caſe, if they had given a bond, and put the ſeal of the new *corporation* to it, it would be void, as was adjudged in the caſe of *Bath* and *Wells*; but if the members of the old charter had gone to election, and ſome, by colour of the new charter, had voted with them againſt their will, there a choice by a majority of the old charter, with ſome mentioned in the new, is good. *Vide Mod. Rep. vol.* 12. *p.* 247. *Vide Salk. vol.* 1. *p.* 191.

Michaelmas, 10 *W.* 3. *The King* v. *The Mayor*, *&c. of Coventry.*

A *mandamus* was directed to the defendants, commanding them to reſtore *O.* to the office of common council man in *Coventry*. They return that they are, and time whereof, *&c.* have been a *corporation* by preſcription, known by ſuch a name; and that King *James* 1. by his letters patent dated in the nineteenth year of his reign, reciting, that they had a cuſtom to elect any one to be of the common council, and to remove him *at pleaſure*, and reciting other cuſtoms; the King confirmed to them all their ſaid liberties; and then they conclude, that by force of the ſaid cuſtom time whereof, *&c.* uſed, *and according to the form of the aforeſaid letters patent*, they removed *O.* And an *exception* was taken to the return, that by the election *O.* had an eſtate for life, and then a cuſtom to remove an officer for life, without cauſe, is not good. *But not allowed.*

Per Holt, Chief Juſtice. He is not returned to be an officer for life, but the contrary, becauſe it is returned that he might be removed at pleaſure. And if the conſtitution in the *corporation* is to elect officers, either by a particular number of perſons, or to elect *during pleaſure*, &c. in ſuch caſe they ought to purſue their cuſtoms; and they cannot elect in other manner, as for a longer or more durable intereſt; and his eſtate is always liable to the determination annexed to it by the cuſtom, as was determined in *Trinity* 31 *Car.* 2. *B. R. The King* v. *Repes.*

A ſecond *exception* was, that they do not ſhew any foundation for this removal; for they inſiſt on their cuſtom and the letters patent; nor do they ſhew any clauſe of grant in the letters patent, which ought to have been pleaded ſpecially. And of this opinion was the court. And therefore a peremptory *mandamus* was granted *niſi*, &c. *Vide Raym. vol.* 1. *p.* 391.

Trinity, 11 *W.* 3. *The City of London* v. *Vanacre.*

On a *habeas corpus* brought in this cauſe, the conſtitution of the city of *London* as to the election of ſheriffs was returned, and alſo the cuſtom for making *bye-laws*; and that by *ſtat.* 7 *Car.* 1. a *bye-law* was made, that no freeman of the city choſen to be ſheriff of *London*, ſhall be exempted from that office, unleſs he will take his oath that he is not worth 10,000*l.* and bring with him *ſix perſons* as compurgators, ſuch as ſhall be approved of; and that on an open proclamation made in *Guildhall* of ſuch choice, he being called to come and take on him the office of ſheriff at the next court, and enter into a bond of 1000*l.* to take on him the ſaid office, on default ſhall forfeit the ſum of 400*l.* and if he does not pay that within *three months*, ſhall forfeit 400*l.* more. On a motion for a *procedendo* it was objected, 1ſt. This is not within the cuſtom for making *bye-laws*, becauſe the conſtitution of ſheriff is by the charter of King *James*, which is within time of memory; *but not allowed*: for where a *franchiſe* is granted for the benefit of a body politic, the body politic has power incidently to regulate that *franchiſe* for the public benefit. And this *bye-law* is only to require ſubſtantial perſons to undergo that office; and as every member has the benefit of the *franchiſe*, ſo they are compellable by penalties to undergo the charge and burdens to which the body politic is liable. 2dly. That the party elect may be indicted for refuſal; *but not allowed*; for though he may be indicted and fined to the King, yet that will not ſave the *city-franchiſe*; therefore that ſhall not hinder the forfeiture on the *bye-law*. 3dly. That the *bye-law* does not provide that the party ſhall have any notice of his being elected, and the perſons who are the ſubjects of the *bye-law* are all the freemen; and it is not the freemen but the liverymen, who are to be preſent at the election: *but not allowed*: for ſuppoſing that, yet the freemen are repreſented by the liverymen; and he that is repreſented muſt take notice as much of the act of the repreſentative body, as if preſent; beſides, the election is a notorious thing, and there is a proclamation notifying it. *Vide Mod. Rep. vol.* 12. *p.* 269. *Vide Salk. vol.* 1. *p.* 142.

Michaelmas, 11 *W.* 3. *The King* v. *The Borough of Abington.*

On the return of a *mandamus*, the filing whereof was oppoſed on *affidavits* of ſeveral burgeſſes, that it was made by the mayor, in the name of the major part of the *corporation*, without conſent of them; it was agreed the return ought to have been by conſent of the majority of the *corporation*, for they ought to anſwer the writ to whom it is directed; and it being directed to the whole *corporation*, it ought to be anſwered by the majority of them. And *Holt*, Chief Juſtice, ſaid, if a writ comes to a ſheriff, and another make a return to it in his name, the ſheriff may come and diſavow it the ſame term, but not in a ſubſequent term. *Dy.* 182. So here will be two queſtions in this caſe; 1ſt. Whether we ought to admit them to diſavow this return? 2dly. In caſe we do it, whether they ought not to do it in their proper perſons? For to examine here, on affidavit, how that fact ſtands, is without example; but we will handle that perſon roughly that ſhall make a return in the name of the majority without conſent; for as they cannot make a return though they are the majority, without the mayor; ſo the mayor cannot make a return without a majority of them; and the return muſt come by the mayor's hands into this court.

Note. By their charter they are empowered to proceed to an election on ſuch a day.

Holt, Chief Juſtice. If they do not chooſe on that day they cannot do it the next day; for they muſt purſue their patent, and that gives power only for one day; and though the mayor be ſick, ſo as he cannot officiate on that day, there is no remedy.

Turton, Juſtice. In ſuch a caſe they are obliged to petition, as in the caſe of the *corporation* of *Norwich*; and they ſaid they had known a *quo warranto* go againſt a *corporation* for chuſing at another day. At laſt, an information was filed againſt the mayor for making a falſe and undue return; and the principal point was not determined. *Vide Mod. Rep. vol.* 12. *p.* 308.

Trinity, 12 *W.* 3. *The College of Phyſicians* v. *Salmon.*

Holt, Chief Juſtice. My Lord *Coke* ſays, that a *corporation* muſt have a name; but that muſt be underſtood to be either expreſſed in the patent, or implied in the nature of the thing; for example, if the King ſhould *incorporate* the inhabitants of *Dale* with power to chuſe a mayor annually; though no name be given, yet it is a good *corporation* by the name of the mayor and commonalty, *&c.* So the city of *Norwich* is *incorporated* to be a mayor and ſheriffs by the charter of *Hen.* 4. and are called *Mayor*, *Sheriffs* and *Commonalty*, *&c.* *Vide Salk. vol.* 1. *p.* 191.

Michaelmas, 12 *W.* 3. *Clapham* v. *Wray.*

Holt, Chief Juſtice. If a perſon pretending to be mayor of a *corporation*, put the *corporation* ſeal to a deed, yet it is not by that the deed of the *corporation*. *Vide Mod. Rep. vol.* 12. *p.* 423.

Hilary, 13 *W.* 3. *The City of London* v. *Wood.*

On a *writ of error* brought on an action in the mayor's court againſt *Wood* for 400*l.* as a forfeiture, for that he being duly choſen *ſheriff*, did not ſerve, or otherwiſe diſcharge himſelf by fining, *&c.*

Holt, Chief Juſtice. In this caſe there are three points to be conſidered; 1ſt. Whether on an action brought on this act of common council for a penalty, incurred, or ſuppoſed to be incurred on it, there ought to be a *wager of law*. 2dly. Whether on this record, as certified to us, there does not appear a *diſcontinuance*. 3dly. Whether on certificate, that the record below is amended, we may amend the record before us, by the record ſet right below? 4thly. Whether this action is well brought by the mayor, *&c.* of *London* in the mayor's court.

A wager of law will not lie here, becauſe this act of common council does not affect the defendant only, but all the whole body of the city; and there is no caſe, where there is a penalty, to which all the men within ſuch a juriſdiction, precinct, or city, are obnoxious, in which a wager of law has been allowed.

As to the ſecond point, whether there be a *diſcontinuance* in this caſe, ſurely there is, for every cauſe ought to be continued from court to court, as in *Weſtminſter Hall* from term to term, if it be not a real action where long proceſs is allowed; and is not *amendable*, no *certiorari* lying to this court of the mayor.

As to the queſtion, whether this action be well brought in the Mayor's court, the *bye-law* inflicting a penalty for the benefit of thoſe that make the law; all *corporations* as ſuch have power to make *bye-laws*, and the penalty of *bye-laws*, may go to the *corporation*; though where a *corporation* claims a *franchiſe*, it ſhall not be judge or jury in a diſpute about it. The true great point is, that the court is held before the Lord Mayor and Aldermen, and the action brought in the name of the Mayor and Commonalty; and that very man, who is head of the city, and without whom the city has no ability or capacity to ſue, is the very perſon before whom the action is brought; and this cannot be by the rules of any law whatſoever; for it is againſt all laws, that the ſame perſon ſhould be party and judge in the ſame cauſe. Now the pleas are virtually held before the Mayor and Aldermen, though in fact the recorder acts, and is as deputy; and the ſteward of a court, who has a deputy, cannot ſue in the court before his deputy; and a deputy acts, and of right ought to act, in the name of his principal. Therefore the judgment was reverſed. *Vide Mod. Rep. vol.* 12. *p.* 669.

Hilary, 13 *W*. 3. *The King* v. *The Corporation of Andover*.

Their charter is, that the Mayor and major part of the *corporation* may turn out whom they pleaſe.

Per curiam. There is no remedy for it, their conſtitution being ſo. *Vide Mod. Rep. vol.* 12. *p.* 665.

Eaſter, 13 *W*. 3. *The Eaſt-India Company's Caſe.*

In an action againſt the *Eaſt-India company* for 5000 *l.* it was moved, that the ſheriff might return exemplary iſſues, becauſe ſeveral writs of *diſtringas* had been already ſerved to no purpoſe; and the court ſaid, he ſhould return good iſſues, and if he did not, the plaintiff might bring an action againſt him; but at laſt he was ordered to attend. *Vide Salk. vol.* 1. *p.* 191.

Michaelmas, 13 *W*. 3. *Anonymous.*

Per Holt, Chief Juſtice. A *corporation* is not indictable, but the particular members of it are. *Vide Mod. Rep. vol.* 12. *p.* 559.

Hilary, 1 *Ann.* *The Mayor of Thetford's Caſe.*

On a *mandamus* directed to the mayor and commonalty of *Thetford*, the return was made in the name of the *corporation*, but without the common ſeal, or the hand of the mayor ſet to it: it was moved, that the mayor might be obliged to ſign it or ſeal it with the *corporation ſeal*, alledging that it was not a *corporate* act to charge the *corporation* without the common ſeal, nor the act of the mayor without his hand to it. After ſearch of precedents, which were found both ways,

Holt, Chief Juſtice. A *corporation* cannot do an act *in pais* without their common ſeal, yet they may do an act on *record*; and that is the caſe of the city of *London* every year, who make an attorney by warrant of attorney in this court, without either ſealing or ſigning; and the reaſon is, becauſe they are *eſtopped* by the record to ſay it is not their act. So if an action be brought againſt a *corporation* in this court for a falſe return, they are *eſtopped* to ſay, it is not their return, for it is the *anſwer of the mayor and commonalty* on record. Neither is the hand of the mayor neceſſary, for he is liable in his private capacity without it; and it is ſufficient evidence againſt him, that the writ was delivered to him, and that there is a return made, for then it is incumbent on the mayor to ſhew the contrary. At *common law* no officer was bound to ſign a return. The ſtatute of *York* obliges a ſheriff to do it, but extends not to a coroner, mayor, or other officer. And the mayor or any other magiſtrate of this *corporation* that procured this return, is liable not only in his *corporate* but private capacity. *Vide Salk. vol.* 1. *page* 192.

Hilary, 2 *Ann.* *Cuddon* v. *Eaſtwick.*

A *habeas corpus* was returned on an action of *debt* for the penalty of a *bye-law* made by the common council of the city of *London*. The *bye-law* was, that whereas the company and fellowſhip of porters had been time out of mind a company and fellowſhip, it was ordained, that they ſhould ſtill remain and continue for ever a company and fellowſhip, and that no maſter of any boat, *&c.* from place to place, *&c.* ſhould unload, or ſend on ſhore any goods, but by ſuch perſons as were free of the ſaid company: to which it was *objected*, 1ſt. That the city of *London* could not make a *corporation*. 2dly. That a *corporation* could not make a *bye-law* to bind ſtrangers, unleſs founded on public convenience.

Per curiam. The city of *London* cannot make a *corporation*, for that can only be created by the *crown*; but this is only a *fraternity*, not a *corporation*, and a *corporation* may make a *fraternity*. A *corporation* is properly an inveſting the people of the place with the local government thereof, and therefore their law ſhall bind ſtrangers; but a *fraternity* is ſome people of a place united together, in reſpect of a myſtery and buſineſs, into a company, and their laws and ordinances cannot bind ſtrangers, for they have not a local power or government. *Vide Salk. vol.* 1. *p.* 193.

Michaelmas, 2 *Ann.* *Aſhby* v. *White.*

See this caſe fully ſtated in page 29 of this work, under the head *Actions.*

Michaelmas, 2 *Ann.* *The Mayor of Wincheſter* v. *Wilks.*

See this caſe fully ſtated in page 29 of this work, under the head *Actions.*

Trinity, 3 *Ann.* *Anonymous.*

Per curiam. One cannot declare againſt a *corporation* aggregate, as in the *cuſtody of the Marſhal.* *Vide Mod. Rep. vol.* 6. *p.* 183.

Hilary, 4 *Ann.* *The Queen* v. *The Bailiffs, Burgeſſes, and Commonalty of the Town of Ipſwich.*

On a *mandamus* to reſtore Mr. Serjeant *Whitaker*, to the office of recorder of the town of *Ipſwich*, an exception was taken to the return.

After hearing council on both ſides, the court gave their opinion.

Holt, Chief Juſtice. Where a *corporation* by one name is *incorporated* anew by another name, the new charter alters the conſtitution of the *corporation*, and new models it, there it ſhall loſe its old name; otherwiſe, if the conſtitution as to all the integral parts of it, remains the ſame, though the new charter gives them a new name, the old one remains. For inſtance, if a Mayor be added, or Mayor and Maſters are made Mayor and Aldermen, or an Abbot and Convent, a Dean and Chapter; there they loſe their old name, becauſe new integral parts of the *corporation* are added. And farther, that the court could not take notice of towns, any otherwiſe than they appeared to them on the record, tho' they did of counties. *Vide Raym. vol.* 2. *p.* 1233.

Eaſter, 5 *Ann.* *The Queen* v. *Truebody.*

On a *mandamus* iſſued to reſtore a burgeſs to his freedom, it appeared by the return, that he had abdicated the *corporation* for above four years laſt paſt; and that he had removed himſelf and family fifteen miles off, and that he had been ſummoned to attend and did not; whereon they diſcharged him, and it was held to be well. If a man attends his office, though he lives out of the *corporation*, yet his attendance on the office will be ſufficient.

Powell, Juſtice, doubted, if a man lives out of the juriſdiction, whether they need ſummon him out of the juriſdiction? It ſeems not, but if he voluntary attends, he anſwers his duty. *Vide Mod. Rep. vol.* 11. *p.* 75. *Raym. vol.* 2. *p.* 1275.

Trinity, 6 *Ann.* *Anonymous.*

The court was moved for an information againſt a man, choſen of the common council of *Briſtol*, who refuſed to accept the office, and it was argued, that in caſe perſons might refuſe to accept it, the *corporation* would ſoon be at an end: and that ſheriffs were always choſen out of the common council: and that the court would take notice of a common councilman, as of a public officer, and that a *corporation* is a part of the public government.

Holt, Chief Juſtice. That is *as far as* the place where they have a power as a *corporation* to make *byelaws*; and they ſhould make a law to inflict a penalty on him that refuſes, and this is the proper way. But adjourned. *Vide Mod. Rep. vol.* 11. *p.* 132.

Hilary, 8 *Ann.* *The Queen* v. *Lane.*

A *mandamus* was directed to the *corporation* of *Glouceſter*, to reſtore *Lane* to the place of a *Capital Burgeſs*; they return, that *Lane* wrote a certain ſcandalous letter to one of the Aldermen, amounting to a libel; and being charged therewith at a court held, *&c.* he conſented to be turned out.

Per curiam. The common council are not judges of a libel; for that is only triable at common law. And ſuppoſe it is a libel, he ſhould be convicted of it at common law, before it can be alledged as a cauſe of removal; and as to his reſignation, if they had deſigned it to be a cauſe of removal, it ſhould have been returned otherwiſe; for here they ſummon him to ſhew cauſe why he ſhould not be turned out for writing a libel; and he appears and ſays, you may turn me out if you will, but I will bring a *mandamus*, and ſo he does; this is certainly no reſignation. Though a reſignation may be by parol, according to Sir *J. Jennings's* caſe; but then it ought to have been returned more certain and ſolemn. So the court granted a peremptory *mandamus*. *Holt*, abſent. *Vide Mod. Rep. vol.* 11. *p.* 270.

Michaelmas, 10 *Ann.* *The Caſe of Whitehorn, Mayor of Portſmouth.*

This was an information in the nature of a *quo warranto* againſt *Whitehorn*, for exerciſing the office of Mayor in the town of *Portſmouth*, and againſt others for exerciſing the office of Aldermen.

Whitehorn pleads the charter of King *Charles* I. *incorporating* the town of *Portſmouth*, *&c.* and ſets forth a particular clauſe in the charter, whereby it is declared, that if the Mayor ſhould die, or for juſt reaſons be removed, it ſhould be lawful for the Aldermen to chooſe another Mayor for the remaining part of the year, till the time to elect came again; then he ſets forth that the Mayor died, and that he was choſen by the majority of Aldermen, *according to the form of the charter aforeſaid.* The Attorney General replied, *he was not elected in manner and form*, &c.

The Aldermen plead their being choſen under the Mayoralty of *Whitehorn*, and iſſue was joined.

On the trial at the aſſizes, it was inſiſted, that the defendants to prove the iſſue, muſt firſt prove themſelves qualified, by receiving the ſacrament according to *ſtat.* 13 *Car.* 2. which point, inſtead of being found *ſpecially*, was ſaved by the judge who tried the cauſe. *Vide Mod. Rep. vol.* 10. *p.* 65.

Michaelmas 10 *Ann.* *The Queen* v. *Sutton.*

On an information brought in nature of a *quo warranto* againſt the defendant for uſurping the office of a *common burgeſs* of the town of the *Deviſes* in *Wiltſhire*; on a trial at bar on this iſſue, whether *Sutton* was a Capital Burgeſs, by the mayor, recorder, and capital burgeſſes, ſeveral points were diſputed, and the particular queſtion was, whether by a *charter* that requires acts to be done by a *majority* of the *corporation*, a perſon might be removed by a *majority* of that body, excluding the perſons that are to be removed, and cannot vote in their own cauſe.

When the whole court were of opinion, that a removal being an act of an *odious nature*, all clauſes concerning it muſt receive a *ſtrict interpretation*; and therefore the word *majority* ſhould be underſtood of a *majority* of the whole *corporation*.

Another queſtion was raiſed which was, whether the not ſummoning to a meeting members *de facto*, *diſfranchiſed* them, though afterwards on re-examination it ſhould appear they were ſtill lawful members, and whether it would vacate acts done in thoſe meetings?

The court inclined to think it would not vacate them. *Vide Mod. Rep. vol.* 10. *p.* 74.

Hilary, 11 *Ann.* *The Caſe of the Univerſity of Cambridge.*

On an action of *aſſault and battery*, brought againſt a member of the *Univerſity*, and a *general imparlance* given by the court from one term to another,

The *Chancellor* claimed cognizance of *pleas* by grant in Queen *Elizabeth*'s time, whereby the court of the *Vice-chancellor* was to proceed *according to law and the cuſtoms of the Univerſity*, in all caſes where any body of that *Univerſity* ſhould be defendant, which grant was confirmed by a *ſtatute* of which they produced a copy, and whether this claim ſhould be received was the queſtion.

After hearing council on both ſides the court gave their opinion.

Per curiam. The claim being made after *imparlance*, was made too late; the ſtatute was out of the caſe, for that related only to the matter of *conuſance*, and was only neceſſary to ſupport a *charter*, which the crown had no power to grant: for though the crown may grant *conuſances*, yet it cannot grant them with a power to proceed by any other *law* than the *common law*. But as to the time and manner of claiming, the ſtatute is wholly ſilent; theſe are therefore to be governed by the rules of law. Hence it is, that it is neceſſary for this privilege to be pleaded; and there is no reaſon why the rules of law ſhould not govern, as well the time of pleading it, as make it neceſſary for it to be pleaded at all. There is no difference in the reaſon of the thing, between conuſances with excluſive words, and conuſances without, as to this point. *Vide Mod. Rep. vol.* 10. *p.* 126.

Hilary, 11 *Ann.* *The Queen* v. *The corporation of Durham.*

On a *mandamus* to reſtore *H.* to the office of Town-clerk, two exceptions were taken to the return.

1ſt. That they ſaid, ſuch a year of Queen *Eliſabeth*, and long before, they were a *corporation*; and ſo did not intitle themſelves by preſcription, which is ever time out of mind.

2dly, It was not returned, that the town clerk was actually choſen *annually*, but only that he was *annually chuſable*, whereas time and uſage are neceſſary to *preſcription*.

Beſides the office of town clerk is, in the nature of it, in the eye of the law, an office for life; and will be ſo intended till the contrary appear. 1 *Ventris.* 82.

As to the 1ſt exception, the court were of opinion, that a *corporation* muſt either be by charter or preſcription, which is ever time out of mind; but yet the exception was diſallowed, becauſe it was only failing in a matter of ſurpluſage.

But as to the 2d exception, the court held it good: for the office of town clerk is an office for life, unleſs reſtrained by charter or preſcription, which ought to be ſhewn on the return, which was not done.

Beſides, though he be *annually chuſable* he may continue town clerk, and will do ſo until they chooſe another; but this does not appear to be done; the exception therefore is good for both theſe reaſons.

If the return had been *chuſable for one year only*, his office would have expired at the end of the year, whether they had choſen another or not; but otherwiſe as this return is. *Vide Mod. Rep. vol.* 10. *p.* 147.

Michaelmas, 11 *Ann. The Queen* v. *The Borough of Aldborough.*

This was a *mandamus* to the mayor and burgeſſes of *Aldborough*, commanding them to reſtore one *S.* to the office of a capital burgeſs of that borough.

To this they return for cauſe for not obeying the writ, that he had not taken the ſacrament within a year before the election, according to *ſtat.* 13. *Car.* 2. it was objected, that this *ſtat.* as to taking the ſacrament, was only directory, what ſort of man they ſhould chooſe, and did not make a nullity of the office; and to mainatin this point, the caſe of *The King* v. *Larwood, Hil.* 6 *W.* 3. was quoted.

Per curiam. This interpretation of the ſtatute was never offered to any court before the caſe of *Whitehorn*; and ſhould it prevail, the ſtatute would ſignify but very little.

As to the authority of *The King* v. *Larwood*, it amounts to no more than this, that a man ſhall not defend one crime by another, *viz.* his not taking on him the office, by his not receiving the ſacrament.

A ſecond exception to this return was, that it did not ſhew the *corporation* was in being, at the time this act was made. *But not allowed:* for the ſtatute extends to all *corporations* created before and after. 2 *Vent.* 243.

A third exception to this return was, that it did not appear that the perſon was ſummoned to ſay what he could for himſelf.

Parker C. J. I think it very proper a *corporation* ſhould hear a man before they expel him No inconvenience in holding *corporations* in this, for it can only keep thoſe in, that are qualified to ſtay in: and if corporations will unjuſtly, after hearing, expel men, it aggravates the fault, becauſe done againſt knowledge. It is true, the party has an action to be reſtored; but then, in the mean time he is wrongfully kept out. *Vide Mod. Rep. vol.* 10. *p.* 100.

Trinity, 12 *Ann. The Queen* v. *The Corporation of Buckingham.*

On a *mandamus* directed to the *corporation* of *Buckingham*, to reſtore one *Muſcot* to the office of a *common burgeſs* of that *corporation*, the return in ſubſtance was as follows, *viz.* that *Muſcot in fact was elected*; but that he not having received the ſacrament within a year before his election, according to *ſtat.* 13. *Car.* 2. his election was void.

On argument this matter was adjourned for further conſideration. And this ſame term, on a ſimilar caſe, the council *objected*, that in the return they had not ſet forth, that the ſtatute made the election void; but only ſaid, that in default thereof, ſuch placing, *&c.* was void, but did not ſay by what authority.

It was further *objected*, that the return had not brought the office within the ſtatute; for the office of *capital burgeſs* is not named in the ſtatute.

On argument, *Eyre*, Juſtce, declared his preſent opinion to be, that the ſtatute cited to prove the election was not void, but only voidable, did not reach the preſent caſe, becauſe all the ſtatutes related either to matters of *record* or *ſpecialties* entred into with ſome ceremony; and therefore although the ſtatutes made them void, yet it muſt be underſtood in a proper manner, and ſtatutes do always ſuppoſe neceſſary incidents: but now this caſe is the caſe of an election, a matter *in pais*, and ſo very different. *Vide Mod. Rep. vol.* 10. *p.* 173, 178.

Eaſter, 3 *Geo. Sir Robert Saliſbury Cotton* v. *Davies.*

On *he was not elected* returned to a *mandamus* to ſwear the plaintiff a Capital Burgeſs of *Denbigh*, the jury found a ſpecial verdict, That by the charters there are to be two Bailiffs, two Aldermen, and twenty five Capital Burgeſſes; and the direction how the Capital Burgeſſes are to be elected, is in theſe words: "And if it happen any of the ſaid Capital Burgeſſes die, or be removed, then it ſhall and may be lawful for the Bailiffs, Aldermen, and Capital Burgeſſes for the time being, or the major part of them, to elect another." That on the 24th of *June* 1 *Geo.* there was a vacancy by the death of *J. S.* and on *Michaelmas* day following, the Bailiffs, Aldermen, and Burgeſſes met and proceeded to election: That the two Bailiffs, and the *major* part of the Capital Burgeſſes gave their votes for the plaintiff; and the two Aldermen and the reſidue of the Capital Burgeſſes voted for another.

After hearing council on both ſides, the court gave their opinion.

Parker C. J. This is like the caſe of the city of *London*, where the Mayor and common council have power to do acts; and yet the act of the majority of the common council is good, though the Mayor diſſents. In this caſe there is nothing required, but the preſence of one Bailiff, and one Alderman, at every election, and they have no negative voices; to which the reſt of the court agreed, and a peremptory *mandamus* was granted. *Vide Strange. vol.* 1. *p.* 53.

Michaelmas, 3 *Geo. The Caſe of the Corporation of Banbury.*

Per Parker, Chief Juſtice. If a Mayor is not choſen by the time preſcribed by the charter; and there is no proviſion in the charter for the Mayor's continuing on till a new Mayor is choſen in, the *corporation* is diſſolved; and conſequently cannot proceed to a new election.

Indeed ſome are of opinion, that this may be cured, by the iſſuing out of a writ under the great ſeal, impowering them to proceed to a new election; but others are of opinion that even this will not do, and that there is no other remedy but to obtain a new charter from the crown. But nobody ever thought, that in ſuch a caſe the *quondam corporation* could revive itſelf, by chuſing a new head, without ſuch a writ under the great ſeal. *Vide Mod. Rep. vol.* 10. *page* 346.

Michaelmas, 5 *Geo. The King* v. *The Mayor of Taunton in the County of Somerſet.*

On an affidavit, that the defendant at the time of taking the oath of office, did not take the declaration required by the *corporation* act of 13 *Car.* 2. againſt the ſolemn *league* and *covenant*, a rule was made to *ſhew cauſe* why an *information* in the nature of a *quo warranto* ſhould not go againſt him.

On ſhewing cauſe, the following *exceptions* were taken; 1ſt. That no private perſon could apply for this information; and, 2dly. That in caſe he might, the *affidavit* was not ſufficient.

After hearing council on both ſides, the court gave their opinion.

Pratt, Chief Juſtice, *Powys* and *Forteſcue*, Juſtices, held the affidavit inſufficient, and that any private perſon might apply for the *information*. But *Eyre*, Juſtice, was of a different opinion as to both points. *Vide Stra. vol.* 1. *p.* 120.

Trinity, 6 *Geo. Barber* v. *Boulton.*

On that *he was not elected*, being returned to a *mandamus*, for ſwearing the plaintiff into the office of Mayor of the borough of *Macclesfield*, wherein the jury found a ſpecial verdict; the caſe was, by the charter the Mayor is to be choſen by the capital burgeſſes out of the capital burgeſſes, who are twenty-four in number. The uſage for fifty years has been, that the common burgeſſes have put five of the capital burgeſſes in nomination; out of which five the capital burgeſſes have choſen one to be Mayor: and this the jury find was according to a *bye-law*, not now extant in writing, and that there are no footſteps before theſe fifty years of any election in any other manner.

At the charter-day the common burgeſſes met, and put eight capital burgeſſes in nomination, whereof the plaintiff was one, who had a majority of the capital burgeſſes for electing him to be Mayor.

It being agreed that this election was not according to the uſage, the plaintiff's council inſiſted that it was an unreaſonable uſage; for here the common burgeſſes, who have no right in the election under the charter, have it in their power to diſſolve the *corporation*, by their neglecting to return five; or if it were good, yet it can only have allowance in caſes where they do nominate, and if they do not, then the capital burgeſſes may make the election under the charter out of the whole body.

Per curiam. This is a good uſage, being to avoid popular confuſion: but here the cuſtom purſues neither the charter nor the *bye-law*. It is not under the charter, for that ſays it muſt be out of the capital burgeſſes at large, and here they have confined themſelves to eight; nor is it according to the uſage, becauſe more than five were nominated, which brings in all the confuſion that was deſigned to be avoided by that proviſion. Therefore judgment for the defendant. *Vide Stra. vol.* 1. *p.* 314.

Trinity, 6 *Geo. The King* v. *The Mayor and Aldermen of the City of Carliſle.*

On a *mandamus* brought to reſtore one *P.* to the office of a capital citizen of *Carliſle*, the return was as follows:

The *corporation* conſiſts of a Mayor, Aldermen, Bailiffs, and Capital Citizens, who together make a common council, and have the power to elect Capital Citizens; the power of amotion is in the power of the Mayor and Aldermen only, or the major part of them: then the return ſets forth, that on ſuch a day, the common council was aſſembled, and *P.* being ſummoned, did not appear, and thereon, the *Mayor and Aldermen and others aſſembled*, made an order for his amotion (for a cauſe allowed to be legal.)

After hearing council on both ſides, on the laſt day of the term, the *Chief Juſtice* delivered the opinion of the court, that the removal in this caſe was not regular, for there ſhould have been a ſummons for the Mayor and Aldermen to meet in their diſtinct capacity. *Vide Strange, vol.* 1. *p.* 385.

Hilary, 8 *Geo. The King* v. *The Mayor and Common Council of Bedford.*

On a rule of court made againſt the Mayor and common council of *Bedford*, to ſhew cauſe why an *information* ſhould not be filed againſt them, for an undue election of a burgeſs of the ſaid borough; the caſe appeared to be as follows:

The town of *Bedford* is a borough by preſcription, which time of mind, on the *Monday* next after *Bartholomew* day, had put up twenty-ſix burgeſſes in nomination, out of which they chooſe thirteen common council men, who, when choſen, had votes in electing a Mayor, and other officers in the ſaid borough; but at the laſt election, they put one *B.* in nomination with twenty-five, who were burgeſſes, but *B. was not*, he being only a freeman of the ſaid borough; and he was choſen by the majority of the other twenty-five burgeſſes to be one of the thirteen common council men.

Afterwards, the Mayor finding that *B.* was not qualified to be one of the twenty-ſix burgeſſes, for the reaſon before mentioned, proceeded to a new election, and then one *D.* was choſen to be burgeſs in the room of *B.* And now *H.* who was one of the twenty-five burgeſſes, and put in nomination as aforeſaid, and who was duly qualified, and had moſt votes to be a common council man next to the ſaid *B.* proſecuted an information againſt the Mayor and the twelve common council men, as not being choſen by twenty-ſix qualified burgeſſes; for *B.* who was one of the twenty-ſix, was a freeman, and no burgeſs, and therefore made the election void, as not warranted by the cuſtom of the borough.

The council for the defendants inſiſted that the rule might be diſcharged; for when an election is made by ſeveral perſons, whereof ſome are qualified to chooſe, and ſome not, it is good as to the perſons qualified; for ſhould it be otherwiſe, the election would be wholly void.

The court declared, that what was inſiſted on by this motion for the proſecution would produce a great inconveniency; for if this ſhould be *adjudged* a void election as to the whole, then the borough would be deſtroyed, for there cannot be any other Mayor elected, or any other thing done by the common council.

On another day, another queſtion was put for the opinion of the court, which was, if one who is unqualified is choſen by a majority of thoſe who are qualified, and his election is made void, becauſe he is unqualified; then, whether a perſon who is qualified, and has a majority of votes next to him who was not qualified, ſhall be *adjudged* duly choſen, or whether they ſhall proceed to a new election.

But the court held the new election to be good, as well for the miſtake in not knowing *B.* was no burgeſs, but only a freeman at the time of his election to be a common council man, as for avoiding an inconveniency, which otherwiſe would be incurable; ſo the election of *D.* was held good, and the rule diſcharged. *Vide Mod. Rep. vol.* 8. *p.* 34.

Hilary, 9 *Geo. The King* v. *The Mayor, &c. of Tregony.*

The queſtion in this caſe was, where a certain day is appointed by the charter for the Mayor and Burgeſſes to proceed to the election of a new Mayor; and that day is paſt, whether they can elect in any other day in that year; and the court was of opinion they could not, unleſs on the death or removal of the Mayor in being; for if they ſhould elect on any other day, it is not *according to the authority* given by the charter. *Vide Mod. Rep. vol.* 8. *p.* 127.

Michaelmas, 9 *Geo. The King* v. *The Mayor and Aldermen of Carliſle.*

See this caſe fully ſtated in page 285 of this work, under the head *Conviction.*

Hilary, 10 *Geo. The King* v. *The Mayor of Kingſton upon Hull.*

On a motion laſt term, a rule was made, that a *mandamus* ſhould go to the Mayor of *Kingſton*, to aſſemble and keep courts, and to do the office of that *corporation*; and in drawing up the writ, the clerk added theſe words, viz. *and to admit all thoſe to their freedom who have a right to be free of that corporation.*

It was now moved to ſet aſide this rule, becauſe all who have a right to be free cannot be joined in one *mandamus*, as it was reſolved in the caſe of the nine common-council men of *Cheſter*, 6 *W.* 3. becauſe every one has a ſeparate right; therefore two or more could not be joined in this writ; for where ſeveral are joined, there can be no traverſe taken, becauſe no one is party to it.

And the court was of opinion, that the *mandamus* was ill, and not warranted by the rule of the court; therefore if it had been returned it ſhould have been quaſhed; but not being returned, it ſhall be ſuperſeded, that the Mayor may not be obliged to make a return. *Vide Mod. Rep. vol.* 8. *p.* 210.

Eaſter, 10 *Geo. Sir Chriſtopher Muſgrave* v. *Nevinſon.*

The *corporation* were all invited to a treat, when one of the Aldermen deſired leave to reſign, on which his reſignation was taken, and the plaintiff at the ſame time choſen and ſworn in. On a trial at *bar* the jury found it a good election; and the court granted a new trial, it being fraudulent, and it appearing that one of the members was not there till after the election, and that there was no ſummons to meet to do ſuch a *corporate act*, that the members might come prepared: the meeting likewiſe was not in the *Moothall*, but at a tavern,

vern, and it was a plain ſurpriſe, and even all not preſent.

As to the point of its being a trial at bar, the court made no difficulty of that, ſince the caſe of *Bewdley*, and another of Sir *Joſeph Tyley* v. *Roberts* in *C. B.* where on a trial at bar, whether *compos* or *non compos*, the jury found againſt the weight of the evidence, and there was a new trial. The caſe in *Stiles* was after a trial at bar; and in the caſe of an Alderman of *Derby*, he was afterwards ouſted on a *quo warranto*.

Raymond Juſtice. Lord Chief Juſtice *Holt* uſed to ſay, he was of opinion, the practice of granting new trials was much more ancient than the caſe in *Stiles*; ſince we meet with challenges that the party was ſworn on the former trial, and therefore ought not to be a juror again.

N. B. As to another of the *corporators* of *Apulby*, he was put to prove the receiving the ſacrament within a year before his election, it being recent, and therefore the court required it, though no notice was given him for that purpoſe. *Vide Strange*, *vol.* 1. p. 585.

Trinity, 10 *Geo.* *Salter* v. *Groſvenor*.

In *ejectment*, &c. the caſe was, a *corporation* aggregate, conſiſting of two Bailiffs and Burgeſſes, &c. and one of the Bailiffs and Burgeſſes made a leaſe of their politic capacity to the other, in his natural capacity; and the queſtion was, whether the leaſe was good or not.

Per curiam. A ſole *corporation*, as a biſhop or parſon, cannot make a leaſe to himſelf, for he cannot be both leſſor and leſſee; and the law is the ſame in a *corporation* aggregate, as *dean and chapter*, for a leaſe cannot be made by the *chapter*, without the concurrence of the *dean*; and for the ſame *reaſon*, a leaſe cannot be made by the *dean* without the concurrence of the *chapter*, but it may be made by any of the *prebendaries*, becauſe it is not neceſſary that any of them ſhould join in the leaſe, for a *prebendary* is not an integral part of the body *corporate*.

But in the principal caſe the Bailiffs make but one officer, and the one cannot act without the other; therefore if a leaſe is made by a *corporation* to one of them, he is both leſſor and leſſee, which cannot be.

And for theſe reaſons the whole court was of opinion, that the leaſe was void, and gave judgment accordingly. *Vide Mod. Rep. vol.* 10. *p.* 303.

Michaelmas, 10 *Geo.* *The King* v. *The Mayor of Tiverton*.

On a motion for an information againſt the defendant for bribery at an election of a new Mayor for the *corporation* of *Tiverton* in *Devonſhire*, who, when he found he could not ſucceed in the choice of the perſon he wiſhed ſhould be the new Mayor, withdrew himſelf on the day of election, ſo that the new Mayor could not be choſen, tho' the common council did all in their power to proceed to an election, by appearing on the ſtairs in the Town-Hall for that purpoſe, but the door was locked by the defendant, (the old Mayor) and a book belonging to the *corporation* was taken away; ſo that for want of chuſing a Mayor on the day of election the *corporation* was diſſolved.

The Chief Juſtice, who was formerly Recorder of this *corporation*, ſaid, that there was a difference among the members thereof about precedency, ſo a rule was made to ſhew cauſe why an information ſhould not go.

Aftewards in *Hilary* term, it appeared that there was bribery on both ſides, ſo informations were filed againſt both parties, and the court agreed that bribery was ſufficient cauſe to remove a man from his office, and that it was an offence by which the very conſtitution of the government might be altered. *Vide Mod. Rep. vol.* 8. *p.* 186.

Eaſter, 11 *Geo.* *The King* v. *Hearle*.

On a *mandamus* to ſwear in one *P.* to be Mayor of *Penryn*, they returned that an information in the nature of a *quo warranto* was exhibited againſt him, to ſhew by what authority he exerciſed the office of Mayor, whereon two iſſues were joined, one whether he was duly elected, and the other whether he was duly ſworn: the firſt iſſue was found for the defendant, and the ſecond for the King, whereon judgment of *ouſter* was given againſt him; and becauſe he was never ſince elected Mayor, we cannot now ſwear him according to the command of the writ.

The queſtion was, whether after this judgment of *ouſter* he was intitled to a *mandamus*, to ſwear him into the office in conſequence of his precedent election.

Raymond, Chief Juſtice. It ſeems to me, that the election is done away, and that unleſs there had been a new election ſince the judgment, the party is not intitled to this *mandamus*.

Per curiam. The return muſt be allowed.

On a *writ of error* being brought in parliament, it was adjudged, that *error* did not lie, and the writ was quaſhed. *Vide Strange. vol.* 1. *p.* 625.

Michaelmas, 12 *Geo.* *Wannel* v. *The Chamberlain of the City of London*.

On a *mandamus* to admit the plaintiff to his freedom of the city of *London*, ſetting forth that he was bound apprentice to one *S. V.* of *London*, merchant-taylor, for ſeven years; and had ſerved out his time, and had been admitted into the merchant-taylors company, and in due form preſented to the chamberlain, who refuſed to admit him his freedom.

The chamberlain returned, that *London* has been time out of mind a *corporation*, and conſiſts of ſeveral ſocieties, &c. freemen of the city; and that no perſon could ever be a freeman of the city, till he was member of one of thoſe fraternities. That time out of mind there has been a company called the joiners company. Then he returned a power to make *bye-laws*, and that on the 19th day of *Oct.* 6 *W.* & *M.* a *bye-law* was made, reciting that ſeveral perſons not free of the joiners company, had exerciſed the trade of a joiner, in an unſkilful and fraudulent manner, which could not be redreſſed whilſt ſuch perſons were not under the orders and regulations of the company, therefore it enacts, that no perſon ſhall uſe that trade, who is not free of the company, under the penalty of 10 *l.* That the plaintiff did exerciſe the trade of a joiner, and that at the time of his being preſented to the chamberlain, he was not free of the joiners company, and therefore he does not admit him to the freedom of the city.

On this return the queſtion was, whether this *bye-law*, to oblige a member of one company to be admitted into another, was good or not; and to prove it was not, *Robertſon* v. *Groſcourt*, 5 *Mod.* 104. was cited. The matter was adjourned for the farther conſideration of the court.

In *Trinity* term laſt, this matter was argued a ſecond time. And this term *Raymond* Chief Juſtice delivered the opinion of the court as follows.

We are all of opinion, that this is a good *bye-law*, being made in regulation of trade, and to prevent fraud and unſkilfulneſs, of which none but a company which exerciſes the ſame trade can be judges. This does not take away his right to his freedom, but only his election of what company he ſhall be free; it is only to direct him to go to the proper company.

As to the objection, that it does not appear the joiners company are bound to admit him, we are all of opinion, that it being ſaid he *ſhall* take up his freedom in that company under the penalty of 10 *l.* he will be intitled to have a *mandamus* to prevent a forfeiture.

Per curiam. The return muſt be allowed. *Vide Stra. vol.* 1. *p.* 675.

Hilary, 2 *Geo.* 2. *The Caſe of the Borough of Chriſtchurch*.

On a motion for an information, in nature of a *quo warranto*, againſt the common freemen; it was held, that they need not be qualified by taking the *teſt*, for they do not exerciſe any office relating to the government of the town, and therefore an information was denied. *Vide Strange*, *vol.* 2. *p.* 828.

Trinity, 2 *Geo.* 2. *Jacob Lopes Henriques & al.* v. *The General Privileged Dutch Company trading to the Weſt Indies.*

It was held in this caſe, that where an action is brought by a *corporation*, they need not ſhew how they were *incorporated*; for if the name is proper for a *corporation*, they need not ſhew how they were *incorporated*, becauſe the name implies a *corporation*, but on the general iſſue pleaded by the defendant, the plaintiffs muſt prove they are a *corporation*. *Hob.* 211. *Norris* v. *Staps*. *Vide Raym. vol.* 2. 1532.

Eaſter, 7 *Geo.* 2. *The King* v. *Poole*.

On a motion for a new trial, on an information in the nature of a *quo warranto*, againſt the defendant, to ſhew by what authority he acted as Mayor of *Liverpoole*, for that the verdict was found on a matter of law againſt the direction of the judge; the judge at laſt ordered the jury to find it *ſpecially*, but they brought in a general verdict.

Reſolved, that the certificate of the judge reporting the matter of fact, as appearing before him at the trial, is concluſive, nor can any affidavit be received againſt it, for that would be to try the matter again on affidavit: therefore let the matter ſtand over.

The principal cauſe came on again, 8 *Geo.* 2. 1734, *Forteſcue*, Juſtice, who tried the cauſe, certified, that the verdict was found againſt his direction, and that he was diſſatisfied with it. There were four iſſues, the three firſt were preparatory to the laſt, and were excuſes for the late Mayor's adjournment of the court to a day after the day appointed by the charter, and the jury found, that there was no adjournment, with which verdict the judge reported himſelf ſatisfied. The laſt iſſue was, whether or not the defendant was duly elected Mayor, and the jury found him *not* duly elected; and this was the verdict with which the judge was diſſatisfied. The point of law was, whether the late Mayor had a power to adjourn the election of a new Mayor to a day beyond the charter.

Lord *Hardwicke*. A new trial ought to be granted in this caſe.

There are two points, one on the common law, the other on the *ſtatute*, and had the preſent caſe reſted wholly on the common law, it ſeems no new trial ought to have been granted, for the law before *ſtat.* 11 *Geo. c.* 4. was taken to be, that the Mayor's office determined at the end of the year, and therefore it ſeems it would have been a void election, where the adjournment was made a day after the expiration of his office, eſpecially where done without cauſe.

But *ſtat.* 11 *Geo. c.* 4. was made to remedy ſuch inconveniencies; and on that act it ought to be tried again.

It ſeems indeed it ought to have been the original intent of that *ſtatute* to enable *corporations* to go to an intire new election on a ſubſequent day, where no election had been begun before; but notwithſtanding, as this is a remedial law to prevent inconveniencies ariſing from new elections of annual officers on a charter day, if the words of the *ſtatute* are large and general enough to comprehend the continuing of elections, begun on the charter day, but not completed within that time, as the miſchief is the ſame, the court ought to give a liberal conſtruction to them; the *ſtatute* ſays, that where by any accident or default whatever, no election ſhall be made on the charter day, they may proceed to an election on another day, *&c.* On this, ſuppoſing the Mayor had done wrong in making a voluntary adjournment, the wrong acts of officers are part of what was intended to be provided againſt by this act.

Another objection is, that the adjournment was made between the hours of 8 and 9, inſtead of 10 and 12; but this mention of the hours in the *ſtatute* is certainly directory, and not reſtrictive, and intended to prevent ſurprize, by beginning at inconvenient times; now as to what appears on this record, there is no pretence of ſurpriſe in the preſent caſe.

The next objection is, that the Mayor, whoſe office had expired the day before, preſided at this election, and if that appeared on the face of the record, it would be a ſtrong objection in favour of the proſecutor; but it does not, therefore the whole matter not appearing on the record, it ought to go again to trial, that if the jury ſhould find a *ſpecial* verdict, the facts might come more fully before the court.

As to the objection, that it is pleaded to be an election for the year next enſuing, this may be, as it were, a technical year created by the *ſtatute*, as in *corporations* where the charter determines the office on a day after a moveable feaſt, the officers nevertheleſs are ſaid to be choſen for a year.

The court concurring in opinion, a new trial was granted on the common rule of paying coſts. *Vide Caſes Temp. Lord Hardwicke*, *p.* 23.

Michaelmas, 7 *Geo.* 2. *The King* v. *White*.

On a motion for an information againſt the defendant in the nature of a *quo warranto*, to ſhew by what authority he exerciſed the office of Burgeſs of the borough of *Calne*; the queſtion was, whether being an infant, under the age of twenty-one years, at the time of his election, he was capable of exerciſing this office. A rule to ſhew cauſe was made.

Per curiam. If an infant is not fit to manage for himſelf, he is improper to be a Mayor for the public; but as it is a matter of law not ſettled, the rule muſt be made abſolute to determine it. *Vide Caſes Temp. Lord Hardwicke*, *p.* 8.

Hilary, 8 *Geo.* 2. *The Caſe of the Borough of Boſſiney alias Tintagel, in Cornwall.*

The court was moved for a *mandamus* on *ſtat.* 11 *Geo. c.* 4. to proceed to the election of a Mayor, which was oppoſed on a pretence, that on the uſual day one *R.* was choſen and ſworn into the office; and therefore as there was an actual officer, they ought firſt to *ouſt* him.

But the court (on conſideration) held the writ ought to iſſue, the *ſtatute* ſaying, if no *due* election was made, and this of *R.* having no ſhadow of right: the intent of the *ſtatute* was to give the *corporation* a rightful officer as ſoon as might be, whereas this pretence would waſte the whole year; they ſaid, this was not laid down as a general rule, for it might be otherwiſe where there was a probable election, and room to doubt; and theſe writs were diſcretionary: beſides, there was no harm done, for it is not a peremptory *mandamus*, and they may return that he is the rightful officer. *Vide Strange*, *vol.* 2. *p.* 1003.

Trinity, 8 *Geo.* 2. *The King* v. *The Mayor*, *&c.* of *Derby*.

Lord *Hardwicke*. This is a *mandamus* directed to the Mayor and Aldermen of *Derby*, bearing *teſte* the 14th day of *June* laſt, and returnable the firſt day of *Trinity* term, commanding them to reſtore *S. S.* to be a freeman of that borough; to which they have returned, that this was an ancient borough, by the name of Bailiff and Burgeſſes; that by a charter, 18 *Car.* 1. they were to have a Mayor and Burgeſſes. That the Mayor and Aldermen, and fourteen capital Burgeſſes, are a common council, and may make *bye-laws*, and let the lands, and tranſact the affairs of the *corporation*. That the Mayor, *&c.* in common council, may from time to time, for miſbehaviour, diſplace the common council-men from their offices, and may amove burgeſſes from being freemen. That *S.* was duly ſworn and admitted a burgeſs, and took the oath, which is, to be true to the Queen, and to aid and aſſiſt the Mayor, *&c.* and to be obedient to them in all lawful commands, and to obſerve ſuch rules and orders as ſhould be made by the common council for the good government of the *corporation*, and to yield and contribute to the good of the *corporation*, as far as he was able, and to uphold all the liberties thereof, *&c.* That on the 14th day of *October* 1718, the Mayor, Aldermen, and Burgeſſes, were aſſembled in common council, in the *Guildhall* of the town, to conſult about the common good of the *coporation*, and being ſo then aſſembled, the ſaid *S.* and ſeveral other perſons, contrary to his oath, and the duty of his office, in ſight of the Mayor, Aldermen, and common council, riotouſly aſſembled in the ſtreet, over againſt the Common-hall, to the diſturbance of the common council, and did then and there aſſault the conſtables appointed to keep the peace; and did then and there aſſault *F. C.* Eſq; an Alderman, and juſtice of peace of the ſaid borough, as he was going to the Common-hall, and prevented him from going to the buſineſs of the *corporation*, and did terrify, aſſault, and hinder ſeveral other perſons from going to the Common-hall: and though the Mayor made proclamation for them to depart, *S.* made a great noiſe and ſhouting, to deter and hinder the cryer from making the proclamation, and would not depart, and with great ſhouts did hinder the Mayor in the buſineſs aforeſaid. That *S.* thereon was ſummoned to appear and ſhew cauſe at the next common council why he ſhould not be difranchiſed; that afterwards the common council met, and continued aſſembled near two hours, and becauſe *S.* did not appear, nor ſhew cauſe to the contrary, they ordered he ſhould be disfranchiſed; and that he was disfranchiſed accordingly, and therefore they cannot reſtore him.

Several *exceptions* were taken to this return, but all of them were over-ruled but one, *viz.* what they have returned is a crime indictable at law, and therefore he ſhould have been convicted by a jury, before they could proceed to disfranchiſe him.

Per curiam. We are all of opinion that the cauſe here returned is ſufficient ground for his disfranchiſement without any prior conviction. *Vide Caſes Temp. Lord Hard. p.* 153.

Trinity, 8 *Geo.* 2. *The Charitable Corporation* v. *Woodcroft.*

In an action of *covenant* brought againſt the defendant, as ſecurity for *J. T.* late warehouſe keeper to the charitable *corporation*, the iſſue was, whether *T.* actually did receive ſome certain goods with which he was charged.

The defendant's council moved for liberty to inſpect the corporation books, as being public books.

The court doubted whether they were public books, and ſo would make no rule; but they told the council, he might give them notice to produce them at the trial. *Vide Caſes Temp. Lord Hardwicke, p.* 130.

Michaelmas, 8 *Geo.* 2. *The King* v. *Ellis.*

By the charter of *New Romney*, the new Mayor is to be ſworn before his predeceſſor. At the election there were two candidates, *Ellis* and *Whitwick*; *Ellis* had the majority, notwithſtanding which, the Mayor ordered *Whitwick* to be ſworn; on which the Town-clerk read the oath, and both *Ellis* and *Whitwick* had their hands on the book, and kiſſed it. On a trial of the iſſue, whether *Ellis* was duly ſworn, it was ruled by *Eyre*, Chief Juſtice, of *C. B.* at *Maidſtone*, that it was not a good ſwearing; for as it is to be the act of the Mayor, his aſſent muſt go along with it: and that there is no difference between ſwearing *by* and *before* a Mayor. And on a motion for a new trial, the court were of the ſame opinion, and judgment was given againſt the defendant. *Vide Strange, vol.* 2. *p.* 994.

Eaſter, 9 *Geo.* 2. *The King* v. *Jordan.*

On an information in the nature of a *quo warranto* againſt the defendant, for uſurping the office of a capital burgeſs of the borough of *Weſtbury*, the defendant ſet out a cuſtom for the Mayor and capital Burgeſſes, or the majority of them, if there be a vacancy among the capital Burgeſſes, to aſſemble and elect an inhabitant into the ſaid office, which is vacant; and that the perſon ſo elected may be ſworn and admitted at that or any future aſſembly. That there being two vacancies among the capital Burgeſſes, he was on the 18th day of *October* 1709, at an aſſembly then holden, elected into one of the ſaid two offices ſo being vacant; then he ſaid, that on the 16th day of *September* 1734, at an aſſembly then holden, he took the oath of office of a capital Burgeſs, and was then duly ſworn and admitted to the office of one of the capital Burgeſſes, the office being at that time vacant. The King's coroner replied, and admitted that he was choſen as in the plea, but not ſworn till 1734, though he had notice of his election; that ſubſequent vacancies happened and that the office into which he was elected was filled up in the year 1714, and that the vacancies happened, and that the whole number of capital Burgeſſes was filled up as often as any vacancies happened.

Lord *Hardwicke.* If his title depends on the cuſtom ſet out by him, which is a cuſtom, on a vacancy of a capital Burgeſs, to elect one into the office ſo vacant, who is at the ſame aſſembly, or any future aſſembly, to be ſworn into the ſaid office, that is, into the office into which he was elected; now, how has the defendant brought himſelf within the cuſtom? Why, by ſaying he was elected into the office then vacant, and afterwards ſworn to be a capital Burgeſs, the office of capital Burgeſs being then vacant, which is not all within the cuſtom, for he has not ſaid he was ſworn into the ſaid office. If a *mandamus* goes to admit, tho' that does not ſpecify the particular office, yet, if the return is traverſed, it comes out always on the pleadings what particular office; for every capital Burgeſs is a diſtinct office; and though in common parlance every one is ſaid to hold the ſame, that only means the ſame kind of office; ſo that I think there is no poſſibility to maintain the defendant's plea, as to this part. So judgment was given for the King. *Vide Caſes Temp. Lord Hardw. p.* 255.

Eaſter, 9 *Geo.* 2. *The King* v. *Holliſter.*

The court was moved for the common rule to inſpect the charter and *corporation* books, there being a rule made to ſhew cauſe why an information in nature of a *quo warranto* ſhould not go againſt the defendant.

Lord *Hardwicke.* I think we have done it of late on a rule to ſhew cauſe. So take it. *Vide Caſes Temp. Lord Hardwicke, p.* 245.

Trinity, 9 *Geo.* 2 *Kynaſton* v. *The Mayor, &c. of Shrewſbury.*

On a *mandamus* to reſtore the plaintiff to the office of Alderman, it was returned, that at an aſſembly held on ſuch a day, the plaintiff for being abſent three years, was removed. And on a traverſe of every part of the return, a ſpecial verdict was found, that the removal was not on a charter day, ſo a ſummons of an aſſembly was neceſſary: the Mayor gave orders for a ſummons of all the members, but the ſerjeant being informed, and believing that one of the Aldermen was out of the ſummons, neglected to give him notice, tho' he had a houſe and family in the town, and accordingly returned him out of ſummons. And the court was of opinion, that it was not a regular aſſembly, for every member ſhould be ſummoned; and he had a right to debate as well as vote. *Vide Strange, vol.* 2. *p.* 1051.

Trinity, 9 *Geo.* 2. *The Mayor, &c. of Wokingham in Berks.*

In an action of *debt* on a *bye-law*, a ſpecial caſe was made, *viz.* that there is a *bye-law* in this *corporation* to this effect, that every inhabitant who is choſen a burgeſs, and refuſes to ſerve, ſhall forfeit 40 *s.* the defendant being a ſecondary burgeſs, was elected capital burgeſs, and refuſed; that the *corporation* conſiſts of a Mayor, capital burgeſſes, and ſecondary burgeſſes; and for the defendant's refuſal to be a capital burgeſs, this action was brought.

Lord *Hardwicke.* Here are two queſtions; 1ſt. Whether this *bye-law* is good or void? 2dly. Whether this refuſal of the defendant is within it? As to the firſt, it is void with reſpect to its extent to the perſons intended to be bound by it; or with reſpect to the ſubject matter. And I think it will be void in neither reſpect; nor in its extent; for it appears on the charter, which is here ſet out, on *oyer* prayed by the defendant, that the perſons *incorporated* are the inhabitants, and no diſtinction made between them and the burgeſſes, nor any mention of freemen, or approved men, but in general, inhabitants, and they are to be conſidered throughout the whole charter as the body to be governed: for the charter directs they ſhall make *bye-laws* for the better government of the inhabitants; and as the capital burgeſſes die, new ones are to be choſen out of the ſecondary burgeſſes; and if they die, new ones are to be choſen out of the inhabitants. Is the *bye-law* void then in reſpect of the ſubject matter? And how does it affect the defendant? And this is a more difficult conſideration; for if the conſtruction of the *bye law* is, that the words, *inhabitant choſen a burgeſs*, mean choſen a capital burgeſs, that would be a void *bye-law*, becauſe contrary to the charter; which directs only a ſecondary burgeſs to be choſen from among the inhabitants, like the caſe of *the Mayor of Oxford* v. *Wildgrove*, 3 *Lev.* 293. but I think the conſtruction muſt be, if any inhabitant choſen a ſecondary burgeſs, *&c.* becauſe an inhabitant, merely as ſuch, could not be a capital burgeſs, and then the *bye-law* is good; but then the *bye-law* inflicts no penalty for a refuſal of a capital burgeſs, and therefore I think judgment muſt be for the defendant.

And therefore the court unanimouſly gave judgment for the defendant. *Vide Caſes Temp. Ld. Hard. page* 284.

Michaelmas, 10 *Geo.* 2. *The King* v. *Tomlyn and others.*

On a motion for an information, *quo warranto*, againſt the defendants, who had been choſen jurats of the *corporation* of *Maidſtone*, by a ſelect number of the inhabitants; whereas the charter directs the choice to be by the inhabitants, which refers to a majority of the whole,

It was objected againſt granting the information, that there has been a long uſage to chooſe them in this manner.

Lord *Hardwicke*. Though according to the caſe of *corporations* in 4 *Co.* where a charter directs the election to be by the Mayor, jurats, and commonalty, the body may make a *bye-law* to veſt the power of election in any ſelect number; yet here the queſtion being, whether there is ſuch a *bye-law* or not? The court cannot determine that on motion, but it muſt be tried; and therefore, in the caſe of *Brecknock*, tho' the ſpecial verdict found that the defendant's election was according to a very long uſage, yet not having found expreſsly that there was a *bye law* for that purpoſe, judgment was given againſt the defendant; for no uſage, how long ſoever, in caſe of a *corporation* by charter, can ſupport an election made otherwiſe than according to the records of the charter, unleſs the jury find there was a *bye-law* for that purpoſe; though poſſibly it may be otherwiſe in caſe of a *corporation* by preſcription.

The court therefore granted an information. *Vide Caſes Temp. Lord Hard. p.* 316.

Hilary, 11 *Geo.* 2. *Boſworth* v. *Hearne.*

On the return of an *hab. corp.* it appeared, that the ſuit was brought by the Chamberlain of *London*, on a *bye-law* made 15 *Car.* 2. that no drayman or brewer's ſervant ſhould be abroad in the ſtreets with his dray or cart after one o'clock in the afternoon, between *Michaelmas* and *Lady-day*, and from thence after eleven in the forenoon, under the penalty of 20 *s.* and a cuſtom was returned for the city's having the regulation of carts.

It was agreed both at *bar* and *bench*, that ſuch a cuſtom may be good: but that without a cuſtom the *bye-law* would be void: and the only queſtion diſputed was, whether this was a reaſonable reſtraint?

The court ſaid, that this was only a regulation of trade, of which the city was the beſt judge; it was enough, that it did not appear unreaſonable in itſelf. And that within the reaſon on which many of the city *bye-laws* had been held good, they were warranted in granting a *procedendo*. *Vide Stra. vol.* 2. *p.* 1085.

Michaelmas, 19 *Geo.* 2. *The Weavers Company, qui tam, &c.* v. *Forreſt and four Others, on ſeparate Actions.*

The company brought actions as *common informers*, for the penalties in *ſtat.* 7 *Geo.* 2. *cap.* 7. for ſelling printed callico, and ſet out their charter, to ſhew they had power to ſue and be ſued, with a *profert*. The defendants demanded *oyer*, and had a copy of the charter delivered to them; after which they put in the general iſſue of *nil debet*, taking no notice of the *oyer*. The plaintiffs made up the iſſue, and inſerted the prayer and *oyer* at the head of the pleas, and demanded to be paid for it; on which the court was moved to expunge it, for though the defendants have a right to ſee whether the plaintiffs *may* ſue, yet they are not bound to inſert the *oyer*, but may plead to the merits.

On the other hand it was inſiſted, that the demand and giving *oyer* is an act of the court, whoſe acts either party has a right to record. And *Carthew* 301. *Lord Raym.* 969. 1055. 1 *Saund.* 306 *Lutw.* 680. 1 *Vent.* 37. 2 *Mod.* 189. *Cro. Jac.* 679. *Co. Lit.* 260. *a.* were cited.

But the court held, that if the plaintiffs would avail themſelves of the letters patent being ſet out at large, they ought to do it by praying them to be inrolled at the head of their replication, and ought not to do it at the defendants expence, and therefore ordered the *oyer* to be expunged. *Vide Strange, vol.* 2. *p.* 1241.

Hilary. 30 *Geo.* 2. *The Maſter* &c. *of the Vintners Company* v. *Paſſey.*

On an action of *debt* brought againſt the defendant by the company, on a *bye-law*, the defendant pleaded ſeveral pleas, *viz.*

1ſt, *Nil debet.* i. e. *that he was not indebted.*

2dly, That there are 12 *greater* livery companies in *London*, and other *inferior* companies, and that an order was made at a court holden before the Mayor and Aldermen, *&c.* on, *&c.* at, *&c.* at which court it was enacted, *&c.* that no perſon ſhould take on himſelf the livery of any company, being one of the ſaid 12 companies, *&c.* unleſs he ſhould have an eſtate of 1000 *l.* *&c.* and the defendant by his plea averred, that this was one of the 12 companies, and that he had no ſuch eſtate, *&c.* and therefore was not duly elected.

The plaintiff demurred to the defendant's *ſecond* plea, and his council offered the following cauſes of demurrer.

1ſt, That the plea does not ſet out by what authority the court which made this order was holden.

2dly, The court is *uncertain*, for many courts are holden before the Mayor and Aldermen, and *it does not follow* which of them this is.

3dly, *It does not follow* what authority the court of the Lord Mayor and Aldermen had to make this order.

The defendant joined in demurrer, and after the ſame was argued by the council on both ſides, the court gave judgment.

Lord *Mansfield*. The plea is admitted to be bad, however one anſwer ſtrikes me, which is, That *nil debet* may be pleaded, if the party was really unqualified.

The defendant being a liveryman of the company, he ought to know when the next court is, and therefore this objection has but little weight.

Deniſon Juſtice. We can never ſuppoſe the company would chuſe perſons not qualified. If they do ſo, *nil debet* will bring the matter in iſſue before the court. The order of the Mayor, *&c.* cannot be taken on this *record*, becauſe that plea is given up, and therefore the notice ſhall be ſuppoſed to be regular.

Per curiam. Let judgment go for the plaintiff. *Vide Bur. vol.* 1. *p.* 235.

Hilary, 30 *Geo.* 2. *Green* v. *The Mayor of Durham.*

On a verdict found on ſix ſeveral traverſes, to the return of a *mandamus*, on *ſtat.* 9*th Ann*, *cap.* 20. directed to the Mayor of *Durham*, commanding him to *ſwear* and *admit* the plaintiff into the place and office of a freeman of the company or fraternity of free-maſons, *&c.* of the ſaid city.

The right claimed by the plaintiff was his having been duly *elected* and *admitted* a freeman of the company, and the *objection* to his being ſworn was, that he had not conformed to certain *bye-laws*, *&c.* mentioned in the return to the *mandamus*, and found by the verdict.

The ſeveral *bye-laws* were ſtated to the court, and after hearing council on both ſides, the court gave their opinion.

Per curiam. We are of opinion, that *none* of the *objections* taken to the *bye-laws* are well founded, and that the return to the writ of *mandamus* ought to be allowed, and judgment be entered for the defendant. *Vide Bur. vol.* 1. *p.* 127.

Michaelmas, 30 *Geo.* 2. *The Chamberlain of London* v. *Godman.*

On a rule to ſhew cauſe againſt iſſuing a writ of *procedendo* to a writ of *habeas corpus* directed to the Mayor, *&c.* of *London*, commanding them to bring up the body of the defendant, together with the cauſe, *&c.* to which the following return was made, *viz.*

That there is a cuſtom in *London*, "That if any antient cuſtom, hard and defective in any thing newly ariſing, wants amendment, the mayor and aldermen, with the conſent of the commonalty, have always, *&c.* appointed a fit remedy for the common good of the citizens, ſo as ſuch their ordinances be conſonant to faith and reaſon, and in no wiſe prejudicial to the King or his people, nor repugnant to the laws or ſtatutes of *England*; and that the cuſtoms of *London* are confirmed by *ſtat.* 7. *Rich.* 2.

That within the city of *London*, there is a company of *butchers*, and that at a common council holden on the 27th *June* 20 *Geo.* 2. the mayor, *&c.* made an ordinance, "That whereas many perſons who exerciſe the trade of butchers, have obtained freedoms of other companies, by *redemption* or *otherwiſe*, by reaſon whereof the company of *butchers* is much *diminiſhed* and *fallen* into decay: for remedy thereof, *It is ordained*, That every perſon, not being already free of the city, occupying, uſing, or exerciſing, or who ſhall occupy, uſe, or exerciſe the art, trade, or myſtery of a *butcher*, within the ſaid city or its liberties, ſhall take on himſelf the freedom of the company of *butchers*, and that no perſon now uſing, or who ſhall hereafter uſe or exerciſe the trade of a *butcher* within the ſaid city or liberties, ſhall be admitted into the freedom of the ſaid city by the chamberlain thereof, of or in any other company than the ſaid company of *butchers*, *Provided always*, That every perſon, not being already free of the ſaid city, who are or ſhall be entitled to the freedom of any other company by *patrimony* or *ſervice*, ſhall be admitted into this company of *butchers*, on payment of a like *fine* and *fees*, as are uſually paid on the admiſſion of a child or apprentice."

And it is further *enacted*, "That if any perſon or perſons, (except ſuch as are free, *&c.*) ſhall uſe the trade of a *butcher*, not being free of this company of *butchers*, he, *&c.* ſhall pay 5 *l.*" And directions are therein given how ſuch penalty ſhall be levied, and alſo concerning *coſts*.

And by the ſaid return it was further certified, "That the defendant was taken on an action brought againſt him in the Mayor's court of *London*, for the penalty of this *bye-law*.

After hearing council on both ſides on this matter, the court gave their opinion.

Lord *Mansfield*. This *bye-law* is a reſtraint of trade, and not a mere regulation of it. The *preamble* don't pretend it to be made to regulate the trade, but merely for the benefit of the *butchers* company: it is founded on the general power of making *bye-laws* in the city of *London*.

Under a general power to make *bye-laws*, it is certain that a *bye-law* cannot be made *to reſtrain trade*.

By the general cuſtom of *London*, every freeman may exerciſe any trade, without being free of a particular company, which this *bye-law* requires him to be. We cannot take *judicial* notice of any particular cuſtom ſupporting ſuch a *bye-law* as this, when no ſuch particular cuſtom is ſet out, and it certainly is not good, under the general power which is ſet out.

Deniſon, *Foſter*, and *Wilmot*, Juſtices, concurred with the *Chief Juſtice*.

Per curiam. The *bye-law* is bad, therefore the rule to ſhew cauſe, why a *procedendo* ſhould not iſſue, muſt be diſcharged. *Vide Bur. vol.* 1. *p.* 12.

Eaſter, 31 *Geo.* 2. *The King* v. *Richardſon.*

On a general demurrer brought by the *King's Coroner* and *Attorney*, to the defendant's plea to an *information*, in nature of a *quo warranto*, exhibited againſt the defendant, to ſhew by what authority he claimed to be one of the *portmen* of the town or borough of *Ipſwich*.

After this caſe was ſeveral times *argued*, it was reduced to this general queſtion.

"Whether the defendant has ſhewn a ſufficient title to the office." Which general queſtion was divided into two *ſubordinate* queſtions, *viz.*

1ſt, Whether the *nine portmen* had been well and duly removed, and admitting they were well removed,

2dly, Whether the defendant was well choſen.

After hearing council on both ſides, the court gave their opinion.

Lord *Mansfield*. The general queſtion on the plea is, whether the defendant has ſet out a good title to the office of a *portman* of the town or borough of *Ipſwich*.

It is clear from the plea, that the *portmen* had full notice of the charge againſt them, and full opportunity to have been heard, and therefore I lay all the objections on that head out of the caſe; but if the charge was *inſufficient*, they had no occaſion to defend themſelves. This brings the whole to this queſtion.

"Whether an abſence from four occaſional great courts, and one on a ſtated day ſo circumſtanced, is a ſufficient cauſe of amotion." There is no authority which ſays it is, and it is not neceſſary, and would be highly improper at preſent, to ſay what kind of abſence, or under what circumſtances non-attendance may be a cauſe of forfeiture; it is ſufficient that the abſence, with all the circumſtances alledged by this plea, is not a cauſe, and we are clearly of opinion, that the cauſe of a motion alledged, and relied on in the plea, is not a ſufficient cauſe of amotion.

Per curiam. Let judgment be entered for the King. *Vide Bur. vol* 1. *p* 517.

Hil. 32 *Geo.* 2. *The King* v. *The Mayor, Bailiffs, and Common Council of the Town of Liverpoole.*

See this caſe fully ſtated in page 200 of this work, under the head *Bankrupts*.

Mich. 33 *Geo.* 2. *The King* v. *The Maſter and Wardens of the Company of Surgeons in London.*

This cauſe ſtood in the *crown paper*, on a return to a *mandamus* directed to the maſter and wardens of the company of ſurgeons of *London*, ſtating a cuſtom of that city, that every freeman of the ſaid city, uſing and exerciſing the art, ſcience, or myſtery of ſurgery within the ſaid city, has a right in reſpect thereof, to have and take apprentices of the age of 14 years or upwards, to be educated and inſtructed in the ſaid art, ſcience, or myſtery, for the ſpace of *ſeven years*, which ſaid apprentices have been uſed and accuſtomed to be admitted and bound, in the preſence, or with the conſent of the maſter and wardens, or ſome of them." And it further ſet forth, that *R. G.* a freeman of the ſaid city, and of the ſaid company, being deſirous of taking his ſon aged 15 years, to be his apprentice for the term of *ſeven years*, had often offered him to be admitted and bound, before the ſaid maſter and wardens, or ſome of them, as his ſaid apprentice for the term of *ſeven years*, according to the ſaid cuſtom, but they refuſed ſo to do.

The company to this *mandamus* returned, that by a *bye-law* of the ſaid company, no perſon was to be bound apprentice to the ſaid art, ſcience, or myſtery, who ſhould not underſtand the *Latin* tongue; that the ſon of the ſaid *R. G.* was examined accordingly, and was found entirely ignorant of the *Latin* tongue, wherefore they refuſed to permit him to be bound as aforeſaid.

It was argued for the King, that this was an inſufficient return, for that the *bye-law* is a bad one, being made in reſtraint of a *natural*, *general*, and *common* right.

If the *bye-law* is bad, this young man's not underſtanding *Latin* will not cure it; the *bye-law* does not expreſsly forbid ſuch a perſon to be admitted, it is not *mandatory*, but only *directory*.

The council for the company riſing to ſupport the return,

Lord *Mansfield* ſaid it was too plain a caſe to argue.

Per curiam. Let the return be allowed. *Vide Bur. vol.* 2. *p.* 892.

Trinity, 33 & 34 *Geo.* 2. *Oldknow* v. *Wainwright, or the King* v. *Foxcroft.*

This caſe of *Oldknow* v. *Wainwright* was a feigned action, under a rule by conſent to try a right of election to the office of *town-clerk* of *Nottingham*, and the ſame rule was made in the cauſe of *The King* v. *Foxcroft*, againſt whom an information had been brought by one *Seagrave*, his competitor.

The queſtion before the court was, whether *Seagrave* was duly elected into the office of *town-clerk?*

After hearing the council on both ſides, the court gave judgment.

Lord *Mansfield.* In this caſe there was an aſſembly duly ſummoned. One candidate was named, no other was named. The poll was taken, they had no right to ſtop in the middle of the election; the Mayor did not put any queſtion for adjournment, nor was there any.

Whenever electors are preſent, and do not vote at all, (as they have done here) they *virtually* acquieſce in the election made by thoſe who do.

Wilmot, Juſtice, concurred with the Chief Juſtice.

Per curiam. Let judgment be entered for the defendant. *Vide Bur. vol.* 2. *p.* 1017.

Trinity, 2 *Geo.* 3. *The King* v. *Sir Thomas Harriſon, Chamberlain of London.*

A writ of *mandamus* having iſſued, directed to the Chamberlain of *London*, to admit *W. C.* into the freedom of the ſaid city, having ſerved an apprenticeſhip to *J. C.* a freeman of the company of cloth-workers, and afterwards admitted himſelf into the freedom of the ſaid company.

The return ſet forth the cuſtoms of the city, touching freemen, and that within the ſaid city there was a certain antient ſociety or company of perſons, uſing the freedom and myſtery of *butchers*, and that by a *bye-law*, made at a common council of the ſaid city, on the 20th of *June*, 1727, for regulating the company of *butchers*, *It was enacted*, That from and after the 29th day of *September* next, every perſon not being already free of this city, uſing the trade of a *butcher*, within the ſaid city or the liberties thereof, ſhall be made a freeman of the company of *butchers*, and that no other perſon not ſo admitted as aforeſaid, ſhould exerciſe the ſaid trade in the ſaid city, &c.

And the ſaid return further ſet forth the apprenticeſhip of the ſaid *W. C.* and his preſentment to the Chamberlain to be admitted, which he refuſed to do for the reaſon aforeſaid.

The council for the proſecutor of the writ *argued*, that this *bye-law* was totally void,

1ſt. Becauſe this *bye-law* is beyond their juriſdiction.

2dly. The cauſe of making it is inſufficient.

After hearing council on both ſides, the court gave their opinion.

Lord *Mansfield.* This is a regulation of a very extenſive trade, that concerns every body who eats in the city of *London*.

It is not neceſſary that all the reaſons of the *bye-law* ſhould be given in the *preamble* of it.

Deniſon, Juſtice. I think this is a very good *bye-law*, and the objections are of no weight.

Foſter and *Wilmot* Juſtices, concurred with the Chief Juſtice.

Per curiam, unanimouſly, let the return be allowed. *Vide Bur. vol.* 3. *p.* 1322.

Eaſter, 5 *Geo.* 3. *The King* v. *The Vice Chancellor, &c. of Cambridge.*

On an application to this court for a *mandamus* to complete the election of the *Earl of Hardwicke* into the office of *High Steward* of the univerſity of *Cambridge*, after hearing council on both ſides, the court gave their opinion.

Lord *Mansfield.* There are three queſtions that ariſe on this caſe:

1ſt. On the validity of Lord *Hardwicke*'s election.

2dly. If his right be clear, then whether a *mandamus* is a proper remedy.

3dly. If it is, then how it ought to be directed.

As to the *firſt queſtion*, there does not ſeem to be the leaſt contradiction as to matter of fact among the witneſſes on the two different ſides, though they differ in opinion as to the right reſulting from them.

It is contended, that the election of *High Steward* ought to have been in the ſame mode as the election of a *Vice Chancellor*, and this is reſted on the ſtatutes of Queen *Elizabeth.*

There is a vaſt deal of difference between a *new charter* granted to a *new corporation* (who muſt take it as it is given) and a *new charter* given to a *corporation* already in being, and acting either under a *former charter*, or under a *preſcriptive uſage*; the latter, a *corporation* already exiſting are not obliged to accept a *new charter in toto*, i. e. *in the whole*, and to receive either all or none of it; they may act partly under it, and partly under their *old charter.*

Whatever might be the notion in former times, it is moſt certain now, that the *corporations* of the *univerſity* are *lay corporations*, and that the crown cannot take away from them any rights that have been formerly ſubſiſting in them under *old charters*, or *preſcriptive uſage.*

The ſtatutes of Queen *Elizabeth* cannot be ſet up to *invalidate* eſtabliſhments ſubſiſting long before ſhe was born. Therefore, I am clear that the mode and manner of this election was right.

Then as to the right of Lord *Hardwicke* under it.

The election was quite fair; the little miſtake in the marking was immediately ſet right, but diſputes ariſing on another matter, the *congregation* was diſſolved.

The next *queſtion* is, as to the remedy:

There is no other than what is now applied for, and this is the reaſon of the court's iſſuing the *prerogative* writ of *mandamus.*

The laſt *queſtion* is, how the *mandamus* ought to be directed.

The arguments uſed by the council for Lord *Hardwicke* are full and ſufficient, that the rule for a *mandamus* ought to be founded on the merits of the election, and not on the declaration of the proctors; therefore the *mandamus* ought to go to the keepers of the ſeal for the time being, requiring and commanding them to put the ſeal of the univerſity to the inſtrument of his appointment, and the two former parts of the rule ought to be diſcharged.

Wilmot, *Yates*, and *Aſton*, Juſtices, went fully into the matter, and concurred with the Chief Juſtice, that a *mandamus* ought to iſſue, &c.

Per curiam. Let the rule be drawn up in the manner we have directed. *Vide Bur. vol.* 3. *p.* 1647.

Hilary, 6 *Geo.* 3. *The King* v. *Spencer*, *Common Councilman of Maidſtone.*

On a rule to ſhew cauſe why judgment ſhould not be arreſted in this cauſe on the following objection,

That the *bye-law* under which the defendant juſtified his election into the office, was a bad *bye-law*, as it reſtrains and narrows the number of electors, without any authority from the *charter*, and even contrary thereto, &c.

“ The *charter* directs the nomination and election
“ of common-council men to be by the Mayor, jurats,
“ and commonalty, and their ſucceſſors, or the majo-
“ rity of them, out of the principal inhabitants of the
“ ſaid town and pariſh.

“ The new *letters patent* of *incorporation* bear date on
“ the 17th day of *June*, 21ſt *Geo.* 2. and *incorporate*
“ them by the name of Mayor, jurats, and common-
“ alty; to conſiſt of a Mayor, thirteen jurats, (in-
“ cluding the Mayor) and forty common-council
“ men. And power is granted to the Mayor, jurats,
“ and common-council to make *bye-laws.*”

After hearing council on both ſides, the court gave their opinion.

Lord *Mansfield*. From the caſes cited or alluded to, it appears to me, that where the power of making *bye-laws* is by *charter* given to the ſelect body, they do not repreſent the whole community, and therefore cannot aſſume to themſelves what belongs to the body at large; but where the power of making *bye-laws* is in the body at large, they may delegate their right to a ſelect body, who become the repreſentative of the whole community. I am therefore clearly of opinion that it is a null and void *bye-law*.

Wilmot, *Yates*, and *Aſton*, Juſtices, delivered their opinions at large, and clearly concurred with the Chief Juſtice.

Per curiam. Let the judgment be arreſted. *Vide Bur. vol.* 3. *p.* 1827.

Eaſter, 6 *Geo.* 3. *The Mayor and Commonalty of Colcheſter* v. *Seaber*, *Executor of William Seaber, his late Father*.

On an action of *debt* brought on a bond, *&c.* a verdict was agreed to be given for the plaintiffs, ſubject to the opinion of the court on the following queſtion: whether the preſent *corporation* could maintain this action?

After hearing the council on both ſides, the court gave their opinion.

Lord *Mansfield*. I am clear on principles of *law*, that the *old corporation* was not abſolutely diſſolved and annihilated, though they had loſt their magiſtracy, and that by virtue of the *new charter*, they are ſo revived as to be entitled to the credits, and liable to the debts of the *old corporation*.

Wilmot, *Yates*, and *Aſton*, Juſtices, gave their opinions at large, and concurred with the Chief Juſtice, that in the preſent caſe the *corporation* was not diſſolved, and that judgment ought to be for the plaintiffs.

Per curiam, unanimouſly, let the *poſtea* be delivered to the plaintiffs. *Vide Bur. vol.* 3. *p.* 1866.

Coſts.

Hilary, 2 *W. & M.* *Cone* v. *Bowles*.

Judgment was given in *C. B.* for the avowant, and damages, and *coſts*; and the plaintiff in *replevin*, brought a *writ of error* in this court, where the judgment was affirmed.

And now a motion was made, that the avowant might have *coſts*, on *ſtat.* 3 *H.* 7. *cap.* 19. which enacts, that the plaintiff ſhall recover *coſts* and damages, where the defendant brings a *writ of error* to delay the execution of the judgment.

That the avowant here is in nature of a plaintiff, and has a judgment of *retorn. habend.* given, and is within the reaſon of that *ſtatute*, becauſe his execution is delayed by ſuch *writ of error*, as well as the judgments obtained by plaintiffs in other actions, and ſo conſequently alſo is within the equity of *ſtat.* 3. *Jac. cap.* 8. which appoints bail to be given in a *writ of error* to proſecute it with effect, and to pay all *coſts* and damages to be awarded for delaying of execution. But the court allowed no *coſts*. *Vide Mod. Rep. vol.* 4. *p.* 7.

Eaſter, 3 *W. & M.* *Willett* v. *Tiddy*.

On an *indeb. aſſump.* for money received to the plaintiff's uſe; the defendant juſtifies as collector of aid of the King by parliament given, by a diſtreſs warranted by the *ſtatute*, and found for the defendant, and if he ſhould have *treble coſts* by the *ſtatute* given, for being ſued in the exerciſe of his office, was the queſtion on motion. And it was urged, that this is not a matter concerning his office; for it may be for money received to his own uſe, or for the overplus of diſtreſs not returned; and whereas an action was brought by preſentment in the *eccleſiaſtical court* againſt a conſtable, and found for him, it was adjudged out of *ſtat.* 7 *Jac. c.* 5. for it does not directly touch his office. 1 *Cro.* 285. *Jones* 305. So in an action on the *caſe* for falſe preſentment by a conſtable, that the plaintiff's lands were in the pariſh of *S.* it was adjudged, that he could not have *double coſts* by *ſtat.* 7 *Jac.* becauſe the queſtion wholly ariſes on the place where the lands are, and not on the duty of the conſtable. 1 *Cro.* 467.

Holt, Chief Juſtice, inclined to that opinion, for if the action was brought for overplus not returned, this does not touch his office, and he does not uſe the *ſtatute* for his defence: but becauſe it was certified by the judge of aſſize, that it was within the *ſtatute*, the defendant had *treble coſts*. *Vide Mod. Rep. vol.* 12. *p.* 6.

Michaelmas, 5 *W. & M.* *Gale* v. *Till*.

An adminiſtrator brought a *writ of error* to reverſe a judgment againſt *himſelf*, but the judgment was affirmed; and a motion was made that he might pay *coſts*; becauſe it was his own fault to bring a *writ of error* to delay the plaintiff, and to put him to charge; and where an adminiſtrator is guilty of any wrong or injury done, which lies within his own knowledge, and which he might prevent, if there is judgment againſt him, *coſts* muſt be paid.

Per curiam. By *ſtat.* 3 *Jac.* it is enacted, that no execution ſhall be ſtaid by *writ of error*, unleſs the plaintiff in the *ſaid writ give bail to the plaintiff in the action in double the ſum recovered, to pay the debts, damages, and coſts, if the judgment ſhould be affirmed*; it is always held, that an adminiſtrator, who brings a *writ of error*, ſhall not give bail, though he is not exempted by the ſtatute, neither ſhall he pay *coſts* in this caſe. *Vide Mod. Rep. vol.* 4. *p.* 244.

Michaelmas, 5 *W. & M.* *The Maſter, Warden, and Company of Cutlers in Highamſhire*, v. *Buſkin*.

In *debt* on a *bye law* for 40 *s.* penalty, that a cutler ſhall keep no more than one apprentice; it was aſſigned for breach, that the defendant *took and kept two perſons as apprentices*, and ſo did not ſay they were apprentices.

Per curiam. The deſign of the company in this *bye-law* was, to hinder any member from qualifying more than one at a time; but if he had taken one to live with him in the exerciſe of the trade for ſeven years, this is a ſufficient qualification, though the party is never bound as an apprentice; and he ſhall have equal privileges with one bound.

The plaintiffs council then moved for *coſts*, the action being brought for a ſum certain of 40 *s.* as a penalty.

Per curiam. That is a ſettled caſe, and *coſts* were awarded, with this difference put by *Holt*, Chief Juſtice: where the action is brought by the party aggrieved, and the penalty certain, he ſhall have *coſts*, becauſe the defendant ought to have paid it without ſuit; and when a penalty is given to the party grieved, it is certain to whom payment ought to be made; but where brought by a common informer, he ſhall not; for he is altogether uncertain, and has no title to the money till he brings his action, and it is that veſts an intereſt in him. *Vide Mod. Rep. vol.* 12. *p.* 46.

Hilary, 6 *W. & M.* *Roop* v. *Scritch*.

In an action of *treſpaſs*, ſeveral *treſpaſſes* were ſet forth, and the defendant was found *not guilty* as to all but one, which was, *walking with his feet*, to the damage of 5 *s.* and no more.

This cauſe began originally in an inferior court, and was removed hither; and the court allowed full *coſts*, though the damages were ſo ſmall. *Vide Mod. Rep. vol.* 4. *p.* 378.

Hilary, 6 *W. & M.* *Roberts* v. *Cook*.

An *ejectment* was brought in the *C. B.* and a verdict given for the plaintiff, but he had no *coſts*; and now the defendant in that action brought a new *ejectment* in this court againſt the ſame plaintiff; and it was moved, that he might have his *coſts* before he ſhould be compelled to plead to the new action.

But it was not granted, becauſe he had no vexation, the verdict being for him; but if it had been againſt him, or that he had been nonſuited, he ſhould not have brought another action before the *coſts* of the ſuit had been paid, becauſe it was a vexation to bring a new action. *Vide Mod. Rep. vol.* 4. *p.* 379.

Mich. 6 *W.* & *M.* *Sir Wilfred Lawſon* v. *Story.*

It is enacted by *ſtat.* 2 *W.* & *M. ſect.* 1. *cap.* 5. that on any pound breach or reſcous of goods deſtrained for rent, that the perſon grieved ſhall have a ſpecial action on the *caſe*, and recover treble damages and *coſts* of ſuit againſt the offenders, *&c.* Now the queſtion on a motion was, whether the *coſts* ſhould be trebled in ſuch an action, as well as the damages? and the defendant's council argued that they ſhould not, becauſe at common law, the word *damna* included as well damages as *coſts*, and therefore, if the ſtatute had given treble damages without ſaying more, the *coſts* had been trebled alſo. But now when the parliament inſerts the word *coſts* after the word damages, it ſhews, that it was not their intent that *coſts* ſhould be included in the word damages, for then it had been in vain to inſert the word *coſts*; but it was their intention to make a diſtinction between the *coſts* and damages. And by the omiſſion of the word *treble* when the *coſts* are ſpoken of, it is apparent it was their intent that the parties ſhould recover treble damages, but only ſingle *coſts*. *But not allowed.*

Per curiam. The word *treble* ſhall he referred as well to the word *coſts*, as to the word *damages*. And therefore it was adjudged, that the *coſts* ſhould be treble alſo. *Vide Raym. vol.* 1. *p.* 19.

Hilary, 7 *W.* 3. *Chamberlain* v. *Huetſon or Hewſon.*

See this caſe fully ſtated in page 204 of this work, under the head *Baron and Feme.*

Michaelmas, 7 *W.* 3. *Reynolds* v. *Oſborn.*

A motion was made for *coſts* on a verdict in *treſpaſs*, for breaking his cloſe and his ſoil, and 1 *s.* damages was given; it was argued, that it was not within *ſtat.* 22 & 23 *Car.* 2. *c.* 9. which does not extend to voluntary, but involuntary *treſpaſſes* only; as walking over the ground.

Rokeby, Juſtice. I remember a caſe in *C. B.* where it was laid, *that he turned up the ſoil with a plough*; and *coſts* were allowed. And what difference in that from this?

Chief Juſtice. *Ploughing* a man's ſoil is quite another thing; the ſtatute extends to *treſpaſs* on the freehold, and not to any *treſpaſs* on goods and chattels: it will be an hard matter for you to get *coſts* here. In the caſe of *whereby he loſt the ſervice*, the *coſts* are not there given for the *battery*, but for the degree of it, *viz.* the *lyſs of the ſervice.* Adjourned. *Vide Mod. Rep. vol.* 5. *p.* 74.

Hilary, 8 *W.* 3. *The King* v. *Edwards.*

Per curiam. The King ſhall pay *coſts* for an amendment, but ſhall not pay *coſts* for not going to trial; but where there is a proſecution, he ſhall pay *coſts* for amendments, and for not going to trial; but then, there muſt be an affidavit of the name of the perſon who is the proſecutor, for that does not appear by the indictment: and if the defendant does not know the proſecutor, he ought to apply to the Attorney General, who will inform him. *Vide Salk. vol.* 1. *p.* 193.

Hilary, 8 *W.* 3. *Bigland* v. *Robinſon.*

Adjudged, that where *executors* ſue on any *contract of their teſtator*, or for any wrong done to him, they ſhall pay no *coſts*, either on a nonſuit or verdict againſt them; ſo wherever he muſt ſue as executor; as for inſtance, an executor brought an action of *debt* on a bond due to his teſtator, and the defendant pleaded payment of the money to himſelf, *viz.* to the executor, on which they were at iſſue, and a verdict given againſt the plaintiff, yet he paid no *coſts*; but if he had brought the money into court, then the plaintiff muſt proceed at his peril. *Vide Salk. vol.* 3. *p.* 105.

Michaelmas, 8 *W.* 3. *Blachly* v. *Fry.*

In an action of *treſpaſs quare clauſum fregit*, and for cutting his corn, and carrying it away; the jury found the defendant guilty of all, but carrying away, and the plaintiff's council moved for full *coſts* on *ſtat.* 22 & 23 *Car.* 2. *c.* 9.

Holt, Chief Juſtice. Where the title muſt be claimed where the *treſpaſs* is done, or the title may come in queſtion, there ſhall be full *coſts*. In *Stroud*'s caſe, for entering his cloſe, and digging his turf, full *coſts* were allowed; but the judge of aſſize, viz. *North*, Chief Juſtice, certified, that the freehold came in queſtion. So in judge *Eyre*'s caſe, in an action on the *caſe* for ſtopping his way. *Adjourned.* *Vide Salk. vol.* 1. *p.* 193.

Hilary, 8 & 9 *W.* 3. *Bellaſis* v. *Burbriche.*

Adjudged, that where the party aggrieved brings an action on a *penal law*, he ſhall have *coſts*, if he recovers; but otherwiſe, if it be brought by a common informer. *Vide Raym. vol.* 1. *p.* 170.

Hilary, 9 *W.* 3. *Anonymous.*

A motion was made, that a *pauper* might pay *coſts*, for not going on to a trial.

Per curiam. He pays *no coſts* unleſs on a nonſuit, or where the verdict is found againſt him, and then he ſhall pay *coſts*, or be whipped. See *ſtat.* 23 *Hen.* 8. *c.* 15. *Vide Salk. vol.* 3. *p.* 107.

Michaelmas, 9 *W.* 3. *Anonymous.*

By a private act of parliament, it was enacted, *that if a trial be between two inhabitants of* Newcaſtle upon Tine, *and the damages not exceeding* 40 *s. that in ſuch caſe the plaintiff ſhall have no judgment, but the defendant ſhall have coſts.* An *indebitatus aſſumpſit* was brought, and a verdict given for the plaintiff, and 30 *s.* damages; and the queſtion was, how the defendant ſhould have his *coſts?* And now, a motion was made, that this matter might be ſuggeſted on the roll: but the Chief Juſtice ſaid, that the judge of the inferior court ſhould have directed the jury to find for the defendant. *Vide Mod. Rep. vol.* 5. *p.* 367.

Trinity, 10 *W.* 3. *Toms or Thomas* v. *Lloyd.*

In an action on the *caſe* for money received to the plaintiff's uſe; the defendant pleaded his privilege in the *Exchequer*, whereon the plaintiff demurred; and judgment was given for the defendant, who prayed *coſts* by virtue of *ſtat.* 8 & 9. *W.* 3. *c.* 11. whereby it is enacted, that for preventing frivolous and vexatious ſuits, that if, on any demurrer, judgment ſhall be given againſt the plaintiff, the defendant ſhall have judgment to recover his *coſts*.

But the court were of opinion, that judgment on demurrer on a plea in abatement for the defendant, is not within this ſtatute; the intent of the ſtatute being only to give the defendant *coſts*, where the plaintiff ſhould have it, if the judgment had been given for him. Now, if the plaintiff had judgment on demurrer, in a plea in abatement, he has then no *coſts*, tho' there be ſome conſideration thereof, at the end of the cauſe, in *coſts*. Beſides, the intent of the ſtatute is, to prevent frivolous and vexatious ſuits; and on a judgment for the defendant on a plea in abatement, it does not appear to the court, that the action is either frivolous or vexatious; ſo that it muſt be underſtood of a demurrer, where there is a judgment final. *Vide Mod. Rep. vol.* 12. *p.* 195.

Michaelmas, 10 *W.* 3. *Coot* v. *Lynch.*

The queſtion in this caſe was, whether a judgment given in this court on a *writ of error* on a judgment in

Ireland could be executed in *England* for the *coſts?* For that execution had been taken out againſt the party who was here in *England*.

Chief Juſtice. Whatever judgment the court gives here, muſt be executed in *Ireland*: here can be no *teſtatum* go into a foreign country, the original judgment being given in *Ireland*. Would you execute a judgment by piece-meals? Shall you execute an acceſſary part of a judgment, when the principal judgment cannot be executed here?

Rokeby, Juſtice. Execution muſt follow the nature of the original action, and this court is to ſend a *mandate* to the judges in *Ireland*, to ſee that the judgment which was given here, be put in execution there.

Chief Juſtice. I am of opinion that this execution ought to be ſet aſide, and let a *ſuperſedeas* iſſue, becauſe he has erroneouſly, &c. *Vide Mod. Rep. vol.* 5. *page* 421.

Hilary, 12 *W*. 3. *Grant* v. *Baily*.

Per curiam. The reaſon why an executor, being defendant, or plaintiff on a nonſuit, ſhall pay no *coſts*, is, becauſe the ſuit being *in auter droit*, he may well be thought miſconuſant of the truth of the cauſe of action. *Vide Mod. Rep. vol.* 12. *p.* 440.

Eaſter, 12 *W*. 3. *The King* v. *The Inhabitants of Shipping Farrington*.

Per curiam. If a new trial be granted for irregularity, there ſhall be no *coſts* paid for it; but if a defence is made, it may help the irregularity. If a new trial be on the merits of the cauſe, there muſt be *coſts*. *Vide Mod. Rep. vol.* 12. *p.* 370.

Eaſter, 12 *W*. 3. *Boiture* v. *Woolrick*.

In an action of *treſpaſs quare clauſum fregit*, for an *aſſault*, *battery*, and *wounding*, and for diſturbing of him in his quiet poſſeſſion, &c. on *not guilty* pleaded, a general verdict was given for the plaintiff, and damages under 40*s*. and the court was moved to have full *coſts*, becauſe the defendant was found guilty of a *wounding*, and *diſturbance* of the quiet poſſeſſion.

Holt, Chief Juſtice. The practice has been always otherwiſe; and I do not remember ſuch a motion to have been made.

Gould, Juſtice, ſaid, that he had moved ſuch a motion, as to the peaceable poſſeſſion, in this court, but it was denied him. This motion therefore was denied. *Vide Raym. vol.* 1. *p.* 566.

Michaelmas, 12 *W*. 3. *The King* v. *Purſey*.

Holt, Chief Juſtice. When proceedings are ſet aſide for irregularity, there ſhall never be *coſts*. *Vide Mod. Rep. vol.* 12. *p.* 435.

Hilary, 13 *W*. 3. *Ballards* v. *Gerard*.

Holt, Chief Juſtice. The defendant ſhall have *coſts* on judgment for him on demurrer in abatement. *Vide Mod. Rep. vol.* 12. *p.* 608.

Trinity, 13 *W*. 3. *Anonymous*.

Holt, Chief Juſtice. The late *ſtatute* giving the defendants *coſts*, does not extend to a judgment for him on demurrer, to a plea in *abatement*. *Vide Mod. Rep. vol.* 12. *p.* 523.

Trinity, 13 *W*. 3. *Anonymous*.

Per curiam. If on notice of trial, the defendant draws his briefs, retains councils, and makes ready his witneſſes before that notice is countermanded, on affidavit thereof, and motion, he ſhall have ſuch *coſts* as the maſter ſhall tax. *Vide Mod. Rep. vol.* 12. *p.* 560.

Michaelmas, 13 *W*. 3. *The Archbiſhop of Canterbury* v. *Fuller*.

An action of *treſpaſs* was brought in an inferior court, and the defendant removed the cauſe by *habeas corpus* into this court. And on not guilty pleaded, a verdict was given for the plaintiff, and 12*d* damages. And the court was moved for full *coſts*, becauſe this cauſe being removed by *habeas corpus* out of an inferior court, was not within *ſtat.* 22. & 23. *Car.* 2. *c.* 9. and ſo it was held by *Northey* and the practiſers, to be the courſe on actions removed out of the *Marſhalſea*, and other inferior courts. And ſo it was ruled here. *Vide Raym. vol.* 1. *p.* 395.

Michaelmas, 13 *W*. 3. *Baſs* v. *Firmen*.

See this caſe fully ſtated in page 242 of this work, under the head *Bonds*.

Hilary, 1 *Ann*. *Brown* v. *Gibbons and Wife*.

In an action on the *caſe* for words ſpoke of the wife, whereby the huſband loſt his cuſtomers; and a verdict under 40*s*. damages given; the queſtion was whether there ſhould be more *coſts* than damages? and it was ſaid, this was not damages for the words, but for the conſequential damages; which, it was urged, was not within the ſtatute; and it was ſaid to have been adjudged, that in an action brought by the maſter, for battery of his ſervant, he ſhall not be held lower in *coſts* by reaſon of the lowneſs of damages; and ſo it was ſaid for ſlandering a man's title; and the court agreed to the diverſity between actions for words actionable in themſelves, and by reaſon of conſequential damage. And here the judgment was entered with a blank for *coſts*, which the court were offended at, for it could not be filled after. *Vide Mod. Rep. vol.* 7. *p.* 129. *Raym. vol.* 2. *p.* 831.

Eaſter, 1 *Ann*. *The King* v. *Summers*.

The defendant was indicted for a *treſpaſs*, and alſo for a *riot*; and on not guilty pleaded, it was removed into this court by *certiorari*, and the defendant went before the maſter who taxed the *coſts*; and the court was moved that he might go before the maſter again, that the proſecutor might be conſidered in the *coſts* for his charges below, the maſter having only taxed *coſts* in reſpect to the charges ſince the *certiorari*.

Per curiam. The maſter ought not to conſider the charges below, but only on the *certiorari*.

Then it was moved to aggravate the *fine*, but that was denied, ſince the party had been before the maſter, and if he inſiſted on it, the court would ſet aſide the *coſts* already taxed. *Vide Salk. vol.* 3. *p.* 105.

Trinity, 1 *Ann*. *The Queen* v. *Clerk*.

Per curiam. An information tried at the bar, is notwithſtanding the late ſtatute of giving *coſts* againſt the proſecutor; for that ſays, the party ſhall enter into a recognizance of 20*l*. and that the party ſhall have a *ſcire facias* thereupon, but 20*l*. would be too ſmall *coſts*, in the caſe of a trial at bar. *Vide Mod. Rep. vol.* 7. *p.* 47.

Trinity, 1 *Ann*. *Smith* v. *Walker and Nois*.

In *replevin* for taking of cattle at a place called *A*. the defendants pleaded that they took them at a place called *B*. *abſque hoc*, that they took them at *A*. The plaintiff confeſſed it; and thereupon the defendant's council moved to have *coſts*; and cited *Cro. Eliz.* 329. *Haſlop* v. *Chaplin*. *Cro. Jac.* 520. *Samuel* v. *Hoder*. *Cro. Car.* 497. *James* v. *Tutney*, that the defendants in *replevin*, after judgment for them on demurrer, ſhall have *coſts*. And after ſeveral motions, the court delivered their opinion as follows.

Per curiam. The defendants in this caſe cannot have *coſts*, becauſe the plaintiff is not barred from having another *replevin*, and driven to his writ of *ſecond deliverance*;

liverance; but notwithſtanding this confeſſion, and the abatement of this writ, he may have a new *replevin.* But it had been otherwiſe, if he had been barred, from having another writ of *replevin*, by this.

And if iſſue had been joined on the place of taking, and found for the defendants, they would have had *coſts*. Therefore *coſts* were denied by the whole court. *Vide Raym. vol* 2. *p.* 788.

Michaelmas, 1 *Ann.* *Dr. Watſon's Caſe.*

Per curiam. An adminiſtrator ſhall pay *coſts* for not going to trial. *Vide Mod. Rep. vol.* 7. *p.* 118.

Michaelmas, 1 *Ann.* *Goodwin* v. *Hilton.*

Per curiam. An executor ſhall pay *coſts* for not going on to trial. *Vide Mod. Rep. vol.* 7. *p.* 97.

Eaſter, 2 *Ann.* *Elwes, Executrix of Elwes* v. *Mocata.*

The plaintiff brought an *indebitatus aſſumpſit* for monies received after the death of the teſtator by the defendant, to the uſe of the plaintiff as executrix, *&c.* On *non aſſumpſit* pleaded, the plaintiff was *nonſuited.* And now ſhe brought a new action, and the defendant moved to have *coſts*, before the plaintiff ſhould be permitted to proceed. And 1 *Vent.* 109. *Cro. Car.* 219. *Atkey* v. *Heard* were cited; where an adminiſtratrix nonſuited in *trover*, brought by her on a converſion in her own time, paid *coſts*. And here ſhe might have ſued, without naming herſelf executrix.

Per curiam. In *trover*, ſhe might have ſued without naming herſelf executrix, if the goods were once in her poſſeſſion; but otherwiſe in this caſe, for theſe debts are not aſſets till recovered.

Note. In another action between the ſame parties, the plaintiff paid *coſts*, for not going to trial according to notice. *Vide Raym. vol.* 2. *p.* 865.

Trinity, 2 *Ann.* *Garland* v. *Extend or Exton.*

The defendant having pleaded in abatement, the plaintiff demurred, and judgment was given for the defendant; when the court was moved to have *coſts* on *ſtat.* 8 & 9 *W.* 3. but it was denied, for the judgment in this caſe is not given on the merits, but *that the bill be quaſhed*; and the ſtatute only meant to give *coſts*, where the merits of the cauſe was determined on the demurrer. If judgment had been for the plaintiff on this demurrer, it had not been final, but only a *reſpondeas ouſter*, and the plaintiff could have had no *coſts* by the ſtatute, which therefore ought to have the ſame expoſition as to the defendant. *Vide Salk. vol.* 1. *p.* 194. *Raym. vol.* 2. *p.* 992.

Michaelmas, 2 *Ann.* *Garden* v. *Exon.*

Per cur. There ſhall be no *coſts* for a defendant on a judgment on demurrer to a plea in abatement, for the ſtatute is to be intended only of a *judgment on demurrer*, on the merits of the caſe; for if there were judgment of *reſpondeas ouſter* for the plaintiff, he ſhould have no *coſts*, and the caſe of *Thomas* v. *Loyd* was cited, where the ſame had been reſolved before. *Vide Mod. Rep. vol.* 6. *p.* 88.

Hilary, 3 *Ann.* *Fanſhaw* v. *Morriſon.*

On a judgment given in *C. B.* on a *ſcire facias*, on a recognizance by bail on a *writ of error*, that the *original plaintiff ſhould have execution on the recognizance*, and *recover his damages*, which he had ſuſtained by *occaſion of the delay of execution*; and the *exception* taken was, that the court had no power to award damages for delay of execution, but they ſhould give them for *coſts* of ſuit.

Per curiam. Damages generally include *coſts*, which word *coſts* properly ſignifies *coſts* of ſuit, and delay of execution is properly damage, *viz.* the being ſo long out of his money, which the court uſed formerly to aſſeſs, by allowing the party the lawful intereſt: ſo damages of delay of execution, and *coſts* of ſuit on the ſtatute are very different, and to be aſſeſſed by different meaſures, and the ſtatute only gives *coſts* of ſuit againſt the bail, *&c.* Therefore this is *error.* *Vide Mod. Rep. vol.* 6. *p.* 157.

Trinity, 3 *Ann.* *Jenkins and Wife* v. *Plumbe.*

See this caſe in page 208 of this work, under the head *Baron and Feme.*

The court having taken time till this term to conſider of the caſe, declared unanimouſly, that the defendant ought to have *coſts*; on this ground aſſigned by *Holt*, Chief Juſtice, that if the plaintiff, having married the executrix, had ordered, as he might have done, *J. S.* to receive this debt, which was due to the teſtator, and he had accordingly received it, that had been a good payment and diſcharge of the firſt debt; and *J. S.* would now become indebted to the plaintiff by contract in the plaintiff's time, *viz.* the appointment; and he in that caſe might bring an *indebitatus aſſumpſit* againſt *J. S.* for ſo much money received to his uſe as executor: and here, though the defendant received the money without any previous appointment of the plaintiff, yet the plaintiff, by bringing his action, having aſſented to the receipt, it amounts to an appointment, and a diſcharge of the firſt debtor, and makes a contract between the defendant and him: and here the plaintiff need not have named himſelf executor, it being a contract with himſelf; his ſaying it was to his uſe as executor, is true, and therefore no harm, but rather better, for it ſhews how the right came; for if he had been an adminiſtrator inſtead of an executor, and declared as ſuch, and recovered, and then, adminiſtration had been revoked, the defendant would have been relievable by the writ of *audita querela.*

And it is a true rule, that where the executor need not name himſelf, he ſhall pay *coſts* on a nonſuit, and the naming himſelf executor ſhall not exempt him from it: and where an executor recovers in a caſe in which he need not name himſelf executor, and dies inteſtate, or makes an executor, who will not prove the will. As to the firſt teſtator's goods, his executor or adminiſtrator, and not the adminiſtrator *de bonis non &c.* and though here the executor ſhould bring the action in his own name, yet the debts recovered, are aſſets in his hands. If an executor lives at *London*, and goods, which the teſtator died poſſeſſed of are at *Briſtol*, yet the executor has ſuch an immediate poſſeſſion of them, that he may maintain *trover* for them in his own name againſt any converter of them, and the damages recovered ſhall be aſſets in his hands; but if he does not recover ſo much in damages as the goods were really worth, and that happens not through any fault of his, he ſhall anſwer for no more than he recovers; and if the goods are periſhable, and before any default in him to preſerve them, or ſell them at due value, they are impaired, he ſhall not anſwer for the firſt value, but ſhall give that matter in evidence to diſcharge himſelf: but if a perſon takes goods out of his poſſeſſion, he muſt ſue them that took them, to have an opportunity from diſcharging himſelf of anſwering more in aſſets than he recovers: ſo if an executor will omit to ſell the goods at a good price, and after they are taken from him, there the value of the goods ſhall be aſſets in his hands, and not what he recovers, for there was a default in him. And in this caſe, if the receipt was by the defendant after the plaintiff's marriage with the executrix, the huſband alone ſhould have brought the action; but if the receipt was in the wife's time, before the marriage, the huſband and wife ought to join in the action. *Vide Mod. Rep. vol.* 6. *p.* 181.

Trinity, 5 *Ann.* *Andrews* v. *Strowd.*

Per curiam. Where the plaintiff in *error* is nonſuited, or where judgment is affirmed, or a diſcontinuance, there *coſts* ſhall be allowed, but no *coſts* where he is barred. *Vide Mod. Rep. vol.* 11. *p.* 88.

Eaſter, 6 *Ann. Kendall* v. *John.*

Formerly no *coſts* were given at *common law*, in any caſe whatſoever, no *coſts* are now given in *real* actions, nor in a *quare impedit*, and till of late, no *coſts* were given on a *ſci. fac.* and a *prohibition*, and yet it was never attempted to form an action on the *caſe* for thoſe *coſts*, by calling of them by the name of damages. *Vide Forteſcue, p.* 116.

6 *Ann. The Queen* v. *Danvers.*

On an information againſt *Danvers* and others, at the aſſizes the defendant was acquitted, and the reſt found guilty; and though the judge did not certify a a probable cauſe, yet it was held, that the proſecutor was not liable to pay this defendant his *coſts*, becauſe till *ſtat.* 8 *&* 9 *W.* 3. the plaintiff never paid *coſts* in any action, if but one defendant was found guilty; *ſtat.* 4 *&* 5 *W. & M. c.* 18. cannot be intended to make proſecutors otherwiſe liable, than as plaintiffs were before in other actions. *Vide Salk. vol.* 1. *p.* 194.

Trinity, 6 *Ann. Modely and Wife Executors* v. *York.*

In an action of *aſſumpſit* brought by an executor, for money received after the death of the teſtator, if the executor is nonſuited, he ſhall pay *coſts*: for the law gave this privilege to executors, of not paying *coſts*, only where the cauſe of action accrued in the defendant's life-time; and there, becauſe it could not be ſuppoſed the executor was conuſant, or privy to the act of the teſtator. *Vide Mod. Rep. vol.* 11. *p.* 135.

Eaſter, 7 *Ann. Buſhell* v. *Haynes.*

See this caſe fully ſtated in page 185 of this work, under the head *Bail-bond.*

Michaelmas, 7 *Ann. Butler* v. *Cozens.*

The court was moved to have full *coſts* in an action of *treſpaſs, among other things*, for breaking his lock on his gate; and 2 *Vent.* 215. and 3 *Mod.* 39. were cited.

Per curiam. Had it been for taking away the lock, full *coſts* might have been given.

Powell, Juſtice. But this ſeems to be laid as a treſpaſs in order to try the title; and where the freehold comes in queſtion, there it is held full *coſts* ſhall be given: but where the freehold does not come in queſtion, there ſhall be no more *coſts* than damages. But if the Judge certifies the treſpaſs to be voluntary and malicious, there the *coſts* are to be full, by *ſtat.* 22 *&* 23 *Car.* 2. *cap.* 9. but it was adjourned to ſee if the judge who tried the cauſe would certify. *Vide Mod. Rep. vol.* 11. *p.* 198.

Michaelmas, 8 *Ann. Jones* v. *Wilſon.*

In an action brought by an adminiſtrator, he declared on *two counts*; one on a promiſe to the inteſtate in his life-time, and the other on a promiſe to the plaintiff himſelf, and names himſelf adminiſtrator in both, and on the trial the plaintiff was nonſuited; and the queſtion was, whether he ſhould pay *coſts*?

Powell, Juſtice, *Holt* abſent, ſaid, that theſe two counts could not be joined; and if an intire judgment had been given, judgment might have been arreſted. But it is a queſtion, whether it might not have been made good, by taking judgment on one count only. But in this caſe the plaintiff muſt pay *coſts*, becauſe the nonſuit goes to the whole; and it was ſo ruled by *Powell, Powys*, and *Gould*, Juſtices. *Vide Mod. Rep. vol.* 11. *p.* 256.

Trinity, 10 *Ann. Player* v. *Bandy.*

Reſolved, that in an action of *debt* on a bond, though the money be tendered before the action is brought, which is refuſed, that yet the plaintiff muſt have *coſts*. For the *ſtatute* for the amendment of the law gives the court no juriſdiction till after the action is brought, and therefore they cannot take notice of a tender before: beſides, it was ſaid by *Powell*, J. and not contradicted, that the *ſtatute* enabled the defendant to plead payment, or to bring the money into court; but not to plead *tender, refuſal*, and *uncore priſt* i. e. *ſtill ready. Vide Mod. Rep. vol.* 10. *p.* 26.

Eaſter, 12 *Ann. Manners* v. *Pern.*

The univerſity of *Cambridge* having the laſt term claimed *conuſance of pleas*, the plaintiff now moved the court, that the defendant might pay all the *coſts* for all motions about that *conuſance*.

But the court rejected the motion; for they knew no precedent, nor ſaw any reaſon, that becauſe a third perſon claimed *conuſance of pleas*, and is refuſed, that therefore the defendant ſhould pay the plaintiff's *coſts*.

Beſides, in this caſe, the defendant by *imparling* had as far as lay in him, ſhewn himſelf deſirous of having the cauſe tried in this court.

Add to all this, that the motion was by no means without foundation; for the univerſity only came a moment too late. *Vide Mod. Rep. vol.* 10. *p.* 156.

Michaelmas, 1 *Geo. Clerk* v. *Lee.*

See this caſe fully ſtated in page 143 of this work, under the head *Attorney.*

Hilary, 3 *Geo. The King* v. *Powell & al.*

A rule for the proſecutor of an information in nature of a *quo warranto*, to pay *coſts* for not going on to trial, was moved to be diſcharged.

Per curiam. In the caſe of the King, there can be no *laches*; but a ſubject in theſe proſecutions ſhall pay *coſts* as in common actions; executors and adminiſtrators ſhall pay *coſts* for not going on to trial. Rule to pay *coſts*. *Vide Strange, vol.* 1. *p.* 33.

Eaſter, 3 *Geo. The King* v. *Poland.*

The court was moved for treble *coſts* againſt the proſecutor of an indictment againſt the defendant for uſing the trade of a glover, on an affidavit, that he was a ſoldier, and diſbanded on the peace of *Ryſwicke*, by virtue of *ſtat.* 10 *&* 11 *W.* 3. *c.* 1. which enacts, "that the ſoldiers time ſhall be taken as if actually ſerved, and if they be indicted, they ſhall be acquitted on the general iſſue, and recover treble *coſts*. *Vide Strange, vol.* 1. *p.* 49.

Eaſter, 5 *Geo. Hudſon and Wife* v. *Aſh.*

See this caſe fully ſtated in page 279 of this work, under the head *Conſtable.*

Trinity, 5 *Geo. Anderſon* v. *Buckton.*

In *treſpaſs* for the entry of diſeaſed cattle into the plaintiff's cloſe, *whereby* the plaintiff's cattle were infected, and a verdict for the plaintiff for 20 *s.*

It was moved to allow the plaintiff his full *coſts*, on account of the ſpecial damages alledged and put in iſſue, and which would have ſubſiſted of itſelf as a diſtinct cauſe of action, and the plaintiff ought not to be puniſhed for joining it with the *treſpaſs*, to avoid vexation. And *Cro. Car.* 163, 307. 3 *Mod.* 39. 2 *Vent.* 48. *Cro. Car.* 141. *Ray.* 487. were cited.

After hearing council on both ſides, *Pratt*, Chief Juſtice, *Powys* and *Forteſcue*, Juſtices, were for full *coſts*, becauſe the conſequential damage is a matter for which the plaintiff might have had a diſtinct ſatiſfaction. Therefore the plaintiff had full *coſts* in this action. *Vide Strange, vol.* 1. *p.* 192.

Trinity, 5 *Geo. Bellew* v. *Aylmer.*

On a *ſci. fac.* againſt an executor, execution was awarded, and then the record went on with a *conſideratum eſt etiam* i. e. *it is conſidered alſo*, that the plaintiff ſhould have *coſts*. It was admitted that *ſtat.* 8 *&* 9 *W.* 3. *c.* 10. which gives *coſts* on a *ſci. fac.* does not extend to executors, and therefore the judgment for *coſts* was erroneous. But then it came in queſtion, whether the court ſhould reverſe the whole judgment, or only *as to* the *coſts*; and the executor's council inſiſted to have it reverſed in the whole, for that it was one intire judgment, on which they could not have ſeveral executions. In *Cro. El.* 162. there were damages given to the crown in a *quare impedit.* and the judgment reverſed in *toto.* So is 1 *Leon.* 149. *Allen* 74. If one defendant dies, and judgment is given againſt all; it muſt be intirely reverſed. 1 *Roll. Abr.* 775. *pl.* 2. 2 *Keb.* 696. 1 *Roll. Abr.* 775. *pl.* 4. 1 *Vent.* 27. 39 *Cro. Car.* 471. *Salk.* 24.

Per curiam. Conſideratum eſt etiam does not disjoin it at all. If a man declares for two *ten pounds*, it is the ſame thing whether judgment be intire for 20 *l.* or ſeveral for each 10 *l.* Adjourned.

In *Hil.* 7. *Geo.* without farther argument, the judgment was reverſed as to *coſts*, and affirmed *as to the reſt*, on the authority of *Green* v. *Waller. Hil.* 13 *W.* 3. and adjudged in this court. *Trin.* 2 *Ann.* on *error* out of *Ireland*, it was reverſed as to the *coſts*. and affirmed as to the reſt. *Vide Strange, vol.* 1. *p.* 188.

Hilary, 6 *Geo.* *The Archbiſhop of Dublin* v. *The Dean of Dublin.*

The defendant in a *prohibition* obtained judgment in *Ireland*, which was affirmed in *B. R.* there, and came over hither by a defective *writ of error*, which was quaſhed; and now the queſtion was, whether the defendant in *error* ſhould have *coſts?* there being none given in the courts below, either on the principal judgment or the affirmance. This matter was adjourned for the conſideration of the court: and in *Trinity* 6 *Geo. Pratt*, Chief Juſtice, delivered the opinion of the court, that *coſts* ſhould be paid. *Vide Stra. vol.* 1. *p.* 262.

Eaſter, 6 *Geo.* *Davila* v. *Herring.*

On trial of the iſſue, a caſe was made and afterwards argued in court, but the fact not being ſufficiently ſtated, ſo as the court could give judgment according to the juſtice of the cauſe, it was recommended to the parties, and accordingly they agreed to go to a new trial, where the plaintiff was nonſuited. And now the queſtion was about the *coſts*, whether the maſter ſhould tax the common *coſts* of a nonſuit, or take into his conſideration all the former proceedings. And on a motion for the court's direction to the maſter, it was ordered, that he ſhould tax the defendant his *coſts* on the whole, as well with relation to the firſt trial as the laſt. *Vide Stra. vol.* 1. *p.* 300.

Trinity, 6 *Geo.* *Shadford* v. *Houſtoun.*

The court ordered *coſts* for not going on to execute a *writ of enquiry*, as they uſed to do for not going on to trial. *Vide Stra. vol.* 1. 317.

Eaſter, 7 *Geo.* *Cutler* v. *Goodwin.*

In *error* on a judgment in *C. B* on ſeveral promiſes, on the inquiry damages were given ſeparately, and *for the damages and coſts to the amount of* 20 *s.* and then the plaintiff releaſes the damages to two of the counts, and has judgment for the reſidue, with increaſed *coſts*.

It was objected, that the 20 *s. coſts* given by the jury went to the whole, whereas by the releaſe the plaintiff confeſſes he has a cauſe of action but as to part. *Hob.* 168.

Per curiam. All the precedents are ſo; the jury give the ſame *coſts* in all caſes, and if the defendant is put to any particulr expence as to the bad count, the court can make him an allowance in the *increaſed coſts* they give. The judgment was therefore affirmed. *Vide Stra. vol.* 1. *p.* 420.

Eaſter, 8 *Geo.* *Jordan* v. *Harper.*

Sir *Sebaſtian Smith* brought an *ejectment* againſt ſeveral perſons who lived in cottages on the waſte as *paupers*, to try whether the cottages belonged to him as lord of the manor. The pariſh made defence, and the plaintiff was nonſuited; and paid the *coſts* to one of the defendants, who was in his intereſt; and on motion, the court ſaid, they could not relieve the pariſh, or the other defendants. *Vide Stra. vol.* 1. *p.* 516.

Eaſter, 9 *Geo.* *Anonymous.*

A judgment was given in this court, and on a *writ of error* brought in the *Exchequer Chamber*, that judgment was affirmed; and now the plaintiff in the action brought a *ſcire facias* for the *coſts* he had ſuſtained by the delay of the execution; and it was objected that it ought not to be allowed, becauſe it was brought in *London*, and not in *Middleſex*, where it ought to be brought; and for a default in the writ itſelf, becauſe it did not ſet forth what became of the caſe in the *Exchequer Chamber*, i. e. it did not ſhew that the judgment was affirmed; for if it was not, then the plaintiff has no right to *coſts*.

Per curiam. It is true, an action of *debt* on the original judgment, or on a recognizance, may be laid in any county, but a *ſcire facias* muſt always go into that county where the execution on the original judgment ſhould be made.

Afterwards, on reading this *ſcire facias*, it was, as before, obſerved, that it did not ſet forth what became of the cauſe in the *Exchequer Chamber*, and certainly the plaintiff cannot have this writ without ſhewing what became of the judgment removed by this *writ of error*; and it is unreaſonable he ſhould have it for *coſts* in delay of execution, without ſhewing that the judgment was affirmed in the *Exchequer Chamber*. *Vide Mod. Rep. vol.* 8. *p.* 74.

Hilary, 10 *Geo.* *Crundell* v. *Bodily.*

In *ejectment*, the defendant had a verdict and judgment, and *coſts* taxed, on which the plaintiff brought a *writ of error* in the *Exchequer Chamber*, and pending ſuch writ, he brought a new ejectment; and the defendant's council moved, that the plaintiff might not proceed on this ejectment till he had paid the *coſts* of the firſt ſuit.

After hearing council on both ſides, the court gave their opinion.

Per curiam. It is hard the defendant ſhould be doubly vexed, by the proceedings on the *writ of error*, and alſo by a new ejectment, therefore let a rule be made, that if the plaintiff ſhould proceed on the ejectment, he ſhall pay the *coſts* of the firſt action, otherwiſe he ſhall not proceed on the *ſecond*. *Vide Mod. Rep. vol.* 8. *p.* 226.

Eaſter, 11 *Geo.* *Clark* v. *Othery.*

In *treſpaſs*, *aſſault*, and *battery* on the plaintiff, the declaration went on, *for that he made an aſſault* on the horſe of the plaintiff. A verdict for the plaintiff and 20 *s.* damages; and it was moved to have full *coſts* on account of the ſpecial matter about the horſe; but refuſed on conſideration, and the plaintiff had no more *coſts* than damages. *Vide Stra. vol.* 1. *p.* 624.

Trinity, 11 *Geo.* *Phillip* v. *Fiſh.*

In an action on the *caſe* for words, on a verdict for the plaintiff, and *one ſhilling* damages,

It was inſiſted by the defendant's council, that under *ſtat.* 22 & 23 *Car.* 2. *cap.* 2. the plaintiff was entitled to no more *coſts* than damages, and this being a *perſonal action*, and the jury having given but 1 *s.* damages, the plaintiff ſhall have no more *coſts*.

Per curiam. If the *fact* that comes under the *verum etiam*, is only laid in aggravation of damages, ſo that the words are the *giſt* of the action, then the plaintiff can have no more *coſts* than damages; but if it be laid as a *diſtinct* fact, for which another action might be brought, then he ſhall recover full *coſts*. Therefore the court in *Mich. Term.* 12 *Geo.* gave full *coſts* for the plaintiff. *Vide Mod. Rep. vol.* 8. *p.* 371.

Michaelmas, 11 *Geo.* *Wyvel* v. *Stapleton.*

On a *writ of error* brought on a judgment in *C. B.* the judgment was *reverſed*, and *adjudged*, that the plaintiff in *error* ſhould recover his debt and *coſts*, as he would have done below. *Vide Mod. Rep. vol.* 8. *p.* 315.

Michaelmas, 11 *Geo.* *Cowper* v. *Ginger.*

On a *writ of error* brought by one on a judgment againſt two in *C. B.* which writ was quaſhed, the defendant in *error* moved for *coſts*, as if the judgment had been affirmed.

Per curiam. Let the defendant have *coſts*, as if the judgment had been affirmed. *Vide Mod. Rep. vol.* 8. *p.* 317.

Michaelmas, 11 *Geo.* *Weldon* v. *Buckler.*

On a *writ of error* brought in this court, on a judgment in *C. B.* on a *ſci. fac.* againſt pledges, in a plaint in *replevin*, removed there from the county court.

Per curiam. Sci. facias's have been often amended, however, in this caſe, let the plaintiff diſcontinue on payment of *coſts*. *Vide Mod. Rep. vol.* 8. *p.* 314.

Hilary, 12 *Geo.* *Portman* v. *Came.*

The plaintiff brought an action of *debt* on a bond as executor, and on *oyer*, it appeared to be conditioned, that the defendant ſhould not hunt in any of the lands of the teſtator; and in the replication a breach was aſſigned, by a hunting in the time of the executor, and a verdict for the defendant.

And now the court was moved for *coſts*, becauſe the hunting which was the cauſe of action, aroſe in the time of the executor, and was a matter within his knowledge. And 6 *Mod.* 91. 181. 1 *Vent.* 92. were cited.

Per curiam. The caſes are only where he need not declare as executor, and ſo was *Baller* v. *Delander*, *Trinity*, 1 *Geo.* But here the bond was the cauſe of action, and he was obliged to declare as executor. And therefore they denied *coſts*. *Vide Strange*, *vol.* 1. *p.* 682.

Michaelmas, 12 *Geo.* *Carter* v. *Fiſh.*

The declaration being for words ſpoken by the defendant, and 1 *s.* damages; it was moved laſt term for full *coſts* on the following authorities. *Salk.* 206. *Cro. Car.* 140. *Salk.* 642. *Cro. Car.* 163. 307. And this term the Chief Juſtice delivered the opinion of the court, that the plaintiff ſhould have full *coſts*, becauſe this was not laid as an aggravation, but as a diſtinct fact; he ſpoke the words, and procured him to be carried before a juſtice. *Vide Strange*, *vol.* 1. *p.* 645.

Michaelmas, 12 *Geo.* *Pocklington* v. *Peck.*

A *writ of error* was brought on a judgment in *C. B.* in an action brought there by a *feme ſole*: to the *ſcire facias quare executio non*, the plaintiff in *error* pleaded in abatement, that the defendant in *error* was married ſince the judgment, and before the iſſuing of the *ſcire facias*. On this the defendant in *error's* council moved to quaſh their own *ſcire facias*, and the council on the other ſide inſiſted on *coſts*.

Per curiam. It is the ſame in a *ſcire facias* as in an action where if you plead in abatement, and the plaintiff's writ is abated, he pays no *coſts*. Had there been no plea in abatement, and the party had moved to quaſh his own writ, we would have made him pay *coſts*. The writ was therefore quaſhed *without coſts*. *Vide Stra. vol.* 1. *p.* 638.

Michaelmas, 13 *Geo.* *Higgins* v. *Jennings.*

In an action of *treſpaſs*, *quare clauſum fregit*, and alſo for erecting a wall, and ſpoiling the graſs, by *trampling thereon with his feet*, the defendant pleaded *not guilty*, as to all but the treading down the graſs, and as to that, he juſtified for a way. The plaintiff replies *extra viam*, in which they were at iſſue, and the jury find for the plaintiff on both iſſues, and 2 *d.* damages. On motion the court ordered *full coſts*, though there was no certificate, it appearing by the record, that the *freehold* was in queſtion. *Vide Strange*, *vol.* 2. *p.* 726.

Michaelmas, 13 *Geo.* *Sutton* v. *Bryan.*

The court gave *coſts* for not going on to execute a writ of enquiry according to notice; and ſaid it was as reaſonable, as in the caſe of a trial. *Vide Strange*, *vol.* 2. *p.* 728.

Hilary, 2 *Geo.* 2. *Granville* v. *Vincent.*

The plaintiff brought an action of treſpaſs, *wherefore he broke the cloſe*, againſt the defendant for entering his cloſe, and trampling under foot a hay rick, and the plaintiff had a verdict and damages under 40 *s.* the court was now moved for *full coſts*, for that this being an action brought for a treſpaſs, and ſpoil committed by the defendant on a hay-rick, which is a charge ſevered, is not within *ſtat.* 22 & 23 *Car.* 2. and for this *Raym.* 244, 247. *Salk.* 208. 3 *Mod.* 3. were cited.

Per curiam. The authorities ſeem to run, that a treſpaſs being laid to be committed on a *chattel ſevered*, the plaintiff is intitled to *full coſts*; but, in this caſe, they doubted on the laſt objection, that the chattel was not deſcribed. *Vide Fitz-Gibbons*, *p.* 42.

Hilary, 2 *Geo.* 2. *Baldwin* v. *Morgan.*

The plaintiff out of the penalty of a recognizance of bail, levied not only the money received, but ſome *coſts*, not included in the judgment, but ſuch as he had really been put to: and on motion it was held, that though *equitable coſts* may be levied out of the penalty of a bond, yet it was too hard to ſuffer it to be done againſt the *bail*, and ſo the overplus money was ordered to be returned. *Vide Strange*, *vol.* 2. *p.* 826.

Eaſter, 4 *Geo.* 2. *Marret* v. *Gardiner.*

Per curiam. Where an amendment of a writ of *error* is prayed, on *ſtatute* 5 *Geo. cap.* 13. it is to be *without coſts*; but if the prayer be alſo to amend the aſſignment of *errors*, the rule is *with coſts*; becauſe then the party comes for a favour of the court. *Vide Fitz-Gibbons*, *p.* 268.

Trinity, 4 *Geo.* 2. *Baynham* v. *Matthews.*

In this caſe the plaintiff prayed leave to *diſcontinue*; and being an adminiſtrator, it was granted *without coſts*. *Vide Strange*, *vol.* 2. *p.* 871.

Trinity, 4 *Geo.* *The King* v. *Earl.*

There was a rule for the proſecutor of an information to pay *coſts* for not going on to trial: the defendant died before they were paid; and it was held the executor could not have them; nor would he have been liable, if the teſtator had been ruled to pay them. *Vide Stra. vol.* 2. *p.* 874.

Trinity, 5 & 6 *Geo.* 2. *Moſes Burry* v. *Jefferey Perry.*

In an action for *words* brought by the plaintiff againſt the defendant, the plaintiff ſet out in his declaration, that he was an houſe-ſmith by trade, and that the defendant ſpoke the words of him, (which words were actionable in themſelves) by reaſon of ſpeaking which words the plaintiff loſt ſeveral cuſtomers, naming them particularly, &c. to his damage of 100 *l.* On the general iſſue pleaded, the jury found for the plaintiff, but gave him only 5 *s.* damages. And the court was moved, that the plaintiff might have full *coſts*, though the damages were found under 40 *s.* becauſe he had received a ſpecial damage, *viz.* the loſs of his cuſtomers; ſo that if the words had not been actionable of themſelves, this action would have been maintainable, by reaſon of the ſpecial damage. And the caſes of *Phillips* v. *Fiſh*, and *Carter* v. *Fiſh*, were cited, where in an action for words importing *felony*, as, *he ſtole my hens*, &c. and, as was argued, laid by way of aggravation of damages, that he carried him before a juſtice of peace, and cauſed him to be impriſoned &c. the jury gave under 40 *s.* damages; and yet, after ſeveral motions in court, *Trinity*, 11 *Geo.* the court made a rule that the plaintiff ſhould have full *coſts*.

Per curiam. Where the words are not actionable, but the action is maintained by reaſon of ſpecial damages the plaintiff has ſuſtained on account of the words, the plaintiff ſhall have *full coſts*, though the damages are under 40 *s.* for it is not the words, but the ſpecial damage is the cauſe of action. 1 *Salk.* 206. *Brown* v. *Gibbons*; but where the words are actionable of themſelves, as in the preſent caſe, and ſpecial damages are laid by way of aggravation, and the damages are under 40 *s.* there ſhall be no more *coſts* than damages, for that is properly an action for words within *ſtat.* 21 *Jac.* 1. *c.* 16. And as to the caſes of *Carter* v. *Fiſh*, and *Phillips* v. *Fiſh*, on conſidering that declaration, the court held, that as it was laid, it was not barely laid in aggravation of damages, but was a diſtinct cauſe of action, importing a charge of felony on him; and therefore the plaintiff had full *coſts*. In this principal caſe, the court directed the plaintiff ſhould have no more *coſts* than damages. *Vide Raym. vol.* 2. *page* 1588.

Hilary, 6 *Geo.* 2. *The King* v. *Moore*.

An indictment for *perjury* was removed by *certiorari*, and the defendant paid *coſts* for not going on to trial: the proſecutor afterwards moved to quaſh it, which the court refuſed, unleſs he would ſubmit to pay *coſts*. *Vide Stra. vol.* 2. *p.* 946.

Eaſter, 7 *Geo.* 2. *Deveniſh* v. *Mertins*.

In *treſpaſs* for taking a gun, after *not guilty* pleaded, the plaintiff moved to diſcontinue, on payment of *coſts*. The defendant, on an affidavit of his being a juſtice of peace, and in the execution of his office, moved for *double coſts*, and the queſtion was, whether it ſhould be done by rule, or by ſuggeſtion. And on conſideration the court held, that this being a diſcontinuance with leave of the court, obtained by rule, they might make this a part of the terms. And that this made it different from the caſe of a verdict or nonſuit, where it muſt be done by way of ſuggeſtion. *Vide Stra. vol.* 2. *p.* 974.

Trinity, 7 *Geo.* 2. *Caſwell* v. *Norman*.

An executor brought *error* of a judgment after a *devaſtavit*, and the court held he ought to pay *coſts* on affirmance. *Vide Strange, vol.* 2. *p.* 977.

Hilary, 8 *Geo.* 2. *Dibben* v. *Cooke & al.*

An action on the *caſe* was brought againſt two defendants, there was judgment by default againſt one, and the other on pleading *not guilty*, was acquitted: and the queſtion was, whether he was intitled to his *coſts?*

And on conſideration, the Chief Juſtice delivered the opinion of the court, that he was intitled to *no coſts*. Before *ſtat.* 8 & 9 *W.* 3. *c.* 11. If one defendant was acquitted, he was not intitled to *coſts*; the courts conſtruing the former acts to relate only to the caſe of a total acquittal of all the defendants. This being inconvenient, *ſtat.* 8 & 9 *W.* 3. *c.* 11. was made and gave *coſts* where one of the defendants is acquitted, unleſs the judge certifies a reaſonable cauſe to make him a defendant, and that act extends to treſpaſs, aſſault, falſe impriſonment, and ejectment. The preſent action is treſpaſs on the *caſe*, and though that be a ſpecies of treſpaſs, and in the caſe of the *ſtatute of limitations*, the word *treſpaſs* in the proviſo, has been extended to actions on the *caſe*; yet conſidering theſe acts giving *coſts* have always been looked on as penal *ſtatutes* not to be extended by equity, and therefore an avowant not within the word plaintiff. *Carth.* 179. we muſt take it only to mean the general ſort of treſpaſs *vi et armis*, 10 *Co. Marſhalſea* caſe. And he ſaid this was the rule in *C. B.*. *Vide Strange, vol.* 2. *p.* 1005.

Eaſter, 8 *Geo.* 2. *Lock* v. *Shermer*.

On application to ſtay an action of *debt* on bond, on payment of principal, intereſt, and *coſts*,

The council ſhews cauſe and oppoſes it, unleſs they pay the *coſts* of a ſuit in the *Exchequer*, relating to the ſame matter.

Lord *Hardwicke*. I believe it has been ruled on the ſtatute for the amendment of the law, that they ſhall do ſo, and *coſts* in equity relating to ſuits on bonds, have been referred to and taxed by the maſter. So let the rule be abſolute, to ſtay the proceedings on payment of principal, intereſt, and *coſts*, and of the *coſts* in the *Exchequer*. *Vide caſe Temp. Ld. Harwicke. p.* 116.

Trinity, 8 *Geo.* 2. *Barton and others* v. *Miles and others*.

The defendants were collectors of the tax for window lights, and were ſued in an action of *trover* by the plaintiffs, who were aſſignees in a commiſſion of bankruptcy againſt one *H.* and at the trial the plaintiffs were nonſuited, for not being able to prove a title to the goods taken; ſo laſt term the defendant's council moved, that they might have double *coſts*, for that they were entitled to them by the ſtatute which gives it for all actions brought for acts done in the execution of office, where a verdict is for the defendant, or the plaintiff is nonſuited; and the method of doing it is generally on a certificate of the judge who tried the cauſe, that the defendants were in the execution of their office; but that could not appear in this caſe, becauſe the plaintiffs were nonſuited for not ſhewing a title, ſo that no evidence as to the taking was heard; but he now produces an affidavit, that they were officers, and in the execution of their office, which was read:

And a rule was made for the plaintiffs to ſhew cauſe why a ſuggeſtion ſhould not be entered on the roll to that purpoſe: and the Chief Juſtice ſaid, that though the court gave *coſts* by rule in a late caſe of this nature, that was done becauſe there was a *diſcontinuance* of the plaintiff's action, but that in the caſe of a *nonſuit*, there is a judgment entered for the defendant to have *coſts*, as is required by ſeveral ſtatutes.

The plaintiff's council came to ſhew cauſe according to the rule; and admitted that *double coſts* muſt be given in favour of ſome of the defendants, but that two of them were not collectors, but only aſſiſtants, and the act which gives *double coſts* does not extend to favour them.

Lord *Hardwicke*. They muſt make their ſuggeſtion as they can, but we take no notice of the ſeveral capacities of the defendants, for it is *one taxation*, and not ſeparate *coſts* for every defendant.

Then the plaintiffs council would have queſtioned, whether, as the parties are out of court on this nonſuit, there can be a ſuggeſtion entered on the roll.

Lord *Hardwicke*. That point is fully ſettled, and not to be diſputed, and the defendants have no other way to get their *double coſts*. Therefore, the rule was made abſolute. *Vide Caſes Temp. Lord Hardw. p.* 125.

Hilary, 9 *Geo.* 2. *Harris and Wife* v. *Hanna*.

On a rule to ſhew cauſe why the defendant ſhould not have *coſts*, the caſe was, that the plaintiff and his wife, who was executrix to one *L.* brought an action of *trover* againſt the defendant, and declared for goods which were in the hands of the teſtator in his lifetime, but were after his death converted by the defendant;

dant; and when the cauſe came down to trial, the plaintiffs were nonſuited.

Serjeant *Eyre*, for the defendant. The rule is, that where the cauſe of action ariſes in the time of the executor, he is liable for *coſts*, for then he may bring an action without naming himſelf executor; but where he is obliged to name himſelf executor, I admit he is not bound to pay *coſts*; but I ſubmit it, that in this caſe the converſion is the cauſe of action, for it is the foundation and *giſt* of the action, and that was in the time of the executor; as to the caſe in *Lev.* there the account was about the aſſets of the teſtator; and I ſubmit it, that the caſe in 3 *Lev.* is not law, for there even the *trover* was in the time of the adminiſtrator, and that reſolution is therefore contrary to all the books. And he cited 1 *Salk.* 314. where in *trover* by an executor, on a *trover* and converſion in the time of the executor, if nonſuited, he ſhall pay *coſts*, for he need not name himſelf executor, and the goods are aſſets in his hands, though he never recover them. The ſame was held 1 *Vent.* 109. and *Cro. Cha.* 219. *Atkey* v. *Hard.* And Sir *W. Jones*, 241. cites *Yentes* v. *Wilbeard*, *Michaelmas*, 1724. *trover* by an executor, and the converſion laid in his own time, and on a nonſuit, held that the plaintiff ſhould pay *coſts*.

Lord *Hardwicke*. There was a caſe of *Baller* v. *Delander*, *Trinity Geo.* 1, where *coſts* were given to the defendant, on the diſtinction that my brother *Eyre* lays down; where it is neceſſary for the plaintiff to name himſelf executor, and that he muſt bring his action in right of the teſtator, there he is excuſed, though even that had been a pretty liberal conſtruction of the ſtatutes for *coſts*, becauſe *coſts* are given as a ſatisfaction, not as a puniſhment; but however, that point is now ſettled, with the diſtinction as above. It uſed to be a ground of giving *coſts*, or not againſt executors, if the thing or damage recovered was *aſſets*; but that is now exploded, for even though the cauſe of action ariſe after the teſtator's death, yet the thing, when recovered, will be *aſſets*; ſo that the matter reſts entirely on the diſtinction laid down by my brother *Eyre*.

Lee, Juſtice. The cauſe of action is the converſion the executor is privy to: 1 *Vent* 109. is a caſe exactly in point. There is a good caſe as to *coſts* concerning executors, which is *Jenkins* v. *Plombe*, in 6 *Mod.* 91. 181. and *Salk.* 207. The rule is, that where the cauſe of action ariſes after the teſtator's death, the executor is liable for *coſts*, becauſe he is ſuppoſed a ſufficient judge of the cauſe to found an action.

The rule muſt be abſolute, with *coſts*, for the defendant. *Vide Caſes Temp. Lord Hardw. p.* 204.

N. B. The ſtatutes which give *coſts* where the plaintiff is nonſuited, or a verdict for the defendant, are 23 *H.* 8. *c.* 15. and 4 *Jac.* 1. *c.* 3.

Eaſter, 9 *Geo.* 2. *The King* v. *Howell.*

On a rule to ſhew cauſe why the proſecutor ſhould not pay *coſts* for not procuring an information *quo warranto* to be tried within a year after iſſue joined, purſuant to *ſtat.* 4 & 5 *W.* & *M. c.* 18. the words of which are, that the clerks of the crown ſhall not, without expreſs order of the court, in open court, file any information for *treſpaſs*, *batteries*, or other miſdemeanors; or any iſſue or proceſs thereon, before having a recognizance from the proſecutor to the defendant, in the penalty of 20 *l.* to proſecute the information effectually; and in caſe the defendant ſhould appear and plead to iſſue, and the proſecutor ſhall not at his own *coſts* within one year after iſſue joined procure the ſame to be tried; or in caſe a verdict is for the defendant, or a *nolle proſequi* is entered by the informer, then the court may award the defendant his *coſts*, unleſs the judge certifies there was a reaſonable cauſe; and if the informer does not pay the *coſts* taxed within three months after demand, then the defendant may have the benefit of the recognizance to compel him.

The council ſhewed for cauſe, that theſe proviſions in the ſtatute extend only to ſuch informations as are filed by the coroner without order of the court, or however, theſe informations *quo warranto* are not within the ſtatute, being neither for treſpaſs, battery, or miſdemeanors meant by the ſtatute, and that this was not a miſdemeanor, but a civil ſuit.

Lord *Hardwicke*. I have always taken this to be within the ſtatute; I believe this is the firſt application for *coſts*; it appears to me both from the act, and the practice on the act, to be a caſe within it; as to the practice, a recognizance to anſwer *coſts* has been always given in theſe informations, which could only be done, as being within the ſtatute. Indeed, the council has endeavoured at a new conſtruction, which, if it ſhould prevail, would entirely defeat the ſtatute. But that can never be the meaning, or the words of the ſtatute, becauſe now no information at all can be filed by the clerk of the crown without leave of the court; but the true meaning of the ſtatute, and warranted by practice, is, that he ſhall file no information without leave, nor iſſue proceſs thereon without a recognizance. As to theſe informations not being for miſdemeanors, it is now too late to make that objection, ſince the practice has been otherwiſe. The court indeed have themſelves made this diſtinction, to grant informations for public uſurpations, but if it is only of a private franchiſe, not concerning public government, as a fair, &c. the court has ſometimes refuſed them, and directed an application to the Attorney General. You cannot in this caſe have a rule for what *coſts* ſhall be taxed in general, for you can have no more than the penalty the recognizance extends to; but if the cauſe had gone to trial, you might have had your *whole coſts*, becauſe on *ſtat.* 9 *Ann*, judgment would have been given for *coſts*.

A rule was made for the defendant to have his *coſts* as far as the recognizance extends. *Vide Caſes Temp. Lord Hard. p.* 247.

Eaſter, 9 *Geo.* 2. *The King* v. *Carpenter.*

A rule was made for the defendant to ſhew cauſe againſt an information in nature of a *quo warranto* to ſhew by what warrant he claimed to vote in the election of a Mayor of *Exon*, on pretence that the right was reſtrained to reſident freemen, which the defendant was not. And on ſhewing cauſe, it appearing clearly, that both by the charter and uſage, the defendant was intitled to vote, the court diſcharged the rule with *coſts*. *Vide Strange, vol.* 2. *p.* 1039.

Trinity, 9 *Geo.* 2. *Smith qui tam* v. *Dunce.*

After a verdict againſt the defendant, for ſuing in the Admiralty for a matter done at land, in which caſe double damages are given; it was moved on 2 *Danv.* 221. that *the increaſed coſts* ſhould not be doubled. But on citing *Carth.* 321. 10 *Co.* 116. and producing the record of the caſe of *Child* v. *Sands*; mentioned in *Carthew*, where doubling *the increaſed coſts*, was aſſigned for *error*, and over-ruled; the court was of opinion, that there was no diſtinction between the *coſts* given by the jury, and thoſe given by the court, but both ought to be doubled. *Vide Strange, vol.* 2. *p.* 1048.

Michaelmas, 9 *Geo.* 2. *The King* v. *James.*

The council for the defendant moved for *coſts*, for not going on to trial. The proſecutor in an information in this court, ought to bring the cauſe to trial at his own *coſts*; but in an indictment, which is ſolely at the ſuit of the Queen, he that is indicted muſt bring the cauſe to a trial at his own charges. *Styles Pract. Reg. tit. Trial, p.* 604.

Per curiam. Let it be referred to the maſter.

N. B. Maſterman ſaid, by the courſe of the court, *coſts* for not going to trial are allowed in ſuits of this ſort, as well as civil. *Vide Caſes Temp. Lord Hardw. p.* 159.

Hilary, 10 *Geo.* 2. *The King* v. *The Inhabitants of Glaſſenby in Cumberland.*

After a traverſe of a writ of *noſtanter*, where the jury found 17 *l.* damages, the queſtion was, whether the proſecutor could have *coſts*? He inſiſted that by the *ſtatute* of *Glouceſter*, *coſts* are given in all caſes where damages are recovered. On the contrary, it was ſaid, that this was a criminal proceeding, in which the inhabitants could recover no *coſts* if they were acquitted. That *coſts* are a penalty, and the *ſtatutes* giving them to be taken ſtrictly. *Salk.* 205. And of this opinion was the court, there being no inſtance of *coſts* given on theſe proceedings, where the inhabitants are brought in collaterally, on the jury finding that the malefactors are unknown. *Vide Strange, vol.* 2. *p.* 1069.

Eaſter, 10 *Geo.* 2. *Saltern* v. *Wynne.*

An executor brought *error* on a judgment againſt the teſtator on bond: and after affirmance, moved on the act for amendment of the law, to pay principal, intereſt, and *coſts*. It was inſiſted, that as he came for a favour to ſave the penalty, it was but equitable he ſhould pay the *coſts* in *error*, which he had put the plaintiff to; for if the plaintiff had taken execution, equity would never puniſh him for taking thoſe expences out of the penalty: and the caſe of *Merril* v. *Jocelyn*, *Trinity*, 13 *Ann.* in this court, was cited for that purpoſe.

On the other ſide were cited *Baynham* v. *Matthews*, *Trin.* 4 *Geo.* 2. where an executor diſcontinued without *coſts*, and *Siſney* v. *Nevinſon*, *Eaſter*, 12 *Geo.* On the authority of which caſe, the court determined, that as by law, the executor was not to pay *coſts* on a *writ of error*, a court of law could not direct them to be taxed, though there was a penalty. *Vide Stra. vol.* 2. *p.* 1072.

Michaelmas, 10 *Geo.* 2. *Middleton and Wife* v. *Croſt.*

The plaintiff in *prohibition* moved for *coſts*, having prevailed in one point, and *ſtat.* 8 & 9 *W.* 3. *c.* 11. *ſect.* 3. giving *coſts* in all ſuits on prohibition, to the plaintiff obtaining judgment, or any award of execution, and it was prayed they might be taxed from the time of the firſt motion, according to ſeveral determinations: and this laſt was acquieſced in, if the court ſhould be of opinion for *coſts*.

Per curiam. The words of the *ſtatute* are not to be got over, which give *coſts* to the plaintiff if he obtains any judgment: and this matter was under conſideration in the houſe of Lords in Dr. *Bentley*'s caſe, where the prohibition ſtood as to ſome articles, and there went a conſultation for the reſt: to be ſure it will be conſidered in the *quantum*, but we cannot deny *coſts*. *Vide Strange, vol.* 2. *p.* 1056.

Hilary, 11 *Geo.* 2. *Ferguſon, qui tam* v. *Rawlinſon.*

After affirmance of a judgment of *C. B.* for the treble value on the ſtatute of uſury; it became a queſtion, whether, as the plaintiff recovered no *coſts* in the original action, he could have his *coſts* in this court on a *writ of error?* And on conſideration, the court declared he was intitled to them by the expreſs words of *ſtat.* 3 *H.* 8. *c.* 10. *in delay of execution:* and that it was the ſtronger ſince *ſtat.* 8 & 9 *W.* 3. *c.* 10. under which the defendant would have been intitled to *coſts*, if there had been judgment for him in *C. B.* and affirmed here. *Vide Stra. vol.* 2. *p.* 1084.

Eaſter, 13 *Geo.* 2. *Smith* v. *Clarke et al.*

The plaintiff declared in *treſpaſs* for entering his houſe, continuing there forty-eight hours, diſturbing him in his poſſeſſion, and eating and conſuming twenty pounds of beef; ſpecifying alſo ſeveral quantities of mutton, veal, lamb, beer, and ale. The jury found for the plaintiff, and half a guinea damages. And the queſtion was, whether the plaintiff ſhould have *full coſts*; which, on conſideration, were awarded to him; for as to the goods, it is in the nature of an action of *trover*; and here it is to all purpoſes an aſportation, which always carries *coſts*. *Vide Stra. vol.* 2. *p.* 1130.

Eaſter, 13 *Geo.* 2. *The King* v. *Woodfall.*

On trial of an information for a libel, the jury acquitted the defendant contrary to the direction of the court, on which the defendant moved above for *coſts*, on *ſtat.* 4 & 5 *W.* & *M.* *c.* 18. which provides, that in caſes where the defendant is acquitted, the court is authoriſed to award *coſts* to the defendant, unleſs the judge at the trial ſhall certify there was a reaſonable cauſe. In this caſe no ſuch certificate was aſked; but it was inſiſted on for the proſecutor, that it was diſcretionary in the court. The Chief Juſtice certified *ore tenus*, i. e. *by word of mouth*, that it was a verdict againſt evidence; but then he and all the others held, that it was now too late to enquire into the probable cauſe; and that it was not diſcretionary, but compulſory on them, where there was no certificate. Therefore the defendant had his *coſts*. *Vide Stra. vol.* 2. *p.* 1131.

Michaelmas, 13 *Geo.* 2. *Hickman* v. *Colley.*

By *ſtat.* 3 *Jac.* 1. *c.* 15. it is provided, that if one citizen of *London* ſues another out of the juriſdiction, and does not recover 40 *s.* he ſhall not only loſe his *own coſts*, but ſhall alſo pay the defendant ſo much ordinary *coſts*, as ſuch defendant ſhall juſtly prove it has coſt him in defence of the ſuit.

In this caſe, the verdict was leſs than 40 *s.* and the court gave the defendant leave to ſuggeſt it on the record, as the only way to get at his *coſts*. And a ſuggeſtion being made, and a demurrer put in to it, which was *adjudged* for the defendant, it came to be a queſtion, whether the *coſts* of the application ſhould be allowed, or only *coſts* of the trial, and former proceedings, this not being, ſtrictly ſpeaking, *coſts* of the defence. But the court ordered the *coſts* of the whole to be taxed. *Vide Stra. vol.* 2. *p.* 1120.

Eaſter, 15 *Geo.* 2. *The King* v. *Sidney.*

On removing an indictment from the ſeſſions of *oyer* and *terminer*, the defendant and his bail entered into 500 *l.* recognizance to plead, go to trial, and appear at the return of the verdict; he did ſo, and received judgment. And on motion to diſcharge the recognizance, it was inſiſted he ſhould pay *coſts*: but this not being in 20 *l.* the ſum required by *ſtat.* 5 & 6 *W.* & *M.* *c.* 11. the court held it was to be conſidered as a recognizance at common law. And precedents being ſearched it was found, that *coſts* had not been required. Here therefore being a performance of every thing the words extended to, the court diſcharged the recognizance. *Vide Strange, vol.* 2. *p.* 1165.

Hilary, 17 *Geo.* 2. *Duthy* v. *Tito & al. and Tito* v. *Duthy.*

In both cauſes, the verdict was for the defendants. And now *Tito*, one of the defendants in the firſt cauſe, moved, that the *coſts* he was to pay to *Duthy* in the ſecond cauſe might be ſet againſt the *coſts*, *Duthy* was to pay in the firſt.

Per curiam. It cannot be done, there was a neceſſity to be an act of parliament in the caſe of mutual debts; beſides, how can we prefer *Tito*, who is but one defendant out of five, when the plaintiff in that action may pay the *coſts* to either of the others. *Vide Strange, vol.* 2. *p.* 1203.

Eaſter, 17 *Geo.* 2. *Real & al.* v. *Macky.*

The plaintiff's were *Swedes*, and brought an action for *freight*, and the court was moved to ſtay their proceedings, till they ſhould give ſecurity for *coſts*, as is done where in *ejectment*, the leſſor of the plaintiff is an infant.

Per curiam. This has never been carried farther than *qui tam* actions; and it may affect trade, in ſhutting up our courts from foreigners, who perhaps cannot find ſecurity in a ſtrange country. The caſes in *ejectment* are conſidered as more under the power of the court than other proceedings; and therefore we ſtay a ſecond action, till the *coſts* are paid of the firſt, which we cannot do in other caſes. There was no rule made. *Vide Strange, vol.* 2. *p.* 1206.

Trinity, 18 *Geo.* 2. *Walker* v. *Robinſon.*

In *treſpaſs* for an *aſſault*, and taking a rope, the jury gave 18 *d.* damages. And Mr. *J. Burnet*, who tried the cauſe, certified his approbation of the verdict, according to *ſtat.* 43 *Eliz. c.* 6. in order to prevent *coſts.* The plaintiff, however, moved (as it was a new caſe) for *increaſed coſts*, pretending here was an *aſportation*, which on *ſtat.* 22 & 23 *Car.* 2. *c.* 9. has been always held to carry *coſts.* But the court in this caſe refuſed it, for *ſtat.* 43 *Eliz.* takes in all but a few excepted caſes, of which this is one. And though it has not been uſual to grant a certificate on this act, yet we have often known it threatened. And in the caſe of *White* v. *Smith* in *C. B. Eaſter* 17 *Geo.* 2. *Willes*, Chief Juſtice, in an action for taking ſand on *Hounſlow-Heath*, certified and prevented *coſts. Vide Stra. vol.* 2. *p.* 1232.

Eaſter, 31 *Geo.* 2. *Thomas* v. *Powell.*

On a feigned iſſue being tried in the cauſe, and a verdict found for the proſecutor.

The queſtion on this motion was, whether the proſecutor ſhould have all his *coſts*, previous to the feigned iſſue, or any, and what part of them, or whether he ſhould only have his *coſts* from the feigned iſſue.

After hearing council on both ſides, the court gave their opinion.

Deniſon and *Wilmot*, Juſtices, were clear, that the *coſts* to be taxed on ſuch feigned iſſue, were only the *coſts* of the feigned iſſue itſelf, and not any *coſts* antecedent to the conſent to try the right in a feigned iſſue.

Lord *Mansfield.* Concurred in opinion, and ſaid *coſts* muſt be given from the time when the feigned iſſue was firſt ordered, and agreed to. *Vide Bur. vol.* 1. *p.* 604.

Hilary, 32 *Geo.* 2. *Cooke* v. *Peter Sayer.*

On a motion for directions to the maſter to tax *coſts* in this cauſe.

The queſtion was, what *coſts* ſhould be allowed, and to whom, on the following facts ſtated.

On an action on the *caſe* for *criminal converſation* with the plaintiff's wife. The defendant (by leave of court) pleaded two pleas, *viz. not guilty* and *not guilty within ſix years*, on the firſt plea the plaintiff joined iſſue, to the latter he demurred.

The iſſue on the plea of *not guilty*, was firſt tried, and a verdict found for the plaintiff with 50 *l.* damages.

The demurrer was argued, over-ruled, and judgment given for the defendant; ſo each party, plaintiff and defendant, had judgment.

The plaintiff taxed his *coſts* on the *poſtea.* The defendant came to tax his *coſts* on his judgment on demurrer.

L. *Mansfield.* We are all of opinion under the preſent circumſtances, that the defendant muſt have the *coſts* of the demurrer, which has been adjudged to him, and on the other hand the plea being found falſe, he ought not to receive *coſts* of the plaintiff on the trial of that iſſue, which has been found againſt him, yet the plaintiff cannot have damages on it, becauſe on the whole, judgment muſt be againſt him, and therefore neither can have *coſts*: on the trial there are to be no *coſts* on either ſide, but each party is to ſit down by his own *coſts. Vide Bur. vol.* 2. *p.* 753.

Hilary, 32 *Geo.* 2. *The King* v. *Roger Philips.*

On a motion on the part of the proſecutor, for the maſter to review the taxation of *coſts.* The caſe ſtated to the court was as follows:

The defendant had leave to amend his plea on payment of *coſts*, but the amendments made in it were not eſſential to the real merits, nor ſuch as defaced the record.

The allowance made to the proſecutor on the amendments of the plea itſelf, and of the ſubſequent pleadings dependant on it, had been only made in proportion to the actual amendments made therein, and not as for a quite new plea.

Lord *Mansfield.* The principle is certainly right, that where the defendant has leave to amend his plea, the proſecutor ought in juſtice to have liberty to reply *quite de novo*, if he judges proper, and alſo, that in all events, he ought to be allowed the expence of attending, conſulting, and feeing council, in order to adviſe whether it be prudent or proper to reply *de novo* or not.

Where the plaintiff does not judge proper to depart from his former replication, and reply *de novo*; but only makes ſuch alterations in it as merely purſue, and are the natural and neceſſary conſequences of the alterations made in the plea by the defendant, and which alterations in the replication do not deface the record (as in the preſent caſe) nothing more ought to be allowed than in proportion for ſuch neceſſary amendments in the replication and its ſeveral dependencies, for it muſt not be left in the proſecutor's power to load defendant unneceſſarily.

Deniſon, Juſtice. Concurred with the Chief Juſtice. *Vide Bur. vol.* 2. *p.* 757.

Eaſter, 32 *Geo.* 2. *The King* v. *William Lewis*, *Capital Burgeſs, and Alderman of New Radnor.*

On ſhewing cauſe againſt an information, in nature of a *quo warranto*, to ſhew by what authority the defendant acted in the characters above mentioned, it appeared to the court, that the charge was groundleſs and frivolous.

Per curiam. Let the rule be diſcharged with *coſts. Vide Bur. vol.* 2. *p.* 780.

Trinity, 33 & 34 *Geo.* 2. *Maxwell* v. *Mayer, Eſq.*

On a motion to ſtay the plaintiff's proceedings till *ſecurity* ſhould be given for anſwering the *coſts* of this ſuit.

It was moved on an *affidavit*, that the plaintiff was a *Scotchman*, reſident in *Scotland*, where the proceſs of this court could not reach in caſe he failed in his action.

The court anſwered, that this was at *moſt* no more than the caſe of a *foreigner*, who brings an action here, in which caſe the court will never oblige him to give ſecurity for the *coſts.*

Per curiam. Let the defendant take nothing by this motion. *Vide Bur. vol.* 2. *p.* 1026.

Trinity, 33 & 34 *Geo.* 2. *Oldknow* v. *Wainwright, or The King* v. *Foxcroft.*

On a motion by the proſecutor's council for *coſts* on this proſecution, (ſee this caſe more fully ſtated in page 302 of this work, under the head *Corporation.*)

Lord *Mansfield.* The court were tied down by the conſent rule, to direct the *coſts* of the whole to be paid by the defendant *Foxcroft*, the words of the conſent rule were, "That the *coſts* ſhall abide the event of of the iſſue," which muſt mean the whole *coſts* on the *civil* ſide would of courſe abide its event, without needing any rule or any conſent for that purpoſe, conſequently this conſent takes in the other *coſts* on the *crown* ſide.

Three other judges being on the bench, concurred with the Chief Juſtice in opinion.

Per curiam. Let the rule be made abſolute. *Vide Bur. vol.* 2. *p.* 1017.

Eaſter, 1 *Geo.* 3. *The King* v. *Palmer and Baine, Eſq; and Others.*

On a motion to ſhew cauſe why an *information* ſhould not be granted againſt two juſtices of peace, and others, for a miſdemeanor relating to a conviction of a poacher, and the circumſtances attending it.

The court thought proper on a full hearing, and on conſidering all the *affidavits*, and what was urged by the council on both ſides, to diſcharge the rule as to all the defendants, with *coſts* to be paid to the juſtices; but without *coſts* as to the others. *Vide Bur. vol.* 2. *p.* 1162.

Trinity, 1 *Geo.* 3. *Edie and another* v. *The Eaſt India Company.*

See this caſe fully ſtated in page 239 of this work, under the head *Bills of Exchange*.

Trinity, 1 *Geo.* 3. *Denn on the demiſe of Lucas* v. *Fulford.*

In *Hilary* term laſt, this court had ſtayed the proceedings till the leſſor of the plaintiff, who lived in *Ireland*, ſhould give ſecurity for the *coſts*, although it was an *ejectment* brought under the direction of the court of *Chancery*, where the bill was retained till after the trial of the *ejectment*, and ſecurity had already been given there; but that ſecurity was only for 40 *l.* *Vide Bur. vol.* 2. *p.* 1177.

Trinity, 1 *Geo.* 3. *Sir John Aſtley, Bart.* v. *Young.*

The plaintiff declared againſt the defendant on *two counts*. The defendant demurred to the one, and obtained judgment on the demurrer. To the other, he pleaded, and on the trial of the iſſue, a verdict was given for the plaintiff. The queſtion was, in what manner the *coſts* ought to be taxed.

The court were all unanimous, that in the preſent caſe, the plaintiff was entitled to *coſts* on his verdict, and the defendant entitled to none on his demurrer, for that the plaintiff having prevailed on one of his *counts*, had a right to have his *coſts* on that *count*, without any deduction to be made on account of the defendant's having gotten judgment on his demurrer to the other *count*. *Vide Bur. vol.* 2. *p.* 1232.

Hilary, 2 *Geo.* 3. *Appleton* v. *Smith.*

The queſtion was, whether the plaintiff ſhould have full *coſts*, or no more *coſts* than damages on the following caſe.

On an action of treſpaſs, *vi & armis*, for breaking and entering the plaintiff's dwelling houſe, and there making a great noiſe, affray, and diſturbance, and continuing it for two hours, and till the plaintiff and his father *R. A.* the elder, and one *C. A.* were compelled and obliged to give, and did give the defendant their promiſory note for 66 *l.* 17 *s.* payable to him the ſaid defendant. The jury found for the plaintiff, and gave him a *guinea* damages.

The defendant's council inſiſted, that the plaintiff could have no more *coſts* than damages, for by *ſtat.* 22 & 23 *Car.* 2. *cap.* 9. In all actions of *treſpaſs*, &*c.* wherein the judge at the trial of the cauſe, ſhall not certify on the back of the record, that an *aſſault* and *battery*, was ſufficiently proved, or that the *freehold* or title was chiefly in queſtion, and the damages found are under 40 *s.* the plaintiff ſhall recover no more *coſts* than damages.

After hearing council on both ſides, the court gave their opinion.

Lord *Mansfield*. This caſe depends on the words, and till the plaintiff, &*c.* were compelled, &*c.* which words are barely an *aggravation* of the defendant's continuing in the houſe, and nothing more.

Deniſon, Juſtice, concurred with the Chief Juſtice.

Therefore the court directed the maſter to tax the *coſts* at a *guinea* only. *Vide Bur. vol.* 3. *p.* 1282.

Hilary, 2 *Geo.* 3. *Ingle* v. *Wordſworth & al.* In Replevin.

In this cauſe one of the defendants was acquitted on verdict, on a plea of *non cepit*, and the judge who tried the cauſe did not certify that there was a reaſonable cauſe for making him a defendant.

The defendant's council moved the court, that the plaintiff in *replevin* might ſhew cauſe, why the maſter ſhould not tax the defendants *coſts*, as directed by *ſtat.* 8 & 9 *W.* 3. *cap.* 11.

The maſter had a doubt whether this action of *replevin* was within the *ſtatute*, which ſpecifically names only actions of *treſpaſs*, *aſſault*, *falſe impriſonment*, and *ejectione firmæ*.

After hearing council on both ſides, the court declared their opinion.

Lord *Mansfield*. We have conſidered this caſe, we had a ſtrong bias to have given the defendant his *coſts* if it had been poſſible; becauſe it is agreeable to *natural juſtice*, that he ſhould receive *coſts* if there was no reaſonable cauſe for making him a defendant.

The *ſtat.* ſpeaks generally of actions of *treſpaſs*, and does not particularly *ſpecify* any actions of *treſpaſs*, that are not treſpaſſes, *quare vi et armis*. This is a caſe in *replevin* which cannot have that liberal conſtruction. This *ſtat.* of *W.* and all the other *ſtatutes* relating to *coſts* are to be conſtrued *ſtrictly*. Therefore the rule to ſhew cauſe muſt be diſcharged. *Vide Bur. vol.* 3. *p.* 1284.

Hilary, 2 *Geo.* 3. *The King* v. *Heydon, Head, and Roper.*

On three informations for bribery at an election, the defendant's council moved to diſcharge a rule for referring the matter to the maſter to tax *coſts* to be paid to the defendants for the proſecutors not going on to trial.

After hearing council on both ſides, the court gave their opinion.

Lord *Mansfield*. By the conſtant courſe of the court, the defendant is entitled to *coſts*, if the proſecutor gives notice of trial, and neither goes to trial, nor countermands it in time.

If the defendant had drawn the proſecutor in to give notice of trial, by giving him hopes of producing any books; that might be a reaſon for not giving the defendant any *coſts*, but no ſuch thing appears in this caſe.

Deniſon, *Wilmot*, and *Foſter*, Juſtices, concurred with the Chief Juſtice in opinion.

Per curiam. Let the defendants take nothing by this motion. *Vide Bur. vol.* 3. *p.* 1304.

Trinity, 2 *Geo.* 3. *The King* v. *Plunket, Eſq.*

See this caſe fully ſtated in page 139 of this work, under the head *Attachment*.

Hilary, 4 *Geo.* 3. *Harris Executor* v. *Jones.*

On a queſtion, whether an *executor* ſhould be permitted to *diſcontinue*, without payment of *coſts*.

After hearing council, the court delivered their opinion.

Per curiam. We are clear that the giving an *executor* leave to *diſcontinue*, was a matter of *diſcretion* in the court, and that they ought not to give him ſuch leave in any caſe where he had knowingly brought his action wrong, unleſs he would conſent to pay *coſts*. Therefore on conſent of the plaintiff's council, a rule was granted to *diſcontinue*, on payment of *coſts*. *Vide Bur. vol.* 3. *p.* 1451.

Eaſter, 4 *Geo.* 3. *Marder and Wife* v. *Lee.*

See this caſe fully ſtated in page 218 of this work, under the head *Baron and Feme*.

Eaſter, 5 *Geo.* 3. *Surman* v. *Shelleto.*

On a motion for full *coſts*, though the jury had found only 1 *s.* damages, and they had given 40 *s.* *coſts*.

It was on an action for words, and the words charged to be ſpoken were, *thou art a rogue, and thou haſt cheated me of ſeveral pounds*.

After hearing the arguments of the council, the court gave their opinion.

Per curiam. The latter words, viz. *thou haſt cheated me of ſeveral pounds*, are actionable, but the plaintiff muſt be contented with his 40 *s.* *coſts*; therefore the motion was denied. *Vide Bur. vol.* 3. *p.* 1688.

Eaſter, 5 *Geo.* 3. *The King* v. *Dixon.*

See this caſe fully ſtated in page 147 of this work, under the head *Attorney*.

Eaſter, 5 *Geo*. 3. *The King* v. *Righton*, *Eſq*;

On a motion on the part of the plaintiff to ſhew cauſe why the defendant ſhould not pay the proſecutor his *coſts* expended for not going on to trial, in purſuance of notice given by him for that purpoſe.

The caſe was; the defendant was indicted for refuſing to take on himſelf the office of *borſholder*, which he removed into this court, and thereon entered into a recognizance to appear, plead, and try ſuch indictment at the next aſſizes.

The defendant obtained a rule for a *ſpecial jury*, and every thing was ready for trial, but only five of the *ſpecial jury* appeared, and neither ſide prayed *tales*, though the defendant had a warrant for *tales* in his pocket.

The queſtion on this motion was, whether under theſe circumſtances the defendant was obliged to pay *coſts* for not going on to trial?

After hearing council on both ſides, the court gave their opinion.

Per curiam. We are unanimouſly of opinion, that the defendant had not been guilty of ſuch a default as could render him liable to pay *coſts* for not going on to trial. The proſecutor might have come prepared with a warrant for a *tales*, if he had thought proper; therefore let the rule be diſcharged *Vide Bur. vol.* 3. *page* 1694.

Trinity, 5 *Geo*. 3. *The King* v. *Midlam*
Idem v. *Eundem*

See this caſe fully ſtated in page 261 of this work, under the head *Certiorari*.

Michaelmas, 5 *Geo*. 3. *Hawes Executrix* v. *Saunders*.

The queſtion that came before the court on this motion was, whether an *executor* ſhall pay *coſts* on a judgment of *non pros*?

The ſtate of the caſe was, the executrix brought the original action, and was *non proſſed* for want of declaring in due time. The attorney for the original defendant came to the maſter to ſign the judgment as in a common caſe, although the plaintiff had brought her action with an *ac etiam* as executrix: the clerk of the judgments, as a matter of courſe, not underſtanding the plaintiff to be an executrix, taxed *coſts* againſt her.

On the judgment of *non pros* with *coſts*, the original defendant brought an action againſt the original plaintiff, and this motion was for the original plaintiff, to ſhew cauſe why further proceedings in the ſecond action ſhould not be ſtayed with *coſts*.

After hearing council on both ſides, the court gave their opinion.

Yates, Juſtice, obſerved, that the caſe of a *non pros* and that of a *diſcontinuance* differ. The former ariſes from the executor's own delay, and therefore he thought, and the Chief Juſtice was of the ſame opinion, that this caſe was ſimilar to the caſe of his not going on to trial according to his notice.

The rule to ſhew cauſe being enlarged, the Chief Juſtice delivered his opinion on this caſe as follows:

Lord *Mansfield*. The privilege of executors is too great already; they ought to be properly informed before they bring actions. The diſtinction made between a *diſcontinuance* and a *non pros* is a very good one. It is very reaſonable that the executrix ſhould pay *coſts* in the preſent caſe: therefore let the rule to ſhew cauſe be diſcharged. *Vide Bur. vol.* 3. *p.* 1584.

Courts.

Eaſter, 3 *W.* & *M.* *The King* v. *Gilbert*.

In many places by preſcription, *leets* are held at other times than within a month after *Eaſter* or *Michaelmas*. In all *leets* they only ſay *at a court*, &c. *held* ſuch a day, without ſhewing their authority; it had been a good objection, not to ſhew an authority, if conſtant practice had not been otherwiſe. *Vide Mod. Rep. vol.* 12. *p.* 4.

Eaſter, 3 *W.* & *M.* *Temple* v. *Killingworth*.

Per Holt, Chief Juſtice. Of late it is held, that *caſe* will lie for a proſecution in an *inferior court*, where the *court* has not the juriſdiction. The firſt caſe in point, was at *Huntingdon* aſſizes, and referred to the *C. B.* and there *adjudged*, that to ſue a man without any cauſe of action at all, no action lies, unleſs it appears to be with a malicious and vexatious deſign. *Vide Mod. Rep.* 12. *p.* 4.

Trinity, 3 *W.* & *M.* *Fiſher* v. *Baſton*.

In *error* on a judgment given in an *inferior court by the ſteward there in court*, and affirmed; for though if it be *by the ſteward* only, without ſaying more, it would be ill, becauſe it might be in a tavern, or other place, yet being ſaid in *court*, ſhews it to be in *court* judicially. *Vide Mod. Rep. vol.* 12. *p.* 16.

Trinity, 7 *W.* 3. *Fletcher* v. *Ingram*.

Per curiam. A ſteward may impoſe a fine on a perſon who is elected by the homage, if he is preſent at the *leet*, and refuſes to be ſworn to execute the office; but if the perſon is not preſent, the ſteward cannot fine him, but he may be amerced, which muſt be preſented at the next court, and affeered; and after the *court* is over, the juſtice of peace may adminiſter the oath of conſtable by the power which they have as conſervators of the peace; which power they had at *common law*, and is now veſted in them, and the rather, becauſe a conſtable is but a ſubordinate officer to them, for the preſervation of the peace. *Vide Mod. Rep. vol.* 5. *p.* 131.

Michaelmas, 7 *W.* 3. *Cudmore* v. *Tripe*.

On a *writ of error* on a judgment given in the *provoſt court* at *Exeter*, where the plaintiff declared in an *indebitatus aſſumpſit*, and alſo on a *quantum meruit*: but on the *quantum meruit* did not ſay, that the cauſe of action was *within the juriſdiction of the court*.

Holt, Chief Juſtice. Indeed there wants the *then and there*; therefore let the judgment be reverſed. *Vide Mod. Rep. vol.* 5. *p.* 78.

Hilary, 8 & 9 *W.* 3. *Tregany* v. *Fletcher*.

This being a *writ of error* on a judgment in the grand ſeſſions of *Wales*,

The defendant's council took an *exception*, that in pleading the common recovery, it was ſaid, that the *writ of entry* in the *poſt* iſſued out of the *Exchequer*, and did not ſay, out of the *court of Exchequer*. But not allowed.

Holt, Chief Juſtice. This *court* will take notice, that the *Exchequer* in *Wales* is a *court*. *Vide Raymond, vol.* 1. *p.* 154.

Eaſter, 9 *W.* 3. *Guilliam* v. *Hardy*.

Per cur. If the judgment of an *inferior court* is removed into this court by *certiorari*, and the party ſues out a *ſcire facias* to have execution on ſuch judgment, he ought to ſhew in his *ſcire facias*, that it is the judgment of ſuch an *inferior court* removed hither by *certiorari*, and ought to ſhew the particular limits of the *inferior* juriſdiction, and pray execution within the particular limits. But if the judgment is removed into this *court* by *writ of error*, and affirmed, the party may have execution in any part of *England*, for by the affirmance it is become the judgment of this *court*. But in a *ſcire facias* on ſuch a judgment affirmed here, the plaintiff ought to alledge, that it was removed hither by *writ of error*. And with this agrees 1 *Sid.* 213. *Hutt.* 117, 118. *Riſam* v. *Godwin*. And therefore, becauſe in the

the principal caſe the *ſcire facias* did not expreſs by what means the judgment was removed into this *court*, and general execution is prayed, where it does not appear to the *court* that they can grant ſuch general execution, for perhaps the record was removed by *certiorari*. For this reaſon the *court* adjudged, that the *ſcire facias* ought to be abated.

The *ſcire facias* was ill, becauſe it recited the judgment of the *inferior court*, *as by inſpection of the record it appears to us*; for if the defendant pleads *nul tiel record*, it ought to be tried by the record itſelf, and not *by inſpection of the record*. But it ought to have been, *as it appears by the record*. And for theſe reaſons, the *ſcire facias* was abated. *Vide Raym. vol.* 1. *p.* 216.

Eaſter, 9 *W.* 3. *Shepherd* v. *Taylor.*

In *error* on *replevin*, for taking ſix pewter diſhes; the defendant makes conuſance, that a judgment was had in a *court baron* againſt the plaintiff; and that a *levari facias* iſſued out againſt him; on which he took the pewter diſhes: the plaintiff demurred, and had judgment; and it was now affirmed, becauſe a *diſtringas* is the execution on a judgment in a *court baron*; and not a *levari facias*, without a particular cuſtom alledged, which is not done; and the avowant ſhould not have begun with the judgment firſt, but have ſhewn a plaint entered, and ſo judgment againſt him. *Vide Mod. Rep. vol.* 12. *p.* 124.

Trinity, 9 *W.* 3. *Truſcott* v. *Carpenter and Man.*

See this caſe fully ſtated in page 120 of this work, under the head *Aſſault and Battery.*

Trinity, 10 *W.* 3. *Cook* v. *Licence.*

A motion was made for a *prohibition*, to be directed to the ſheriff's *court* in *Briſtol*, on ſuggeſtion that the cauſes of action ariſing out of the ſheriff's *court* ought not to be ſued there. And this motion was made on behalf of the defendant in the action, before he had appeared to ſtay the proceedings of the *court*, who proceeded to attach his goods in the hands of a garniſhee. And the plaintiff's council oppoſed the motion, becauſe the defendant cannot pray a prohibition on ſuggeſtion of a matter he could not plead. Now, here he cannot plead before his appearance, and therefore he ought not to make ſuch a motion before appearance.

Holt, Chief Juſtice. A man ſhall not plead to a juriſdiction till he appears. But if the original cauſe of action aroſe out of the juriſdiction of the *court*, the garniſhee may plead it; and of that opinion was *Hale*, Chief Juſtice. But if it was *debt* on *ſimple contract*, it is attachable where the perſon of the debtor is.

The plaintiff's council then ſaid, that in the caſe of *Clerk* v. *Andrews*, *Eaſter*, 1 *W.* & *M.* this *court* was moved for a prohibition to the *court* of the ſheriffs of *London*, to ſtay proceedings, where they attached the debt of the garniſhee, becauſe it aroſe out of the juriſdiction; but it was denied, becauſe the debt was on a ſimple contract, which follows the perſon of the debtor. *Vide Raym. vol.* 1. *p.* 346.

Trinity, 10 *W.* 3. *Wilkins* v. *Mitchell.*

The plaintiff was nonſuited in the *town-court* of *Cambridge*, held before the Mayor there, and the nonſuit entered and recorded. The defendant prayed to have judgment for his coſts; but the Mayor refuſed it. On which it was moved to this court to have a *mandamus* to compel the ſaid Mayor to give judgment for the defendant on the nonſuit. But it was denied.

Per curiam. The defendant may have a writ *de executione judicii*, and a *mandamus* ſhall not be granted where the party has another remedy.

Note. In the caſe of *the King* v. *the Biſhop of Ely*, it was ſaid by *Lee*, Chief Juſtice, that the law had been held contrary ever ſince *Eaſter* term, 11 *Geo.* 2. Dr. *Bentley*'s caſe. *Vide Raym. vol.* 1. *p.* 348. *Mod. Rep. vol.* 12. *p.* 196.

Michaelmas, 10 *W.* 3. *Brinſby* v. *Gold.*

On an *indebitatus aſſumpſit* for horſe meat, the defendant pleaded an action depending in the *ſheriff's court* for the ſame cauſe; and held no plea, becauſe an action pending in an *inferior court* is no bar to an action in a *ſuperior court* for the ſame cauſe. *Vide Mod. Rep. vol.* 12. *p.* 204.

Trinity, 11 *W.* 3. *Maſon* v. *White*, *Marks et al'.*

The plaintiff brought an action on the *caſe* againſt the defendant *White* as an attorney, and the other defendants, for entering judgment againſt him without his aſſent, or without his being arreſted, or any proceſs ſued out againſt him, and without having made any warrant of attorney to *White*; on which a *fieri facias* iſſued, and his goods were taken, &c. Judgment by default; and a *writ of enquiry* being executed and returned, the defendant's council moved in arreſt of judgment, 1ſt. That the declaration is againſt *White*, one of the attornies of the *court of our Lord the King of the Bench here*, where it ought to be at *Weſtminſter*, for it cannot be underſtood what place *here* means, and therefore it cannot be known what *court* the plaintiff means. *But not allowed.*

For the court ſaid, *the court of our Lord the King of the Bench*, is the *Common Pleas*; and the judges will take notice that the *Common Pleas* is at *Weſtminſter*, and therefore *here* is at *Weſtminſter*.

A ſecond *exception* was, that the plaintiff has not ſaid who were juſtices of the *court*; whereas he ought to have mentioned the Chief Juſtice by name, *and his brethren. But not allowed.*

For in the opinion of the court, tho' in pleading of a fine, they plead that the fine was levied before the Chief Juſtice by name, *and his brethren*, yet there is no neceſſity here, to name the juſtices of the *court*. So judgment was given for the plaintiff. *Vide Raym. vol.* 1. *p.* 485.

Michaelmas, 11 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. The *buſtings* is the county *court* in *London*, and the ſheriff may grant *replevins* out of it as ſuch, by *ſtat. W.* 2. *Vide Mod. Rep. vol.* 12. *p.* 320.

Eaſter, 12 *W.* 3. *Dr. Grenville or Groenvelt*, v. *The College of Phyſicians.*

See page 253 of this work, under the head *Certiorari.*

Eaſter, 12 *W.* 3. *The King* v. *Toler.*

In this caſe, *Holt*, Chief Juſtice, ſaid, that where a *writ of error* is ſued out of *Chancery* to remove a record out of an inferior *court*, returnable here; if they ſue execution afterwards, and before the return, this *court* will puniſh them. And he cited the caſe of Mr. *Starkey* in the time of Lord Chief Juſtice *Kelynge*, who was ſteward of *Windſor Court*, where a complaint was made againſt him for being judge, plaintiff, and bailiff; and Mr. *Starkey*, at the bar, ſaid, it did not concern this *court*; but he was committed, for every ſuch miſdemeanor is inquirable here. *Vide Raym. vol.* 1. *page* 555.

Trinity, 12 *W.* 3. *The King* v. *Gilbert.*

A *preſentment* in a *court-leet*, for a nuiſance, was removed by *certiorari*, and an exception was taken to it, that it was not ſhewn *how*, nor *by what right*, this *court* was held, whether by patent or preſcription, which was urged, ought to be done, for that the *leet* is not of common right, but is taken out of the town, and the town is of common right; ſuch derivation therefore muſt be either by grant or preſcription. But the *court* over-ruled the objection, and ſaid, the precedents were all in this manner. *Vide Salk. vol.* 1. *p.* 200.

Hilary, 13 *W.* 3. *Croſſe* v. *Smith.*

See this caſe fully ſtated in page 161 of this work, under the head *Bail.*

Hilary, 13 *W.* 3. *Fenwick* v. *Lady Groſvenor.*

Holt, Chief Juſtice. In *inferior courts* the courſe is, to enforce an appearance by *diſtreſs*, and that ought to be reaſonable; and if a *reſcous* is made to a reaſonable diſtreſs, the ſteward may impoſe a fine for it. And it would be too much to diſtrain goods to the value of the debt demanded. And the inferior officers cannot juſtify the breaking an houſe to take ſuch diſtreſs. And though an *inferior court* may grant other proceſs out of *court*, yet they cannot grant an attachment on a contempt in court. *Vide Mod. Rep. vol.* 12. *p.* 610.

Eaſter, 13 *W.* 3. *Anonymous.*

A *replevin* by plaint in an *inferior court* was removed hither by *certiorari*; and on the removal the plaintiff changed his declaration.

Per curiam. That cannot be, for whatever is below ought to be now here. And if a perſon removes a *replevin* by *recordare* hither, and declares for leſs than he took, the defendant muſt avow for them, and alſo for what he has not declared on; and if he has a return, he ſhall have it for all. And if a perſon replevies part of the goods taken, the other ſhall avow for them, and the reſt alſo, and have return if his avowry go for him for all. And this *certiorari* removes the pledges below, ſo as a *ſcire facias* may iſſue againſt them. And the entry here above, in this caſe of the removal of a *replevin* by plaint, ought not to be of a *he was ſummoned*, as on an original, but as of a cauſe removed. *Vide Mod. Rep. vol.* 12. *p.* 453.

Michaelmas, 13 *W.* 3. *Gwin* v. *Thornborough.*

Per curiam. A perſon cannot be amerced in a *leet* for a private nuiſance, but may for a public one. *Vide Mod. Rep. vol.* 12. *p.* 598.

Michaelmas, 13 *W.* 3. *Stedman* v. *Robiſon or Robinſon.*

In a falſe judgment from a *county court*, where *debt* was by *juſtices*; the declaration was, that the defendant was indebted to the plaintiff within the juriſdiction of the *court*, for goods ſold and delivered; and becauſe it was not alledged that the contract was within the juriſdiction, the judgment was reverſed; for if one is indebted to another, he is ſo wherever he goes. 1 *Vent.* 243. *Vide Mod. Rep. vol.* 12. *p.* 598.

Hilary, 1 *Ann.* *Chambers* v. *Jennings.*

The declaration on a *prohibition* to the *court* of the Earl-Marſhal, to ſtay a ſuit there againſt *Chambers*, ſet forth, that *Jennings* was a gentleman born, and dubbed a Knight by King *Charles* the Second, that the plaintiff ſpoke theſe words to, and of him, *You a Knight! You are a pitiful fellow, and an inconſiderable fellow, to the great ſcandal of gentlemen, and of the order of Knighthood*, and likewiſe, to the great provocation of *Jennings* to duels, and breach of the peace. And it appeared on the pleadings, that the queſtion was,

1ſt. Whether there was ſuch a *court of honour* in *England* as gave remedy for words not actionable at law, tending to the diſhonour of Knighthood, or of any perſon bearing arms.

2dly, If the *court of honour* had ſuch a juriſdiction, whether it ought not in ſuch caſe to be held before the conſtable and marſhal, and not before the marſhal alone? And the ſtatute of *Richard* the Second was likewiſe under conſideration.

Per Holt, Chief Juſtice. It was made an argument ſome years ago, that a *prohibition* would not lie out of this *court* to the *court of honour*; becauſe, as was then ſaid, none ever was known to have iſſued before; and *ſtat. R.* 2. was relied on, which proves if they ſhould encroach on things not within their juriſdiction, there ſhould be a writ from the *Privy Council* to reſtrain them. But notwithſtanding this, it was adjudged, that in caſe of incroachments *prohibitions* would lie, and it was the proper remedy: for it is the duty and buſineſs of this *court* to reſtrain all manner of *inferior juriſdictions*, and to keep them within their bounds; and the ſaid ſtatute was made to give a farther remedy by privy ſeal from the council; and the reaſon of that additional remedy was, that *Thomas* Earl of *Glouceſter*, the then conſtable, was too great and powerful for the King's *courts* to deal with him; and, beſides, there could not be application to this *court* in vacation, when they proceed below; and ſo it was held by all the judges.

Now, the firſt matter here is, concerning the conſtitution of the court; and, no doubt, formerly it was held before the conſtable and marſhal, and ſo all along till the 13th of *H.* 8. when the then conſtable was attainted of treaſon. How then came it to be held before the marſhal alone, and is there any precedent before that time, that it was held before the marſhal alone? And to make it out by preſcription, you cannot; for the firſt inſtance is within time of memory, and no ancienter than the court of the council of *York*, which obtained by incroachment only; for firſt it was but a commiſſion of *oyer* and *terminer*, yet afterwards, it drew in abundance of other matter, and all by the great power of the preſident of the *North*: and the *Court of Requeſt* was only by encroachment, and they acted like maſters in *Chancery*, and held conuſance of matters of law, without any preſcription; and yet it fell at laſt of itſelf, without any act of parliament; their proceſs was a *ſubpœna*. And I am entirely ignorant what ſort of juriſdiction a *court of honour* has, as to matters ariſing within *England*; for *ſtat. R.* 2. gives them authority only of matters ariſing out of the realm, and feats of arms within the realm; by which they would have meant coats of arms and eſcutcheons; and he ſaid, the miniſters of that *court* underſtood this matter of arms well, and gave coats of arms, and kept pedigrees of families; and if they find people that aſſume arms, to whom arms do not belong, or at leaſt thoſe they aſſume belong not to them, their way is, to poſt them up, by what juſtice or law I cannot tell, and in this caſe, what ſatisfaction can they make to the plaintiff? If they fine the defendant, ſhall they enforce the payment of it by impriſonment? We have a well known maxim, that no *court* ſhall impriſon but a *court of record*; and the *court of honour* is none; and the high commiſſion *court* had aſſumed a ſtrange authority, more indeed than belongs to it, by *ſtatute H.* 8. or of Queen *Elizabeth*, and carried their power ſo far, by the authority of ſome great men of the clergy, that were in the commiſſion, that it was hard dealing with them in *Weſtminſter-Hall*; for that *court* aſſumed a power to impriſon, though they could not juſtify it; and in my opinion, it were to be wiſhed the parliament would give them juriſdiction of words tending to diſparage men of honour; and ſuch as generally provoke gentlemen to fight.

Powell, Juſtice. If they have juriſdiction of words concerning coats of arms, that is not this caſe: but here you ſay, the words tend to a breach of the peace, and are provoking to fight a duel; and if ſo, they are indictable.

And this term it coming on in the paper, and none appearing for the defendant, the *court* ſaid, whatever colour there is to hold plea of ſomething before the marſhal alone, there was no pretence to hold plea of words; and ordered the rule for a *prohibition* to ſtand. *Vide Mod. Rep. vol.* 7. *p.* 125.

Eaſter, 1 *Ann.* *Wright* v. *Crump.*

See this caſe fully ſtated in page 133 of this work, under the head *Attachment.*

Eaſter, 1 *Ann.* *Anonymous.*

If a jury in an *inferior court* will not agree on their verdict, the way is, as in other *courts*, to keep them without meat, drink, fire, or candle, till they agree, and the ſteward may from time to time adjourn the court till they do agree. Generally a *levari facias* is not the proceſs of the *hundred court*, but by cuſtom it may be, and all *hundred courts* have this cuſtom; but the true proceſs at common law is a *diſtringas*. All miſdemeanors in judicial officers are a contempt of *this court*, and attachments go daily againſt ſtewards, for granting attachments againſt all the parties goods.

Holt, Chief Juſtice, remembered a caſe of the Mayor of *Hereford*, who gave judgment for his own leſſee in *ejectment*: but for *error* in judgment a judge is not puniſhable. All this was held by the court on a motion for an attachment againſt a ſteward for diſcharging a jury before they gave a verdict. *Vide Salk. vol.* 1. *p.* 201.

Eaſter, 1 *Ann. Stanmer* v. *Davers.*

In this caſe it was held by *Holt*, Chief Juſtice, and the court, that whenever an action is brought in an *inferior court* or juriſdiction, the compleat cauſe of action muſt be laid to ariſe within the juriſdiction; and if ſo, whatever matter lies in aggravation, need not be laid within the juriſdiction: as if an inn-keeper ſuffer my horſe to be taken out of the ſtable, without my conſent, it is a compleat cauſe of action; for thereby he is a wrong-doer: and though the aiding and beating be done out of the juriſdiction, yet the *inferior juriſdiction* may hold plea of it: the compleat cauſe of action ariſing from the firſt taking; and the ſubſequent matter only being an aggravation. And *note*, this was on a *writ of error* of a judgment in the *Marſhalſea court*; and the judgment was afterwards affirmed unanimouſly in this *court*, in *Michaelmas*, 3 *Ann. Vide Mod. Rep. vol.* 11. *p.* 7.

Trinity, 1 *Ann. The Queen* v. *Hill & al.*

Judgment was given in the *town court* of *Briſtol*, the *coſts* taxed, and a *ſci. fac.* taken out againſt the bail, and a year afterwards the court granted a new trial, and ſet aſide the firſt judgment, and an attachment iſſued againſt the judge for this cauſe. *Vide Salk. vol.* 1. *p.* 201.

Trinity, 1 *Ann. Lucking* v. *Denning.*

In an action on the *caſe*, brought againſt a ſerjeant at mace for the eſcape of one in cuſtody by virtue of a proceſs of the court of the ſheriffs of *London*, in an action of *debt* on a bond ſued there; on *not guilty* pleaded, it appeared that the bond was made out of the juriſdiction of the *court*; and thereon it was objected, that the proceedings on the bond were all void, and the ſerjeant a treſpaſſer; and 2 *Bulſt.* 64. 2 *Mod.* 30. 1 *Ro.* 545, 809. 1 *Sid.* 125. 1 *Lev.* 95. *Hob.* 267. *Lut.* 935, 1560. 2 *Mod.* 196. *March* 117. & *ſtat. Weſtm.* 1. *c.* 35. were cited in ſupport of this aſſertion.

Per curiam. Where an *inferior juriſdiction* is confined to perſons, as the *Marſhalſea* to thoſe of the houſhold, if it appears on the face of the declaration, that the perſons who ſue are qualified to ſue, though in fact they are not, yet if the defendant does not plead to the juriſdiction, but comes in and admits it, he ſhall never take advantage of this afterwards, but is *eſtopped* and concluded: but if it is not averred in the declaration that the perſon is qualified to ſue, and within their juriſdiction, the whole proceedings are void, and *treſpaſs* lies againſt the officer.

2dly, Where the *inferior juriſdiction* is confined to ſome particular things, and the ſuit there is for ſomething elſe of which they have no juriſdiction, all is void, and can be made good by no admiſſion.

3dly, Where they are confined to place, *viz.* to all contracts ariſing within ſuch a diſtrict; though the contract ariſe out of the diſtrict, yet the *court* may award proceſs, and the officer may execute it, unleſs it appears to him that it aroſe without the *juriſdiction*, as if this bond had been dated at *York*, and that was the caſe, 1 *Roll.* 809. but he is not bound to inquire, either whether there be a cauſe of action, or where it aroſe, and may proceed in his duty, unleſs the contrary appears to him. The plaint is general without any averment, *that it was within the juriſdiction*, but that is ſupplied by the *court*; and if a matter ariſes *without the juriſdiction*, and the plaintiff declares of it as *within the juriſdiction*, the defendant may plead to the juriſdiction of the *court*, and if that be over-ruled, may have a *prohibition* on the *ſtatute* of *Weſtminſter*: but if he waives that, and pleads to the merits, he can never then have a *prohibition*, nor can he take advantage of their want of juriſdiction, for by the averment of the count, and his own admiſſion, he is *eſtopped* to ſay that it was a matter that aroſe out of their juriſdiction. It is impoſſible the *court* ſhould know where a *tranſitory* matter ariſes, unleſs the defendant acquaints them with it. Accordingly the plaintiff had judgment. *Vide Salk. vol.* 1. *p.* 202.

Michaelmas, 1 *Geo. The King* v. *Elliot.*

The juſtices of a borough committed the defendant for non-payment of a fine ſet on him for a contempt in *court*. The defendant brought an *habeas corpus*, and the *court* held it a good commitment; on which he offered to pay the fine in this *court*, but they ſaid they could not take it; he muſt be remanded, and pay it below. *Vide Stra. vol.* 2. *p.* 786.

Michaelmas, 3 *Ann, or* 1 *Ann, according to Raymond, Stannian, Stanion, or Stanyon*, v. *Davis or Davies.*

Per curiam. In actions in *inferior courts*, it is neceſſary that every part of that which is the *giſt* of the action ſhould appear to be within *their juriſdiction*, otherwiſe ſuch matters as are inſerted only for aggravation of damages, might be omitted, and yet the action remain. See this caſe fully ſtated in page 153 of this work, under the head *Averment*.

Hilary, 2 *Geo.* 2. *Emery* v. *Bartlett.*

On a *writ of error* brought by *Bartlett* to reverſe a judgment given againſt him by the *court of record* of the city of *Litchfield*, in an action on the *caſe* on ſeveral promiſes brought by *Emery* againſt him, and judgment by *default*, a writ of enquiry executed, entire damages found, and final judgment given. In the declaration there were two counts: The firſt was on a promiſory note made within the juriſdiction of the *court*, and ſubſcribed by the defendant, by which he promiſed to pay *Emery* 59 *l.* 10 *s.* on demand, for value received. And the *exception* to that *count* was, that it was not averred that the value was received *within the juriſdiction of the court*; the plaintiff in *error*'s council inſiſting, that this was the foundation of the note, and that therefore it was neceſſary to be ſet forth within the juriſdiction, to give the *court* a juriſdiction over the cauſe. The ſecond count was on an *inſimul computaſſet*, wherein the plaintiff *Emery* below declared, that the defendant *Bartlett* accounted with her *within* the juriſdiction of the *court*, for divers ſums of money *before then due, and ſtill remaining in arrear and unpaid.*

The *exception* to this was, that it was not averred, that the ſums of money were due *within the juriſdiction* of the *court*. And it was *urged*, that if the defendant was not contracted within the juriſdiction of the *court*, the laying the accounting to be within it would not be ſufficient, becauſe the accounting did not alter the nature of the debt. And for that were cited the caſes of *Harrenden* v. *Palmer*, *Hob.* 88. *Done* v. *Thorpe*, *Allen* 72. *Coney* v *Laws*, *Stile's Rep.* 472. *Sir Thomas Jones*, 47. and *Lev.* 165. *Buli* v. *Palmer*. But the *court* were of opinion, as to the firſt point, that the promiſory note being laid to have been made *within the juriſdiction*, was ſufficient, becauſe whether it was for value received or not, it would not be material, for an action on a promiſory note payable to a man, or order, tho' it was not for value received, is maintainable on *ſtat.* 3 & 5 *Ann*, *c.* 9. and if the value received is in the note, there is no occaſion to prove that the value was paid. As to the *exception* to the ſecond count, the *court* alſo *over-ruled* it, becauſe the action was grounded on the ſtated account, which was laid to be ſtated *within the juriſdiction*. And though the ſtating the account might not alter the nature of the debt, yet giving the ſtated account in evidence, would be good evidence to prove the declaration. The judgment was therefore affirmed. *Vide Raym. vol.* 2. *p.* 1555.

Michaelmas, 2 *Geo.* 2. *George Blenkinſon and William Waite* v. *Francis Iles.*

See this caſe fully ſtated in p. 86 of this work, under the head *Appearance.*

Trinity, 8 *Geo.* 2. *Moravia's Caſe.*

On application for an information againſt the judges of the *court* of the borough of the *Deviſes* in *Wilts,* for a miſdemeanor in their office, in unduly diſcharging a debtor out of their priſon:

Lord *Hardwicke.* Such a miſdemeanor may be puniſhed by information, and alſo by attachment, being conſidered as a contempt of this *court,* which has a general ſuperintendency over all *inferior* juriſdictions.

But in this caſe the affidavits not being ſufficient, no rule was made. *Vide Caſes Temp. Lord Hardwicke, p.* 135.

Eaſter, 30 *Geo.* 2. *The King* v. *Roger Phillips, Mayor of Carmarthen.*

Adjudged, that general rules were wiſely eſtabliſhed for attaining juſtice with eaſe, certainty, and diſpatch, the great end of them being to do juſtice, and it is the duty of the *court* to ſee that this end be really attained. *Vide Bur. vol.* 1. *p.* 301.

Hilary, 31 *Geo.* 2. *Sir Edward Worſeley, & al. Aſſignees of Richard Slader, a Bankrupt* v. *De Mattos and Slader.*

See this caſe fully ſtated in page 200 of this work, under the head *Bankrupt.*

Trinity, 33 *&* 34 *Geo.* 2. *The King* v. *Moreley and Others.*

See this caſe fully ſtated in page 260 of this work, under the head *Certiorari.*

Michaelmas, 1 *Geo.* 3. *Doe, on the Demiſe of Long* v. *Laming.*

Adjudged, that a court of equity is as much bound by poſitive rules and general maxims concerning property, (though the reaſon of them may now have ceaſed) as a court of *law* is. *Vide Bur. vol.* 2. *p.* 1108.

Covenant.

Trinity, 3 *W. & M.* *Sawyer* v. *Killigrew.*

In an action of *covenant* for the ſale of an office, and the vendor to have the penſion belonging to it, judgment was given for the defendant.

On this judgment a *writ of error* was brought in this court, and the queſtion debated was, whether this was a good grant or not? And it was agreed that nothing but *uſage* could ſupport it.

Then it was argued, that this *covenant* was in the nature of a perſonal warranty, and not to be compared to a *covenant* for quiet enjoyment, where on a diſturbance, the party has a remedy over; but this action reſts on the *covenant* itſelf, and does not wait on the *office*; for if the Queen ſhould die, the defendant is ſtill bound, and ſo he is alſo, if the profits of the office ſhould be ſunk.

Holt, Chief Juſtice, and *Eyre,* Juſtice, were of opinion, that the breach was not well aſſigned: the other two juſtices were of a different opinion; they held that there was a good breach, and that the *bar* was good, and a direct anſwer to the breach; ſo all were againſt the plaintiff in the *writ of error*; wherefore he proceeded no farther, and there the matter reſted. *Vide Mod. Rep. vol.* 4. *p.* 39.

Hilary, 3 *&* 4 *W. & M.* *Glover* v. *Cope.*

In an action of *covenant,* the plaintiff declared, that the manor of *Hackney,* in the county of *Middleſex,* was an antient manor, whereof one meſſuage with the appurtenances in *Mere-ſtreet,* is copyhold of inheritance.

That there is a cuſtom within the ſaid manor for every cuſtomary tenant thereof, being ſeized in fee of any copyhold lands or tenements, to demiſe the ſame for 31 years, more or leſs, without licence, *&c.*

That on the 31ſt day of *December,* 19 *Car.* 2. Sir *William Bolton* being then Lord of the ſaid manor, granted the ſaid meſſuage, *&c.* to *G. H.* and *M.* his wife, and to the heirs of the ſaid *G.* who was thereon admitted.

That on the 20th of *February,* 1671, the ſaid *H.* and his wife, by their indenture, did demiſe the ſaid meſſuage to the defendant for 21 years, rendering rent, in which leaſe the defendant *covenanted to repair during the term.*

That by virtue of the ſaid demiſe, the defendant entered and was poſſeſſed, *&c.*

That *M. H.* died, and afterwards, *&c.* on the 20th of *January,* 1684, the ſaid *G. H.* granted the reverſion of the ſaid meſſuage, *&c.* to his ſon *G. H.* the younger, and to his heirs.

That afterwards, *viz.* on the 14th of *Auguſt,* 1 *Jac.* 2. the ſaid *G. H.* the ſon, was admitted tenant, and the ſame day ſurrendered the premiſes to the plaintiff *Glover,* who was admitted, and now brought this action againſt the defendant *for not repairing the premiſes.*

The defendant pleaded, that after the leaſe was made to him, and before the reverſion came to the plaintiff, *viz. July* 24, 28 *Car.* 2. he the ſaid defendant aſſigned the meſſuage, *&c.* to *S. P.* of which the plaintiff had notice, by virtue whereof ſhe entered, and was poſſeſſed, *and this &c.*

The plaintiff demurred, and the defendant joined in demurrer; on which two queſtions aroſe.

1ſt. Whether this *covenant* runs with the reverſion? for if ſo, then the plaintiff being a grantee of a reverſion, may bring this action at common law.

2dly, If not, then, whether the aſſignee of a reverſion a copyhold, is aided by *ſtat. H.* 8.?

Per curiam. A copyholder has an inheritance, tho' he has it in the *poſt,* and his eſtate is now fixed and eſtabliſhed by the cuſtom; and therefore muſt be conſtrued to be within the equity of this *ſtatute,* and the rather, becauſe of late he has been held to be within the *ſtatute de donis, &c.* And ſo without farther argument, judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 4. *p.* 80.

Eaſter, 4 *W.* 3. *Pitcher* v. *Tovey.*

See this caſe fully ſtated in page 128 of this work, under the head *Aſſignment.*

Eaſter, 4 *W. & M.* *Buſh* v. *Cole.*

In an action of *Covenant,* the plaintiff declared, that he leaſed to *A.* a houſe for years, excepting two rooms, with free ingreſs, egreſs, *&c.* thro' the parlour, hall, *&c.* and afterwards the leſſee aſſigned to the defendant, and now alledges a breach, becauſe the defendant had ſtopped the paſſage; and on demurrer, that theſe words do not make a *covenant,* for they are only the words of the leſſor, and not like 1 *Saund.* 321. where *covenant* was maintained on the word *dimiſi*; for there the uſe of a pump was leaſed by him againſt whom the *covenant* was brought; but here they are the words of him who brings the *covenant*; and if *covenant* lies, it is not maintainable againſt the aſſignee.

Per curiam. Covenant lies againſt the leſſee and aſſignee too, for it is expreſsly laid, that the demiſe was to him and his aſſigns.

Eyre, Juſtice, ſaid, the difference was as taken in Lord *Ruſſel's* caſe, where the demiſe was of land, except a cloſe, and agreed that *covenant* did not lie for diſturbance in this cloſe; but where the exception was of a thing *dehors* to the leſſor, as a way, common, eſtovers, or other profit *to take*, that is by agreement of the leſſee, the leſſor ſhall have them; and therefore *covenant* lies. 3 *Cro.* 657. *Mo.* 553. *Vide Mod. Rep. vol.* 12. *p.* 24.

Michaelmas, 5 *W.* & *M.* *Midgleys* v. *Lovelace.*

The aſſignee of a reverſion granted over his reverſion, and afterwards brought an action of *covenant* againſt the aſſignee of the term, for rent arrear before the grant of reverſion: and on demurrer,

Per curiam. If at *common law*, the aſſignee of a reverſion had granted it over, yet he might afterwards have an action of *debt* for rent; though he could not diſtrain or have waſte; becauſe his power over the land was determined. It is true, where a man ſeized of a rent in *fee*, grants it over, there he has no remedy for the arrear, becauſe the diſtreſs, which was his only one, is gone by the aſſignment; but where rent is reverſed on a leaſe for years, it is otherwiſe, becauſe *debt* lies on the contract; and here the aſſignee ſhall have it as a fruit fallen from the reverſion. Judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 12. *p.* 45.

Michaelmas, 5 *W.* & *M.* *Griffith* v. *Harriſon.*

An action was brought by an executor, on a *covenant* in an aſſignment of a leaſe, for quiet enjoyment free and clear, and freely and clearly diſcharged, or otherwiſe indemnified of and from all arrears of rent, &c. And the plaintiff aſſigned a breach, that ſo much rent was in arrear; the defendant to part pleaded payment to the leſſor, and to the reſt of the rent alledged to be in arrear, that he left money in the hands of the plaintiff, *with an intention that he ſhould pay it* to the leſſor; on demurrer it was objected, that the plea was not good, becauſe the intention was not traverſable.

Holt, Chief Juſtice. In ſome caſes the intention is traverſable, as if *A.* be indebted to *B.* by obligation, and by ſimple contract, and pays money to *B.* the intention to which debt it ſhall be applied is traverſable: and the *court* inclined that this plea was good; but held clearly, that if it had been *left to pay* it had been good, and that *he did not leave it in manner and form*, &c. had been a good traverſe: but the *court* took exception to the aſſignment of the breach, for that the plaintiff did not ſhew a diſturbance in the enjoyment, or other ſpecial damage, without which the rent being behind, is not a breach of the *covenant*, *Tollard*'s caſe, 1 *Ro. Abr.* 433. and took this difference, *viz.* where the counter-bond or *covenant* is given to ſave harmleſs from a penal bond before the condition broken, there if the penal ſum be not paid at the day, and ſo the condition not preſerved, the party to be ſaved harmleſs, does by this become liable to the penalty, and is damaged, and the counter-bond forfeited; but if the counter-bond is given after the condition of the obligation is broken, or to ſave harmleſs from a ſingle bill without a penalty, there the counter-bond cannot be ſued without a ſpecial damage. So here the rent remaining in arrear, and not paid, is not a damage, unleſs the plaintiff is ſued or charged; and if paid any time before ſuch damage incurred by the plaintiff, it is ſufficient. *Vide Salk. vol.* 1. *p.* 197.

Eaſter, 6 *W.* & *M.* *Green* v. *Home.*

In an action of *covenant*, the plaintiff declared, that *A.* being indebted to him, and arreſted at his ſuit, the defendant, in conſideration that he would order the bailiff to let *A.* go at large, undertook and *covenanted* with the plaintiff to bring in the body of the ſaid *A.* and deliver him into the cuſtody of the ſaid bailiff, on ſuch a day, &c. The defendant prayed *oyer* of the deed, which was, *I* (the defendant) *do promiſe and engage myſelf to bring in the body of* A. *to the cuſtody of* B. *bailiff, on ſuch a day*; and thereon it was demurred.

Per curiam. 1ſt. The plaintiff cannot ſet forth matter of fact in his declaration not contained in the deed itſelf, ſo as to alter the caſe; therefore all ſuch matter of fact ſo alledged or averred, is immaterial. 8 *Rep.* 151.

2dly. The plaintiff is no party to the deed, nor ſo much as named in it, and though *covenant* may be brought on a *deed-poll*, yet the party muſt be named in the deed. 1 *Rol. Ab.* 517. *Vide Salk. vol.* 1. *p.* 197.

Michaelmas, 7 *W.* 3. *Smith* v. *Sharp.*

See this caſe fully ſtated in page 247 of this work, under the head *Breach.*

Eaſter, 8 *W.* 3. *Thwaites and Wife*, &c.

An action of *debt* was brought for rent on a leaſe of a houſe to be made by three judges, purſuant to the ſtatute, for erecting a court of judicature for the determination of differences concerning houſes built in *London*, whoſe judgment and decrees by the ſaid ſtatute are made a record, and entered into a book, and kept by the Lord Mayor, with the records of the city; in which leaſe the rent of 2 *l.* 13 *s.* was reſerved *per ann.* and the plaintiff declared for 100 *l.* due for ſo many years; and it appeared on the record, in caſting up the ſums, that he had declared for 8 *l.* too much.

The defendant pleaded *nul tiel record*, and there was a judgment for the plaintiff, that he had produced the record.

It was moved in arreſt of judgment, that this being in *debt* for rent, and an entire demand of a *certain* ſum, the plaintiff could never have judgment, becauſe it appeared on his own ſhewing, that he had not any cauſe of action for the whole.

Per curiam. If an action of *debt* is brought on ſeveral bonds, and it appears that one is not due, the plaintiff may recover the reſt. So here the plaintiff demands 100 *l.* on ſeveral arreſts of rent, and it appears that the whole is not due, but falls ſhort 10 *l.* He may recover for the reſidue. *Vide Mod. Rep. vol.* 5. *p.* 212.

Michaelmas, 8 *W.* 3. *French, Executor of Squire*, v. *Trewin.*

In an action of *covenant* brought on articles of agreement between the teſtator *Squire* and the defendant, by which it was *covenanted* and agreed between them, that *Squire* ſhould reſign to the defendant his intereſt in a houſe, &c. and that the defendant ſhould pay to *Squire* 30 *l.* The plaintiff aſſigns for breach, that the defendant has not paid the 30 *l.* The defendant pleads, that *Squire* did not aſſign his intereſt in the houſe to him. On demurrer, it was *adjudged* for the plaintiff, becauſe theſe are mutual and independant *covenants*, and the parties may have reciprocal actions; and therefore the plaintiff may bring his action before the aſſignment of the houſe. And the defendant has a remedy after, if the other party does not perform his part. *Vide Raym. vol.* 1. *p.* 124.

Hilary, 9 *W.* 3. *Brewſter* v. *Kitchell, Kidgel, or Kitchin.*

This was a feigned action on the *caſe* upon a wager, in order to ſettle a difference about the deduction of taxes out of a rent-charge. Upon *non aſſumpſit* pleaded, the jury found a ſpecial verdict, *viz.* that *A.* being ſeized of lands in *fee*, by a deed dated in 1649, granted a rent-charge to one *Brewſter* and his heirs, and *covenanted* for farther aſſurance, and on the ſame deed there was an indorſement, that the rent was to be paid clear of all taxes; and afterwards *A.* confirmed the grant, and *covenanted* to pay the rent-charge clear of all taxes. By the land-tax 3 *W.* & *M.* 4 *s.* *per* pound was laid upon land, and power given to the tenant to deduct 4 *s.* in the pound, with a *proviſo* not to alter *covenants* or agreements of parties.

Holt, C. Juſtice held, 1ſt. That the heir of the grantee could not maintain an action of *covenant* againſt the aſſignee or leſſee of the grantor; but only againſt the grantor and his heirs; for a warranty, though a *covenant real*, does not bind the land, till judgment had in *warrantia chartæ*; much leſs that which is only a *perſonal covenant*. An aſſignee of land may have *covenant* againſt the *covenantor* and his heirs, where the *covenant* runs with the land; *ſtat.* 42 *E. c.* 3. *ſect.* 5. 5 *Co. Spencer's* caſe; but *covenant* will not lie merely againſt one as an aſſignee of land. *Hard.* 87. *pl.* 5.

2dly. Where the queſtion is, whether a *covenant* be repealed by act of parliament, this is the diſtinction, *viz.* where *H. covenants* not to do an act or thing which was lawful to do, and an act of parliament is made afterwards, and compels him to do it, the ſtatute repeals the *covenant*: ſo if *H. covenants* to do a thing which is lawful, and an act of parliament comes in and hinders him from doing it, the *covenant* is repealed. *Vide Dyer* 27. *pl.* 278. But if a man *covenants* not to do a thing which then was unlawful, and a ſtatute afterwards makes it lawful to do it, ſuch act of parliament does not repeal the *covenant*. *Vide Salk. vol.* 1. *p.* 198. *Raym. vol.* 1. *p.* 317. *Mod. Rep. vol.* 5. *p.* 368. *ibid. vol.* 12. *p.* 166.

Trinity, 9 *W.* 3. *Toddard* v. *Middleton.*

An action of *covenant* was brought on the penalty of certain articles, wherein the defendant had agreed to pay ſo much *per chaldron* for all coals laden either at *Newcaſtle* or on the river *Tyne*, and brought to *London*; and the breach aſſigned was, that the coals were laden in ſuch a ſhip *in the port of Tinmouth*, viz. at *North-Shields*, and brought from thence to *London*.

To this declaration the defendant demurred, becauſe it did not appear that *Tinmouth* was on the river *Tyne*, and ſo the breach is not well aſſigned, and the court cannot take notice *judicially*, that *Tinmouth* is on that river; and for this reaſon they inclined againſt the plaintiff; but gave him leave to *diſcontinue*, on payment of coſts. *Vide Mod. Rep. vol.* 5. *p.* 352.

Michaelmas, 9 *W.* 3. *Hannan* v. *Redman.*

Per Holt, Chief Juſtice. Where ſeveral lands are charged with a rent-charge, and the owner of theſe lands makes a leaſe thereof, and *covenants* with the leſſee to *ſave him harmleſs*, &c. and afterwards the leſſee pays the rent to the grantee of the rent-charge, *voluntarily and without compulſion*, in ſuch caſe he pays it in his own wrong, and muſt pay it again to the leſſor; but if he is diſtrained for the rent-charge and his goods taken, this is a breach of the *covenant*, and not before; and the leſſee muſt not alledge *generally*, that he was compelled to pay the rent, but muſt ſhew how.

A biſhop made a leaſe, in which the leſſee *covenanted* to *repair*, the biſhop died, and his executors brought an action for not repairing in the time of the biſhop, and *adjudged* well. *Vide Salk. vol.* 3. *p.* 108.

Michaelmas, 10 *W.* 3. *Northcote* v. *Underhill.*

In *covenant* the plaintiff declared, that the defendant by his deed did grant, bargain and ſell, to the plaintiff and his heirs, provided that if the grantor paid ſo much money, it ſhould be lawful for him to re-enter, and that he *covenanted* to pay the ſaid money to the plaintiff; and a breach was aſſigned in non-payment of the money: after judgment by *default*, and a writ of inquiry executed, *It was objected*, that nothing paſſed by the deed for want of inrolment, *which was granted*; and from hence he inferred, that the *covenants* were void, like the caſe in *Raymond* 27. where *H.* grants all the reſidue of his term, which ſhould be unexpired at the time of his death, and *covenants* for quiet enjoyment, and gives a bond to perform that *covenant*, and it was held that the bond and *covenant* were void.

Holt, C. J. allowed this reaſoning, becauſe that was a relative and dependent *covenant*. It refers to an eſtate, and is to wait on it; and if there be no eſtate granted, the *covenant* fails; but in this caſe the *covenant* to pay the money is a diſtinct, ſeparate, and independent *covenant*, and it is not material whether any eſtate paſſed, and the plaintiff need not ſhew it, nor ſay *that the defendant granted*, but the beſt way is to declare with a *quod cum teſtatum exiſtit*, &c. therefore judgment was given for the plaintiff. *Vide Salk. vol.* 1. *p.* 199.

Michaelmas, 10 *W.* 3. *Cook* v. *Harris.*

See this caſe fully ſtated in page 128 of this work, under the head *Aſſignments*.

Michaelmas, 10 *W.* 3. *Anonymous.*

In an action of *covenant*, the plaintiff declared on an indenture of ſettlement on a marriage, by which the father ſettled certain lands to the uſe of *J. S.* for *four years*, and afterwards to the uſe of the ſon for life, and then to the daughter for life, and then to the firſt, ſecond, *&c.* ſons of their two bodies in *tail*, *&c.* and the father *covenanted*, that the lands limited in jointure, after the expiration of the *four years*, ſhould be, and for ever continue, of the annual value of 200 *l. per annum*; and the breach was aſſigned, that the lands were not of ſuch value. This action was brought by the ſon againſt the executor, who demurred to the declaration. And an *exception* was taken, that this *covenant* did but extend to the eſtate for life limited to the wife for her jointure, and ſo the ſon cannot have an action. For the words *(eſtate ſo limited in jointure)* reſtrained it to this eſtate only; and the ſecurity muſt be intended to have been for the benefit of the wife only, to the end that ſhe might be certain of a jointure of ſuch a value. And it cannot be intended that the father meant to oblige himſelf to ſecure it to his ſon. And he cited *Hob.* 273. 329. 2 *Saund.* 413. *Alleyn.* 10. 2 *Vent.* 140. being caſes where *covenants* are reſtrained by the intent of the parties. That the words *(for ever continue)* cannot be conſtrued to make a perpetual *covenant*, but muſt have ſome reſtriction; and that which he had not mentioned, ſeemed to be the moſt proper; and if this conſtruction was not made, the words *(ſo limited in jointure)* would be idle, and of no effect; for it does not appear that there were any other lands compriſed in the deed. But the plaintiff's council argued, that the *covenant* is, that after the *four years* the lands ſhall be, and continue for ever, *&c.* Now, the ſon having, by the limitation of the deed, the next immediate eſtate after the *four years* is expired, if this *covenant* is not conſtrued to extend to him, it will be deſtroyed; ſince his eſtate commences immediately on the expiration of the *four years*.

Which *Holt*, Chief Juſtice, granted, and ſaid, that the words *(lands ſo limited in jointure)* were only a deſcription of the lands to which the *covenant* ſhould extend; and it is advantageous to the wife that the lands ſhould be of ſuch a value to the ſon of her huſband, as thereby ſhe may live in a more plentiful manner. And as to the *objection*, that the words would be idle, and of no effect, he anſwered, that notwithſtanding any thing to the contrary appearing to the court, there might be other lands mentioned in the deed; and if the defendant would have taken advantage of this *exception*, he ſhould have prayed *oyer* of the deed, to the end that it might have appeared, that there were no other lands compriſed; for the plaintiff has no need to ſhew more of the deed in his declaration than concerns his caſe. And as to the extenſiveneſs of the *covenant*, he made this diſtinction, that it would extend to all eſtates raiſed by the deed: as if *H.* limits an eſtate to *A.* for life, remainder to *B.* for life, remainder to the firſt, ſecond, *&c.* ſons of their two bodies, remainder to his own right heirs, with ſuch a *covenant* annexed to it, it will extend to the eſtates for *life*, and the eſtates *tail*; but if for default of iſſue of the bodies of *A.* and *B.* the reverſion deſcends to the *collateral* or *lineal* heir of *H.* he ſhall never take advantage of it, becauſe he is not privy to the conſideration of the deed, nor party to the deed, nor is his eſtate raiſed by the deed. But if in ſuch caſe the remainder had been limited to the right heirs of *A.* or *B.* or *J. S.* they might ſue on this *covenant*, becauſe they had taken by the limitation of the deed, and are privy to it. Therefore judgment was given for the plaintiff by the whole court. *Vide Raym. vol.* 1. *p.* 365.

Eaſter, 12 *W.* 3. *Greſcot* v. *Green.*

The leſſee *covenanted* for him and his aſſigns to rebuild and finiſh a houſe within ſuch a time, and after the time expired the leſſee aſſigned over the premiſes, the houſe not being built and finiſhed according to the *covenant*.

Holt, Chief Juſtice. This *covenant* ſhall not bind the aſſignee, becauſe it was broke before the aſſignment; otherwiſe if it was broke after, as if the leſſee had aſſigned before the time expired, *&c.* *Vide Salk. vol.* 1. *p.* 199.

Eaſter, 12 *W.* 3. *Steer* v. *Shalecroft.*

This was an action of *covenant* for not conveying an eſtate purſuant to articles.

Per Holt, Chief Juſtice. There is a manifeſt difference between a *covenant* to make a conveyance at the charge of the *covenantee*, and a *covenant* to convey to the *covenantee*, and he *covenants* to be at the charge of it; for in the firſt caſe, the *covenantor* is not obliged to perform till a tender of the charges; but in the ſecond he is to convey at his peril; and if the *covenantee* will not pay, he has his remedy againſt him on his *covenant*; but where a *covenant* is to make a conveyance at the charge of the *covenantee*, the *covenantor* ought to give notice to the *covenantee*, what ſort of conveyance he intends to make, that the *covenantee* may judge what charge to tender. 2dly, When a perſon pleads a deed, he muſt plead it according to its legal operation, and not according to the words thereof. 3dly, If a *covenant* is to make a feoffment, *&c.* before ſuch a day, the *covenantor* ought to give notice when he will make it, that the *covenantee* may be there to receive it; *otherwiſe*, if it be to make a feoffment on a day certain; but in that caſe the *covenantor* muſt plead a tender on the laſt convenient time of that day. *Vide Mod. Rep. vol.* 12, *p.* 400.

Eaſter, 12 *W.* 3. *Stanhop* v. *Pemperton.*

A *covenant* was to build a houſe on land demiſed before ſuch a day, and to keep it in repair, for the leſſee and his aſſigns; and after the day, an action of *covenant* was brought againſt the aſſignee for not repairing. The defendant pleads the houſe was not built before the day; and on general demurrer, judgment was given for the plaintiff. It was agreed this would not have bound the aſſignee, being a new thing, without expreſsly naming him. 2dly, That the plea was a negative pregnant. *Vide Mod. Rep. vol.* 12. *p.* 384.

Eaſter, 12 *W.* 3. *Keeling* v. *Morrice.*

In an action of *covenant* brought againſt an adminiſtrator of an aſſignee of a term, generally in his own name, on a *covenant* in the original demiſe to repair, and a *breach* in his time; it was agreed, 1ſt. That this *covenant* ran with the land, and bound the poſſeſſor without the word *aſſigns.* 5 *Co.* 15. And the *Dean and Chapter* of *Windſor*'s caſe. *Mo.* 399. 1 *Cro.* 229. *Jo.* 245. And he ſhall not ſay, *I ſhall not be charged for my own wrong for want of aſſets*, for it is his own act to be adminiſtrator, and he is preſumed to have known the *covenant* annexed to the leaſes, as executors, under pain of *devaſtavit*, are obliged to take notice of their teſtator's debts by bonds, and give preference of payment to them; and he might have diſcharged himſelf, by aſſigning over before *breach*. And by the ſame reaſon that he ſhould be charged for the rent, ſo he ought here for the damages. 2 *Inſt.* 202. An executor or adminiſtrator ſhall be puniſhed for waſte, whether voluntary or permiſſive, though treble damages are recoverable in it. 1 *And.* 51, 52. 5 *Co. Hargrave*'s caſe. *Allen* 42. And judgment was given for the plaintiff, *niſi*, before the end of the term. *Vide Mod. Rep. vol.* 12. *p.* 371.

Eaſter, 12 *W.* 3. *Badger* v. *Floyd.*

Per Holt, Chief Juſtice. If *A.* *covenants* with *B.* to convey to him all his right and title to the manor of *D.* to which *A.* has no right; it is not a good plea in an action of *covenant*, that he had no right, *&c.* but he muſt take ſuch a conveyance as would in truth paſs all his title, in caſe he had any; and he is eſtopped by his *covenant* to ſay he had no title. *Vide Mod. Rep. vol.* 12. *p.* 398.

Trinity, 12 *W.* 3. *Frontin* v. *Small.*

See this caſe fully ſtated in page 146 of this work, under the head *Attorney.*

Trinity, 12 *W.* 3. *Lacy* v. *Kynaſton.*

Holt, Chief Juſtice. If *A.* *covenants* to do a thing, and the *covenantee* agrees to ſave him harmleſs, that is a defeazance of the *covenant*. If two are bound jointly and ſeverally in a bond, and a releaſe is given to one of them, it releaſes the ſeveral, as well as the joint *lien*, if *A.* is bound by bond to *B.* and *B.* *covenants* not to put it in ſuit till ſuch a time, it is a defeaſance; but if he grants not to ſue on it at all, it is a releaſe. *Vide Mod. Rep. vol.* 12. *p.* 415. *Raymond, vol.* 1. *p.* 688.

Hilary, 1 *Ann.* *Robinſon* v. *Walker.*

In an action of *covenant*, the plaintiff declared, that the defendant and *J. S.* *did agree for himſelf and each of them*, *&c.* that they or either of them would load a ſhip at ſuch a place, and pay the plaintiff for the freight, *&c.* and the defendant pleaded in *abatement*, that the other *covenantor* was alive and not named in the writ. And it was agreed by all, that *we bind ourſelves and each of us*, was joint and ſeveral.

But *Holt*, Chief Juſtice, declared, he thought there might be a difference between *A.* and *B.* *do agree, and each of them agrees*, and *A. and B. agree for themſelves and each of them*, for in the firſt, *each of them agrees*, expreſsly ſevers the *lien*, but *for each of them*, ſeems to go to the thing to be done; that is, that they both or either of them would do it. And a perſon may *covenant*, that he or *A.* will do ſuch a thing; ſo if two *covenant* that they or one of them ſhall do ſuch a thing, that is a *joint covenant* only; and the word *agree*, and not *for each of them*, makes *the lien*. But the reſt of the court were of a different opinion, *viz.* that there is no difference between this, and the caſe of *we bind ourſelves, and each of us.* And judgment was given *to anſwer over*. *Vide Mod. Rep. vol.* 7. *p.* 153.

Eaſter, 1 *Ann.* *Lylly's Caſe.*

An action of *covenant* lies not againſt an apprentice, being an infant. 1 *Cro.* 179. 1 *Mod.* 271. *Vide Mod. Rep. vol.* 7. *p.* 15.

1 *Ann,* *Heron* v. *Treyne.*

In an action of *covenant* brought by *Heron* againſt *Treyne*, it was ruled by *Holt*, Chief Juſtice, on evidence at the trial at the *Lent* aſſizes in *Southwark*, that if *A.* *covenants* with *B.* to make a farther aſſurance to *B.* at the coſts of *B.* *A.* ought to give notice to *B.* what ſort of aſſurance he will make, and then *B.* ought to tender the *coſts*, and then *A.* ought to make the aſſurance. But if the *covenant* is, that *A.* ſhall make a new demiſe to *B.* at the coſts of *B.* (as the *covenant* on which this action was brought, was) or any particular aſſurance ſpecified in the *covenant*; then *B.* ought firſt to tender the coſts, and then *A.* ought to make the aſſurance. For in the former caſe, *B.* cannot know what coſts will be ſufficient to tender, before he knows what ſort of aſſurance *A.* will make; but in the latter caſe by the inſpection of the *covenant* itſelf, he will know what ſort of aſſurance will be made. *Vide Raym. vol.* 2. *p.* 750.

Eaſter, 3 *Ann.* *Foxton* v. *Moſely.*

In an action of *covenant* brought by an apprentice for not teaching him four ſeveral trades in an indenture of apprenticeſhip mentioned, the defendant, inſtead of craving *oyer* of the plaintiff's indenture, ſet forth an indenture of his own, and pleaded performance of the *covenants* therein contained.

And on demurrer, it was adjudged for the plaintiff, for the defendant cannot ſhew any other indenture, but crave *oyer* of the indenture declared on. *Vide Mod. Rep. vol.* 6. *p.* 154.

Eaſter, 3 *Ann.* *White* v. *Bodinam.*

A leſſee for years, brought an action of *covenant* againſt the leſſor, declaring on a demiſe and *covenant* for quiet enjoyment, and aſſigns for breach, that the leſſor did enter on him, and *ouſt* him out of the premiſes: the defendant pleads, that he entered to diſtrain for rent in arrear, *abſque hoc*, that he did *ouſt* him *of the premiſes*. To which the plaintiff demurred, thinking the traverſe ill; becauſe if he had *ouſted* him of any parcel of the premiſes, he had good cauſe of action; therefore he ſhould have traverſed, *abſque hoc*, that he *ouſted* him of the premiſes, or any part thereof.

Per curiam. The plea is well enough in this caſe; for if the plaintiff will join iſſue on the matter of the traverſe, and prove *ouſter* of any part, the iſſue will be for him. And the court made a diſtinction between pleading the general iſſue, (as in *debt*, you plead, *is indebted, nor any part or parcel thereof doth owe*) and a ſpecial iſſue as this is. 3 *Cro.* 83, 84. *Robſert* v. *Andrews.* *Dyer* 115. Therefore judgment was given for the defendant. *Vide Mod. Rep. vol.* 6. *p.* 150.

Michaelmas, 3 *Ann.* *Anonymous.*

In an action of *covenant* brought againſt huſband and wife, on a deed of demiſe to the wife, *when ſole*; whereby ſhe *covenanted*, that ſhe would every year, during the term, plant ſo many oaken plants on the premiſes: the breach aſſigned was, *that any oaken plants in any year during the ſaid term, they or either of them, annually had not planted.*

Per curiam. If the wife had aſſigned *when ſole*, the action for *breach* would lie againſt the huſband and her jointly: and as to the *annually in any year*, at moſt it is nothing but ſurpluſage, and ſhall be rejected. *Vide Mod. Rep. vol.* 6. *p.* 239.

Michaelmas, 3 *Ann.* *Arnote or Armit*, v. *Breame.*

See this caſe fully ſtated in page 103 of this work, under the head *Arbitration.*

Hilary, 4 *Ann.* *Seignorett* v. *Noguire*, *&* *al.*

An action of *covenant* was brought on articles of partnerſhip, whereby it was agreed, that the three defendants ſhould contract for 336 ſhares of the Royal Lute-ſtring Company, for which the plaintiffs were to pay the money, and to have the ſhares delivered to them; and the plaintiffs were to have intereſt for their money; that the plaintiffs and defendants were to manage the ſhares in partnerſhip, and in caſe of difference in opinion, the moſt voices to carry it; the plaintiff's to be but one voice: that when any of the ſhares ſhould be ſold, the money ſhould go to ſatisfy the plaintiffs, the principal and intereſt of what they advanced; the partnerſhip to continue for four years, to begin from the day of the date of the contract for the ſhares; that after the expiration of the ſaid four years, the plaintiffs ſhould not be obliged to keep any of the ſaid ſhares, which ſhould then remain unſold, any longer, but might ſell them to make an end of the account of the partnerſhip; and if there ſhould be any loſs, the ſame ſhould be borne, one-fourth part by the plaintiffs, and the other three-fourths by the defendants. The contract for the 336 ſhares was laid to be made the 13th day of *April* 1693; and for breach the plaitiffs ſhewed, that after the four years elapſed, the plaintiffs ſold 174 ſhares, which were what were then remaining of 336 ſhares, for 2921 *l.* 10 *s.* and no more, which was the beſt price that could be got for them, ſo that the damage came to ſo much, three-fourths of which was ſo much, for which the plaintiff brought this action. The defendants craved *oyer* of the articles, and they were entered *in theſe words*; and it appeared, that the commencement of the four years was to be from the day of the date of the contract. The defendants pleaded, that before the ſale of the 174 ſhares, *viz.* on the 23d day of *November* 1698, the plaintiffs *ſold and transferred* the ſaid 174 ſhares, *viz.* 90 ſhares to *R. L.* and 84 ſhares to *W. S.* and that at the time of ſelling and transferring aforeſaid, *the current and marketable price* of the ſaid 174 ſhares was ſo much: and ſo there was no loſs. The plaintiffs replied, and traverſed the ſale of the ſaid 174 ſhares *in manner and form*, &c. and thereon iſſue was joined, and the jury found a *ſpecial verdict*, that the plaintiff *Seignorett*, at the ſeſſions of parliament, 9 *&* 10 *W.* 3. was impeached for miſdemeanors, and *R. L.* and *W. S.* became his bail: and that the plaintiffs on the 30th day of *May* 1698, aſſigned over the 174 ſhares to *R. L.* and *W. S.* viz. 90 to *L.* and 84 to *S.* *for their ſecurity, and to ſecure and indemnify them*, of and from the recognizances: that afterwards on the 28th day of *October* 1698, *L.* and *S.* were diſcharged from their recognizances, and that they were no ways damnified thereby; but whether this aſſignment was in law a ſale, they leave to the diſcretion of the court.

After this cauſe had been a long time depending, the three judges gave judgment the latter end of this term, but the Chief Juſtice was not ſatisfied. It was agreed by the three judges, that if this partnerſhip had been concerning chattels that had been aſſignable, that then this aſſignment to *L.* and *S.* would have been a ſale within the meaning of the *covenant*, and would have been with the defendants, becauſe the legal intereſt being out of the plaintiffs, they had diſabled themſelves to perform the truſt. But they ſaid, this aſſignment was not like a conveyance in law; that they could not tell what it was; that by it they were not ſatisfied; that though the ſhares were put out of the plaintiffs power, they might have executed the truſt notwithſtanding. And *Powell*, Juſtice, ſaid, the merits of the cauſe were with the plaintiffs.

Holt, Chief Juſtice, doubted, for he thought there was no difference between the caſes, for that ſuch aſſignments muſt be taken to be within this agreement as the nature of the thing is capable of, whether they were or were not effectual aſſignments in point of law. So if a man aſſigns a bond to *J. S.* and afterwards receives the money of the obligor, if he does not immediately pay it over to the aſſignee, the aſſignee may maintain an action of *covenant* againſt him on the word *aſſigned*, and that was the caſe of *Deering* v. ——— So if the obligee *covenants* to aſſign a bond to *J. S.* *on ſuch a day*, and will not aſſign it, or before the day receives the money of the obligor, by which means he has diſabled himſelf to aſſign it; in either of theſe caſes it is a breach of *covenant*, and yet in ſtrictneſs a bond is not aſſignable. Judgment was given for the plaintiffs. *Vide Raym. vol.* 2. *p.* 1241.

Eaſter, 4 *Ann.* *Anonymous.*

Per Holt, Chief Juſtice. If a farm is out of repair in the life of the anceſtor, and afterwards the heir brings an action, he ſhall recover damages for the whole time; but the heir ought not to alledge a breach in the anceſtor's time, becauſe that belongs to the executor. *Vide Mod. Rep. vol.* 11. *p.* 45.

Trinity, 6 *Ann.* *Rich* v. *Wilks.*

A *covenant* was, that the defendant ſhould dance, ſing, and act under the ſociety of comedians, and obey orders; and ſhould act, and be aſſiſting to no other theatre, but what was appointed by Mr. *Rich*; and the breach aſſigned was, that he acted at *Oxford*, without the conſent of the plaintiff. The defendant demurred to the declaration.

The defendant's council excepted to the declaration, 1ſt. That it is ſet out with *poſt hæc*, &c. which muſt be conſtrued from the filing of the declaration, (or bringing the writ) and it ſhould have been *after the making of the indenture*, i. e. that he the ſaid *Robert Wilks* did *covenant* that he, for five years after the making, would not act, *&c.*

2dly. This breach is not well aſſigned, becauſe it does not appear that the play acted was public, and if not ſo, it was no damage to the plaintiff. And the deſign of the *covenant* was not to reſtrain any dancing, acting, *&c.* unleſs where it drew others (to lay out their money at another play-houſe) from the play-houſe of *Rich*.

Per Holt, Chief Juſtice, and *Powell*, Juſtice. That *he would not act after this*, &c. in the declaration, ſhould have been, *that from thence he would not act*, &c. Now, *after this*, &c. was right in the recital of the *covenant*, but wrong in the declaration; becauſe *after this* muſt be taken to be after the preſent time; ſo that the breach is laid to be after the declaration. But the matter was adjourned; though the court thought it could not be made good. *Vide Mod. Rep. vol.* 11. *p.* 133.

Michaelmas, 8 *Ann*. *Fitzgerrard* v. *Trant*.

In *debt* on a bond by the executor of the obligee; on *oyer* of the bond, it appeared, that *A. B.* and *C.* were bound jointly and ſeverally to the obligee; the defendant pleaded a releaſe made by the obligee to *B.* one of the obligors; and on *oyer* of the releaſe, it appeared, that the obligee *covenanted* with *B* not to ſue him on this obligation; the plaintiff demurred, and and it was adjudged, that a *covenant* not to ſue one of the obligors, where there are ſeveral, is no diſcharge againſt the others. Judgment was therefore given for the plaintiff; abſent, *Holt*, Chief Juſtice. *Vide Mod. Rep. vol.* 11. *p.* 254.

Hilary, 11 *Ann*. *Hacket* v. *Glover*.

See this caſe fully ſtated in page 248 of this work, under the head *Breach*.

Eaſter, 12 *Ann*. *Sail* v. *Kitchingham*.

See this caſe fully ſtated in page 248 of this work, under the head *Breach*.

Michaelmat, 12 *Ann*. *Turner* v. *Goodwin*.

See this caſe fully ſtated in page 129 of this work, under the head *Aſſignments*.

Hilary, 3 *Geo*. *Chaplain* v. *Southgate*.

This was an action of *covenant*, and the caſe was thus: the defendant leaſed to the plaintiff a farm called *Dale*; and there being a pretence of a right of common ſet up to two cloſes, comprehended in the leaſe, the leſſor *covenants* with the leſſee, that he ſhall quietly enjoy the ſaid two cloſes, againſt all claiming, or pretending to claim any right in them. On this *covenant* the leſſee brings his action, and aſſigns his *breach* thus, that one having or pretending to have a claim time out of mind, did enter on the ſaid cloſes.

To this the defendant demurs; and it was inſiſted on by the defendant's council, that the *covenant* extended only to legal, not to illegal claims; and therefore the plaintiff ſhould have ſet forth, that the claim of him that diſturbed him was a legal one. 2 *Cro*. 315. *Vaughan's Reports* 119, 120. *Bickerſtaff's* caſe.

Per curiam. The words of the *covenant* extended to all interruptions whatſoever; and ſo was the plain intent and meaning of the parties; for if it was to extend to legal claims only, then would the tenant be under the hardſhip of trying the right of the landlord; which was the very thing the tenant plainly deſigned to prevent by this *covenant*.

This caſe is very different from the caſe of *Kirby* v. *Hanſacre*, for there it did not appear, but the diſturber might claim under the leſſee himſelf; but this is impoſſible here, by reaſon of thoſe words, *time out of mind*. The *breach* is well aſſigned, therefore judgment for the plaintiff. *Vide Mod. Rep. vol.* 10. *p.* 384.

Michaelmas, 6 *Geo*. *Aleberry* v. *Walby*.

See this caſe fully ſtated in page 213 of this work, under the head *Baron and Feme*.

Michaelmas, 7 *Geo*. *Perry* v. *Edwards*. Error.

In *error* brought on a judgment in *C. B.* in an action of *covenant*, wherein the plaintiff ſet forth a *covenant*, which recited, that the defendant had ſold a certain quantity of goods to her teſtator, which had been arreſted at *Archangel* by one *E. B.* and therefore the defendant *covenanted* to ſave him harmleſs from any coſts or damages relating to ſuch ſeizure: and then aſſigned for breach, that the ſaid *E. B.* having arreſted the ſaid goods, *under pretence* of a debt due from the defendant to him, touching ſuch arreſt the plaintiff was put to 1500 *l.* expence, which the defendant had neglected to pay.

The queſtion turning on the declaration, it was objected, that the *covenant* does not extend to wrongful acts, for which the plaintiff has a remedy; and therefore the title of *E. B.* ought to have been ſet forth, 4 *Co*. 80. *Vaugh*. 118. *Cro. Car*. 443. and that *having a legal title*, is not enough. 2 *Saund*. 177. 1 *Mod*. 219. 2 *Vent*. 61. *Cro. El*. 828. *All*. 41. *Mar*. 40. Here it is only ſaid *under pretence*, which is not ſo much.

Per curiam. This pretence of *B.*'s being recited in the *covenant*, ſhews it was meant a ſecurity againſt it in all events; and though it ſhould be wrongful, yet being particular, it comes within the diſtinction that has been well made.

Adjourned. And in *Hilary* term following, the plaintiff had judgment, the defendant's council declining to argue the matter. *Vide Strange, vol.* 1. *p.* 400.

Eaſter, 9 *Geo*. *Lovelock* v. *Sorrel*.

See this caſe fully ſtated in page 130 of this work, under the head *Aſſignments*.

Trinity, 9 *Geo*. *Wilkinſon* v. *Meyer*.

In an action of *covenant* brought on an agreement in writing for *South-Sea* ſtock, wherein the plaintiff *covenanted* by indenture to transfer the ſtock before the 25th day of *March, or within four days after*; and the defendant *covenanted* to accept the ſame, and to pay ſo much money for it *within the time aforeſaid*, which he had not paid.

On demurrer to the declaration it was inſiſted for the defendant, that here was an *indefinite time* ſet forth for the performance of this *covenant*, therefore the plaintiff ought to have ſet forth a *requeſt* to perform it, otherwiſe he cannot be intitled to this action.

Per curiam. This is a *mutual covenant*, and in ſuch caſe the plaintiff may maintain his action without laying any requeſt made by him to the defendant to perform it; for the time is not indefinite, as has been ſuggeſted, becauſe the defendant was to accept the ſtock, and pay the money *within the time aforeſaid*, which muſt be within the *fourth day*; and therefore there is no occaſion to aver a requeſt in this declaration; this caſe is the ſame with that of *Blackwell* v. *Naſh*, only in that caſe *one day* was appointed, and here are *four days*. So judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 8. *p.* 173.

Trinity, 9 *Geo*. *Lock* v. *Wright*.

See this caſe fully ſtated in page 272 of this work, under the head *Condition*.

Trinity, 9 *Geo*. *Lilly* v. *Hodges*.

The defendant and one *G.* *covenanted* for themſelves, and each of them, and for their executors and adminiſtrators, and for each of their executors and adminiſtrators, with the ſaid *Lilly* and *C.* to receive the rents due to the plaintiff *Lilly*, and one *C.* in *Ireland*, and likewiſe that they, and each of them would pay a moiety thereof to the plaintiff and *C.*

And now, in an action of *covenant* brought againſt the defendant alone by the plaintiff *Lilly* for his moiety, the breach aſſigned was againſt both the *covenantors*, *viz.* that the defendant *Hodges*, and *J. G.* received 7000 *l.* and that the defendant did not pay the moiety to the plaintiff, nor account to him for the rent, &c. And on the general iſſue pleaded, the plaintiff had a verdict.

And now, it was moved in arreſt of judgment, that this action is not maintainable in this manner: it muſt either be an action againſt the defendant alone, charging him for his own act, or againſt both the defendant and *G.* charging them on their joint act. This action is neither ſeparate nor joint, but both confounded together; for the receipt of the money is laid to be by both.

Beſides, the breach is aſſigned againſt both the *covenantors*, which is ill, becauſe the action was brought againſt one, and by one of the *covenantees*, when it ought to be brought by both on the joint *covenant*.

Per curiam. Two perſons may engage for the acts of both, as well as for the acts of one, and may each *covenant* for the other as well as himſelf; but that which is fatal in this action is, that the *covenant* was made to two, ſo they both ought to join, for otherwiſe one may recover, and ſo may the other, ſo that the *covenantor* would be doubly charged.

However, they were all of opinion, that the plaintiff ſhould take his judgment, becauſe the defendant had *covenanted* for the acts of his companion, as well as his own; and the *breach* and non-performance of the *covenant* being laid jointly againſt both the *covenantors*, it is well enough.

The moſt material objection is, that both the *covenantees* ought to have *joined* in bringing this action, and that it ſhould not be brought by one of them alone.

But it was *adjudged*, that the action is ſevered by the ſubſequent *covenant*, by which the defendant and the ſaid *G. covenanted* each of them to pay a ſeveral moiety of the rents, for though the *covenant* was joined in the beginning of the deed, *viz.* they both *covenanted* to receive the rents; yet it was ſevered by the apparent intention of the parties by that ſubſequent clauſe of paying the moieties to each of the *covenantees*; and if that had been omitted in this deed, then the action muſt have been joint againſt both, but now it is ſevered, and well brought againſt one by one. *Vide Mod. Rep. vol.* 8. *p.* 167.

Michaelmas, 9 *Geo.* **Blackwell v. *Naſh.***

See this caſe fully ſtated in page 272 of this work, under the head *Condition.*

Michaelmas, 10 *Geo.* ***Whitley* v. *Loftus.***

See this caſe fully ſtated in page 91 of this work, under the head *Apprentice.*

Michaelmas, 11 *Geo.* ***Theed* v. *Starkey.***

In an action of *covenant* brought againſt an executor for not paying taxes according to a *covenant* in a leaſe made by his teſtator, wherein he *covenanted* with the leſſee to pay all the *taxes on the lands demiſed*; and the breach aſſigned was, for not paying the rates to the church, and poor.

On demurrer to the declaration it was objected, that the breach was not well aſſigned, becauſe thoſe rates are perſonal charges, and not on the land; and for this reaſon the defendant had judgment. *Vide Mod. Rep. vol.* 8. *p.* 314.

Michaelmas, 11 *Geo.* ***Andrews* v. *Paradiſe.***

See this caſe fully ſtated in page 249 of this work, under the head *Breach.*

Michaelmas, 11 *Geo.* ***Wyvil* v. *Stapleton.*** ***Shelburne* v. *Eundem.***

See this caſe fully ſtated in page 16 of this work, under the head *Accord.*

Eaſter, 13 *Geo.* ***Monk* v. *Cooper.***

In an action of *covenant* for non-payment of a year's rent, from *Michaelmas* 1725, to *Michaelmas* 1726. The defendant craved *oyer* of the leaſe, in which there was a *covenant* on the part of the leſſee to repair, except the premiſes ſhould be deſtroyed by fire: and then he pleaded, that before *Michaelmas* 1725, the premiſes were burnt down againſt his will, and that they were not rebuilt by the plaintiff during the whole year, for which the rent is demanded, nor had he any enjoyment of the premiſes; and therefore prayed judgment whether he ſhould be charged with the rent.

To this the plaintiff demurred, and it was inſiſted on by his council, that whatever may be the default in the plaintiff in not repairing, yet the defendant muſt at all events perform his *covenant* to pay the rent; and *Allen* 27. was cited for that purpoſe.

Per curiam. The caſe in *Allen* 27. is expreſs to the contrary: if the defendant has any injury he will have his remedy; but he cannot ſet it off againſt the demand for rent. The plaintiff muſt have judgment. *Vide Stra. vol.* 2. *p.* 763.

Michaelmas, 4 *Geo.* 2. ***Ball* v. *Squarry.***

The defendant cannot take advantage of any *covenant* omitted in the plaintiff's declaration on an action of *covenant*, without craving *oyer*. *Vide Forteſcue, p.* 354.

Michaelmas, 10 *Geo.* 2. ***Jodderel* v. *Cowell.***

In an action of *covenant* brought on a leaſe to pay rent, the plaintiff aſſigned the breach in non-payment; the defendant pleaded, that before any rent became due, the defendant, with the aſſent of the leſſor, aſſigned the premiſes to *A.* who, with the aſſent of the leſſor, entered and paid the rent to the leſſor. To which the plaintiff demurred.

Lord *Hardwicke.* This is a bad plea, for it is expreſsly contrary to the caſe of *Bachelor* v. *Gage. Cro. Car.* 188.

Then the defendant's council took an exception to the declaration, it being laid that the indenture was made in *Middleſex*, and yet the bill begins, *London, to wit.*

2dly. There is no averment that the leſſor has performed the *covenants* on his part.

Lord *Hardwicke.* I think this is well enough; as to the mention of the county in the margin, that is not of importance, if not referred to in the declaration; for the word *to wit*, I verily believe, was not originally meant to the county, but only a denotation of each action or paragraph in the record; but now, as it ſtands in this record, the declaration refers to the county in the margin, and therefore, the word *London* muſt be left out, as being repugnant to the reſt of the declaration, where there is a ſufficient *venue* beſides. As to the leſſor's performance of his *covenants*, that lies on the defendant to ſhew: therefore judgment was given for the plaintiff. *Vide Caſes Temp. Lord Hardwicke, p.* 343.

Eaſter, 30 *Geo.* 2. *Lant, Eſq;* v. *Norris.*

An action of *covenant* was brought by *R. L.* ſon and heir of *T. L.* Eſq; againſt *W. N.* adminiſtrator of *J. N.* Eſq; which *J. N.* was aſſignee of *T. W.*

The action was founded on an indenture of leaſe, made the 23d of *January*, 1707, by *T. L.* deceaſed who was ſeized of certain meſſuages, ground, and premiſes, mentioned in the ſaid indenture of the one part, and the ſaid *T. W.* of the other part, *whereby* in conſideration of 200 *l.* to be laid out, in, upon, or about rebuilding on the ground and premiſes thereby demiſed, and other *covenants*, the ſaid *T. L.* did demiſe to the ſaid *T. W. All* that piece of ground, *And alſo all* the meſſuages, tenements, houſes thereon ſtanding, in, &c. abutting and bounding, &c. from *Chriſtmas*, 1715, for 43 years, at 17 *l. per ann.*

The leſſee *T. W. covenanted* to lay out the ſaid ſum of 200 *l.* within 15 years, in erecting, &c. of meſſuages, &c. on the ground and premiſes; and to keep the ſame in repair, &c. and at the end of the term to deliver up the ſame, &c.

T. W. entered, *J. L.* died the 29th of *May*, 1722, ſeized, and the reverſion deſcended to *J. L.* his ſon and heir.

On the 24th of *March*, 1738, *T. W.* aſſigned the term to *J. N.* who entered.

On the 24th of *March*, 1728, *J. L.* died ſeized, and the reverſion deſcended to the plaintiff, his brother and heir.

On this action the breaches aſſigned were,

1ſt, That after the term came to *J. N.* and after the plaintiff became ſeized of the reverſion, and while *J. N.* was poſſeſſed, *viz.* on the 1ſt of *May*, 1745, the ſaid *J. N.* in his life-time permitted *all the ſaid demiſed premiſes* to be uncovered, *&c.* by reaſon whereof the walls of the ſaid demiſed premiſes were out of repair.

2dly, That the ſaid *J. N.* did permit ſix meſſuages, parcel of the ſaid demiſed premiſes to be *proſtrated*, and to remain ſo till his death.

3dly, That the ſaid *J. N.* on the 1ſt of *March*, did pull down ſix other meſſuages then erected on the ſaid demiſed premiſes.

To the *firſt* and *ſecond breach*, the defendant pleaded, that *T. W.* did not within 15 years, or at any other time lay out the 200 *l.* agreeable to the *covenant*.

To the *third breach* the defendant pleaded *non infregit conventionem*, i. e. *that he has not broke the covenant*, to all the breaches the ſame plea as above, to the *firſt* and *ſecond*, the ſame plea over again.

The plaintiff demurred *generally* to the *firſt* plea to the *firſt breach*, and *ſpecially* to the *firſt plea* to the *third breach*, *generally* to the *ſecond plea* to the *third breach*, and *generally* to the *laſt plea* to all the *breaches*.

Note, There was alſo a plea of *non proſtravit*, i. e. *he did not pull down*, to which the plaintiff demurred, and ths defendant joined in demurrer, to all the demurrers.

After hearing council on both ſides, the court gave judgment.

Lord *Mansfield*. We are extremely clear, that not only the *words* of the *covenant*, but alſo the intent of the parties manifeſtly ſhew that it was not intended, that any of the money ſhould be laid out on the old buildings, but that they were to be pulled down, and that whatever he ſhould *erect* with the 200 *l.* or otherwiſe for his own convenience, ſhould be kept in repair.

The words, *demiſed premiſes* are put in oppoſition to the buildings that were *to be erected* thereon with the 200 *l.* and the *covenant* to deliver up is agreeable to that conſtruction. That *covenant* being to leave the demiſed premiſes together with all ſuch houſes, *&c.* as ſhould be afterwards erected, *&c.* ſo well repaired, therefore it is clearly againſt the plaintiff on the *firſt* and *ſecond breach*, and his council allows it is againſt him on the *third breach*.

Per curiam. Let judgment go for the defendant. *Vide Bur. vol.* 1. *p.* 287.

Trinity, 1 *Geo.* 3. *John Enys*, *Eſq*; *Executor of Samuel Enys*, *Eſq*; v. *Iſaac Donnithorne*, *Executor of Nicholas Donnithorne*.

On an action of *covenant* brought by the executor of the *leſſor* againſt the executor of the deceaſed *joint leſſee*, on an indenture of leaſe, dated the 10th day of *October* 1735, made between the plaintiff's teſtator of the one part, the defendant's teſtator of the other part, and another perſon; the *habendum* was for fifty years, if the ſaid grantors ſhould ſo long live, and continue poſſeſſed, the term was to commence immediately on the ſurrender of a former leaſe, dated the 27th day of *February* 1728, *&c.*

To the plaintiff's declaration the defendant demurred *generally*, and the plaintiff joined in demurrer.

The defendant's council took *four exceptions* to the leaſe on which this action was founded.

1ſt. It is void, for the uncertainty in the commencement of its term.

2dly. By the death of *N. D.* (one of the joint-leſſees) on the 10th day of *December* 1737, the whole benefit of the term, and the term itſelf, and the whole charge ſurvived to the ſurviving joint-leſſee *J. D.*

3dly. It is improper for the plaintiff to ſue as executor, he ought to have ſued directly in his own name abſolutely, and not as executor.

4thly. He is alſo irregular in ſuing the defendant as executor, he ought to have ſued him as aſſignee.

The defendant's council gave up the two laſt *exceptions*; and after this cauſe was twice argued before the court, they gave judgment.

Lord *Mansfield*. On the *firſt point*, it is either a ſurrender of the former leaſe, or if it is not, yet the new one is, in point of intereſt, to take its commencement from the determination of the former one only.

On the *ſecond point*, the action is brought on a *joint* and *ſeveral covenant*; the difficulty only aroſe on a miſrepreſentation of *Slingby*'s caſe, which is not ſimilar to this.

Deniſon, *Foſter*, and *Wilmot*, Juſtices, concurred with the Chief Juſtice.

Per curiam, unanimouſly, let judgment go for the plaintiff. *Vide Bur. vol.* 2. *p.* 1190.

Hilary, 2 *Geo.* 3. *The Churchwardens of St. Saviours Southwark*, v. *Smith*.

On an action of *covenant* againſt the *aſſignee* of a term, the queſtion before the court was,

Whether the *aſſignee* be anſwerable for the breach incurred before the aſſignment.

After hearing the plaintiff's council, the court thought it unneceſſary to hear the defendant's council, they being clearly of opinion againſt the plaintiff, and therefore gave judgment.

Lord *Mansfield*. The ſingle queſtion is, "whether "an aſſignee is liable for a breach which he never "committed?" Certainly he is not; this breach was committed before his time; and this *covenant* does not run with the land.

Denniſon and *Wilmot*, Juſtices, concurred with the Chief Juſtice, and obſerved that the point was ſettled in the caſe of *Greſcot* v. *Green*. *Vide Bur. vol.* 3. *page* 1271.

Hilary, 5 *Geo.* 3. *Shubrick* v. *Salmund*.

In an action of *covenant* on a charter party of affreightment, brought by a merchant who hired the ſhip againſt the maſter of the ſhip, for a breach of contract in not going his voyage as he had *covenanted* to do, the plaintiff in his declaration aſſigns *two breaches*.

1ſt. That the ſhip did not ſail and proceed to the place agreed on to load, *&c.* but on the contrary, the defendant did wilfully abſent himſelf, *&c.*

2dly. That the defendant did not arrive at the time or place agreed on, but did wilfully abſent himſelf, *&c.*

The defendant pleaded a plea in *bar* to this action, and to the ſecond breach pleaded the ſame plea; to which pleas the plaintiff demurred *generally*, and the defendant joined in demurrer.

After hearing the council on both ſides, the court gave judgment.

Lord *Mansfield*. On the true conſtruction of this agreement, there is no foundation of fact for arguing this point of law.

The diſtinction between *implied covenants* by operation of law, and *expreſs covenants*, is, that *expreſs covenants* are taken more *ſtrictly*; a man may without conſideration enter into an *expreſs covenant* under hand and ſeal.

In this caſe, each has bound himſelf by an *expreſs covenant* under hand and ſeal, and the defendant has broken the *covenant* on his part.

The words are *poſitive* and *expreſs*, that the defendant ſhould go thither; the parties plainly meant that the ſhip was to go thither; and the conſideration fails by the defendant's not doing ſo: therefore the demurrer muſt be over-ruled.

Wilmot, Juſtice, concurred with the Chief Juſtice.

Per curiam. Let judgment go for the plaintiff. *Vide Bur. vol.* 3. *p.* 1637.

Coverture, *See* Baron *and* Feme.

Cuſtom.

Michaelmas, 6 *W.* & *M.* *Hicks* v. *Woodeſon*.

On a writ of *prohibition*, the plaintiff ſuggeſted, that the pariſh of *Huntsſpill* was an antient pariſh, of which he was an inhabitant, and occupied lands there; that in the ſaid pariſh there was a *cuſtom* to pay ſeveral ſmall ſums to the parſon, in lieu of ſmall tithes; which ſums were particularly ſet forth, that this pariſh was within the hundred of *Huntſpill*, and that there was a *cuſtom* alſo for every inhabitant and occupier of land within the ſaid hundred to be diſcharged of tithes for the paſture of barren and unprofitable cattle.

The defendant traverſed the *cuſtoms*, and iſſue being thereon joined, it was found for the plaintiff.

And now it was moved in arreſt of judgment, 1ſt. That a *cuſtom* alledged of *not tithing* in a whole hundred is void in law.

2dly. Admitting it to be good, yet that it is not well pleaded here, becauſe the plaintiff had not ſhewn that there was a ſufficient maintenance for the parſon excluſive of thoſe tithes.

After hearing council on both ſides, the court gave their opinion.

Per curiam. It will be difficult to ſhew a *not tithing* for any tithes beſides thoſe of wood; for all the caſes which incline to ſuch a *cuſtom* are but generally, *viz.* that a county or hundred may thus preſcribe, but do not mention what tithes are in queſtion.

Now, if tithes of *wood* had been due of common right, to what purpoſe was that canon made by Archbiſhop *Stratford*, 17 *Ed.* 3. that tithes of *coppice wood* ſhall be paid: againſt which canon there was a petition made to parliament in that very year, reciting the ancient uſage to be, that tithes ſhould not be paid for wood; and the petition was anſwered, that a *prohibition* ſhould be granted againſt the canon, where tithes of *wood* have not been *accuſtomed* to be paid.

It is true, the eccleſiaſtical courts hold, that *tithes* are due of common right, for every thing, nay, even for ſtones, or gravel dug out of pits, but the common law is otherwiſe; for *tithes* of common right are due only for ſuch things which ariſe by annual profits; now, the trees are renewing yearly, yet they yield no annual profits, and therefore *tithes* are not paid for them.

Therefore, where *tithes* are paid for things which do not ariſe by ſuch means, they muſt be by *cuſtom*.

But ſuch a *cuſtom* in *not tithing* cannot be good: therefore a *conſultation* was granted. *Vide Mod. Rep. vol.* 4. *p.* 336.

Trinity, 7 *W.* 3. *Maſters* v. *Lewis*.

See this caſe fully ſtated in page 131 of this work, under the head *Attachment*.

Michaemas, 7 *W.* 3. *Fletcher* v. *Ingram*.

See this caſe fully ſtated in page 276 of this work, under the head *Conſtable*.

Michaelmas, 7 *W.* 3. *Arnot* v. *Brown*.

Arnot and *Brown* were owners of two contiguous houſes. *Brown* had lights in his houſe towards *Arnot*'s yard, and *Arnot* made up blinds. The court of aldermen, on ſtat. 19 *Car.* 2. *c.* 3. ordered they ſhould be removed; but a *prohibition* was granted in this court. For whatever they may do in their inferior court by the writ of *quod permittat*, where they have power to determine *real* actions; it is plain, that the court of aldermen have no power in this ſummary way, unleſs by *ſtat.* 19 *Car.* 2. *c.* 3. and that gave them only a temporary power during the rebuilding of the city. While the city was rebuilding, they had power to aſſign lights; but by being once aſſigned, the party gained a legal title to them, and may maintain an action at common law for the obſtruction, and the court of aldermen have no farther power. *Vide Salk. vol.* 2. *p.* 425.

Hilary, 11 *W.* 3. *Aſhmead* v. *Ranger*.

In an action of *treſpaſs* brought by a copyholder againſt the lord of the *fee*, for entering his copyhold, and cutting down timber, though it was the lord's own timber, and no *cuſtom* for the tenant to cut down any timber.

Holt, Chief Juſtice. The lord of a manor cannot enter on his tenant, though a copyholder for *life* only, and cut down timber without the tenant's conſent; becauſe he has a ſpecial property in the trees as well as in the land, he is as much a copyholder of the trees, as he is a copyholder of the land. *Vide Forteſcue, page* 152.

Trinity, 11 *W.* 3. *The City of London* v. *Vanacre*.

In this caſe, *Holt*, Chief Juſtice, ſaid, *general cuſtoms* may extend to new things which are within the reaſon of the *cuſtoms*, 5 *Co. Snelling*'s caſe. See this caſe fully ſtated in page 292 of this work, under the head *Corporations*.

Michaelmas, 11 *W.* 3. *Anonymous*.

Holt, Chief Juſtice. The *cuſtom* of the town of *Dartmouth* is, that if a perſon ſerves his time, and learns his trade there, he is not thereby free; but the corporation have a power to make whom they pleaſe free. It is an extraordinary *cuſtom*, but who can help it. *Vide Mod. Rep. vol.* 12. *p.* 336.

Trinity, 12 *W.* 3. *Lovelace's Caſe*. Error.

In *error* brought on a judgment in the court of *Canterbury*, the exception was, that the court was laid to be time out of mind, and the proceſs of the court was alſo laid to be time out of mind, which they ſaid was making one time immemorial ſubſequent to another. *But not allowed.* For *cuſtoms* may be time out of mind, and yet co-equal. *Vide Salk. vol.* 1. *p.* 203.

Hilary, 1 *Ann.* *Cutting* v. *Wilkins*. Error.

The plaintiff in the original action declared on a note payable to him or order, according to the *cuſtom* of merchants; and further ſet forth an *aſſumpſit* for monies received to his uſe. The plaintiff had judgment by *default*, and *ſeveral* damages; but an *intire* judgment *that he ſhould receive the damages aforeſaid*, whereon *error* was brought.

The defendant in *error*, to ſupport the judgment, inſiſted, that though the action, according to the *cuſtom of merchants*, does not lie in this caſe, yet the damages being *ſeveral*, and the judgment, *that he ſhould recover the damages aforeſaid*, it ſhall be taken as a *ſeveral* judgment, and not as a *joint* one.

And therefore, if judgment be reverſed for the damages given on the bad count, yet it ſhall ſtand for the reſt; and inſiſted on the caſe of *Miles* v. *Jacob*, *Hob.* 6. *Cro. Jac.* 343. 1 *Roll.* 77. or 771. 3. And alſo the caſe of *Reymer* v. *Grimſtone*.

The court were of opinion to reverſe the judgment *in toto*; and denied the authority of *Miles* v. *Jacob* in *Hob.* 6. For the judgment being intire, cannot be reverſed in part: and therefore the judgment was reverſed *niſi*. *Vide Mod. Rep. vol.* 11. *p.* 24.

Trinity, 1 *Ann.* *The Queen* v. *Rogers*.

On a *certiorari* brought, the *cuſtom* of *London* was returned, that if any citizen ſpeaks contemptuous words of an alderman, or aſſaults him in the execution of his office, an information ſhall be exhibited againſt him in the name of the common ſerjeant in the court of aldermen, and that they ſhould proceed againſt him to fine him; and that at a wardmote held by Sir *R. J.* the defendant aſſaulted him, and ſaid, *I have as much to do here as you; you think ſure you are among your Bridewell birds, but you are miſtaken*; for which an information was exhibited againſt him by the common ſerjeant.

Per curiam. It had been doubtful, if the offence had been by words only, becauſe no indictment lies at common law, but he is to be bound to good behaviour; yet for the aſſault he is puniſhable, and that may be by information there, by *cuſtom*, as well as in this court, though the regular courſe at common law is by indictment.

2dly. The court held, that the information lay in the court of aldermen, though an alderman was aggrieved; otherwiſe of the mayor, for he is an integral part, without which the court cannot be held, but the other may be ſevered, and he muſt not ſit; ſo the mayor and aldermen may grant to an alderman, but the aldermen and city cannot grant to a mayor: but the court held, that a *cuſtom* to disfranchiſe for contemptuous words ſpoken of an alderman was void, according to 2 *Lev.* 200, and a *procedendo* was granted for the reaſons aforeſaid. *Vide Raym. vol.* 2. *p.* 777. *Salk. vol.* 2. *p.* 426.

Hilary, 2 *Ann.* *Cudden* v. *Eaſtwick.*

On arguing this caſe, it was ſaid, that a *cuſtom* againſt reaſon is void, becauſe it deprives the ſubject of the common law, which is his birth-right;

See this caſe fully ſtated in page 293 of this work, under the head *Corporations. Vide Mod. Rep. vol.* 6. *p.* 123.

Eaſter, 2 *Ann.* *Ogle* v. *Norcliffe.*

In an action brought on a *bill of exchange*, the defendant pleaded in *abatement*, that he was clerk to one of the prothonotaries of the *C. B.* and ought not to be ſued (except for treaſon or felony) in any other court than in the *C. B.* and laid a *cuſtom* in the negative, without his conſent. The plaintiff replied, that the defendant conſented to be ſued in this court. The defendant demurred, and the bill was abated, becauſe the conſent intended in the plea is a waiver of the privilege by ſome act in a court of record. And as to the exception taken, that the *cuſtom* was laid in the negative,

Holt, Chief Juſtice, ſaid, that it was a privilege due to the clerks of the *C. B.* of common right, of which this court will take notice. Perhaps it might be otherwiſe, had it been againſt a clerk of the *Exchequer. Vide Raym. vol.* 2. *p.* 869.

Michuelmas, 2 *Ann.* *Evans* v. *Roberts.* Error.

On a *writ of error* brought on a judgment on a bond before the ſheriff and bailiff of *Briſtol* in a *court*, held before them, *according to the law of merchants, and according to the cuſtom of the city aforeſaid, from time whereof, &c.*

It was excepted, 1ſt, that there is no court held *by the law of merchants* before the ſheriff, for that muſt be only held before the *Mayor of the Staple*, and in matters only concerning *ſtaple* tranſactions.

Per curiam. It being laid to be *according to the cuſtom of the city*, it will be enough, like the caſe in 1 *Cro.* 46. where a *court* of *pyepowder*, which only is intended as a *court* for fairs and markets, during the fair or market, and for matters there ariſing, is ſaid to be held at *Glouceſter*, *according to the cuſtom of the city aforeſaid*, and an action for 100 *l.* brought therein, held good, becauſe of the *cuſtom, &c. Saund.* 87. 311. for it being laid to be an ancient court, it ſhall be intended a common inferior *court*, for common matters conuſable there.

The 2*d. Exception* was to the writ, for it was to remove *the record of the imparlance* that remains with you, and it appears the record removed was before his predeceſſor.

Per curiam. The writ being directed to the ſheriff without naming him, is well enough, and if a writ is directed to the ſheriff of *B.* and before its return another ſheriff is choſen, he ought to return, and execute the writ, and the difference is when it is directed to him by name, and when by the name of his office generally; and this is not like a *writ of error* from the *C. B.* for that is always directed to the Chief Juſtice by his name, if there be a Chief Juſtice, or to the other judges by name, and therefore muſt not vary. The judgment was therefore affirmed. *Vide Mod. Rep. vol.* 6. *p.* 61.

Hilary, 4 *Ann.* *Anonymous.*

Holt, Chief Juſtice. This court will on a *writ of error* take judicial notice of all *private cuſtoms* in private places; for they below are as much bound to proceed on their *cuſtoms*, as the judges here are on the common law. *Vide Mod. Rep. vol.* 11. *p.* 68.

Eaſter, 4 *Ann.* *The Mayor of Wincheſter* v. *Wilks.*

On a ſpecial verdict in the mayor's court of *Winton*, a *cuſtom* was found to reſtrain any ſtranger from ſetting up the trade of —— unleſs he was qualified according to the *cuſtom, &c.* It was queſtioned, if ſuch a *cuſtom* was good in any other city than *London*; it being a *cuſtom* reſtraining the liberty of the ſubject in a matter beneficial to the kingdom; and *Palmer*, 2, 3, 4, 5. 2 *Roll's Rep.* 203. 8 *E.* 3 *c.* 37. *Hob.* 85. *Moor*, 871. 4 *Mod.* 421. were cited.

It was argued, that this *cuſtom* was not good, and 8 *Co. Waggener*'s caſe, 1 *Co.* 53. 2 *H.* 6. 5. *pl.* 26. *Cro. Jac.* 196. 210. 2 *Roll.* 277. 1 *Lutwich*, 562. were cited as caſes in point; and great ſtreſs was laid on confirmations of acts of parliament in that caſe. 9 *Co.* 59. 1 *Lev.* 262. *Cro. El.* 165. 803.

Holt, Chief Juſtice. Whenever a town is incorporated, it is as well for the benefit of the inhabitants in general as for a freeman, where it is for the benefit of trade; and a *bye-law* will extend to both. The city of *London* has a power to qualify perſons, and to oblige infants, if they bind themſelves, to ſtand to their indentures, notwithſtanding their nonage; but there is no ſuch *cuſtom* any where elſe, which occaſioned *ſtat.* 5 *El.* which binds infants.

The court ſeemed of opinion, that it was a *bad cuſtom*. But judgment was given on the defect in the declaration; for that the plaintiffs had not intitled themſelves to the action.

Powell, Juſtice, ſaid, moſt of the corporations in *England*, that are by preſcription, aſſume this *cuſtom*. *Vide Mod. Rep. vol.* 11. *p.* 48. *Raym. vol.* 2. *p.* 1129.

Trinity, 5 *Ann.* *Bulkley* v. *Camden.*

An *aſſumpſit* was brought on a *foreign bill of exchange*, to pay according to the *cuſtom* of merchants ſo much money, at *two uſances, viz.* at *Amſterdam*; but it did not appear what the time of thoſe *uſances* was.

Holt, Chief Juſtice, ſaid, he would take notice of the *cuſtom* of merchants here, but not of that *Amſterdam* or *Venice*. In ſuch caſe, the *cuſtom* muſt be ſet forth in the declaration. *Vide Mod. Rep. vol.* 11. *p.* 92.

Hilary, 6 *Ann.* *Alton* v. *Jarvis.*

In an action of *treſpaſs* for entering his cloſe, and taking his cattle, the defendant juſtifies by ſeveral judgments in a *court baron*, where the plaintiff having levied a plaint againſt the defendant, obtained judgment, for the defendant, and coſts were given him; and thereon the defendant by virtue of a *levari facias* took the cattle and ſold them; and for this the plaintiff brings his action. The defendant demurred to the declaration.

The plaintiff's council inſiſted, that they could not ſell the cattle on a *levari* in a *court baron*, without alledging a *cuſtom* for ſo doing; and cited *Bro. Abr. Execution* 80. *Lutw.* 1524. *Dalt. Sher.* 419. *Lutw.* 1410. *Kel.* 136. The bailiff ought to keep the diſtreſs till the parties are agreed.

Holt, Chief Juſtice. Diſtraining is levying (*Q.*) If a man diſtrains for rent, and impounds the *diſtreſs*, and then brings *debt* for the ſame rent, the defendant may plead *levied by diſtreſs*. As to the ſelling by the *levari*; it is always alledged in the pleading to be *according to the cuſtom of the manor*, which is the *cuſtom* in moſt manors, being ſo general, that any *court baron, &c.* may plead it as a *cuſtom*. Adjourned. *Vide Mod. Rep. vol.* 11. *p.* 144.

Eaſter, 7 Ann. Starr v. *Rookby.*

An action was brought for not repairing of ſences; and the plaintiff declared, that *all the tenants and occupiers* uſed to repair them, which the council for the defendant ſaid could not be good, becauſe they could not lay the *cuſtom* for *occupiers*, and cited 4 *Mod. Stroud* v. *Bitt*'s caſe; *Yelv.* 75. *Cro. Eliz.* 45.

The council on the other ſide inſiſted, Tenants may preſcribe; and cited *Cro. Jac.* 665. *Book of Entries*, 140. and ſaid, that this way of pleading is uſed more now than formerly, and this is after judgment by *nil dicit*. But the court ſeemed to incline that the *preſcription* was not ſufficiently laid. *Vide Mod. Rep. vol.* 11. *p.* 168.

Michaelmas, 7 Ann. Walker v. *Atwood.*

See this caſe fully ſtated in page 231 of this work, under the head *Bills of Exchange*.

Michaelmas, 8 Ann. Mrs. Pool's Caſe.

An *habeas corpus* was directed to the keeper of the *Compter*, to bring up the body of ——*Pool*, to which they returned the *cuſtom*; that a *feme covert ſole* trading ſhall be ſued as a *feme ſole*, and that the huſband is neither chargeable in body or eſtate.

It was objected, that the *cuſtom* was bad, becauſe unreaſonable; for the huſband might take her goods, &c. and if ſhe were liable for debts, and not have her own goods to ſatisfy them, then ſhe may be detained in cuſtody, without a poſſibility of ever being releaſed.

Per curiam. The huſband has nothing to do with the goods or money with which ſhe trades, and thoſe are liable to her debts; as ſhe may be ſued *ſole*, ſo ſhe may ſue *ſole* for debts owing to her within the city; but for thoſe due to her elſewhere, the huſband muſt join. *Vide Mod. Rep. vol.* 11. *p.* 253.

Hilary, 11 Ann. Mitchell v. *Reynolds.*

See this caſe fully ſtated in page 90 of this work, under the head *Apprentice*.

Trinity, 5 Geo. Hunt v. *Hargill.*

A *libel* being brought in the *ſpiritual court* for words, *viz.* for calling *whore*, in *London*, the defendant did not inſiſt on the *cuſtom* of *London*, but went on to an hearing, and there was a ſentence, and then he moved for a *prohibition*, but it was denied.

Per curiam. This court is not bound to take notice of the *cuſtoms* of any city or town; they muſt be inſiſted on, as on a return of an *habeas corpus*, and coming after ſentence it is too late. *Vide Forteſcue, p.* 347.

Michaelmas, 12 Geo. The Duke of Somerſet v. *France and other Tenants in Cumberland.*

On a trial at *bar* on a ſpecial iſſue directed, to try the *cuſtom* of ſeveral manors of the Duke of *Somerſet* in *Cumberland*, i. e. whether he was entitled to a general fine, as his Ducheſs was when ſhe was living. Theſe were tenant-right eſtates in *Cumberland*; and it was agreed, this *cuſtom* extends only to the three northern counties; i. e. *Cumberland*, *Weſtmoreland*, and *Northumberland*. The firſt queſtion was on the evidence; for, the Duke's council were forced to make uſe of the evidence of other manors in the ſame counties that had this *cuſtom*; for it was clearly agreed, that evidence of a *cuſtom* in one manor, could not be, nor ever was allowed to prove a *cuſtom* in another. But on the authority of the caſe in 3 *Keb.* 90. and on what the council, who went the northern circuit, ſaid, that it had been conſtantly allowed in thoſe three counties; the court unanimouſly agreed to it. *Vide Forteſcue, p.* 41.

Michaelmas, 13 Geo. Story v. *Atkins.*

In this caſe, *Forteſcue*, J. ſaid, it had been long ſince *adjudged* in this court in the caſe of *Stevens* v. *Britland*, that there is no neceſſity to ſet out the *cuſtom* at large in an *agreemint to pay*, but laying it to be *according to the cuſtom*, &c. is ſufficient. *Vide Raym. vol.* 2. *page* 1427.

Eaſter, 2 Geo. 2. Naylor or Taylor, qui tam, &c. v. *Scott.*

On a *prohibition* granted to ſtay a ſuit in the ſpiritual court by the vicar of *Wakefield*, grounded on a *cuſtom* for a *due* for churching of women, which was alledged to be this, *viz.* that every inhabitant, keeping an houſe, and having a family in *Wakefield* in *Yorkſhire*, and having a child or children born in that pariſh, at the time of churching the mother of the child, or at the uſual time after her delivery, when ſhe ſhould be churched, have time, out of mind, paid *ten-pence* to the vicar of that pariſh, for, or in reſpect of ſuch churching, or at the uſual times when the mother of ſuch child ſhould be churched. Iſſue was taken on the *cuſtom*, and a verdict was found for the defendant, that there was ſuch a *cuſtom*. And on a motion made by the plaintiff's council in arreſt of judgment to prevent the granting a *conſultation*, the court were of opinion, that it was a *void cuſtom*; 1ſt. Becauſe it was not alledged what was the uſual time the women were to be churched, and therefore uncertain. 2dly. Becauſe it was unreaſonable, as it obliged the huſband to pay, if the woman was not churched at all, or if ſhe went out of the pariſh, or died before the time of churching. Judgment was therefore arreſted. *Vide Raym. vol.* 2. *p.* 1558. *Fitz-Gibbons, p.* 55.

Eaſter, 2 Geo. 2. Sherborn v. *Boſtock.*

The plaintiff having been arreſted by a proceſs out of the Mayor's court in *London*, brought an *hab. corp. cum cauſa*, on which it was returned, that by the *cuſtom* of *London*, an executor being indebted as executor, by ſimple contract within the city of *London*, may be ſued by an action of *debt* for the ſame in the Mayor's court there; and it was averred, that the plaintiff as executor to *J. S.* was indebted to the defendant within the city of *London* by ſimple contract, for which, &c.

The plaintiff's council took two exceptions to the return: 1ſt, That it being a debt by ſimple contract, it follows the perſon; and therefore the *cuſtom* being general, extends to ſtrangers as well as to citizens, ſo that a ſtranger going through the city, or being there but one night, may ſue or be ſued within this *cuſtom*; wherefore this being a general *cuſtom*, that may extend to all the ſubjects in *England*, and being contrary to the *common law*, is void.

2dly, It is not averred, that the cauſe of action aroſe within the juriſdiction of the Mayor's court; it is only averred the defendant was indebted within the city, which may well be, and yet the cauſe of action might ariſe in any part in *England*, for this debt follows the perſon; and therefore it ſhould have been averred, that he became indebted within the city of *London*; and the *cuſtom* they would return, extends to citizens only, and ſo it is ſet out in *Snelling*'s caſe, 5 *Co.* 82. *Cro. El.* 409. *Hob.* 175. 176. *Winch. Ent.* 588.

It was reſolved by the whole court, that the *cuſtom* returned being *general*, and ſuch a one as may extend to every ſubject, whether citizen or ſtranger, is void.

It was then moved, that the return might be amended, the defendant paying the coſts of the motion, which the court granted.

The return being amended, a motion was made at another day for a *procedendo*.

Page, Juſtice. It does not appear on the caption of the writ, nor is it ſet forth in the declaration, that the defendant *agreed to repay within the juriſdiction a certain ſum of money, received or borrowed within the ſaid juriſdiction*; and why ſhould not the plaintiff intitle himſelf to his action within the *cuſtom*; ſo that the caption would ſeem to be for a cauſe of action ariſing within the juriſdiction of the Mayor's court, ſince the *cuſtom* is ſo:

Raymond, Chief Juſtice. The *cuſtom* need not be ſet forth in the declaration, for in *London* they take notice of their own *cuſtoms*; if this is the uſual manner of declaring in *London*, we cannot meddle with this matter as now before us; but they muſt proceed to judgment, and then it will be properly examinable on a *writ of error*, ſo that I think a *procedendo* ſhould iſſue; to which the reſt of the judges agreed. *Vide Fitz-Gibbons, p.* 51.

Hilary, 5 *Geo.* 2. *Thompſon* v. *Roberts.*

In an action of *treſpaſs* for taking and carrying away ſo many cart load of ſtones; the defendant juſtified, and pleaded that the *place in which*, is part of the waſte of the manor of *L.* and that there are many quarries of ſtone there which are open; and that time out of mind there was an *ancient cuſtom for the free tenants of ancient meſſuages or lands within the manor*, by themſelves and ſervants, to dig and carry away ſtones for repairing their houſes, or building others.

Per curiam. This is an ill plea; for it ought to be pleaded by *preſcription*, and by way of *que eſtate*, and not by way of *cuſtom*, which is the way of pleading by copyholders only; as is the caſe of *Crowther* v. *Oldfield*; a tenant for life cannot indeed preſcribe, but here the words *tenentes terrarum* in law ſignify tenants of freehold and inheritance. *Vide Forteſcue, p.* 339.

Trinity, 9 *Geo.* 2. *Sharp* v. *Lowther.*

On a *prohibition* to the *eccleſiaſtical court* in a ſuit for *tithes* on a ſuggeſtion, and a plea in that court of a *modus*, the plaintiff declared, that he was an occupier of an ancient tenement in the pariſh of *B.* and that within the pariſh aforeſaid, there has been a *cuſtom* for all tenants and occupiers of the ſaid tenements, yearly to pay 5 *s.* and to perform certain ſervices to the parſon, in lieu and ſatisfaction of all tithes of corn and hay; which ſaid *modus* the parſon of the ſaid pariſh has always accepted; the defendant traverſed the *cuſtom* as laid in the declaration, and thereon the parties went to iſſue; and a verdict was given for the plaintiff.

The defendant's council now moved in arreſt of judgment, and objected, that this is a bad *modus*, being alledged to be warranted by *cuſtom*, whereas a *cuſtom* is local and extends over ſome place; whereas this is laid to extend to the occupiers of ſuch a tenement, and therefore if it were good, it ſhould be laid as a *preſcription*; and to ſupport this objection, 1 *Lutw.* 126. *Nicholſon* v. *Smith. Cro. Car.* 418. *Baker* v. *Brewman.* 1 *Vent.* 97. *Poplins* v. *Henſtock.* 2 *Lutw.* 1312. *Bereſford* v. *Bacon. Bro. cuſtom, pl.* 51. *Popham* 201. *Jackin* v. *Vivian*, were cited.

The plaintiff's council took the diſtinction in *Gatewood*'s caſe, 6 *Co.* 60. *b.* between a charge on another's lands, and a diſcharge in his own land, and that therefore a *cuſtom* that every inhabitant has paid a *modus* in diſcharge of tithes is good. He cited alſo *Hob.* 118. *Dyer* 349. 1 *Vent.* 3. *Yelv.* 55. *Hob.* 300 and 85.

Lord *Hardwicke.* The queſtion is, whether here is any *modus* ſufficiently and ſubſtantially found; for if there is now, after a verdict no *conſultation* can go; the objection is, that though the ſubject matter is a proper *modus*, yet the manner of laying it is defective, being laid by way of *cuſtom*; for they ſay a *cuſtom* extends over ſome place or vill, and that it is a preſcription which extends only to particular perſons; and there are, I allow, many caſes to warrant that, but they are not applicable in this caſe; and the difference laid down by the plaintiff's council, as to the pleading a thing as a charge on another, or in diſcharge of one's ſelf is very material; it is admitted, that *cuſtom* may be alledged for a particular tenant, where the neceſſity of the caſe requires it; as in caſe a copyholder claims a right of common out of the manor, he muſt lay a preſcription in the Lord; but where he claims common in the waſte of the Lord, he having ſtrictly no inheritance in his land, but only a tenant at will, and for that a preſcription muſt always be had by way of *que eſtate*, which he cannot alledge, not being tenant in *fee*; for in ſtrictneſs the *fee ſimple* is in the lord; therefore the law permits him to alledge it as a *cuſtom* in the occupiers of ſuch a piece of land, *&c.* and that ſeems agreeable to this caſe; for the plaintiff here could not preſcribe that the owners of the inheritance, and all thoſe whole eſtates, *&c.* have been always diſcharged of tithes; becauſe here is no diſcharge claimed, but a ſatisfaction in lieu of tithes, therefore it muſt be alledged in this way; it is allowed, that if the declaration had been laid, that a *modus* had been paid him time out of mind, it had been good; which ſhews there is no neceſſity of laying a ſtrict preſcription. All the caſes cited, have been in inſtances where it is neceſſary to preſcribe by a *que eſtate*, and in ſuch caſes a *cuſtom* may not be alledged, ſo is the caſe in 1 *Lutw.* 126. ſo is that in *Cro. Car.* 418, and that in *Vent.* 97. And the reaſon is, becauſe all preſcriptions in a *que eſtate*, ſuppoſe a grant made originally, and therefore it ſhould be duly derived down to the claimant, but in this caſe it is impoſſible to ſhew a *que eſtate*; and therefore it is ſufficient to lay there has been a *modus* time out of mind; if the word *modus* had not been uſed; but a declaration ſhould only ſay, that time out of mind, the tenants and occupiers of ſuch a tenement had paid, *&c.* or had uſed and accuſtomed to pay, that would be good; and why ſhould it differ, becauſe the ſentence begins by ſaying, there is a *cuſtom* to pay; eſpecially at the concluſion, which ſays, that this *cuſtom* and *modus* have been always inviolably preſerved, ſhews it was intended to be claimed as a *modus*, however, this being a *cuſtom* alleged in a ſuit of *prohibition*, it differs from other allegations of *cuſtoms*, for in thoſe the *cuſtom* muſt be proved exactly as it is laid; otherwiſe the party fails; but in *conſultation* the defendant is conſidered as an actor, ſuing for a conſultation; and therefore as in this, if on the whole it appears to the court, that there is a *modus*, they cannot grant a *conſultation*; and it has been determined, that if the jury ſhould find what amounts to a *modus*, the court cannot award a *conſultation*: therefore I think, taking this caſe in any light, the court cannot award a *conſultation*.

Page, Juſtice. If 6 *d.* is inſiſted on, and but 4 *d.* found due; yet there ſhall not be a *conſultation*, for the practice is, that in ſuch caſes the judge always certifies that they have proved a *modus.* Whenever you can ſhew that ſome other thing is due, for which the parſon has a remedy, a *prohibition* is granted; and for a *modus*, he has a remedy not only at *common law*, but in the *ſpiritual court* alſo, if he will ſue for that. On this verdict it muſt have been proved, that tithes were never paid in kind; I take it that a *modus* and a *cuſtom* are the ſame, for a *modus* is the manner of paying, and the manner of paying for ever is a *cuſtom.*

Probyn, Juſtice. The fact here is found as the plaintiff laid it, only the deſcription of it as a *cuſtom* is miſtaken.

Lee, Juſtice. It appears by the caſe in *Hob.* 85. that the bare uſe of the word *cuſtom* in pleadings, will not bring them under the ſame regulations as the law has appointed for pleadings of *cuſtoms*, and in that caſe too, a diſcharge laid by way of *cuſtom*, was not conſidered as a *cuſtom*, but as a *preſcription.* If the fact here alledged is a ſufficient diſcharge, ſure the bare alledging it to be a *cuſtom* will not vitiate; the force of the word *cuſtom* in this caſe, is no more than it is *cuſtomary*; it is allowed, that if this had been laid as a *preſcription* it had been right; ſo then the queſtion is, whether what is here laid, amounts to a ſufficient deſcription of a diſcharge, and I think it does; in the caſe cited for the defendant, there was not ſufficient to ſhew a *preſcription.* Therefore the court ordered the *poſtea* to be delivered to the plaintiff. *Vide Caſes Temp. Lord Hardwicke, p.* 292.

Hilary, 6 *Geo.* 3. *Heſketh* v. *Braddock.*

On a *writ of error* brought from the *great ſeſſions* for the county of *Cheſter*, who had reverſed the judgment of the *Portmote* court of the city of *Cheſter*, in an action of *debt* brought there for recovering a penalty of 5 *l.* *&c.*

Adjudged, that all courts muſt take notice of their own *cuſtoms*, and their *cuſtoms* can be tried no where elſe but where they ariſe.

If a *cuſtom* be a neceſſary foundation for a *bye-law*, it is neceſſary to prove ſuch *cuſtom*. *Vide Bur. vol.* 3. *p.* 1847.

Eaſter, 6 *Geo.* 6. *Butler* v. *Heathby*.

On an action on the *caſe* brought againſt the defendant for not fetching away his *tithes* in a reaſonable time, the declaration ſet forth, that the plaintiff ſet out the *tithes*, and the defendant refuſed to fetch them away.

On the trial of the cauſe, the defendant's council inſiſted on a *cuſtom* in the pariſh, *viz.* "that notice "ſhould be given to the owner of the *tithes* of the ſet- "ting them out." A verdict was found for the plaintiff, and *thirty guineas* damages, ſubject to the opinion of the court on the following queſtion:

"Whether this *cuſtom* be good in *law* or not?"

On a motion for a new trial in this cauſe, a rule to ſhew cauſe was obtained, and on ſhewing cauſe, the defendant's council raiſed two *objections*:

1ſt. It is ſetting up the *eccleſiaſtical law* againſt the *common law* of the kingdom.

2dly. This cannot be done by *cuſtom* in any *particular diſtrict*.

Wilmot, Juſtice. By the *common law*, no notice is neceſſary; by the *eccleſiaſtical law* it is neceſſary. The queſtion therefore is,

"Whether the *eccleſiaſtical law* can be introduced "under the notion of ſuch a *cuſtom*?

After hearing council on both ſides, the court gave their opinion:

Per curiam. We are all clear that it is a *good cuſtom*. It is for the *prevention of fraud*, and for the *convenience of the parties*: therefore the rule muſt be made abſolute for a *new* trial, but without *coſts*. *Vide Bur. vol.* 3. *p.* 1891.

See **Corporations** *and* **Preſcription.**

For **Conſpiracy,** *See* **Indictment.**

Damages.

Mich. 2 *W.* & *M.* *Cone* v. *Bowles*. Error.

In an action of *replevin* brought againſt three defendants, one of whom was an infant, all appeared and avowed by attorney. Judgment being given againſt the plaintiff, he brought a *writ of error*, and aſſigned the infancy of one of the defendants for *error*: and becauſe he might have pleaded this in abatement to the avowry, it was held well enough, and judgment was affirmed; but the court held the avowants ſhould have no *coſts*; for all ſtatutes that give *coſts* are to be taken ſtrictly, as being a kind of penalty, and *ſtat.* 3 *H.* 7. *cap.* 10. mentions only *writs of error* brought by any defendant, or tenant. *Vide Salk. vol.* 1. *p.* 205. *Mod. Rep. vol.* 4. *p.* 7.

Hilary, 5 *W.* & *M.* *Lawſon* v. *Storie*.

By *ſtat.* 2 *W.* & *M. ſect.* 1. *cap.* 5. *treble damages* and *coſts* are given againſt the reſcouſor of a *diſtreſs* for rent: in an action on the *caſe* for a *reſcous* upon this ſtatute, the plaintiff ſhall recover *treble coſts* as well as *treble damages*; for the *damages* are not given by the ſtatute, but increaſed, an action on the *caſe* lying for a *reſcous* at common law. *Vide Salk. vol.* 1. *p.* 205.

Mich. 7 *W.* 3. *Herbert* v. *Waters*.

In an action of *replevin*, the defendant avowed as *overſeer* of the poor for a *diſtreſs* for a rate on *ſtat.* 43 *Eliz. cap.* 2. at the trial the plaintiff was non-ſuited, and *no damages* being found, the court was moved for a *writ of inquiry* of *damages* to ſupply this omiſſion, and it was granted; becauſe if the jury had enquired, they had enquired as an inqueſt of office, on which no *attaint* would have lain. 1 *Cro.* 146. 1 *Ro.* 272. 2 *Ro.* 112. 1 *Sid.* 380. And the council diſtinguiſhed this from the caſe 1 *Sid.* 380. of an avowry for a rent-charge according to *ſtat.* 17 *Car.* 2. *cap.* 7. There a *writ of inquiry* was rightly denied, for by that ſtatute the ſame jury are to enquire of the rent-arrear, and the value of the cattle; but *ſtat.* 43 *Eliz.* does not tie it up only to the ſame jury.

Holt C. J. ſaid, That 17 *Car.* 2. in the caſe of *Burton* v. *Robinſon*, *detinue* was brought, and on trial of the iſſue, the jury found the *damages*, but not the *value* of the *diſtreſs*; and the court granted *a writ of inquiry*, which he ſaid was contrary to *Cheney*'s caſe, and as he thought, contrary to law. *Vide Mod. Rep. vol.* 12. *p.* 85. *Salk. vol.* 1. *p.* 205. *Raym. vol.* 1. *p.* 59. *Mod. Rep. vol.* 5. *p.* 118.

Trin. 9. *W.* 3. *Shore* v. *Madiſten*. Error.

The plaintiff brought an action of *debt* in *C. B.* on *ſtat.* 5 *Eliz. cap.* 9. for not appearing upon a *ſubpœna ad teſtificandum*, and recovered judgment, with *coſts* of ſuit; and upon this judgment, *error* was brought here, and the court held, that where a ſtatute gives a ſum certain to the party grieved, he ſhall in conſequence have *coſts*, becauſe he had a right of action antecedent to the bringing of the action. But where a ſum certain is given to a ſtranger, as where it is to him that ſhall proſecute, he ſhall *not* have his *coſts*; for till he commenced his action, he had no right of action in him: and the judgment was affirmed. 1 *Brownl.* 66. *Hutt.* 22. 1 *Lut.* 201. *No coſts* ſhall be in a popular action, be the penalty *certain* or *uncertain*; but where the party grieved ſhall have a *penalty certain*, he ſhall have *coſts*. *Vide Salk. vol.* 1. *p.* 206.

Trinity, 9 *W.* 3. *Prince* v. *Molton*.

In an action on the *caſe*, wherein the plaintiff declared, that on the 2d day of *July*, 6 *W.* 3. he was poſſeſſed of a meadow next adjoining to a river, and to another contiguous to the ſaid river; which river, time out of mind, ran through his meadow to an ancient mill of the defendant's, without any overflowing. That the defendant, on the 3d of *Auguſt* 6. *W.* 3. extended and enlarged the foundation of his mill further into the river, whereby he ſo obſtructed the river, and heightened the water, that it overflowed and drowned the plaintiff's meadow, *whereby* he loſt the uſe and profit thereof, from the aforeſaid 2d day of *July* to the time of exhibiting the bill. *Not guilty* pleaded, being a verdict was found for the plaintiff.

It was moved in arreſt of judgment, that *entire damages* are given to the plaintiff; and from the 2d day of *July* to the 3d of *Auguſt*, he had no *damages* at all, but by his own ſhewing; and it ſhall not be intended, the *damages* given by the jury are only for the time after the 3d of *Auguſt*; for the *damages* ſhall be underſtood to be given not according to law, but according to the allegation of the plaintiff who lays his *damage*, as reſolved in the caſe of *Harbin* v. *Green*, *Hob.* 189. *Moore* 887. And at firſt, all the court, except *Rokeby*, ſeemed to think it well enough; for it may be, the plaintiff laid up his meadow for graſs from the 2d of *July*; but afterwards judgment was arreſted; for though he might loſe the profit from that time, he, notwithſtanding, could not loſe the uſe; if he had not ſaid *uſum* they might have given judgment for him: this caſe is the very ſame with *Harbin* v. *Green*. *Vide Mod. Rep. vol.* 12. *p.* 131.

Trinity, 9 *W.* 3. *Weſt* v. *Cole*.

On an *indebitatus aſſumpſit*, and a *quantum meruit* for meat, drink, and lodging; and on another *aſſumpſit*, and *quantum meruit*, in the ſame declaration, for wares ſold; judgment by default; a *writ of enquiry*, and *entire damages* given *by reaſon of the premiſes*; the judgment was moved to be ſtaid, becauſe in the ſecond *aſſumpſit*, and *quantum meruit*, there is no averment *in fact* of the value of the wares, and ſo is void, for which no *damages* can be given. A *quantum meruit* for wares ſold, without an averment *de facto* of the value, is naught; but here being another *aſſumpſit* well laid, we will ſuppoſe all the *damages* given for that, and reject the other as ſurpluſage. *Vide Mod. Rep. vol.* 12. *p.* 127.

Michaelmas, 9 *W.* 3. *Ricards* v. *Corneforth.*

Adjudged in this caſe, that in *aſſumpſit*, if two breaches are aſſigned, and one is ill aſſigned, and a verdict is given for the plaintiff, and *damages entire*, he ſhall never recover; becauſe *damages* are intended as well for the breach which is ill aſſigned, as for the other that is well. *Vide Mod. Rep. vol.* 5. *p.* 363.

Hilary, 10 *W.* 3. *Parkhouſe or Parkhurſt*, v. *Forſter Foſter.*

See this caſe fully ſtated in page 277 of this work, under the head *Conſtable*.

Eaſter, 10 *W.* 3. *Braſfield* v. *Lee.*

In an action of *treſpaſs*, *aſſault*, *battery*, *falſe impriſonment*, the plaintiff declared, that the defendant aſſaulted, beat, and impriſoned the plaintiff, 1ſt *October*, 9 *W.* 3. and detained him in priſon *four* months. On *not guilty* pleaded, a verdict was given for the plaintiff, and *entire damages* given by the jury. And now it was moved in arreſt of judgment, that the declaration was a declaration of *Michaelmas*, 9 *W.* 3. and therefore the damages being entire, and given for the impriſonment of *four* months from the 1ſt *October*; it appears the *damages* were given for impriſonment after the action was commenced: therefore judgment was arreſted. *Vide Raym. vol.* 1. *p.* 329.

Summer Aſſizes, 10 *W.* 3. *Windle* v. *The Hundred of Chelmsford.*

In an action on the ſtatute of *Wincheſter*, in which the plaintiff ſhewed, that he was robbed of a bank bill; on evidence at the trial at *Brentwood ſummer aſſizes*, before *Hatſel*, Baron of the Exchequer, he directed the jury to give *damages* for the whole value of the bill, which they did accordingly. *Vide Raym. vol.* 1. *p.* 727.

Eaſter, 10 *W.* 3. *Fetter* v. *Beal.*

In a ſpecial action of *treſpaſs* and *battery*, for a *battery* committed by the defendant on the plaintiff, and breaking his ſkull, the plaintiff declared of the *battery*, &c. and that he brought an action againſt the defendant, and recovered 11 *l.* and no more; and that after that recovery, part of his ſkull, by reaſon of the ſaid *battery*, came out of his head, whereby, *&c.* The defendant pleaded the ſaid recovery in *bar*. On which the plaintiff demurred; and his council ſtrongly inſiſted, that this action differed from the nature of the former, and therefore would well lie, notwithſtanding the recovery in the other; becauſe the recovery in the former action was only for the bruiſe and battery, but here there is a *maihem* by the loſs of the ſkull. As if a man brings an action againſt another for taking and detaining of goods for *two months*, and afterwards he brings another action for taking and detaining for *two years*; the recovery in the former action is not pleadable in *bar* of the ſecond. If death enſues on the battery of a ſervant, this will take away the action *whereby he loſt his ſervice*. And then, if a conſequence will take away an action, for the ſame reaſon it will give an action. If a man brings an action for uncovering his houſe, by which his goods were ſpoiled, and afterward, by reaſon of the ſaid uncovering, new goods are ſpoiled, he ſhall have a new action, which *Holt*, Chief Juſtice, denied.

Per curiam. The jury, in the former action, conſidered the nature of the wound, and gave *damages* for all the *damages* it had done to the plaintiff; and therefore a recovery in the ſaid action is good here. And it is the plaintiff's fault, for if he had not been ſo haſty he might have been ſatisfied for this loſs of the ſkull alſo: therefore, the defendant had judgment *niſi*, &c.

In *Trinity*, 13 *W.* 3. the court was moved in this cauſe for judgment for the plaintiff, becauſe this ſpecial *ſubſequent damage* is a ſufficient foundation for an action; and that for great reaſon, becauſe the jury could not have conſideration of it in giving *damages*. And it was compared to the caſe of a nuiſance, that a man might have an action for every new dropping of the water from the eaves of the houſe. 2dly. There is a *maim* laid here, and therefore the prior recovery in the action of aſſault cannot be a *bar*.

Holt, Chief Juſtice. This is a new caſe, to which there is no parallel in the books. Every one ſhall recover *damages* in proportion to his prejudice, which he has ſuſtained; and if this matter had been given in evidence, as that which in probability might have been the conſequence of the battery, the plaintiff would have recovered *damages* for it. The injury, which is the foundation of the action, is the *battery*, and the greatneſs or conſequence of that is, only in aggravation of *damages*. In ſome caſes the *damage* is the foundation of the action, as in an action by the maſter for battery of his ſervant, *whereby he loſt his ſervice*, but here the battery *only* is the foundation of the action; and this *damage*, which might probably enſue, might and ought to have been given in evidence, and muſt be intended to have been given in evidence in the former action, and that the jury gave *damages* for all the hurt he had ſuffered; for if the nature of the battery was ſuch, as probably to produce this effect, the jury might give *damages* for it before it happened. As to the caſe of a ſea-wall, the plaintiff would recover *damages* enough in the firſt action to rebuild it; and if he rebuilds it ill, the fault is his own. And as to the nuiſance, every new dropping is a nuiſance. As to the *maihem*, that is nothing, for a recovery in battery, *&c.* is a *bar* in appeal of *maihem*, 4 *Co.* 43. *a.* becauſe in battery the plaintiff may give a *maihem* in evidence, and recover *damages* for it. And *Holt*, Chief Juſtice, further ſaid, that the original cauſe was tried by him eight years before, and the plaintiff and defendant appeared to be both in drink, and the jury did not well know which of them was in fault; and therefore they gave the leſs *damages*. The plaintiff could not obtain judgment, the court inclining ſtrongly againſt him. *Vide Raym. vol.* 1. *p.* 339. 692.

Michaelmas, 11 *W.* 3. *The Earl of Kent* v. *Walters.*

In an action of *trover*, for ſeveral loads of wood, where judgment went by default, and a *writ of inquiry* was executed, the court was moved to ſet aſide the *writ of inquiry*; on affidavit that the ſheriff refuſed to receive any evidence of the value of the wood, but directed the jury to find the full *damages* declared of; and for that it was ſet aſide, on payment of *coſts*. *Vide Mod. Rep. vol.* 12. *p.* 317.

Michaelmas, 12 *W.* 3. *Davila* v. *Dalmanſer.*

Per curiam. If there be two dealers, and they reciprocally pay money for one another, they ſhall have their reciprocal action for it, in which either of them ſhall give *ſpecial* bail; and neither of them ſhall give the money paid by him in mitigation of *damages*, unleſs there is an account ſtated, and they never can have an account againſt one another. *Vide Mod. Rep. vol.* 12. *p.* 408.

Hilary, 13 *W.* 3. *Fenwick* v. *Lady Groſvenor.*

Holt, Chief Juſtice. A judge of *niſi prius*, on executing a *writ of inquiry*, is only an aſſiſtant to the ſheriff, and has no judicial power; and if the parties come to any agreement, there the way to make it effectual is, to bring it to him to ſign, and after to move above to have it made a rule of court. *Vide Mod. Rep. vol.* 12. *p.* 610.

Eaſter, 13 *W.* 3. *The Caſe of the Farmers of Hampſtead-Water.*

On the executing a *writ of inquiry* of *Damages*, in *treſpaſs* for digging an hole in the plaintiff's ſoil, whereby his land was overflowed, and *continuing the tranſgreſſion* for nine months; it was inſiſted, that they might give evidenee of a *conſequential damage* after the nine months, as well as in a *nuiſance* which continues nine months, and the cauſe is removed; if the effect continues after, *damage* may be recovered for it.

Holt, Chief Juſtice, ſaid, he was not ſatisfied, that the parity would hold, for the *giſt* of the action in a nuiſance is the *damage*; and therefore as long as there are *damages*, there is ground for an action; but *treſpaſs* is one intire act, and the very *tort* is the *giſt* of the action; and therefore he ſaid he doubted, whether an action would lie for the continuance of a *treſpaſs*, as for that of a nuiſance. *Vide Mod. Rep. vol.* 12. *p.* 519.

Eaſter, 13 *W.* 3. *How* v. *Acton.*

Holt, Chief Juſtice. If the plaintiff delay the executing a *writ of inquiry*, till a year after the interlocutory judgment, he cannot do it after, without a *ſci. fac.* *Vide Mod. Rep. vol.* 12. *p.* 500.

Trinity, 13 *W.* 3. *Pratt* v. *Rutleis.*

On a *diſtreſs* for rent, *replevin*, and avowry, the plaintiff in *replevin* nonſuited, a *retorno hab.* awarded, and a *writ of inquiry* and *damages* iſſued out, and before execution a ſecond deliverance; a doubt aroſe whether this ſecond deliverance was a *ſuperſedeas* of the *writ of inquiry*?

Holt, Chief Juſtice. The *damages* are not given by *ſtat.* 21 *H.* 8 *c.* 19. for getting the thing avowed for from the avowant, but for the vexation in bringing a *replevin* without cauſe; and the *nonſuit* is ſufficient evidence, that there was no cauſe of *replevin*, at leaſt it is evidence of a vexation; and if the avowant cannot maintain his avowry, the plantiff ſhall recover *damages* for the diſtreſs. If a man brings an action and is nonſuited, the defendant ſhall recover *damages* for the nonſuit; but if the plaintiff brings a new action, and recovers, he ſhall recover *damages*, but ſhall have nothing for the coſts of the nonſuit; and if a ſecond deliverance is brought before a *retorno habendo* executed, it ſhall *ſuperſede* the execution; if after it it is executed, it ſhall notwithſtanding fetch back the *diſtreſs*. *Vide Mod. Rep. vol.* 12. *p.* 547.

Summer Aſſizes, 13 *W* 3. *Smithies* v. *Dr. Harriſon.*

In an action on the *caſe* for words, which imported the committing of adultery by the plaintiff with *Jane at Stile*, the defendant in mitigation of *damages*, may give in evidence, that the plaintiff committed adultery with *Jane at Stile*, but not with any other woman.

Per Holt, Chief Juſtice, at *Brentwood*, *Summer Aſſizes*, and ruled accordingly. *Vide Raymond*, *vol.* 1. *p.* 727.

Hilary, 1 *Ann.* *Brown and Wife* v. *Gibbons.*

See this caſe fully ſtated in page 305 of this work, under the head *Coſts*.

Hilary, 1 *Ann.* *Cutting* v. *Wilkins.*

See this caſe fully ſtated in page 327 of this work, under the head *Cuſtom*.

Hilary, 1 *Ann.* *Brook* v. *Biſhop.*

See this caſe fully ſtated in page 119 of this work, under the head *Arreſt of Judgment.*

Michaelmas, 1 *Ann.* *Shortridge* v. *Lamplugh.* Error.

On a *writ of error* brought on a judgment given in *C. B.* on an action of *covenant*, among other *errors* aſſigned, was the following, *viz.* That the plaintiff ought to recover only for the *damages* that he has ſuſtained at the time of the action brought; but here the jury on the *writ of inquiry*, have given *damages*, that the plaintiff ſuſtained after the bringing of the action, *viz.* till the *writ of inquiry* ſued, which is erroneous. 2 *Saund.* 169. *Hambleton* v. *Vere.* *Hob.* 189. *Harbin* v. *Green.* *Trin.* 9 *W.* 3. *Prince* v. *Moulton.*

Holt, C. J. anſwered, 1ſt, That the *writ of inquiry* recited the declaration, *in theſe words*, which was well enough. 2dly, That it is not like the caſes cited, where more *damages* were given than ought to have been given; becauſe the jury in this caſe ought to give ſo much in *damages* as would repair the tenements, and put them into ſuch condition as they ought to be in, and *damages* alſo for the rent; and therefore if the tenements were become in a worſe condition ſince the action was brought, they ought to give *damages* for them. The judgment was accordingly affirmed by the whole court. *Vide Raym. vol.* 2. *p.* 798.

Hilary, 2 *Ann.* *Jenkins and Wife* v. *Plombe or Plume.*

See this caſe fully ſtated in page 208 of this work, under the head *Baron and Feme.*

Eaſter, 2 *Ann.* *Ven* v. *Phillips.*

In an action of *treſpaſs*, for chaſing, driving, and wounding his ſheep, *whereby* ſome died, and others were damnified, and alſo for taking and carrying away one hog of the plaintiff; the jury found the defendant *guilty* of all but the taking and carrying away the hog, of which they found him *not guilty*, and gave 2 *d.* *damages*; and the queſtion was, whether the plaintiff could have more coſts than *damages*; And the court opening the matter, held the plaintiff ſhould have his full coſts, for this is out of *ſtat.* 22 & 23 *Car.* 2. *c.* 9. and the reaſon is, becauſe the *ſtatute* enacts, that in all actions of *treſpaſs*, *aſſault and battery*, and other perſonal actions wherein the judge ſhall not certify an *aſſault and battery* ſufficiently proved, or that the title of the *land* came in queſtion, there ſhall be no more coſts than *damages*, where *damages* are found under 40 *s.* ſo that the firſt words are general, yet by the laſt words, *actions* are reſtrained to ſuch wherein there can be ſuch certifying of the *battery*, or the like: therefore if it be an action wherein there can be no ſuch certifying, as *debt*, *aſſumpſit*, *trover*, *treſpaſs* for taking his goods, *treſpaſs* for ſpoiling his goods, *treſpaſs* for beating his ſervant *whereby he loſt his ſervice*, it is out of the *ſtatute*; but *treſpaſs quare clauſum fregit*, or *treſpaſs* for riding over his ground, are within the *ſtatute*. 3 *Keb.* 184, 3, 8, 9. *Raym.* 487. 2 *Jones* 232. *Treſpaſs* for breaking his ſtall *ſituated in the market*. And although *treſpaſs quare clauſum fregit*, is within the *ſtatute*, yet if it goes on to cutting and carrying away his corn, it is out of the *ſtatute*, unleſs the defendant is acquitted thereof. 3 *Keb.* 21. 247. *Vide Salk. vol.* 1. *p.* 208.

Trinity, 3 *Ann.* *Fanſhaw* v. *Morriſon.* Error.

On a *ſci. fac.* on a recognizance in *C. B.* againſt bail, the plaintiff had judgment for execution on the recognizance, and *that he ſhould recover his damages, which he had ſuſtained by reaſon of the delay of execution.* On a *writ of error* in this court, this point was reverſed, for the bail are only liable to coſts of ſuit by the *ſtatute*, and *damages* by reaſon of the delay of execution are not coſts, nor coſts of ſuit, but *damage* ſuſtained by being ſo long out of his money, which is uſually aſſeſſed by allowing the party what lawful intereſt would have come to him in the mean time; ſo that *coſts* and *damages* are different in this caſe, given for different ends, and aſſeſſed by different meaſures. *Vide Salk. vol.* 1. *p.* 209. *Raym. vol.* 2. *p.* 1138. *Mod. Rep. vol.* 6. *p.* 157, 197.

Eaſter, 4 *Ann.* *Vivian* v. *Champion.*

See this caſe fully ſtated in page 248 of this work, under the head *Breach.*

Eaſter, 4 *Ann.* *Anonymous.*

Holt, Chief Juſtice. If a farm is out of repair in the life of the anceſtor, and after the heir brings an action, he ſhall recover *damages* for the whole time: but the heir ought not to alledge a *breach* in the anceſtor's time, becauſe that belongs to the executor. *Vide Mod. Rep. vol.* 11. *p.* 45.

Michaelmas, 7 *Ann.* *Tate* v. *Whiting.*

See this caſe fully ſtated in page 37 of this work, under the head *Actions.*

Hilary, 8 *Ann.* *Biſhop* v. *Eagle.*

The plaintiff declared on a *prohibition*, and on a demurrer to the declaration, an exception was taken to it, becauſe the declaration ſet forth, that the defendant ſued in the *ſpiritual court after the King's writ of prohibition to the contrary, directed to him*, but does not ſay, *delivered*, and here appears no cauſe of action, ſince it is not ſet forth, that the *prohibition* was delivered.

This matter was moved laſt term; and this term the court were of opinion, *Holt*, Chief Juſtice, being abſent, that when a perſon proceeds for *damages*, then it muſt be ſet forth, that the *prohibition* was delivered, and alſo a *venire* laid: but in this caſe, which is only to maintain the *juriſdiction* of this court, it is not neceſſary. *Vide Mod. Rep. vol.* 11. *p.* 263.

Hilary, 8 *Ann.* *Todd and Wife* v. *Redford.*

See this caſe fully ſtated in page 212 of this work, under the head *Baron and Feme.*

Hilary, 12 *Ann.* *Jones* v. *Gwynn.*

See this caſe fully ſtated in page 39 of this work, under the head *Actions.*

Hilary, 1 *Geo.* *Holroi* v. *Ebizſon.* Error.

An action was brought in *C. B.* on ſeveral promiſes; and judgment by *default*; a *writ of inquiry* executed, and 424 *l. damages* given. A *writ of error* being brought in this court, the plaintiff in error was *nonproſſed.*

The court was moved on *ſtat.* 3 *H.* 7. *c.* 10. that the defendant in *error* ſhould, beſides his coſts, have intereſt allowed him, for the ſum *adjudged* due to him, pending the *writ of error*, from the judgment.

After hearing council on both ſides, the court gave their opinion.

Parker, Chief Juſtice. No man is ſure of making intereſt of his money; a man cannot always place his money out to his mind; he may loſe the principal; and wherever intereſt is made, a hazard is run: but here there is no hazard at all; intereſt was very low when this act was made.

However, if this were a new caſe, I ſhould think it highly reaſonable, that *damages* ſhould be given for the delay; the word *coſts* in the act ſeem to me to relate to vexation, and *damages* to delay.

By the common law, in every action of *debt*, *damages* are given, *occaſioned by detaining the debt*, either by *writ of inquiry*, or by the court.

Where a penal ſum is recovered, *damages* are never given. But on a ſingle bill, even by the common law, *damages* are given for the delay.

This is a key to the ſtatute. Whenever a man is kept out of his juſt debt, the law implies and ſuppoſes a *damage*. I doubt only by reaſon of the different practice in the Exchequer.

Afterwards, in *Trinity* term, it was reſolved by the whole court, that the defendant, on a *writ of error*, brought to this court, ſhould not have intereſt allowed him, by way of *damages*, for the ſum *adjudged* due to him, from the time of the firſt judgment, pending the *writ of error.*

For at the time of making *ſtat.* 3. *H.* 7. *c.* 15. which gives the *damages* on the *writ of error*, all intereſt was imputed unlawful; and therefore that ſtatute could not give it.

In fact, when intereſt ran high, as at 10 *l. per cent.* intereſt has not been allowed.

In *writs of error* brought in the *Exchequer Chamber*, intereſt is never allowed, and an uniformity in practice is to be wiſhed and endeavoured. *Vide Mod. Rep. vol.* 10. *p.* 274.

Michaelmas, 2 *Geo.* *Leeds* v. *Carlton.*

A man ſues in the *ſpiritual court* for a matter which on the face of the libel appears to be of temporal conuſance, and obtains a ſentence. The defendant appeals firſt, and then ſues out a *prohibition.* In the declaration in that *prohibition*, and proceſs thereon, there is judgment againſt the defendant by *nil dicit*; and a *writ of inquiry of damages* awarded

It was now debated, whether *damages* were to be given by the jury on the *writ of inquiry* for the proceedings in the *ſpiritual court*, from the beginning of the ſuit in that court; or only for the proceſs in that court, ſubſequent to the delivery of the *writ of prohibition.*

After hearing council on both ſides, the court gave their opinion.

Parker, Chief Juſtice, was of opinion, that *damages* were to be given only for the proceedings in the *ſpiritual court*, ſince the *prohibition* delivered.

This is a ſpecial action for proceeding in contempt of the *prohibition*, this is the very *giſt* of the action; on this iſſue is conſtantly joined, which, according to what is now contended for, muſt be an immaterial iſſue; for if the iſſue is found with the defendant, that he has not proceeded after the *prohibition* delivered, yet if he had proceeded at all, the plaintiff muſt have judgment for his *damages.* Nay, according to this doctrine, the very pleading the plea, in this ſort of actions, is very impertinent; and on doing which, the plaintiff may ſign his judgment; for he ought not to plead that he did not proceed after *prohibition*, &c. but that he did not proceed at all.

Prohibition is to the judge, not to the party; and in this caſe, this is not a *prohibition* to the judge, but to the judge on the appeal.

In *prohibition*, two things are to be conſidered; 1ſt. Whether the party is to be puniſhed? 2dly. Whether he is to be eſtopped.

His not proceeding after the *prohibition* delivered, prevents his puniſhment, and excuſes him from contempt; but cannot hinder the plaintiff of his judgment.

If on this iſſue, whether the defendant did, or did not proceed after *prohibition* delivered, a verdict is found for the defendant, no coſts ever are given.

The late ſtatute about giving coſts was unneceſſary, if this doctrine had been true.

And of this opinion was the court. But *Pratt*, Juſtice, doubting, the matter was *adjourned.* *Vide Mod. Rep. vol.* 10. *p.* 319.

Eaſter, 7 *Geo.* *Onſlow* v. *Orchard.*

An action of *treſpaſs* was brought againſt two, and judgment by *default*, and ſeparate *damages*, 20 *l.* as to one, and 1 *d.* as to the other; and ſtayed till further motion, on the authority of *Heydon*'s caſe, that the *damages* cannot be ſevered where the *treſpaſs* is confeſſed. In *Trinity* term following the judgment was arreſted. *Vide Stra. vol.* 1. *p.* 422.

Eaſter, 7 *Geo.* *Woodford* v. *Eades et al.*'

On a contract for ſtock between the plaintiff and *J. S.* they each depoſited 200 *l.* in the hands of the defendant,

dant, and *J. S.* not performing his agreement, the plaintiff ſued for the depoſit, had judgment on demurrer, took out a *writ of inquiry*, and proved his caſe; but the jury, on a motion that the defendant could not pay the money without the conſent of both parties, gave 1 *d. damages*; which was now ſet aſide, the court ſaying, that the rule of not ſetting aſide verdicts for the ſmallneſs of the *damages* did not extend to this caſe, where the jury miſtook in point of law; and the Chief Juſtice ſaid, he knew no reaſon why the court ſhould not interpoſe in the other caſe. *Vide Stra. vol.* 1. *p.* 425.

Hilary, 8 *Geo.* *Read* v. *Marſhall.*

See this caſe fully ſtated in page 213 of this work, under the head *Baron and Feme.*

Hilary, 8 *Geo.* *Spiller and Wife* v. *Adams or Andrews.* Error.

The plaintiff brought a *writ of dower* againſt the defendant, who was then an infant, and admitted *to ſue* by his next friend, and pleaded *uncore priſt*, and judgment being given for the plaintiff in the *C. B. Adams* brought a *writ of error* in this court, and aſſigned the matters following for *error*.

1ſt. That the admittance *to ſue by his next friend* was wrong, for it ſhould be *to defend by his guardian.*

To which it was anſwered, and ſo reſolved by the court, that it is true, an infant often proſecutes *by his next friend*, but yet an admittance *to proſecute* is good, even where he is defendant; for it is to proſecute his plea, by which he defends himſelf againſt the plaintiff.

2dly. It was objected, that *damages* are given to the defendant, which ought not to be done, becauſe he pleaded *uncore priſt*, which is no plea in *dower*, unleſs an actual aſſignment was made.

To which it was anſwered, and ſo ruled, that *damages* in this ſenſe are well given, though the defendant had pleaded *uncore priſt*, becauſe *damages* may be given on *account of the detention of dower.*

3dly. It was objected, that tho' *damages* might be given in this caſe, yet it ought to be on the judgment *that ſhe ſhould recover her dower*, his being a *real* action, for before the ſtatute of *Glouceſter*, no *damages* were allowed in a real action; therefore the *damages* ought to be given from the time of the *diſſeiſin* till after the *writ of inquiry* returned by the ſheriff, if there were no wilful delay by the demandant.

To which it was anſwered, and ſo reſolved, that by the ſtatute of *Merton*, *c.* 1. the widow, in a *writ of dower*, ſhall recover the value of her *dower* in *damages* from the death of her huſband to the day that ſhe recovers the *dower* itſelf; that is, *until the day on which ſhe ſhall have recovered her ſeiſin by the judgment of the court*, which by intendment of law is the day on which ſhe had judgment *to recover her dower*, for from that day ſhe is accounted in the poſſeſſion or ſeiſin of her *dower*: wherefore the judgment was affirmed. *Vide Mod. Rep. vol.* 8. *p.* 25.

Hilary, 8 *Geo.* *Armory* v. *Delamirie.*

The plaintiff being a chimney-ſweeper's boy, found a jewel, and carried it to the defendant's ſhop, (who was a goldſmith) to know what it was, and delivered into the hands of the apprentice, who, under pretence of weighing, took out the ſtones, and calling to the maſter to let him know it came to three half-pence, the maſter offered the boy the money, who refuſed to take it, and inſiſted to have the thing again; whereon the apprentice delivered him back the ſocket without the ſtones. And now, in *trover* againſt the maſter, theſe points were ruled.

1ſt. That the finder of a jewel, though he does not thereby acquire an abſolute property or ownerſhip, yet he has ſuch a property as will enable him to keep it againſt all but the rightful owner, and conſequently may maintain *trover*.

2dly. That the action well lies againſt the maſter, who gives credit to his apprentice, and is anſwerable for his neglect.

3dly. As to the value of the jewel, ſeveral of the trade were examined to prove what a jewel of the fineſt water that would fit the ſocket would be worth; and *Pratt*, Chief Juſtice, directed the jury, that unleſs the defendant produced the jewel, and ſhewed it not to be of the fineſt water, they ſhould preſume the ſtrongeſt againſt him, and make the value of the beſt jewels the meaſure of their *damages*; which they accordingly did. *Vide Stra. vol.* 1. *p.* 505.

Trinity, 9 *Geo.* *Moor* v. *Thompſon.* Error.

In an action of *treſpaſs* brought by the plaintiff in *C. B.* for entering on his (the plaintiff's) land, on the 25th *March* 4 *Geo.* with a *continuando* of the ſaid *treſpaſs* to the 25th *March* 6 *Geo.* (which was two years) *&c. to the damages*, &c.

The defendant pleaded, that the lands were *copyhold*, and the freehold of one *G.* The plaintiff replied, and admitting them to be *copyhold*, ſet forth a ſurrender made to him, and that he admitted a whole year before he brought this action of *treſpaſs*, &c. *viz.* 7 *April* 5 *Geo.* The defendant in his rejoinder denied the ſurrender: iſſue thereon. And at the trial there was a verdict for the plaintiff; and the jury gave *damages* for that year only, *preceding the 7th day of April* 5 *Geo.* whereas the plaintiff had declared for two years *damages*; and now, on a *writ of error* brought, it was inſiſted, that though the plaintiff had a verdict, yet if the jury did not find enough, it was an inſufficient finding; and here they had found *damages* only for one year, where the plaintiff had declared for two years *damages*, and the jury cannot ſever the *damages* for which the plaintiff had declared.

Per curiam. Had the *damages* been aſſeſſed *generally*, it had not been good, becauſe on the record it appears, that the plaintiff ought to recover no *damages* till 7th *April* 5 *Geo.* becauſe till then he has no title to the lands: if the *damages* had been aſſeſſed, they might have been releaſed. *Vide Mod. Rep. vol.* 8. *p.* 78.

Trinity, 9 *Geo.* *Huxfer* v. *Gapan.*

In an action of *trover for a ring*, the defendant moved for leave to bring it into court, that it might be ſtruck out of the declaration.

This being an action for *damages*, founded on a ſuppoſed *converſion*, the motion was denied; but if it had been an action of *detinue* it would have been granted.

The plaintiff then moved for leave to amend his declaration, and add more counts to it, having only declared for 15 *s. damages*, and this was to give the court juriſdiction; and though this was ſtrongly oppoſed on the other ſide, he had leave to amend.

Per curiam. In *trover* the converſion is the point in iſſue, for which the time and place ſhould certainly be alledged. *Vide Mod. Rep. vol.* 8. *p.* 176.

Hilary, 10 *Geo.* *Parr* v. *Niblett.*

On a *writ of inquiry* executed, the ſame was ſet aſide, becauſe the jury gave too little *damages*; and a rule was made, that *on payment of coſts*, a new *writ of inquiry* might be executed, which was done, *but without paying coſts.*

It was now moved, that this laſt *writ of inquiry* might likewiſe be ſet aſide, and a rule being made for that purpoſe, unleſs cauſe ſhewn on ſuch a day why it ſhould not, *it was now ſhewn* for cauſe, that the plaintiff had done all in his power to get the coſts taxed, but could not prevail; and that the defendant's attorney promiſed him, that he would take notice of executing this *writ of inquiry*, as if the coſts had been already paid, therefore, this motion was made, that on payment of coſts, the rule might be diſcharged.

The court ordered the attornies on both ſides to attend the maſter, and that the plaintiff ſhould pay what coſts the maſter ſhould tax, and that on payment thereof, the rule for ſetting aſide the *writ of inquiry* ſhould be diſcharged. *Vide Mod. Rep. vol.* 8. *p.* 213.

Trinity, 10 *Geo.* *Herbert* v. *Morgan.*

The plaintiff was arreſted at the ſuit of the now defendant in a fictitious action, and afterwards he brought an action of falſe impriſonment againſt the defendant, and the jury gave him 80 *l.* *damages*; and on a motion in *arreſt of judgment*, becauſe the *damages* were exceſſive, it was oppoſed by the plaintiff's council, who inſiſted, that he might have the benefit of the verdict, which was granted, and accordingly the plaintiff had judgment. *Vide Mod. Rep. vol.* 8. *p.* 296.

Michaelmas, 10 *Geo.* *King and Wiſe* v. *Baſingham.*

See this caſe fully ſtated in page 214 of this work, under the head *Baron and Feme.*

Eaſter, 11 *Geo.* *Baker* v. *Bache.* Error.

The plaintiff brought an action on the *caſe* againſt the defendant for money laid out, and neceſſaries provided by him, for the defendant's ſons, to whom the plaintiff was by the defendant appointed tutor, *&c.* and the plaintiff laid the promiſe to be made by the defendant to the plaintiff, on the 19th of *June*, 1718, to pay the plaintiff for the neceſſaries he ſhould provide for the ſons, and the money he ſhould lay out for them, *&c.* and avers, that he continued their tutor for five years and nine months, and during that time found them neceſſaries, *&c.* which came to 140 *l.* judgment was given againſt the defendant, by *nil dicit* in *C. B.* and the *writ of inquiry* was executed on the 3d of *Febr.* 10 *Geo.* 1723, and the inquiſition found, that the plaintiff ſuſtained *damages*, *by reaſon of the aforeſaid premiſes*, &c. 129 *l.* 9 *s.* 11 *d.* and final judgment being given for the plaintiff in *C. B.* the defendant brought a *writ of error* in this court. And on *Monday* the 3d of *May*, this term, the judgment of the *C. B.* was reverſed, becauſe the jury on the *writ of inquiry*, had given *damages* for neceſſaries provided after the action had commenced, and to a time after the *writ of inquiry* was executed; for the promiſe being laid to have been made on the 19th of *June*, 1718, and that the plaintiff provided the neceſſaries, *&c.* from that time for five years and nine months, next following; that time did not expire till the 19th of *March* 1723, computing by calendar months, and not till about the 25th or 26th of *February*, computing by lunar months. *Vide Raym. vol.* 2. *p.* 1382.

Eaſter, 11 *Geo.* *William Maddox and Robert Godfrey* v. *Taylor & al.*

In an action of *treſpaſs* brought for breaking and entering the houſe of *William Maddox*, and taking the goods of *William Maddox*, and *Robert Godfrey*, *to the damage of them*; after a verdict for the plaintiffs, and *entire damages*, it was moved in *arreſt of judgment*, that this action could not be maintained, ſince the jury has given *entire damages*; for how can *William Maddox* (who had no right in the houſe, for that was in *Robert Godfrey*) recover *damages* for the unlawful entering. So the judgment was arreſted. *Vide Mod. Rep. vol.* 8. *p.* 370.

Trinity, 11 *Geo.* *Anonymous.*

In an action of *replevin* brought, the defendant juſtified taking the cattle *damage feaſant*, and it was now moved to ſtay proceedings on bringing into court what was due, with coſts.

Per curiam. If you bring in what is due on the *replevin bond*, proceedings ſhall be ſtayed, but if it is to ſtay proceedings on payment of what is due for *damages*, it ſhall not be granted, becauſe the court has no rule to guide them in ſuch caſe; but it is otherwiſe for rent, for that is certain. *Vide Mod. Rep. vol.* 8. *p.* 379.

Michaelmas, 12 *Geo.* *Powell* v. *Hord.* Error.

In an action on the *caſe* againſt the ſheriff of *Oxfordſhire*, for a falſe return, viz. *non eſt inventus*, to an *alias capias ad ſatisfaciendum*, on a judgment in the *C. B.* recovered by the plaintiff againſt one *E. J.* for 21 *l.* 10 *s.* on a *writ of error* brought in this court, the judgment was affirmed, on which the whole ſum amounted to 43 *l.* On *not guilty* pleaded, the cauſe was tried before *Raymond* at *niſi prius* in *Middleſex* this term. And it appeared on the evidence, that the bailiff on the firſt *capias* had frequent opportunity of taking *J.* and that when that return was out, the underſheriff deſired the plaintiff's attorney to take out another *capias ad ſatisfaciendum*, and promiſed to arreſt *J.* but did not, though he had opportunities to arreſt him on that writ. And the defendant on the trial attempted in mitigation of *damages* to prove, that *J.* might yet be taken, but failed in that proof, it appearing *J.* had abſconded. On which, by direction of the court, the jury gave the whole 43 *l.* debt in *damages.* And the defendant moved for a new trial; firſt, becauſe the judge refuſed to admit the ſheriff's bailiff to be a witneſs on the trial, to prove that he had often endeavoured to arreſt on this *capias ad ſatisfaciendum*, but could not. *But not allowed*:

For the court agreed, that the bailiff was no legal witneſs, becauſe he was intereſted in the cauſe, having given ſecurity for his due executing the proceſs, and by conſequence could not be a witneſs in his own cauſe.

Then it was inſiſted on by the council for the defendant, that the *damages* were exceſſive, becauſe the jury had given *damages* for the whole debt; whereas they ſaid the jury ought to have given only the charges the plaintiff had been put to in the ſuing the *capias ad ſatisfaciendum*, &c. in *damages*. *But not allowed*:

For on the circumſtances of the caſe, the court thought it very proper the whole debt ſhould be given in *damages*. *Vide Raym. vol.* 2. *p.* 1411.

Hilary, 5 *Geo.* 2. *The Biſhop of London* v. *The Mercers Company.* Error.

On a *writ of error* brought on a judgment in *C. B.* on a writ of *quare impedit* brought by the *mercers company*, and *E. L.* clerk, for the preſentation to the pariſh church of *St. Mildred*, *Poultry*, and *St. Mary Colechurch* in the city of *London*, the judgment was affirmed.

Afterwards the company moved for *damages* to be aſſeſſed, *by reaſon of the delay of execution*, on *ſtat.* 3. *H.* 7. *c.* 10. and that the computation might be at the rate ſet on the enquiry for the value of the church during the time they were kept out by the *writ of error*, and *Cro. Car.* 145, 173. and *Dyer*, 77. were cited.

Per curiam. Though they are intitled to *damages*, yet they are not to compute them in that manner. For if the *writ of error* had not been brought, they would not have been intitled to the profits, but their preſentee, and all the real *damage* they ſuſtain is, the being kept out of 70 *l.* Let the maſter therefore compute legal intereſt for that, and add it to the coſts: they ſaid the caſes in *Croke* were unreaſonable, and had never been conſidered. *Vide Stra. vol.* 2. *p.* 925.

Trinity, 5 *Geo.* 2. *Lowfield* v. *Bancroft et al.*

On an action brought for a malicious proſecution, the jury would have found 800 *l.* *damages* againſt one defendant, and 100 *l.* againſt each of the others. But *Raymond*, Chief Juſtice, ſaid, it could not be done; therefore the jury gave a general credit for 1100 *l.* *Vide Stra. vol.* 2. *p.* 910.

Eaſter, 7 *Geo.* *Kent* v. *Kent.* Error.

On a *writ of error* from *Ireland* on a ſpecial verdict in *dower*, the caſe was as follows:

There were two tenants to the *writ of dower*, *Edw. May* and *R. Kent*: the demandant had judgment to recover her *dower*, and 158 *l.* for *damages* and coſts. They both bring *error*, and aſſign *errors*, and then *Ed. May* dies, and there was judgment to abate the *writ of error*. After which *Kent*, and *R. May*, the heir of *Edw.*

May brought a new *writ of error*; and the judgment was affirmed *in toto*; and a *writ of ſeiſin* awarded for the *dower* againſt both, and execution for the *damages* and coſts againſt *Kent* only, and alſo for the value from the time of the judgment, according to the former computation.

To this an exception was taken, that *Kent* alone ought not to be charged; for the ſtatute ſubjects not only the tenant in the action, but alſo thoſe who join in the *writ of error*, as being bound by the judgment.

And after conſideration, the Chief Juſtice delivered the opinion of the court on this point as follows:

We are all of opinion, that as to *damages* from the time of the judgment in *C. B* to the affirmance in *B. R.* in *Ireland*, the judgment is erroneous, and ought to be reverſed.

We have no doubt but that the *King's Bench* might award *damages* from the time of the judgment to the affirmance. But the objections are to the manner of doing it, and they are two. 1ſt. That they have computed it according to the value found by the firſt jury, whereas there ought to have been a *writ of inquiry*. And, 2dly. Becauſe they have awarded them againſt *Kent* only.

As to the firſt: This power of awarding *damages* on the *writ of error* is not founded on the ſtatute of *Merton*, for that does not enable the courts to go farther than the effectual judgment to recover *ſeiſin* in the court where the writ is brought. This gave occaſion to make ſtatute 16 & 17 *Car.* 2. *c.* 8. which was enacted in *Ireland* the next year; and thereby power is given to the court to which the cauſe is removed by *writ of error*, to award an inquiry of the value of the *meſne* profits after the firſt judgment in *dower*, and on return thereof to award an execution.

And as it was wrong in this caſe to aſſeſs the *damages* without an inquiry; ſo, 2dly. It was wrong to lay the whole on *Kent*.

As to the *damages* during their joint lives, they muſt be conſidered as joint treſpaſſers, and then the heir is not chargeable, but the whole *damages* may be levied on the ſurvivor. But for the time the heir was in poſſeſſion, he was equally a treſpaſſer with *Kent*, and as ſuch equally liable to make ſatisfaction. Could he maintain this *writ of error* without entering into a recognizance? Certainly he could not. And has he not thereby ſubjected himſelf as much as the other had done?

But then, taking it to be wrong in both particulars, an objection is made, that this being for the benefit of the heir, he cannot aſſign this for *error*, though *Kent* may. And to be ſure the general rule is, that a man ſhall not aſſign matter for his own advantage, but he ought to be ſevered from the defendant, who is hurt. *Cro. Eliz.* 891. 1 *Saund.* 239. *Yelv.* 3. *Cro. Jac.* 92. But we think that was neceſſary here, it being the fault of the court, and differs from the caſe of too long an *eſſoign*, which is prayed by the party. 8 *Co. Beecher's* caſe, 2 *Saund.* 49. 1 *Roll. Abr.* 759. *p.* 2.

This part of the judgment therefore being wrong, and the *error* well aſſigned, it muſt be reverſed as to this part only, and the other being a diſtinct judgment, may be affirmed. *Salk* 24. To this, we think, proper to add, that we are alſo to do what the court below would have done; which is, to direct them to award a *writ of inquiry*, for we cannot do it ourſelves, as we ſhould have done in an *Engliſh* cauſe, ſince it muſt go to a ſheriff out of our power. But we remit the record, with an affirmance of one part, and reverſal of the other, with a command to *B. R.* in *Ireland* to award a court of inquiry, and on return thereof to do what by law appertains thereto. *Vide Stra. vol.* 2. *p.* 971.

Michaelmas, 7 *Geo.* 2. *Horton* v. *Kilmore*.

See this caſe fully ſtated in page 44 of this work, under the head *Actions*. *Vide Caſes Temp. Lord Hardw. p.* 5.

Trinity, 8 *Geo.* 2. *Valentine* v. *Fawcett*.

The defendant, who was an overſeer of the poor, was ſued for what he did in the execution of his office; and on the trial a verdict was given for him; but *ſtat.* 43 *Eliz. c.* 2. ſaying, that he ſhall recover *treble damages* by reaſon of his wrongful vexation, with his coſts, to be aſſeſſed by the ſame jury, or have a writ to inquire of the *damages*, as the ſame ſhall require; he now moved for a *writ of inquiry*; which was oppoſed, for that it could only iſſue when the plaintiff was nonſuited, after which the ſame jury could not go on; whereas here the plaintiff appeared, and a verdict was given.

But the court held the *writ of inquiry* ſhould iſſue. *Vide Stra. vol.* 2. *p.* 1021. *Caſes Temp. Lord Hardw. p.* 138.

Hilary, 12 *Geo.* 2. *Jones* v. *Harris*.

In an action of *treſpaſs* brought againſt *ſix* defendants, *three* ſuffered judgment to go by *default*, and the other *three* pleaded *not guilty*; the *venire went as well to try as to inquire*; and on the evidence it appeared, that the *treſpaſs* was done after the action was brought, it being a general *memorandum*: whereon the Chief Juſtice directed the jury to acquit the *three* defendants, but ſuffered the plaintiff to go on, and aſſeſs his *damages* as to the others. *Vide Stra. vol.* 2. *p.* 1108.

Eaſter, 12 *Geo.* 2. *Wray* v. *Liſter*. Error.

In an action of *debt* brought on an old judgment, the plaintiff laid *the damage* at 10 *l.* the jury gave intereſt, which came to 30 *l.* and for that and coſts the judgment was entered up. And after *error* brought, the plaintiff moved to have liberty to remit the *ſurplus*, and enter judgment for 10 *l.* And *Page*, Juſtice, was for doing it; but the Chief Juſtice, and the other two, held it could not be done in another form. And the inſtances of reverſing judgment for this fault ſhew it was never thought to be amendable. *Yelv.* 45. *Vide Stra. vol,* 2. *p.* 1110.

Hilary, 18 *Geo.* 2. *Creſſy* v. *Webb et al'.*

In this cauſe the defendant *Webb only* pleaded to iſſue, the other defendants let judgment go by *default*. And it came on at *Guildhall* to try the iſſue, and alſo to aſſeſs the *damages* as to the others. On the trial *Webb* was acquitted; and a doubt aroſe, whether the plaintiff could go on; but the Chief Juſtice thought he might proceed, and he did ſo. *Vide Stra. vol.* 2. *p.* 1222.

Hilary, 33 *Geo.* 2. *Gardner* v. *Croaſdale*.

On a caſe reſerved for the opinion of the court, on an action on the *caſe* brought on a policy of inſurance, after hearing the council on both ſides, the court gave their opinion as follows:

Lord *Mansfield*. This is an action on the *caſe*, which is a liberal action, and a plaintiff may recover leſs than the grounds of his declaration ſupport, though not more. This is agreeable to juſtice, and conſiſtent with his demand.

Here are two grounds of the plaintiff's declaration, *viz.* the policy, and the *damage* of the ſhip.

As to its being a total loſs, or a partial loſs, that is a queſtion more applicable to the quantity of the *damages* than to the ground of the action: the ground of the action is the ſame, whether the loſs be partial or total, both are perils within the policy.

As to the defendant's not coming prepared to defend a partial loſs, this indeed would be an objection if it was true, but the defendant does in truth come prepared to ſhew, "that either no *damages* have happened at all, or at leaſt that *damages* have not happened to ſuch a degree as the plaintiff has alledged in his declaration, &c."

As to the effects of a judgment by *default*, the defendant could not have been hurt by the ſame, for the plaintiff could not have recovered even on a *writ of inquiry* any greater *damages* than the plaintiff could prove to the jury ſworn to aſſeſs them, "that he had actually ſuffered."

Deniſon, *Foſter*, and *Wilmot*, Juſtices, concurred with the Chief Juſtice in opinion; and *Deniſon* and *Wilmot* gave their reaſons at large for ſuch their opinion.

Per curiam, unanimouſly, let the *poſtea* be delivered to the plaintiff. *Vide Bur. vol.* 2. *p.* 904.

Michaelmas, 1 *Geo.* 3. *Palmes Robinſon, Eſq;* v. *Ann Bland, Spinſter, Adminiſtratrix de bonis non, of Sir John Bland, Bart, deceaſed.*

On a *caſe* reſerved for the opinion of the court, as to what time the plaintiff was to receive judgment on an action on the *caſe*, brought on a bill of exchange for money won at play, drawn by the defendant's inteſtate in favour of the plaintiff.

Lord *Mansfield*. Although this be nominally an action for *damages*, and *damages* be nominally recovered in it, yet it is really and effectually brought for a ſpecific performance of the contract.

The *damages* given by the ſtatutes are, where the action is againſt ſuch as come in under *wrong doers* only, or where a ſpecific thing is to be recovered.

The ſtatute of *Glouceſter*, 6 *Edw.* 1. (whereby *damages* are given in *real* actions on a *writ of inquiry*, to recover the ſpecific lands) gives *damages generally*, without ſaying what time, yet the conſtruction of the ſtatute has been, "that they ſhall compute all the *damages* that have ariſen *pending the writ.*

Here the jury have left the matter quite open to us. We can bring the intereſt down to the time of the liquidation of the ſum really due from the defendant to the plaintiff; which is the time of giving judgment. Therefore let judgment be entered for the plaintiff.

Ruled, That the *poſtea* be forthwith delivered to the plaintiff's attorney. *Vide Bur. vol.* 2. *p.* 1077.

Date, Day, and Delivery.

Trinity, 7 *W.* 3. *Wilſon* v. *Guttery.*

The defendant was arreſted on a *Sunday*, by a writ out of the *Marſhalſea*, and now the court was moved to diſcharge him; but it was denied, and he was directed to bring an action of falſe impriſonment. *Vide Mod. Rep. vol.* 5. *p.* 95.

Michaelmas, 8 *W.* 3. *White* v. *Martin.*

A declaration was delivered on a *Sunday*. *Holt*, Chief Juſtice, ſaid it had been allowed, but that he was never ſatisfied with it. And *Turton*, Juſtice, ſaid, in the *Exchequer*, they rejected a declaration in *ejectment* for that reaſon, and *Eyre*, Juſtice, that it was abominable. *Vide Forteſcue, p.* 375.

Hilary, 10 *W.* 3. *Kinſay* v. *Heyward.* Error.

The plaintiff declared as adminiſtratrix to her huſband, againſt the defendant as executor to *Heyward*, on an *indebitatus aſſumpſit*. The defendant pleaded *non-aſſumpſit within ſix years*, and judgment was given in *C. B.* for the plaintiff, by *Treby*, Chief Juſtice, *Nevil* and *Powell*, Juſtices, againſt the opinion of *Blencowe*, Juſtice.

Afterwards a *writ of error* being brought in this court, *Michaelmas*, 13 *W.* 3. after argument twice at the bar, the judgment was reverſed, becauſe the *continuances* of the writ were not pleaded, and it was not ſaid the writ was undetermined.

And on *error* brought in parliament, the judgment of this court was affirmed on the 1ſt of *May*, 1 *Ann*, on the ſame point of not having entered the *continuances*, &c. *Vide Raym. vol.* 1. *p.* 453.

Eaſter, 10 *W.* 3. *Cromwell or Crumwell* v. *Grumſdale or Grunſdall.*

See this caſe fully ſtated in page 241 of this work, under the head *Bonds.*

Michaelmas, 10 *W.* 3. *Fanſhaw* v. *Harris.*

A policy of inſurance was, that the defendant undertook to pay the plaintiff 100 *l.* if Sir *Robert Howard* lived a twelve-month from the *day* of the *date* of the policy, being the 3d of *December*, 1697, and he died on the 3d of *December*, 1698.

Holt, Chief Juſtice, directed the jury to find for the plaintiff, and he ſaid, if a man is born on the 3d of *December*, and dies on the 2d of *December*, twenty years after, making a will on *that day*, it would be a good will. *Vide Mod. Rep. vol.* 12. *p.* 256. *Raym. vol.* 1. *p.* 480.

Michaelmas, 10 *W.* 3. *Pullen* v. *Benſon.*

In an action of *debt* brought on a ſheriff's bond for appearance, the 20th of *Nov.* 9 *W.* 3. conditioned, that *William Benſon* ſhould appear in this court, on *Monday*, in 15 *days of St. Martin, Michaelmas*, 9 *W.* 3. the defendant pleaded *ſtat.* 23 *H.* 6. and that the bond was delivered by him on the 30th of *November*, 9 *W.* 3. and that *William Benſon*, at the time of the making and *delivery* of the bond, was taken and arreſted by the plaintiff, being ſheriff of *Yorkſhire*, by a writ returnable in *K. B.* in *Michaelmas* term laſt paſt, that being ſo in his cuſtody, he took the ſaid bond from him; and this he is ready to verify, *&c.* whereon the plaintiff demurred, and ſhewed for cauſe that the plea was double, and wanted a traverſe; and the whole court held the plea to be ill; becauſe when he pleaded the bond to be *firſt delivered* on the 30th of *November*, he ſhould have traverſed *abſque hoc*, that he *delivered* it on the 20th of *November*, according to the caſe of *Green* v. *Eden*. *Yel.* 138. *Cro.* 264. for here the *date* was material; for ſuppoſe the arreſt was before the return of the writ, and after the return of the writ he took an *antedated* bond, this bond is void; and therefore the *date* is material, and ought to be traverſed.

Holt, Chief Juſtice. The *date* of the bond is one thing and the bearing *date* another; the *date* of the bond is the *delivery* of it; wherefore the plaintiff had judgment. *Vide Mod. Rep. vol.* 12. *p.* 204.

Trinity, 11 *W.* 3. *Aſmole* v. *Goodwin.*

In an action on the *caſe* againſt the *cuſtos brevium*, the declaration was *delivered* on *Friday* morning, and rules given to plead within *four days*, whereas *Saturday* and *Sunday* were not *juridical days*.

Per curiam. We reckon them not *juridical* as to matters to be tranſacted in court, and therefore *Sundays* and *Holidays*, are no *days* to move in *arreſt of judgment*. But as to buſineſs done out of court, as a rule to plead within *four days*, *&c.* *Sundays* are reckoned the ſame with other *days*. *Vide Salk. vol.* 2. *p.* 624. *Mod. Rep. vol.* 5. *p.* 449.

Trinity, 11 *W.* 3. *Allen or Alanſon* v. *Brookbank.*

On a *libel* in the *ſpiritual court* for incontinency, the citation was ſerved on the *Sunday*, and fixed on the church door; it was objected to be void, becauſe it is a proceſs, and *ſtat.* 22 *Car.* 2. was quoted.

Holt, Chief Juſtice. That *ſtatute* extends not to this proceſs, nor to ſummonſes at the church; but only to ſuch proceſs, which may as well be executed at any other time. *Vide Salk. vol.* 2. *p.* 625.

Hilary, 12 *W.* 3. *The King* v. *Everard.*

A *preſentment* made at a *court leet*, for erecting of a cottage, *&c.* contrary to *ſtat.* 31. *Eliz. c.* 7. being removed into this court by *certiorari*, among ſeveral other exceptions, the following was taken, *viz.* That the *anno domini* was in *Engliſh* figures. But becauſe the year of the King was in words at length, it was held certain enough, and that the year of our Lord was only ſurpluſage. And therefore the motion was denied. *Vide Raym. vol.* 1. *p.* 638.

Eaſter, 12 *W.* 3. *Lord Bellamont's Caſe.*

The Attorney General moved for a trial at *bar*, laſt *paper day*, in the term, in an action againſt the Governor of *New York*, for matter done by him as Governor; and granted becauſe the King defended it. *Vide Salk. vol.* 2. *p.* 625.

Eaſter, 12 *W.* 3. *The Caſe of —— Cecil, and others of the Town of Nottingham.*

See this caſe fully ſtated in page 132 of this work, under the head *Attachment*.

Hilary, 13 *W.* 3. *Thomſon* v. *Southwell.*

The declaration was of *Eaſter* term; and the cauſe of action laid on ſuch a *day* in *April*, which *day* in fact was *within* the term. And *firſt*, it was agreed the court would judicially take notice of the firſt *day* of that term, *viz.* what *day* of the month it was, and conſequently that the cauſe of action accrued *after* it. *Secondly*, That a declaration *generally* of ſuch a term, without any ſpecial *memorandum*, refers to the firſt day of the term, otherwiſe, if there was a ſpecial *memorandum* of the time of filing the bill, or of giving bail; ſo if it is made out in fact to have been at a *day* after the *day* of cauſe of action mentioned, it may be ſet right. But on examination, it appeared the declaration was accepted by conſent (which *Holt*, Chief Juſtice, ſaid, was filing common bail of courſe) but there was no writ or proceſs returnable; and thereon *Holt* declared, if there was a proceſs returnable at ſuch a *day* certain, and it had appeared when bail had been put in, that would be a ground for amendment; but it being only found that common bail was filed, that muſt refer to the *firſt day* of term; and therefore judgment was arreſted. *Vide Mod. Rep. vol.* 12. *p.* 647.

Hilary, 13 *W.* 3. *Lane* v. *Green.*

The plaintiff declared, that the defendant on the 8th of *September*, 1689, *by his writing*, obligatory, allowed himſelf to be bound and firmly held, *&c.* to the plaintiff, and on *oyer*, the bond bore *date* the 8th of *September*, 1699, and for the variance there was a demurrer. And it was urged, that ſince the plaintiff varied the *lien* from the *date* of the bond, he ought to ſhew when it was delivered; and the right way had been to declare on the bond with the *date* it bore, and then to ſay *firſt delivered* at ſuch a time; and at this rate a perſon might declare on a bond after the action was brought.

Per curiam. Since it is ſaid, that ſuch a day *he allowed himſelf to be bound and firmly held, &c.* it is well, for that could not be without it was then *delivered*; it is well enough. Therefore judgment for the plaintiff. *Vide Mod. Rep. vol.* 12. *p.* 651.

Hilary, 13 *W.* 3. *Taylor's Caſe.*

The queſtion on a motion made in this cauſe was, whether a ſervice of a declaration in *ejectment* on a *Sunday* was now good on *ſtat.* 29 *Car.* 2.

Per curiam. It is not; being a proceſs, though not a judicial one; being compulſive to the party to appear; and it may as well be ſaid, that the ſervice of a ſummons in a *real* action, may be good on a *Sunday*. *Vide Mod. Rep. vol.* 12. *p.* 667.

Eaſter, 13 *W.* 3. *Fox* v. *Wilbraham.*

In an action of *covenant* brought againſt the aſſignor of a term, on a *covenant*, that the leaſe was free from incumbrances, and that the aſſignor had not done nor ſuffered, *&c.* the breach aſſigned was, that at the ſeſſions held at *Cheſter*, 4 *Jac.* the defendant was *outlawed*. On demurrer the declaration was held ill, becauſe it was not ſhewn, in the time of which King *James* the *outlawry* was.

Holt, Chief Juſtice. The pleading ought to be very certain, as to ſhew in what term the *outlawry* was; but this uncertainty of the King's reign is ſtill greater: and the declaration was for this exception held ill. *Vide Raym. vol.* 1. *p.* 668.

Michaelmas, 13 *W.* 3. *Watſon* v. *Huddleſton.* Error.

A *writ of error* was brought on a judgment given in the court of *Carliſle* in an action of *debt* on *two* bonds. The plaintiff declared there on a bond *dated* the 10th of *February*, 6 *W. & M. in the year of our Lord* 1693; judgment went by *default*. And on *error* brought, and the general *errors* aſſigned, the plaintiff in *error's* council argued, that there was no ſuch day as the 10th *day* of *February*, 6 *W. & M.* becauſe the Queen died before the 10th of *February*, in the ſixth year of her reign, *viz.* on the 27th of *December*, and therefore the *date* being impoſſible, the plaintiff ſhould have declared on the *delivery*. *Co. Lit.* 46. and other books. And of that opinion *Holt*, Chief Juſtice, ſeemed to be.

But *Powyt*, and *Gould*, Juſtices, held, that *in the year of our Lord*, 1693, was ſufficient, and that the reſt ſhould be rejected. *Vide Raym. vol.* 1. *p.* 703.

Michaelmas, 13 *W.* 3. *Walgrave or Hargrave* v. *Taylor.*

The motion was to have judgment ſet aſide in *treſpaſs* after judgment by *default*, and a *writ of inquiry* executed; becauſe the *Eſſoign* day of *Eaſter* term was *Sunday*, which not being a *day in law*, it was held on the *Monday*, and the declaration in this caſe was delivered on the *Sunday*, which could not be by *ſtat.* 29 *Car.* 2. *c.* 7. which reſtrains proceſſes in law from being executed on *Sundays*. If this ſhould be allowed, the plaintiff would gain a term by it, where the ſaid *day* ought to be the *Eſſoign* day of *Eaſter* term, and therefore it ought to be but a declaration of the ſaid term; but the declaration being delivered before the *Eſſoign* day, which was held on *Monday*, it will be a declaration of *Hilary*.

But againſt this it was urged by the plaintiff's council, that the delivery of a declaration was not a ſervice of a proceſs. And that in *Hilary* 11 *W.* 3. it was held in this court in the caſe of *All'n* v. *Brookbank*, that the ſervice of a citation on a *Sunday* was good, and not reſtrained by the ſtatute of *Charles* 2. which was agreed to by *Holt*, Chief Juſtice, but he ſeemed to incline, that the delivery of a declaration on a *Sunday* was ill, becauſe the ſaid ſtatute intended to reſtrain all ſorts of legal proceedings. But *Powys* and *Gould*, Juſtices, were of a different opinion, becauſe ſuch delivery was but as it were a notice; and as a letter, not a proceſs. But it appearing to the court, that the defendant had appeared, and that a *writ of inquiry* had been executed, they would not intermeddle, and ſaid, that had made all good. And the judgment ſtood. *Vide Raym. vol.* 1. *p.* 705. *Mod. Rep. vol.* 12. *p.* 606. *Forteſcue, p.* 375.

Eaſter, 1 *Ann.* *The Queen* v. *Clerk.*

Note, *Midſummer-day* was on a *Wedneſday* this year, and if it had not been *Midſummer-day* that very *Wedneſday* had been the laſt day of *Trinity* term, but now the term ended on the *Thurſday*.

Holt, Chief Juſtice. *Trinity* term may begin on *Midſummer-day*, but cannot end on it; there can be no return this year, *in three weeks of Trinity*, but it muſt be on *Thurſday after three weeks of Trinity*: and this he ſaid had not happened in one hundred years before. *Vide Mod. Rep. vol.* 7. *p.* 16.

Trinity, 1 *Ann.* *Anonymous.*

Holt, Chief Juſtice. If a deed has *no date*, or an *impoſſible date*, you may declare, that the defendant by his deed on ſuch a *day* and year did ſo and ſo, and on *oyer*, there will be no variance; but if you ſay, that by his deed of ſuch a *date*, or bearing *date* ſo and ſo, and on *oyer* the deed has no *date*, or an *impoſſible one*, it will be a variance. *Vide Mod. Rep. vol.* 7. *p.* 38.

Trinity, 1 *Ann.* *Holman* v. *Burrow.*

The plaintiff brought an action of *covenant* againſt the defendant, on an indenture of charter-party, which he alledged in his declaration, was made on the 26th of *Auguſt*, 13 *W.* 3. The defendant prayed *oyer* of the deed; which being granted, it was entered *in theſe words*, this indenture, *&c.* made, *&c.* the ſix and twentieth of *Auguſt*, 1701. And then he pleaded in *Abatement* of the bill this variance in the *date* of the deed pleaded, and of that ſhewn on the *oyer*. The plaintiff demurred; and the council for the plaintiff urged, that this was not a material variance, becauſe the year 1701, was the 13th of *W.* 3. and the court agreed, that though it was not ſaid in the deed *anno domini*, 1701, yet they would intend 1701, to be the year of our Lord 1701.

Holt, Chief Juſtice, ſaid, that the plaintiff by his *profert in court, the date whereof is of the ſame day and year*, had confined himſelf to the deed, *dated* the 13th *W.* 3. but the deed produced, not being ſo, it was a material variance; and he inclined for the defendant; the matter was however adjourned. But in *Michaelmas* term following, he and all the other judges held, that the 26th *day* of *Auguſt*, 13th of *W.* 3. and the 26th *day* of *Auguſt*, 1701, were the ſame *day*; and therefore they awarded that the defendant ſhould anſwer over. *Vide Raym. vol.* 2. *p.* 791. 794.

Hilary, 2 *Ann.* *Parker* v. *Sir William Moor or More.*

The defendant was taken on a *Sunday*, by virtue of an *eſcape warrant*, and it was held good; for one may take another on a *Sunday* on a freſh purſuit, and this is in the nature of it, though it is by a new method, for this is no original proceſs, but the party is ſtill on the old commitment continued down. *Vide Salk. vol.* 2. *p.* 626. *Mod. Rep. vol.* 6. *p.* 95.

Hilary, 2 *Ann.* *Lidford* v. *Thomas.*

See this caſe fully ſtated in page 111 of this work, under the head *Arreſt.*

Hilary, 2 *Ann.* *James* v. *Parſons.*

A perſon was taken on an *eſcape warrant* on a *Sunday*, and it was moved to have him diſcharged; but the court would not, becauſe the act was made in purſuance of an old authority, and to amend the law.

Per curiam. Bring your *audita querela*; in the *C. B.* they are of another opinion; we of this, that they may take him on *Sunday*, therefore let it come judicially before us; take out your *audita querela* immediately, and they ſhall plead *inſtanter*; this act is made in purſuance of a former reaſon of law, when a creditor might ſeize his debtor, and ſo might a ſheriff on an *eſcape*, though on a *Sunday*. *Statute* 29 *Car.* 2. extends only to ſuch proceſs as was at that time when the *ſtatute* was made. *Vide Forteſcue*, *p.* 374.

Eaſter, 2 *Ann.* *Rogers* v. *Rereſby.*

In *ejectment* by original, the declaration was *general* of *Michaelmas* term, the demiſe was laid to be on the 20th day of *October*. After a verdict for the plaintiff, it was moved in arreſt of judgment, that the action was brought before any cauſe of action accrued, the 20th day of *October* being the *Eſſoign* day of the term, and the *firſt day* of it in law. To which it was anſwered, that the *ejectment* and *action* may be on the ſame day.

Per curiam. This action being by original, is very conſiſtent, becauſe the *ejectment* was in full term; yet it being a long term, a man may ſue an original *teſte* in full term, and returnable before the end of it. Then, ſince it is poſſible that it may be well, the court will intend it ſo after verdict. Farther, if it is a ſlip, advantage ſhould have been taken of it on *oyer* of the original: therefore judgment was given for the plaintiff. *Vide Raym. vol.* 2. *p.* 870.

Trinity, 2 *Ann.* *Sir Chriſtopher Hales* v. *Owen.*

Sunday is not included in the *four days* to move in arreſt of judgment, but the defendant muſt have *four juridical days*. *Vide Salk. vol.* 2. *p.* 625.

Eaſter, 3 *Ann.* *Harvey* v. *Broad.* Error.

A *writ of inquiry* was returnable *in three weeks* of the holy *Trinity*, which was *Sunday*, and the writ was executed on the 14th, and that was *Monday*, which was kept as the *Eſſoign* day, but was a day after three weeks of the holy *Trinity*: on which a *writ of error* was brought.

Per curiam. 1ſt. A writ may be executed the day it is returnable, but not after. 2dly. The court may take notice of this judicially, and there needs no *writ of error*, and no aſſignment of this for *error* on the record. So 5 *Co.* 45. The court took notice that the *teſte* of the writ of *covenant* was after the return. *Co. Ent.* 250. *Mo.* 571. and *Plowden*, the caſe of *Fiſh* v. *Brocket*, the court took notice the proclamation of a *fine* was on a *Sunday*. 3dly. There is no difference between the moveable and immoveable feaſts; for the moveable calculation for *Eaſter* was made by the council of *Nice*, but received in *England*, and made part of the Calendar, which is eſtabliſhed by the law of *England*: therefore, whether the feaſt is moveable or immoveable, or whether the computation is by the day of the month, or the day of the week, viz. *on Monday next after three weeks*, &c. as it is in judicial proceedings; we have the ſame law, and the ſame rule, and the court cannot but take notice of what appears to them. 1 *Cro.* 53. 1 *Lev.* 196. 1 *Sid.* 301. *Plowd.* 265, 266. *b.* *Ro.* 524. *Dy.* 181. *pl.* 52. 21 *H.* 6. 13. *pl.* 4. 3 *Cro.* 227. *Lut.* 118. 2 *Cro.* 506. 548. 1 *Jon.* 301. *ſtat. of the year of Biſſextile*: therefore the judgment was reverſed. *Vide Salk. vol.* 2. *p.* 626.

Michaelmas, 3 *Ann.* *Davies or Davy*, v. *Salter.* Error.

A *writ of inquiry* was returnable in *three weeks of the holy Trinity*, which was on the 13th day of *June*, and the writ appeared to have been executed on the 14th day of *June*. Judgment was given for the plaintiff. And on a *writ of error* being brought, it was *urged* that the court could not take notice of the days of the month. 1 *Cro.* 275. *Yelv.* 140. 1 *Ro. Abr.* 595. *But not allowed.*

Then it was urged, that *Sunday* ought not to be reckoned, but *Monday* in lieu of it. *Br. c.* 5. 2 *Cro.* 16. 1 *Cro.* 11.

Holt, Chief Juſtice. If *Sunday* happens to be the *fourth day afterwards*, the holding of the term of neceſſity goes over till *Monday*. So if *Sunday* happens to be the *Eſſoign* day: and as to the relation of judgment, where the *Eſſoign* day is a *Sunday*, the judgment can only relate to the firſt *judicial day*. All *in fifteen days from the octave* are incluſive: here we enter *Monday*, *&c.* and that is incluſive: in *C. B.* they enter *from Monday*, &c. and yet that is incluſive too; but in the principal caſe, there is no neceſſity; the writ might have been executed ſooner, or returned at another day. *Vide Salk. vol.* 2. *p.* 627. *Mod. Rep. vol.* 6. *f.* 250.

Hilary, 4 *Ann.* *Seignorett* v. *Noguire.*

In this cauſe the defendant took exception for ſeveral variances between the declaration and the articles; and particularly that of the commencement of the four years for the continuance of the partnerſhip, which in the declaration was ſaid to be *with* the *day* of the *date* of the contract, in the articles *from* the *day* of the *date* of the contract.

Holt, Chief Juſtice, ſaid, that *from the date*, does not exclude the *date*, and ſo was the ſame as *with the date*; but that *from the date*, and the *day of the date*, were not the ſame: and the other exceptions being over-ruled, the plaintiff had judgment. See this caſe fully ſtated in page 323 of this work, under the head *Covenant*. *Vide Raym. vol.* 2. *p.* 1241.

Michaelmas, 6 *Geo.* *Harvey* v. *Porter*.

Per curiam. If an old notice of trial is given before the *firſt day* in full term, it is ſufficient; and it need not be given before the *Eſſoign* day. *Vide Stra. vol.* 1. *p.* 211.

Michaelmas, 6 *Geo.* *Lord Cornwallis* v. *Hoyle*, *or Hyle* v. *Lord Cornwallis*.

A *writ of inquiry* was executed on the 15th day of *June*, which was on a *Sunday*, and held naught, and that they might take advantage of it on a *writ of error*, though not aſſigned for *error*. *Vide Forteſcue*, *p.* 373.

Trinity, 11 *Geo.* *Hutton* v. *Stroubridge*.

On the 2d day of *June*, (which was in *Trinity* term) the defendant brought an *habeas corpus*, and put in bail; the plaintiff did not proceed in that term, or in *Michaelmas* term, but in *Hilary* term following delivered a declaration; and on motion, the court held the defendant's attorney was not obliged to accept it, though but a part of *Trinity* term elapſed after bringing the *habeas corpus*, there not being two whole terms. *Vide Stra. vol.* 1. *p.* 361.

Trinity, 13 *Geo.* *Hicks* v. *Jones*.

A *ſcire facias* was *teſted* the 15th day of *May*, returnable on the 29th, which is making both the *teſte* and return *incluſive* of the *fifteen days*; and on conſideration it was held well, and there was no difference whether the proceedings were by bill, or by original. *Salk.* 599. *Sir T. Jones*, 228. *Vide Stra. vol.* 2. *p.* 765.

Michaelmas, 1 *Geo.* 2. *Studley* v. *Sturt*.

The writ was returnable on *Wedneſday*, and the bail-bond was aſſigned on the *Monday* following; and the court held the plaintiff was too ſoon by a day, for that *Sunday* was not to be reckoned. *Vide Stra. vol.* 2 *page* 782.

Trinity, 2 *Geo.* 2. *Mathews* v. *Spicer*.

The plaintiff declared in *aſſumpſit* on a promiſe made the 26th day of *March* 12 *Geo.* The defendant pleaded, that after the promiſe, and before the bill was filed, *viz.* on the 2d day of *April*, he tendered the money. The plaintiff replied, that after making the promiſe, *to wit*, on the 12th day of *Febr.* he filed the bill, &c. On demurrer, the defendant's council objected, that by the plaintiff's own ſhewing he had brought his action before the cauſe of action accrued, for the promiſe he declared on was made on the 26th day of *March*, and his bill was filed the 12th day of *February* preceding.

Per curiam. As the plaintiff would not in evidence have been confined to the *day* in his declaration, there is no reaſon he ſhould be more confined in pleading. Indeed, if this was a note, the *day* would be material, and an eſſential part of the agreement, from which he could not vary, but in the caſe of a common *aſſumpſit*, the day is alledged only for the ſake of form, and therefore the defendant cannot confine the plaintiff to the *day* alledged in the declaration: and on this diſtinction, the caſes of *Stafford* v. *Forcer*, *Eaſter* 1 *Geo.* and *Cole* v. *Hawkins*, *Hilary* 3 *Geo.* were *adjudged*: therefore the plaintiff had judgment. *Vide Stra. vol.* 2. *p.* 806.

Michaelmas, 3 *Geo.* 2. *Whitlock* v. *Humphreys*.

On debate it was ſettled, that to ſave coſts for not going on to trial, it would be ſufficient to countermand notice in a town-cauſe *two days*, and in a country-cauſe *four days*, before the aſſizes; and that it ſhould be a general rule, without conſidering the charges and inconveniencies in any particular caſe. *Vide Stra. vol.* 2. *p.* 849.

Michaelmas, 5 *Geo.* 2. *Bullock* v. *Lincoln*.

The *latitat* was returnable on the *Wedneſday*; and on debate it was held, that the bail-bond could not be aſſigned till after *Monday*, for the *four days* are to be one incluſive, and the other excluſive; and where the *fourth day* is *Sunday*, the party has all the next day to put in bail. *Vide Stra. vol.* 2. *p.* 914.

Trinity, 21 *Geo.* 2. *Guy and Wife* v. *Kitchiner et al.*

On an *aſſault* and *battery*, the *memorandum* was *generally* of *Michaelmas* term, and the fact, on *ſon aſſault* proved, was on a day within the term, *viz.* the 27th day of *October*. And a caſe being made of this, it was held well enough; for the plaintiff need have given no evidence of this plea, unleſs to aggravate damages; and the court will not *nonſuit* him, becauſe it is amendable by a new bill. *Vide Stra. vol.* 2. *p.* 1271.

Michaelmas, 5 *Geo.* 3. *Swann* v. *Broome*. Error.

On a writ of *error* brought from the *Common Pleas* on a common recovery there ſuffered:

Adjudged, that whilſt the court did ſit on *Sundays*, the notice muſt follow the practice then in uſe, and muſt of conſequence be given for appearing on the *Sunday*, but now, that old practice "of their actually "ſitting on *Sundays*," being altered, and at an end, theſe notices muſt neceſſarily relate to the *Monday*, when the courts do ſit, and before which day they cannot ſit; and therefore the defendant cannot be miſled by having notice given him to "appear on the "*Sunday*." *Vide Bur. vol.* 3. *p.* 1595.

Debt.

Trinity, 3 *W.* & *M.* *Newton or Newport* v. *Godfrey*. Error.

On *error* brought on a judgment in *C. B.* in an action of *debt* againſt an executor, after the leaſe was determined, for rent due in the teſtator's time, on a *parol* leaſe; the defendant pleaded an *obligation* entered into, to *A.* by the teſtator, *beyond which*, he had not aſſets, and ſo demanded judgment, and on demurrer judgment was given for the plaintiff in the *C. B.* and affirmed here.

Per curiam. *Debt* for rent on a leaſe for years, after the leaſe is ended ſavours of the *realty*, and is in equal degree with *debt* on a bond, and therefore a bond is not to be preferred to it: and ſo is the practice of the *Exchequer*. *Vide Mod. Rep. vol.* 12. *p.* 7. *Ibid. vol.* 4. *p.* 44.

Michaelmas, 3 *W.* & *M.* *The College of Phyſicians* v. *Buſh*.

The plaintiffs brought an action of *debt* on *ſtat.* 14 *H.* 8. *c.* 5. which prohibits the practice of phyſic within *London*, or *ſeven miles thereof*, under the penalty of 5 *l.* for every month, except the party is approved of under the ſeal of the college; and for practiſing phyſic in *Weſtminſter* ——— months this action was brought.

The defendant pleaded letters patent from King *Charles* the ſecond, by which free liberty is given to *French* proteſtants to exerciſe the faculty of phyſic in *London* and *Weſtminſter*, &c. and that he was a *French* proteſtant, &c.

On demurrer the plea was held ill; but then an exception was taken to the declaration, which ſet forth, that the defendant practiſed phyſic in *Weſtminſter*, and did not ſay it was within ſeven miles of *London*, for which reaſon the defendant had judgment. *Vide Mod. Rep. vol.* 4. *p.* 47.

Michaelmas, 4 *W. & M.* *The King and Queen* v. *Hicks.*

An information was brought againſt *Marmaduke Hicks*, and it was laid in *Middleſex*, in the name of Sir *S. Aſtry*, *for exerciſing the trade of a grocer* for the ſpace of three months, not having ſerved as an apprentice for ſeven years to that trade, *contrary to the form of the ſtatute.*

The defendant did not live in *Middleſex*, nor uſe the trade there, but in another county.

And on demurrer the defendant had judgment, becauſe the information being grounded on a *penal* law, it ought to have been laid in the proper county where the offence was committed, and not elſewhere, by the expreſs words of *ſtat.* 21 *Jac. c.* 4.

Per curiam. An action of *debt* will lie on *ſtat.* 5 *Eliz.* in *Middleſex*, though the offence was done in *Cumberland*, becauſe the *ſtatute* of King *James* did not extend to deprive the courts of *Weſtminſter* of *ſuch actions*, but only thoſe which might be brought before the juſtices of aſſize, or of the peace; now informations may be brought before them, as well as in this court; but *debt* cannot. *Vide Mod. Rep. vol.* 4. *p.* 158.

Hilary, 5 *W. & M.* *Coombs* v. *Talbot.*

In an action of *debt* for rent on a demiſe of an houſe and lands, at the yearly rent of 9 *l. per annum*, the action was brought for two years rent in arrear.

The defendant pleaded as to 9 *l.* part thereof *nil debet*, and as to the other 9 *l.* he confeſſed the demiſe as laid in the declaration *to render annually* 9 *l.* for a piece of land called *Chalwell*, and 40 *s.* for the other lands, and 7 *s.* for another parcel, *&c.* and *as to* 40 *s.* part thereof *nil debet*, and as to the reſt, *he had no intereſt in the tenements*; and on demurrer the plea was held to be ill, becauſe in conſtruction of law this *laſt* plea goes to the whole, though pleaded as to part; and having likewiſe pleaded *nil debet*, that makes the plea double; for on *nil debet* the defendant might give in evidence, *that he had no intereſt in the tenements*; by pleading that he owed nothing, the demiſe was admitted; and then by ſaying the plaintiff had nothing in the lands, *&c.* that made the plea double and repugnant; but he ſhould have traverſed the whole demiſe. *Vide Mod. Rep. vol.* 4. *p.* 254.

Michaelmas, 5 *W & M.* *Dighton* v. *Granvil.* Error.

A judgment was obtained in this caſe, in the reign of King *James* 2. in an action commenced in the reign of King *Charles* the Second, and an action of *debt* was brought on the judgment in this court after a *writ of error allowed.*

The defendant pleaded a *writ of error* depending, and the record certified into the *Exchequer Chamber*; to which plea the plaintiff demurred.

It was now argued for him, that this was no plea, becauſe *debt* will lie in this court after a *writ of error* is brought, and ſo it has been adjudged; the reaſon is, becauſe by the *writ of error* the tranſcript only, and not the record itſelf is removed; for if the judgment ſhould be affirmed in the *Exchequer*, the execution muſt be awarded in this court, where the record of the original judgment remains.

Per curiam. At common law before the *ſtatute* of *W.* 2. if execution had not been ſued on a judgment in any *perſonal* action within a year and a day, the party muſt then have brought an action of *debt* on that judgment; for he could have no *ſci. fa.* on that judgment; but now the *ſtatute* applies a proper remedy by giving the *ſci. fac.* on the judgment, after a year and a day; and it has been held, that a *writ of error* pending, was a good plea in *abatement* to ſuch a *ſci. fa.* But of late days that has been over-ruled, though it has been ſaid, that if there is a judgment precedent to a *ſtatute* from the ſame perſon who dies, and afterwards a *writ of error* is brought on the judgment, and pending that *writ*, the money due on the *ſtatute* is paid, and there is not enough remaining to ſatisfy the *judgment creditor*, that the firſt payment to the obligee is good, becauſe by the *writ of error*, the execution of the judgment was ſuſpended.

But in this caſe the demurrer was held good, and afterwards the defendant was ruled to anſwer over. *Vide Mod. Rep. vol.* 4. *p.* 247.

Michaelmas, 6 *W. & M.* *Walker* v. *Walker.*

The defendant's council moved in *arreſt of judgment*, becauſe the action was for money won on a wager, on a general *indeb. aſſump.* which is not a good promiſe in law: for there is no *debt*, and the verdict being general and entire, the damages given cannot be good. It is true, there are caſes on both ſides, but the point is now depending in a cauſe in the *Exchequer Chamber.*

On the other ſide it was argued, that though it was depending, yet in *Egleſton's* v. *Lewen's* caſe. *Hil.* 33 & 34 *Car.* 2. in Sir *F. Pemberton's* time, a judgment in this point was affirmed.

Holt, Chief Juſtice. It was ſo: but ſince we came hither, we have held the contrary, that it does not lie; it is merely a wager, and no *indeb. aſſump.* lies for it; for to make that lie, there muſt be a work done, or ſome meritorious act for which *debt* would lie; but it does not for this wager, becauſe this is due in a collateral reſpect. *Vide Mod. Rep. vol.* 5. *p.* 13.

Hilary, 7 *W.* 3. *Bovey* v. *Caſtleman.*

On an *indebitatus aſſumpſit*, the plaintiff declared, that there was an agreement between the defendant and him, that if the Duke of *Savoy* made an incurſion into *Dauphiny* within ſuch a time, that then the plaintiff ſhould give the defendant 100 *l.* and if the Duke did not make the incurſion into *Dauphiny* within the time limited, that then the defendant ſhould give to the plaintiff 100 *l.* which agreement was reduced into writing, and ſigned by both the parties: and the plaintiff avers, that the Duke of *Savoy* did not make any incurſion into *Dauphiny*, within the time limited; by which the defendant became *indebted* to the plaintiff in 100 *l.* and being ſo *indebted*, aſſumed to pay, *&c.* On *non-aſſumpſit* pleaded, a verdict was found for the plaintiff. And now it was moved in *arreſt of judgment*, that there was not any conſideration to raiſe a *debt*, for no *debt* could ariſe between the plaintiff and defendant on the incurſion of the Duke. For it is but a wager, for which an *indebitatus aſſumpſit* will not lie, becauſe there wants a real *conſideration*; but for mutual promiſes *aſſumpſit* may lie; but not *indebitatus aſſumpſit*, for *indebitatus aſſumpſit* will lie only in caſes where *debt* will lie; but in this caſe *debt* cannot lie: *which was agreed to by the whole court.* And therefore judgment was given, *that the plaintiff take nothing by his bill. Vide Raym. vol.* 1. *p.* 69.

Michaelmas, 7 *W.* 3. *Redſhaw* v. *Heſter.*

In an action of *debt* on a bond againſt an heir, who pleaded *be had nothing by deſcent:*

The plaintiff replied, that he had lands and tenements by *deſcent*, before the exhibiting the bill, *whence he was able to ſatisfy the aforeſaid plaintiff of the aforeſaid debt*, and then put himſelf on the judgment of the court.

And on demurrer, exception was taken to this replication, it being double, for he ought to have concluded to the country.

Per curiam. The replication is good, both by the common and ſtatute law. *Vide Mod. Rep. vol.* 5. *p.* 122.

Michaelmas, 7 *W.* 3. *St. Leger* v. *Pope.*

Holt, Chief Juſtice. *Debt*, with an averment in the declaration, differs from the condition of a bond; for the plaintiff here muſt fully intitle himſelf to an action; but the condition of a bond goes only in defeazance, and muſt come on the part of the defendant; and he ſaid, the preſent plaintiff does not intitle himſelf to any action, unleſs the hundred *guineas*, as well as the value, were unpaid, Where foreign coin is demanded, the action is in the *detinet*; but if the value is demanded, it is in the *debet* and *detinet*; and the averment always is, that the defendant has neither rendered the foreign coin, nor the value. *Vide Mod, Rep. vol.* 12. *p.* 81.

Eaſter, W. 3. *Thwaites and Wiſe, &c.*

See this caſe fully ſtated in page 320 of this work, under the head *Covenant*.

Eaſter, 8 *W.* 3. *Roberts* v. *Withered.*

An action of *detinue* was brought for goods forfeited by virtue of *ſtat.* 12 *Car.* 2. entitled, *An act for encouraging ſhipping and navigation.*

On *non detinet* pleaded, there was a verdict for the plaintiff. And now, it was moved in arreſt of judgment, that an action of *detinue* will not lie, but where the defendant comes by the goods either by delivering, or by finding, and where the plaintiff has an antecedent right, neither of which is this caſe; and it is not enough to ſay, that the ſtatute veſts a property in him who firſt ſues for the forfeiture, becauſe by the expreſs words thereof the right is not attached but by ſeizure, or information, *&c. &c.*

The plaintiff's council argued, that on reading the act and the declaration, the ſimple queſtion was, whether an action of *detinue* would lie, or not, in this caſe? And it was inſiſted that it would; for if the act had given only the penalty of 100 *l.* one moiety to the King, the other to him who ſhall ſue for the ſame, and did not ſay for what action, it will not be denied but that *debt* would have been the proper action in ſuch caſe for the informer to recover his moiety.

And that there was no difference between *debt* and *detinue* for ſuch a forfeiture; for the informer had no antecedent property in neither.

Therefore, without any farther argument, the judgment was affirmed by the whole court. *Vide Mod. Rep. vol.* 5. *p.* 193.

Trinity, 8 *W.* 3. *Wilkinſon* v. *Kitchin.*

The plaintiff being committed to priſon, on two indictments found againſt him for clipping, *&c.* by the grand jury, ſent for the defendant, a *Newgate* ſolicitor, and gave him 70 *l.* at ſeveral days, to procure his diſcharge, and for his pains. And not being proſecuted on theſe indictments, he brought an *indebitatus aſſumpſit* againſt the defendant for the whole 70 *l.* And on the trial before *Holt,* Chief Juſtice, the queſtion was, whether money given to a man to be expended in an ill uſe, might be recovered by the giver, who was *a partaker of the crime.* And a caſe was cited where a bribe was given to a cuſtom-houſe officer for exempting goods from the payment of cuſtoms, which being diſcovered, and the goods ſeized, the party recovered his money in an *indebitatus aſſumpſit*; and afterwards it being proved in this caſe, that the defendant confeſſed that he had diſpoſed of this money in bribes, the jury, by direction, gave a verdict for the plaintiff. *Vide Raym. vol.* 1. *p.* 89.

Trinity, 8 *W.* 3. *Newnham* v. *Lunn.*

An action of *debt* was brought by a common informer on *ſtat.* 23 *H.* 6. againſt the defendant for taking 5 *s.* 6 *d.* for an arreſt on a bond. That ſtatute enacts, *that the ſheriff ſhall have* 20 *d. and the bailiff, who makes the arreſt,* 4 *d. and the ſheriff or bailiff who does the contrary, ſhall pay treble damages to the party grieved, and ſhall forfeit the ſum of* 40 *l. one moiety to the King, and the other to the party ſuing; and that the juſtices of aſſize, at their ſeſſions, juſtices of the one bench, and of the other, and juſtices of the peace in their county, may determine the ſaid offence.*

There was a verdict for the plaintiff, and it was moved in arreſt of judgment, that by the ſtatute of K. *James* 1. all offences committed againſt any *penal ſtatute,* for which any common informer may have a popular action, bill, plaint, ſuit, or information, ſhall be proſecuted in the county where the offence was committed, and not elſewhere. So it was *adjudged* in this court in *Eaſter* term, 27 *Car.* 2. between *Nicholes* v. *Cockerill*; for if *debt* will lie here by a common informer on a *penal* law, then the ſtatute of K. *James* 1. will be wholly avoided.

The action was brought in *London,* and the offence was committed in *Buckinghamſhire. Adjourned. Vide Mod. Rep. vol.* 5. *p.* 225.

Michaelmas, 8 *W.* 3. *Norris* v. *Mawditt.* Error.

A *writ of error* was brought on a judgment in *C. B.* on an action of *debt,* on *ſtat.* 7 & 8 *W.* 3. *c.* 7. for a falſe return of a burgeſs to ſerve in parliament for the borough of *Liverpool*; which *ſtat.* enacts, *that if any Mayor,* &c. *ſhall return other than the perſon choſen by the burgeſſes of the borough where ſuch election ſhall be made, that ſhall forfeit to the King* 40 *l. and alſo gives an action of debt for* 40 *l. againſt ſuch Mayor,* &c. *his executors and adminiſtrators, to any perſon choſen and not returned, or to any other perſon who in default of ſuch burgeſs ſo choſen will ſue for the ſame.*

On this writ the general *errors* were aſſigned; and ſeveral *exceptions* were taken to the declaration.

1ſt. As to the perſon ſuppoſed to be elected, he ſhould have averred, that he was none of thoſe excluded by the act, as ſheriff, lawyer, merchant, or infant; for the authority given by the act is limited, both as to the perſon to be choſen, and by whom the choice is to be made; and the plaintiff has not brought himſelf within either.

2dly. This action is founded on *ſtat.* 23 *H.* 6. which directs how and in what manner the ſheriff, after the receipt of this writ, ſhall make his precept under his ſeal, *viz.* to the Mayor, *&c.* (reciting the writ) and commanding him by the ſaid precept (if it is in a borough) to chuſe a burgeſs by *burgeſſes.*

But this precept, ſet forth in the declaration, is directed to the Mayor to chuſe one burgeſs of the diſcreet men of the borough, and does not ſay by the burgeſſes.

3dly. The action is not well brought as to the form in the commencement of it, for it is in *debt as well for the Lord the King as for himſelf,* when in ſuch caſe the King ought not to be made a party.

Per curiam. This precept is well enough, for it commands them to chuſe burgeſſes *of the ſame borough*; which is no more than what the law was before the making of this act.

As to the form of this action, that it is brought *as well for the Lord the King as for himſelf,* it is true, where a ſtatute gives damages to the party injured; as for inſtance, the ſtatute of *R.* 2. for a *ſcandalum magnatum,* it is uſual to join the King with the party; but where a ſum certain is given, as in this caſe, they need not be joined: ſo on the ſtatute of *hue and cry* they are always joined.

But here is a contempt made by the defendant to an expreſs law, which is puniſhable by fine, and therefore the action may be brought *qui tam,* &c. There was the like precedent in this court, between *Culliford* v. *The Mayor of Dorcheſter, Anno* 3. *W.* which was an action of *debt* on a falſe return in this very form. *Adjourned. Vide Mod. Rep. vol.* 5. *p.* 311.

Hilary, 9 *W.* 3. *Taylor* v. *Jones.*

See this caſe fully ſtated in page 274 of this work, under the head *Conſideration.*

Trinity, 9 *W.* 3. *Maddiſon* v. *Shore.* Error.

This was an action of *debt* brought on the ſtatute for not appearing and giving evidence at the aſſizes, being ſerved with a *ſubpœna* for that purpoſe. On *nil debet* pleaded, a verdict was given for the plaintiff; and it was then moved in arreſt of judgment,

1ſt. That it did not appear by the declaration that the *ſubpœna* was left with the defendant; for the delivery of the ticket, and reading the writ is no good ſervice.

But this exception was over-ruled, for the plaintiff ſhewed that he delivered the very writ of *ſubpœna* to the defendant himſelf; but the delivery of a ticket containing the ſubſtance of the writ is a good ſervice within the ſtatute.

2dly. It was objected, that the plaintiff had not ſet forth any *ſpecial* damage which he had ſuſtained by the negligence of the defendant in not appearing to give evidence, as that he was nonſuited, or could not proceed to trial for want of the defendant's evidence, and the action is given to the party grieved. Now, if the plaintiff is not grieved, he cannot bring this action.

The court of *C. B.* held the declaration to be ill for this laſt objection, becauſe there muſt be a party grieved, otherwiſe there is no cauſe of forfeiture, and there muſt be a particular damage ſet forth, though this was contrary to a judgment in the like caſe, *Anno* 30 *Eliz.* where the like exception was taken and overruled.

Afterwards, a *writ of error* was brought in this court on the judgment; but it was affirmed. *Vide Mod. Rep. vol.* 5. *p.* 355.

Trinity, 11 *W.* 3. *Turner* v. *Maine.*

In an action of *debt* brought by the aſſignees under a commiſſion of bankruptcy, it was not ſet forth in the declaration, that the defendant had notice of the aſſignment.

Holt, Chief Juſtice. No notice is neceſſary, it is all well enough, the place is ſufficiently alledged, therefore let the plaintiff have judgment. *Vide Mod. Rep. vol.* 5. *p.* 444.

Michaelmas, 11 *W.* 3. *Bignoll* v. *Rogers.*

In an action of *debt* againſt the Sheriff of *Bucks*, for the reward given by the *ſtat.* 6 & 7 *W.* & *M.* to thoſe who ſhould diſcover and convict clippers and coiners.

Note, Here the plaintiff had a certificate from Lord Chief Juſtice *Holt*, who tried the malefactor, of his having been convicted on the plaintiff's evidence; which being produced, though under his Lordſhip's own hand, yet was proved by his Lordſhip's clerk to the jury.

Holt, Chief Juſtice, held, the demand of this *debt* of the Sheriff, after the certificate, did attach the *debt* on him; and that the money was to be paid out of the profits of the county, or, on failure thereof, out of the *Exchequer*, and that in ſuch caſe, the action would lie againſt the ſheriff's executor, becauſe given by act of parliament, and attached in the teſtator; but for the penalty given by the *ſtatute* againſt the Sheriff for default of payment, that would not affect the executor; and if the Sheriff paid the *debt* and died, it ſhould be allowed to his executor. *Vide Mod. Rep. vol.* 12. *p.* 310.

Trinity, 12 *W.* 3. *Marle* v. *Flake.*

Holt, Chief Juſtice. Payment of a bond with a condition indorſed, is a good plea before the condition broken, but not after, no more than to an action of *debt* on a ſingle bill; for when the breach is made, the benefit of the condition, which is always in behalf of the obligor, is gone. *Salk. vol.* 3. *p.* 118.

Hilary, 1 *Ann.* *The Caſe of Courtney & Al.*

In *debt* on a judgment in *C. B.* pending a *writ of error*, that matter was pleaded in abatement. *Vide Mod. Rep. vol.* 7. *p.* 140.

Trinity, 1 *Ann.* *Smith* v. *Angel.*

See this caſe fully ſtated in page 23 of this work, under the head *Aſſets.*

Michaelmas, 1 *Ann.* *Fiſh* v. *Horner.*

An action of *debt* was brought on a judgment in the *C. B.* pending a *writ of error*, and the *writ of error* pleaded in abatement, and to maintain the plea, the caſe of *Cremer* v. *Wickett*, lately in this court was cited.

Powell, Juſtice. It has often been attempted, but never could be obtained; and ſo he ſaid it had been reſolved by all the judges on conſideration had: but he ſaid, the court would diſcountenance ſuch proceedings; and therefore would not hold the party to bail. *Vide Mod. Rep. vol.* 7. *p.* 62.

Michaelmas, 1 *Ann.* *Ingledew* v. *Crips, or Grips* v. *Ingledew.*

See this caſe fully ſtated in page 152 of this work, under the head *Averment.*

Michaelmas, 1 *Ann.* *Hart* v. *Langfitt or Longfield.*

On an *indeb. aſſump.* on ſeveral promiſes, the plaintiff laid eight counts in the declaration. As to four, the defendant pleaded *non aſſumpſit*; and as to the other four, demurred. And the firſt exception taken to the firſt count was, that it was an *indebitatus aſſumpſit*, for that the defendant being *indebted* to the plaintiff in 20*l.* *for the nurſing one* Edward Langfitt *an infant* by the plaintiff, at the requeſt of the defendant, he aſſumed to pay; and that an action would well lie on a collateral promiſe, but not an *indebitatus aſſumpſit*, becauſe it will not raiſe a *debt.* And to prove that, *Moor* 701. *pl.* 975. was cited,, where, in an *indebitatus aſſumpſit*, in conſideration that the plaintiff would ſell to *D.* the defendant's factor, at the inſtance of the defendant, 200 hogs, to the uſe of the defendant, it was adjudged, *debt* did not lie on error brought. *Cro. Car.* 107. 193. 1 *Roll. Abr. lit. F. pl.* 2. *Cogan* v. *Green.* 2 *Vent.* 36. *Rover* v. *Rozer.* *But not allowed.*

Per curiam. It will raiſe a *debt*; for if *A.* comes into the ſhop of *B.* and ſays to him, deliver ſuch goods to *C.* and I will pay you; this will raiſe a *debt* in *A.* and *C.* is not to pay for the goods, nor is he liable to *B.* for it is a gift from *A.* to *C.* and a *debt* for them from *A.* to *B.* And the caſes cited depended on a repugnancy in the declaration, for the declaration is of a ſale to a third perſon, and he is liable; and the defendant is only a guarantee, and it is only a collateral promiſe in him. And as to the caſe in *Cro. Car.* 193. *Sands* v. *Trevilian*,

Holt, Chief Juſtice, ſaid, that the attorney had a remedy againſt the party for whom he acted, notwithſtanding he was employed by the defendant.

The exception to the three other counts was, that they were for the ſame time of nurſing, and yet he declared on ſeveral agreements, *viz.* one for three ſhillings a week, another for two ſhillings and ſixpence a week, another for two ſhillings, and he has not ſaid *other*; and it appears they were for the very ſame weeks. The court held this exception good, becauſe the one count falſified the others, and the plaintiff has contradicted himſelf. But on the firſt count judgment was given for the plaintiff. *Vide Raym. vol.* 2. *p.* 841. *Mod. Rep. vol.* 7. *p.* 148.

Hilary, 3 *Ann.* *Wangford Legatee of Shelly* v. *Wangford, Debtor and Executor to Shelly.*

See this caſe fully ſtated in page 242 of this work, under the head *Bonds.*

Eaſter, 3 *Ann.* *Smith* v. *Ayrey.*

In an action on the *caſe* for money won at play, the plaintiff among other counts, introduced in his declaration, an *indeb. aſſump.* The defendant pleaded *non aſſumpſit*, and the plaintiff had a verdict, and intire damages.

On a motion in *arreſt of judgment*, becauſe the count was not good,

Holt, Chief Juſtice, ſaid, that winning money at play, did not raiſe a *debt*, nor was *debt* ever brought for money won at play, and an *indebitatus aſſumpſit* would lie for it, but the only ground of action in ſuch caſes, was the mutual promiſes. That though there was a promiſe, yet *debt* would not lie on that. That he remembered a caſe brought before *Hale* in the *Exchequer*, and the ſame caſe was brought again before him in the ſame court, and afterwards here, on an *indebitatus aſſumpſit* againſt the acceptor of a bill of exchange, and declared that he was *indebted* to the plaintiff in ſo much on the acceptance of the bill of exchange; but it was held the action would not lie; and yet there was a promiſe in that caſe. *Vide Raym. vol.* 2. *p.* 1034.

Eaſter, 4 *Ann. The Sheriff of Middleſex* v. *Barnes.*

In an action of *debt* on a bail-bond, the plaintiffs declared thus: *A. B.* and *C. B. ſheriffs of Middleſex aforeſaid, complain*, &c. and on a ſham plea pleaded, there was a demurrer. And now, an exception was taken to the declaration, that it ought to have been *complains*, and not *complain*, becauſe the bond is taken by them as officers, by the name of their office, and they declare by the name of *office*, and they both make but one officer.

Holt, Chief Juſtice, ſaid, that if the plaintiffs had not named themſelves ſheriffs in the declaration, yet it had been a good declaration *at firſt ſight*; but indeed, if the defendant had craved *oyer* of the bond, and of the condition, and on that it had happened, that it was a bail-bond, that might have been ill. He ſaid, that the *debt* veſted in them in their natural capacity, otherwiſe, on their deaths, it ought to go to their ſucceſſors, like the chamberlain of *London*'s caſe; which it would not do, but to the ſurvivor, and on his death to his executors.

Powell, Juſtice, ſaid, that unleſs the defendant had craved *oyer* of the bond and the condition, and it had been entered on the record, they could not take notice that it was a bail-bond: therefore judgment was given for the plaintiffs. *Vide Raym. vol.* 2. *p.* 1135.

Michaelmas, 4 *Ann. Jayſon* v. *Raſh.*

The ſheriff brought an action of *debt* for his fees in executing an *elegit*; and *Holt*, Chief Juſtice, held, that it lies, for it is all the execution the plaintiff in the original action can have on this judgment, and he may enter on the land extended, if he can, without force. 1 *Cro.* 286. *Vide Salk. vol.* 1. *p.* 209.

Trinity, 5 *Ann. Anonymous.*

Holt, Chief Juſtice. If a legacy is given, or a ſum of money in *groſs* deviſed to iſſue out of lands, I doubt not but an action of *debt* might be brought for that money; tho' ſuch an action never as yet has been brought; and I doubt not but it might be brought on the ſtatute of *H.* 8. For whenever a ſtatute gives a right, it muſt by neceſſary conſequence give a remedy: and the proper remedy in ſuch caſe is *debt*, which may be founded on that ſtatute.

Powell, Juſtice. If I give money to another to buy goods for me, and he neglects to buy them, for this breach of truſt I ſhall have my election to bring *debt* or *account*; and cited four or five caſes.

Holt, Chief Juſtice. *Contra.* If the party did not take it as a *debt*, but to *account*, or *to merchandize*, it muſt be an account, and he ſhall have the benefit of an accomptant; which is, he may plead being robbed, which ſhall be a good plea in the laſt caſe, but not in the firſt. *Adjourned. Vide Mod. Rep. vol.* 11. *p.* 91.

Eaſter, 7 *Ann. Billingſworth* v. *Spearman*, &c.

See this caſe fully ſtated in page 211 of this work, under the head *Baron and Feme.*

Hilary, 8 *Ann. Hadley* v. *Styles or Stiles.*

On a *writ of error* brought on a judgment in *C. B.* the *error* inſiſted on was this; an action of *debt* was brought, and the jury found for the plaintiff as to part, and for the defendant as to the reſt. Now it was objected, that this verdict was naught, becauſe a *debt* is an entire thing; and on a *nil debet* the jury cannot ſever; and ſhould a man bring an action of *debt* for 80 *l.* and declare for leſs, this would be a variance between the writ and the count, unleſs he ſhew how the reſt was ſatisfied.

To this the court agreed, but yet were of opinion, that if the party brought an action for the whole *debt*, and part of it was paid, the jury might, on a *nil debet*, ſever, as in caſe of rent. *Adjourned. Vide Mod. Rep. vol.* 10. *p.* 7. *Salk. vol.* 2. *p.* 664.

Eaſter, 8 *Ann. Anonymous.*

An action of *debt* was brought on a bond againſt an executor, who pleaded *he had fully adminiſtered.* The plaintiff's council gave into court the inventory taken in the *ſpiritual court*, and put it on the defendant to diſcharge himſelf.

Holt, Chief Juſtice, ſaid, that where in the inventory it was ſet down deſperate *debts*, thoſe ſhall not be aſſets, unleſs the plaintiff can prove that the defendant has received them. But thoſe *debts* that are not ſet down deſperate, whether arrears of rent, or any other, ſhall be accounted aſſets, whether paid or not. *Vide Mod. Rep. vol.* 11. *p.* 225.

Michaelmas, 10 *Ann. Stafford* v. *Beneath.*

In an action of *debt* for 15 *l.* the plaintiff declared on two demiſes, and that on the one demiſe there was 10 *l.* rent behind, and on the other 12 *l.* To this the defendant demurred. Afterwards the plaintiff entered a *remittitur* for all that appeared due from the declaration, over and above the 15 *l.* demanded in the writ.

It was argued for the defendant, that ſuppoſing the declaration naught, the *remittitur* would not help it. 1 *Saunds* 285. *Duppa* v. *Mayo*, where it was expreſsly reſolved, that a *remittitur* in ſuch a caſe would ſignify nothing at all; and the reaſon given for it was, becauſe a man that had a good cauſe of demurrer, at the time of his demurring, might by this means be tricked out of it. To prove the declaration bad, this ground was laid down, that in an action of *debt* for rent, the plaintiff cannot abridge his own demand without ſhewing how the reſt was ſatisfied.

The court were of opinion for the defendant; and obſerved there was a difference between actions brought for a ſum certain, and actions that lay in damages: and ſaid, that on this declaration they could give judgment for no leſs than 22 *l.* which was more than was demanded in the writ. *Vide Mod. Rep. vol.* 10. *p.* 69.

Trinity, 11 *Ann. Anonymous.*

Per cur. Debt lies in the Marſhalſea, or in any other inferior courts, on judgments in *C. B.* or *B. R.* and on *nul tiel record* the iſſue ſhall be tried by *certiorari* and *mittimus* out of Chancery. The judgment being the *giſt* of the action, *quære*, how that can be alledged to be within the juriſdiction? which is neceſſary. *Vide Salk. vol.* 1. *p.* 209.

Trinity, 13 *Ann. Miles* v. *Williams.*

See this caſe fully ſtated in page 194 of this work, under the head *Bankrupts.*

Hilary, 1 *Geo. Holroi* v. *Ebizſon.*

See this caſe fully ſtated in page 334 of this work, under the head *Damages.*

Michaelmas, 1 *Geo. Vaux* v. *Mainwaring.*

Parker, Chief Juſtice. *Debt* is on the contract or ſale, but *indebitatus aſſumpſit* is an action on the promiſe, and lies only becauſe of the promiſe; if you bring an *indebitatus aſſumpſit* for 10 *l.* for a horſe ſold, if it was ſold for more or leſs, yet the plaintiff ſhall recover what it was ſold for; but if an action of *debt* is brought on that contract, if it come out to be more or leſs, the plaintiff cannot recover, for it is a *precipe that he reſtore* ſo much money in particular. This was an action of *debt*, whereon the plaintiff declared, that whereas the defendant bought of the plaintiff divers goods and merchandizes for ſo much money as they ſhould be worth, to be paid on requeſt, and ſaid in fact that they were worth 437 *l.* *&c.* *Vide Forteſcue, p.* 197.

Hilary, 2 Geo. Baldwin v. *Church.*

On a *writ of error* brought on a judgment in *C. B.* on an action of *debt* for 20 *l.* againſt two executors. The one pleaded *plene adminiſtravit* i. e. *that he had fully adminiſtered*, as to all the aſſets in his hands, *except* 40 *s.* and concludes, *therefore no action has accrued*; the other pleaded *plene adminiſtravit* generally. The plaintiff demurred to both pleas.

After hearing council on both ſides, the court proceeded to give judgment.

Per curiam. Judgment muſt be reverſed; and the ſame judgment given here, as ſhould have been given in the *C. B.* the plaintiff muſt take care to take his judgment rightly.

The plea is undoubtedly ill; for it ſets forth ſuch a matter, as ſhews plainly, that the plaintiff has good cauſe of action; and yet concludes, *no action has accrued*, which import the plaintiff ſhould not have brought this action at all.

If a man brings an action of *debt* for 20 *l.* and the defendant ſhould plead, that he has paid 40 *s.* and concludes *therefore no action has accrued*; this would be bad, and yet the plaintiff might have brought his action for the 18 *l.* only; whereas in the caſe of an executor, the creditor muſt bring the action for the amount of the *debt* that is really due, let the aſſets be never ſo ſmall.

The reaſon why, though the aſſets be very ſmall, yet judgment muſt be for the whole *debt*, ſeems to be for preventing a freſh action, in caſe of more aſſets. *Vide Mod. Rep. vol.* 10. *p.* 323.

Michaelmas, 9 Geo. Coleborne v. *Stockdale.*

In an action of *debt* on a bond, *&c.* the defendant pleaded, that the ſaid bond was given for money won at play; the plaintiff replied, it was not given for money won at play; and on demurrer to this replication, it was inſiſted for the defendant that it was ill, becauſe the plaintiff did not ſet forth, that the money, *or any part thereof*, was not won at play; for by *ſtat.* 9 *Ann.* It is enacted, *that all ſecurities, where the whole or any part of the conſideration is for money won at play, ſhall be void*; ſo that it is not ſufficient for the plaintiff to alledge, that the money for which the bond was given, was not won at play; but he muſt likewiſe add, *nor any part thereof*; for if any part is for gaming money, the intire ſpecialty is avoided by the *ſtatute*.

On the other ſide it was argued, that where the plaintiff has any manner of right, he may alledge it to ſupport his action, and where the defendant pleads but one fact, there can be but one reply.

The court was of opinion, that the replication was too large and uncertain; therefore gave judgment for the defendant. *Vide Mod. Rep. vol.* 8. *p.* 58.

Michaelmas, 9 Geo. The Chamberlain of London v. *Lopes.*

In an action for 25 *l.* brought by the Chamberlain of *London*, againſt the defendant, on *ſtat.* 6 *Ann*, by which an act of parliament for well *garbling ſpices was repealed*, by which repeal a duty ariſing by that act, and which was part of the revenue of the city of *London* was taken away, and an equivalent was granted to the ſaid city, by taking money to admit *brokers*, to exerciſe their office:

The defendant by his plea confeſſed, that he had acted as a *broker* in the city, and that he was not admitted thereto; but further ſet forth the act of general pardon, *by which the King diſcharged all manner of offences, which he might or could in any wiſe pardon*; and averred, that this was an offence which the King might pardon, *&c.* to which plea the plaintiff demurred, and the defendant joined in demurrer.

After hearing council on both ſides, the court gave their opinion.

Per curiam. This is a duty given to the city of *London*, for and inſtead of another duty taken from them by act of parliament, and this forfeiture is given as a proviſional ſecurity, for what they might ſuffer thereby; and therefore is not pardonable; and as a right veſts *in an informer* immediately on bringing his action, ſo in this caſe, in that very inſtant of time in which the offence was done, a right veſted in the *Chamberlain*, which intitles him to an action for the forfeiture, and which the King cannot pardon. *Vide Mod. Rep. vol.* 8. *p.* 103.

Eaſter, 10 Geo. Shipton v. *Hopton.*

This was an action of *debt*, *qui tam*, *&c.* brought by a common informer on *ſtat.* 5 *Ann. c.* 14. for 15 *l.* wherein the plaintiff declared on two ſeveral counts, one for 10 *l.* for killing two partridges, the other for 5 *l.* for keeping an engine to deſtroy game, not being qualified, *&c.* by *virtue of the ſtatute*, *&c.* on *nil debet* pleaded, the plaintiff had a verdict for 5 *l.* only; and it was now moved, that he might enter the verdict on either of the counts, becauſe the defendant intended to move in *arreſt of judgment*; for though he may not be qualified by the *ſtatute* of this land to keep a gun, yet if he is otherwiſe *qualified by law*, he is not ſubject to this penalty.

Now he may be qualified by law, as being huntſman to a nobleman, who, in coming up to parliament, may kill a deer in any of the King's foreſts; and this he may do by the foreſt law, which is part of the law of the realm; and for this reaſon the plaintiff was ordered to enter his judgment. *Vide Mod. Rep. vol.* 8. *p.* 238.

Trinity, 10 Geo. Williams v. *Green.*

Judgment was given againſt the principal, and a *ſci. fac.* was brought againſt the bail, and on two *nihils* returned, there was judgment againſt the bail; and afterward an action of *debt* was brought againſt one of the bail for all the money due to the plaintiff; and it was objected, that this action would not lie againſt one of the bail, becauſe the judgment againſt them was joint.

It was argued on the other ſide, that the action was brought on the *recognizance of bail*, which is joint and ſeveral, and conſequently good, either joint or ſeparate; and ſo is the caſe of *Corniſh* v. *Clarke*, *Michaelmas*, 10 *Geo.* and the court were of the ſame opinion in this caſe. *Vide Mod. Rep. vol.* 8. *p.* 296.

Trinity, 10 Geo. Serle or Searle v. *Barrington.*

See this caſe fully ſtated in page 244 of this work, under the head *Bonds*.

Trinity, 10 Geo. Springett v. *Chadwick.*

On an *indeb. aſſump.* brought for ſeveral things due to the plaintiff, to which declaration the defendant pleaded in bar, that he gave a note of 20 *l.* to the plaintiff in full ſatisfaction of the debt, *&c.* and on demurrer to this plea, the plaintiff had judgment, becauſe a note thus given is no diſcharge of a *debt* or duty. *Vide Mod. Rep. vol.* 8. *p.* 290.

Eaſter, 11 Geo. Burland v. *Tyler.*

An adminiſtrator brought an action of *debt*, in the *debet* and *detinet*, againſt the heir of the obligor, and concluded his declaration, *to the damage of himſelf*, the plaintiff, *&c.*

On demurrer to the plea, which was admitted to be ill, the defendant's council inſiſted, that the declaration was ill, to which he took two exceptions:

1ſt, For that the action is brought againſt the heir in the *debet* and *detinet*, when it ſhould be in the *detinet* only.

2dly, For that the declaration concluded, *to the damages of himſelf*, the plaintiff, when it ſhould be *in delay of adminiſtration*.

The plaintiff's council anſwered, the firſt exception would have been cured, if after a verdict, by *ſtat.* 16 & 17 *Car.* 2. *c.* 8. and if ſo, it will be cured by *ſtat.* 4 *Ann. c.* 16. being after a general demurrer.

Per curiam. The *Oxford* act cured the defect, *if a verdict* had paſſed, and by *ſtat.* 4 *Ann. c.* 16. judgment is to be given without reſpect to any defect in the declaration (unleſs ſhewn for cauſe of demurrer) ſo as the right of the cauſe appears.

2dly, This is only a matter of form; beſides the modern precedents are according to this declaration. Therefore judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 8. *p.* 356.

Eaſter, 12 *Geo.* *Siſney* v. *Nevinſon.* Error.

The plaintiff brought an action of *debt* on a bond againſt the defendant, as adminiſtratrix; and filed a bill in equity to diſcover aſſets; and had inſtituted a ſuit in the *ſpiritual court*, to oblige her to give in an inventory. After judgment for the plaintiff in the action, a *writ of error* was brought in this court, where the judgment was reverſed. After which the plaintiff brought a freſh action, and the defendant moved to ſtay proceedings, on the *ſtatute* for amendment of the law, on paying principal, intereſt, and coſts. And now on motion for the court's direction to the maſter in taxing the coſts, it was inſiſted for the plaintiff, that the defendant ought to pay the whole coſts of the firſt ſuit, the proceedings in *Chancery*, and the *ſpiritual court*: and the caſe of *Merril* v. *Jocelyn*, *Trin.* 13 *Ann.* was cited for that purpoſe.

Per curiam. We have nothing to do to order coſts for proceedings in another court, which has power to award coſts, if the party is intitled to them; and as to the judgment that is reverſed, there is no reaſon why the defendant ſhould pay for the error and miſtake of the plaintiff. We are of opinion, the proceedings in this cauſe muſt be ſtayed, on payment of the coſts of this ſuit. *Vide Strange, vol.* 1. *p.* 699.

Trinity, 12 *Geo.* *Welſh* v. *Craig.*

See this caſe fully ſtated in page 235 of this work, under the head *Bills of Exchange, &c.*

Trinity, 13 *Geo.* *Patterſon* v. *Scot.*

In an action of *debt* for rent on an indenture laid to be made at *London*, for the demiſe of lands in *Surry*, the action was laid in *London*; and on demurrer, it was held, that the plaintiff had his election to bring it in either, againſt the leſſee; otherwiſe it had been againſt an aſſignee, who is chargeable only on the privity of eſtate. Therefore the plaintiff had judgment. *Vide Strange, vol.* 2. *p.* 776.

Michaelmas, 5 *Geo.* 2. *The South Sea Company* v. *Duncomb.*

On a trial at *bar* in an action for money lent, it appeared that 8000 *l.* was advanced to the defendant by the plaintiffs in the year 1720, on a pawn of 2000 *l.* ſtock. And the defendant not repaying it, the queſtion to be tried was, whether the plaintiffs could proceed againſt the perſon of the defendant, or muſt ſtand to the remedy againſt the ſtock. And after proof of many particulars, to induce a belief, that in theſe loans no regard was had to the perſonal ſecurity; the court left it to the jury on this point, that where money is generally lent on a pledge, it will not deprive the lender of his remedy againſt the perſon; and that to diſcharge the perſon of the borrower, there muſt be a ſpecial agreement to ſtand to the pledge only. Wherefore the jury found for the defendant. *Vide Stra. vol.* 2. *p.* 919.

Eaſter, 9 *Geo.* 2. *Ambroſe & al. Aſſignees of the Eſtate of Ambroſe, a Bankrupt* v. *Clendon.*

See this caſe fully ſtated in page 198 of this work, under the head *Bankrupts.*

Michaelmas, 30 *Geo.* 2. *Roades* v. *Barnes.*

This action was brought on a *ſimple contract debt*; the defendant pleaded an *account ſtated*; the queſtion before the court was only on the validity of the plea.

After a long argument by the defendant's council in ſupport of the plea, the court (without hearing the plaintiff's council) held the plea bad in *ſubſtance* as had been determined in this court in the caſe of *Atherly* v. *Evans.* A promiſory note cannot be pleaded in *bar* to an action on a *ſimple contract*, though a bond may, becauſe it extinguiſhes the *debt*. One bond cannot be pleaded to an action brought on another bond; therefore judgment was given for the plaintiff. *Vide Bur. vol.* 1. *p.* 9.

Trinity, 32 & 33 *Geo.* 2. *Collins, Senior*, v. *Collins, Junior.*

On an action of *debt* on bond brought by the plaintiff againſt the defendant for an annuity of 10 *l. per annum*; *and alſo* for maintenance in the dwelling-houſe at *Crandall End.* The defendant, by leave of the court, as to the annuity, pleaded a plea of *ſett off*, *viz.* that only 60 *l.* was due to the plaintiff on account of the ſaid annuity, and that the plaintiff owed him more than 60 *l. viz.* 500 *l.*

As to the maintenance, the defendant pleaded that the plaintiff left the houſe voluntarily, and did not lodge and board in the houſe, ſo that the defendant was not obliged to board, waſh, and lodge him; but the defendant *averred* he was always ready to maintain him, *&c.* at, and in the houſe, *&c.*

To theſe pleas the plaintiff demurred, and the defendant joined in demurrer; and after hearing council on both ſides, the court gave their opinion.

Lord *Mansfield.* We are all clearly of opinion, that this caſe is within *ſtat. Geo.* 2. *cap.* 24. where *mutual debts* may be ſet off juſt as much as actual payment of the money might have been before.

Since the making of *ſtat.* 2 *Geo.* 2. *c.* 22. and 8 *Geo.* 2. *c.* 24. *ſtoppage* or *ſetting off* of *mutual debts* is become equivalent to actual payment: and a balance ſhall be ſtruck, as in equity and juſtice it ought to be.

As it has not been before ſettled, "that a ſett off "may be pleaded in ſuch a caſe as this, where the "condition is for the payment of an annuity or growing ſum," it would be hard to bind the plaintiff down ſtrictly to his demurrer.

Per curiam. Let the plaintiff withdraw his demurrer, on payment of coſts. *Vide Bur. vol.* 2. *p.* 820.

Declaration.

Eaſter, 3 *W. & M.* *Smith* v. *Bromley.*

A leaſe was made for a year, and the rent *payable quarterly*, and it was not ſaid to be at the moſt uſual feaſts or days of payment; and avowry was made for rent due at the *feaſt of St. Michael*, whereas it ought to have been on the 23d of *September*, according to calculation.

Eyres, Juſtice. If he had *declared* for rent *in arrear* at *Michaelmas*, it would have been well, but here it is for rent due at *Michaelmas*, therefore not good. *Vide Mod. Rep. vol.* 12. *p.* 5.

Eaſter, 3 *W. & M.* *Temple* v. *Killingworth.*

Holt, Chief Juſtice. If a *declaration* is part well, and part ill, it ſhall be good for that which is well *declared* on: but if a *writ of inquiry* is executed for the whole, or if intire damages are given, it is a good cauſe to ſtay judgment. 1 *Vent.* 27. *Vide Mod. Rep. vol.* 12. *p.* 5.

Michaelmas, *W. & M.* *The College of Phyſicians* v. *Baſſet.*

In an action for practiſing phyſic without licence; the *declaration* laid it to be at *Weſtminſter*, *in the county of Middleſex*, but not that it was within ſeven miles of *London*,

London, and therefore bad. *Vide Mod. Rep. vol.* 12. *p.* 10.

Eaſter, 4 *W.* & *M.* *Anonymous.*

In an action of *treſpaſs*, the *declaration* was without *vi et armis:* on a general demurrer, this omiſſion is fatal, for it is ſubſtance, and alters the entry of the judgment, which ought to be with a *capiatur* when the action is *vi et armis*, otherwiſe with a *miſericordia*. *Vide Mod. Rep. vol.* 12. *p.* 24.

Eaſter, 4 *W.* & *M.* *Haſtrop* v. *Haſtings.*

In an action on the caſe for board and wages, the defendant pleaded in abatement, *and prayed judgment of the bill and that the ſame might be quaſhed*, for uncertainty in the *declaration*, on demurrer the defendant's council inſiſted on many faults in the *declaration*.

Per curiam. The defendant ſhall not take advantage of miſtakes in the *declaration* on a plea in abatement; but if he would do that, he muſt demur to the *declaration*, *wherefore a reſpondeas ouſter* was awarded. *Vide Salk. vol.* 1. *p.* 212.

Michaelmas, 6 *W.* & *M.* *Camphill* v. *St. John.*

In an action of *trover* for a box *and two hundred ounces of plate*, &c.

The defendant demurred to the *declaration*, the plaintiff demurred to the demurrer of the defendant, and the defendant joined in demurrer. Exception was taken to the *declaration*, that it was *uncertain*, becauſe it had not ſpecified what ſort of plate, &c. ſo that the defendant cannot defend himſelf if the plaintiff ſhould bring another action againſt him for the ſame plate, by pleading the recovery in this action. *But not allowed*; *for trover for two hundred weight of medicines*, has been adjudged good; and here is as much certainty as there. Another *exception* was taken to the plaintiff's demurring to the demurrer of the defendant, when he ought to have joined in demurrer, ſo that here is a diſcontinuance, for which was cited *Yelv.* 137, 138. 1 *Brownl.* 103. *Alexander* v. *Lamb*.

Eyre, Juſtice, ſaid, that he doubted whether the caſe of *Alexander* v. *Lamb* was law as to the point of diſcontinuance; but all the court were of opinion, that there was a diſcontinuance here in the principal caſe. *Vide Raym. vol.* 1. *p.* 20.

Hilary, 8 *W.* 3. *Bennet* v. *Talbot or Talboys.*

In *treſpaſs* for entering his cloſe, and treading down his graſs and corn, and hunting there, the defendant being an inferior tradeſman, *viz.* a clothier, *againſt the peace of our Lord the King, and againſt the form of the ſtatute in that caſe made and provided*; after a verdict for the plaintiff, it was objected in arreſt of judgment, that *againſt the form of the ſtatute*, goes to the whole *declaration*, whereas ſeveral of the *treſpaſſes* contained are not contrary to any ſtatute; for *ſtat.* 4 & 5 *W.* & *M.* only gives *increaſed coſts*.

Holt, Chief Juſtice. If an act of parliament increaſes a penalty, or deprives a man of a benefit he had before at common law, in ſuch caſe, if one declares on the ſtatute, and does not bring himſelf within the ſtatute, and concludes *againſt the form of the ſtatute aforeſaid*, it is naught: this was *Penhallow*'s caſe, 3 *Cro.* 231. But if there be no act of parliament at all, and the plaintiff concludes *againſt the form of the ſtatute aforeſaid*, it is only ſurpluſage. This was *Ward*'s caſe, 1. *Vent.* 103. Here an act gives an increaſe of coſts, and in that only reſtores the common law, which was taken away by *ſtat.* 22 & 23 *Car.* 2. The queſtion is now, how the plaintiff ſhall *declare* in this caſe? In this count ſeveral *treſpaſſes* are alledged, the laſt whereof only is within the ſtatute, and the concluſion of the count is *againſt the form of the ſtatute*, which, though in grammatical conſtruction it goes to the whole count, yet in law it only goes to the hunting, and therefore why may we not apply it only to the latter part, and reject it as to the reſt for ſurpluſage, as was done in an indictment in *Harwood*'s caſe. *Al.* 43. Accordingly the court held, that *againſt the form of the ſtatute* ſhould only be applied to the latter part, which was really againſt the ſtatute, and that, ſeeing the hunting and breaking could not be ſeparated, the plaintiff ſhould have his coſts according to the new ſtatute: therefore judgment was given for the plaintiff. *Vide Salk. vol.* 1. *p.* 213. *Mod. Rep. vol.* 12. *p.* 122.

Eaſter, 8 *W* 3. *Thwaites* v. *Lady Aſhfield.*

See this caſe fully ſtated in page 320 of this work, under the head *covenant*. *Vide Mod. Rep. vol.* 5. *p.* 212. *Ibid. vol.* 12. *p.* 93.

Michaelmas, 8 *W.* 3. *Bedam* v. *Clerkſon.*

See this caſe fully ſtated in page 97 of this work, under the head *Arbitration and Award*.

Michaelmas, 9 *W.* 3. *Weſt* v. *Troles.*

The plaintiff declared, that whereas the defendant on the 6th day of *May* 1695, for 120 weeks diet then paſt, had promiſed to pay him 7 *s. per* week, and that the plaintiff *afterwards, to wit*, on the 5th day of *May* 1695, having found the defendant diet for 120 weeks then paſt, the defendant promiſed to the worth, and that it was worth 7 *s. per* week: on *non aſſumpſit* pleaded, and a verdict for the plaintiff, it was now moved in arreſt of judgment, that the weeks in the *quantum meruit* are not ſaid to be *other* than thoſe laid in the ſpecial promiſe, ſo that the defendant is twice charged for the ſame thing. *But not allowed*; for they do not appear neceſſarily to be the ſame, and without neceſſity the court will not intend them ſo. *Vide Salk. vol.* 1. *p.* 213.

Michaelmas, 9 *W.* 3. *Wingfield* v. *Jefferys.*

An information was exhibited in the court of *Exchequer* againſt *Wingfield*, for ſelling live cattle, or cauſing them to be ſold, &c. Judgment being given for the plaintiff in the *Exchequer*, and a *writ of error* being brought here, it was aſſigned for error, that the information was *uncertain*, becauſe in the disjunctive.

Holt, Chief Juſtice, inclined, that it was ill for that reaſon. But on certificate by the barons, that the courſe was ſo in the *Exchequer*, and ſince the jury had found the defendant guilty of one; the judgment was affirmed. *Vide Raym. vol.* 1. *p.* 284.

Eaſter, 10 *W.* 3. *Cromwell or Crumwell* v. *Grumſdale or Grunſdale.*

See this caſe fully ſtated in page 241 of this work, under the head *Bonds*.

Trinity, 10 *W.* 3. *Nevil* v. *Soper.*

On an action of *covenant* brought againſt an apprentice, the plaintiff aſſigned for breach, that the apprentice before the time of his apprenticeſhip expired, *and during the time which he ſerved*, departed from his maſter's ſervice: the defendant demurred, and had judgment, becauſe the *declaration* was repugnant, for it ſhould have been *during the time which he ought to have ſerved*. The caſe of *Lawly* v. *Arnold*. *Hilary*, 8 *W.* 3. in this court, was not unlike this: that was *treſpaſs* for taking and carrying away his timber and brick *lying on his land towards the building of an houſe built anew*. And the court held this to be nonſenſe, for they could not be materials towards the building of a houſe already built. *Vide Salk. vol.* 1. *p.* 213.

Michaelmas, 10 *W.* 3. *Barnes* v. *Geering.*

Barnes, an attorney of this court, brought an action of *debt* againſt the defendant, but did not deliver a *declaration* againſt the defendant till after the ſecond term; but ſome time after, and before the defendant had ſigned a *non-pros*, he delivered him a *declaration*, which the defendant refuſed to receive, and then ſigned his *non-pros.* And the plaintiff ſigned judgment for want of a plea, which was now ſet aſide as irregular; for the courſe of the court is, that if the *declaration* is not delivered by the laſt day of the *ſecond* term, that is, on or before it, the court ſitting the laſt day, the defendant may ſign a *non-pros*, though he may after receive a *declaration*, if he will, yet he is not compellable ſo to do; but he may well refuſe it; by an expreſs clauſe in *ſtat. H.* 8. there ſhall be no coſts againſt an attorney on a nonſuit. *Vide Mod. Rep. vol.* 12. *p.* 217.

Michaelmas, 10 *W.* 3. *Coxeter* v. *Parſon.*

Per curiam. If a *declaration* is delivered the day before the laſt day of term, the defendant has *two* days in the next term to put in an anſwer; for he ought to have *four* days in the term. *Vide Mod. Rep. vol.* 12. *p.* 231.

Eaſter, 11 *W.* 3. *Anonymous.*

In an action on the *caſe* for ſtopping a water-courſe; on *not guilty* pleaded, a verdict was found for the plaintiff.

It was moved in arreſt of judgment, that it was for *ſtopping and obſtructing* generally, without ſhewing how, as *by a bank*, &c. But it was over-ruled; and *Gould*, Juſtice, ſaid, that 3 *Leon* 13. *ſtopping generally* was held good, but that it would be ill on demurrer.

Holt, Chief Juſtice, ſaid, that he had known it held both ways. And the plaintiff had his judgment by the three judges. *Holt*, Chief Juſtice, not contradicting it. *Vide Raym. vol.* 1. *p.* 452.

Trinity, 11 *W.* 3. *Farrow* v. *Chevalier.*

See this caſe fully ſtated in page 247 of this work, under the head *Breach.*

Eaſter, 11 *W.* 3. *Dr. Groenvelt* v. *The College of Phyſicians.*

In this caſe, *Holt*, Chief Juſtice, held, that in an action on the *caſe* againſt a phyſician, it is ſufficient to ſay, that he adminiſtered phyſic unſkilfully, *&c.* without ſhewing the particular defect in his ſkill. *Vide Raym. vol.* 2. *p.* 454.

Trinity, 12 *W.* 3. *Hartfort* v. *Jones.*

In an action of *trover*, the plaintiff declared for *ſundry* cloaths and grocery goods loſt by him, and found by the defendant. The defendant permitted judgment to go againſt him by default, a *writ of inquiry* was executed, and intire damages were given for the plaintiff. And it was moved in arreſt of judgment on the *uncertainty* of the *declaration* in the ſeveral particulars there mentioned; but the chief *objection* to the *declaration* was, the *ſeventy-two ounces of cloves, mace, and nutmegs*, as it did not ſhew the quantity of each.

The plaintiff's council, to maintain the action, cited 2 *Vent.* 67. *Bliſſe* v. *Froſt*, 78. *Chamberlain* v. *Cook*, in *trover* for *turks* and *garnets*, ſuch *declaration* after verdict was held good. 1 *Sid.* 263. *Pledall* v. *The Hundred of Thiſtleworth*, &c.

Holt, Chief Juſtice, ſaid, the laſt term when this was moved, that the caſes cited by the plaintiff's council were after verdict, and if there was a verdict in the preſent caſe, the judgment would be accordingly, for then they would intend that they were mixed; but this caſe is after judgment by *default.* There is a great difference, where the thing, for which the action is brought, is one intire aggregate body, though conſiſting perhaps of many different parts; there it will be good, which is the reaſon of the caſes before cited. And for the ſaid reaſon, *Trin.* 23 *Car.* 2. in this court, *Boroughs* v. *Hall*, *trover* for a ſhip, *with its tackle*, was held good; *whereas* if the action was brought for the guns and rigging ſeverally, they ought to ſhew what, and how much. And ſo it was held in the caſe of *Pollexfen* v. *Criſpe.* The true reaſon why *certainty* is ſo much required is, becauſe a recovery in this action may be pleaded in *bar*, if another action ſhould be brought for the ſame cauſe. This had been ill in *detinue*, without ſhewing that they were mixed. But why is not this *declaration* as *certain* as a *declaration* in *ejectment* for *twenty acres of land, thirty of meadow*, &c. in the towns of *A. B.* and *C.* without ſhewing how much lies in each town: and afterwards this term, on motion, judgment was given for the plaintiff, the court eſteeming theſe to be things mixed. *Vide Raym. vol.* 1. *p.* 588.

Michaelmas, 12 *W.* 3. *Snow* v. *Firebrace.*

The plaintiff *declared*, that the defendant, in conſideration that the plaintiff had found him ſufficient meat and drink, *&c.* aſſumed to pay him as much as he ſhould deſerve, and *avers* that he deſerved ſo much, *&c.* On *non aſſumpſit* pleaded, a verdict was given for the plaintiff. And a motion was made in arreſt of judgment, that this *declaration* was intirely uncertain, having neither certainty of time nor of things.

Holt, Chief Juſtice, ſaid, he did not know why the *uncertainty* of time was worſe than the *uncertainty* of things, which have been oftentimes adjudged good. And it is enough to aver *quantum meruit*, i. e. *as much as he has deſerved.* *Vide Raym. vol* 1. *p.* 611.

Hilary, 1 *Ann.* *Hart* v. *Langfitt or Longfield.*

See this caſe fully ſtated in page 344 of this work, under the head *Debt.*

Hilary, 1 *Ann.* *Cutting* v. *Wilkins.*

See this caſe fully ſtated in page 327 of this work, under the head *Cuſtom.*

Lent Aſſizes, 1 *Ann.* *Jones* v. *Hammond.*

In an action on the *caſe* brought by the plaintiff againſt the defendant for ſtopping a way, the plaintiff *declared*, that he was poſſeſſed of the cloſe of *A.* and that the defendant was poſſeſſed of the cloſe of *B.* and that the plaintiff *had, and ought to have*, a way over the cloſe of *B.* On *not guilty* pleaded, on the evidence at the trial at *Maidſtone*, it was objected, that the plaintiff ought to be *nonſuited*; becauſe it appeared by the plaintiff's *declaration*, that the defendant was poſſeſſed of the cloſe of *B.* and for that reaſon ſuch a general *declaration*, of *had and ought to have*, is not good, but the plaintiff ought to ſhew his title to the way; for ſuch a general *declaration* is only good againſt a *wrong doer*; but in this caſe, if the plaintiff recovered, it might be, that the court at *Weſtminſter* would hold that this defect was aided by the verdict, becauſe they would intend that the plaintiff ſhewed his title to the way in evidence.

Holt, Chief Juſtice, ſaid, that the defendant had good reaſon to have demurred; but he had authority only to try the iſſue, and the plaintiff need not prove more than was contained in the *declaration*; and for that reaſon he over-ruled the council's objection, and the plaintiff recovered a verdict. *Vide Raym. vol.* 2. *p.* 751.

Michaelmas, 1 *Ann.* *Ingledew* v. *Crips or Grips*, v. *Ingledew.*

See this caſe full ſtated in page 152 of this work, under the head *Averment.*

Michaelmas, 1 *Ann.* *Marsfield or Blainfield* v. *Marſh.*

In an action of *trover* brought by an adminiſtrator, the plaintiff *declared* on a poſſeſſion in the inteſtate, and of a loſs by him in his life-time, (among other things particularly mentioned in the *declaration) of twelve caſks of ſpirits, and fifty galons of cordial water, &c.* and then he lays the converſion to be in his own time, *&c.* On *not guilty* pleaded, the defendant's council offered to give in evidence, that there was an executor alive; and argued, that this deſtroyed the property in the plaintiff; and in *trover* he cannot recover; but perhaps it might have been otherwiſe in *treſpaſs*, becauſe the bare poſſeſſion had been enough. *But not allowed.*

Holt, Chief Juſtice. The defendant ſhould have pleaded it in abatement; and it cannot be given in evidence on *not guilty* pleaded, becauſe here the property is laid in the inteſtate. But if the plaintiff had *declared* on a property in himſelf, and it had appeared on the evidence, that he claimed the goods but as adminiſtrator to *J. S.* &c. there the evidence of an executor, *&c.* had been a *bar* to the plaintiff, becauſe it would have defeated his property, on which his action is founded. Therefore a verdict was given for the plaintiff, with intire damages,

On which the defendant's council moved in arreſt of judgment, that the words *caſks of ſpirits*, with a daſh, and *galon*, were ſo uncertain, that the court could not underſtand what the plaintiff meant by them; and therefore the damages being intire, they were given for them as well as *for* the other things; and therefore judgment ought to be arreſted. But after mature conſideration,

Holt, C. J. held, the words *caſks of ſpirits*, were certain enough, without ſhewing what ſort of ſpirits they were, ſince they were contained in caſks. And he compared it to the caſe of *trover* for a library of books, without ſpecifying the particulars, where it was held good; and that the words *de ſpirit.* with a daſh, muſt be underſtood *de ſpiritibus*, i. e. *of ſpirits.* 2dly. The court held, that the word *galon*, was very proper; therefore the plaintiff had judgment. *Vide Raym. vol.* 2. *p.* 824.

Hilary, 2 *Ann.* *Martin* v. *Henrickſon.*

In an action on the *caſe* for ſo negligently managing his ſhip, that it ran over the plaintiff's barge, the plaintiff declared, that he was poſſeſſed of a barge laden with divers goods and merchandizes *generally*, *&c.* and the pilot was produced to give evidence for defendant.

Holt, Chief Juſtice, held, that he was no witneſs, becauſe he was anſwerable to the maſter of the ſhip in an action for the damages he ſuffered by his ill management, and conſequently for the damages which ſhould be recovered in this action againſt the defendant, the ſteering the ſhip being his province, and his management therein, the cauſe of damage to the barge. 2dly, He held, the plaintiff could recover no damages for the goods, becauſe the *declaration* was *too general*; but the particular goods ought to have been mentioned, as in an action on the *caſe* for burning a houſe of goods. *Vide Raym. vol.* 2. *p.* 1007.

Trinity, 2 *Ann.* *Thorneton* v. *Bernard.*

In an action of *treſpaſs* for taking *two packs of flax, and two packs of hemp*, after a verdict it was moved in *arreſt of judgment*, that this was uncertain, not ſetting out the weight or quantity of a pack or bundle.

Holt, Chief Juſtice. It is well enough; you may plead the recovery in this action in *bar* to any other action brought for the ſame thing; and if the plaintiff ſhould *declare* on the taking ſo much hemp by weight, you may aver, that theſe packs or bundles contained that weight. In an action of *detinue*, you may *declare* for a box of writings, without ſetting forth any writing in particular, but if you ſet forth a particular writing which concerns land, as a charter of *feoffment*, then indeed the defendant ſhall not be allowed to wage his law.

Per curiam. Let the plaintiff take his judgment. *Vide Raym. vol.* 2. *p.* 991.

Michaelmas, 2 *Ann.* *Anonymous.*

If a *declaration* is delivered of *Hilary* term, and rules for pleading given, if the defendant does not plead before the *eſſoign day* of *Eaſter* term, the plaintiff may ſign judgment for want of a plea; but if the plaintiff in that caſe has not given rules in *Hilary* term, he muſt give them in *Eaſter* term, before he can ſign judgment. *Vide Mod. Rep. vol.* 6. *p.* 22.

Michaelmas, 2 *Ann.* *Wiat qui tam* v. *Ayland.*

It was a *declaration* of *Michaelmas* term *generally* which at *firſt ſight* is to be intended to be of the firſt day of the term, and the fact was laid to be on the 15th day of *November* after, ſo the action was brought, of their own ſhewing, before the cauſe of action aroſe.

Per curiam. If on examination it appears, that the *declaration* was after the 15th, it ſhall be ſet right, as if the bail was filed after the 15th, or the bill of *Middleſex* taken out; and ſo it was referred to the maſter to examine. They all agreed that it could not be amended by any *ſtatute* of *jeofail*; but if bail was filed after the 15th of *November*, that would be a good warrant for a *memorandum* of the day that the *declaration* was of, for none is in *cuſtody of the Marſhall*, *&c.* till bail is filed.

Note, At laſt all parties agreed to waive execution, and go to trial again. *Vide Mod. Rep. vol.* 6. *p.* 33.

Hilary, 3 *Ann.* *Green*, *Executor of* —— v. *Crane.*

See this caſe fully ſtated in page 31 of this work, under the head *Actions.*

Hilary, 3 *Ann.* *Wangford*, *Legatee of Shelly* v. *Wangford*, *Debtor and Executor to Shelly.*

Powell, J. A *perſonal action* once ſuſpended, is for ever gone. But it is plain the right of action is in the executor before *probate*, and therefore he may releaſe: nay he may bring an action, though he cannot go on with it till he has obtained the *probate*, under ſeal, to produce in court, and muſt *declare* with a *profert*, *&c.* *Vide Mod. Rep. vol.* 11. *p.* 38.

Eaſter, 3 *Ann.* *Dove* v. *Smith.*

Per curiam. If an attorney is well known, and may be found, it is not ſufficient to leave a *declaration* for him in the office, but it ought to be delivered to him; otherwiſe it ſuffices to leave it in the office. *Vide Mod. Rep. vol.* 6. *p.* 153.

Michaelmas, 3 *Ann.* *Stanyon* v. *Davis.*

See this caſe fully ſtated in page 153 of this work, under the head *Averment.*

Michaelmas, 3 *Ann.* *Arnote* v. *Breame.*

See this caſe fully ſtated in page 103 of this work, under the had *Arbitration and Award.*

Michaelmas, 3 *Ann.* *Tilſden* v. *Palfriman.*

Per curiam. If a perſon be *in the cuſtody of the Marſhal*, the way to charge him in execution is thus: if it be in *term time* you muſt file a bill againſt him, and deliver a *declaration* to the turnkey; upon this he ſhall lie *two terms* before he be diſcharged, even on common bail: but if it be in *vacation*, the plaintiff muſt go the *Marſhal*'s book in the office, and make an entry *that he may remain in cuſtody at ſuit of J. S.* But then he muſt be in actual cuſtody, and not at liberty; becauſe then he may be arreſted. *Vide Salk. vol.* 1. *p.* 214.

Eaſter, 4 *Ann.* *The Mayor of Wincheſter* v. *Wilks.*

In an action on the *caſe* for exerciſing the trade of a woollen-draper, not being free of the *guild* of merchants, nor having ſerved *ſeven Years* as an apprentice, contrary to the cuſtom, *&c.*

The defendant's council took *two exceptions* to the plaintiff's *declaration*, *viz.*

1ſt. As to the ſetting out of the cuſtom, that it was too *generally* laid, to ſay, *or whereby he was other-*

wiſe in a legal manner authoriſed according to the uſage of the ſaid city, without ſhewing how that was.

2dly, That the guild of merchants ought to have brought this action.

After hearing council on both ſides, the court gave judgment.

Per curiam. Let judgment go for the defendant on the exceptions taken to the *declaration*. *Vide Raym. vol. 2. p.* 1129.

Eaſter 4 *Ann. Anonymous.*

The court was moved to amend a *declaration*, which was carried down to *Wincheſter* to be tried, but ſomething neceſſary being omitted in it, was not tried; it not being a record, but only a paper, it was prayed that it might be amended on payment of coſts; which was granted *niſi*, &c. *Abſent Holt*, Chief Juſtice. *Vide Mod. Rep. vol.* 11. *p.* 45.

Michaelmas, 4 *Ann. Knight* v. *Barker.*

An action of *trover* was brought for 400 *ends* of deal boards: on *not guilty* being pleaded, a verdict was given for the plaintiff: And it was moved in *arreſt of judgment*, that it was uncertain what an end of a board meant; it ſhould ſhew how many feet or inches there were. And after ſeveral motions, judgment was given for the plaintiff, becauſe ends of boards ſeem to be a term of art, and are ſufficiently known among workmen. *Stile* 75. 1 *Keb.* 34. *Walcot* v. *Tappin. Vide Raym. vol. 2. p.* 1219.

Trinity, 5 *Ann. Anonymous.*

Per curiam. Although a cauſe has proceeded no farther than in paper, yet if the time is out for entering it up on the record, this court will not give leave, on motion, to amend the *declaration*, on paying coſts. Let them declare *de novo*. *Vide Mod. Rep. vol.* 11. *p.* 92.

Trinity, 5 *Ann. Bulkley* v. *Camden.*

See this caſe fully ſtated in page 328 of this work, under the head *Cuſtom*.

Trinity, 7 *Willet* v. *Boſcomb.*

An action of *covenant* being brought by an heir for rent againſt the aſſignee, the plaintiff did not ſet forth in his *declaration*, that his father was ſeized of any eſtate when he made the demiſe, only *generally* that he demiſed, *&c.*

The defendant pleaded *no arrears due*: and a motion was made in *arreſt of judgment*, that the *declaration* was ill, for not ſhewing a title in his father.

Per curiam. We fear it is a fatal fault. The matter was however adjourned.

In *Michaelmas* term following this cauſe came on again; and *Holt*, C. J. then ſaid, ſurely this *declaration* is naught: the plea ſays the rent was not in arrear, but the *declaration* and the verdict ſay, it was; and ſo the queſtion is, whether this is not helped by the verdict.

Powell, Juſtice. If you intitle yourſelf to the reverſion, you muſt ſhew that you are heir; but in an *avowry* perhaps you need not, becauſe in that caſe if you had no title he is a treſpaſſer.

Holt, Chief Juſtice. If a leſſor brought *debt*, that perhaps might have been well, becauſe the action there had been on the demiſe, and on the privity of the contract; but where the action is brought on the title, there the title muſt be ſhewn. And here the jury have found a title where no title appears; it will be hard to help this caſe by the verdict. And it was again adjourned. *Vide Mod. Rep. vol.* 11. *p.* 179.

Michaelmas, 7 *Ann. Withers* v. *Baker.*

In this caſe, *Holt*, Chief Juſtice, declared, that by the courſe of the court, a man may amend his *declaration* the *ſecond* term; but that when the *declaration* is amended, new rules for pleading muſt be given; for the plaintiff perhaps muſt thereby be put to a new defence. The plaintiff the *ſecond* term may amend, but not change the *venue*, though iſſue is not joined, nor in any caſe afterwards. For in *tranſitory* actions the plaintiff has his election to lay his action where he pleaſes; therefore he ſhall not change it; though the defendant may, on cauſe ſhewn. *Vide Mod. Rep. vol.* 11. *p.* 198.

Michaelmas, 8 *Ann. Joddrell* v. *Heathcot.*

In an action of *debt* for rent, the plaintiff declared, *for that whereas by a certain indenture made*, &c. *it is mentioned*, that the plaintiff did demiſe, *&c.* to the defendant, *&c.* the defendant pleaded an ill plea, to which the plaintiff demurred, and afterwards pleaded over.

The defendant's council took an exception to the *declaration*, *that it is mentioned*, was ill in this caſe.

The plaintiff's council cited 2 *Lev.* 74. where *teſtatum exiſtit*, was held well in *debt*; alſo he ſaid, that though it was ill on a ſpecial demurrer, yet it was helped by their pleading over.

Powell, Juſtice, held the *declaration* ill; for the demiſe muſt be laid ſo certain, that it may be traverſed. He ſaid it had been held well in *covenant*, becauſe the precedents are ſo; and as to the caſe in *Lev. debt* on a charter-party, that is the ſame as *covenant*, and a *declaration* in *treſpaſs* by a *for that whereas*, has always been held ill.

The plaintiff's council ſeeing the opinion of the court was againſt them, prayed leave to *diſcontinue*; which was granted on payment of coſts. *Vide Mod. Rep. vol.* 11. *p.* 258.

Hilary, 9 *Ann. Goodwin* v. *Godwin.*

See this caſe fully ſtated in page 6 of this work, under the head *Abatement*.

Hilary, 11 *Ann. Parker* v. *Langley.*

See this caſe fully ſtated in page 38 of this work, under the head *Actions*.

Hilary, 12 *Ann. Johnſon* v. *Altham.* Error.

Parker, Chief Juſtice, delivered the reſolution of the court to be, that the judgment of the *C. B.* ſhould be affirmed.

Petit judicium de billa i. e. *prays judgment of the bill*, is the form of pleading in *abatement*.

Petit judicium de narratione i. e. *prays judgment of the declaration*, is the form of pleading in *bar*.

Demanding judgment of the *declaration*, is underſtood to be demanding judgment of the caſe in the *declaration*.

The demanding judgment of the *bill*, is as much as to ſay, ſince the *declaration* is your caſe, which it is always ſuppoſed to be, you have brought a wrong bill.

In this caſe there being no bill on the file, and the *declaration* being the firſt ſtep in the cauſe (which undoubtedly is erroneous, for every cauſe muſt begin by writ or bill) neither of theſe two forms of pleading were proper: not *petit judicium de billa*, for there was none; not *judicium de narratione*, for it was not the caſe in the *declaration*, but the want of a bill that was the *error*. The defendant therefore in the original action ſhould have concluded his plea thus, *petit judicium ſi reſpondere compelli debeat*, i. e. *prays judgment whether he ought to be compelled to anſwer*. See this caſe in p. 7 of this work, under the head *Abatement*. *Vide Mod. Rep. vol.* 10. *p.* 211.

Michaelmas, 12 *Ann. Jackſon* v. *Laveright.* Error.

On a *writ of error* brought on a judgment in *C. B.* in an action on the *caſe* for incloſing ſo many acres of land, parcel *communiæ paſturiæ*, *&c.* i. e. *common of paſture*, *&c.*

It was urged, that the word *communia* did ſignify, not the place, but the right of commoning; and a right being a thing of an *incorporeal* nature, was no more capable of being incloſed than a *rent*, *Bracton*, *lib.* 4. *c.* 4. and this definition of the word is given in *Fleta*, *lib.* 4. *c.* 19.

Eyre, Juſtice. It is very hard, that after a verdict this word ſhould not receive that ſenſe, which it will do in common parlance, nay, in acts of parliament, and in very good authors; as in *Du Freſne's Gloſſary*.

Powys, Junior, Juſtice, was of the ſame opinion; and ſaid, if the word was not capable of receiving this ſenſe, he did not ſee why it might not, after a verdict, be eſteemed a miſtake of the clerk, inſtead of *communis*.

He likewiſe thought it might be rejected as *ſurpluſage*; for though the legal import of the word *terra*, when ſtanding alone, is arable land, yet the word *terra*, in conjunction with other words, will ſignify all ſorts of land; as, here *acras terræ*, i. e. *acres of land*, is conjoined with the following words, *parcel. paſturæ terræ*, *vocat.* i. e. *parcel of paſture lands*, *called*, &c. and thus no abſurdity, as all follows the word *communia*. *Adjourned.* But afterwards judgment was given for the defendant in *error*. *Vide Mod. Rep. vol.* 10. *p.* 184.

Michaelmas, 12 *Ann.* *Walker qui tam* v. *Laughton*.

See this caſe fully ſtated in page 65 of this work, under the head *Amendment*.

Michaelmas, 12 *Ann.* *Seſtern* v. *Cibber*.

See this caſe fully ſtated in page 185 of this work, under the head *Bail-bond*.

Trinity, 13 *Ann.* *Johnſon* v. *Gardiner*. Error.

On a *writ of error* brought on a judgment in *C. B.* it was inſiſted that the *declaration* was naught, becauſe the action was brought againſt the defendant as executor, on a promiſe made by the executor *after the death of the teſtator*, that whereas the teſtator was indebted to the plaintiff in *March* for goods ſold and delivered, which he promiſed to pay on the 23d day of *November*.

It was argued that this promiſe of the executor, founded plainly on the conſideration of forbearance, made it the contract of the executor, and therefore the action ſhould have been brought againſt him in his own name.

Parker, Chief Juſtice. The naming him executor is ſurpluſage, becauſe it appears on the face of the record, that the demand was a demand againſt him on his own account.

In effect, the forbearance is the conſideration of this promiſe, becauſe without forbearance no advantage can be taken of this promiſe. *Yard* v. *Ellard*, 10 *W.* 3.

And to this opinion the reſt of the court inclined. *But adjourned.* *Vide Mod. Rep. vol.* 10. *p.* 254.

Trinity, 13 *Ann.* *Cole* v. *Hawkins*.

On an *aſſumpſit*, the plaintiff *declared* on a promiſe made the 16th day of *January* 1706. The defendant pleaded in *bar* the *ſtatute of limitations*.

The plaintiff replied, that the bill was exhibited on the 23d day of *January* 1713, and that *the cauſe of action accrued within ſix years*. To this the defendant demurred.

It was inſiſted for the defendant, that this replication was a departure from his *declaration*. For though in *tranſitory* actions, time and place are not material; and the jury may, notwithſtanding the promiſe at a different time and place, find for the plaintiff; yet the plaintiff ſhall not be at liberty himſelf to vary from, or falſify his own record. 5 *H.* 7. 28. 3 *Lev.* 348. 2 *Cro.* 364. *Book of Aſſizes*, 22. *pl.* 86. *Cro. Car.* 228. *Tyler* v. *Wall*. *Raym.* 86.

Parker, Chief Juſtice. Time is material, if laid ſubſequent to the *declaration*; time is material, if the defendant anſwers to the time; time is material on the *ſtatute of limitations*.

As the matter ſtands on the pleading, the plaintiff in his replication ſhews, that his bill was exhibited *ſeven* years *after* the cauſe of action.

Now, this being a general demurrer, it ſtands by virtue of the ſtatute for the amendment of the law, as if there had been a verdict; ſo that it muſt be conſidered, whether this is a matter of form, or of ſubſtance.

Powys, Senior, Juſtice. Time here is material on the *ſtatute of limitations*, not probably to lay it in the *declaration* ſo many years ago, unleſs the fact was ſo; moſt commonly people lay their cauſe of action at a later time than it really was.

Powys, Jun. J. In *tranſitory* actions, time and place muſt be laid *for form*'s ſake, as to the defendant and jury; for the jury are not bound by it, and the defendant cannot traverſe it without a ſpecial juſtification. The plaintiff, indeed, in his replication, has verified the plea of the defendant. He has now fixed both the boundaries; in his *declaration* he has ſhewn the time of the cauſe of his action; in his replication, the time that the bill was exhibited. And yet, if inſtead of a demurrer, iſſue had been joined, the jury might have found for the plaintiff, if in fact his cauſe of action was within ſix years. It is to be conſidered therefore, on the ſtatute for the amendment of the law, whether this not being a *ſpecial* demurrer, the fault in the pleading is not now cured.

Parker, Chief Juſtice. This may be conſidered likewiſe: that notwithſtanding that ſtatute, it does not follow, that judgment on this *general* demurrer be given for the plaintiff, becauſe on a verdict for the plaintiff it would have been ſo; and for this reaſon, becauſe on a verdict for the plaintiff, a new fact is laid before the court, *viz.* that the cauſe of action did ariſe within *ſix* years. *Adjourned.*

In *Hilary* term, 3 *Geo.* this matter came before the court again, when *Parker*, Chief Juſtice, delivered the reſolution of the court as follows:

Judgment muſt be given for the plaintiff, for this being the caſe of a parol promiſe, the day in the *declaration* is not material; and therefore the plaintiff in his replication has only departed from an immaterial part of his *declaration*, which would be cured by a verdict, and is now aided on a general demurrer, by the ſtatute for amendment of the law.

Were it more than matter of form, a verdict finding the promiſe at another day could never cure it, as moſt certainly it would.

And for this purpoſe he cited the caſe of *Lee* v. *Rayne*, 1 *Lev.* 110. reported likewiſe in 1 *Keble*, 566, 578. where this doctrine is laid down, that for the plaintiff in his replication, to vary from the time or place in his *declaration*, in order to follow the defendant's plea, is not a departure.

And unleſs what ſtrictly ſpeaking is a departure, is ſometimes allowed; unleſs the plaintiff, where the defendant by his juſtification makes the time or place material, may follow the defendant's plea, though it leads him to another time and place; all that doctrine, that in *tranſitory* actions, where time and place are not material, the plaintiff may *declare* at any time and place, muſt fall to the ground: therefore judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 10. *p.* 251, 348.

Trinity, 13 *Ann.* *Parker* v. *Crook*.

This was an action of *covenant*, on a deed indented. It was objected to the *declaration*, that the defendant is ſaid in the *declaration* to continue at *Fort St. George* in the *Eaſt Indies*. And on *oyer* of the deed, it bore date at *Fort St. George*; and therefore the court, as was pretended, had no juriſdiction. *Latch.* 4. *Lutw.* 959.

Parker, Chief Juſtice. An action will lie in *England* on a deed dated in foreign parts, or elſe the party can have no remedy; but then, in the *declaration* a place in *England* muſt be alledged *for form's ſake*. Generally ſpeaking, the deed, on the *oyer* of it, muſt be conſiſtent with the *declaration*; but in theſe caſes, *from neceſſity*, if the inconſiſtency is as little as poſſible, it is not to be regarded; but here the contract being of a voyage to be performed from *Fort St. George* to *Great Britain*, does import that *Fort St. George* is different from *Great Britain*.

Afterwards, in *Hilary* term, the plaintiff had his judgment notwithſtanding this objection. *Vide Mod. Rep. vol.* 10. *p.* 255.

Eaſter, 2 *Geo.* *Child* v. *Pierce.* Error.

This was an action on the *caſe* on ſeveral promiſes, brought by the plaintiffs as aſſignees under a commiſſion of bankruptcy againſt *J. S.* The plaintiff had judgment by default; and a *writ of inquiry* was executed.

On a *writ of error* brought to reverſe this judgment, it was inſiſted that the *declaration* of the plaintiff was naught. For they *declare* that the defendant was indebted to them as aſſignees under a commiſſion of bankruptcy againſt *J. S.* in the ſum of 320*l.* for ſo much money had and received by the defendant from the bankrupt; and not ſaid the money was the money of the bankrupt.

It was acknowledged, that in pleas of *bar*, which may be ſupported by common intendment, this way of pleading might poſſibly be admitted, and the money be intended the money of the bankrupt; but not in a *declaration*, where the words ſhall ever be taken in the ſtrongeſt ſenſe againſt him that pleads them.

Formerly, in actions of *debt*, the whole agreement uſed to be ſet forth, but of late, a more conciſe way of pleading has been practiſed in actions on the *caſe*. And yet even now, to *declare* on an *indebitatus aſſumpſit* for goods ſold and delivered would be naught on demurrer. *Adjourned. Vide Mod. Rep. vol.* 10. *p.* 331.

Michaelmas, 3 *Geo.* *Banneaux* v. *Plaſtead.*

A *declaration* was delivered *generally* as of the laſt term; and in that *declaration* it appeared, that the cauſe of action did not ariſe before the middle of that term. On a verdict for the plaintiff, it was moved in arreſt of judgment, that the *declaration* being as of the *laſt* term *generally* muſt have relation to the *firſt* day of the term; and conſequently the *declaration* will in point of law be antecedent to the cauſe of action.

It was *urged* by the plaintiff's council, that by entering a ſpecial *memorandum* on the record, *viz.* ſuch a day of the term, which would not contradict, but explain the record, this motion would fall to the ground; and that this might be done without moving the court.

Parker, Chief Juſtice, and *Pratt*, Juſtice, were of opinion, that the plaintiff might enter this *memorandum* of courſe, and without leave, and the rather, becauſe here was no deceit, as to the defendant; for he very well knew he was not arreſted, nor bail put in, till the middle of the term; and conſequently, that this *declaration* could not be as of the firſt day of the term.

Eyre, Juſtice, was of opinion, that the ſpecial *memorandum* ought to be entered, but that the proper way was by motion.

On which, to end the diſpute, the court was moved for leave, which was accordingly granted. *Vide Mod. Rep. vol.* 10. *p.* 340.

Eaſter, 5 *Geo.* *Rudge* v. *Onon.*

In an action of *battery*, there was two counts, the firſt was good, the ſecond was with a *cumque etiam*, and intire damages were given, for which the judgment was arreſted. *Vide Forteſcue*, *p.* 376.

Michaelmas, 6 *Geo.* *Windham* v. *Palgrave.*

In an action on the ſtatute againſt removing goods on an execution till a year's rent is paid, the *declaration* ſtated, that by a ſtatute made in a parliament held the 8th day of *July*, 8 *Ann*, it was enacted, *&c.* whereas the parliament began the 8th day of *July*, 7 *Ann*, but was continued by prorogations beyond the 8th of *Ann*: it was agreed, if it went no farther it would be naught, as is 2 *Cro.* 111. but concluding *contrary to the form of the ſtatute in that caſe made and provided*, it is well enough, and not tied up by the words *according to the form of the ſtatute aforeſaid*; for *aforeſaid* would tie it up. *Vide Forteſcue p.* 372.

Hilary, 8 *Geo.* *Atkinſon, Executrix, &c.* v. *Coatſworth.* Error.

On a *writ of error* brought on a judgment given at the aſſizes at *Durham*, in an action of *covenant*; the caſe was, *S.* by indenture of leaſe, demiſed to *Atkinſon* the teſtator, for a certain term of years, rendering rent, and performing other things therein mentioned; and afterwards *Atkinſon* made an under-leaſe of the premiſes to the defendant, who therein covenanted with the ſaid *Atkinſon to perform and keep all the covenants in the original leaſe, to be kept and performed by the ſaid Atkinſon, his executors,* &c. *or aſſigns.*

Afterwards *Atkinſon* having made his wife (the now plaintiff) executrix, died. It was aſſigned for *error*, that the plaintiff in her *declaration* had not ſet forth, that *Atkinſon*, her teſtator, did execute the *original leaſe on his part.* And the defendant's council argued, that if it was not ſigned and ſealed by him, then it was not his deed; it is true, it being executed by *S.* it had all the eſſential qualities of a deed, but it does not follow from thence that it was the deed of the teſtator, and by conſequence the defendant ſhall not be bound by a *covenant* relative to ſuch deed.

It was argued for the plaintiff, that by her *declaration* ſhe had ſet forth, that by an *indenture made between the parties aforeſaid*, *Atkinſon* did *covenant*, &c. Now, theſe words imply that the indenture was executed by him on his part; and therefore ſhe need not ſet forth all the circumſtances of ſigning, ſealing, and delivering, becauſe her alledging that it was *made between the parties aforeſaid* implies all the reſt.

Per curiam. The ſubſtance of the objection is, that the plaintiff has not ſet forth in her *declaration*, that the original indenture was ſigned and ſealed by *Atkinſon on his part*, or that it was his deed; for if it was not, then the defendant is not bound to perform the *covenants* therein contained; but the plaintiff has alledged, that it was an indenture *made between the parties aforeſaid*, which implies that both *S.* the original leſſor, and *Atkinſon* likewiſe, ſigned the deed, and ſo it became the deed of both parties, for where an indenture is made between two parties, that muſt be implied, and the other circumſtances of ſealing and delivering it as his deed, need not be ſet forth: therefore the judgment was affirmed. *Vide Mod. Rep. vol.* 8. *p.* 33.

Eaſter, 8 *Geo.* *Lawrence* v. *Jacob.* Error.

On a *writ of error* brought on a judgment in *C. B.* the caſe was, the plaintiff, who was executor of a ſecond indorſee of a promiſory note, brought an action againſt the indorſor for default of payment by the indorſor, and after demurrer to the *declaration*, judgment for the plaintiff in the *C. B.* and a *writ of error* brought in this court; the *error* aſſigned was, that the plaintiff in his *declaration* did not ſet forth that the drawer had notice of the indorſement, nor alledge any demand or default in the drawer. *But not allowed*; it being the conſtant form, and matter of evidence; and the judgment was affirmed on the authority of the caſe, and on the reaſon of the thing; for the defendant by his demurrer admits, that in conſideration of the premiſes, *viz.* the defendant's making the indorſable note, and the indorſing it to the plaintiff, the defendant aſſumed to pay the money according to the tenor of the note. *Vide Mod. Rep. vol.* 8. *p.* 43.

Trinity, 9 *Geo.* *Tucker* v. *Goldburne.*

See this caſe fully ſtated in page 186 of this work, under the head *Bail-Bond.*

Trinity, 9 *Geo.* *Wilkinſon* v. *Meyer.*

See this caſe fully ſtated in page 324 of this work, under the head *Covenant.*

Hilary, 10 *Geo.* *The King* v. *Colvin.*

See this caſe fully ſtated in page 136 of this work, under the head *Attachment*,

Eaſter, 10 *Geo.* *Burges* v. *Bracher.*

By articles made between the plaintiff and the defendant for a horſe match, it was agreed, that the plaintiff ſhould ride without *whip or ſtick, or other weapons*, except boots and ſpurs; and in an action of covenant brought on theſe articles, the plaintiff ſet forth in his *declaration*, that he mounted the horſe *without whip and ſtick, or other weapons*, and did ride *in form aforeſaid*; on the general iſſue, the plaintiff had a verdict; and now it was moved in *arreſt of judgment*, that this *declaration* was not purſuant to the articles of agreement, for that he was to ride *without whip or ſtick, or other weapons*, in the *diſjunctive*; and the *declaration* is *without whip and ſtick, &c.* in the *conjunctive*.

Per curiam. If the terms of the agreement had not been proved at the trial, the plaintiff could not have had a verdict; ſo it muſt be *intended*, that the agreement was ſufficiently proved; and there are ſeveral caſes wherein it has been adjudged, that where words may be taken in a double ſenſe, the court, after a verdict, will always conſtrue them in that ſenſe which may ſupport the verdict; now here the jury found, that the plaintiff did ride *without whip and ſtick, or other weapons*, in which the diſjunctive *or* in the latter part of the ſentence, qualifies the conjunctive *and*, and diſjoins that copulative; ſo that it ſhall be taken in the diſjunctive ſenſe; wherefore judgment was given for the plaintiff. *Vide Mod. Rep. vol. 8. p.* 239.

Eaſter, 10 *Geo. Webſter* v. *Gearing.*

See this caſe fully ſtated in page 168 of this work' under the head *Bail.*

Michaelmas, 10 *Geo. King and Wife* v. *Baſingham.*

See this caſe fully ſtated in page 214 of this work, under the head *Baron and Feme.*

Eaſter, 11 *Geo. Phillibrown* v. *Ryland.*

See this caſe fully ſtated in page 40 of this work, under the head *Actions.*

Eaſter, 11 *Geo. Kent* v. *Kerry.* Error.

In an action of *dower* in *C. B.* wherein the plaintiff *declared* for her *dower* in three meſſuages, and *three tenements, &c.* the tenant confeſſed the action, on which judgment was given to recover her *dower* and damages: a *writ of error* was brought in this court, and the following errors aſſigned.

1ſt, That the word *tenement* was of ſuch an uncertain ſignification in law, that the ſheriff could not deliver poſſeſſion of it; and that by the concurrent authorities in the books, *an ejectment will not lie for a tenement*, for the reaſon before mentioned, neither can a *fine* be levied of it.

2dly, The plaintiff did not ſet forth, that her huſband died ſeized, for which reaſon no damages can be recovered by the *ſtatute*; and yet the ſheriff has executed a *writ of inquiry* of damages, and by virtue of the writ of *habere facias ſeiſinam* has delivered to the plaintiff *ſeiſin* of ſuch an houſe, *&c.* or ſo much thereof as is worth 10*l. per annum*, which is void for the uncertainty.

Per curiam. Here is a demand made of a ſpecific thing, which is to be recovered and aſſigned by the ſheriff; the confeſſion cannot aid the uncertainty. The word *tenement* is uncertain; the *declaration* cannot be maintained. The judgment therefore muſt be reverſed. *Vide Mod. Rep. vol.* 8. *p.* 355.

Eaſter, 11 *Geo. Burland* v. *Tyler.*

See this caſe fully ſtated in page 346 of this work, under head *Debt.*

Eaſter, 11 *Geo. Wyvil* v. *Stapleton. Shelburne* v. *Eundem.*

See this caſe fully ſtated in page 16 of this work, under the head *Accord.*

Eaſter, 11 *Geo. William Maddox and R. Godfrey* v. *Taylor & al.*

See this caſe fully ſtated in page 336 of this work, under the head *Damages.*

Trinity 11 *Geo. Beach* v. *Hobbs.*

In this caſe it was ruled by the court, that to leave a *declaration* in the office before the *eſſoign* day of the term, is a compleat delivery thereof, if notice is given to the attorney on the other ſide in writing, and he refuſes to pay for the copy; but all attornies ought to deliver a copy of the *declaration* to the defendant's attornies, where they are known, and willing to pay for it; but if not known or refuſing to pay for it, then it muſt be filed in the office before the *eſſoign* day of the term, and the attorney for the defendant muſt have notice of it before the *eſſoign* day, otherwiſe he ſhall have an imparlance of courſe. *Vide Mod. Rep. vol.* 8. *p.* 379.

Michaelmas, 11 *Geo. Henly* v. *Roſſe.*

The defendant was arreſted, and no *declaration* being filed againſt him within two terms after the arreſt, he procured a *ſuperſedeas*, and was diſcharged, and immediately afterwards he was arreſted again by a *capias* out of the *C. B.* at the ſuit of the ſame plaintiff, and for the ſame cauſe of action; and on a motion to diſcharge theſe proceedings, becauſe irregular,

The court was of another opinion, for that the defendant had a right to ſuperſede the action, becauſe no *declaration* was filed againſt him in time, and as he had a right to ſuperſede the action, certainly the plaintiff muſt have liberty to proceed in another; for his debt is not loſt for want of declaring in time, but only that action is gone; and therefore a new action may be brought. *Vide Mod. Rep. vol.* 8. *p.* 306.

Hilary, 12 *Geo. Dobbs* v. *Edmunds.*

In an action of *treſpaſs* the plaintiff *declared, for that whereas* the defendant on ſuch a day broke and entered his houſe, *&c. and alſo for that whereas*, the defendant *afterwards* on ſuch a day, *with force and arms*, entered his ſhop, *&c.* On *not guilty* pleaded, a verdict was found for the plaintiff, but damages were given ſeverally, *viz.* 1 *d.* on the firſt fact, and 40 *s.* for the ſecond fact.

It was now moved in *arreſt of judgment*, that taking the damages ſeverally, would not help the fault in the *declaration*; for the, *that whereas*, went through the whole *declaration*, and ſo no fact was poſitively alleged, which is ill in *treſpaſs*, and has been often ſo adjudged. 1 *Rol. Rep.* 55.

Per curiam. The word *alſo* cannot bring the ſecond fact into the *that whereas*, but ſhould be took to be a poſitive averment, as if the word *complains* had been repeated again, *viz. and alſo complains of him that, &c.* which certainly had been good; and therefore the plaintiff had his judgment for the damages found for the ſecond fact; and the court *declared*, they would be bound by what had been already often determined; but they would be very cautious of extending this exception after a verdict, further than it had been carried before. *Vide Raym. vol.* 2. *p.* 1413.

Trinity, 12 *Geo. Luke* v. *Helmer.*

In an action of *treſpaſs why he broke down, &c.* 100 wears or fences of him the ſaid plaintiff; the defendant juſtified the treſpaſs in the words of the *declaration*, by means of a highway; on which iſſue was joined, and a verdict given for the plaintiff; and it was objected in *arreſt of judgment*, that the *declaration* was in the diſjunctive, therefore uncertain.

But the court held that the plea, taking notice what a wear and a fence was, and that they were the ſame, had made the *declaration* good; and relied on a caſe in *Lutw.* 1492, the *declaration* was *treſpaſs* for taking *four fowls*, generally, and the defendant juſtified as here, and it was held that the plea made the *declaration* good; *art or myſtery*, the ſame thing; Dr. *Bonham's* caſe, if only a circumſtance. *Vide Forteſcue, p.* 377.

Michaelmas,

Michaelmas, 12 *Geo. Wiat or Wyat* v. *Eſſington.*

In an action of *treſpaſs* for breaking the plaintiff's houſe, and taking away *divers goods and chattels* of the plaintiff *there found*, a verdict was given for the plaintiff, and intire damages aſſeſſed; and on motion the judgment was arreſted for the uncertainty in the *declaration*, in not ſpecifying what the goods were, ſo that this recovery could not be pleaded in *bar* of another action brought for the ſame goods. *Vide Raym. vol.* 2. *p.* 1410. *Forteſcue*, *p.* 377.

Hilary, 13 *Geo. Radley* v. *Rudge.*

On a motion in *arreſt of judgment*, it was held well enough in *trover* to *declare for a piece of tepee*, without ſaying how many yards it contained. *Vide Strange*, *vol.* 2. *p.* 738.

Hilary, 13 *Geo. Bendover* v. *Sindercombe.*

On a *writ of error* brought on a judgment in *ejectment* in *C. B.* after a verdict, and intire damages given, the plaintiff in *error* by his council, offered ſeveral exceptions to the *declaration* for the uncertain deſcription of the premiſes therein ſet forth.

After hearing council on both ſides on this *writ of error*,

Holt, Chief Juſtice, held, that the premiſes for which the plaintiff goes, in his *declaration* in *ejectment* ſhould be ſo certainly ſtated, that the ſheriff may know how, and in what manner, to give poſſeſſion on a judgment of the ſame premiſes. But in this cauſe, the exceptions taken to the *declaration* were over-ruled on the authority of ſeveral caſes in point. And therefore the court affirmed the judgment of the *C. B.* *Vide Raym. vol.* 2. *p.* 1470.

Michaelmas, 13 *Geo. Spark* v. *Jobber.*

On an *indeb. aſſump.* for 100 *l.* *for divers goods, merchandizes and things* by the plaintiff, at the requeſt of the defendant, ſold to the defendant, *&c.* and a *quantum meruit* laid in the ſame manner, the defendant demurred to the *declaration*, and the plaintiff joined in demurrer. The cauſe coming on in the paper the 9th of *November*, no council appeared for the defendant; whereon the council for the plaintiff prayed judgment, alledging it was only a demurrer for delay. But the court objected, that the word *things* was a very uncertain word, for it might be for rent, or money due on a bond, *&c.* for which an *indeb. aſſump.* would not lie. But the council for the plaintiff informing the court, that the defendant *declared* he would not defend it, judgment was given for the plaintiff.

Note, This was only an interlocutory judgment on the demurrer. *Vide Raym. vol.* 2. *p.* 1450.

Hilary, 2 *Geo.* 2. *White* v. *Graham.* Error.

On a *writ of error* brought on a judgment in *C. B.* in *trover*, for a parcel of diamonds, the plaintiff in *error*'s council would have diſtinguiſhed this from the caſe of *Bottomley* v. *Harriſon*, which was *trover* for a parcel of packcloths, wrappers, and cords, becauſe that was taken as a bundle of ſeveral things not eaſy to be ſeparated, whereas each diamond was diſtinct: and it ought to have been brought for ſo many diamonds. But the court thought there was no difference, and affirmed the judgment, which afterwards on *error* in parliament, was likewiſe affirmed, the council declining to argue it. *Vide Stra. vol.* 2. *p.* 827.

Trinity, 2 *Geo.* 2. *Matthews* v. *Spicer.*

See this caſe fully ſtated in page 341 of this work, under the head *Day*, *Date*, *&c.*

Trinity, 2 *Geo.* 2. *Bottomley* v. *Harriſon.* Error.

On a *writ of error* brought on a judgment by default in the *C. B.* in an action of *trover* for ſeveral parcels of goods, it was objected, that the damages were intire; and as to one parcel of the goods, it was too general, the words being one *parcel* of packcloths, wrappers, and cords.

The council on the other ſide argued, that of late years more general expreſſions had been allowed; and cited the caſe of *Hartfort* v. *Jones*, 12 *W.* 3. *trover*, for ſeventy-two ounces of cloves, mace, and nutmegs, and adjudged to be ſufficient, though the particular quantities of each were not ſpecified.

Per curiam. We are not ſo ſtrict as formerly: a ſtack of hay, a library of books, which was an *integer*, have been held well; this may be taken to be a bundle, and the plaintiff has particularized all the ſeveral ſorts of goods of which it conſiſted. In 2 *Sid.* 175. there is a caſe cited of two packs of linen-cloth, and other goods, and held certain enough; which is more general than this caſe: and the caſe cited of the ſeveral ſorts of ſpices goes as far as this: and therefore, tho' all the caſes are not to be reconciled, yet ſince there are caſes which will make this good, we are of opinion to hold it well, and affirm the judgment.

In *Michaelmas*, 4 *Geo.* 2. *Haſlegrave* v. *Thompſon*, in *trover*, for fifty pieces of ſquare timber, was held well on *error*, and the judgment was affirmed. *Vide Stra. vol.* 2. *p.* 809. *Raym. vol.* 2. *p.* 1529.

Trinity, 2 & 3 *Geo.* 2. *Lyne* v. *Moody.* Error.

On a *writ of error* brought on a judgment in *C. B.* in an action of *treſpaſs*, where the plaintiff declared, that the defendant, *with force and arms*, entered and broke his houſe, and that the defendant, in the plaintiff's ſaid houſe, *viz.* at *D.* *with force and arms, and illicitly*, took an exceſſive diſtreſs, *viz.* to the value of 100 *l.* for a rent of 30 *s.* *to the damage*, &c. The plaintiff had judgment by default, and damages on the inquiry *ſeverally*; and he releaſed the damages found on the ſecond count, *&c.*

Raymond, Chief Juſtice. The entry to make the *diſtreſs* is certainly lawful, and the *tort* commences by the exceſſiveneſs of the diſtreſs; if this action ſhould lie, it would make the party a treſpaſſer *from the beginning*, which he cannot be in this caſe, which differs from the abuſe of an authority given by law, as in the caſe of the ſix carpenters: the taking of the exceſſive diſtreſs cannot be intended to have been laid in aggravation of damages; but the action was originally intended and brought for that only; if this ſhould be taken as an aggravation of damages, a manifeſt inconvenience would follow, for the jury may conſider it in *treſpaſs*; and yet I think judgment in *treſpaſs* could be no *bar* to an action on the *caſe* afterwards brought by the party for this *tort* for it would not appear by the judgment, that it was conſidered in the damages by the jury: in the preſent caſe, part of the act is lawful.

Page and *Reynolds*, Juſtices, concurred with the Chief Juſtice; but *Probyn*, Juſtice, *doubting*, the matter was adjourned: however, in *Michaelmas* term following, the judgment was reverſed. *Vide Fitz-Gibbons*, *p.* 85.

Eaſter, 3 *Geo.* 2. *Rogers* v. *Gibbs.*

In an action of *aſſault* and *battery* there was a *quod cum* in the *declaration*.

Per curiam. This is helped by the writ, which runs, *wherefore* he did the *treſpaſs*, which is affirmative.

Forteſcue, Juſtice. The ſtile of the writ, which is rather interrogatory, cannot help the ſtile of the count, which ought to be poſitive and affirmative. 2 *Bulſt.* 214. *Vide Forteſcue*, *p.* 376.

Hilary, 4 *Geo.* 2. *Vice* v. *Burton.* Error.

In an action of *treſpaſs* for *meſne* profits, the *declaration* was for an entry into *meſſuages or tenements*, and on *error* brought it was objected to for the uncertainty; and a caſe cited, where it had been held ill in *ejectment*. To which it was anſwered, and reſolved by the court, that there was a very eſſential difference; becauſe in *ejectment* it will be uncertain of what the ſheriff is to deliver the poſſeſſion: ſo the defendant in *error* made an exception to the *writ of error*, which was quaſhed, being returnable before judgment. *Vide Stra. vol.* 2. *p.* 891.

Michaelmas, 4 *Geo.* 2. *Heſſellgrave or Haſtegrave* v. *Thomſon.* Error.

On a *writ of error* brought on a judgment in *C. B.* where the plaintiff *declared* in *treſpaſs*, *quare clauſum fregit at* D. *and goods and chattels*, viz. *fifty peices materiæ quadratæ*, *anglice*, ſquare timber, *there found*, *took*, *and carried away*, &c. the plaintiff had judgment by default, and a *writ of inquiry* was executed: the *error* inſiſted on was, that *materia quadrata* was no proper *Latin* word for timber; and then damages being aſſeſſed for that timber, as well as for the *treſpaſs* intirely, the judgment is erroneous.

Raymond, Chief Juſtice. Where there is a proper *Latin* word it muſt be made uſe of, for the party is not at liberty to coin: and the whole court ſeemed to think that the conſequence muſt be to reverſe the judgment: but the caſe coming another day before the court, the Chief Juſtice ſaid, it was good claſſical *Latin* for ſquare timber, and ſo uſed in *Pliny*, and in *Cæſar's Commentaries.*

Another exception was taken to the *declaration*, becauſe the nature of the timber ſhould have been ſet out, that the defendant might know how to make his defence at the trial, 2 *Vent.* 262. and that it was within the reaſon of *Playter*'s caſe.

Raymond, Chief Juſtice, ſaid, the principal caſe differed from that in 2 *Vent.* becauſe the number was there expreſſed; for there the *declaration* was, *divers pieces*, which is quite contrary; and that ſeveral caſes ſince *Playter*'s have gone contrary to it: therefore the judgment was affirmed. *Vide Fitz-Gibbons*, *p.* 161.

Michaelmas, 7 *Geo.* 2. *Horton* v. *Kilmore.*

See this caſe fully ſtated in page 44 of this work, under the head *Actions.*

Eaſter, 8 *Geo.* 2. *Bern and Wife* v. *Mattaire.*

See this caſe fully ſtated in page 216 of this work, under the head *Baron and Feme.*

Trinity, 8 *Geo.* 2. *Wilkins* v. *Perry and Salter*, *Sheriffs of London.*

On an action of *debt* for an eſcape, the court was moved for the defendant, that the plaintiff might be obliged to ſtrike out one of the counts in the *declaration*; for that they were exactly the ſame: there were two counts: one laid that at the time of the delivery of a *declaration*, the perſon who eſcaped was a priſoner in the cuſtody of the ſheriffs; and the other laid it, that the ſheriffs had arreſted *H.* the perſon who eſcaped by his body. The inconvenience to the defendants was, that they muſt prove in this caſe two *re-captions*, on freſh purſuit.

The court would not oblige the plaintiff to ſtrike out one of the connts, but diſcharged the rule.

Lee, Juſtice. I do not apprehend the court ever ſtrikes out counts, unleſs they appear to be put in for vexation.

Lord *Hardwicke.* As you have obtained time to plead on this *declaration*, without applying to the court to have it ſtruck out, or referred to the maſter, which is the uſual way, I think the rule muſt be diſcharged; and though I cannot ſee what evidence can be produced to prove one of the counts, which will not equally prove the other, yet it may be pretty hard to reſtrain the plaintiff from laying his caſe in his own way, when it does not appear that he intends to be vexatious. *Vide Caſes Temp. Lord Hardw. p.* 129.

Trinity, 8 *Geo.* 2. *Stacey* v. *Sutton.* *The ſame* v.——

The plaintiff recovered ſome lands in *ejectment*, and brought ſeveral actions againſt the ſeveral defendants, who were occupiers of ſmall parcels thereof, and were ſome little ſums in arrear; he brought ſeveral actions of *treſpaſs* for the *meſne* profits; the council for the defendants moved that theſe actions might be conſolidated.

But the court refuſed to do it, and ſaid they could not oblige the plaintiff to join them. But if ſeveral actions of *treſpaſs* are brought for one and the ſame cauſe againſt the ſame defendant, the court will order the plaintiff to join all his actions in one, if it may be done conveniently. *Vide Caſes Temp. Lord Hardwicke*, *p.* 137.

Hilary, 9 *Geo.* 2. *Wallis* v. *Smith.*

Per curiam. Where common bail is filed by the plaintiff's attorney, according to act of parliament, that is not ſuch a general bringing the defendant into court, as to warrant delivering a *declaration* by the bye; and to prevent miſtakes, it would be proper to add to the bail-piece, that it was filed by the plaintiff purſuant to act of parliament. *Vide Strange*, *vol.* 2. *p.* 1027. *Caſes Temp. Lord Hardw. p.* 207.

Eaſter, 9 *Geo.* 2. *Morgan* v. *Luckup.*

On an application to ſet aſide the proceedings for irregularity, no notice being ſubſcribed to the copy of the proceſs ſerved,

It was ſhewn for cauſe, that the defendant's attorney, *viz.* one who had been *generally* concerned for him, had taken the *declaration* out of the office, and paid for it, and the plaintiff had received the money, which it was argued, was a waiver of the irregularity, as in the caſe of *Burken* v. *Carter*, *Trinity*, 3 *Geo.* 2. where the irregularity complained of was, that the defendant was in *London* charged with a bill of *Middleſex*, and on ſhewing that the defendant had taken a *declaration* out of the office, and paid for it, the irregularity was held to be diſcharged.

Lord *Hardwicke.* I do not remember the caſe cited, but it ſeems very reaſonable, for it is like what the court does when no common bail has been filed for the defendant, they will make the action good notwithſtanding, if the defendant has taken a *declaration* from the office, and paid for it; and therefore I think the plaintiff now is not irregular.

Probyn, Juſtice. The defendant has notice by ſervice of the proceſs, and ſhould have complained then of the irregularity; but now this is a waiver of the miſtake made in ſerving the proceſs.

Per curiam. The rule muſt be diſcharged. *Vide Caſes Temp. Lord Hardw. p.* 242.

Michaelmas, 9 *Geo.* 2. *Franklyn* v. *Reeve.* Error.

On a *writ of error* brought on a judgment in the *C. B.* in an action of *treſpaſs*, where after recital of the writ, the plaintiff declared for taking and carrying away ſeveral loads of dung and ſoil, without ſaying *of him the ſaid plaintiff*; this was objected, and held that it was ſuch a defect of title in the count, as could not be aided by the verdict which aids not a a defective title, but only a title defectively ſet forth.

But though the count was held ill, yet the court thought it might be good by the recital of the writ, which had ſhewn them to be the dung and ſoil of the plaintiff, and was to be taken as part of the *declaration*, according to the caſes in *Cro. Jac.* 536. 1 *Sid.* 150. 187. 1 *Keb.* 699. 727. *Lutw.* 1509. 1 *Mod.* 219. And though it was agreed there was no original (which otherwiſe they would have ſent for up by *certiorari*) yet as the want of that was aided by the verdict, the judgment was affirmed. *Vide Strange*, *vol.* 2. *p.* 1023.

Hilary, 16 *Geo.* 2. *Mynot* v. *Bridge & al.*

In this caſe two *declarations* were delivered at the ſuit of the ſame plaintiff againſt the ſame defendants, one of them for a right of a way from one part of a cloſe to one part of a town, and the other was for another way from the cloſe to another part of the town: and the court refuſed to conſolidate them, becauſe the plaintiff may be ready as to one, and not as to the other: and in the caſe of *Smith* v. *Crabb*, about two years ſince the court refuſed to conſolidate ſeveral *declarations* in ejectment for the ſame reaſon. *Vide Strange, vol.* 2. *p.* 1178.

Hilary, 30 *Geo.* 2. *The Maſter, &c. of the Vintner's Company* v. *Paſſey.*

See this caſe fully ſtated in page 300 of this work, under the head *Corporations.*

Eaſter, 30 *Geo.* 2. *Whiſkard Aſſignee, &c.* v. *Wildon.*

On a demurrer brought to a *declaration* on a *bail-bond*, the defendant's council took the following, *exception* to the *declaration, viz.* That the *declaration* ought to have particularly ſet forth, "That the *debt* "was ſworn to be by the plaintiff, and that the ſum "ſworn to be due, and for which the defendant was "holden to bail, was marked on the writ," for he alledged, that without ſhewing that, here was no ſufficient authority to arreſt the defendant; and conſequently the bail-bond is not good, ſince *ſtat.* 12 *Geo. cap.* 29. but void, nor is it ſhewn, "that the debt was "to the amount of 10 *l.* nor is the ſum due ſworn to, "or the writ marked," all which are eſſentially requiſite by *ſtat.* 12. *Geo. cap.* 29. *ſect.* 1 & 2.

After hearing council on both ſides, the court gave judgment.

Lord *Mansfield.* This has not been thought neceſſary to be ſet forth till this time, ever ſince the making of *ſtat.* 12 *Geo.* nor does it, on reading the act, appear to be an eſſential requiſite to the validity of the bail-bond, nor in the nature of a condition precedent to it: but on the contrary, the *ſtat.* 12 *Geo.* appears to be only *directory* to the ſheriff; ſo that though the ſheriff may be himſelf anſwerable for ſuch an omiſſion, yet the bond is not void.

Deniſon and *Foſter*, Juſtices, gave their opinions at large on this queſtion, and concurred with the *Chief Juſtice.*

Per curiam. Let judgment go for the plaintiff. *Vide Bur. vol.* 1. *p.* 331.

Michaelmas, 30 *Geo.* 2. *Shadwell, Eſq;* v. *Angel, Eſq;*

A queſtion came before the court on the conſtruction of the following rule, *viz.* That on a proceſs returnable the *firſt* or *ſecond* return of a term, a plaintiff may (in certain caſes) deliver a *declaration de bene eſſe*, at the return of the proceſs, with notice "for the defendant to plead within eight days after delivery of the *declaration*," And if the defendant ſhall not file common bail, and plead within *eight days* after, *&c.* the plaintiff (having firſt filed common bail for ſuch defendant, according to the then late act for preventing frivolous and vexations arreſts) may ſign judgment for want of a plea, a rule to plead being firſt duly entered.

The caſe was, the proceſs brought by the plaintiff was made returnable on *Saturday* the 15th of *November*, (*the ſecond return*). The *declaration* with notice, "to plead in *eight days*," was filed in the office, on *Monday* the 24th of *November*. And on the defendant's not pleading within *eight days*, nor even before the time of ſigning the judgment: the plaintiff on the 3d of *January*, (*ſix weeks* afterwards) filed common bail for the defendant, and (a rule to plead having been duly entered) ſigned judgment on the ſame day.

The *maſter* informed the court, that he thought the plaintiff's ſigning the judgment was irregular, for that when the defendant was once in court, the plaintiff ought to proceed againſt him as being in court.

After hearing the council on both ſides on this queſtion, the court gave their opinion.

Lord *Mansfield* obſerved, that no further notice (beſides that given on delivering the *declaration de bene eſſe*) was neceſſary.

Deniſon, Juſtice. The defendant has *eight days* after the delivery of the *declaration de bene eſſe*, when ever it may be delivered, (either ſooner or later.)

Foſter, Juſtice. The whole objection in this caſe is, the plaintiff has not proceeded with ſo much ſpeed as he might have done, he might have ſigned his judgment on the 25th of *November*, the defendant might have filed common bail himſelf, if he thought proper, and then he might have had a freſh rule to plead.

Per curiam. Let the rule of reference to the maſter for irregularity in this cauſe be diſcharged. *Vide Bur. vol.* 1. *p.* 56.

Trinity, 30 & 31 *Geo.* 2. *Harris* v. *Huntbach.*

See this caſe fully ſtated in page 49 of this work, under the head *Actions.*

Michaelmas, 32 *Geo.* 2. *Heylyn and Others* v. *Adamſon.*

See this caſe fully ſtated in page 239 of this work, under the head *Bills of Exchange, &c.*

Hilary, 33 *Geo.* 2. *Croaſdale* v. *Gardiner.*

See this caſe fully ſtated in page 337 of this work, under the head *Damages.*

Trinity, 1 *Geo.* 3. *Sarah Nichleſon* v. *Stephen Croft.*

The queſtion before the court on the maſter's report in this cauſe was, Whether there were, or were not, more *counts* inſerted in the *declaration*, than were neceſſary.

It was a *declaration* on a policy of inſurance conſiſting of *ſeven counts.*

1ſt, For a total loſs on a policy ſubſcribed by the plaintiff himſelf.

2dly, For an average loſs.

3dly, For 6 *l. per cent.* to be returned.

The 4th, 5th and 6th *counts* were exactly the ſame as the 1ſt, 2d and 3d, with this difference, that theſe three laſt *counts*, alledged the policy to have been ſubſcribed by one *M. F. S.* the defendant's agent.

The 7th *count* was for money had and received to the plaintiff's uſe.

The *maſter* thought that *four counts* were ſufficient, *viz.* either the three firſt, with the laſt, or elſe the 4th, 5th and 6th, together with the laſt.

Lord *Mansfield.* On a *declaration* for a total loſs, you may recover an average loſs. It is unneceſſary to *declare* double with reſpect to the ſigning of the policy, one alone of theſe two methods of *declaring*, is ſufficient.

The court at laſt made a rule for ſtriking out the three firſt *counts*, but without coſts, as this manner of declaring was allowed to be uſual. *Vide Bur. vol.* 2. *p.* 1188.

Michaelmas, 1 *Geo.* 3. *Bonfield qui tam* v. *Milner.*

See this caſe fully ſtated in page 74 of this work, under the head *Amendment.*

Michaelmas, 2 *Geo.* 3. *Sulſton* v. *Norton.*

On an action on *ſtat.* 2 *Geo.* 2. *cap.* 24. for the more effectual preventing bribery, *&c.*

The *declaration* contained *five counts*; *viz.*

1ſt, That the defendant corrupted one *M.* to vote for Lord *V.* and Sir *R. B.* by giving him 5 *l.* 5 *s.*

2dly, A corrupt agreement to give *M.* 5 *l.* 5 *s.*

3dly, A corrupt agreement to lend him 5 *l.* 5 *s.* on a promiſory note.

4thly, A corrupt agreement to deliver the note to *M.* on voting.

5thly, For giving the note and counter-note, therein ſtated. A verdict was found for the plaintiff, and entered on the *firſt count.*

On a motion to ſet aſide the verdict, two objections were made, *viz.*

1ſt, That the man did not in fact vote for the perſons he promiſed to vote for, but on the contrary voted for their opponents, and therefore the defendant as he did not by any corrupt agreement procure

M. to vote for them, cannot be ſaid to have corrupted him ſo to do.

2dly, That the verdict ought not to have been taken on the *firſt count*, which was for giving him the money.

After hearing council on both ſides, the court gave their opinion.

Lord *Mansfield.* The *firſt objection* is in the nature of a motion for a new trial, on account of a miſ-direction by the judge.

2dly, As to the verdicts being taken on a *wrong count*, the evidence does ſupport the *firſt count*, for this is a gift; the note and all the reſt is mere evaſion, colour, diſguiſe, and device, in order to evade the law: but if it were not ſo, the verdict was given *generally* for the plaintiff; if by miſtake it had been entered on a *count* not proved, inſtead of the *count* which was proved, that is no reaſon for a new trial, the court ought rather to rectify the miſtake, by ordering the verdict to be entered on the right *count* according to the evidence.

Wilmot, Juſtice, concurred with the *Chief Juſtice.*

Per curiam. Let the rule be diſcharged. *Vide Bur. vol.* 3. *p.* 1235.

Michaelmas, 2 *Geo.* 3. *Morris* v. *Pugh and Harwood.*

On a motion for a new trial in an action of *trover*, brought for a mare, no actual converſion was proved, the evidence of converſion was a demand and refuſal on the 2d of *May*.

The defendant's council objected at the trial, that this demand and refuſal appeared to be ſubſequent to the bringing the action, for it appeared on the *niſi prius* roll, that the bill was filed of *Eaſter* term, and conſequently as there was no ſpecial *memorandum*, it muſt refer to the *firſt day of term*, which was in the begining of *April* (long before the time of the demand and refuſal on the 2d of *May*) and there was no other evidence to ſupport the *declaration.*

Lord *Mansfield*, reſerved the point for the opinion of the court, and if the court ſhould be of opinion, that it was *admiſſible*, then the verdict (which was found for the plaintiff) was to ſtand, otherwiſe the plaintiff was to be *nonſuited.*

After hearing council on both ſides, the court gave their opinion,

Lord *Mansfield.* A refuſal on demand is not an actual converſion, but evidence of it, if the refuſal on the 2d of *May*, had been after the action brought, I ought to have left it to the jury as evidence of a converſion before the bringing of the action. If there be no ſpecial *memorandum*, the bill by fiction of law, relates to the firſt day of the tetm, but fictions of law hold only in reſpect of the ends and purpoſes, for which they were invented.

The *bill* is not the commencement of the ſuit the writ is, and being after the time to which the bill refers, ſhews there ſhould have been a ſpecial *memorandum*.

I am clearly of opinion, that the writ was rightly admitted to be given in evidence, and therefore the rule ought to be diſcharged.

Deniſon and *Wilmot*, Juſtices, concurred with the *Chief Juſtice* in opinion.

Per curiam. Let the rule to ſhew cauſe why the verdict ſhould not be ſet aſide, and a new trial had, be diſcharged. *Vide Bur. vol.* 3. *p.* 1241.

Trinity, 3 *Geo.* 3. *The Mayor of Yarmouth* v. *Eaton.*

On an action on the *caſe* for *toll*, to which the defendant demurred, and the plaintiff joined in demurrer, the ſingle queſtion on the demurrer was:

Whether it was incumbent on the plaintiff in this action to ſet forth in his *declaration* a conſideration for the *toll* which he demands?

After hearing council on both ſides, the court gave judgment.

Lord *Mansfield.* This is a very plain caſe indeed, the plaintiffs ſet out, that they have a right by *preſcription* to the *port duties.*

The queſtion is, whether they are obliged to ſet out a conſideration.

The making the port is itſelf a conſideration: it is a ſelf evident convenience to the merchant: it ſpeaks for itſelf, it may never require repair; therefore I do not know it is neceſſary to ſhew repair.

This alone would be ſufficient if the reaſon of the thing was not ſo ſtrong as it is.

Deniſon and *Wilmot*, Juſtices, gave their opinions at large, and concurred with the *Chief Juſtice.*

Per curiam. Let judgment go for the plaintiffs. *Vide Bur. vol.* 3. *p.* 1462.

Trinity, 4 *Geo.* 3. *Grant* v. *Vaughan.*

See this caſe fully ſtated in page 240 of this work, under the head *Bills of Exchange, &c.*

Deed.

Hilary, 2 *W. & M.* *Symonds* v. *Cudmore.*

See this caſe fully ſtated in page 13 of this work, under the head *Acceptance.*

Michaelmas, 3 *W. & M.* *The Counteſs of Winchelſea* v. *Lady Maidſtone.*

In an action of *trover* for goods, tried at the bar by a jury of *Kent*; on the trial the caſe was as follows:

The Earl of *Winchelſea*, in the month of *Auguſt* 1689, made his will, and thereby deviſed to the plaintiff all his perſonal eſtate to pay his debts, *&c.*

The will was proved. But immediately on the death of the Earl, and before he was buried, the defendant, who was married to the eldeſt ſon of the ſaid Earl, took poſſeſſion of the houſe and goods in the declaration mentioned.

The plaintiff produced the will under the *probate*, and then ſhe proved that the goods were appraiſed at 1800*l.* She produced an inventory of them, and proved they were the ſame contained in the declaration; ſhe likewiſe gave evidence of the converſion.

The defendant produced a *deed of gift* of theſe goods made by the Earl in the year 1650, the *habendum*, to truſtees therein named, for the uſe of his then Lady, (but ſince dead) for the term of her natural life, and afterwards that they ſhould be, and remain to his children.

The plaintiff's council admitted, that though the ſame goods for which this action was brought were likewiſe contained in the *deed of gift*, yet that *deed* could not be good againſt a verdict.

That the Earl being in debt, a judgment was obtained againſt him; and by a *teſtatum fieri facias*, his goods were taken in execution, and ſold by the ſheriff in *Hilary* term 1657, for 800*l.* which was after this *deed of gift.*

It was proved that his ſteward paid the money, and redeemed the goods, and the Earl gave him a bond for repayment, which was paid, and the bond cancelled, ſo that by this means he gained a new property.

A copy of the *teſtatum fieri facias* was produced, and likewiſe the bill of ſale by the ſheriff, and the bond cancelled; and thereon the plaintiff had a verdict. *Vide Mod. Rep. vol.* 4. *p.* 51.

Michaelmas, 3 *W. & M.* or *Trinity* 4 *W. & M.* *Thomas* v. *Howell.*

See this caſe fully ſtated in page 270 of this work, under the head *Condition.*

Trinity, 4 *W. & M.* *Smith* v. *Milford.*

On a ſpecial verdict in *ejectment*, the caſe was as follows, *viz.*

J. D. being ſeized in fee of the lands in queſtion, did by *indenture*, bearing date the 5th day of *June*, 17 *Car.* 1. and made between him of the one part, and *J. C.* of the other part, in conſideration of a marriage then intended to be had between *G.* his ſecond ſon, with *M. P.* and in conſideration of a portion of 200 *l.* &c. and for the ſettling of his lands on the truſts therein declared, DID covenant with the ſaid truſtees to levy a fine of his ſaid eſtate before *Michaelmas* term then next following, to the uſe of himſelf and *E.* his wife, and to the ſurvivor of them for life, then to *G.* his ſon for life, then to *M.* his ſon's intended wife for life, and afterwards *to the heirs of the body of the ſaid* G. *to be begotten on the body of the ſaid* M. *remainder to his own right heirs.*

There was no fine levied, but *three years* after the ſealing of this *deed. J. D.* made his will, in which (among other things) was this clauſe, *viz.*

Item, *I do ratify and make good all thoſe my eſtates made or granted in marriage to* G. *my ſon, according to the writing made by me in truſt*, &c.

The jury found that there was no writing made by him in truſt to any other perſon or perſons whatſoever, other than the *deed* of the 5th day of *June*, which they found to be the *very deed* of *J. D.*

They *likewiſe* found that the ſaid *J. D.* had iſſue, *J.* his eldeſt ſon and heir, who entered, and died, leaving iſſue *M.* his only daughter and heir.

They *alſo* found that *G.* his ſecond ſon, and *M.* died, leaving iſſue a ſon, who was leſſor of the plaintiff, &c.

The queſtion was, whether the will ſupplied the defect in the *deed*, which, without a fine, would not operate to create an eſtate-tail in *G.* the ſecond ſon. In wills, if the intention is certain, for tho' not fully expreſſed in words, it is well enough: it was argued, that it did, and that the plaintiff had an eſtate-*tail.* And accordingly judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 4. *p.* 131.

Michaelmas, 6 *W. & M.* *Nurſe* v. *Frampton.*

The plaintiff brought an action of *debt* againſt the defendant for a certain ſum of 25 *l.* due to the plaintiff by agreement, on a *deed* between the plaintiff and defendant. On *oyer* of the *deed* it appeared to be thus: *viz. It is agreed, that a grey nag bought of* J. S. *by Mr.* F. *ſhall run twenty-five miles in two hours time, for*, &c. *In witneſs whereof we have ſet our hands and ſeals*, &c. omitting the names of the perſons between whom this *deed* was made, but the plaintiff and defendant had ſigned the *deed*. And on demurrer, the court were of opinion, that inaſmuch as the plaintiff and defendant had ſigned this, although it was not mentioned in the body of the *deed*, by whom or to whom it was made; yet it will warrant the declarations reciting, that it was made by the plaintiff and defendant: and therefore judgment was given for the plaintiff. *Vide Raym. vol.* 1. *p.* 28. *Salk. vol.* 1. *p.* 214.

Eaſter, 9 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. When a *deed* is pleaded with a *profert in this court*, the very *deed* itſelf, is by intendment of law immediately in poſſeſſion of the court, and therefore when *oyer* is craved, it is of the court, and not of the party. *Vide Salk. vol.* 3. *p.* 119.

Michaelmas, 10 *W.* 3. *Pullien* v. *Benſon.*

See this caſe fully ſtated in page 338 of this work, under the head *Date, Day, and Delivery.*

Eaſter, 1 *Ann.* *Feltham* v. *Cudworth.*

See this caſe fully ſtated in page 269 of this work, under the head *Compoſition.*

Trinity, 1 *Ann.* *Anonymous.*

See this caſe fully ſtated in page 339 of this work, under the head *Day, Date, and Delivery.*

Trinity, 2 *Ann.* *Clarkſon* v. *Buſſey.*

See this caſe fully ſtated in page 269 of this work, under the head *Compoſition.*

Michaelmas, 3 *Ann.* *Anonymous.*

Holt, Chief juſtice. The *date of a deed* is either *expreſs* or *implied*; the *expreſs* date is the very day and year in which the *deed* was made, and this is always intended when in pleading it is ſaid, *bearing date*; the other is the *implied* date, which is the delivery. *Vide Salk. vol.* 3. *p.* 120.

Hilary, 4 *Ann.* *Fitch* v. *Wells.*

On a trial in *ejectment*, the plaintiff made his title under ſeveral *deeds*, and the jury found againſt them, and on motion the court ordered them to be kept in the officers hands, in order for a proſecution for forgery; but on application to the *Court of Chancery*, from whence the iſſue was directed, a new trial being granted, the plaintiff moved to have the *deeds* out of court.

Holt, Chief Juſtice, held, that they muſt be delivered out as this caſe was, becauſe the *deeds* were not in iſſue directly on the pleadings in the cauſe; *otherwiſe* if the iſſue had been, *not his deed*; and he remembered the caſe of Sir *John Hughley*, who was ſued as executor to *J. S.* on a bond of 10,000 *l.* ſet up by an old woman that looked after *J. S.* an old miſer, as his nurſe; and on *it was not his deed* pleaded, it was found on a trial at *bar* not to be the *deed* of *J. S.* And on the authority of *Wymark*'s caſe in 5 *Co.* it was made a queſtion, whether the bond ſhould not be cancelled? And it was held it ſhould not be cancelled, becauſe the judgment might be reverſed by a *writ of error*, but that the bond ſhould be kept in court. *Vide Salk. vol.* 1. *page* 215.

Eaſter, 4 *Ann.* *Vivian* v. *Champion.*

See this caſe fully ſtated in page 248 of this work, under the head *Breach.*

Eaſter, 4 *Ann.* *Luttin* v. *Benin.*

See this caſe fully ſtated in page 243 of this work, under the head *Bonds.*

Michaelmas, 4 *Ann.* *Benns* v. *Parre.*

The court was moved for a *prohibition* on a ſuit depending in the *Admiralty* for ſeamens wages, on a ſuggeſtion that the contract was made by *deed* at land: but on reading the ſuggeſtion, it appeared to be general, that the contract was made at land. The court directed him to amend his ſuggeſtion, and inſert that it was by *deed.* And he amended it, and made it *by writing.* But the court held, that that was not ſufficient, for it might be by writing, and yet not by *deed*; and if it were ſo, that would not alter the caſe, for notwithſtanding the writing, it was but a *parol* contract. But it was urged by the council, that it was a ſpecial agreement, yet the court held that did not draw it from the *Admiralty*'s juriſdiction: therefore the motion was denied. *Vide Raym. vol.* 2. *p.* 1206.

Eaſter, 5 *Ann.* *Hill* v. *Ayland.*

An action was brought on a ſpecial agreement contained in a *note*, and a rule was made to ſhew cauſe why the plaintiff ſhould not give the defendant a copy; but on ſhewing cauſe, the rule was diſcharged, becauſe the contract on which the action was founded was a *parol* contract, of which the note was only evidence; and therefore the defendant ought not to have a copy. *Vide Salk. vol.* 1. *p.* 215.

Hilary, 8 *Ann.* Sir *Edward Seymour*'s *Caſe.*

On a trial in *ejectment* between Sir *Ed. Seymour* and his mother-in-law, the court allowed the contents of a *deed* to be given in evidence, by witneſſes; nay by witneſſes who put down the contents of the *deed* in writing from memory, *four or five days* after reading the *deed.* The court ſeemed of opinion, that in caſe a *deed* was loſt by ſome inevitable accident, that there it might be proved by a copy. But in caſe there was no copy, the contents of it could not be proved from the memory of thoſe who knew the *deed*; and though it was hard for a man that had no copy to loſe the benefit of his *deed*, yet the inconveniencies of admitting that ſort of evidence would be greater.

But here the opinion of the court was founded on a particular reaſon, for the *deed* by which the plaintiff was to prove his title, was not loſt, but proved to be in the hands of the defendant; ſo that in this caſe, the danger of allowing this ſort of evidence was none at all; for if the defendant was wronged by the *parol* evidence, it was in her power to ſet all right by producing the *deed*. *Vide Mod. Rep. vol.* 10. *p.* 8.

Michaelmas, 8 *Ann.* *Taylor* v. ———

It was ruled by *Holt*, Chief Juſtice, that a perſon who has not ſet his hand to the witneſſing a *leaſe* may be a witneſs to it, if thoſe that ſigned it do not appear. For in the caſe of a leaſe for years, it is ſufficient if the leſſor only ſigns in the witneſſes preſence. And ſo it ſeems in other grants of chattels. *Vide Mod. Rep. vol.* 11. 262.

Trinity, 10 *Ann.* *Thomlinſon* v. *Dighton.* Error.

A tenant in fee of the lands in queſtion deviſed the lands to his wife for life, then to diſpoſe of them according to her pleaſure, provided it was to ſome one of the teſtator's children. The huſband, the deviſor, died, and left behind him a ſon and daughter; the wife married again; then the wife by leaſe and releaſe, and alſo by fine, levied covenants to ſtand ſeized, to the uſe of herſelf for life, without impeachment of waſte, remainder to her daughter by her firſt huſband in tail.

The queſtion was, whether this conveyance of the lands was a good execution of the power, ſo that they ſhould go to the daughter; or elſe, being bad, to the heir at law, *viz.* the ſon.

The court of *C. B.* gave judgment for the daughter. And on a *writ of error* being brought on this judgment: this court, after hearing council on both ſides, gave their opinion as follows:

Powell, Juſtice. The main queſtion of the caſe is, whether the power is well executed? A *feoffment* to a man's own ſon ſhall operate as a covenant to ſtand ſeized, rather than the intention of the parties ſhould be fruſtrated. Sir *Edward Cleer*'s caſe is expreſs, that where it can paſs no other way than by virtue of the power, it ſhall paſs that way, though the intention of the parties were, that it ſhould paſs another. And as for her own eſtate being limitted without impeachment of waſte, as to the impeachment of waſte, it ſhall be void, becauſe it exceeds the power: the intention of the parties is plain. And therefore he was of opinion for the defendant.

Parker, Chief Juſtice. In Sir *Edward Cleer*'s caſe it was reſoved, that where, according to the way the parties intended, the *conveyance* would have no effect at all, that there it ſhould paſs another way; but where, ſhould the eſtate paſs the way the parties intended, the *conveyance* would have ſome effect, though not all that was intended by the parties, there it ſhould paſs no other way than the parties deſigned. But this point ſince has been carried much farther, as that, where it would have ſome effect, but not all that was intended by the parties; that there, to the end that the main deſign of the parties may be obſerved, the eſtate ſhall paſs in another way than the parties intended. For example, ſuppoſe a woman ſeiſed of an eſtate for life, with a power to make a *leaſe* for *three lives*, or *twenty-one* years, ſhe marries, and then ſhe and her huſband join in making the *leaſe*, and huſband and wife die before the *leaſe* is expired; here, tho' the huſband in right of his wife, and ſhe in her own right, are poſſeſſed of an eſtate for life, and therefore can as owner make a *leaſe*, and there appears no intention of the parties (imagining perhaps that they ſhould have outlived the *leaſe*) that this *leaſe* ſhould be made by virtue of the power; yet becauſe the *leaſe*, ſuppoſing it made by them as owners, cannot have all the effect the parties intended, for ſome it would have, (it would be a good *leaſe* during the lives of the huſband and wife) yet becauſe it cannot have all, it ſhall be eſteemed made by virtue of the power. But in the preſent caſe, the *conveyance*, as intended by the parties, would be wholly void.

The Chief Juſtice was of opinion for the defendant, and that the judgment of the *C. B.* muſt be affirmed. *Vide Mod. Rep. vol.* 10. *p.* 31.

Trinity, 13 *Ann.* *Miles* v. *Williams.*

See this caſe fully ſtated in page 194 of this work, under the head *Bankrupts.*

Eaſter, 8 *Geo.* *Atkinſon* v. *Coatſworth.*

On a *writ of error* brought on a judgment in county palatine *of Durham*, in an action of *covenant*, brought by the executor of the leſſee, againſt his aſſignee, wherein the breach was aſſigned on non-payment of rent to the original leſſor; it was objected, that it did not appear, the firſt leſſee ever ſealed the leaſe; and if he did not, then there was no obligation on him to pay the rent, and conſequently no action could be maintained on this covenant, which is only to pay the ſame rent to the firſt leſſor, as was payable to the firſt leſſee before the aſſignment.

To which it was anſwered, and reſolved by the court, that the firſt *deed* being ſet out as *an indenture made between* the leſſor and the leſſee, by which the leſſee *covenanted and agreed* to pay the rent, that was an implicit averment of a ſealing by him within the reaſon of the caſe of *Taylor* v. *Dobbins*, *Michaelmas*, 7 *Geo.* where a *note made by himſelf*, was held to import a ſigning. *Raym.* 1377.

2dly, If it was not ſo, yet the defendant by covenanting to pay the rent reſerved by the *firſt indenture*, was *eſtopped* to ſay there was no ſuch *deed* as could raiſe the rent. And therefore the judgment given below, for the plaintiff was affirmed. *Vide Strange, vol.* 1. *p.* 512.

Trinity, 9 *Geo.* *Lock* v. *Wright.*

See this caſe fully ſtated in page 272 of this work, under the head *Condition.*

Eaſter, 10 *Geo.* *Cloud* v. *Nicholſon.*

See this caſe fully ſtated in page 244 of this work, under the head *Bonds.*

Hilary, 11 *Geo.* *Strong* v. *How.*

See this caſe fully ſtated in page 143 of this work, under the head *Attorney.*

Michaelmas, 11 *Geo.* *Lawſon* v. *Dickenſon.*

See this caſe fully ſtated in page 144 of this work, under the head *Attorney.*

Trinity, 12 *Geo.* *Frontin* v. *Small.*

See this caſe fully ſtated in page 146 of this work, under the head *Attorney.*

Michaelmas, 2 *Geo.* 2. *Moore* v. *Jones.* Error.

On a *writ of error* brought on a judgment in *C. B.* on an action of *covenant*, wherein the plaintiff declared, that the defendant per *quoddam ſcriptum ſuam factum, apud Weſtm. conceſſit* i. e. *by his certain writing*, *made at* Weſtminſter, *granted* to the plaintiff an annuity *for advice beſtowed*, and aſſigns the breach for non-payment thereof for a certain time. On *oyer* which was ſet out *in theſe words*, and concluded with, *in witneſs whereof I have hereunto ſet my hand and ſeal*; the defendant pleaded, that during that time the plaintiff gave no advice; and on demurrer there was judgment by *default* for want of a joinder.

Raymond, Chief Juſtice. Where the word *factum* i. e. *made*, being joined to at *Weſtminſter*, renders it impoſſible to be taken as a ſubſtantive: the word *convenit* i. e. *covenanted* in a declaration would never do alone; and though the word *convention* is alone in the regiſter, yet it is only a ſhort deſcription of the nature of the cauſe, to be explained more at large when the plaintiff comes to declare on it. I do not ſee the plea has made it good.

Page, J. If the word *ſcriptum*, i. e. *written*, does not import a *deed*, (as no body will pretend it does) here is nothing elſe to import it: the *oyer* does not actually prove it was ſigned and ſealed, for every body knows the words *In witneſs, &c.* are in the inſtrument, before it is ſo much as ſigned by the party. And indeed *oyer* of a ſealing was never heard of before.

Reynolds, Juſtice. I think this declaration is not to be maintained: anciently, the words *ſigillatum & deliberatum* i. e. *ſealed and delivered,* were required. But now it is held well enough to call it *an indenture, made, written, and indented*, which imply the circumſtances of ſealing and delivery. A *conceſſit ſolvere*, i. e. *agreed to pay*, lies at *Briſtol*, and yet the word *conceſſit*, i. e. *agreed*, does not imply a *deed*; nor is there any thing in the plea which makes the declaration to be better than on the face of it.

Probyn, Juſtice. I do not think *agreed* better than *promiſed*, for if the circumſtances of ſealing and delivery were ſhewn, *promiſed* would be well enough. The word *written* alone will not make it a *deed*, and there is nothing elſe left to imply it.

Per curiam. Let the judgment be reverſed. *Vide Strange, vol.* 2. *p.* 814.

Michaelmas, 15 *Geo.* 2. *The King* v. *Beck.*

In this caſe, *Lee*, Chief Juſtice, held, that a *deed* altered in an immaterial part, by a ſtranger, is not vitiated thereby. *Vide Strange, vol.* 2. *p.* 1160.

Hilary, 30 *Geo.* 2. *Taylor on the demiſe of Atkyns, Eſq;* v. *Horde, Eſq; and Others.*

Adjudged, That where two *deeds* are made, bearing the ſame date, and are both conſiſtent, they are manifeſtly but one agreement, executed by different inſtruments, to anſwer different purpoſes, the internal evidence of the thing itſelf ſpeaks them to be one tranſaction, and the ſame to all intents and purpoſes as if expreſſed in one inſtrument. *Vide Bur. vol.* 1. *p.* 60 to 127.

Eaſter, 30 *Geo.* 2. *Wright, on the demiſe of Plowden, Eſq;* v. *Cartwright.*

A caſe was ſtated from the aſſizes as follows:

E. P. being ſeized in *fee*, demiſed on the 5th of *October* 1676, by *deed*, (*viz.* by indenture of leaſe between *E. P.* and *E. C.* only) to the ſaid *E. C.* for 99 *years*, if ſhe ſhould ſo long live, and after her death, if ſhe ſhould happen to die within the ſaid term, or other end or determination of the ſaid term, the remainder thereof to *R. C.* her eldeſt ſon, (then under age) for and during the remainder of the ſaid term, from thence enſuing, and fully to be compleat and ended, *Yielding and paying*, *&c.* and doing ſuit at a mill, *&c.* with a penalty for every time that ſhe or *R.* ſhall grind at another mill, and paying a *heriot* on the death of either; and it was covenanted, that both of them ſhall repair, *&c.* And the leſſor on his part covenanted that both ſhall quietly enjoy, *&c.*

E. C. entered and was poſſeſſed, and died on the 4th of *September*, 1694, whereon *R. C.* entered and was poſſeſſed till the ſaid *R.* died, which happened on the 5th of *November*, 1753.

The leſſor of the plaintiff is heir at law to *E. P.* the leſſor. The defendant is the perſonal repreſentative of *R. C.*

The queſtion before the court on this caſe was, "Whether the term exiſted? *i. e.* whether it continued beyond the life of *E. C.*; for if the term did not continue beyond the life of *E. C.* then the leſſor of the plaintiff had a title as repreſentative of *R. C.*

After hearing council on both ſides, on this caſe, the court gave judgment.

Lord *Mansfield*. The old caſes held, that there could be no remainder or ſubſtitution of a term, after an eſtate for life by *deed* or will. It was a mere poſſibility.

When long and beneficial terms came into uſe, the convenience of families required that they might be ſettled on a child, after the death of a parent. Such limitations were ſoon allowed to be created by will, and the old objections were removed by changing the name from *remainders* to *executory deviſes*.

In this caſe, on the true conſtruction of the leaſe, I am clearly of opinion, "That the land is demiſed to the ſon for ſo much of the 99 years, as ſhould be unexpired at the death of his mother."

If in this leaſe the word be taken in the latter ſenſe, the widow can only have it for ſo many of the 99 *years* as ſhe ſhould live, and the ſon have nothing afterwards; but it is clear that an intereſt was underſtood to continue after her death, to be enjoyed by her ſon, for by the courſe of nature, it could not be ſuppoſed that ſhe would out-live the 99 *years*. *R.* is to pay a penalty for grinding at another mill. He is to pay a *heriot* on the death of his mother, he is to repair; the leſſor covenants, "that *R.* ſhall quietly enjoy," *i. e.* for ſo many years as ſhould be remaining at the death of his mother.

The *firſt* ſenſe of the *word* makes every thing *conſiſtent* and *effectual*. The *ſecond* ſenſe deſtroys one half of the leaſe, as repugnant and contradictory to the other. There can be no doubt therefore, in which ſenſe the *word* ſhould be underſtood.

Deniſon and *Foſter*, Juſtices, gave their opinions at large, and concurred with the *Chief Juſtice*.

Per curiam. Let the plaintiff be *nonſuited*. *Vide Bur. vol.* 1. *p.* 282.

Michaelmas, 6 *Geo.* 3. *Zouch, on the demiſe of Abbott and Hallet,* v. *Parſons.*

Adjudged, that all gifts, grants, or *deeds*, made by infants, which do not take effect by delivery of his hand, are void; but all gifts, grants, or *deeds*, made by infants, by matter in *deed* or writing, which do take effect by delivery of his hand, are voidable by himſelf, his heirs, and thoſe who have his eſtate. *Vide Bur. vol.* 3. *p.* 1794.

Default.

Trin. 2 *Ann.* *Staple* v. *Haydon.*

In an action of *treſpaſs*, the defendant juſtified for a way, *&c.* and iſſue being joined, the cauſe came down to be tried at *niſi prius*: But the defendant made *default*, and ſo the inqueſt was taken by *default*; and now the iſſue being deemed immaterial, the court was moved for a repleader.

Holt, Chief Juſtice. The defendant is out of court by the *default*, and that to all purpoſes but this, *viz.* that judgment may be given againſt him; therefore being out of court there cannot be a repleacer, unleſs the *default* could be waived, or the party could be brought into court again.

He ſaid, in *perſonal* actions, before iſſue joined every *default* was peremptory, but after iſſue joined the firſt *default* is not peremptory, but the ſecond is, and that is by the ſtatute of *Weſtminſter*, *c.* 27. and *Marlb.* and this *one default* is always upon the return of the *venire*, and not on the *diſtringas*, for the *one default* muſt be *to the next day*, which is the day on the *venire*. And though the defendant never appears now on the return of the *venire*, yet heretofore the defendant was then demanded ſolemnly, and if he made *default*, there iſſued a *diſtringas* againſt the jury with a clauſe to diſtrain the defendant; and if after this he made *default* again, it was peremptory, becauſe there was no proceſs left to fetch him in.

Generally, if after iſſue joined the defendant makes *default*, the plaintiff may proceed to trial, and have the inqueſt taken by *default*; but he ſhall not have judgment by *default*, unleſs in ſome ſpecial caſes. In *debt* on a bond, if the defendant pleads a releaſe, and iſſue is thereon joined, and at the trial the defendant makes *default*, the plaintiff may pray judgment by *default*, and the inqueſt need not be taken by *default*, for by this plea the duty is confeſſed, and the plea is not made good; *otherwiſe*, on *non eſt factum* pleaded, for thereby the duty is denied, therefore in that caſe the inqueſt muſt be taken by *default*: but in *treſpaſs*, if the defendant pleads a releaſe, and makes *default*, the plaintiff cannot pray judgment by *default*, but muſt pray the inqueſt by *default*; for the debt was certain, but the damages are uncertain.

On an appeal for a *Rape*, if after iſſue joined the defendant makes *default*, there ſhall be neither judgment by *default* nor inqueſt by *default*, but an *alias*, *pluries*, *capias*, *& exigent* ſhall be awarded. *Vide Jenk.* 68. 18 *Aſſ.* 13. 34. *H.* 6. 24.

The plaintiff cannot waive the *default* here, as the demandant may in a *real* action: If the tenant makes *default* in a real action, a *grand cape* is awarded, and on the return of it, if the demandant inſiſts upon the *default*, he muſt have final judgment: but the demandant may waive the *default*, and take an appearance on the *grand cape*; and that is regular, becauſe the tenant comes in by proceſs: and ſo it is of a *default* on a *petit cape*, but in a *perſonal* action there is no proceſs to bring the party into court again: alſo the day of *niſi prius* not being the ſame with the day in bank, a *default* at *niſi prius* cannot be waived at the day in bank.

And the *bar* was cautioned never to make *defaults* at *niſi prius*, becauſe no judgment could be given for the defendant afterwards. *Vide Salk. vol.* 1. *p.* 216. *Raym. vol.* 2. *p.* 922. *Mod. Rep. vol.* 6. *p.* 1.

Hilary, 3 *Geo.* *Brampton* v. *Crabb.*

After a verdict for the plaintiff on an *indebit. aſſump.* and 22*s.* damages aſſeſſed, the defendant came into court, and ſuggeſted on the roll *that the plaintiff ought not to recover any coſts and damages againſt him in this cauſe on the verdict*, &c. (ſetting out *ſtat.* 3 *Jac.* 1. *cap.* 15. made for the recovery of ſmall debts in the city of *London*, which ſubjects the plaintiff to loſe his coſts, and pay coſts where the parties are citizens, and the damages under 40*s.*) Then the defendant averred, that at the time of making the promiſes in the declaration, *and always from thence hitherto*, he was and is a freeman of the city of *London*, reſiding within the city, (*viz.* in ſuch a pariſh and ward) uſing the trade of a cooper, and that the plaintiff was and is a freeman reſiding within the city, *viz. &c.* uſing the trade of a barber, and that the cauſe of action aroſe within the juriſdiction of the court of conſcience, which was held every *Wedneſday* and *Saturday* in every week ſince the time of the promiſe. He likewiſe averred, that he was indebted to the plaintiff in no more than 22*s.* and that he had expended ſo much in his defence, which the plaintiff ought to pay, according to the form of the ſtatute aforeſaid.

The firſt doubt on this ſuggeſtion was, whether the defendant ſhould not have made it before the cauſe had proceeded ſo far as a verdict: but on the cauſe of *Pennel* v. *Wallis*, *Michaelmas* 9 *W.* 3. being cited, where, after a verdict for 30*s.* the defendant made ſuch a ſuggeſtion, which was argued on demurrer, and held to be well ſuggeſted after a verdict, this firſt difficulty was got over.

But then it was objected, that it appeared the inqueſt was taken by *default*, and therefore the defendant was out of court as to all purpoſes, but having judgment againſt him. After a *default* there can be no repleader *Salk.* 216. 1 *Mod. ca.* 1. *Salk.* 594. *Roll. Abr.* 430. *pl.* 4.

For this laſt reaſon the court held, that the defendant could not be received to make the ſuggeſtion, and ſo the plaintiff had judgment. *Vide Stra. vol.* 1. *p.* 46.

Michaelmas, 11 *Geo.* *The Eaſt India Company* v. *Glover.* *Eadem* v. *Lutman et al.*

The plaintiffs declared on a ſale of coffee, at ſo much *per* hundred, which the defendant was to take away by ſuch a time, or anſwer in damages. Judgment went by *default*; and on executing a *writ of inquiry* before *Pratt*, Chief Juſtice, at *Guildhall*, he refuſed to let the defendant give evidence of fraud on the ſide of the plaintiffs at the ſale, becauſe, he ſaid, the defendant had admitted the contract to be as the plaintiffs had declared, by ſuffering judgment by *default*, inſtead of pleading *non aſſumpſit*; and now the only matter before them was the *quantum* of the damages. *Vide Stra. vol.* 1. *p.* 612.

Defence, *ſee* Plea.

Demurrer.

Hilary, 3 *W. & M.* *Benbridge* v. *Day.*

On an action of *trover* brought for ſeveral things, and among the reſt *for two poſts*: the defendant demurred, and *Holt*, Chief Juſtice, refuſed to give judgment *quod nil capiat*, ſaying, the plaintiff may take *ſeveral damages*, and releaſe as to this, and then take judgment as to the reſt, and all would be well. *Vide Salk. vol.* 1. *p.* 218.

Eaſter, 3 *W. & M.* *Carter* v. *Davies.*

On an *indebitatus aſſumpſit* and a *quantum meruit* for wares; as to the firſt count the defendant pleaded *non aſſumpſit*, and as to the ſecond *prayed judgment of the bill*, and pleaded in *abatement*; the plaintiff took iſſue on the *non aſſumpſit*, and *demurred* on the plea in abatement, *becauſe the plea aforeſaid is inſufficient in law to preclude him from having his ſaid action.*

Per curiam. The plaintiff having *demurred in bar*, where the plea is only in *abatement*, the ſuit is thereby diſcontinued; but iſſue being joined on the other promiſe, the court ſtayed proceedings on the *demurrer*, ſaying, the diſcontinuance would be helped by the verdict. *Vide Salk.* 1. *p.* 218.

Trinity, 4 *W. & M.* *Maſon* v. *Hanſon.*

In an action of *debt* brought by an adminiſtrator for rent due in the life-time of the inteſtate; on *nil debet* pleaded, they were at iſſue, and the plaintiff had a verdict; and it was moved in arreſt of judgment, that the plaintiff had made out no title; for he had ſet forth adminiſtration was committed to him by *the official of the Reverend John Hall, prebendary of the prebend, or peculiar juriſdiction of Brampton within the cathedral church of Lincoln*, and did not ſay that it belonged to him to grant adminiſtration, &c.

Per curiam. This might have been a good objection on a *demurrer*, but it is cured by the verdict ſince *ſtat.* 17 *Car.* 2. and before the making of that ſtatute, it has been held, that in an action brought by an adminiſtrator, the omiſſion of a *profert*, &c. was good after verdict: therefore the judgment in this caſe was confirmed, and the motion over-ruled. *Vide Mod. Rep. vol.* 4. *p.* 133.

Eaſter, 5 *W. & M.* *Hill* v. *Gallop.*

The plaintiff brought an action on the *caſe* for being *diſturbed in his common*, and declared that he was poſſeſſed of a meſſuage and ſo many acres of land, with the appurtenances in *&c.* for a certain term of years yet to come and unexpired, and that *during all that time he had, and ought to have enjoyed, common of paſture for all his cattle, levant and couchant*, &c.

On *not guilty* pleaded, the cauſe came to iſſue, the plaintiff had a verdict, and it was moved in arreſt of judgment, that the plaintiff had not ſhewn any title in himſelf, either by *grant* or *preſcription.* *But not allowed.*

Holt, Chief Juſtice. This might be a good *exception* on a *demurrer*, but here it is cured by the verdict. *Vide Mod. Rep. vol.* 4. *p.* 175.

Michaelmas, 5 *W. & M.* *Combe* v. *Talbot.*

In an action of *debt* for two years rent due on the demiſe of a meſſuage, and ſeveral parcels of land, rendering 9 *l. per annum*, the plaintiff demanded 18 *l.* the defendant as to 9 *l. parcel thereof*, being the firſt year's rent, pleaded *nil debet*, and concluded to the country, but there was no joinder in iſſue thereon; and as to the 9 *l.* reſidue, he confeſſed the demiſe as laid in the declaration *rendering annually* 9 *l. viz.* 40 *s.* for ſuch a parcel, and 7 *l.* for other parcels; and as to the 40 *s.* parcel there, he pleaded *nil debet*, and as to the reſt, he pleaded, that *he had no intereſt in the tenements*. The plaintiff *demurred* generally, *becauſe the plea aforeſaid*, &c.

Holt, Chief Juſtice, and *Eyre*, Juſtice. 1ſt. One defendant cannot plead two ſuch pleas as to the whole; thus, one defendant cannot plead *nil debet*, and *no intereſt in the tenements*.

2dly. If the word *plea be a collective term*, which was doubted, 1 *Saund.* 338. *Dyer*, 325. *b.* 15 *H.* 7. 10. *b.* 3 *Cro.* 139. 1 *Leon.* 125. 1 *Sid.* 39. then the *demurrer* goes to all; and no judgment can be given for the plaintiff, becauſe the plea of *nil debet* is a good plea. Wherefore leave was given to amend on both ſides. *Vide Salk. vol.* 1. *p.* 219.

Hilary, 6 *W. & M.* *The King* v. *Grove.*

Per curiam. If a ſpecial matter is pleaded, which looks like the colour of a plea, but amounts to the general iſſue, it is no cauſe of *demurrer*; as if in *debt* you plead a releaſe, though you might have given it in evidence on *nil debet*, yet it is no cauſe of *demurrer*; ſo in *debt* for rent, if you plead entry and expulſion, it is no cauſe of *demurrer*, though it may be given in evidence on *nil debet*.

After a *demurrer* is joined, we cannot give leave to the defendant to waive his *demurrer*, and plead the general iſſue; and here the *demurrer* is entered on the roll. It is a record of the court, and put into the paper to be read as a record. *Vide Mod. Rep. vol.* 5. *p.* 18.

Trinity, 6 *W. & M.* *Campbell* v. *St. John.*

In an action of *trover* brought for a box and 290 *pieces of ſilver*, the defendant *demurred* to the *declaration*, and the plaintiff *demurred* to the defendant's *demurrer*, and concluded, *and this he is ready to verify*; the defendant maintained his *demurrer*, and put the matter in iſſue.

The court held, *firſt*, that *trover* would lie for plate *generally*, *Style* 244. 264. *Secondly*, that all is diſcontinued by the plaintiff's not joining in *demurrer*, but *demurring* on the defendant's *demurrer*; for there is no difference between pleading over when iſſue is offered, and not joining in *demurrer*, both are alike and make a diſcontinuance. *Vide Salk. vol.* 1. *p.* 219. *Raym. vol.* 1. *p.* 20.

Michaelmas, 6 *W. & M.* *Wilſon* v. *Law.*

In this caſe, among ſeveral exceptions taken, was the following, *viz.* that the appellant by joining in *demurrer as to the time*, *&c.* and then *as to the plea*, *&c.* had divided that which the defendant had united, and ſo diſcontinued the whole.

But it was anſwered, that a *demurrer* is properly called a plea. *Co. Inter.* 80. and he could not make a joint reply to both; for which reaſons the defendant was ordered to anſwer over. See this caſe fully ſtated in page 75 of this work; under the head *Appeal*. *Vide Raym. vol.* 1. *p.* 20. *Mod. Rep. vol.* 4. *p.* 290.

Michaelmas, 7 *W.* 3. *Leaves* v. *Bernard.*

The plaintiff declared, that in conſideration he had paid to the defendant ſixteen guineas, he promiſed to pay the plaintiff 100 *l.* if no town in *Flanders* garriſoned with 2000 men, ſhould be taken or ſurrendered to the *French* King, before the firſt day of *September* 1695. And laid an *indeb. aſſump.* for 100 *l.* on a wager, and another *indebitatus* for 100 *l.* received by the defendant for the uſe of the plaintiff.

An objection was taken to the defendant's form of pleading, that it was neither a *demurrer*, nor a plea in *bar*, and therefore it muſt be a plea in *abatement*; and ſo no final judgment could be given, but a *reſpondeas ouſter*.

1ſt, It cannot be a *demurrer*, for that is where the party will go no farther, becauſe the other has not ſhewn ſufficient matter againſt him; and therefore he ſays, that *the bill is not ſufficient in law*, to make him give any anſwer thereto: whereon he prays the judgment of the court, if he ſhall be compelled to anſwer. All which form is wanting in this plea.

2dly, It cannot be a plea in *bar* to the action, for then he ſhould have pleaded, that the plaintiff *ought not to have his action againſt the defendant*; and have concluded his plea thus, *wherefore he prays judgment if the plaintiff ought to have or maintain his action aforeſaid againſt the ſaid defendant*, *&c.*

3dly, Therefore it muſt be in *abatement*, and it is either to the writ or *count*; if the action is brought by original, then the plea is, *prays judgment of the writ*, and it muſt conclude in the ſame words; if it is to the declaration, then it muſt be, *prays judgment of the bill and declaration*, for *billa* and *narratio* are the ſame, and in this form the defendant has now pleaded.

The firſt time that ſuch uncertainty in pleading was introduced, was in the 22 *Car.* 2. where the defendant began his plea in *bar*, *viz. actio non*, *&c.* and concluded in *abatement*; but all the other entries are otherwiſe.

The court, however, were of opinion, that the ſubſtantial part of a *demurrer* was in this plea, and therefore the defendant had judgment. *Vide Mod. Rep. vol.* 5. *p.* 131.

Michaelmas, 10 *W.* 3. *Lug* v. *Godwin.*

A *ſci. fac.* being iſſued on a judgment againſt the defendant, he pleaded in *abatement* no ſpecification. The plaintiff *demurred* in *bar*, and a *reſpondeas ouſter* was awarded. Afterwards the defendant pleaded the ſame matter in *bar*; the plaintiff *demurred*; and an exception was taken by the defendant's council, that there was a diſcontinuance here; becauſe on the plea in *abatement* the plaintiff had concluded his *demurrer*, as if it had been in *bar*: *But not allowed.*

Per curiam. Where the defendant pleads a good plea in *abatement*, and the plaintiff replies new matter, he ought to maintain his writ; but if the defendant pleads an ill plea, though the plaintiff replies and concludes in *bar*, it is not material. *Vide Raym. vol.* 1. *p.* 393.

Michaelmas, 10 *W.* 3. *Pullein* v. *Benſon.*

In this caſe there was a *ſpecial demurrer* and *want of form* ſhewn for cauſe. And *Rokeby*, Juſtice, ſaid, that if a man ſhews any thing for cauſe of *demurrer* on record, he may aver other matters, verbally. *Vide Raym. vol.* 1. *p.* 349.

Michaelmas, 13 *W.* 3. *Anonymous.*

Per curiam. If there be a *demurrer* to part, and an iſſue on the other part, and judgment be given for the plaintiff on the *demurrer*, he may enter a *non proſ.* as to the iſſue, and proceed to a *writ of inquiry* on the *demurrer*; but without a *non proſ.* he cannot have a *writ of inquiry*, becauſe on the trial of the iſſue the ſame jury will aſcertain the damages for that part which the *demurrer* was. *Vide Salk. vol.* 1. *p.* 219.

Anonymous.

Holt, Chief Juſtice. There were *ſpecial demurrers at common law*, but they were never neceſſary, but in caſes of *duplicity*, and therefore they are ſeldom practiſed; for as the law was then to be taken on a *ſpecial demurrer*, the party could take advantage of no other defect in the pleadings, but what were ſpecially ly aſſigned as cauſes of *demurrer*. *Vide Salk. vol.* 3. *p* 122.

Hilary, 1 *Ann*. *Wood* v. *Branford*. Error.

On an action of *dower*, it appeared on the record certified here, this being a *writ of error*, that it was aſſigned for *error*, that the defendant being an infant, had appeared by attorney. And after, *on no error* pleaded, and a *demurrer thereon*; it was ſuggeſted, that there was an admittance of a guardian below, and a warrant for receiving of the guardian.

Per curiam. If it is ſo, it is good cauſe to amend the record; and the caſe of *Waldgrave* v. *Lane*, in the 5th year of *W. & M.* was quoted as a precedent: after a good *error* in fact alledged, if the party will not join iſſue on it, but pleads *no error*, he admits the fact true, and it is a good cauſe of *demurrer*. *Vide Mod. Rep. vol.* 7. *p*. 124.

Eaſter, 1 *Ann*. *Anonymous*.

Holt, Chief Juſtice, If *A*. puts in an ill plea, and *B*. joins iſſue on it, and a verdict is given againſt *B*. *B*. ſhall never take the advantage of *A*.'s bad plea, having ſlipped this opportunity of *demurring* to it: but it may be aided by the *ſtatute* of *jeofails*. *Vide Mod. Rep. vol.* 11. *p*. 2.

Michaelmas, 1 *Ann*. *Shortridge* v. *Lamplugh*. Error.

On a *writ of error* brought on a judgment given in *C. B.* in an action of *covenant*, among ſeveral *errors* aſſigned, was the following, *viz*.

That the plaintiff in the original action has declared, that he, by virtue of the indentures of bargain and ſale, and releaſe, and virtue of *ſtat. H.* 8. for transferring uſes into poſſeſſion, was ſeiſed, *&c.* whereas the releaſe does not operate by virtue of the *ſtatute of uſes*; but by the common law, and therefore it is *informal* at leaſt, and the defendant has *demurred* ſpecially for want of form. *But not allowed.*

Per curiam. Though it is *informal*, yet the *demurrer* is general; for it is not enough to ſay, *for which want of form*; but the particular want of form muſt be ſhewn. *Vide Raym. vol.* 2. *p*. 798. *Salk. vol.* 1. *p*. 219.

Michaelmas, 1 *Ann*. *Hart* v. *Langfitt or Longfield*.

See this caſe fully ſtated in page 344 of this work, under the head *Debt*.

Hilary, 2 *Ann*. *Croſſe* v. *Bilſon*.

See this caſe fully ſtated in page 3 of this work, under the head *Abatement*.

Hilary, 2 *Ann*. *Elwis* v. *Lombe*. Error.

On a *writ of error* brought on a judgment in an action of *treſpaſs* for *with force and arms* taking away *ten* mattocks of the plaintiff, in *R*. the defendant, as to *nine*, pleaded *not guilty*; and as to the *tenth*, *no action*, *becauſe the place in which* is his *freehold tenement*, and that the mattocks were there *damage feaſant*. On a general *demurrer*, the ſingle queſtion was, whether this general way of pleading his *freehold tenement*, without ſhewing any further certainty, was good?

The plaintiff in *error*'s council argued, that the general *errors* being aſſigned: either the *freehold tenement* muſt take in all the vill of *R*. *viz*. that all the vill is the freehold of the defendant, and then, without queſtion, the plea will be good; or it muſt be taken of a particular place not certainly known or deſcribed within *R*. and take it to be the laſt, and ſo the more ſtrongly againſt him, yet it will be well, eſpecially on a *general demurrer*.

But the reaſon why *freehold tenement* is a good plea, is, that where the plaintiff is general in his writ or count, the defendant may be as general in his plea; and if the plaintiff will have more certainty, he muſt make it in his replication.

Now, to conſider this caſe ſince *ſtat*. 27 *Eliz*. on *demurrers*, before which there was no difference between matter and form, as to point of *demurrer*, though before that ſtatute one might *demur* ſpecially; but it was never ſafe or neceſſary ſo to do in any caſe except that of duplicity, becauſe if one had *demurred ſpecially*, he could have inſiſted on nothing elſe but what he had ſpecially ſhewn for cauſe in his *demurrer*; whereas if he had *demurred generally*, he was left at large to inſiſt on any thing except duplicity. Nor was this any way inconvenient, for while all the pleadings were by word of mouth at the bar, though the *demurrer* was general, yet the matter was ſo ſcanned, that the court and parties well knew what the cauſe of *demurrer* was. But after that way of pleading came to be diſuſed, neither the court nor party could know it; for which reaſon the ſtatute was made, which reſtores the common law ſo far, that people may know what a *demurrer* is for, whether for matter or form; for if the *demurrer* is for matter, the entry is *becauſe the matter in the plea*, &c. is not ſufficient, *&c.*

There are indeed ſome exceptions to the rule, *that a circumſtantial fault in a plea will not vitiate on a general demurrer*: as where a deed is pleaded, and no *profert* made of it. But the reaſon of that is particular, *viz*. that by pleading a deed with a *profert*, you put a great difficulty on the party to anſwer it.

Per curiam. This is a *tranſitory* action, in which there is no ſuch thing as a *place in which*; if it had been a *local* action, without doubt the pleading had been good. If a man declares *quare clauſum fregit* generally, in ſuch a vill, the defendant may plead a freehold tenement, and if the plaintiff traverſes it, it is at his peril; for the defendant, if he has any part of his land in the whole town, ſhall juſtify it there; and therefore in that caſe, the better way is to make a new aſſignment.

But now there is a fixed courſe eſtabliſhed in the *C. B.* as was alſo in this court formerly, that in *local* actions the plaintiff ſhall aſcertain the place in his declaration, to prevent ſuch general pleas, and the prolixity of a new aſſignment; and the defendant is confined to the place aſcertained in the declaration: but here the defendant by pleading of *damage feaſant*, has made that *local* which was at large before, and therefore he ought to aſcertain it at his peril.

And the court agreed, that if a man brings *treſpaſs* for taking his cattle in *Black Acre*, on ſuch a day, and the defendant juſtifies the taking at another place *damage feaſant*, the plaintiff may make a *novel* aſſignment, if there were two takings; ſo if there were *two batteries* on one day, and the one were on the plaintiff's own aſſault, and the other not, if the defendant will juſtify one *de ſon aſſault demeſne*, he may make a new aſſignment of the other battery: wherefore the judgment was affirmed. *Vide Mod. Rep. vol.* 6. *p*. 17.

Eaſter, 2 *Ann*. *Turner* v. *Turner*.

To an action of *debt* on a bond, the defendant pleaded the compoſition act, and on *demurrer* ſeveral exceptions were taken to the plea, and all over-ruled; on which judgment, *niſi*, *&c.* was given for the defendant; whereon the court was moved for leave to diſcontinue, and 1 *Saund*. 39. 2 *Saund*. 73. and 1 *Saund* 23. were cited, where leave was given to diſcontinue after argument of the council at the bar, and of the judges on the bench. But the motion was denied, abſent *Powell*, Juſtice, becauſe after a rule for a judgment *niſi*, *&c.* and then a peremptory rule for judgment, (as was in this caſe), *Holt*, Chief Juſtice, ſaid, he never knew leave given to diſcontinue; and the rule in the old books is, that if after the exception ſtirred, the court has pronounced their opinion, and yet the plaintiff *demurs*; he does it at at his peril; and if the exception is over-ruled, judgment ſhall be given againſt him. *Vide Raym. vol.* 2. *p*. 856.

Michaelmas, 2 *Ann.* *Godolphin and Wife* v. *Tudor.*

A *demurrer* was joined in *Eaſter* term laſt, and all continuing in paper, they moved to change their plea, and plead an iſſuable matter.

Per curiam. Whilſt it is in paper, it is very regular to change or amend, on payment of *coſts*; therefore the motion was granted on payment of *coſts*. *Vide Mod. Rep. vol.* 6, *p.* 38.

Trinity, 3 *Ann.* *Dockminique or Docmanny*, v. *Davenant.*

Per curiam. If a defendant *demurs* in *abatement*, the court will, notwithſtanding, give final judgment, becauſe there cannot be a *demurrer* in *abatement*; for if the matter of *abatement* be extrinſic, the defendant muſt plead it; if intrinſic, the court will take notice of it themſelves. *Vide Salk. vol.* 1. *p.* 220.

Michaelmas, 10 *Ann.* *Stafford* v. *Beneath.*

See this caſe fully ſtated in page 345 of this work, under the head *Debt.*

Eaſter, 11 *Ann.* *Widdrington* v. *Charleton.*

See this caſe fully ſtated in page 80 of this work, under the head *Appeal.*

Hilary, 12 *Ann.* *The Queen* v. *The Corporation of Helſton in Cornwall.*

Powys, Junior, Juſtice. If a defendant, in an action of *debt* on a bond, who has a good defence on the merits, ſhould, by advice of council, hazard his cauſe on a *demurrer*, which is adjudged againſt him, this miſtake of council would not be allowed in *Chancery* as a good cauſe of relief. *Vide Mod. Rep. vol.* 10. *p.* 203.

Trinity, 13 *Ann.* *Cole* v. *Hawkins.*

See this caſe fully ſtated in page 352 of this work, under the head *Declaration.*

Trinity, 13 *Ann.* *Miles* v. *Williams.*

See this caſe fully ſtated in page 129 of this work, under the head *Aſſignments.*

Hilary, 1 *Geo.* *Haiton & al.* v. *Jeffreys.*

The court was moved for leave to plead a plea, and to *demur* to the declaration at the ſame time, on *ſtat.* 4 *Ann.* the words are, " That it ſhall be lawful for any defendant or tenant in any action or ſuit, or for any plaintiff in *replevin*, in any court of record, with the leave of the ſame court, to plead as many ſeveral matters thereto, as he ſhall think neceſſary for his defence. *Provided nevertheleſs*, that if ſuch matter ſhall, on *demurrer* joined, be judged inſufficient, coſts, &c.

Per curiam. The words of the *ſtatute* are, that it ſhall be lawful to *plead* as many ſeveral *matters*, &c. Now a *demurrer* is ſo far from being a *plea*, that it is an excuſe for not pleading. Here you plead, and at the ſame time pray that you may not plead. The word *matter* imports a poſſibility, that the other party may *demur* to it; but there can be no *demurrer* on a *demurrer*. This was never attempted before. *Vide Mod. Rep. vol.* 10. *p.* 281.

Hilary, 2 *Geo.* *Baldwin* v. *Church.*

See this caſe fully ſtated in page 346 of this work, under the head *Debt.*

Trinity, 4 *Geo.* *Long* v. *Buckeridge.*

See this caſe fully ſtated in page 148 of this work, under the head *Attornment.*

Michaelmas, 9 *Geo.* *The King* v. *Layer.*

The defendant being indicted for *high-treaſon*, in compaſſing the death of the King, was demanded to plead; he pleaded *miſnomer* in abatement, and his plea was received, read, and filed, and afterwards he was ſent back to the Tower, and ordered to be brought again to the bar on *Saturday*, *the Morrow of All Souls*; and being accordingly brought up on that day, the Attorney General *demurred* to the plea, and prayed that the priſoner might join in *demurrer*.

But his council deſired time to reply, or to join in *demurrer*, and the rather, becauſe in *Fitz-Harris's* caſe *four* days were given by this court, which is ſome proof that it is the courſe of the court, to allow the priſoner to plead in ſuch caſes; and thereon the chief clerk of the Crown-Office being aſked what was the cuſtom of the court in this matter, he anſwered, that in *criminal caſes* there were precedents, where, on *demurrer*, time was given to join in *demurrer*, but never in *capital caſes*.

Per curiam. In *capital* caſes no rule is given either to plead or join in *demurrer*: but the priſoner being at the bar, is obliged to anſwer immediately. *Vide Mod. Rep. vol.* 8. *p.* 82.

Eaſter, 11 *Geo.* *Phillibrown* v. *Ryland.*

See this caſe fully ſtated in page 40 of this work, under the head *Actions.*

Eaſter, 11 *Geo.* *Griffith's Caſe.*

See this caſe fully ſtated in page 273 of this work, under the head *Condition.*

Eaſter, 11 *Geo.* *Burland* v. *Tyler.*

See this caſe fully ſtated in page 346 of this work, under the head *Debt.*

Michaelmas, 11 *Geo.* *Weldon* v. *Buckler.*

See this caſe fully ſtated in page 68 of this work, under the head *Amendment.*

Hilary, 12 *Geo.* *White* v. *Cleaver.*

See this caſe fully ſtated in page 273 of this work, under the head *Condition.*

Eaſter, 12 *Geo.* *Courtney* v. *Satchwell.*

In an action of *treſpaſs*, *aſſault*, and *falſe impriſonment*, the defendant juſtified under a proceſs out of the ſheriffs court in *London*, *which is the ſame*, &c. and traverſed, being guilty, *otherwiſe*, *or in any other manner*; to this the plaintiff *demurred*, and ſhewed for cauſe, that the traverſe is idle and unneceſſary. And on argument, the court were of opinion that this was ill on a *ſpecial demurrer*, the words, *which is the ſame*, being a ſufficient *traverſe*. *Lutw.* 1457. And ſo it was held in the caſe of *Carvil* v. *Manby*, where on a *general demurrer* it was allowed to be well enough; but the court ſaid, if it had been a *ſpecial demurrer*, it would have been otherwiſe: wherefore the plaintiff had judgment. *Vide Stra. vol.* 1. *p.* 694.

Eaſter, 2 *Geo.* 2. *Mansfield* v. *Richman.*

On an *indebitatus aſſumpſit*, the defendant *demurred* to the declaration, and for cauſe ſhewed that there were no pledges on the writ, or mentioned in the declaration.

Per curiam. Let judgment go for the plaintiff, for he may enter pledges any time before judgment, becauſe pledges are not liable before judgment, and even not then if it is for the plaintiff. *Vide Forteſcue*, *p.* 330.

Hilary, 30 *Geo.* 2. *The Maſter*, &c. *of the Vintners Company* v. *Paſſey.*

See this caſe fully ſtated in page 300 of this work, under the head *Corporations.*

Eaſter, 30 *Geo*. 2. *Robinſon* v. *Raley*.

In an action of *treſpaſs* brought by the plaintiff againſt the defendant, the plaintiff declared on three different *counts*: the defendant by leave of court pleaded ſeveral matters to each plea; the plaintiff replied, and the defendant *demurred* to the plaintiff's *replication* to his plea to the *fifth count*, and alſo to the *replication* to the plea to the 13th *count*, to which the plaintiff rejoined.

The cauſes of *demurrer* ſhewn by the defendant's council were:

To the *replication* to the defendant's plea to the *fifth count*, that the *replication* was *multifarious*, and that the ſeveral matters ſpecifying them are put in iſſue, *whereas* only one ſingle matter ought to be ſo.

To the *replication* to the defendant's plea to the 13th *count*, that the *replication* traverſes the *licence*; and alſo that the *replication* concludes to the country, *whereas* it ought to conclude with an *averment*.

After hearing the council on both ſides, the court gave judgment.

Lord *Mansfield*. Both the *demurrers* are frivolous.

The ſubſtantial rules of pleading are founded in ſtrong ſenſe, and in the ſoundeſt and cloſeſt logic; and ſo appear, when well underſtood and explained: tho', by being miſunderſtood and miſapplied, they are often made uſe of as inſtruments of *chicane*.

As to the preſent caſe, it is true, you muſt take iſſue on a *ſingle point*, but it is not neceſſary that this ſingle point ſhould conſiſt only of a *ſingle fact*.

The licence is the point in queſtion; and this point whether the licence was given or not, is put in iſſue; the whole turns on this particular propoſition; indeed it may be a difficult caſe, where the whole of the plea is not denied, but only ſome parts of it, but that is not the preſent caſe.

Deniſon and *Foſter*, Juſtices, gave their opinion at large, and concurred with the Chief Juſtice.

Per curiam. Let judgment go for the plaintiff on the *demurrers*. *Vide Bur*. *vol*. 1. *p*. 317.

Michaelmas, 6 *Geo*. 3. *Gray* v. *Aſhton*.

On a judge's order for time to plead, on the terms (among others) "of pleading an iſſuable plea," the defendant put in a ſham *demurrer*; the plaintiff's attorney conſidering this as an evaſion of the judge's order, ſigned judgment.

The defendant moved the court to ſet aſide the judgment, and obtained a rule to ſhew cauſe.

On the plaintiff's council ſhewing cauſe on this motion, he prayed, that the rule might be diſcharged with coſts, which the court ſaid ought to be done.

Note, On this motion, the court made a diſtinction between a real and fair *demurrer*, and a *ſham* one. They obſerved, that the former was an iſſuable plea, within the intent and meaning of the judge's order; the latter only an evaſion of it.

Per curiam. Let the rule be diſcharged with *coſts*. *Vide Bur*. *vol*. 3. *p*. 1788.

Deodand *ſee* Forfeiture.

Departure.

Trinity, 5 *W*. & *M*. *The Counteſs of Arran* v. *Criſpe*.

In an action of *debt* on a bond, the defendant craved *oyer* of the condition, which was to perform all covenants in an indenture of leaſe, wherein a covenant was, to pay a certain ſum, clear of all taxes, and then ſet forth the indenture of leaſe, and pleaded performance: the plaintiff replied, non-payment of —— for half a year's rent: the defendant rejoined, ſuch a particular ſum was paid in money, and —— in taxes, on the *ſtatute* for laying 4 *s*. *per* pound on land, which being allowed, amounted to the full. The plaintiff demurred.

Holt, Chief Juſtice, held, that the covenant did not extend to parliamentary taxes, for want of the word *parliamentary*: the other judges thought the words *all taxes* included parliamentary ones: yet *Holt* held, judgment was for the plaintiff, though the point of law was againſt him; becauſe the matter of this rejoinder being by way of excuſe, ought to have been ſet forth in the *bar*; but as it is here, it is a *departure*; for whereas he ſaid at firſt, he had performed the covenants, now he ſays, he is not obliged to perform. Wherefore the plaintiff had his judgment. *Vide Salk*. *vol*. 1. *p*. 222. *Mod*. *Rep*. *vol*. 12. *p*. 54.

Hilary, 6 *W*. & *M*. *The King and Queen* v. *Larwood*.

An information was exhibited againſt the defendant for neglecting and refuſing to take on him the office of ſheriff of *Norwich*, ſetting forth the charter of *Hen*. 4. whereby that city was made a county, and to have two ſheriffs choſen by the commonalty, and alſo the charter of *Car*. 2. confirming the former, but granting further, that one ſheriff ſhall be choſen by the mayor, ſheriffs, and aldermen only: and that the defendant being choſen by the mayor, ſheriffs, and aldermen, had notice, but did not appear to take the oaths, nor take on him and execute his office. The defendant pleaded *ſtat*. 13 *Car*. 2. and that he had not qualified himſelf by taking the ſacrament according to the uſage of the church of *England*, within a year before the election. The attorney general replied, that by law he ought to have done it, the defendant rejoined, the act of toleration, and that he was a proteſtant diſſenter, and excuſed by that *ſtatute*; on which there was a demurrer.

All the judges concurred, that the rejoinder was a *departure*, becauſe it did not fortify the plea, and ſhould have been pleaded at firſt, when he had an opportunity, and might have done it. Therefore judgment was given againſt the defendant. *Vide Raym*. *vol*. 1. *p*. 29. *Salk*. *vol*. 1. *p*. 167.

Eaſter, 6 *W*. & *M*. *Primer* v. *Phillips*.

In an action of *treſpaſs* for taking his cattle in the King's highway at —— the defendant juſtified the taking for *damage feaſant*; the plaintiff replied, that time out of mind, there had been *a certain horſe as well as foot-way, for all perſons*, between ſuch a place, &c. and that the defendant drove his cattle over the way, and that *as they were paſſing along*, the cattle did eat, &c. The defendant rejoined, that the cattle were commorant *in the way aforeſaid*, and iſſue was joined thereon, which was found for the plaintiff. The court was moved for a repleader, the treſpaſs now tried, being another treſpaſs than that which was complained of.

Holt, Chief Juſtice. The treſpaſs is a tranſitory treſpaſs, and the mention of it in the declaration as done in *the highway*, was nothing to the purpoſe; it was idle and out of time, and mere ſurpluſage; and therefore the plaintiff in his replication, by following the defendant to another way, does not *depart*, becauſe it is not materially alledged in the declaration; and a *departure* muſt be from ſomething that is material; and when the iſſue is taken on the commorancy, it admits the plaintiff had a way, but that he continued longer in it than he ſhould. Therefore judgment was given for the plaintiff. *Vide Salk*. *vol*. 1. *p*. 222.

Michaelmas, 7 *W*. 3. *Webly* v. *Palmer*.

In an action of *trover*, the defendant pleaded a releaſe, &c. and it was held by *Holt*, Chief Juſtice, that in *treſpaſs*, if the defendant pleads a releaſe from the time, he muſt alſo go on with an *abſque hoc*, that he is guilty *at any time afterwards*; but if he does not vary the time, there needs no *traverſe*, for ſuppoſe you alledge the *treſpaſs* to be on ſuch a day, and the defendant juſtifies as to that day, the plaintiff may ſhew another day, and it is no *departure*; for the defendant has occaſioned this; and there is a great difference between a *bond* and a *treſpaſs*; if the declaration lays the bond to be dated on one day, the replication cannot ſay it was dated on another day; but in *treſpaſs* the plaintiff may *depart*, if neceſſary. *Adjourned. Vide Salk. vol.* 1. *p.* 222.

Eaſter, 8 *W.* 3. *Howard or Hoard* v. *Tenniſon or Jenniſon.*

An action on the *caſe* for work done, was brought by a taylor, and ſix ſeveral promiſes laid, all on the 16th of *October*; the defendant pleaded *under age* to all *generally*; the plaintiff replied as to two promiſes, *not precluded, &c.* becauſe the defendant was at that time of full age, and as to the reſt, that they were *for neceſſary cloathing*; hereon the defendant demurred, alledging that this was repugnant; that the defendant could not at the ſame time be of full age, and not of full age: but the court held, that time was but a circumſtance in no wiſe material, nor part of the iſſue; that a man is not tied down to a preciſe day in his declaration; and if the defendant forces him to vary, it is no *departure*. Accordingly the plaintiff had judgment. *Vide Salk. vol.* 1. *p.* 223. *Mod. Rep. vol.* 12. *p.* 92.

Eaſter, 12 *W.* 3. *Thonkin* v. *Crocker.*

See this caſe fully ſtated in page 59 of this work, under the head *Amendment.*

Hilary, 2 *Ann. Anonymous.*

Holt, Chief Juſtice. In an action of *treſpaſs*, *aſſault*, and *battery*, if the plaintiff lays the *aſſault* on one day, and the defendant pleads a ſpecial matter, that juſtifies at another day, whereby the day becomes material, the plaintiff may reply an *aſſault* on another day, and it is no *departure*, although it has been held otherwiſe; for the day is not material, and the plaintiff may maintain his count. *Vide Raym. vol.* 2. *p.* 1015. *Salk. vol.* 3. *p.* 123.

Eaſter, 3 *Ann. Parkins* v. *Woollaſton.*

See this caſe fully ſtated in page 163 of this work, under the head *Bail.*

Trinity, 13 *Ann. Cole* v. *Hawkins.*

See this caſe fully ſtated in page 352 of this work, under the head *Declaration.*

Michaelmas, 1 *Geo. Vincent* v. *Atwood.*

On a *ſcire facias* brought againſt bail, the defendant pleaded that the principal died before the return of the *capias*; the plaintiff replied, that the principal did not die before the return of the *capias*; the defendant demurred.

The defendant's council argued, that the replication was naught.

1ſt. Becauſe the plaintiff did not ſet forth that there was any *capias* at all iſſued out; but only that the principal did not die before the return of the *capias*.

2dly. Becauſe by this replication, there is an iſſue formed, wherein the jury muſt at once try matter of law, matter of record, and matter of fact.

It was argued for the plaintiff, that when the defendant pleaded that the principal died before the return of the *capias*, he certainly admitted, that there was a *capias* ſued out; and the only thing doubted is the death of the principal, *&c.* It is neceſſary for the plaintiff only to anſwer the defendant's plea, and not to ſet forth what is admitted by the defendant.

In a *ſcire facias* it is not neceſſary to ſet forth the awarding of a *capias*. *Lutw.* 1281. 2 *Cro.* 97.

Had the plaintiff replied there was a *capias* ſued out, and the defendant rejoined *nil tiel record*, the rejoinder would have been a *departure* from his *bar*. How then can it in reaſon be neceſſary, for the plaintiff, in his replication to ſet forth, that which the defendant cannot deny in his rejoinder, without a *departure?*

Perkins v. *Wollaſton*, 3 *Ann.* In an action of *debt* againſt bail, the defendant pleaded no *capias*; the plaintiff replied, there was a *capias*; the defendant rejoined, that the force of the *capias* was ſuſpended by a *writ of error*. Reſolved, that this rejoinder was a *departure* from the *bar*.

Wherefore judgment was given for the plaintiff *niſi*, *&c. Vide Mod. Rep. vol.* 10. *p.* 257.

Eaſter, 7 Geo. *Hillier* v. *Plympton.*

In an action on the *caſe* on ſeveral promiſes, the defendant pleaded *infancy*; the plaintiff replied, it was for neceſſaries, and the defendant rejoined a ſtated account, *and that thereon the ſaid plaintiff had diſcharged* the defendant; and on demurrer judgment was given for the plaintiff, becauſe the rejoinder was a *departure* from the plea; or if not, yet *diſcharged* generally will not do, for the party muſt ſhew how he was diſcharged. *Vide Stra. vol.* 1. *p.* 422.

Michaelmas, 13 *Geo. White* v. *Clever.*

In an action of *debt* on a bond, with a condition carefully to execute the office of overſeer of the poor ſingly, without the aſſiſtance of the plaintiff; the defendant pleaded that he did execute the office ſingly, without the aſſiſtance of the plaintiff; and the plaintiff replied, he did not execute the office ſingly without the aſſiſtance of the plaintiff; the defendant rejoined, that the plaintiff voluntarily took on him the office without the defendant's requeſt, and that he did it without his requeſt.

Per curiam. This is a *departure* from the defendant's plea, and a contradiction: therefore judgment was given for the plaintiff. *Vide Forteſcue, p.* 333. *Raym. vol.* 2. *p.* 1449.

Trinity, 3 & 4 *Geo.* 2. *Hyder* v. *Warren.*

In an action of *debt* on recognizance of bail, the defendant pleaded no *ca' ſa'* againſt the principal; the plaintiff ſet out one, and the defendant replied, that *it was erroneouſly* iſſued.

Per curiam. This is a *departure.* Let judgment go for the plaintiff. *Vide Forteſcue, p.* 333.

Michaelmas, 5 & 6 *Geo.* 2. *Owen and others* v. *Reynolds.*

In an action of *debt* on a bond, conditioned to ſave harmleſs from tonnage of coals due to *W. B.* the defendant pleaded *not damnified*; the plaintiff replied, that *B.* diſtrained for the ſaid coals, and the defendant rejoined, that nothing was due to *B.* for tonnage; this was held to be a good rejoinder, and no *departure*, for it fortifies the plea, and gives a good reaſon why he was not damnified. *Vide Forteſcue, p.* 341.

Detainer, *ſee* **Priſoners.**

Detinue, *ſee* **Trover.**

Deviſe *ſee* **Wills.**

Diſcontinuance, &c.

Eaſter, 2 *W. & M.* *Biſſe* v. *Harcourt.*

On an *indebitatus aſſumpſit*, the defendant pleaded an attainder of high-treaſon in diſability. The plaintiff replied a pardon, *for that by the exemplification thereof*, &c. (which was held good) *and prayed judgment and his damages*; to which the plaintiff demurred: and held, that there was a *diſcontinuance* by the miſconcluſion of the replication; for an ill prayer of judgment is as if there was no judgment at all. *Vide Salk. vol.* 1. *p.* 177.

Eaſter, 3 *& M.* *Carter* v. *Davies.* Error.

See this caſe fully ſtated in page 356 of this work, under the head *Demurrer.*

Trinity, 3 *W. & M.* *Walwin* v. *Smith.* Error.

In an action of *debt* brought on a bond in the court of the corporation of *Hereford*, conditioned to perform articles, *&c.* the defendant pleaded performance. The plaintiff replied and aſſigned a breach, on which iſſue was joined. And then there was an entry, that the Mayor was removed and another choſen, but no day was given to the parties, nor any court held; but after this a *venire* was awarded, and the iſſue tried. On a *writ of error* brought in this court on the ſaid judgment, it was objected, that *ſtat.* 32 *H.* 8. *c.* 30. does not extend to inferior courts, and that it helps only *diſcontinuances* of pleas or proceſs, and not of the court.

Holt, Chief Juſtice. It is a remedial law, and ſhall be conſtrued to extend to *all diſcontinuances*, as well in inferior as ſuperior courts; and indeed inferior courts have moſt need of ſuch aſſiſtance. *Vide Salk. vol.* 1. *p.* 178. *Mod. Rep. vol.* 4. *p.* 86.

Trinity, 3 *W. & M.* *Chew* v. *Briggs.*

Holt, Chief Juſtice. An appearance does not help a *diſcontinuance*, as it does a *miſcontinuance*; and it is a queſtion, whether a *diſcontinuance* in proceſs is helped by the *ſtatute* of *jeofails*; a *diſcontinuance* in pleading may be helped. *Vide Mod. Rep. vol.* 12. *p.* 8.

Hilary, 3 *&* 4 *W.* *Philer* v. *Boſon.*

On a *writ of error* brought on a judgment in the court of *Exeter*, the *error* aſſigned was the want of a *continuance*, for it was *to the next court, which is ill in an inferior court.*

Per curiam. The judgment being given on a verdict, this *diſcontinuance* is aided; for the ſtatute of *jeofails* extends to inferior courts, and muſt be favourably conſtrued to give a remedy, and the words are, any *diſcontinuance*, *miſcontinuance*, or *miſconceiving of proceſs*, which are general words, and applicable to all the courts of law. *Vide Salk. vol.* 3. *p.* 130.

Eaſter, 5 *W.* 3. *Anonymous.*

In an action of *treſpaſs* and *battery*, brought againſt huſband and wife, the original, as recited in the declaration, was of a *battery* only at one time, but the declaration itſelf was of ſeveral *batteries* done by them at ſeveral times, to which ſeveral *batteries* the defendants pleaded; and the plaintiff replied as to one of them only, on which they were at iſſue, and it was found for the plaintiff.

Per curiam. The original not being ſet out by craving *oyer*, we will intend it to be right, but miſ-recited at the top of the declaration; and the plaintiff not replying to one of the *batteries*, is but a *diſcontinuance*, which is helped by the verdict. *Vide Salk. vol.* 3. *page* 131.

Trinity, 6 *W. & M.* *Campbell* v. *St. John.*

See this caſe fully ſtated in page 363 of this work, under the head *Demurrer.*

Michaelmas, 6 *W. & M.* *Moor* v. *Green.*

In an action of *debt* on a judgment brought in *Trinity* term, the defendant imparled till *Michaelmas* term following, and then pleaded in *bar*, that the plaintiff *on Monday next after the Feaſt of St. Martin* was *outlawed*; to which the plaintiff demurred. It was urged by the defendant's council, that the *outlawry* was *meſne* between the action brought, and the plea pleaded, and that all matters in diſcharge of the action, which happen after the action brought, ought to be pleaded *puis darrein continuance. Yelv.* 140. But the court compared this to the common caſe of a judgment confeſſed by an executor after an action brought, which is never pleaded *puis darrein continuance*, but as this caſe is. And in theſe caſes, the time of the *outlawry*, and the time of the judgment, and when it was, appear in themſelves. *Vide Salk. vol.* 1. *p.* 178. *Mod. Rep. vol.* 5. *p.* 11.

Hilary, 8 *W.* 3. *Saliſbury* v. *Proctor.* Error.

An action was brought againſt two defendants, one joined in iſſue, and the other demurred; the iſſue was tried, and there was a verdict againſt that defendant; ſo that no day was to be given to him; but as to the other, day ſhould be given, and *continuances* entered till judgment, but none being entered, a *writ of error* was brought, and theſe *diſcontinuances* were aſſigned for *error*; for, being after verdict they could not be helped by the verdict.

Holt, Chief Juſtice. *Diſcontinuances* are helped as well after the verdict as before; and ſo it has been adjudged, for the ſtatute ſays, *where the fact is tried*, without relating to *diſcontinuances* before, more than to to thoſe after a verdict. *Vide Salk. vol.* 3. *p.* 130.

Eaſter, 8 *W.* 3. *Price* v. *Parker.*

On a motion to *diſcontinue* on payment of coſts, the court held, that after a *general* verdict there can be no leave given to *diſcontinue*; for that would be having as many new trials as the plaintiff pleaſes: but that after a *ſpecial* verdict there may, becauſe that is not complete and final; but in that caſe it is great favour. The ſame point was ſo ruled in the caſe of *Reeve* v. *Gelding. Eaſter* 5 *&* 6 *W. & M.* in this court. *Vide Salk. vol.* 1 *p.* 178.

Eaſter, 8 *W.* 3. *Keat* v. *Barker.*

An action was brought againſt the defendant for ſix years wages due to the plaintiff for his ſalary, being a ſteward; there was a verdict for the plaintiff at the aſſizes in *Berkſhire*, and only ſeven pounds damages given.

It was moved to *diſcontinue* the action, and that the *poſtea* might be brought in. *But not allowed.*

Per curiam. After a general verdict, the court will not ſuffer the plaintiff to *diſcontinue* his action: it has been allowed after a ſpecial verdict, and an argument at *bar*; ſo likewiſe after joining in demurrer, but not after arguing ſuch demurrer. But *ſtat. H.* 4. ordains, *that after verdict, a plaintiff ſhall not be nonſuited*; which was otherwiſe at common law; for if he did not like his damages, he might be nonſuited. *Vide Mod. Rep. vol.* 5. *p.* 208.

Michaelmas, 10 *W.* 3. *Lug* v. *Godwin.*

See this caſe fully ſtated in page 363 of this work, under the head *Demurrer.*

Michaelmas, 10 *W.* 3. *Anonymous.*

The court was moved to *diſcontinue* a former action pleaded in abatement of a ſubſequent one, on ſuggeſtion, that the attorney in the former action was not to be found.

Holt, Chief Juſtice, would not allow it; but bid them plead *nul tiel record*, and that the defendant would find their attorney for them: and held, that a perſon cannot plead twice in *Abatement. Vide Mod. Rep. vol.* 12. *p.* 230.

Michaelmas, 11 *W*. 3. *Pierceſon* v. *Huls*. Error.

On a *writ of error* brought on a judgment in *C. B.* it was aſſigned for *error* that there was a *miſcontinuance*, the *continuance* being from one day to another in the ſame term, which was urged could not be, the whole term being but one day in law. But over-ruled. Another *error* aſſigned was, that the imparlance was to *fifteen days in Eaſter*, inſtead of *from the day of Eaſter in fifteen days*, which was alſo rejected by the court. *Vide Mod. Rep. vol.* 12. *p.* 307.

Trinity, 12 *W*. 3. *Coux* v. *Lowther*. Error.

Adjudged, on *ſtat.* 39 *Ed.* 3. that in *treſpaſs* a *diſcontinuance* as to one defendant, is a *diſcontinuance* as to all. *Vide Raym. vol.* 1. *p.* 597.

Michaelmas, 12 *W*. 3. *Morley* v. ———

Per curiam. If a defendant pleads as to part, and ſays nothing as to the reſt, it is a *diſcontinuance*, unleſs the plaintiff will take judgment by *nil dicit*. *Vide Mod. Rep. vol.* 12. *p.* 421.

Hilary, 13 *W*. 3. *Vincent* v. *Beſton*.

On an *aſſumpſit* on three promiſes for 55 *l.* each, the defendant, as to the 55 *l.* mentioned in the *firſt count*, pleaded, that the plaintiff ought not to have his action, for that the ſaid three ſeveral *aſſumptions in the declaration above-mentioned*, were for, the ſame ſum of 55 *l.* which ſum of 55 *l.* the defendant had paid to the plaintiff before the action was brought; and for this he prayed judgment, if the plaintiff ought to have his action againſt him. The plaintiff replied, that the defendant did not pay, &c. to which the defendant *demurred*.

The court held, that the whole was *diſcontinued*, becauſe the defendant pleaded only to the firſt of the promiſes, and therefore the plaintiff ſhould have taken judgment by *nihil dicit* on two of them; for the defendant had fixed his plea by beginning in this manner to the firſt promiſe, and therefore the ſpecial matter which follows will not aid it. 1 *Roll. Rep.* 177. 406. But afterwards, this being all done in *Michaelmas* term, and no *continuance* being entered on the roll, the plaintiff entered up judgment by *nil dicit* on the two promiſes to which the defendant did not plead. And this was approved by the court, on a report made by the maſter after reference to him. And judgment was this term given for the plaintiff on *demurrer*. *Vide Raym. vol.* 1. *p.* 716.

Hilary, 13 *W*. 3. *Anonymous*.

Holt, Chief Juſtice. In an action of *treſpaſs* againſt two, after iſſue joined, and the plea of *puis darein continuance*, one of them dies; the plaintiff may at the trial get his *default* recorded, proceed to trial, and obtain a verdict againſt the other; and he may before judgment come and ſuggeſt the death of the defendant who died, and have judgment againſt the other. And taking the inqueſt againſt one, where there are two defendants, and one of them dies, *puis darein continuance* cannot be *error*, if the *default* of the other is recorded, and his death is ſuggeſted before judgment; and the death of a party cannot be pleaded in *abatement*, *puis darein continuance*. *Vide Mod. Rep. vol.* 12. *p.* 668.

Hilary, 13 *W*. 3. *The City of London* v. *Wood*.

See this caſe fully ſtated in page 292 of this work, under the head *Corporations*.

Hilary, 13 *W*. 3. *Crow* v. *Maſon*.

Per curiam. In an action of *debt* on a bond, the defendant pleaded in *bar* as to part, that after the laſt *continuance* he had paid ſo much, which the plaintiff accepted; to which the plaintiff *demurred*; and it being a declaration of *Michaelmas* term, it was adjudged, the whole was *diſcontinued*; for the plaintiff's proper way had been to demur to the plea, ſo far as it was pleaded, as he had a right to do, it being after the laſt *continuance*, and no acquittance pleaded or produced; therefore let the plaintiff take judgment by *nil dicit* as to the reſt. *Vide Mod. Rep. vol.* 12. *p.* 626.

Trinity, 13 *W*. 3. *Pierce* v. *Packſtan*.

In an action of *debt* on a bond, the defendant pleaded payment of part, *puis darein continuance*, which the plaintiff accepted in *bar*.

Holt, Chief Juſtice. The defendant could not have pleaded it in *abatement*, but muſt have done it in *bar*; and whenever a thing, which in its nature happens, and is pleaded *puis darein continuance*, it admits of no anſwer; and this he ſaid was not like the caſe of foreign *attachment*, though that was held to be a matter of payment, and therefore a good plea in *bar*; nor like the caſe of the demandant's entry into part of the land, *puis darein continuance*, for that is the party's own act only. And he quoted the caſe of 3 *H.* 7. 3 *b.* 5 *H.* 7. 41. *a.* The firſt was debt on contract, and receipt of part *puis darein continuance* was pleaded; and there it was held to be no good plea, becauſe it might be given in evidence, but if it had been in *debt* on a *ſpecialty*, it muſt have been pleaded in *bar*. *Vide Mod. Rep. vol.* 12. *p.* 541.

Trinity, 13 *W*. 3. *Barber* v. *Palmer*.

If after a plea in *bar* the defendant pleads a *puis darrein continuance*, this is a waiver of his *bar*, and no advantage ſhall be taken of any thing in the *bar*. *Vide Salk. vol.* 1. *p.* 178.

Trinity, 13 *W*. 3. *Slanney* v. *Slanney*.

In an action of *debt* on a bond, a declaration was delivered on the firſt day of *Eaſter* term, and a plea put in after the rules for pleading were out, beginning with *no action*, and concluding in *abatement*; and the doubt was, whether this was not a *diſcontinuance*, and it was ſaid the books ran both ways, and agreed if it be taken in *abatement* it came too late, the rule being out. And the caſe of *Biſſe* v. *Harcourt* was quoted, where an attainder in diſability of the perſon was pleaded thus; and the plaintiff replied, demanding judgment for damages, ſhewing that it was a *diſcontinuance*, matter of *abatement* being pleaded in *bar*; and he ſaid, if the plaintiff had pleaded matter of fact, anſwering a fact pleaded in *abatement*, a concluſion of a prayer of damages had been proper; but where he does not reply ſuch a fact, he only ought to pray that his writ be adjudged good; for if on trial of matter of fact pleaded in abatement, the iſſue be for the plaintiff, he ſhall have final judgment: and the caſe of *Medina* v. *Stanton*, adjudged in this court, was quoted.

Holt, Chief Juſtice. Where the court awards a *reſpondeas ouſter*, when the judgment ought to be final, it can do no harm, becauſe the defendant cannot aſſign it for error, no more than he can the awarding an *eſſoign*, when it ought not to have been, being for his advantage. At another day he ſaid, the defendant begins with a *actio non*, i. e. *no action*, becauſe the plaintiff is outlawed in the *C. B.* and *prays judgment of the writ*. But if it be for any thing out of the writ, as joint-tenancy, or the like, the condition may be with a *judgment of the writ*, or otherwiſe in *abatement*; if one begins in *abatement*, and concludes to the action, it is ill, if the plea be not ſufficient in *bar* according to the concluſion; and if a demurrer be put in to ſuch plea, in that caſe judgment ſhall be againſt the defendant, for his concluſion affirms the writ to be good; but if the plea commences in *bar* with a good matter, and concludes to the writ in *abatement*, it will be well, for the plaintiff cannot have a good writ if he has not a good cauſe of action. 36 *H.* 6. 18. And it was ſaid, if in the principal caſe the plaintiff had demurred, or replied in *bar*, and the court were of opinion that it was a plea in *abatement*, perhaps it would be a *diſcontinuance*. At laſt, a rule was obtained for the defendant to conclude his plea well, and then judgment went according to the juſtice of the matter; for if this be made in *abatement*, it is irregular after the rules are out: therefore let the defendant ſhew cauſe why he ſhould not conclude in *bar*, for theſe irregularities in pleading are not to be encouraged to inveigle the court. *Vide Mod. Rep. vol.* 12. *p.* 524.

Michaelmas, 13 *W.* 3. *Hayward* v. *Kinſey.*

On a *writ of error* brought on a judgment in *C. B.* in an action on the *caſe*, after hearing council on both ſides, on the *errors* aſſigned, the court gave judgment as follows:

Holt, Chief Juſtice. We are bound *by our office* to take notice of the practice of every court in *Weſtminſter-hall*, let us be informed which way we can; the rule of court is one thing, and an eſtabliſhed practice, of which one ſhall have avail without pleading, is another thing; and it is not the judges of that court ſaying that it is the courſe of the court, will determine it.

Suppoſe you had pleaded a right, and a proper original in this manner, that you have done here, you have not ſhewn that it was ever returned, and till return, there is no day in court; and there is no *continuance* ſhewn to have been entered; and to prevent the *ſtatute*, it is not enough to take out a writ, even a proper one, but all the *continuances*, though for ſix or ſeven years, muſt be entered, and ſo ſhewn to the court; for if there is but an omiſſion of one *continuance*, it ſpoils all. Indeed where it is pleaded in *abatement*, on another action depending *for the ſame cauſe*, the plaintiff need not ſhew all the *continuances*, but yet he muſt ſhew the action is not determined. But *by law*, in this caſe it is not enough to ſay, it was *continued*, but it muſt be ſhewn how.

Gould, Juſtice thought it would be well only to alledge a *continuance* generally; but agreed if a *continuance* is not alledged, it ſhall be intended a *diſcontinuance*, for it is ſo of courſe. And for the *diſcontinuance* only, the judgment was reverſed. *Vide Mod. Rep. vol.* 12. *p.* 568.

Michaelmas, 13 *W.* 3. *Weeks* v. *Peach.*

In an action of *replevin* for taking chattels *in a certain place called* A. *and alſo in a certain other place called* B. the defendant avowed the taking *in the place aforeſaid, in which*, &c. for that ſuch a one was ſeiſed of the *place in which*, &c. To this the plaintiff demurred.

Per curiam. The *place in which* relates only to one place, ſo that there is a *diſcontinuance*, the avowry not being an anſwer to the whole declaration; and this diſtinction was made by *Holt*, Chief Juſtice, *viz.* if a plea begins with an anſwer to the whole, but in truth the matter pleaded is only an anſwer to part, the whole plea is naught, and the plaintiff may demur; but if a plea begins only as an anſwer to part, and is in truth but an anſwer to part, it is a *diſcontinuance*, and the plaintiff muſt not demur, but take his judgment for that as by *nil dicit*; for if he demurs or pleads over, the whole action is *diſcontinued. Vide Salk. vol.* 1. *p.* 179. *Raym. vol.* 1. *p.* 679.

Hilary, 1 *Ann.* *Pierce* v. *Henriques.*

In an *aſſumpſit* on two *counts*, the defendant pleaded *non-aſſumpſit*, as to one, and as to the other it being for 100 *l.* he pleaded payment of 99 *l.* which the defendant received; but pleaded nothing to the reſt: the plaintiff replied, denying the payment; and on *demurrer*,

Per curiam. The plea is well as to the 99 *l.* for a perſon may plead ſeveral pleas, as payment of part, and a releaſe as to the reſt, *&c.* and here it is a *diſcontinuance*; for he ſhould have taken judgment by *nihil dicit*, for ſo much as had not been pleaded to, and plead as to the reſt: but it was agreed here, the defendant could not plead *non-aſſumpſit* in part, and a releaſe or payment to the reſt; for that would ſpoil the whole plea.

And being ſpoke to again, it was held a *diſcontinuance* in the whole by the court.

Holt, Chief Juſtice, ſaid, it might be doubted whether it could be ſo pleaded on an *indebitatus aſſumpſit*. *Vide Mod. Rep. vol.* 7. *p.* 124.

Eaſter, 1 *Ann.* *Atwood* v. *Burr.*

Error.

On a *writ of error* brought on a judgment on a *ſci. fac.* againſt bail in the mayor's court of *Maidſtone*, among other exceptions taken on the *writ of error*, was the following, *viz.*

There were two *ſci. fac.'s* on which this judgment was founded, and the firſt *ſci. fac.* was not returned, as appeared by the record.

After hearing council on both ſides, the court gave their opinion.

Holt, Chief Juſtice. If there is no return, I doubt it will be a *diſcontinuance*, and that cannot be cured by appearance; but after verdict a *miſcontinuance* is cured, and there being no return to the firſt *ſci. fac.* or ſo much as a recital of it in the *ſecond*, it is not maintainable, and if you do not appear at the return, you cannot appear at all, if the proceſs is not *continued* down. If there is an original returnable in *Trinity* term, and the defendant does not appear, but comes in *Hilary* term, all is wrong if there is not a *continuance* down to *Hilary* term duely entered: if a *ſci. fac.* is returnable *on Thurſday next after three weeks of St. Michael*, if the party appears on the *morrow of St. Martin*, it will be an incurable fault, for none can appear when he has no day on the writ, or on the roll, and here is neither. And ſuppoſe the firſt *ſci. fac.* had been well returned, and an *alias* iſſues out returnable in *June*, and the defendant appears in *Auguſt*, all would be bad without on a *continuance* entered till *Auguſt*; becauſe without it the defendant has no day in court; but he ſaid perhaps the want of the return of the *ſci. fac.* might be cured by the day on the roll, where the *teſte* and iſſuing out of the writ is, which perhaps may be a ground for an *alias*, and alſo for a day for appearance; and he ſaid, that on pleading the *ſtatute of limitations*, he always uſed to plead the return, and not the purchaſe of the writ; for it was the return that gave the poſſeſſion of the cauſe to the court. And if a perſon was to *continue* a *latitat* for ſeveral years, he muſt get the *firſt* returned; on which return, you make your *continuances* down, though you never take out another; but there muſt be a return of the firſt writ; ſo if a *cap. ad ſatisfac.* is taken out within a year, you may *continue* it down as long as you think proper, on a return, that *the ſheriff did not ſend the writ*, and not be put to a *ſci. fac.* There is a vaſt difference between the writ to which the defendant has an anſwer, and one to which he has none; for if it is a writ to which the party has a plea, there muſt be ſome ſort of a return, as that it came *too late*, *&c.* but ſtill there muſt be ſome return; and for this he quoted Sir *John Vidian* v. *Wellings*. *Vide Mod. Rep. vol.* 7. *p.* 3.

Hilary, 2 *Ann.* *Bezaliel Knight's Caſe.*

An action having been brought againſt *Knight* in a wrong name, he pleaded the *miſnomer* in abatement. On which the plaintiff declared againſt him *de novo* by his right name, and *Knight* pleaded the firſt action pending, for the plaintiff ought to have *diſcontinued* it.

Holt, Chief Juſtice, ſaid, it was too late to do it now, becauſe the *diſcontinuance* only relates to the time of its being entered on the record; ſo that if the plaintiff ſhould now enter it, and reply *nul tiel record*, it would be againſt him, being a record at the time of the plea pleaded: and it is not like the reverſing a judgment or outlawry on a *writ of error*, which makes void the record *ab initio*; ſo that on *nul tiel record*, if the judgment is reverſed before the day given to bring in the record, it is ſufficient. *Vide Raym. vol.* 2. *p.* 1014.

Eaſter, 2 *Ann.* *Curluis or Curlewis*, v. *Padley or Dudley.*

In an action of *debt*, the declaration was of *Michaelmas* term, and the plea-roll of *Eaſter*, and no *continuance* entered; and this on demurrer was ſhewn to the court as a *diſcontinuance*; but they ſaid, the practice is never to enter *continuances* till the plea-roll be entered up, though the declaration be of *four* or *five* terms ſtanding. *Vide Salk. vol.* 1. *p.* 179. *Raym. vol. p.* 872.

Eaſter, 2 *Ann.* *Turner* v. *Turner*.

In an action of *debt* on a bond, the defendant pleaded a compoſition, and this being argued ſeveral times at bar on demurrer, at laſt the court made a rule for judgment, *unleſs cauſe ſhewn*. And it being moved again, the former rule was made abſolute. The next day the court was moved to *diſcontinue*, alledging, that this was a ſham plea, and no ſuch compoſition ever made, and 1 *Saund.* 39, 23. 2 *Saund.* 73. were cited.

Holt, Chief Juſtice. After a rule *niſi*, and then a peremptory rule for judgment, it was never done: the rule of the old books was, if after an exception was taken, and the court had given their opinions, the plaintiff would be ſo hardy as to demur, he muſt do it at his peril, and ſo it is here. *Vide Salk. vol.* 1. *p.* 197. *Raym. vol.* 2. *p.* 856.

Eaſter, 2 *Ann.* *Green* v. *Waller*.

In an action of *debt* on a bond, among ſeveral exceptions taken, was the following, *viz.*

There was a *diſcontinuance* in this court, the *continuance* being *at the King's courts ubicunque*, which is as if a *continuance* ſhould be here *at Weſtminſter, ubicunque*, whereas it ſhould be *before our Lady the Queen ubicunque*, which is the ſtile of the court.

Holt, Chief Juſtice, ſaid, that a day being given to the parties, this was but a *miſcontinuance*, and could not be a *diſcontinuance*; and that *miſcontinuances* are helped by appearance. And he ſaid, that where the proceedings are by bill, the *continuances* are *before the Lord the King at Weſtminſter*; where by original *before, the Lord the King ubicunque*. *Vide Raym. vol.* 2. *p.* 891.

Hilary, 3 *Ann.* *Market* v. *Johnſon*.

In an action of *debt* on a bond for 500 *l.* the defendant as to 225 *l. part of the aforeſaid* 500 *l.* pleaded payment; and the plaintiff demurred.

Per curiam. This is only a plea to part, for in *debt* on a bond a man may have ſeveral pleas in *bar*; as for example, ſuppoſe the plaintiff ſues as executor, the defendant may plead the releaſe of the teſtator for any part, and for the reſidue the releaſe of the plaintiff: ſo a man as to part may plead payment, and as to the reſt an acquittance: then there being no anſwer as to the reſidue, here is a *diſcontinuance* for the reſidue; and the plaintiff ſhould have taken judgment by *nil dicit*.

Michaelmas, 6 *Ann.* *Falmouth* v. *Strode*.

In *ejectment*, the caſe was as follows, *viz.* the aſſizes began on the *Monday*, and the defendant died the day before, and yet a trial was had, and after a long defence, a verdict was given for the plaintiff: and now it was moved, that judgment ſhould be arreſted, on this objection, that this is a matter of fact, and not aſſignable after a verdict, but that they ought to bring a *writ of error*.

Holt, Chief Juſtice. If he had died the day the aſſizes began, though the cauſe had been tried after, the trial had been good, though he had died at one o'clock in the morning; for there is no fraction of a day, according to *Shelly*'s caſe in 1 *Cro.* in which caſe Lord *Hobart* ſaid, any man as a *friend to the court* may inform the court of ſuch an error. *Adjourned.* *Vide Mod. Rep. vol.* 11. *p.* 136.

Eaſter, 7 *Ann.* *Buſhell* v. *Haynes*.

See this caſe fully ſtated in page 185 of this work, under the head *Bail-Bond*.

Michaelmas, 8 *Ann.* *Joddrell* v. *Heathcot*.

See this caſe fully ſtated in page 351 of this work, under the head *Declaration*.

Eaſter, 11 *Ann.* *Widdrington* v. *Charleton*.

See this caſe fully ſtated in page 80 of this work, under the head *Appeal*.

Michaelmas, 11 *Ann.* *Alice* v. *Gale*.

Per curiam. If a defendant pleads in *abatement*, and the plaintiff replies as to a plea in *bar*, it is a *diſcontinuance*. *Vide Mod. Rep. vol.* 10. *p.* 112.

Hilary, 2 *Geo.* *Taylor* v. *Matthews*.

Per curiam. If pending the conſideration of the court the plaintiff dies, judgment may be entered without entering the *continuances*; and then it will have relation to the day in bank. *Latch.* 91. 1 *Leon.* 187. *Baller* v. *Delander*, a modern caſe. A *continuance* is nothing about a *curia adviſare vult.*

The time when in fact judgment was given muſt be entered on the roll, *that* is only in reſpect to land, that it may not be bound until the time of the judgment given, and ſo purchaſers over-reached. Before this inconvenience was provided againſt, by *ſtat. Car.* 2. there might have been inconvenience in entering judgment without *continuances*; there can be none now. *Vide Mod. Rep. vol.* 10. *p.* 325.

Trinity, 4 *Geo.* *Long* v. *Buckeridge*.

See this caſe fully ſtated in page 148 of this work, under the head *Attornment*.

Hilary, 8 *Geo.* *Martin* v. *Wyvill*.

In *Trinity* term laſt, the plaintiff delivered a declaration on a ſtock-jobbing contract, with an *imparlance* to *Michaelmas* term, and then, on *demurrer* to the plaintiff's replication, the paper book was made up, and after the 1ſt of *Nov.* it was made a *concilium*, and the plaintiff had judgment *niſi*, before the end of the term; and the day before the end of the term the rule was diſcharged, and an *ulterius concilium* made to this term; at the firſt return of which the defendant pleaded *puis darein continuance*, that the contract was not regiſtered according to the *ſtatute*: whereon the plaintiff made a ſpecial entry of the *continuances* from the firſt day of *Michaelmas* term to that day, when it ſtood in the paper, and ſo on to the laſt day of laſt term, and then again to the firſt day of this term.

The court was moved to ſet aſide the plea, becauſe not pleaded after the laſt *continuance*, the time for regiſtering expiring on the firſt of *November*, after which there are two *continuances* on the roll before the plea comes in, whereas all pleas *puis darein continuance* ſhould be pleaded before the next *continuance* after the fact happens; and as to the ſpecial entry here made, he ſaid, that indeed the common practice is only to enter *continuances* from term to term, becauſe that being ſufficient to prevent a *diſcontinuance*, attornies for their own eaſe never enter any more; but yet in fact the party has a right to enter all the *continuances*, the proceedings here being *from day to day*. Beſides, the plea is falſe in fact, and that is another reaſon to ſet it aſide as dilatory; the words of the *ſtatute* are, "That "ſuch memorial ſhall be ſigned by the party," and it is on that they ground themſelves, for the contract is regiſtered, and in this manner, "This contract was "made for the benefit of me *William Martin*, and has "not been compounded;" which being all the plaintiff's hand writing, that is a ſigning, tho' the name is not at the bottom; like the caſe of a will which the teſtator writes himſelf, and begins I *A. B.* &c. and does not ſubſcribe it, yet that has been adjudged to be a ſigning. 3 *Lev.* 1.

As to the point of the *continuance*, the court did not determine the matter.

Pratt, Chief Juſtice, and *Forteſcue*, Juſtice, held that as the fact would warrant it, every act of the court might be entered, and then the plea muſt be ſet aſide, as not coming in time.

Eyre, Juſtice, (abſent *Powys*, Juſtice) thought this uncommon entry, which was to deprive the defendant of a benefit, which in the common courſe of practice he would be intitled to, ought not to be allowed; however, this point was not determined, being all of opinion, that for the ſecond reaſon the plea ſhould be ſet aſide, as falſe; ſaying, it is the conſtant practice at the aſſizes, to put the party to verify ſuch a plea, before it is allowed; and if the party does not give ſome evidence of the truth of it, the judge will reject it, and go on with the cauſe. And at another day, *Eyre*, Juſtice, cited *Mo.* 871. that a plea *puis darein continuance* could not be pleaded after *demurrer*. The others gave no opinion as to this, but ſet it aſide on the point of its being falſe in fact, without meddling farther with the *continuances*. *Vide Stra. vol.* 1. *p.* 492.

Eaſter, 6 *Geo.* *Woodward* v. *Robinſon.*

In an action on the *caſe* for ſeveral promiſes, and *among other things*, for a note for 65 *l.* and on an *indebitatus aſſumpſit* for 36 *l.* 9 *s.* 5 *d.* and a *quantum meruit* for carpenters work and materials found, wherein the plaintiff averred he deſerved 36 *l.* 9 *s.* 5 *d.* for the work, and the like for the materials.

The defendant, as to the count on the note, pleaded, that he gave a bond in ſatisfaction for the ſaid 60 *l.* and the plaintiff received it as ſuch. And as to the ſaid ſeveral ſums of 36 *l.* 9 *s.* 5 *d.* and 36 *l.* 9 *s.* 5 *d.* that he gave a note for ſo much in ſatisfaction; and on iſſues tendered, the defendant demurred.

On this cauſe being put in the paper, nobody appeared for the defendant, but it was obſerved by the court, that there was a *diſcontinuance*. And at another day the defendant's council argued, that there were two *diſcontinuances*; 1. As to the note for 65 *l.* where the defendant in his plea has artfully dropped 5 *l.* and pleaded only a ſatisfaction for 60 *l.* And, 2dly. In the plea of a note in ſatisfaction, which covers no more than two ſeveral ſums of 36 *l.* 4 *s.* 5 *d.* whereas there are three ſuch ſums in the declaration, *Eaſter*, 4 *Geo.* *Nichols* v. *Backhouſe*, on an *indebitatus aſſumpſit*, the defendant, *as to* ——— parcel of the damages pleaded one plea; *and as to* ——— *reſidue*, pleaded another; and on *error*, when it ſtood to be affirmed, *Eyre*, Juſtice, obſerved, that between the two pleas the defendant had dropped a penny, and the court held it a *diſcontinuance*: and ſo is *Yelv.* 5. *Carter* 51.

To this it was anſwered and reſolved by the court, that as to the firſt part of the objection, there was no *diſcontinuance*, it being pleaded *as to* the whole promiſe; and though it is in law only an anſwer to part, and by that means a void plea, yet it will not make a *diſcontinuance*; ſo *vice verſa*, if it is pleaded as to part, it will be a *diſcontinuance*, though in law it is an anſwer to the whole. As to the other point, they all held it a *diſcontinuance*; but then *Eyre*, Chief Juſtice, obſerved, that it being a record of this term, the plaintiff might take judgment by *nihil dicit* for ſo much as is uncovered by the plea; and cited two inſtances where it was ſo done; *Vincent* v. *Preſton*, *Michaelmas*, 11 *W.* 3. *rol.* 183. and the caſe of *Marcas* v. *Johnſon*, *Hilary*, 3 *Ann. Salk.* 180. *Vide Stra. vol.* 1. *p.* 302.

Eaſter, 10 *Geo.* *Hawker* v. *Hinton.*

See this caſe fully ſtated in page 145 of this work, under the head *Attorney*.

Michaelmas, 10 *Geo.* *Miller* v. *Bradley.* Error.

On a *writ of error* brought on a judgment in *C. B.* the judgment being affirmed in this court the laſt paper-day of the laſt term, it was inſiſted the *capias ad ſatisfaciend.* muſt be returnable this term, becauſe the judgment could not be ſigned till the *fourth day afterwards*, &c. if ſo, then the plaintiff having brought a *teſtatum capias ad ſatisfaciend.* that muſt be irregular, becauſe there could be no *capias ad ſatisfaciendum* on a judgment not ſigned, and conſequently nothing to ground a *teſtatum ca. ſa.* eſpecially as this action was brought by *original*.

The objection was, that this action being brought by original, no *ca. ſa.* could iſſue before the *judgment was ſigned*; and it being obtained the laſt paper-day of the laſt term, it could not be ſigned till after the *fourth day afterwards*, &c. of this term; ſo there being nothing to warrant a *ca. ſa.* by conſequence the *teſtatum ca. ſa.* muſt be irregular.

The council on the other ſide replied, that when the *judgment was ſigned*, though in the latter end of the laſt term, this by relation is a ſufficient foundation to ſue out a *capias* the firſt day of the term, which will be a warrant to found a *teſtatum* returnable *in three weeks of Trinity*, and ſo good.

To which it was anſwered, that though to ſome purpoſes the term is but one day in law; yet to other purpoſes it is not ſo; as for inſtance, if there are *continuances*, there can be no judgment before they are entered, and the principal caſe being by original, there could be no judgment entered till the *fourth day after* of the following term; ſo there could be no ſuch judgment as is now ſet up to ground a *teſtatum ca. ſa.*

Per curiam. This is a judgment of the firſt day of the term, in which it was obtained by relation, which is ſufficient to ground a *ca. ſa.* and conſequently a *teſtatum ca. ſa.* and if there is no difference between an action by *bill*, and by *orginal*, it is regular.

As to the *continuances* being carried on from one term to another, no ſuch thing appears on the record, ſo this execution is regular; it is true, if the *continuances* had been entered, no execution could be prior to ſuch entry; and ſo is 2 *Vent.* 104. *Prince* v. *Slaughter*, and 2 *Lev.* 167. *Dobſon* v. *Bell.* *Vide Mod. Rep. vol.* 8. *page* 190.

Hilary, 32 *Geo.* 2. *Doe*, *on the Demiſe of Odiarne* v. *Whitehead.*

Adjudged, that a fine, with proclamations, levied by a tenant in *tail* in poſſeſſion, will *diſcontinue* the reverſion in fee as well as diveſt the remainder man in *tail*, ſo as to put him to his *writ of formedon*. *Vide Bur. vol.* 2. *p.* 704.

Hilary, 4 *Geo.* 3. *Harris*, *Executor* v. *Jones.*

On a queſtion before the court, "whether an executor ſhould be permitted to *diſcontinue* without payment of coſts."

After hearing council on this motion, the court ſaid they were clear that the giving an executor leave to *diſcontinue* was a matter of diſcretion in the court; and that they ought not to give him leave in any caſe where he had knowingly brought his action wrong, unleſs he would conſent to pay coſts.

Per curiam. Let the plaintiff have a rule to *diſcontinue*, on payment of coſts. *Vide Bur. vol.* 3. *p.* 1451.

Diſfranchiſement.

Hilary, 3 *W.* & *M.* *The City of Exeter* v. *Glide.*

Per curiam. An alderman deſerting his office is a good cauſe of *diſfranchiſement*; and *Holt*, Chief Juſtice, obſerved, that abſenting himſelf from the council, in the very nature of the thing, was the ſame. *Vide Mod. Rep. vol.* 4. *p.* 33.

Eaſter, 9 *W.* 3. *The King* v. *Chalke.*

On a *mandamus* directed to the corporation of *Wilton*, to command them to reſtore an alderman, they made return, that he being Mayor ſuch a year, miſemployed the revenue of the corporation, *&c.* to ſuch uſe, *&c.* and that he eraſed one of the books of the corporation, *&c.* and that being charged with theſe crimes, he had been heard what he could ſay in his defence, and therefore they removed him, *&c.* An exception was taken to the return, becauſe it did not appear that the party was ſummoned. And the rule in *Glide*'s caſe in this court, *Trinity*, 4 *W.* & *M.* was, that ſummons was neceſſary in all caſes of *diſfranchiſement*, except where the party does not live within the corporation, but in ſome diſtant place. And though it is ſaid, that he was heard, that might be without ſummons, and therefore unprepared.

Holt, Chief Juſtice. A man ought not to be *diſfranchiſed* until he has been heard in his defence, on notice and preparation; and ſummons is only neceſſary for that purpoſe. Therefore if a man be charged in *common council*, and ordered to prepare by ſuch a time, this will be good, though there is no actual ſummons; for ſummons is only to give the party opportunity to make his defence, and if he is heard, *&c.* it is enough. And he ſaid, that he remembered a caſe where the return was, that the party *diſfranchiſed* in common council, was examined touching particular affairs; and not being able to give ſufficient anſwers, was *diſfranchiſed*.

The ſecond exception was, that it was not ſaid that the order to remove him was under the ſeal of the corporation.

Holt, Chief Juſtice. If a burgeſs is conſtituted by patent under the common ſeal, he ought to be diſcharged in like manner; but if by election, there it is only entered in the book, and an order is ſufficient to diſcharge him, ſo that they may *diſfranchiſe* him without any inſtrument under their common ſeal. And a common council is incident to all corporations of common right, unleſs it is otherwiſe provided by the patent of creation.

The third exception was, that the offences were not ſufficient cauſes of *diſfranchiſement*; for as to the miſemploying or non-payment of the money, that is no cauſe of forfeiture, becauſe the corporation may have their action for it: beſides, it is not ſaid that he was required to give any account for it. And as to the eraſing of the books, it may be that the entry was wrong, and he only made it as it ought to be; for it is not averred that it was as it ought to be, nor is the eraſure averred to be to the detriment of the corporation. And of this opinion was the whole court; and therefore a peremptory *mandamus* was granted. *Vide Raym. vol.* 1. *p.* 225.

Michaelmas, 10 *W.* 3. *The King* v. *The Mayor of Coventry.*

See this caſe fully ſtated in page 292 of this work, under the head *Corporations.*

Hilary, 4 *Ann. The Queen* v. *The Bailiffs, Burgeſſes, &c. of the Town of Ipſwich.*

See this caſe fully ſtated in page 293 of this work, under the head *Corporations.*

Eaſter, 5 *Ann. The Queen* v. *Truebody.*

See this caſe fully ſtated in page 293 of this work, under the head *Corporations.*

Michaelmas, 7 *Ann. The Queen* v. *Lane.*

On a *mandamus* to reſtore an alderman of *Glouceſter*, the return was, that he had wrote a letter to another alderman, which was very ſcandalous, and agreed to be a libel.

Per curiam. Though never ſo much a libel, yet there ought to be a conviction for it; it is indictable at common law, and, ſo ought to be proſecuted to a conviction, according to *Bagg*'s caſe; and held to be no good return.

At another day, the council urged, that it was good without a conviction, becauſe he agreed to the fact, and conſented to be turned out.

Per curiam. He cannot conſent, becauſe a libel is a thing of which they have no juriſdiction; they have not the conuſance of the trial of libels.

Holt, Chief Juſtice. If he comes to their aſſemblies, and ſhould by *parol* only come and reſign, I hold that is a good reſignation, if entered on their books as accepted; but a conſent to be turned out I cannot think to be a reſignation, and is no corporate act.

The council then made three diſtinctions.

Firſt, Where the offence is not indictable, but touches the point of office, in ſuch caſe they have juriſdiction to remove without conviction.

Secondly, So likewiſe, where it concerns his duty and office, yet mixed with ſome great crime, why ſhould they have leſs authority, becauſe the offence is greater? as tearing the charters and records of corpoations, that is an offence indictable, and yet much againſt the duty of his office.

Thirdly, Where there is no relation to the office or *franchiſe*, there it is very juſt that they ſhould have no juriſdiction, as in the caſes of *perjury* and *forgery.*

Holt, Chief Juſtice. They cannot examine an infamous offence for the ſake of *diſfranchiſing* the party; nor can you try whether it is a libel or not a libel, on an action for a falſe return; but I cannot comprehend that this is an offence againſt the *franchiſe* and duty of his office. 1 *Sid.* 14. and 1 *Sid. The King* v. *Sadler. Styles* 477. *Vide Forteſcue, p.* 275.

Michaelmas, 11 *Ann. The Queen* v. *The Mayor and Burgeſſes of Pomfret.*

In this caſe it was held, that non-attendance at the ſeſſions was not a good cauſe of removal: for the abſence of a ſingle alderman does not hinder the holding of courts, or the validity of the acts of that court; ſo that here abſence does not amount to a *non uſer* of the office. The court was likewiſe of opinion, that returns to *mandamuſes* were to be kept to the ſame ſtrictneſs, ſince *ſtat.* 9 *Ann*, as before. *Vide Mod. Rep. vol.* 10. *p.* 108.

Michaelmas, 2 *Geo.* 2. *Lord Bruce's Caſe.*

On an *information* in the nature of a *quo warranto*, being moved for againſt his Lordſhip, to remove him from the office of Recorder, for not attending his duty, it appeared on producing the *charter*, that there was no clauſe therein, impowering the corporation to remove an officer.

Per curiam. If this is an actual forfeiture, his Lordſhip is out, and you may chuſe another Recorder. If not, it is but a miſdemeanor, and a *quo warranto* will not lie; beſides the modern opinion has been, that a power of *amotion* is incident to the corporation. *Vide Strange, vol.* 2. *p.* 819.

Michaelmas, 3 *Geo.* 2. *The King* v. *The Mayor, &c. of Doncaſter.*

On a *mandamus*, directed to the Mayor, Aldermen, and Burgeſſes of *Doncaſter*, commanding them to reſtore one *C. S.* to the office of a capital burgeſs of that corporation; the court held that a freeman ſhall not be removed but by *charter* or *preſcription*; accordingly the return was quaſhed, and a peremptory *mandamus iſſued. Vide Raym. vol.* 2. *p.* 1564.

Eaſter, 31 *Geo.* 2. *The King* v. *Richardſon.*

See this caſe fully ſtated in page 301 of this work, under the head *Corporations.*

N. B. In this caſe the court unanimouſly approved of the reſolution in Lord *Bruce*'s caſe, as ſtated in *Strange, vol.* 2. *p.* 819.

Hilary, 32 *Geo.* 2. *The King* v. *The Mayor, Bailiffs, and Common Council of the Town of Liverpool.*

See this caſe fully ſtated in page 200 of this work, under the head *Bankrupts.*

Diſtreſs.

Michaelmas, 5 *W. & M. Salter* v. *Brunſden.*

This was an action brought on an act of parliament lately made, empowering the landlord to make ſale of goods *diſtrained for rent* after a certain time therein limited, in which act there is a proviſo, viz. *that in* *caſe a diſtreſs or ſale ſhall be made for rent* (by colour of this act) *pretended to be due, when in truth no rent is in arrear*, &c. *to the perſon diſtraining, that the owner of the goods ſhall have an action of treſpaſs to recover double the value.*

The plaintiff had judgment by *default*, and the court was now moved in arreſt of judgment, and the reaſon offered was, that there muſt be a *leſſor* and a *leſſee* to bring this caſe to be within the act, and if there was no demiſe, the act gives no remedy, becauſe it is expreſsly declared therein, *viz. that where goods ſhall be diſtrained for rent reſerved, and due on any demiſe, leaſe, or contract*, &c. the perſon *diſtraining* may ſell the ſame, *&c.*

Now, there is no demiſe ſufficiently ſet forth in this declaration, neither is it ſaid, that the goods were *diſtrained* for rent in arrear; but that they were taken in *the name of a diſtreſs*, which is not a good averment that they were *diſtrained.*

But the court held the declaration to be good. *Vide Mod. Rep. vol.* 4. *p.* 231.

Hilary, 7 *Ann.* *Leg* v. *Stradwick.*

The earl of *Bedford*, on the 2d day of *January* 1692, demiſed to *A. H.* from *Lady-day* 1695, for twenty-one years; which term, by means of aſſignments, came to the defendant; and he, on the 25th day of *March* 1703, demiſed to *J. B.* from the 25th day of *March*, unto the full end and term of one year, and ſo *from year to year, as long as both parties ſhould like*, rendering 40*l.* rent *per annum.* *J.* enjoyed the term from the 21ſt day of *March* to the 17th day of *December*, and then died inteſtate; and adminiſtration was granted to the plaintiff, who entered into the ſaid land; and becauſe 60*l.* for a year and an half's rent was due, he avowed taking the cattle. *&c.* The plaintiff in *bar* to the avowry ſaid he did not demiſe to *B.* as he had alledged in the avowry; and on that iſſue was joined, and a verdict found for the defendant.

Laſt term it was moved in arreſt of judgment, that it was but a leaſe for one year to *B.* then *Stradwick's diſtraining* for one year and a half's rent was ill, becauſe he *diſtrained* after the leaſe was ended.

But this term the court gave judgment for the avowant, that the *diſtreſs* was lawful; for *Holt*, Chief Juſtice, ſaid, ſuch a leaſe as this is not a leaſe for two years, or a leaſe at will, but it is a leaſe for every particular year, and yet you may *diſtrain* for ten years rent, at the end of ten years; becauſe one leaſe ſprings ſo out of the other, and out of the ſame contract, as that when one year is ended, there is an end of that leaſe, and when the leſſee enters on another year, it is another leaſe for a year, and ſo on. *Vide Mod. Rep. vol.* 11. *p.* 203.

Trinity, 7 *W.* 3. *Walter or Walker* v. *Rumball or Rumbald.*

On an action of *trover* for ſix hogs, a ſpecial verdict was found, *viz.* that the lands demiſed lying in two counties, *viz.* part in the hundred of *A.* in *Wilts*, and part in the hundred of *B.* in *Southampton*, the *leſſor* for rent in arrear *diſtrained* in both hundreds, and the *diſtreſs* being not replevied in five days, notice was given to the owner of the goods, and then he ſent for the conſtable of *A.* who in the preſence of the conſtable of *B.* ſold them in the hundred of *B.* after a legal appraiſement.

Per curiam. Perſonal notice is ſufficient, for notice is the thing required.

2dly, Notice to the owner is ſufficient againſt him in *trover*; but if the tenant had brought *replevin*, that would not have ſerved as to him, but he muſt have had notice alſo.

3dly, The act requires the oath ſhould be adminiſtered by the conſtable of the hundred where the goods are, and here the conſtable of *A.* adminiſtered the oath in the hundred of *B.* where he had no authority; yet this was held good, becauſe the defendant could not ſever the *diſtreſs*, it being intire as the cauſe was, and the hundreds contiguous, ſo that the driving was lawful, and a continuance of the firſt taking. Therefore judgment was given for the defendant.

Per curiam. A joint-tenant without any authority from his companion, may *diſtrain* for the whole rent; but he muſt particularly *avow* his own right, and for the other part as bailiff of the other. *Vide Mod. Rep. vol.* 12. *p.* 76. *Salk. vol.* 1. 247. *Mod. Rep. vol.* 4. *p.* 399. *Raym. vol.* 1. *p.* 53.

Hilary, 9 *W.* 3. *Britton* v. *Cole.*

Holt, Chief Juſtice. If a neighbour's cattle eſcape into land, out of which a rent-charge iſſues, and are *levant* and *couchant*, (there are good authorities, though they are not *levant* and *couchant*) they are *diſtrainable* for the rent-charge, and the owner ſhall not have them again, unleſs he pays the arrears; which is as hard a caſe as the preſent caſe, for the rent-charge is againſt common right, and commences by the grant of the party. *Vide Stra. vol.* 1. *p.* 305.

Michaelmas, 9 *W.* 3. *Riccards or Richards* v. *Corneforth, Cornforth, or Cornford.* Error.

On a *writ of error* brought on a judgment in *replevin*, wherein the defendant avowed for rent, and had judgment; the plaintiff in *error's* council aſſigned for *error*, that part of the rent became due after the *diſtreſs* was taken, for the *diſtreſs* was made on the 26th day of *September*, 7 *W.* 3. which was three days before *Michaelmas*; whereas the defendant had avowed for the *Michaelmas* rent.

Per curiam. This is naught, for the judgment is to have a return *irrepleviſable*, *i. e.* that he ſhall have the *diſtreſs* as a pledge, till all the rent avowed for be paid, and that was more than was due at the time of the *diſtreſs.* In this caſe the avowant before judgment ſhould have *abated* his avowry *as to* the *Michaelmas* rent, and taken judgment for the reſt; but the defendant getting his avowry amended in *C. B.* the roll was amended here in this court, and ſo the *error* was cured, and the judgment affirmed. *Vide Salk. vol.* 2. *p.* 580. *Mod. Rep. vol.* 5. *p.* 363. *Raym. vol.* 1. *p.* 255.

Michaelmas, 10 *W.* 3. *Vinkeſtone, Vinkenſterne, or Winkeſline*, v. *Ebden.*

An action of *trover* was brought for an anchor and ſails, and on *not guilty* pleaded a ſpecial verdict was found, *viz.* that the mayor and burgeſſes of *Newcaſtle*, by cuſtom time out of mind, had uſed and ought to repair the port there, and had in conſideration thereof 5*s.* *per chaldron* of all coals exported, to be paid by the exporter; and for that, by the ſame cuſtom, had uſed to *diſtrain* any thing *diſtrainable*; and that the defendant, being maſter of a veſſel loaded with coals, intended to be carried out of the ſaid port, refuſed, and for this they *diſtrained* the ſaid anchor and ſails, being part of the tackle belonging to the ſaid ſhip; and if this was *diſtrainable* they found for the defendant; otherwiſe, for the plaintiff: and it was urged, that the concluſion of the ſpecial verdict being on a ſpecial point, the court could doubt of nothing but what was thereby referred to them. *Vide* 5 *Co.* 97. 1 *Cro.* 21. *Mo.* 261. *pl.* 420. However, the court heard and over-ruled all the other objections, and held, 1ſt. That it was not neceſſary the town ſhould ſhew that they actually did keep the port in repair, for their keeping the port in repair is not the conſideration, but their being bound by cuſtom to do it. 2dly. That though the maſter is not ſtrictly the exporter, yet as to port-duties the maſter is always looked on as ſuch, and is the perſon anſwerable; for to put them to ſeek the merchant to anſwer duties is impracticable, and it is but reaſonable the maſter ſhould pay a duty for the benefit of the port, and that the town ſhould have the duty who are to maintain the port.

As to the *diſtreſs*, it was argued, that inſtruments of trade are not diſtrainable, *viz.* a millſtone is not; *averia carucæ*, i. e. *cattle of the plough*, are not; a horſe in a ſmith's ſhop cannot be *diſtrained*; and that the goods ſubject to the toll only can be taken, and this was part of the ſhip and going from market. *Vide* 3 *Cro.* 227. *pl.* 14. *Dy.* 199. 1 *Leon.* 231. 105. 3 *Cro.* 550. 569. *Noy* 68. 1 *Inſt.* 47. 1 *Sid.* 348. *Dy.* 312.

On the other ſide it was ſaid, that *averia carucæ* are not privileged where there is no other *diſtreſs*. *Vide ſtat.* 51. *H.* 3. 2 *Inſt.* 122, 123. 565. So it is of inſtruments of trade, as if there be two millſtones, or cattle that are not worked. *Mo.* 214. *Dy.* 302. *Gobd.* 67. *Ow.* 139. A boat is *diſtrainable*, *ergo* a ſhip, and *ergo* a ſail of a ſhip. *Dy.* 117. *pl.* 73.

Holt, Chief Juſtice. The duty ariſes from the goods loaded on board the ſhip, with which the maſter is chargeable; therefore the ſhip and every thing thereof, the maſter is chargeable as well as the goods. So the defendant had judgment. *Vide Salk. vol.* 1. *p.* 249. *Raym. vol.* 1. *p.* 384. *Mod. Rep. vol.* 12. *p.* 216. *Ibid. vol.* 5. *p.* 359.

Hilary or Eaſter, 12 *W.* 3. *Horn or Horne*, v. *Lewin or Luines.*

In an action of *replevin* the defendant made *conuſance* for 100 *l.* for *rent* due and in arrear for one year. The plaintiff, as to 50 *l.* pleaded *that the defendant took the cattle of his own wrong*, abſque hoc, *that nothing was in arrear*, &c. and as to the other 50 *l.* that he was ready on the land till ſun-ſet, and nobody came to receive it, and that he is ſtill ready to pay it, and brings the money into court: the defendant demurred *ſpecially* to the firſt plea, *becauſe it affected the general iſſue*; and as to the other 50 *l.* he takes it out of the court, *and prays his damages*; to which the plaintiff demurred.

This caſe being ſeveral times ſpoken to, it was held,

1ſt. That *of his own wrong*, abſque hoc, *&c.* was an impertinent round-about way of pleading the general iſſue, and that it amounted to no more than the general iſſue, *viz. nothing in arrear*, and conſequently was ill on a ſpecial demurrer: alſo this traverſe put the defendant to an unneceſſary replication; therefore as to the 50 *l.* it was clear for the defendant.

2dly. As to the other 50 *l.* the court held, 1ſt. That the bare *being ready* was not ſufficient, and did not amount to a tender without an *obtulit*, i. e. *he offered*, and therefore his being ready on the land, ſince he did not tender the rent, did not oblige the grantee to demand the rent before he made *diſtreſs*. *Hob.* 207. 1 *Vent.* 322. and ſo the *diſtreſs* was lawful without a demand, and then the avowry or *conuſance* of the defendant ſtands unanſwered. 2dly. The *profert* of the money was impertinent and idle. *Keil.* 20. *Dy.* 227. 2 *E.* 4. 25. *pl.* 15. *pl.* 15. 2 *Cro.* 126. In *debt* on a bond, there might be a *profert* to ſave damages, becauſe there the money is the thing in demand: but it cannot be in an avowry to a *replevin*, becauſe the avowry is to juſtify the taking the cattle; and whether the money is paid or not, is not the queſtion; but if the *diſtreſs* was rightfully taken, the avowant muſt have a return, if wrongfully, he muſt anſwer the plaintiff's damages. If then the *profert* was ſuperfluous, ſo was the avowant's accepting it, and judgment muſt be given for the avowant on the avowry, by which it appears the rent was behind, and the *diſtreſs* lawful, and to which there is no ſufficient anſwer. And judgment was given for the avowant accordingly. *Vide Salk. vol.* 2. *p.* 584. *Mod. Rep. vol.* 12. *p.* 352. *Raym. vol.* 1. *page* 639.

Eaſter, 12 *W.* 3. ——— v. *Farrell.*

Holt, Chief Juſtice. If a *diſtreſs* for *damage feaſant* die in the pound, or eſcape, the party ſhall not retake them; but if it were for rent, in either caſe, he may *diſtrain anew*; an eſcape of cattle out of a pound, is not like the eſcape of a priſoner out of goal; for if the pound is not good, the *diſtrainant* may be his own keeper, and put them in his own pound, but he cannot be a keeper of his priſoner; and every pound-keeper is the ſervant of him who impounds the cattle, *for that purpoſe*. *Vide Mod. Rep. vol.* 12. *p.* 397.

Eaſter, 12 *W.* 3. *or Hilary* 1 *Ann. Vaſper or Vaſpor, or Jaſper*, v. *Eddows, Eddowes, or Edwards.*

On an action of *treſpaſs* brought for breaking the plaintiff's cloſe, *&c.* and treading down his graſs with hogs, *&c.* the defendant, as to all but one hog, pleaded *not guilty*, and as to that pleaded, that the plaintiff *diſtrained* it *damage-feaſant* for the ſame treſpaſs, and impounded it in the common pound; the plaintiff replied, that the hog eſcaped without his aſſent, that he neither then nor yet is ſatisfied for the damage. On demurrer it was ſaid for the plaintiff, that the hog was only as a pledge, and that he could not tie it in the pound, and where a *diſtreſs* dies, the diſtrainor may diſtrain again. 3 *Cro.* 162. 2 *Leon.* 174. *pl.* 211. 13 *H.* 4. 17. 2 *Inſt.* 107. *Cro. Car.* 148. and that where one pleads levy by *diſtreſs*, *&c.* he muſt conclude, *and ſo he is nothing indebted*, or *that he ſtill detains*. 28 *H.* 6. 6. 35 *H.* 6. 10. *&c.*

Gould, J. againſt *Holt*, C. J. and *Turton* and *Powys*, Juſtices, who held that there was a time when the plaintiff could not have any action for this *treſpaſs*, *viz.* while the hog was in the pound, and it was the plaintiff's fault to put him in a pound which could not hold him; alſo it is the diſtrainor's pound. *F. N.* 100. He might have put him in any other place, even into a pound covert; and he does not ſay it eſcaped *without his fault*, but *without his aſſent*. If a *diſtreſs* dies in the pound, the action revives, for the *diſtreſs* failed by the act of God; otherwiſe where it eſcapes, eſpecially unleſs it be made to appear that the plaintiff was in no default; which is not done in this caſe; for his own default ought not to intitle him to another action, nor ſubject the defendant to a double puniſhment for the ſame cauſe, *viz.* the loſs of his pig, and the damages and coſts of this action: therefore judgment was given for the defendant. *Vide Salk. vol.* 1. *p.* 248. *Raym. vol.* 1. *p.* 719. *Mod. Rep. vol.* 12. *p.* 658. *Ibid. vol.* 11. *p.* 21.

Hilary, 13 *W.* 3. *Fenwick* v. *Lady Groſvenor.*

See this caſe fully ſtated in page 371 of this work, under the head *Courts.*

Michaelmas, 1 *Ann. Anonymous.*

Per curiam. If a perſon *diſtrain* again for the ſame rent, the remedy is a writ of *recaption*; and if the ſheriff refuſes a *replevin*, an action lies againſt him. *Vide Mod. Rep. vol.* 7. *p.* 118.

Michaelmas, 2 *Ann. Morley* v. *Stacker.*

A warant of a juſtice of peace was given to the defendant to levy money by *diſtreſs*, againſt a perſon convicted of *deer-ſtealing*, according to the late act of parliament, againſt deer-ſtealers: in purſuance whereof he *diſtrained* the party's cattle, and ſold them for a certain ſum; but before he paid the money, he was adviſed it was dangerous for him to ſell the cattle, for it was doubtful whether the words of the act warranted a ſale: on this he came to *Morley*, and proffered him the money if he would ſave him harmleſs, which *Morley* denied to do: whereon he undid the bargain, and reſtored the money to the buyer, and the cattle to the firſt owner. And now a *mandamus* was moved for to compel him to pay the money to *Morley*; and this was the more ſtrongly inſiſted on, for that they could not charge him in any action, without giving the warrant in evidence, which was out of their power, being in his cuſtody.

Per curiam. 1ſt, It has been ſolemnly reſolved in the caſe of the *King* v. *Speed*, that theſe words in an act of parliament, *to be levied by diſtreſs*, muſt be underſtood of a *diſtreſs* and *ſale.*

2dly, That a copy of the warrant would be good evidence in this caſe.

3dly, If an officer, who has power to ſell, ſells on credit, when he may ſell for ready money, he is thereby immediately charged to the party for whom the ſale was.

4thly, That in a doubtful caſe it is hard to make an officer ſell at his peril.

Note, In this caſe, after the warrant iſſued out, a *certiorari* was brought, and the record thereby removed up hither, and that could not hinder the execution; as if a *writ of error* comes to the *C. B.* after execution is ſued out, the return of the writ of execution muſt be in the *C. B.* and if goods are taken in execution before the *writ of error* is allowed, after the record is returned here above, a writ of *venditioni exponas* ſhall iſſue out of the C. B. *Vide Mod. Rep. vol.* 6. *p.* 83.

Trinity, 3 *Ann.* *Dod* v. *Monger.*

In an action on the *caſe,* for reſcuing goods which the plaintiff had *diſtrained* for rent, the plaintiff declared, that he was ſeiſed in *fee* of a certain meſſuage, *&c.* and being ſo ſeiſed, demiſed it to *J. S.* for a year, and ſo from year to year, as long as both parties ſhould pleaſe, by a *parol* demiſe, reſerving rent; and for rent arrear he *diſtrained,* and the *diſtreſs* was reſcued from him by the defendant, for which this action was brought; and here the plaintiff having laid a *ſeiſin* in himſelf, was forced to prove it; and in proving the leaſe, it appeared to be for a year, and ſo from year to year as long as both parties ſhould pleaſe; and that the leſſee ſhould not go away without giving a quarter's warning: and it was inſiſted on, that the leaſe given in evidence, varied from the leaſe in the declaration, ſo that they failed in proving their declaration.

Holt, Chief Juſtice. It is well enough; for the agreement concerning the quarter's warning is only a collateral agreement, not at all affecting the land in point of intereſt, but collaterally binding the perſon of the leſſee, and therefore it need not be mentioned in the declaration: and in this caſe, if at the year's end the leſſee had given up the poſſeſſion without any warning, he would have been liable to pay a quarter's rent, by virtue of this agreement; but if he had given a quarter's warning, he might have quitted without more ado; but if he once entered on the ſecond year, he would be bound for all that year, and a quarter's warning, and ſo on; and ſo it would have been if ſuch a leaſe had been by deed: if a leaſe is for a year, and ſo from year to year as long as both parties ſhall pleaſe, that is a leaſe binding but one year; but if the leſſee without a countermand of the leſſor, enter on the ſecond year, he is bound for that year, and ſo on: but if it is a leaſe for a year, and ſo from year to year, till *ſix* years expire, that is a certain leaſe for *ſix* years; if it is for a year, and ſo from year to year, as long as both parties ſhall agree, till *ſix* years ſhall expire, that is a leaſe for *ſix* years, determinable at every year's end, at the will of either party.

He alſo held, if a landlord come into a houſe, and ſeizes on ſome goods as a *diſtreſs,* in the name of all the goods in the houſe, that will be a good ſeizure of all: but he muſt remove them in convenient time at common law; and now ſince the late *ſtatute* of *W.* & *M.* immediately, except it is hay or corn; and here, for that the ſeizure was on *Monday,* though of barrels of beer, not eaſily removeable, if at all, without damage, and no removal till *Wedneſday,* when the defendant took them by virtue of a *replevin,* in which the leſſee, not the *diſtrainant,* was made defendant; and beſides, the plaintiff quitted the poſſeſſion of them the two intervening nights, and had not the poſſeſſion at the time of the taking, by virtue of the *replevin,* without which there could be no *reſcous:* the plaintiff was nonſuited. In this caſe it appeared alſo, that the *diſtrainant* drew beer out of one of the barrels, which *Holt* held, made him a treſpaſſer *from the beginning,* as to that barrel only. *Vide Mod. Rep. vol.* 6. *p.* 215.

Trinity, 3 *Ann.* *Tracy* v. *Talbot.*

In an action of *replevin,* the caſe on evidence at *niſi prius* was as follows, *viz.* the plaintiff having been a lodger in the pariſh for ſome time before, took part of a houſe there on the 23d day of *December,* and was rated to the pariſh as an inhabitant for the quarter, expiring at *Chriſtmas,* and before *Chriſtmas* the *diſtreſs* was made for the rate, by virtue of a general warrant made long before for the whole year, firſt in reſpect of ſeparate tenements chargeable to the pariſh.

Holt, Chief Juſtice, ſaid, one houſe originally and intire and undiſtinct, may become ſeveral and diſtinct, by dividing it into diſtinct partitions, and allotting them diſtinct avenues, ſo as the ſeveral inhabitants have no communication one with another: and in that caſe, if the owner of the houſe lives in one of the ſeparate apartments himſelf, and an inhabitant of another ſeparate apartment goes away, that tenement which he occupied is not now an empty tenement, but the poſſeſſion of it devolves on the owner, and that with the tenement in his poſſeſſion before make now but one intire tenement, for which he is rateable to the pariſh: but if there are two ſeveral tenements originally, and they become inhabited by ſeveral families, who make but one avenue for both, and uſe it promiſcuouſly; yet, in reſpect of the original ſeverally, they continue ſeverally rateable.

He alſo held, that if the party removed into another pariſh in the ſame county, they might *diſtrain* by a warrant from the juſtices as well as in the ſame pariſh; but if he removed out of the county, that remedy failed. *Vide Mod. Rep. vol.* 6. *p.* 214.

Michaelmas, 13 *Geo.* *Griffin* v. *Scott* & *al.*

In an action of *treſpaſs* for entering his houſe, and keeping poſſeſſion of his goods *eight* days, the defendant juſtified under a *diſtreſs* for rent; to which the plaintiff replied a tender; and on a demurrer it was objected, that it ought to be pleaded with an *uncore preſt.* *Lutw.* 591. *Tho. ent.* 265. *Winch.* 939. *Cro. Jac.* 423. *Salk.* 622.

Per curiam. Be the replication good or bad, yet we muſt go back to the firſt fault, which is in the plea, for the defendant ought to have removed the goods at the *five* days end; and for the other *three* he is a *treſpaſſer,* and there is no juſtification; therefore judgment was given for the plaintiff. *Vide Strange, vol.* 2. *p.* 717. *Raym. vol.* 2. *p.* 1424.

Michaelmas, 3 *Geo.* 2. *Lynne* v. *Moody.* Error.

The plaintiff brought an action of *treſpaſs* in *C. B.* for taking an *exceſſive diſtreſs,* and on a *writ of error* being brought in this court, the judgment was reverſed; for that *treſpaſs* would not lie where the entry at firſt was lawful, and here was nothing ſubſequent to make it a *treſpaſs,* as there is where the *diſtreſs* is abuſed: the remedy ought to be by a ſpecial action founded on the ſtatute of *Marlebridge,* 3 *Lev.* 48. for at common law the party might take a *diſtreſs* of more value than the rent, ſo as to make it more eligible for the party to redeem the goods by payment of the rent: here was ſome rent due, ſo a *diſtreſs* was lawful, and as it was but one act, it cannot be a *treſpaſs.* *Vide Stra. vol.* 2. *page* 851.

Eaſter, 9 *Geo.* 2. *Rogers* v. *Birkmire.*

In an action of *treſpaſs* for taking goods, the defendant juſtified, that he demiſed ſome tenements to the plaintiff for one term, and others for another term; and there being rent in arrear on both demiſes, he *diſtrained* the goods. And on a demurrer it was held ill, for there being ſeparate demiſes, there ought to have been *ſeparate diſtreſſes* on the ſeveral premiſſes ſubject to the diſtinct rents; and no *diſtreſs* on one part can be good for both rents: therefore the plaintiff had judgment. *Vide Stra. vol.* 2. *p.* 1040.

Michaelmas, 9 *Geo.* 2. *Browning* v. *Dann and others.*

In an action of *treſpaſs* for breaking and entering the plaintiff's cellar, and taking and carrying away *ſix* butts of beer, and for with-holding the poſſeſſion for *fourteen* days, the defendants juſtified, *viz.* the ſaid *Dann* in his own right, and the ſaid other defendants as his ſervants, and *Dann* pleaded, that the cellar was parcel of a meſſuage, whereof he was ſeized in his demeſne, as of a freehold for the term of his life, and that he demiſed the ſaid meſſuage to one *T. K.* at will, at the rent of 12 *l.* 10 *s. per ann.* by virtue whereof he entered, and being ſo poſſeſſed, 12 *l.* 10 *s.* became due and in arrear for rent, and therefore he entered into the ſaid cellar, with the aſſent of the ſaid *T. K.* the leſſee, in order to *diſtrain* for the ſaid arrear, and did then and there take the ſaid *ſix* buts of beer, then being in the ſaid cellar in the name of a *diſtreſs* for the ſaid rent, and impounded the ſaid *diſtreſs* in the ſaid cellar, and continued the ſame there, till afterwards he again entered into the ſaid cellar, as his proper freehold, and delivered the ſaid *ſix butts* to the plaintiff on a *replevin* thereof granted to him; and ſo withheld the poſſeſſion for *fourteen days*, as being the proper cellar of the ſaid *Dann*.

The plaintiff replied, as to the breaking and entering the cellar, and taking *ſix butts*, that the ſaid *ſix buts* were in the ſaid cellar, in poſſeſſion of the ſaid plaintiff locked up there, and being ſo locked up in the ſaid cellar, the ſaid defendants in the night time broke and entered into the ſaid *cellar in which*, &c. *ſo locked up as aforeſaid*, and then in the poſſeſſion of the ſaid plaintiff, and then and there took the ſaid butts by colour of a *diſtreſs*, and impounded them in the ſaid cellar, and continued the ſame till afterwards they entered; and this he is ready to verify; and as to the with-holding the poſſeſſion of the ſaid cellar, he replied, that the ſaid *T. K.* had and continued in poſſeſſion of thereof, from *Lady-day* 1734, to *Lady-day* 1735, and on the laſt mentioned feaſt, the ſaid *T. K.* paid to the ſaid *Dann* a year's rent, which he accepted.

The defendant rejoined as to the breaking and entering the cellar, and taking the beer, on the ſaid 3d of *April*, 1734, in the day time, into the ſaid cellar, then being parcel of the ſaid meſſuage, through the ſaid meſſuage, the door of the ſaid meſſuage, and alſo the door of the ſaid cellar then being open, in order to *diſtrain*, *&c.* and then and there in the day time the ſaid beer, then being in the ſaid cellar, *&c.* and traverſed the entering and taking in the night, with *and this he is ready to verify*; and as to the replication as to with-holding the poſſeſſion, proteſted that *T. K.* did not pay the ſaid rent as above alledged; they demurred, and ſhewed for cauſe, that the plaintiff had made ſeveral replications to their own plea and juſtification.

The plaintiff by ſur-rejoinder demurred *generally* to the firſt part of the rejoinder, and joined in demurrer as to the laſt.

And on both theſe demurrers the court were of opinion for the defendants; for on the plaintiff's demurrer to the rejoinder, it was againſt him, becauſe he cannot take advantage of duplicity, which was the objection made to it, without having ſhewn it for cauſe of demurrer, which was not done here: and Lord *Hardwicke* ſaid he was of that opinion, even if it was not double; and obſerved, that if the outer door of an houſe is open, a perſon may break an inner door to make a *diſtreſs*; and ſo one may on an execution. And on the defendant's demurrer to the replication, it is likewiſe againſt him, for the replication is double in alledging the *diſtreſs* to be in the night, and that *K.* continued the poſſeſſion by payment of rent; therefore judgment was given for the defendant. *Vide Caſes Temp. Lord Hardw. p.* 167.

Trinity, 21 *Geo.* 2: *Gimbart* v. *Pelah.*

The defendant juſtified impounding cattle *damage feaſant*. And on evidence it appeared, that he put them in the next pound, though it happened to be in another county. And on 3 *Lev.* 48. the Chief Juſtice held it did not make him a treſpaſſer, though it ſubjected him to the penalty in the ſtatute 1 & 2 *Philip & Mary*, *c.* 12. wherefore a verdict was given for the defendant. *Vide Stra. vol.* 2. *p.* 1272.

Eaſter, 31 *Geo.* 2. *Hutchins* v. *Chambers, and others:*

On a ſpecial *caſe* from the *Surry Aſſizes*, tried before *Willes*, Chief Juſtice, on an action of *treſpaſs* againſt *the juſtices of peace, the pariſh officers, the conſtables, and their aſſiſtants*, for executing a warrant of *diſtreſs* made by two juſtices on a poor's rate, amounting to 13 *l.* 2 *s.*

In this caſe *five queſtions* were ſtated for the opinion of the court, *viz.*

1ſt. Whether the rate and aſſeſſment was good and ſufficient in point of law; if not, whether the plaintiff could avail himſelf of any objection to it?

2dly. Whether the *warrant* ought to have fixed and limited the time within which the *things diſtrained* were to be ſold; and if for want thereof the *warrant* is void, or any, and which of them are *treſpaſſers*?

3dly. Whether the *ſecond diſtreſs* taken is juſtifiable?

4thly. Whether the *geldings* being beaſts of the plough, and uſed by the plaintiff both for the *plough* and *cart*, were liable to be taken in *diſtreſs* for the rate? *&c.*

5thly. Whether, on the whole ſtate of the caſe, the action is maintainable againſt the defendants, or *any*, and which of them?

Note. A *ſixth queſtion* aroſe on the argument, *viz.*

Whether the *ſecond diſtreſs* was not exceſſive?

On the firſt argument on this caſe, Lord *Mansfield* (being informed that the parties intended to ſpeak to it again) obſerved, that every thing about the *rates* was clearly out of the queſtion, for if they are bad, the parties who thought themſelves aggrieved ſhould have appealed.

After hearing the council on both ſides on the ſecond argument of this caſe, the court gave their opinion.

Lord *Mansfield*. As on the firſt argument, the *two* firſt *objections* are laid out of the queſtion, and the matter is reduced to the *three* laſt *queſtions*. As to the firſt queſtion, "whether *cattle of the plough* may be taken "for a *diſtreſs* on the *poor's rate*, where there are other "diſtrainable goods ſufficient?"

The ſolid diſtinction is, that the ſeizing under *ſtat.* 43 of *Eliz.* is but partly analogous to the *common law diſtreſs*, (as being repleviſable, *&c.*) but is much more analogous to the *common law execution*, (like a *fieri fac.* where the ſurplus after ſale ſhall be returned.)

In the old *common law diſtreſſes*, which were in nature of a penalty, to compel payment, it would have been abſurd to have ſuffered the implements by which a man gains his livelihood to be holden as a pledge, becauſe that would have been taking from the man the only means he had of being able to pay the debt, but this reaſoning will not hold, where the things *diſtrained* may be immediately ſold by way of ſatisfaction, which tho' called a *diſtreſs*, yet really is in this caſe an *execution*.

On this ground we are all of opinion that there is no objection to the *firſt diſtreſs* from the *cattle of the plough* being taken, for they are *diſtrainable* under *ſtat.* 43 *El.* *&c.*

As to the *ſecond diſtreſs*, the *firſt queſtion* relating thereto is, "whether the *ſecond diſtreſs* can be juſtified; "it was a *ſecond diſtreſs* taken under the ſame warrant, "when enough might have been taken at firſt, if the "diſtrainer had then thought proper."

A man who has an entire duty ſhall not ſplit the entire ſum, and diſtrain for part at one time, and part at another, becauſe that would be great oppreſſion, if a man *ſeizes* for the whole ſum due to him, and only miſtakes the value of the goods *ſeized* there is no reaſon why he ſhould not afterwards compleat his execution by making a further *ſeizure*.

As to the *third objection*, viz. it being *exceſſive*, and as ſuch it being a ſufficient ground for an action of *treſpaſs*;

It has been ſufficiently eſtabliſhed, that a general action of *treſpaſs* cannot be maintained for taking an *exceſſive diſtreſs*.

We are therefore all of us of opinion, that there is no cauſe of action maintainable by the plaintiff in the preſent caſe, nor has he any right to recover againſt any of the defendants, and that the defendants be at liberty to enter a *nonſuit*.

Per curiam. Let the *poſtea* be delivered to, and judgment entered for the defendants. *Vide Bur. vol.* 1. *page* 580.

Trinity, 4 *Geo.* 3. *Francis* v. *Wyatt.*

On an action of *replevin* brought for *diſtraining* a chariot of the plaintiff's, which ſtood in a *coach-houſe* belonging to, and part of a *livery ſtable*.

The queſtion on arguing the demurrer was, "Whether a gentleman's chariot which ſtood in a "*coach-houſe* belonging to a common livery ſtable "keeper was *diſtrainable* for rent due to the landlord, "from the livery ſtable keeper, for this *coach-houſe*, "which (together with the ſtables, *&c.*) he rented of "of the landlord who *diſtrained* it."

After hearing council on both ſides, on two arguments, no determination was given, the plaintiff in *replevin* not chuſing to bring the matter to another argument,

ment, but Lord *Manſfield*, Chief Juſtice, and *Wilmot* and *Yates*, Juſtices, ſaw this queſtion in ſuch a light, with regard to its conſequences even to landlords, owners, and keepers of livery ſtables, as well as to gentlemen who uſed them, (ſhould this *diſtreſs* be adjudged a good one) that they informed the landlord who happened to be perſonally preſent, that it might be well worth his while to conſider whether it would be for his own intereſt to wiſh, "that judgment "ſhould be formally pronounced for him."

Note, It appeared clear, that the plaintiff's chariot was liable to the *diſtreſs*, and that there was not the leaſt ſhadow of *legal* claim for an *exemption*. *Vide Bur. vol.* 3. *p.* 1498.

Diſtribution.

Trinity, 8 *W.* 3. *Petit* v. *Smith*.

A *prohibition* was granted to the court of delegates, to ſtay a ſuit there. *&c.* becauſe they compelled an executor to make *diſtribution* of the *ſurplus*, he having 50 *l.* deviſed to him by the will as a legacy; becauſe, there being a will and an executor, the ſpiritual court cannot compel *diſtribution*, but only where the party dies inteſtate. *Vide Raym. vol.* 1. *p.* 86. *Mod. Rep. vol.* 5. *p.* 247.

Michaelmas, 8 *W.* 3. *Oldiſon or Olderoon* v. *Pickering*.

In this caſe it was adjudged, that though an eſtate *pur auter vie* is made *aſſets* by *ſtat.* 29 *Car.* 2. yet it is not *diſtributable* within *ſtat.* 22 *Car.* 2. for *diſtribution* of inteſtates eſtates, becauſe *diſtribution* is a quality not neceſſarily included in the notion of *aſſets*, as payment of debts is; and this laſt *ſtatute* is only, that goods and chattels ſhall be *diſtributed*; now an eſtate *pur auter vie* is not properly goods or chattels, but remains a freehold, though it is *aſſets* by the firſt *ſtatute*. *Vide Salk. vol.* 3. *p.* 138. *Vide Raym. vol.* 1. *p.* 96.

Trinity, 12 *or* 13 *W.* 3. *Pett* v. *Pett*; *or*, *The King* v. *Raines*.

The court was moved for a *mandamus* to the ordinary to make *diſtribution* on *ſtat.* 22 & 23 *Car.* 2. *c.* 10. and the queſtion was, whether the brother's grandſon ſhould have a ſhare with the daughter of the ſiſter of the inteſtate? The words of the *ſtatute* are, *Provided no repreſentatives be admitted among collaterals after brothers and ſiſters children*. And it was urged, that this act was a remedial law, to prevent the miſchief of adminiſtrators ſweeping away the whole perſonal eſtate of the inteſtate, and therefore to be taken largely. *But not allowed.*

Per curiam. Brothers children are the children of the inteſtate's brother; for the inteſtate is the ſubject of the act, it is his eſtate, his wife, his children, and by the ſame reaſon his brother's children; for he is equally the co-relative to all. 1 *Vent. Tracy's* caſe, in which *Holt*, Chief Juſtice, ſaid, a conſultation was at laſt awarded. *Vide Salk. vol.* 1. *p.* 250. *Raym. vol.* 1. *p.* 57. *Mod. Rep. vol.* 12. *p.* 409.

Eaſter or Trinity, 13 *W.* 3. *Blackborough* v. *Davis or Davies*.

Adminiſtration being granted to the grandmother, the aunt moved for a *mandamus* to have it granted to her, which was denied, and now ſhe moved for a *mandamus* to have *diſtribution*, being in equal degree; and it was urged, ſhe was not intitled to it, being not ſo near as the grandmother; for the grandmother ſtands in the place of the mother, and is in the ſecond degree to the inteſtate; the aunts are daughters of the grandmother, and the daughters cannot be in equal degree with the mother. Before *ſtat.* 1 *Jac.* 2. *c.* 17. If a perſon died without wife or child, the mother had all, and his brothers and ſiſters nothing. The father ſurviving, has all at this day, and the reaſon of making that act was, becauſe the mother might marry and carry all that away to another huſband.

Holt, Chief Juſtice. No *mandamus* ought to be in this caſe. By the *common law*, before and at the conqueſt, the children, both male and female inherited alike, and the eſtate, whether real or perſonal, deſcended to all equally. *Seld. Eadem.* 134. *Lamb. Sax. laws* 36. *fo.* 167. In the reign of *H.* 1. females began to be excluded as to the real eſtate, and the males inherited equally the ſocage land. *Glanv. l.* 7. *c.* 3. at that time the land deſcended to the father, if the ſon died without iſſue. *Lamb.* 202, 203. *L. L. H.* 1. *c.* 70. And yet about this time, or in the time of *H.* 2. the father and mother began to be excluded as to the real eſtate, but not as to the perſonal. And as by common law, father and mother are nearer than brother or ſiſter, grandfather and grandmother are nearer than uncle or aunt. And the grandmother in this caſe is the root of the kindred; whereas the aunt is only a branch. *Vide Salk. vol.* 1. *p.* 251. *Raym. vol.* 1. 684. *Mod. Rep. vol.* 12. *p.* 65.

Michaelmas, 13 *W.* 3. *Anonymous*.

Holt, Chief Juſtice. There never is a *diſtribution* ordered by the *eccleſiaſtical court*, but where the party dies inteſtate, or the will directs it; but *Chancery* does ſometimes inforce a *diſtribution* where the will does not direct it. *Vide Salk. vol.* 1. *p.* 566.

Hilary, 6 *Ann.* *The Archbiſhop of Canterbury* v. *Willis*.

Per curiam. Any perſon that is intitled to *diſtribution* within *ſtat.* 22 *Car.* 2. *c.* 10. is by conſequence intitled to ſue the adminiſtrator in the *eccleſiaſtical court*, to make good his account by proof and examination on oath, as a legatee was againſt an executor before that *ſtatute*. *Vide Salk. vol.* 1. *p.* 251.

Michaelmas, 10 *Ann.* *D'Eath* v. *Baux*.

See this caſe fully ſtated in page 212 of this work, under the head *Baron and Feme*.

Hilary, or Eaſter, 3 *Geo.* 2. *Hatton* v. *Hatton*.

A *prohibition* was prayed to the ſpiritual court, to ſtay a ſuit there againſt an executor for *diſtribution* of the ſurplus of the teſtator's eſtate after the debts and legacies were paid; it was inſiſted they have no authority when a will is made, 5 *Mod.* 247. and the prohibition was granted on debate. *Vide Fitz-Gibbons*, *p.* 126. *Stra. vol.* 2. *p.* 865.

Dower.

Trinity, 2 *W. & M.* *Moraunt* v. *Thorold*, *Bar.*

The plaintiff brought a *ſcire facias* as adminiſtrator of the lady *T.* on a judgment in *dower* obtained by her againſt the defendant, to have the value of the damages, coſts, meſne profits and waſte, from the time of the death of her huſband, *&c.* which judgment was removed by *writ of error* out of the *C. B.* into this court, and there affirmed; after which, and before *the writ of inquiry* was executed, the lady died, and adminiſtration was committed to the plaintiff, who brought this writ. The defendant pleaded that no damages were adjudged to the feme in her life-time, *&c.* To which plea the plaintiff demurred, and the court reſolved that this was a good plea; for if damages had been aſcertained on the *writ of inquiry*, and judgment thereon, ſuch damages had then veſted in the inteſtate as a debt, and the adminiſtrator would have had them; but ſhe dying before the final jndgment, and when the damages were due to her only by way of ſatisfaction for an injury, which is in nature of a *treſpaſs*, and the *writ of inquiry* being in nature of a perſonal action for them, it goes with the perſon, and a *ſcire facias* lies not for the executor or adminiſtrator: therefore judgment was given for the defendant. *Noy* 126. 3 *Lev.* 275. *Shower* 97. *Vide Salk. vol.* 1. *p.* 252.

Eaſter, 3 *W. & M. Burdon* v. *Burdon.* Error.

On a *writ of error* on a judgment in the court of *Durham* on a writ of *dower*; the defendant after imparlance had pleaded detainer of charters, and on demurrer judgment was given by the court for the demandant, which was now affirmed.

Per curiam. He that pleads this plea muſt plead, that from the time of the death of his anceſtors *he was provided for, and that ſuch proviſion is ſtill remaining* to aſſign her *dower*, if ſhe would deliver the charters. *Vide Salk. vol.* 1. *p.* 252.

Hilary, 7 *W.* 3. *The Lord Gerard* v. *The Lady Gerard.* Error.

On a *writ of error* on a judgment in *C. B*, given on a writ of *dower*, where the tenant as to part confeſſed the action, and judgment was given in *C. B.* and a *miſericordia* entered againſt the tenant; and as to the reſt, the tenant pleaded, that the meſſuage in demand had time out of mind been called as well *Gerard's Bromley*, as *Bromley-Hall*; that Sir *T. G.* was ſeiſed thereof in his demeſne as of fee; and being ſo ſeiſed, King *James* I. by letters patent under the great ſeal of *England*, created the ſaid Sir *T. G.* baron of *Gerard's Bromley*, and that he reſided with his family in the ſaid capital meſſuage, and ſo the meſſuage in demand became, and had ever ſince continued, the plea of *caput baroniæ*, brings down the deſcent both of the barony and meſſuage to himſelf, and demands judgment, if of the third part thereof the demandant ought to be endowed. The demandant demurred, and judgment was given in *C. B.* for the demandant, and another *miſericordia* entered againſt the tenant, who now brought *error*, and aſſigned for *error*,

1ſt. That the demandant ought not to be endowed of *caput baroniæ*, becauſe it is for the honour of the kingdom to have the chief ſeat kept entire; and for authorities were cited 1 *Inſt.* 31. *b. F. Abr. Dower* 180. *Bract. lib.* 2. 170. *b. p.* 4. *H.* 3. *Rot.* 7.

2dly. That there ought not to be two *miſericordias*; for it is repugnant to this maxim in law, *that nobody can be puniſhed twice for one offence*; and ſo is *Specot*'s caſe, 5 *Rep.* 57. and *Peytoe*'s caſe. As to the firſt point, the defendant's council in error argued, that the authorities cited on the other ſide were of *feudal baronies*, of which there were not any remaining at this time except *Arundel*; of which opinion were the whole court. *Rokeſby*, Chief Juſtice, ſaid, that was the ground we went on in the *C. B.*

Holt, Chief Juſtice. *Feudal baronies* were when the king in the creation of the baronies gave lands and rents to hold of him for the defence of the realm. But the King could not make this a barony which was in the ſeiſin of the *Gerards* before. As to the ſecond point the council argued, that here were two delays, which are two ſeveral offences, and two ſeveral judgments, and therefore there ſhould be two ſeveral amerciament; 2 *Leon. pl.* 231. 1 *Ro. Abr.* 213, 218, *Barry*'s caſe, *Fitz. Abr. Judgment* 32. *Raſt. Ent.* 19. *Co. Entr.* 169. *b.* and that *Specot*'s caſe was not againſt this, becauſe the ſecond judgment there was erroneous, there being no delay in the defendant. *Br. Amerciament*, 16, 17, 56. inſinuates, that where there is a final judgment given, there muſt be a *miſericordia*, and then, if there is a new delay, there muſt be a new *miſericordia*, and *Peytoe*'s caſe is only a ſaying of the council; therefore judgment was affirmed by the whole court on both points. *Vide Salk. vol.* 1. *p.* 253. *Mod. Rep. vol.* 12. *p.* 84. *Ibid. vol.* 5. *p.* 64. *Raym. vol.* 1. *p.* 64.

Michaelmas, 10 *W.* 3. *Coot* v. *Berty.*

On a *writ of dower*, the defendant pleaded elopement in the wife; the wife replied, that her huſband had bargained and ſold her to the adulterer; and held bad; and licence by a huſband to a wife, to lie with another man, cannot be pleaded in *bar* to an action of *treſpaſs* by the huſband; nor that ſhe was a notorious lewd woman; though theſe matters may be given in mitigation of damages. *Vide Mod. Rep. vol.* 12. *p.* 232.

Trinity, 1 *Ann. Smith* v. *Angel.*

See this caſe fully ſtated in page 123 of this work, under the head *Aſſets.*

Michaelmas, 1 *Ann. Wood* v. *Branford.* Error.

On a *writ of error* brought on a judgment in *dower* in the *C. B.* and on *in no error* pleaded, it was aſſigned for *error*, that it was againſt an infant who appeared by attorney, when he ſhould have appeared by guardian.

Per curiam. Though it is after *in no error* pleaded, yet we may grant a *certiorari ad informandus conſcientias*, and a dowager is a kind of a purchaſer. *Vide Mod. Rep. vol.* 7. *p.* 104.

Michaelmas, 8 *Ann. Booth* v. *The Marquis of Lindſey and others.*

The plaintiff brought an *ejectment* for lands in *Lincolnſhire*, on the demiſe of the Counteſs Dowager of *Lindſey*. On *not guilty* pleaded, the leſſor made a title under a judgment, on a *writ of dower*, brought by her for the third part of the manors of *G. S.* and *E.* in which ſhe had judgment to recover the ſaid third part of the ſaid manors; and thereon a *writ of ſeiſin* iſſued, whereon the ſheriff returned, that he had given her *ſeiſin* of the lands in queſtion, as the third part of the ſaid manors. It was inſiſted, that the plaintiff ought to prove the lands in the return, part of the ſaid manors.

Per curiam. That ſhall be preſumed, unleſs the defendant proves the contrary, becauſe it ſhall not be intended the ſheriff has done wrong. And for the ſame reaſon it ſhall be intended, that the ſheriff has given *ſeiſin* but of a third.

Then the defendant's council offered to give in evidence an old term for 500 *years*, created by *R.* Earl of *Lindſey*, by his marriage ſettlement, made on the marriage with his firſt Lady (the leſſor being his third wife) which was ſtill ſubſiſting, and was now in the executors of the late Lord Chief Baron *Montague*, who was ſurviving truſtee, the term being in truſt for raiſing portions for the daughters of that marriage, which truſt was not yet performed, 6000 *l.* being yet due to the counteſs of *Rivers*, who was a daughter of that marriage.

The court unanimouſly reſolved, that unleſs the defendants would derive a title under that term, or ſhew they had a title prior to the recovery (which they could not do) they were *eſtopped* by the recovery to give this term in evidence. For 1ſt, as to the Marquis of *Lindſey*, who was tenant in the *writ of dower*, they held, that if he would have took advantage of this term, he ſhould have pleaded in the *C. B.* to the *writ of dower*, not in *bar* of the action, for it is no *bar* in *dower*, but in delay of the execution; which he not doing, but pleading *never ſeized in dower*, he cannot now give it in evidence, for that would be in effect to falſify the recovery; for the Lady has recovered her *dower* as in poſſeſſion, whereas had this term been pleaded, ſhe would have received but in reverſion; ſo the Marquis is *eſtopped* to give it in evidence by the judgment. Then the other defendants being all his tenants, are *eſtopped* likewiſe, claiming under him. But if they could ſhew any leaſes prior to the recovery, then the court would give them leave ſo far to falſify the recovery; but being only tenants to the Marquis, they are *eſtopped* as well as him.

Holt, Chief Juſtice, ſaid, that theſe defendants were not within the *ſtatute*, which gives termors leave to falſify recoveries. At common law, no termor could falſify a recovery in a *real* action; then the *ſtatute* of *Glouc. c.* 11. gave termors remedy where judgments were let go by *default*; then *ſtat.* 21 *Hen.* 8. *c.* 15. gave termors leave to falſify recoveries in any *real* action in all caſes; but then ſuch perſon muſt ſhew himſelf to be a termor, or derive a title under the term; but the tenant of the land being a mere ſtranger to the term, is not within the benefit of that *ſtatute*, ſo as to give a term of a third perſon in evidence to falſify the recovery againſt himſelf, or thoſe under whom he claims, which is the preſent caſe. To which the other judges agreed, and refuſed the defendant's council, though very importunate, to admit them to give evidence of that term of 500 *years*; but offered to ſign a bill of exceptions, which the council declining to offer, but attempted to falſify the ſheriff's return of the *writ of ſeiſin*, by proving, that the lands in the return, or at leaſt a great part of them were not parcel of any of the three manors.

But as to this, the court was clear in opinion, that for whatever was compriſed in the return, which was not part of the manors in the judgment, the execution was actually void, and advantage might be taken of it in *ejectment*.

On which the defendants council attempted to prove the lands in the return not parcel of the manors, but being very deficient in their proofs, a verdict was was given for the plaintiff. *Vide Raym. vol.* 2. *p.* 1293.

Hilary, 8 *Geo.* *Spiller and Wife* v. *Adams or Andrews.*

See this caſe fully ſtated in page 335 of this work, under the head *Damages*.

Eaſter, 11 *Geo.* *Kent* v. *Kerry.*

See this caſe fully ſtated in page 354 of this work, under the head *Declaration*.

Hilary, 7 *Geo.* 2. *Hooker* v. *Hooker.*

A queſtion in *dower* was ſent by the *Court of Chancery* for the opinion of this court.

The caſe was; *W. Hooker* the elder and wife, and *W. Hooker* the younger and wife, by their deed, dated the 12th day of *July* 1699, covenanted to levy a fine to the uſe of the conuſee in fee; the fine was levied, and afterwards the conuſees, by leaſe and releaſe, convey to *Y.* and *G.* for the uſe of *W. Hooker* the elder for life, and to his wife, if ſhe ſhould ſurvive, then to *W. Hooker* the younger, (who was ſon and heir apparent of *W. Hooker* the elder) remainder to his firſt and other ſons in tail, remainder to his daughters in tail, remainder to *Hooker* the elder in fee; with power to *Hooker* the younger to ſettle on any other wife. *W. Hooker* the elder and his wife died without other iſſue in the life-time of *W. Hooker* the younger, whoſe wife alſo died. He had two other wives, and the laſt is the plaintiff; and he being *dead without iſſue*, the queſtion is, whether this laſt wife is intitled to *dower* in theſe lands?

After hearing council on both ſides, the court gave their opinion.

Lord *Hardwicke*. The general queſtions in this caſe are, 1ſt. Whether the contingent remainder was deſtroyed by the reverſion in fee falling on the eſtate for life? And, 2dly. Admitting that it was not, and there might be an opening, whether this poſſibility would deſtroy the *dower*?

I am inclined to think the remainder is deſtroyed; the collecting the intent of the parties by any ſubſequent act *dehors* the conveyance ought not to be taken into conſideration, and therefore to ſay any other matter than what appears on the face of the conveyance to have been in the contemplation of the parties, cannot be of any weight. *Kent* v. *Harpool* was a very ſtrong caſe.

But ſuppoſing it were not ſo, and there was a poſſibility of the eſtates opening in this caſe to let in the contingent remainder, yet I do not think it would defeat the *dower*.

The diſtinctions in the law books are, that where a remainder comes in it ſhall work no wrong. I do not find that any of the books ſay, that if the eſtates opened during the tenancy in fee, that the wife ſhall not be *endowed*; in *Cordell*'s caſe, *Cro. Eliz.* 316. it is ſaid, that it was reſolved that the eſtate tail in that caſe was not executed for the probability of the *meſne* eſtate that might interpoſe, and therefore, as it was always disjoined during the life of the tenant in tail, his wife could not be *endowed*; but in 2 *Saund.* 336. this caſe is denied to be law; and I have ſeen a note of the like caſe in the *C. B.* where it was likewiſe denied to be law by *Bridgman*.

Page, Juſtice. Here is nothing but a poſſibility which has never happened, nor now can happen, to diſtinguiſh this eſtate from an eſtate in fee, therefore I think the wife is plainly intitled to her *dower*.

Probyn, Juſtice. The diſtinctions taken in this caſe may be allowed, and yet the widow be intitled to her *dower*; beſides, it is impoſſible now the contingencies ever ſhould happen.

Lee, Juſtice. *Kent* v. *Harpool* is to me a very ſtrong caſe; the words of the book are a veſting *under ſuch a form*, but here there is an actual limitation to the right heirs, which makes the eſtate veſted, and if an abſolute veſting, there never can be an opening to let in remainders, but is an utter deſtruction of it.

Lord *Hardwicke*. The caſe of *Boothby* v. *Vernon* does not come up to this caſe, for the wife there was but a bare tenant for life, with a poſſibility to her iſſue.

Per curiam. We are all clear of opinion that the widow in this caſe is intitled to *dower*: therefore judgment was given for the demandant. *Vide Caſes Temp. Lord Hardw. p.* 13.

Eaſter, 7 *Geo.* 2. *Dobſon* v. *Dobſon and others.*

See this caſe fully ſtated in page 215 of this work, under the head *Baron and Feme*.

Eaſter, 7 *Geo.* 2. *Kent* v. *Kent.*

See this caſe fully ſtated in page 336 of this work, under the head *Damages*.

Eccleſiaſtical Matters, &c.

Trinity, 1 *W.* & *M.* *Woodward* v. *Makepeace.*

Woodward, who lived in the dioceſe of *Litchfield* and *Coventry*, but occupied lands in the pariſh of *D.* in the dioceſe of *Peterborough*, was there taxed in reſpect of his land, as an inhabitant, towards a rate for new-caſting of the bells, and becauſe he refuſed to pay, was cited into the court of the Biſhop of *Peterborough*, and libelled againſt for this matter.

Per curiam. 1ſt, This is not a citing out of the dioceſe, within *ſtat.* 32 *H.* 8. *c.* 9. for he is an inhabitant where he occupies the land, as well as where he perſonally reſides. *Vide Cro. Jac.* 321. *Cro. Car.* 97. 2dly. Though he does not perſonally live in the pariſh, yet by having lands in his hands, he is taxable; and whereas it was pretended the bells were but ornaments, it was held, they were more than mere ornaments; that they were as neceſſary as the ſteeple, which is of no uſe without the bells; and *Holt*, Chief Juſtice, ſaid, if he be an inhabitant as to the church, which is confeſſed, how can he not be an inhabitant as to the ornaments of the church? *Vide Salk. vol.* 1. *p.* 164.

Ball v. *Croſs.*

The inhabitants of a chapelry within a pariſh were proſecuted in the *eccleſiaſtical court*, for not paying towards the repairs of the pariſh church; and the caſe was, thoſe of the chapelry never had contributed, but always buried in the mother-church, till about *Henry* the eight's time, the biſhop was prevailed on to conſecrate them a burial-place, in conſequence of which, they agreed to pay towards the repair of the mother-church; all which appeared on the libel.

And *Holt*, Chief Juſtice, held, that by *common law* the pariſhioners of every pariſh are bound to repair the church, but by the *cannon law* the parſon is obliged to do it; and ſo it is in foreign countries. In *London* the pariſhioners repair both church and chancel, tho' the freehold is in the *parſon*, and it is part of his glebe, for which he may bring an *ejectment*.

In the principal caſe, thoſe of a *chapelry* may preſcribe to be exempt from repairing the *mother-church*, as where it buries and chriſtens within itſelf, and has never contributed to the *mother-church*: for in that caſe it ſhall be intended coeval, and not a latter erection in caſe of thoſe of the chapelry; but here it appears, that the chapel could be only an erection in eaſe and favour of them of the chapelry; for they of the chapelry buried at the *mother-church* till *Henry* the eighth's time, and then undertook to contribute to the repairs of the *mother-church*. *Vide Salk. vol.* 1. *p.* 165.

Michaelmas, 3 *W.* & *M.* *Styrrup* v. *Stoakes*.

Adjudged, that if money is diſburſed by the *churchwardens* for repairing the *church*, or any thing elſe, merely *eccleſiaſtical* or *ſpiritual*; the *ſpiritual courts* ſhall allow their accounts; but if there is any thing elſe, that is an agreement between the *pariſhioners*, the ſucceeding *churchwardens* may have an action of account at *law*, and the *ſpiritual court* has no *juriſdiction* of the ſame. *Vide Mod. Rep. vol.* 12. *p.* 9.

Michaelmas, 3 *W.* & *M.* *Hele* v. *The Biſhop of Exeter*.

On a writ of *quare impedit* brought, the *Biſhop* pleaded, that the *church* became vacant on the 15th of *April*, and that the plaintiff preſented to him one *H.* and that on examining *H.* he found him *ignorant of the dead languages, and on that account an improper perſon to hold a benefice*, &c. and therefore refuſed him on the 20th of *June*, and gave the plaintiff notice; and becauſe no other was preſented within *ſix months* after the avoidance, he collated the other defendant (the incumbent) who was inſtituted. The incumbent pleaded to the ſame effect. The plaintiff replied, that *H.* at the time of his preſentation was *Vicar* of another *church*: that he was a *learned man*, and in *prieſts orders*; that he was licenced to *preach*; and had celebrated *divine ſervice* many years, and was *ſufficiently learned*, to celebrate the ſame. There was a rejoinder, and ſur-rejoinder, (which were laid out of the caſe) and thereon a demurrer.

Per curiam. 1ſt, The *Ordinary* muſt examine in convenient time, and after that, refuſe in a convenient time; if he does not, he is a diſturber by his delay. 2dly, If the *Ordinary* refuſes, *becauſe the candidate is a bad man*, he need not give notice of his refuſal, for the crime is as much in the conuzance of the *patron*, as of the *Biſhop*, and in that caſe the lapſe ſhall incur from the avoidance; but if he refuſes, *becauſe he is an unlearned perſon*, he muſt give perſonal notice, and the lapſe ſhall incur from the refuſal. 3 *Cro.* 119. 1 *Lev.* 31. *Dy.* 327. 2 *R.* 364. 3*dly*, That the *ordinary* may well refuſe him now, as unfit for this *cure*, tho' he had been allowed for a former. 4thly, It was not determined what learning was neceſſary; while the *Liturgy* was in *Latin*, that language was undoubtedly neceſſary; but now the *Liturgy* is in *Engliſh*: but it was obſerved, that *ſtat.* 13 *Eliz. c.* 12. requires that a *clerk* ſhould be able to anſwer his *Ordinary*, and give an account of his faith in *Latin*, according to the articles. 5thly, The court held this pleading too general; becauſe it was not ſhewn what learning he was defective in; *whereas* it ought to be certain, becauſe it is *traverſable*; and if the *clerk* dies, it muſt be tried by a jury, and the King's courts are to judge of it; and the law will the rather require a certainty, becauſe this anſwer is to diſable a man in his profeſſion, and prevent him of a freehold. Therefore judgment was given for the plaintiff, which was reverſed on a *writ of error* in parliament. *Vide Mod. Rep. vol.* 4. *p.* 134. *Salk. vol.* 2. *p.* 539.

Trinity, 4 *W.* & *M.* *Anonymous*.

On a *libel* in the *ſpiritual court* againſt the defendant for not paying of a rate towards the repairing of a *church*, &c.

He ſuggeſted, that the lands were in the occupation of his tenant, and that he was not an inhabitant of the pariſh where this *church* was, &*c.* and this was held a good ſuggeſtion; for it is contrary to law to charge a perſon with repairs, who does not live in the pariſh; the tenant of the land ſhould be charged, and not the owner.

Per curiam. If a man takes a leaſe of a ſtall in a market town, which he uſes once a week to ſell his wares, but lives in another pariſh, he ſhall not be charged towards the repairs of the *church* in that market town. *Vide Mod. Rep. vol.* 4. *p.* 148.

Michaelmas, 5 *W.* & *M.* *Waples* v. *Baſſet*.

A ſpecial action on the *caſe* was brought againſt the defendant, who was *Rector* of a *church*, for not keeping a *bull* and a *boar*, and on a demurrer to the declaration, theſe exceptions were taken to it, *viz.* he did not ſet forth, that the defendant was obliged to keep them either by *cuſtom*, *preſcription*, or otherwiſe; neither had he alledged any particular loſs or damage by his cattle not encreaſing, or that the defendant ought to find a *boar* in conſideration of paying him *tithes*; for which reaſons the declaration was held ill. *Vide Mod. Rep. vol.* 4. *p.* 241.

Hilary or Michaelmas, 7 *W.* 3. *Chamberlaine or Chamberlain* v. *Huetſon or Hewſon*.

See this caſe fully ſtated in page 204 of this work, under the head *Baron and Feme*.

Trinity, 7 *W.* 3. *Maſters* v. *Lewis*.

See this caſe fully ſtate in page 131 of this work, under the head *Attachment*.

Trinity or Michaelmas, 7 *W.* 3. *Pierce or Price*, *et al.* v. *Prouſe or Rouſe*.

The *churchwardens* aſſeſſed a rate for repairs of the *church*, and afterwards brought a libel againſt a pariſhoner for not paying it. The court being moved for a *prohibition*.

Per curiam. 1ſt. The pariſhioners ought to aſſeſs the rate, and not the *churchwardens*.

2dly. The pariſhioners are only bound to repair the *church* and not the *chancel*, for that is to be repaired by the *parſon*. *Vide Salk. vol.* 1. *p.* 165. *Mod. Rep. vol.* 12. *p.* 83.

Michaelmas, 7 *W.* 3. *Herman or Harman*, v. *Denne Renew*.

The court was moved for a *prohibition* to a ſuit in the *Conſiſtory Court* of London, on *ſtat.* 22 *Car.* 2. *c.* 11. about the rates for repairing the *church* of *St. Swithin*.

Holt, Chief Juſtice, *Rokeby* and *Eyre*, Juſtices. At *common law*, there might be an union; but that was only of *churches*, and but as an appropriation of one *rectory* to another; but ſtill the pariſhes were diſtinct; and that did not make the pariſh *church* of *A.* to be the pariſh *church* of *B.* but the incumbent was as well incumbent of *B.* as of *A.* and is obliged to ſerve the *cure* if neceſſary. But by this *ſtatute*, the pariſh *church* of St. Swithin is the pariſh *church* of *St. Mary Bothaw*, and the other *church* is thereby deſtroyed; and therefore the pariſh muſt repair *St. Swithins*; the rates were made diſtinct in this caſe, which the *court* ſeemed to approve. *Vide Mod. Rep. vol.* 12. *p.* 82. *Salk. vol.* 1. *p.* 165.

Hilary, 8 *W.* 3. *The King* v. *The Biſhop of Cheſter et al.*

See this caſe fully ſtated in page 53 of this work, under the head *Addition*.

Hilary, 8 *W.* 3. *Morgan Rees* v. *The Archdeacon of Cardigan, or the King* v. *Morgan Rice.*

On a *mandamus* to the *archdeacon* to ſwear in a churchwarden being duly elected; the archdeacon made this return, that he was a *poor milkman, and unfit to execute the office*, &c. and thereupon a peremptory *mandamus* was awarded; for the churchwarden is a temporal officer, he has the property and cuſtody of the pariſh goods, and as it is at the peril of the pariſhioners, ſo they may chooſe and truſt whom they think fit; and the archdeacon has no power to elect, or controul their election. *Vide Salk. vol.* 1. *p.* 166. *Mod. Rep. vol.* 11. *p.* 116. *Ibid. vol.* 5. 325.

Trinity, 8 *W.* 3. *Johnſon* v. *Lee.*

On a writ of *prohibition* brought, the plaintiff declared, that by *ſtat.* 23 *H.* 8. *c.* 9. It is enacted, *That no perſon ſhall be cited to appear out of his dioceſe where he dwells*, that the plaintiff was reſident at *Hungerford* in *Berks*, in the dioceſe of *Saliſbury*; that the defendant cauſed him to be cited before the *Dean of the Arches* in *London*, and brought a *libel* againſt him for expences and fees in the *Conſiſtory Court* of the Biſhop of *London*, and averred, that ſuch fees were juſtly due according to the cuſtom of the ſaid court, and that he promiſed to pay it; and although he made no ſuch promiſe within *ſix years*, yet the court proceeded to give ſentence againſt him; and the defendant proſecuted his plea after the writ of *prohibition* delivered to him, &c.

The defendant for conſultation pleads the very ſame *ſtatute*; by which it is enacted, "That no perſon ſhould be cited, ſummoned, or otherwiſe called
" to appear by himſelf or herſelf, or by any proctor,
" before any Ordinary, Archdeacon, Commiſſory,
" or any other ſpiritual judge, out of the dioceſe, or
" particular juriſdiction, where the perſon which
" ſhall be cited, ſummoned, or otherwiſe called, ſhall
" be inhabiting and dwelling at the time of the
" awarding of ſuch citation, or ſummons; except
" (*among many other clauſes in the ſaid act mentioned*)
" that any *Biſhop* or other inferior judge, having under him juriſdiction in his own right and title, or by
" commiſſion, make requeſt or inſtance to the Archbiſhop, or other ſuperior Ordinary or judge, to take,
" treat, examine, or determine the matter before
" him or his ſubſtitute; and that to be done in caſes
" only where the *civil* or *common law* does affirm
" execution of ſuch requeſt or inſtance of juriſdiction
" to be lawful or tolerated."

That the defendant is a proctor in the *conſiſtory court* of the *Biſhop* of *London*, and was retained as ſuch by the Curatrix of the plaintiff (he being then under age) to proſecute a ſuit againſt the executors of his grandfather, for a legacy given to the plaintiff, and to exhibit an inventory; that they were *excommunicated* for *contumacy* in not appearing, and that the fees and expences in the *libel* were juſtly due to him for proſecuting the ſaid ſuit. That he endeavoured to ſue the ſaid plaintiff for the recovery of the ſaid fees in the court of *Peculiars* of the Dean of *Saliſbury*; but he being judge of the court, and having juriſdiction in his own right, did, by a writing under his ſeal, require the Dean of the *Arches* to call the plaintiff before him, to anſwer the defendant in a cauſe for ſubſtraction of fees; which cauſe was there determined accordingly: and the defendant avers, that the *civil* and *common law* affirmed the execution of ſuch requeſt to be lawful. Whereon the defendant before the *prohibition* was delivered to him, did cite the ſaid *Johnſon* to appear before the ſaid judge of the *Arches* in the cauſe aforeſaid, and avers it to be the ſame proſecution of which the plaintiff complained.

To this plea the plaintiff demurred, and the defendant joined in demurrer.

1ſt, It was argued, that no conſultation ought to go; for if the defendant will bring himſelf out of the *ſtatute*, he muſt ſhew, that the requeſt made by the inferior *Ordinary*, was made to him who had the next ſuperior juriſdiction, which he has not done; for here the requeſt is from the Dean of *Saliſbury*, who was judge of the *Peculiars*, to the Dean of the *Arches*, when it ought to have been to the Biſhop of *Saliſbury*, being the next immediate *Ordinary*, unleſs it appears that a *peculiar* is ſuch a juriſdiction, from which there is appeal to the *Ordinary*; or that it is a juriſdiction by *preſcription*.

The judge of the *Peculiars* is an inferior perſon to the *Biſhop*, and the *Peculiars* itſelf may be ſubordinate to him; if ſo, he cannot tranſmit a cauſe *per ſaltum* to the Archbiſhop, but muſt leave it to the *Ordinary* from whom his power is derived.

2dly, The defendant does not ſay, that this was a caſe which was permitted by their law, but only that the *civil* or *canon law* affirms ſuch requeſt, which is in the disjunctive and very uncertain.

3dly, He alledges, that the Dean of *Saliſbury* did requeſt the Dean of the *Arches* to call the plaintiff before him, to anſwer in a cauſe for ſubſtraction of fees; and the *libel* is for ſubſtraction of fees and expences, which is larger than the requeſt, and therefore not good.

4thly, The principal point was, whether the defendant ought to ſue for fees in the *eccleſiaſtical court*, ſince ſuch things are properly cognizable at *common law*, for which he might have a *quantum meruit*, or an *indebitatus aſſumpſit*, on the retainer for *work and labour*, and for money laid out, and the law raiſes the promiſe.

Per curiam. If the proctor had petitioned the court, and not proceeded by way of *libel* for his fees, in ſuch caſe a *prohibition* could not lie; ſo that there can be no inconvenience in allowing this juriſdiction, for they are the proper judges of what buſineſs is done in their courts, and can call for vouchers better than a jury can.

Their fees are eſtabliſhed by the *canon law*, and are leſſened and reſtrained by the power and authority of the court. Rules are made here, to oblige the attornies in matters of practice; and the like rules are made there, to oblige the proctors and miniſters of that court; ſo that they muſt be allowed to be the proper judges in this matter.

Matrimony, and things *teſtamentary*, were at firſt the whole buſineſs of that court: but now in caſes where they have original juriſdiction, they do retain ſuits even for ſuch matters which may be tried at law, as a libel may be there for not repairing a way leading to a *church*, &c.

This caſe may be compared to that where a *prohibition* was prayed to the court of *admiralty*, becauſe inſtead of *ſtipulation*, (which is a recognizance in their law as much as bail is here) they had taken a recognizance at *common law*, wherein the principal and ſureties, and their heirs, goods, and lands, were bound; *whereas* the *libel* ought to be againſt the ſhip and goods, and executor againſt the latter, and not againſt the party: but the Civilians argued, that execution might have been taken of the body, though not of the lands; and that this was not in the nature of a recognizance, but a ſtipulation in nature of bail, and might be ſued as well in the court of *admiralty* as at *common law*; and no *prohibition* was granted, but the matter was adjourned.

The caſe in the *Modern Report* is an expreſs authority to rule this, where a *prohibition* was denied for a ſuit for proctors fees, and there is no book againſt it. The reaſon of the law is for the plaintiff; for he being a proctor is not a *temporal* officer, and what he has done is about an *Eccleſiaſtical* ſuit, and therefore that court muſt judge of it.

Laſtly. The *ſtatute of limitations* does not extend to this caſe; for it is not properly a debt, becauſe expences and fees are of the ſame nature with the ſubject-matter for which they were demanded: it may as well be alledged, that defamatory cauſes are within the ſtatute; ſo that the *eccleſiaſtical court* having original juriſdiction of this matter, no *prohibition* ought to go: it has been denied in the *C. B.* for regiſter's fees, in a cauſe between *Geſtlin* v. *Froggat. Adjourned. Vide Mod. Rep. vol.* 5. *p.* 238.

Michaelmas, 8 *W.* 3. *The Caſe of the Churchwardens of St. Bartholomew.*

One *F.* left 25 *l. per annum*, for the maintenance of a weekly *lecture and lecturer*, to be choſen by the pariſhioners,

riſhioners, and to preach on what day of the week they ſhould like beſt. The pariſhioners fixed on *Thurſday*, and choſe a *lecturer* every year; and now, one *T.* being *lecturer*, and the pariſhioners having choſe one *R.* he was oppoſed by *T.* who would not ſubmit to their choice, whereon the churchwardens ſhut *T.* out of the church; but the *Biſhop* of *London* determined in favour of *T.* and granted an *inhibition* and *monition*, &c.

Holt, Chief Juſtice. A *prohibition* muſt be granted to try the right; for no man can be a *lecturer* without a licence from the *biſhop* or *archbiſhop*; but their power is only as to the fitneſs of the perſon; but not as to the right. *Vide Salk. vol.* 3. *p.* 144.

Hilary, 9 *W.* 3. *The King* v. *Sanchee.*

The defendant and others who were *quakers*, were cited into the *eccleſiaſtical court*, to anſwer there on their ſolemn affirmation, *&c.* concerning *tithes* with-held by them from the *parſon* of the *pariſh*; and for not anſwering, the commiſſary, according to the direction of *ſtat.* 27 *H.* 8. *c.* 20. certifies their *contumacy* to two juſtices of the peace, by whoſe warrant they were ſeized, and committed to priſon; and being brought by *hab. corp.* into this court, their council moved that they might be diſcharged.

Per curiam. In many caſes the *common law* and *eccleſiaſtical courts*, have concurrent juriſdiction; for example, if a penſion be payable out of a *parſonage* by *preſcription*, the remedy for this is either in the *ſpiritual court*, or a *writ of annuity* lies for it at *common law.* But where the nature of the offence is altered by a *ſtatute*, and a new penalty inflicted; then after the party has been tried at *common law* and condemned, the *eccleſiaſtical court* ſhall not proceed againſt him. And therefore the quakers were diſcharged out of cuſtody. *Vide Raym. vol.* 1. *p.* 323.

Michaelmas, 9 *W.* 3. *Moſely* v. *Warburton.*

A *levari facias* iſſued to the Biſhop of *Cheſter*, to require him to levy the debt on the defendant, *de bonis eccleſiaſticis* i. e. *out of the effects belonging to the church*, *Warburton*, being a fellow of *Magdalen* college. On which the *Biſhop* wrote to the warden and fellows of the college, requiring them to pay the defendant's penſion to him, to which the warden and fellows anſwered, that they had not power to do it. On this a motion was made in this court on behalf of the *Biſhop* of *Cheſter*, for advice of the court, what the *Biſhop* ought to do.

Holt, Chief Juſtice. If a *Prebendary* has a ſole body, the *Biſhop* on a *levari facias de bonis eccleſiaſticis*, may *ſequeſter* it; but if he has not a body aggregate with the *Dean* and *Chapter*, he cannot ſequeſter it. Then in this caſe the profits of the fellowſhip are but caſual dividends, in which before diviſion the defendant has no intereſt, ſo that they do not make an eſtate; and it ſeems in this caſe the defendant is not a *beneficed clergyman*, and the *Biſhop* may return no effects of the church; and though the college has the impropriation of a *church*, yet it belongs to the whole body, and not to one of them only.

But the court would give no poſitive opinion, becauſe the caſe did not come *judicially* before them. *Vide Raym. vol.* 1. *p.* 265.

Hilary, 10 *W.* 3. *The Biſhop of St. Davids* v. *Lucy.*

The *Biſhop* was *cited* before the *Archbiſhop* of *Canterbury*, for *ſimony*, and his council moved for a *prohibition* on this *exception*, becauſe the *citation* enjoined him to appear at *Lambeth*, and not at the court of *Arches*, and before the *Archbiſhop* himſelf, inſtead of before his *Chancellor* or *Vicar General*.

Per curiam. The *Archbiſhop* has a *provincial* power over all the *Biſhops* of his province, and may hold his court where he pleaſes, and he may *convene* before himſelf, and ſet judge himſelf, and ſo may any other *Biſhop*, for the power of a *Chancellor* or *Vicar General* is only delegated; therefore the *prohibition* was denied. *Vide Salk. vol.* 1. *p.* 134. *Vol.* 3. *p.* 90. *Raym. vol.* 1. *p.* 447 & 539. *Mod. Rep. vol.* 7. *p.* 56.

Michaelmas, 10 *W.* 3. *Jacob* v. *Dallow.*

A ſuit was depending in the *ſpiritual court* concerning the right of a ſeat in the *church*, and it was ſuggeſted for a *prohibition*, that the right of a ſeat in a *church* was a *temporal* matter, and determinable at *common law.*

Per curiam. If you would preſcribe for a right againſt the *Ordinary*, you muſt ſhew uſage to repair the ſeat; but in an action on the *caſe* for diſturbance, you need only lay poſſeſſion againſt any other diſturber; and of common right, the diſpoſal of ſeats in a *parochial church*, belongs to the *Ordinary*. 2 *Bulſt. May* v. *Gilbert*. *Hob.* 69. *Boothby* v. *Baily*, was held otherwiſe in this court, in *Buxton* v. *Baker*'s caſe, on a diverſity between an action on the *caſe*, and a *prohibition*. *Vide Mod. Rep. vol.* 12. *p.* 233.

Michaelmas, 10 *W.* 3. *Lee* v. *Daniel.*

Holt, Chief Juſtice. The diſpoſal of ſeats in the *mother church* belongs to the *Ordinary*, and ſo the ſeats of a *chapel of eaſe* belong to the *mother church*; and to know whether it is a *church* or not, is by knowing whether it has a *font or burying ground*. *Vide Mod. Rep. vol.* 12. *p.* 228.

Hilary, 11 *W.* 3. *Machin* v. *Moulton.*

The defendant was *Rector* of *S. C.* in the dioceſe of *York*, within which pariſh the plaintiff had lands, but lived in *Lincoln* in another dioceſe, and now coming to *York*, the defendant ſued him in the *ſpiritual court* there, for *ſubſtraction of tithes*; and it was inſiſted by the plaintiff's council, that this was a *citing him out of his dioceſe*; at firſt the court held, that the *reſidency* of the party draws the cauſe to the dioceſe where *he lives*, in *tranſitory* matters, but not in *local*; as for inſtance, an *executor* muſt be ſued for a legacy where the will was proved, and not where he lives: but the court afterwards ruled this caſe to ſtand on a ſingle reaſon, for whatever the law might be in other inſtances, yet in the caſe of *tithes*, *ſtat.* 32 *H.* 8 expreſsly *enacts*, that the party *ſubſtracting* them ſhall appear before the *Ordinary* of the *dioceſe* where they were *ſubſtracted*, and therefore a conſultation was granted. *Vide Raym. vol.* 1. *p.* 452.

Trinity, 11 *W.* 3. *Allen or Allanſon* v. *Brookbank.*

See this caſe fully ſtated in page 338 of this work, under the head *Date, Day, and Delivery.*

Trinity, 12 *W.* 3. *Lutton* v. *King.*

Adjudged, that before *ſtat.* 31 *H.* 8. a *Vicar* might bring a *libel* in the *ſpiritual court*, for an *augmentation of his vicarage*; for on the creation of *vicarages*, that power was commonly reſerved, and where it was not reſerved, the *Biſhop could not augment them*, and *libels* for that purpoſe were frequently exhibited againſt *impropriators*, but ſince by that *ſtatute*, *impropriations* are made *lay fees*, the *Ordinary* cannot intermeddle, neither could they have ſued for *tithes* in the *ſpiritual court*, if that power was not particularly ſaved to them by the *ſtatute*: but there ſeems to be a difference where a *Vicar* ſues a *lay impropriator*, and where the *impropriator* is a *ſpiritual perſon*, for in the laſt caſe it is probable he may ſue for an *augmentation*; and in ſome caſes where the *impropriation* is not a *lay fee*, as in the caſe of the *Choriſters of the Cathedral* of *Saliſbury*, where the *appropriation* of a *parſonage* was made to them before the *ſtatute*, and continues ſo ſtill, and in ſuch caſe the *Biſhop* may make an *augmentation*; if that power is reſerved, for the perſons are ſubject to his command. *Vide Salk. vol.* 3. *p.* 378.

Trinity, 12 *W.* 3. *Smith* v. *Waller*.

Per curiam. Where the *Vicar is endowed*, and comes in by *inſtitution* and *induction*, he has *actually the cure of ſouls*, and is not to be removed at the pleaſure of the *Rector*, who in this caſe has only *habitually the cure of ſouls*; but where the *Vicar* is not endowed, nor comes in by *inſtitution* and *induction*, the *Rector* has *actually the cure of ſouls*, and may remove the *Vicar* at pleaſure; and where the *Vicar* is *endowed*, it is always out of the *rectory*, and by the act of the *Ordinary*; therefore, where the queſtion is, whether it is a *Vicarage* or not, it ſhall be tried in the *ſpiritual court*; becauſe it could not begin or be created by the *Ordinary*, and with his concurrence, and ſo it is of an appropriation. *Vide Salk. vol.* 3. *p.* 378.

Michaelmas, 12 *W.* 3. *Turton* v. *Reignolds*

A legacy of 50*l. per annum* was left as a maintenance for a *parſon* to preach once a week in the pariſh *church* of *B.* he was choſe, and removed by the majority of the pariſhioners; who choſe one *R.* to whom the churchwarden refuſed to open the *church*; whereon he brought a *libel* againſt them in the *ſpiritual court*; and a *prohibition* was granted, for that he did not ſhew he had a licence from the *parſon* of the *church*, in whom the freehold of the *church* is. It is true, it may be an *eccleſiaſtical* offence for the churchwardens to ſhut out the *parſon*, or any other appointed by him to preach in the *church*; yet it cannot be one not to open the *church* for one appointed by a ſtranger, without he has the *parſon*'s licence; and you ſhould have ſhewn in your *libel*, that you had ſuch a licence.

Holt, Chief Juſtice, was of opinion, if the *Ordinary* had appointed a perſon to come and preach in ſuch a *church*, yet he could not juſtify doing it without the conſent of the *parſon*. And if a perſon gives a charity to a certain *clerk* for preaching in ſuch a pariſh, he muſt do it by the conſent of the *parſon*, and further ſaid, that let a *parſon* be ever ſo *orthodox* and able, yet he is puniſhable for his preſumption, if he preaches without a licence of the *Ordinary*; but the *Ordinary*, from a principle of juſtice, ought to give ſuch licence to one that is fit; but if he refuſes, no *mandamus* will lie, but his remedy is to *appeal*. *Vide Mod. Rep. vol.* 12. *p.* 433.

Hilary, 13 *W.* 3. *Finch* v. *Harris*.

A *prohibition* was moved for to ſtay a ſuit in the *ſpiritual court*, againſt a *clerk* in orders, for preaching without a licence, on ſuggeſtion that there is a *chapel donative* within ſuch a pariſh, *four miles* diſtant from the *mother-church*, and that it is conſecrated; and that this ſuit below is for preaching there, ſo the *Ordinary* has nothing to do with it; and the deſign of this *libel* is to bring in queſtion whether this is a *donative* or a *chapel of eaſe*.

Per curiam. None can preach without a licence of the *Ordinary*, whoſe care it is to prevent *hereſies* and *ſchiſms* in his dioceſe; and there is a *canon* againſt preaching without a licence, and that binds all the clergy. And a *clerk* ordained cannot preach even in the dioceſe whereof he is, and by whoſe dioceſan he is ordained, without licence; though one would think that the very ordination would amount to a licence to preach within that dioceſe. And though it is true, that the *Ordinary* cannot puniſh him by depravation of his benefice, it being a *donative*, yet he may cenſure him otherwiſe; for otherwiſe the inconvenience would be intolerable, that it ſhould be in the power of a man, by putting a *clerk* into ſuch *donative*, to exempt him from the cenſures of the *Ordinary*, and *ſubordination* to the *eccleſiaſtical law*.

Holt, Chief Juſtice. It is againſt the *eccleſiaſtical law* to preach in a place not conſecrated; and ſo it would be to ſet up a *conventicle*. Indeed, a perſon may pray in his own houſe or family, but he cannot preach there; and this *clerk*, without queſtion, is viſitable by the *Ordinary*, though he has no juriſdiction over the thing, ſo as to deprive, as in caſe of a *rectory*. And here they at laſt moved for a *prohibition as to* the reading of prayers; but it was denied. *Vide Mod. Rep. vol.* 12. *p.* 640.

Eaſter, 13 *W.* 3. *Wilmot* v. *Tiler*.

Holt, Chief Juſtice. A *clerk* in orders, on having his *clergy*, ſhall not be burnt in the hand; and none could have the benefit of his *clergy* twice, except a *clerk*. In all caſes before *ſtat.* 18 *El.* where a *clerk* had *clergy*, he was delivered to the *Ordinary*, but in no caſes ſince. And where a perſon in orders has his *clergy*, there ought to be a ſpecial entry made why he was *not burnt* in the hand; and if he is a *clerk* in orders, or not, he is triable by his *Ordination*. And if a *clerk* ſhews his *Ordination*, he need not have the book, becauſe it is preſumed a *clerk* in orders can read. And in the time of *Ed.* 3. *clergy* was denied to one *not being properly habited*, &c. *Vide Mod. Rep. vol.* 12. *p.* 448.

Holt v. *The Biſhop of Winton*.

On a *writ of quare impedit*, the caſe was, *viz.* The incumbent being ſeized of the advowſon of the ſame *church* in *fee*, died, and the queſtion was, who ſhould preſent, his *heir at law*, or his *executor*; and on a demurrer, it was objected againſt the right of the heir at law, that he could not preſent; becauſe the advowſon did not deſcend to him till after the death of his anceſtor, in which very inſtant of time, the *church* was void; and therefore the avoidance was ſevered from the inheritance, and veſted in the *executor*.

Per curiam. The *heir* ſhall preſent, becauſe at the ſame time, that the avoidance veſted in the executor, the inheritance deſcended to the heir, and where *two titles* concur in an inſtant of time, the elder ſhall be preferred. *Vide Salk. vol.* 3. *p.* 280.

Trinity, 13 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. Of a common right, the diſpoſition of pews in a *church*, belongs to the *Ordinary*, but the pariſh is bound to repair them; and it is only *reſiancy* that makes right to a pew in a pariſh; for if a perſon purchaſes a pew there, and afterwards leaves it, his intereſt in the pew is gone; and if he ſhould return again into the place, yet he muſt renew his intereſt; but if a perſon ceaſes to be a houſe-keeper in a pariſh, but continues ſtill in the pariſh as a lodger, and goes to *church*, and is taken notice of, as a pariſhioner, though he is but a lodger, yet his intereſt which he had in the pew continues. *Vide Mod. Rep. vol.* 12. *p.* 554.

Hilary, 1 *Ann.* *Anonymous.*

The defendant's council came to the *bar*, to ſhew cauſe againſt a *prohibition*, to a ſuit in the *eccleſiaſtical court* of *Ely*, for a *church-rate*, for repairing the *church* and ornaments. The ſuit ſet forth, that the *church* was out of repair, &c. and that at a meeting of the pariſhioners, a rate was made by a majority of them, that the plaintiff in the *prohibition* was an inhabitant, and rated ſo much. The ſuggeſtion was, that *J. S.* is ſeized in *fee* of the manor of *D.* within the pariſh; that he, and all thoſe, who have an eſtate therein, time out of mind, uſed to repair an iſle in the pariſh *church*, and in conſideration thereof, were diſcharged of all rates for repairing the whole *church*, and that the defendant is tenant of part of the ſaid manor.

1ſt, *Exception*, That the *libel* is for the repair of the *church* and the *church ornaments*, and the *preſcription* goes only to the repair of the *church*.

2dly, The tendering ſuch a plea below, and refuſal of it, is no cauſe of *prohibition*, but rather of *appeal*. 1 *Bulſt.* 16.

3dly, The *preſcription* is, that all the tenants of the manor were diſcharged, and he makes himſelf a tenant of part.

Holt, Chief Juſtice. Though a man, time out of mind, repairs a *chapel*, yet if it is not a *predial chapel*, having *chapel-wardens* belonging to it, it is not a reaſon to exempt him from a *church-rate* to repair; and here if he repairs leſs than his proportion amounts to, it may be a queſtion if it ought to diſcharge him? But if he repairs more, or as much, it will be good: but this is not matter to be determined on motion. As to the *firſt exception*, if you have not diſtinguiſhed how much is demanded for ornament, you have not *libelled* right; and a *prohibition*, if it goes at all, muſt go for *all*. As to the *third exception*, if the tenant of the whole manor has ſuch an exemption, the tenant in part muſt have it in proportion; and therefore the rule muſt be made abſolute, and the plaintiff muſt declare forthwith; for in *prohibition*, we may order the declaration to be delivered as we pleaſe in point of time. *Vide Mod. Rep. vol.* 7. *p.* 121.

Trinity, 1 *Ann.* *Brown* v. *Mugg.*

In *ejectment*, on a ſpecial verdict, the caſe was, the defendant had a *benefice*, with cure of ſouls, of 8 *l. per annum*, to which he was preſented by *J. S.* and was inſtituted and inducted; afterwards the defendant was made chaplain extraordinary to his Majeſty, and was preſented by the King with another benefice and cure of ſouls, of 8 *l. per annum*, and was inſtituted and inducted to that alſo. On which the King preſented the leſſor of the plaintiff to the former benefice as by *lapſe*. And it was adjudged, after ſeveral arguments at the bar, that the plaintiff ought to have judgment, becauſe by the acceptance of the ſecond benefice the former became void; a chaplain extraordinary to the King not having privilege to retain two benefices with a cure of ſouls, above 8 *l. per annum* value, without a diſpenſation: and therefore judgment was given for the plaintiff. *Vide Raym. vol.* 2. *p.* 791.

Michaelmas, 1 *Ann.* *Ladd* v. *Widdows.*

On a motion for a new trial brought on a writ of *quare impedit*, wherein the point in iſſue was, whether the *church* was *donative* or *preſentative?* Evidence was pretended of ſeveral preſentations; and the court held, that though a preſentation might deſtroy an impropriation, yet it could not deſtroy a *donative*, becauſe the creation thereof was by letters patent, whereby the land is ſettled to the *parſon* and his ſucceſſors, and he to come in by donation. *Vide Salk. vol.* 1. *p.* 541.

Michaelmas, 1 *Ann.* *Newſon* v. *Bawldry.*

The plaintiff declared on a *prohibition* for *libelling* in the *ſpiritual court*, for the payment of a pariſh rate, made at an aſſembly of *twenty* pariſhioners, *fifteen* whereof were againſt the rate, and *five* only for it; and that the money was expended in repairing the chancel and railing it in, and raiſing the floor ſome ſteps higher: to which it was pleaded, that the communion table was, *anciently*, placed in the chancel; and that there was ancient rails about it, which were out of repair; that at a meeting of a majority of the pariſhioners, a rate was made to replace the communion table in the chancel, and to repair the rails; the plea alſo contained ſome other things which was thought decent to be done at that aſſembly, but the matter being ill pleaded, they were directed to amend their plea, in order to bring in the following points in judgment:

1ſt. Whether, if the communion table was not in the chancel before, or if there was no ſteps up to it, and the pariſhioners, on a meeting, do not find that ſo decent, the majority of them can make a rate to oblige all for altering the place of the communion table, or carrying it into the chancel, or for raiſing it higher?

The court inclined they could; for as to the degrees of order and decency, there is no rule, but as the pariſhioners agree among themſelves; and though they are compellable to put things in decent order, yet there is no other rule for the degrees of decency than the judgment of the majority.

2dly. Whether the majority of the pariſhioners may make a rate to bind the reſt for repairing or adorning the chancel? for that is a ſpecial freehold belonging to the *parſon*. The council here quoted the caſe of *Roſe* v. *Hawkins*, 9 *W.* 3. in this court, where a *libel* was for a pariſh rate to repair a *church* and *chancel*, and a *prohibition* was granted for two reaſons; one, becauſe the *chancel* ought to be repaired by the *parſon*; the other, for that it was ſuggeſted, the rate was not made by a majority; yet, becauſe they had gone to try that point below, the court ſaid it was no cauſe. *Vide Mod. Rep.* 7. *p.* 69.

Hilary, 2 *Ann.* *The Queen* v. *Guy.*

A *mandamus* was directed to the *official* of ——— to ſwear in *A.* and *B.* churchwardens of the pariſh of——

To this, the return was, that *they were not duly choſen*; and now a rule was made for a peremptory *mandamus*, for he ſhould have complied with the writ as far as he could, and have ſworn in one of them, if the fact was that one of them had been duly choſen, or elſe have returned that neither of them were choſe.

But it was *objected*, that this could not be done; for by the cuſtom of the pariſh the *parſon* was to chuſe one, and the pariſhioners the other: and the pariſhioners inſiſted, that they would chuſe *two*, and did return *two*, and the *official* could not tell which of them to ſwear in.

Holt, Chief Juſtice. Then you ſhould have made a ſpecial return, that the pariſh claims a right to chuſe *two*, and that theſe perſons had an equal number of voices; that the *parſon* had choſe his man, and ſo you could not ſwear either of the pariſhioners men; or if the pariſh unanimouſly choſe two jointly, when in fact they had a right to choſe but one, that would be void as to both; and in that caſe you might return generally, that neither of them had been choſen; and ſo where two have an equal number of votes. And at laſt, by the direction of the court, it was conſented to, to try the cuſtom in a *feigned* action. *Vide Mod. Rep vol.* 6. *p.* 89.

Eaſter, 2 *Ann.* *Adams* v. *Terretenants of Savage.*

Holt, Chief Juſtice. This court will take notice of the limits of *eccleſiaſtical juriſdictions*, which is part of the law of the realm under which we live, and conſequently it will take notice, that a judgment of this court is not within the juriſdiction of the *archdeacon* of *Dorſet*. *Vide Raym. vol.* 2. 854.

Hilary, 3 *Ann.* *Britton* v. *Standiſh.*

The plaintiff was *libelled* againſt in the *ſpiritual court* by Mr. *Standiſh*, the *parſon* of the pariſh, for not coming to his pariſh-church on *Sundays*; to which he pleaded, that he went to another *church* more commodious for him: on this matter ſuggeſted, there was a *prohibition*, and the plaintiff declared therein; and the ſingle queſtion was, whether he was compellable to go to his pariſh church? It was ſaid he was compellable, becauſe every *parſon* was obliged not to allow a pariſhioner of another pariſh to partake of ſacraments with him. 2 *Spel. Conc.* 141. *Lyn.* 184, 233. *Reform. L. Eccl.* 106. *Spar. Coll.* 77, 78, 126, 226, 237, 181, 31. and that this is allowed by *common law*. 2 *Roll. Rep.* 438, 455. *Hardr.* 406, 407. in point, and that the *ſpiritual court* is to judge of the excuſe. *March* 93. And by the act of *uniformity*, every man is required to reſort to his pariſh-church: on the other ſide it was argued, that the diſtribution into pariſhes was by the *common law*, and that if this diſtribution did by conſequence bring people under a new obligation, ſuch obligation ought to be examinable by the *common law*; that the *ſtatute of uniformity* has been always looked on as ſufficiently complied with by going to any *church*, and *ſtat.* 23 *Eliz.* impoſes a penalty on any perſon that abſents from the *church*, contrary to *ſtat.* 1 *Eliz.* and that if theſe acts are conſtrued to give a juriſdiction, that juriſdiction muſt be to the *common law* courts, and not the *eccleſiaſtical courts*.

In this caſe it was agreed, that every man was obliged to go to ſome *church* or other, and that an intire neglect was puniſhable in the *eccleſiaſtical court*; and that it was a good charge at *firſt ſight*, that a man went not to his *pariſh church*, becauſe he ſhall not be ſuppoſed to go to any other: and the court ſeemed to be of opinion, that though the *act of uniformity* is taken to be introductive of a new law, yet the thing being purely of *eccleſiaſtical* conuſance, and proper for their examination, yet the court, after conſideration, granted a *prohibition* *Vide Salk. vol.* 1. *p.* 166. *Mod. Rep. vol.* 6. *p.* 188.

Hilary, 3 *Ann.* *Preſgrave* v. *The Churchwardens of Shrewſbury.*

A *prohibition* was prayed to a ſuit in the *ſpiritual court*, where the pariſhioners preſcribed to diſpoſe of the pews, excluſive of the *Ordinary*.

Per curiam. That cannot be; the *Ordinary*'s not acting might be, becauſe there was no occaſion for his intermeddling; but that cannot veſt the right in them who are only a corporation capable of *goods*, but not of *inheritance*. *Adjourned*. *Vide Salk. vol. p.* 167.

Eaſter, 4 *Ann.* *Anonymous.*

If a parſon is *inſtituted* only, he cannot have an action of *diſtreſs* till *induction*.

Holt, Chief Juſtice. He is intitled to the *ſpiritual profits*, as oblations, *&c.* before induction: he is likewiſe liable to be ſued in the *ſpiritual court* before induction, if he neglects the cure; but he cannot ſue for great tithes before induction, for they are *temporal*. *Vide Mod. Rep. vol.* 11. *p.* 46.

Eaſter, 4 *Ann.* *Anonymous.*

If a *biſhop* grants a patent to a man to be *vicar general*, wherein he reſerves a juriſdiction to himſelf, it ſeems to be repugnant and void. So where a *biſhop* grants his chancellorſhip, with a reverſion to himſelf of inſtitution and induction.

Holt, Chief Juſtice, ſaid, what cannot a *vicar general* do; if he is reſtrained he is not a *vicar general*. *Vide Mod. Rep. vol.* 11. *p.* 46.

Michaelmas, 4 *Ann.* *Coleſatt* v. *Newcomb.*

A *miniſter* of a *donative* was ſued in the *eccleſiaſtical court*, for that, when he read prayers, he did not read the whole ſervice, but left out what parts he thought fit, and for preaching without a licence; and the defendant's council moved for a *prohibition*, on a ſuggeſtion that the *church* was a *donative*; and argued that *donatives* were exempt from the juriſdiction of the *Ordinary*, and that it was a *lay* thing, and the *biſhop* could not viſit it, and that if the incumbent was guilty of hereſy, the *Ordinary* could not meddle with him, for the *parſon* was privileged in reſpect to the place, but the patron might by commiſſion examine the matter, and on cauſe deprive him. *Yelv.* 61, 62. *Fairchild* v. *Gair.* 2 *Cro.* 63. *S. C.* and *Co. Lit.* 344. *a.* that the founder ſhall viſit them; and *Bro. Præmunire*, 21. to the ſame purpoſe. But

Powell, Juſtice, made this diſtinction; where the ſuit in the *eccleſiaſtical court* is in order to deprivation, and where only for reformation of manners; in the firſt caſe the court will *prohibit*, but not in the laſt: and therefore if in this caſe the *ſpiritual court* proceed to deprivation, the court would *prohibit* them, but not till then. He ſaid he had known *prohibitions* denied frequently to ſuits againſt *parſons* of *donatives* for marrying without licence. He ſaid, that by the old *canon law*, preaching was no part of the *miniſter*'s office, however it came to be ſo in vogue now; but only reading maſs, and adminiſtering the ſacraments; and nobody preached then without the licence of the *biſhop*, but he appointed preachers. And he ſaid, that now, ſince the *act of uniformity*, if a *biſhop* denied to grant a licence to a *parſon* who was fit to preach, they would grant a *mandamus* to him to grant one; and that by the *act of uniformity*, the *eccleſiaſtical juriſdiction* was ſaved: therefore the motion was denied. *Vide Raym. vol.* 2. *p.* 1205.

Hilary, 7 *Ann.* *Sawyer* v. *Loggin.*

On an *information* for ſtriking in the *church*, and an acquittal thereon; they exhibited articles in the *ſpiritual court* for brawling in the *church*; whereon the defendant moved this court for a *prohibition*. And for the *prohibition* it was ſuggeſted, that where a man is acquitted at *common law*, he ought not to be cited or ſued in the *ſpiritual court*; and ſhewed that an information was exhibited againſt him for the ſame battery, and that he was acquitted, *&c.*

But the court would not grant the *prohibition*, becauſe they ſhould have pleaded this matter, which they ſuggeſt here, in the *ſpiritual court*; and if they had refuſed the plea, then they might have juſtly come here and move for a *prohibition*.

Powell, Juſtice, ſaid, brawling and ſtriking in the *church* were two diſtinct offences; and though they cannot proceed in the *ſpiritual court* for the battery, after an acquittal at *common law*, yet they may go on for the brawling, for the *common law* has not conuſance of the brawling; to which *Holt*, Chief Juſtice, ſeemed to agree; but ſaid, that it would be hard to proceed in the *ſpiritual court* for the brawling, after an acquittal at *common law* for the battery. But for this reaſon, a *prohibition* was denied. *Vide Mod. Rep. vol.* 11. *p.* 200.

Michaelmas, 9 *Ann.* *Fort* v. *Buviere.*

The major part of the pariſh, aſſembled in veſtry, taxed the pariſh for building of a gallery, and each pariſhioner *ten* times the value of an ancient rate. One pariſhioner refuſed payment, and was ſued in the *ſpiritual court*, whereon he prayed a *prohibition*.

1ſt, Becauſe a pariſh could not be taxed for building a gallery, which was neither uſeful nor ornamental to the *church*; but this was not much regarded by the *court*.

2dly, The oldneſs of the former rate; but the caſes produced to maintain the *prohibition* on this head, did not come up to it; they being granted in caſes where the rate was to continue always the ſame: but here there was a new rate modelled by the old, and if *ten* times the value of the old rate had been put into one intire ſum, it would have been plain; beſides, there is no need for a pariſh to depart from an old rate, till it grows unequal. *Vide Mod. Rep. vol.* 10. *p.* 13.

Michaelmas, 9 *Ann.* *Forty* v. ———

A rate was made for erecting galleries in a *church*; and in the *libel* it was ſaid, it was rated according to an ancient and ſtanding rate, and to be continued to a future time.

Parker, Chief Juſtice, and *Powell*, Juſtice. This old rate is only a meaſure to rate by; they muſt rate according to exigencies of the *church*, they are not bound to vary; the difference is only in expreſſion, they need not repeat it over again; and they held galleries might be erected, which was in the nature of a new floor, and therefore would grant no *prohibition*, though there was quoted the caſe of *Newcomb* in *Devon* v. *Noy*. *Vide Forteſcue, p.* 346.

Michaelmas, 9 *Ann.* *Baniſter* v. *Hopton.*

On a motion for a *prohibition*, it was agreed, that though a *preſcription*, as whether a whole pariſh, or a ſelect veſtry ſhould chuſe *churchwardens*, be a matter triable at *common law* by a jury, yet ſentence is to be given in the *ſpiritual court*, according to their verdict; and therefore though this is a matter triable at *common law*, yet if the party ſubmits to a trial in the *ſpiritual court*, by not demanding a *prohibition*, it will be too late after ſentence to move for one. *Vide Mod. Rep. vol.* 10. *p.* 12.

Eaſter, 10 *Ann.* *Biſhop* v. *Eagle.*

See this caſe fully ſtated in page 17 of this work, under the head *Account*.

Michaelmas, 10 *Ann. Anonymous.*

The court was moved to quaſh a writ *de excommunicato capiendo.*

The *firſt exception* was, that the writ ſays only *for defamation*, but does not ſay *what defamation*; now there are ſome *defamations* that are not of *ſpiritual* conuzance.

This objection was over-ruled by the court, who ſaid, they would not preſume, that any court would exceed its own juriſdiction, unleſs it plainly appeared it had done ſo.

The *ſecond exception* was, that the ſtanding 40 *days excommunicated*, did not appear in the writ. *But not allowed.*

Per curiam. The 40 *days* are never inſerted in the writ, but the *ſignificavit* only; beſides this objection is not proper here, but in *Chancery*; the 40 *days excommunication*, being the very foundation on which the court grants the writ. *Vide Mod. Rep. vol.* 10. *p.* 71.

Michaelmas, 10 *Ann. D'Eath* v. *Baux.*

See this caſe fully ſtated in page 212 of this work, under the head *Baron and Feme.*

Trinity, 13 *Ann. Miles* v. *Williams.*

In this caſe, *Parker,* Chief Juſtice, ſaid, that at *common law*, if a *Biſhop* ſeized in right of his *church*, or a huſband in right of his wife, had aliened by fine, &c. it was but a *diſcontinuance.* 3 *Cro.* 85, &c. *Vide Mod. Rep. vol.* 10. *p.* 243.

Michaelmas, 1 *Geo. Clerk* v. *Lee.*

See this caſe fully ſtated in page 143 of this work, under the head *Attorney.*

Trinity, 5 *Geo: Dr. Bows* v. *Jurat.*

Dr. *Bows* vicar of *New Romney*, brought a *libel* in the *ſpiritual court* againſt the defendant, one of his pariſhioners for *Eaſter* offerings; ſuggeſting that they for time out of mind uſed to be paid in that pariſh.

The defendant made no defence at all in the *ſpiritual court*; but after ſentence againſt him, moved this court for a *prohibition*; the motion was granted *niſi.*

The reaſon why the court doubted whether the *prohibition* was to be granted or not, was their ignorance of the practice of the *ſpiritual court.* For the court ſeemed clearly of opinion, that if the practice of the *ſpiritual court* was agreeable to that of the courts at law, *viz.* to take every thing for *confeſſion* againſt a defendant that makes no defence, and ſo give ſentence for the plaintiff without obliging him to prove the truth of his caſe, then the *prohibition* was not to be granted; becauſe the cuſtom ſet forth by the plaintiff was not denied by the defendant, and conſequently no occaſion for the trial by cuſtom. But in caſe the practice of the *ſpiritual court* was, not to give ſentence for the plaintiff even in caſe of no defence made by the defendant without proof made in the court by the plaintiff of the truth of his caſe, that then a *prohibition* was to be granted; becauſe then the ſentence of the *ſpiriritual court* was founded plainly on a proof made before them of the cuſtom, which is not to be permitted, becauſe the proof required by them is very different from *that* required by the *common law.*

The council who ſpoke againſt the *prohibition* ingenuouſly owned, that it was the practice of the *ſpiritual court* to require proof: however, the court took time to conſider, and would not make the rule abſolute. *Vide Mod. Rep. vol.* 10. *p.* 441.

Trinity, 5 *Geo. Aſgill* v. *Hunt, or Hunt* v. *Hargill.*

On proceſs in the *ſpiritual court* for calling a woman *whore* in *London*; after ſentence, this court was moved for a *prohibition.*

But the *prohibition* was denied; for the court ſaid, that it was known to be a rule laid down in the books, that where it does not appear on the face of the *libel*, that the matter is of *temporal* and not *ſpiritual* cognizance, there a *prohibition* may be granted after ſentence; but where it does not appear it muſt be taken advantage of before ſentence. Now, here the offence in the *libel* is certainly a matter of *ſpiritual* cognizance; and though it does not appear in the *libel* that the words were ſpoken in *London*, yet it would not take away the juriſdiction of the *ſpiritual court*, were it not for a particular cuſtom, by virtue of which theſe words are puniſhable in *London:* but this being a particular cuſtom, the court can no more *judicially* take notice of it than they can of any other cuſtom of the city of *London*; and if the cauſe is removed out of the city courts by *habeas corpus*, the cuſtom muſt be returned, or no *procedendo* can ever be granted. *Vide Mod. Rep. vol.* 10. *p.* 440. *Forteſcue, p.* 347.

Michaelmas, 6 *Geo. Herbert* v. *The Dean and Chapter of Weſtminſter.*

On a *libel* in the *ſpiritual court* of the *dean and chapter*, which is a *peculiar*, againſt Mr. *Herbert*, who had got poſſeſſion of the new chapel, before *B.* the commiſſary of the *dean and chapter*, and who had a leaſe of the freehold of this chapel from the *dean and chapter*, and after *B.* had brought an ejectment againſt *Herbert* to turn him out; the *libel* was for preaching without licence, and without any pretence of right to demand a licence, and that *B.* might have juſtice, and Mr. *Herbert* be perpetually ſilenced; and this was for not having a licence from them as *Ordinary*, having a peculiar juriſdiction, as pretended.

Per curiam. Let there be a rule for a *prohibition*, becauſe this ſuit was founded on no *canon*; for they could not mention one not to preach without licence of the *Ordinary*, and the act is *biſhop* or *archbiſhop*, and this was a ſuit clearly within the act of uniformity, and ſo there is a remedy on that ſtatute, and it is a perſonal power given to the *biſhop* and *archbiſhop*, and not to the *Ordinary*, ſo a *prohibition* was granted by the whole court. *Vide ſtat.* 2 *H.* 4. *cap.* 15. againſt preaching without licence. *Vide Forteſcue, p.* 345.

Michaelmas, 10 *Geo. Middleton and Wife* v. *Croft.*

See this caſe fully ſtated in page 8 of this work, under the head *Abatement.*

Michaelmas, 10 *Geo. Palmer* v. *The biſhop of Exeter.*

Sir *Thomas Bury* ſet up his arms in the church of *St. Davis*'s in *Exeter:* the *Ordinary* promoted a ſuit in the *ſpiritual court* to deface them, as being ſet up without his conſent. The court was moved for a *prohibition*, on the authorities that an action lies by the heir for defacing the monument of his anceſtor; but *Eyre* and *Forteſcue*, Juſtices, ſaid, the *Ordinary* was judge what ornaments were proper, and might order them to be defaced. *Vide Stra. vol.* 1. *p.* 576.

Hilary, 11 *Geo. Archer* v. *Sweetnam or Swetnam,* v. *Archer.*

Adjudged, that when ſeats are pulled down in the *church*, in order to a repair, yet a preſcription to have ſeat remains to every one, ſo that if ſeats are built up by the *Ordinary*, where another had an ancient one, or built on part of it, it is illegal, and if the *ſpiritual court* interpoſes, a *prohibition* lies. *Vide Forteſcue, p.* 346. *Mod. Rep. vol.* 8. *p.* 338.

Michaelmas, 12 *Geo. The King* v. *White.*

On a *mandamus* directed to the *archdeacon*, to ſwear in a churchwarden, he returned, *he was not elected*; on this matter coming before the court, *Forteſcue*, Juſtice, ſaid, that it was ſettled, and had been often ruled, that the *archdeacon* could not judge of the election, and therefore this return was ill. Whereon a peremptory *mandamus* was granted. *Vide Raym. vol.* 2. *p.* 130.

Trinity, .13 *Geo* *Townſhend* v. *Thorpe*.

The plaintiff declared in *prohibition*, that he was indicted for an *aſſault*, with intent to commit *ſodomy*, notwithſtanding which, he was proceeded againſt in the *ſpiritual court* for the ſame offence, and drunkeneſs. The defendant pleaded, that the plaintiff was pariſh-clerk, and that the ſuit was not only to puniſh him for *incontinency*, but alſo to deprive him of his office, and on a demurrer thereon, in *Michaelmas* term laſt, as it was going to be argued, the court propoſed to ſtay till the indictment was tried: and it having been tried, and the defendant convicted, and pillored; the court, without ordering the declaration to be amended, granted a conſulation *as to* the proceeding to deprive, and confirmed the *prohibition* as to any other puniſhment. They ſaid he was an *eccleſiaſtical* perſon as to every thing but his election. *Salk.* 536. *Mar.* 101. *Salk.* 550. *Vide Strange, vol.* 2. *p.* 776.

Trinity, 13 *Geo.* *Thomas* v. *Batty*.

An executor brought a *libel* in the *ſpiritual court*, for taking a tankard without his conſent, on pretence that the teſtator gave it the defendant if he died of his then ſickneſs. And the court granted a *prohibition*, this not being a legacy, but a *gift in caſe of death* the validity whereof may be tried in an action of *trover*. *Vide Strange, vol.* 2. *p.* 777.

Michaelmas, 13 *Geo.* *Caſtle* v. *Richardſon*.

On a *libel* in the *ſpiritual court*, for not taking on him the office of *chapelwarden*, the defendant pleaded, that it was a *donative*, and thereon moved for a *prohibition*. And on debate the ſame was denied, the whole court being of opinion, that though there was a difference as to the incumbent, yet as to the pariſh officers, there was none; for they are the officers of the pariſh, and not of the patron of the *donative*. *Vide Strange, vol.* 2. *p.* 715.

Hilary, 2 *Geo.* 2. *Ferguſon* v. *Cuthbert*.

A *prohibition* was moved for to a ſuit in the *ſpiritual court* for calling a woman *jilt and ſtrumpet*, and ſaying *he would cut his wife's legs off if ſhe was ſuch a ſtrumpet*; which was denied.

Per curiam. The words are a charge of *incontinence*, and the ſignification of them well known. *Vide Stra. vol.* 2. *p.* 823.

Trinity, 2 *Geo.* 2. *Sereen* v. *Cockernutt*.

In *prohibition* for ſuing a quaker in the *eccleſiaſtical court* on *ſtat.* 7 & 8 *W.* 3. *c.* 34. for repairing of the church, the act giving a remedy before juſtices of peace; though the juriſdiction of the *ſpiritual court* is not ſaved in the act, yet the court held a *prohibition* would not lie, and that it is a new remedy given by the ſtatute, and the old one not taken away; which appears more fully by *ſtat.* 7 & 8 *W.* 3. *c.* 6. which gives the like remedy for ſmall tithes. *Vide Forteſcue*, *p.* 347.

Michaelmas, 3 *Geo.* 2. *Edgworth* v. *Smalldridge*.

The *executor* proved the will in the *prerogative court*, and a legatee ſued him in the *Arches*, which is a court held within the dioceſe of *London*, but belonging to the Archbiſhop of *Canterbury*. The defendant moved for a *prohibition*, he living in *Hertfordſhire*, and therefore by *ſtat.* 23 *H.* 8. *c.* 9. ought not to be cited out of the dioceſe, this not being within any of the exceptions in the ſtatute.

Per curiam. The general ſaving, as to the probate of wills, extends to this, which is in conſequence of their having juriſdiction to cite a man out of the dioceſe to prove a will; and if his living out of the dioceſe in which the will was proved is an objection to ſuing him there for a legacy, it will overthrow the juriſdiction of the *ſpiritual court* as to legacies: the executor, by proving the will in the *Arches*, ſubmits to the juriſdiction of that court: it is the *Arches*, and not the *prerogative court*, where the will is to be proved; and it is proper the executor ſhould be ſued in the court where he muſt render an account, and get his diſcharge. *Vide Stra. v.* 2. *p.* 847.

Michaellmas, 4 *Geo.* 2. *Dr. Gooche* v. *The Biſhop of London*.

The Biſhop libelled in the *ſpiritual court*, ſuggeſting that Dr. *Gooche*, as archdeacon of *Eſſex*, *with-held to pay* 10*l.* due to the biſhop as preſtation, for the exerciſe of his exterior juriſdiction.

The court was moved for a *prohibition*, alledging that they had pleaded there was no preſcription; and then, that being denied, a *prohibition* ought to go for defect of trial.

On the other ſide it was argued, that the libel being general, it muſt not be taken that they go on preſcription; but it is to be conſidered in the ſame light as the common caſe of a penſion, which is ſuable for in the *ſpiritual court*: and the nature of the demand ſhews it muſt have its original from a compoſition, it being a recompence for the *archdeacon*'s being allowed to exerciſe a juriſdiction, which originally belonged to the *Ordinary*. 2 *Cro.* 666. *Salk.* 58. *Cro. Eliz.* 675. 2 *Inſt.* 491.

Per curiam. They may certainly entitle themſelves, *from length of time*, without laying a *preſcription*. And as they have only laid it in general, there is no ground for us to interpoſe, till it appears by the proceedings that a preſcriptive right will come in queſtion: if they join iſſue on the plea, it will then be proper to apply; but at preſent there ought to be no *prohibition*. *Vide Stra. vol.* 2. *p.* 879.

Hilary, 6 *Geo.* 2. *Muſgrave* v. *Bovey*.

A *prohibition* was granted to a ſuit for theſe words, ſpoken by one clergyman to another, "You are an "old rogue and a raſcal, and a contemptable fellow, "deſpiſed and hated by every body." *Cumb.* 253, *Vide Strange, vol.* 2. *p.* 946.

Michaelmas, 6 *Geo.* 2. *Peake* v. *Bourne*.

The plaintiff declared in *prohibition* that he was ſued in the *ſpiritual court* for executing the office of deputy pariſh-clerk, without the licence of the *Ordinary*.

On demurrer, three points were made; 1ſt. Whether a pariſh-clerk is a *temporal* or *ſpiritual* officer. 2dly. Whether he can make a deputy. And, 3dly. Whether the licence of the *Ordinary* is requiſite.

It was argued three ſeveral times on all the points: but the court, in giving judgment, founded themſelves only on the laſt, as to which they held a licence was not neceſſary, and therefore gave judgment for the plaintiff in *prohibition*. They ſaid the *canon* did not require it, and indeed it would be a transferring the right of appointment to all intents and purpoſes to the *Ordinary*. *Inſtitutes of the Canon Law* 22, and 2 *Roll. Abr.* 286. *pl.* 44.

As to the other two points, the court ſtrongly inclined that he was a *temporal* officer as to the right of his office, and that he might make a deputy

For the firſt were cited 18 *E.* 3. 27. 13 *Co.* 70. 2 *Cro.* 670. *Pal.* 379. *Mar.* 101. 1 *Keb.* 286. 2 *Roll. Abr.* 285. *pl.* 37. 2 *Brownlow* 11. 1 *Lev.* 75. 1 *Vent.* 143. 2 *Lev.* 18. *Salk.* 536. *Goodb.* 163. *Old Bendl.* 142. 1 *Leon.* 94. *Fitzh. Annuity* 40. *Hugh's Parſons Law*, 275. And when the court were preſſed with their own authority in *Townſhend* v. *Thorpe*, they ſaid it was a haſty opinion into which they were tranſport- by the enormity of the caſe.

From the ſecond were cited 1 *Roll. Rep.* 274. *Mo.* 845. (3 *Bulſt.* 77. 2 *Roll. Rep.* 274. 9 *Co.* 48.) That a conſtable may make a deputy: and the common diſtinction is between a *judicial* and *miniſterial* officer, as a pariſh-clerk certainly is. *Vide Stra. vol.* 2. *p.* 942.

Hilary,

Hilary, 7 *Geo.* 2. *Clews* v. *Bathurſt.*

On an action for maliciouſly procuring the plaintiff's wife to exhibit articles of the peace againſt him, and for living with her in adultery, the plaintiff proved marriage by the parſon and a woman, and alſo a conſummation. To encounter which, the defendant produced a ſentence of the *conſiſtory court* of *London*, in a cauſe of jactitation of marriage brought by the woman againſt the plaintiff, wherein ſhe was declared free from all contract, and perpetual ſilence impoſed on the plaintiff, which ſentence was pronounced ſince iſſue joined in this cauſe; and the Chief Juſtice ruled this to be concluſive evidence, till reverſed by appeal; and the plaintiff had judgment. *Vide Strange, vol.* 2. *p.* 960.

Eaſter, 8 *Geo.* 2. *Pew* v. *Creſwell & al. Churchwardens of St. Mary, Rotherhithe.*

The plaintiff was *libelled* againſt in the *ſpiritual court* for a nuiſance and encroachment on the *church-yard*; to which he pleaded, that he was owner of four tenements, which formerly ſtood on the ground in queſtion, and that his preſent building was on the old foundation, and did not project farther. And this not being a matter properly triable there, a *prohibition* was granted; for though interrupting the uſe of a *church-yard*, as a *church-yard*, is properly cognizable in the *Eccleſiaſtical Court*, yet the bounds of it, which is a matter of freehold, ought not to be determined there. *F. N. B.* 51. *A.* 2 *Roll. Abr.* 137. *pl.* 4. 1 *Roll.* 12. *Mo.* 413. 1 *Sid. Butler* v. *Yelman. Vide Stra. vol.* 2. *p.* 1013.

Michaelmas, 12 *Geo.* 2. *Lockey* v. *Dangerfield.*

On a *libel* brought in the *ſpiritual court* for theſe words, "You are a bawd; the court was moved for a *prohibition*, and *Raym.* 115. 3 *Mod.* 74. were cited, to prove that an action lies: but the court, on conſideration, diſcharged the rule; for it is not a charge of keeping a bawdy-houſe, which is puniſhable as a temporal offence. 1 *Roll. Abr.* 44. *pl.* 8. and an action will lie for thoſe words; but for the word *bawd* only it will not, that being perhaps no more than a ſolicitation of chaſtity. 1 *Sid.* 241. 1 *Vent.* 53. *Salk.* 552. and *Trinity* 4 *Ann, The Queen* v. *Pearſon*, who was convicted at *Hicks's Hall* for being a common bawd, and procuring men and women to meet and commit fornication, the court, on error, reverſed it, ſince it might only be in a private room, and be but a ſolicitation of chaſtity, and not amount to the temporal offence of keeping a bawdy-houſe, to the nuiſance of the neighbourhood. And the ſame point was determined in this court *Hilary* 3 *Geo. Savil* v. *Kirby. Vide Stra. vol.* 2. *p.* 1100.

Hilary, 13 *Geo.* 2. *The Rector, &c. of St. George, Hanover Square,* v. *Stewart.*

The pariſh was cited to appear in the biſhop of *London's court*, to ſhew cauſe why a licence ſhould not be granted to Mr. *Stewart* to erect a charity-ſchool on part of the *church-yard*. And on motion of the rector and pariſhioners a *prohibition* was granted, for the *eccleſiaſtical court* has nothing to do with this, and cannot compel them without their conſent. *Vide Stra. vol.* 2. *p.* 1126.

Trinity, 13 *Geo.* 2. *The King* v. *The Archbiſhop of Armagh, and Nathaniel Whaley, Clerk.*

See this caſe fully ſtated in page 9 of this work, under the head *Abatement*.

Hilary, 30 *Geo.* 2. *Sir John Trelawny, Baronet,* v. *The Biſhop of Wincheſter.*

In an action of *debt* brought by the plaintiff againſt the defendant for 600 *l.* for five years ſalary, due for ſeveral offices, viz. *great or chief ſteward to the biſhoprick and all its caſtles, lordſhips, manors,* &c. *and conductor of the men and tenants of the Biſhop thereof, with a ſalary of* 100 *l.* per annum, *and of maſter-keeper or preſerver of the wild beaſts in all the foreſts,* &c. belonging to the Biſhop, *and chief governor of all birds,* &c. (which was commonly called *Chief Parker,*) with a ſalary of 20 *l. per annum.* Theſe offices, *&c.* were granted to the plaintiff by the late Biſhop of *Winton*, by *letters patent*: on iſſue joined between the parties, the jury found a *ſpecial verdict*; and the queſtion that came before the court on ſuch verdict was,

" Whether Sir *J. Trelawny* the *grantee* was intitled " to hold the two firſt mentioned offices, and to reco-" ver thoſe arrears againſt the preſent *Biſhop*:" as to the office of *chief parker*, it was given up by the plaintiff's council?

After hearing council on both ſides on this queſtion, the court gave their opinion.

Per curiam. We are all unanimouſly of opinion, that an *office* and *fee* which exiſted before *ſtat.* 1 *Eliz.* is not within ſuch *ſtat.* but may be granted *ſince* preciſely in the ſame *manner* as it was granted before, and that the *utility* or *neceſſity* of ſuch an office is no more *material ſince* that *ſtat.* than it was *before*; and we think this opinion agreeable to the words and intent of the ſtatute, and to every precedent made ſince: therefore the plaintiff muſt have judgment. *Vide Bur. vol.* 1. *p.* 219.

Eaſter, 31 *Geo.* 2. *The King* v. *The Biſhop of Durham.*

On a motion for a *mandamus* to the *Biſhop* of *Durham*, commanding him to exerciſe his viſitorial power over the temporalities of that *church*, the merits of the queſtion was,

" Whether the *ſucceſſor's prebendary* (Dr. *Sterne*) had " a right to two years and a half's profits accruing " during the vacancy of the ſtall, from the death of " Dr. *Benſon Biſhop* of *Glouceſtr*, (the laſt preceding " prebendary) which intermediate profits the other " *prebendaries* had received, and divided among " them?"

After hearing the arguments of the council on both ſides, the court gave their opinion.

Lord *Mansfield* ſaid, he thought an *action at law* was the proper method; and quoted the caſe of Dr. *Young* v. Dr. *Lynch, p.* 26. *Geo.* 2. 1753, *B. R.* and alſo *Seagar*'s caſe in *Chancery*.

" Whether the *Biſhop* can have a juriſdiction to de-" termine this point, or whether matters of property " in cathedrals can be determined otherwiſe than ac-" cording to the courſe of the law of the land?" is a great queſtion, and certainly the *Dean* and *Chapter* muſt have an opportunity to ſhew cauſe againſt a *mandamus* being iſſued to the *Biſhop* to exerciſe ſuch juriſdiction.

In this particular caſe the queſtion muſt be litigated not only with the members of the body, but with the *executors* and *adminiſtrators* of the deceaſed prebendaries, over whom the *Biſhop* (ſuppoſing him viſitor, and as viſitor to have conuiſance of ſuch a caſe) can have no power, which alone is deciſive againſt his juriſdiction in this queſtion.

The council on behalf of Dr. *Sterne*, the *prebendary*, ſeeing the court clearly againſt his client, declined the motion. *Vide Bur. vol.* 1. *p.* 567.

Trinity, 32 & 33 *Geo.* 2. *Symes* v. *Symes.*

A motion for a *prohibition* to the *eccleſiaſtical court* was denied in this cauſe by the whole court, for they ſaid, where the *eccleſiaſtical court* have juriſdiction, (as in this caſe) and they have pronounced ſentence, the remedy muſt be by *appeal*, and not by way of *prohibition*; but if they proceed where they have *no juriſdiction* at all, there a *prohibition* may be applied for after ſentence in the *eccleſiaſtical court. Vide Bur. vol.* 2. *p.* 813.

Trinity, 4 *Geo.* 3. *John, late Biſhop of Lincoln, now Biſhop of Saliſbury,* v. *Wolfarſtan.* Error.

A *writ of error* was brought on a judgment in the *C. B.* againſt the *Biſhop* of *Lincoln*, and *T. W.* his *clerk*, in a *quare impedit* brought by the grantee of the *advowſon* in *fee* of the *church* of *Great Sheepy*.

The caſe was ; *Great Sheepy* is a rectory, and a benefice with cure of ſouls, of above the yearly value of 8 *l.* That *T. G.* the incumbent, accepted and took another benefice with cure of ſouls, namely, the living of *Seale*, and was inſtituted, admitted, and inducted into the poſſeſſion of the ſame, and thereon the plaintiff below preſented *T. H.* to the rectory of *Great Sheepy*, who tendered himſelf to the *Biſhop*, and was refuſed by him.

The *Biſhop's plea*, which was *bad*, admits the incumbency of *Grieſley*, and his acceptance of the living of *Seale*, but ſuppoſes the avoidance of his former *church* to have been made by his *inſtitution* to the ſecond, on the 31ſt day of *October* 1759, and then by computing from the *inſtitution*, ſhews that *ſix months* elapſed, whereon he collated *T. W.* to it by *lapſe* on the 20th day of *June*.

The *replication* (which was *informal)* ſpecifies the time of *Grieſley*'s induction to *Seale* to have been on the 22d day of *December* 1759, and alledges that on the 20th of *June* 1760, the day when the Biſhop collated his clerk *T. W. ſix months* from the induction of *Grieſley* to *Seale* had not *elapſed*.

The Biſhop in his *rejoinder* inſiſts on the *lapſe* incurring at the end of *ſix months* from the time of *Grieſley*'s inſtitution to *Seale*, and *traverſes* his refuſal of *Hall* before he himſelf had collated his own clerk, or that *Hall* tendered himſelf to him *before* he had collated the other, or within *ſix months* after the *inſtitution* of *Grieſley* to *Seale*.

On this *rejoinder* the plaintiff *demurred* both *generally* and *ſpecially*, and the Biſhop joined in *demurrer*.

The court were clearly of opinion, that as to the *lapſe*, the voidance of the former *benefice* does not take place till *induction* to the *ſecond*, and that a grant of a *next preſentation*, or of an *advowſon* made after the *church* was actually *fallen vacant*, was a void grant, and ſaid, that the fact was not ſufficiently aſcertained on the pleadings, for tho' it appeared that the grant was made on the 9th day of *November* 1759, yet it does not appear at that time *Grieſley* was inſtituted to the *ſecond benefice*, conſequently the objection cannot be let in, that it was vacant when the grant was made.

Per curiàm. Let the judgment be affirmed. *Vide Bur. vol.* 3. *p.* 1504.

Ejectment.

Eaſter, 4 *W.* & *M.* *Knight* v. *Syms or Symms.*

In *ejectment* for five cloſes of arable and paſture, called —— containing twenty acres in *D.* on *not guilty* pleaded, a verdict was given for the plaintiff, but judgment was arreſted, becauſe *ejectment* lies not of twenty acres arable and paſture, without ſhewing how much of the one, and how much of the other ; and *clauſum* i. e. *a cloſe* does not help the matter : *furlinga* i. e. *a furlong* is a known meaſure ; ſo is *bovata* i. e. *as much land as one can plough*, *hida* i. e. *an hyde*, *caruca* i. e. *a carucate of land*, but *clauſum* is not ſo certain in law, and the adding a name to the cloſe is nothing ; and *Holt*, Chief Juſtice, affirmed *Savill*'s caſe for law. *Vide Salk. vol.* 1. *p.* 254. *Mod. Rep. vol.* 4. *p.* 97.

Michaelmas, 4 *W.* & *M.* *Whittingham* v. *Andrews.* Error.

On a *writ of error* brought on a judgment in *ejectment* in the court of *Durham*, and the declaration was of *coal mines*, without ſhewing the number of mines. It was not queſtioned but an *ejectment* lies of a *coal* mine, 2 *Cro.* 150. But the incertainty in not expreſſing the number was doubted : for the plaintiff it was urged, that the courſe was ſo in *Durham*, and that the declaration was according to the plaintiff's leaſe ; and as this was the conſtant courſe in *Durham*, ſo it was well enough underſtood in thoſe parts, comparing it to the *ejectment* for ſo many acres of mountain, in which caſe this court would not reverſe the judgment, but wrote to the juſtices in *Ireland* to certify whether the practice there could warrant ſuch *ejectments* ; and being certified, this court did not reverſe the judgment. And here the court were ſatisfied ſuch *ejectments* were uſual in *Durham*, and affirmed the judgment *Vide Salk. vol.* 1. *p.* 255. *Mod. Rep. vol.* 4. *p.* 143.

Eaſter, 5 *W.* & *M.* *Gwynn* v. *Pie.*

In *ejectment* for two meſſuages, two gardens, and ſeventy acres of land, fifteen acres of meadow, and thirty acres of paſture in *Much Dew-Church*, &c, the plaintiff delivered declarations to *two* tenants only, and as to the lands in their poſſeſſion, the defendants entered into the common rule ; but becauſe he had made ſeveral ſmall purchaſes in that pariſh, and the plaintiff claimed only twenty acres lately granted to him by leaſe from the *Biſhop* of *Glouceſter* ; therefore he moved by his council, that the plaintiff might give a note in writing, before the firſt day of the next term, what lands in particular he claimed, and where ſuch lands lay, and in whoſe poſſeſſion, &c. or otherwiſe that he might not proceed to a trial at the next aſſizes ; for the defendant not knowing what lands the plaintiff would claim, could not tell what purchaſe-deeds to produce at the trial ; *but not allowed. Vide Mod. Rep. vol.* 4. *p.* 214.

Hilary, 8 *W.* 3. *Anonymous.* Error.

In *ejectment* on a demiſe by a corporation aggregate, the plaintiff had a verdict in *C. B.* and a *writ of error* being brought here, it was objected, that the demiſe is not ſet forth by the deed ; but the judgment was affirmed ; for the demiſe is confeſſed to be good by confeſſing *leaſe*, *entry*, and *ouſter* ; and the jury could never have found for the plaintiff, if there had not been a good demiſe. *Vide Mod. Rep. vol.* 12. *p.* 113.

Hilary, 8 *W.* 3. *Smartly* v. *Henden.*

In *ejectment* for certain empty houſes, a leaſe was ſealed on the land, and a declaration delivered to the caſual *ejector*, and judgment and execution had ; yet becauſe they had not moved for a peremptory rule to plead, the judgment was ſet aſide ; and held that in ſuch caſe there muſt be an affidavit of the ſealing of the leaſe, entry, &c. *Vide Salk. vol.* 1. *p.* 255.

Hilary, 8 & 9 *W.* 3. *Partridge* v. *Ball.* Error.

In *ejectment* for lands in *Suffolk*, on the demiſe of the corporation of *Bury*, on *not guilty* pleaded, a verdict was given for the plaintiff. But it was moved in *arreſt of judgment* in *C. B.* that it does not appear on the record, that the leaſe was by deed. And the prothonotaries there certified, that the practice was, notwithſtanding the common rule, of confeſſing *leaſe*, *entry*, and *ouſter*, in *ejectment* for things incorporeal, as tithes, or on demiſes of corporations, to lay the demiſe by deed. But it was adjudged in *C. B.* that it was aided by the verdict ; and judgment was given there for the plaintiff, on which a *writ of error* was brought in this court, and that judgment affirmed. And *Holt* Chief Juſtice ſaid, that at this day, the caſe in 2 *Cro.* 613. is not law. *Swadling* v. *Pieres.* For now *ejectments* are grounded on fiction. *Vide Raym. vol.* 1. *p.* 136.

Edſter, 9 *W.* 3. *Puliſton* v. *Warburton et al.*

See this caſe fully ſtated in page 58 of this work, under the head *Amendment*.

Hilary, 10 *W.* 3. *Anonymous.*

H. brought an *ejectment* in *C. B.* and at the aſſizes was nonſuited, and coſts were taxed on the nonſuit ; the plaintiff brought a new *ejectment* in *C. B.* and a rule was made to ſtay all proceedings till the coſts of the nonſuit were paid. Then he brought an *ejectment* in this court, and on producing the rule of the court of *C. B.* the ſame rule was made here. *Vide Salk. vol.* 1. *p.* 255.

Hilary, 10 *W.* 3. *Anonymous.*

A motion was made for a rule to plead in *ejectment*, and the affidavit was, that the declaration was delivered to the ſervant of the tenant in poſſeſſion; and alſo that ſince that the tenant in poſſeſſion had wrote a letter to him, which he verily believed to be his hand, deſiring him, being attorney for the plaintiff, to intercede with the leſſor (who was a mortgagee) for forbearance; and the rule was granted. *Vide Salk. vol.* 1. *p.* 256.

Summer Aſſizes, 10 *W.* 3. *Boner* v. *Juner.*

It was ruled by *Holt* Chief Juſtice, at *Ryegate* in *Surry*, upon evidence at a trial, that *coparceners* may join in *ejectment*. And he ſaid, the caſe in *Moor* 682. *n.* 939. was not law. *Vide Raym. vol.* 1. *p.* 726.

Michaelmas, 10 *W.* 3. *Anonymous.*

If notice in *ejectment* is given to an under-tenant, and he does not acquaint his landlord therewith, but ſuffers judgment to go againſt him, the court, on motion, will not ſuffer execution to be taken out, till the right is tried. *Vide Mod. Rep. vol.* 12. *p.* 211.

Trinity, 11 *W.* 3. *Underhill* v. *Durham.*

The plaintiff moved that the landlord might be joined as a defendant with the tenant in poſſeſſion; but it was denied; for the court cannot compel him without his conſent; otherwiſe if he requeſt it himſelf. In another cauſe, a motion was made on the behalf of the landlord, that he might be made a defendant; and the plaintiff oppoſed it, becauſe he was a member of parliament.

Holt, Chief Juſtice. He muſt be joined, and we cannot compel him to waive his privilege.

A perſon privileged cannot be joined to be a plaintiff, but he may be made a defendant, for every one ought to be allowed to defend his own right. *Vide Salk. vol.* 1. *p.* 256.

11 *W.* 3. *Stocker* v. *Berny. At the Summer Aſſizes at Lincoln.*

Holt, Chief Juſtice. If *H.* has poſſeſſion of land for *twenty years* uninterrupted, and then *B.* gains poſſeſſion, on which *H.* brings an *ejectment*; though *H.* is plaintiff, yet his poſſeſſion for *twenty years* will be a good title for him, as well as if *H.* had been then in poſſeſſion; becauſe poſſeſſion for *twenty years* now by virtue of *ſtat.* 21 *Jac.* 1. *cap.* 16. is like a deſcent at *Common Law*, which *tolls* the entry. *Vide Raym. vol.* 1. *p.* 741.

Michaelmas, 11 *W.* 3. *Anonymous.*

A declaration in *ejectment* had been delivered to one to whom the keys were given to let the houſe.

Per curiam. The delivery is not good, becauſe it ſhould be to the tenant in poſſeſſion, and he is only a ſervant, and the plaintiff is not without remedy, for he may ſign a leaſe on the land. *Vide Mod. Rep. vol.* 12. *p.* 313.

Michaelmas, 11 *W.* 3. *Sherwin* v. *Sir Walter Clayes.*

Per curiam. When it appears to the court, that a ſuit is vexatious, they will not grant a trial at bar in *ejectment*, without naming a ſufficient plaintiff.

And by favour of the court, one may have a trial at bar, though he ſue *in forma pauperis. Vide Mod. Rep. vol.* 12. *p.* 318.

Eaſter, 12 *W.* 3. *Anonymous.*

The plaintiff had a judgment in *ejectment*, but was hung up by *injunction*, ſo that the term expired. The court was moved to enlarge the term, the injunction being now diſſolved.

Holt, Chief Juſtice. We cannot alter records.

Note, The ſame motion was made *Eaſt.* 3 *Ann.* in this court and denied for the ſame reaſon; and ſaid, that it could not be done without conſent, and that in Sir *John Roll*'s caſe (which was cited) the term was enlarged; but it was by conſent. *Vide Salk. vol.* 1. *p.* 257.

Trinity, 12 *W.* 3. *Anonymous.*

In an *ejectment* for lands in *Middleſex*, the declaration was delivered after the *eſſoign day* of *Michaelmas* term; the plaintiff let that term paſs without doing any thing, and alſo till the laſt day of *Hilary* term in like manner, when he moved for a rule to plead, and for want of a plea, ſigned the judgment: and the court held this to be a ſurpriſe on the defendant, for when he had let all *Hilary* term ſlip without doing any thing, within which time he might have had a trial, he ought to have given freſh notice: as in the caſe where a man lets an aſſizes paſs in a country cauſe without proceeding; wherefore the judgment was ſet aſide. *Vide Salk. vol.* 1. *p.* 257.

Eaſter, 12 *W.* 3. *Slabourne* v. *Bengo.*

In *ejectment*, the plaintiff declared upon two ſeveral demiſes, *to have the tenements aforeſaid, &c.* by virtue whereof he entered, and was poſſeſſed, until the defendant entered into the *tenements*, and the plaintiff expelled and removed him out of, &c. his ſaid term not being then expired. The court was moved in *arreſt of judgment*, that the words *tenements aforeſaid* were uncertain, and therefore ill, for it did not appear which; the ſame of *his term aforeſaid then not expired*, which makes the former objection the ſtronger, becauſe it complains but of one. But the court held the firſt to be well enough, and that it would extend to both. And as to the other, if it had been omitted, the declaration had been well enough, and therefore it would not hurt it. Therefore judgment was given for the plaintiff. *Vide Raym. vol.* 1. *p.* 561.

Eaſter, 12 *W.* 3. *Badger* v. *Floyd.* Error.

The plaintiff had judgment in *ejectment*, on which a *writ of error* being brought, bail was given to proſecute, and anſwer the *meſne profits*, and pending it, the plaintiff brought an action of *debt* for rent.

Per curiam. The *writ of error* does not hinder the plaintiff from bringing an action of *debt*, or diſtraining for his rent; and here he might have entered without a writ of execution, for only all executions are ſuſpended by the *writ of error*; and in a *real* action, after judgment, the plaintiff may enter, notwithſtanding a *writ of error*, if his entry was lawful without the judgment, for that is not by force of the judgment, which ſhall not put him in a worſe condition than he was in before. And whereas it was urged, that in the *Exchequer*, they had laid a plaintiff by the heels for ſuch a thing,

Holt, Chief Juſtice ſaid, it muſt have been by virtue of their equitable power, which this court had not. *Vide Mod. Rep. vol.* 12. *p.* 398.

Hilary, 13 *W.* 3. *Johnſon* v. *Allen.*

Per curiam. Where there be two tenants in common, and one of them does actually *ouſt* the other, he may maintain an *ejectment* againſt him, and he ſhall not be admitted to defend, without confeſſing *leaſe*, *entry* and *ouſter*; and in that caſe the plaintiff ſhall only recover his property in *an undivided ſhare*, and ſhall be put in poſſeſſion of no more; and in ſuch caſe the ſheriff ſhall give the ſame execution as he would do of rent on aſſize, and there can be no mean profits at all recovered in caſe of tenants in common; but if one enters only on another, claiming only as tenant in *common*, and the other brings an *ejectment*, it will be hard to enforce the defendant, who has done nothing but as tenant in common, to confeſs *leaſe*, *entry*, and *ouſter*; and here it was ruled, that there ſhould be a confeſſion of *leaſe*, *entry*, and *ouſter*, in caſe it ſhould appear to be an actual *ouſter* on evidence at the trial, *otherwiſe* not; and it was agreed, that to obſtruct one to make the utmoſt profit of his moiety, would amount to an *ouſter*, but not to conſent to have the rents raiſed on the tenants would not. *Vide Mod. Rep. vol.* 12. *page* 657.

Hilary, 13 *W.* 3. *Gree* v. *Rolle and Newell.*

The plaintiff brought an *ejectment* againſt the defendant for lands in *Devonſhire*; the defendant appeared, and entered into the common rule in *ejectment*, and pleaded jointly *not guilty*. The cauſe being brought to trial at the aſſizes at *Exeter*, the defendant *Rolle* appeared, and confeſſed *leaſe*, *entry*, and *ouſter*, but the defendant did not appear. On which the plaintiff entered a *non pros* againſt *Newell* at the ſaid aſſizes. And as to the defendant *Rolle*, the jury found a *ſpecial* verdict; on which the ſingle queſtion was, whether the entry of *ceſtuy que truſt* would be ſufficient to avoid the *ſtatute of limitations*, 21 *Jac.* 1. *c.* 16.?

And it was held clearly by the whole court, that ſuch entry was ſufficient to avoid the ſtatute; and they would not hear an argument on the point. And a rule was made that the plaintiff ſhould have judgment, unleſs the defendant ſhewed cauſe to the contrary before the end of *Trinity* term then laſt paſt. On which the court was moved to ſet aſide the ſaid rule, becauſe the *retraxit* was irregularly entered; and the plaintiff, after the entry of it, ought not to have proceeded, ſuppoſing it had been regularly entered; becauſe by his declaration, he ſays that he has a right againſt both jointly, which ſuppoſal he has falſified by the entry of the *retraxit*, confeſſing thereby, that he has no right at all againſt *Newell*.

Per curiam. If an *ejectment* is brought againſt two, and iſſue is joined, and then one of them dies, and a *venire* is awarded as to the two defendants, and a verdict againſt two, yet on ſuggeſtion of the death of one of them on the roll, the plaintiff ſhall have judgment for the whole againſt the other. *Cro. Jac.* 303, 274. 2 *Keb.* 845. becauſe this action is grounded on *torts*, which are irregular in their nature, and one may be found guilty, and the other acquitted.

Then it was further argued, that this *retraxit* was entered irregularly, for the *non pros* muſt be interpreted a *retraxit*, or nothing; for it cannot be a *nonſuit*; for if it were a nonſuit, then the plaintiff being nonſuited againſt one, ſhall be nonſuited againſt both. And as a *retruxit*, it cannot be good, becauſe the defendants have joined in plea, and therefore neither the plaintiff nor the judge of aſſize can ſever them; and all the caſes where *retraxits* have been adjudged good, where the pleas were ſeveral, and not joint. *Long.* 5 *Ed.* 4. 108. *Bro. Judgment* 77.

Holt, Chief Juſtice. On the *non pros* entered againſt one of the defendants, judgment ought to have been entered for him, which could not be done at *niſi prius*; and before ſuch entry he is not diſcharged, and the plaintiff ought not to have proceeded againſt the other. He ſaid, that he had never ſeen ſuch a *retraxit* as this; and he was of opinion, that a *retraxit* cannot be entered againſt one of the defendants where they join in plea. Beſides, that before the ſtatute of *York*, the plaintiff could not have been nonſuited at *niſi prius*, becauſe he was not demandable there. And therefore he held, that this *retraxit* was irregularly entered, and that the plaintiff ought not to have his judgment.

But *Powys* and *Gould*, Juſtices, held the contrary; 1ſt. Becauſe the plea is in its nature ſeverable, and therefore a *retraxit* may be well entered as to one of the defendants. 2dly. That the judge of *niſi prius* may receive ſuch entry. Wherefore judgment was given for the plaintiff. But afterwards a *writ of error* was brought on this judgment in parliament; and the judgment of this court was affirmed, and 50 *l.* coſts given to the defendant in *error*. *Vide Raym. vol.* 2. *page* 716. *Mod. Rep. vol.* 12. *p.* 651.

Lent aſſizes, 13 *W.* 3. *Chettle* v. *Pound.*

On an action of *debt* for rent, the defendant pleaded *nil debet*.

The plaintiff gave in evidence a note in writing, by which the defendant agreed, to hold for one year, rendering a rent of 15 *l.* and in fact he was grantee of a reverſion, expectant upon an eſtate for life, which life was dead at the time of the giving of the note, which grant was *forty years* before, and he was never in poſſeſſion, but the tenant for life was all the time in poſſeſſion during his life. The defendant gave in evidence a *prior* grant of the ſaid reverſion, and it was ruled by *Holt*, Chief Juſtice:

That the defendant in this caſe may give in evidence, *he had no intereſt in the tenements*, the plaintiff having never been in poſſeſſion, notwithſtanding the note ſigned by the defendant, by which he agreed to hold, *&c.* But if the plaintiff had been in poſſeſſion, though but a tenant at will, *&c.* then the defendant could not have given this in evidence, without having been evicted. And therefore the plaintiff was *nonſuited*. *Vide Raym. vol.* 1. *p.* 746.

Summer Aſſizes, 13 *W.* 3. *Claxmore* v. *Searle & others.*

The plaintiff brought an *ejectment* againſt the defendants *Searle*, *Field*, and *Falkner*; *Field* appeared, and confeſſed *leaſe*, *entry*, and *ouſter*, *Searle* and *Falkner* did not appear, nor confeſs *leaſe*, *entry*, and *ouſter*, on which, by the direction of *Holt*, C. J. at *Horſham* in *Suſſex*, a verdict was given by the jury for the plaintiff againſt *Field* generally; and a verdict was given againſt the plaintiff for *Searl* and *Falkner*; and an indorſement was made upon the *poſtea* that this verdict was for *Searle* and *Falkner*, becauſe they did not appear and confeſs *leaſe*, *entry*, and *ouſter*; and for this reaſon, that they ſhould not have coſts againſt the plaintiff, and that the plaintiff ſhould have judgment againſt the *caſual ejector*, for ſuch lands as were in the poſſeſſion of *Searle* and *Falkner*. *Vide Raym. vol.* 1. *p.* 729.

Michaelmas, 1 *Ann.* *Fenwick's Caſe.*

A motion was made to make the leſſor of the plaintiff's wife a defendant in *ejectment*, the plaintiff's title being by a pretended intermarriage, which was controverted.

Holt, Chief Juſtice. To make the landlord a defendant in *ejectment* is of right; for otherwiſe he might loſe his poſſeſſion by combination between the plaintiff and tenant in poſſeſſion: and the court inclined to grant the motion, becauſe there could be no inconvenience, and it would make the verdict more conſiderable; but in regard the wife lived in *Cheſhire*, and muſt have *fourteen* days notice of trial, and the defendant would not waive that, the court perceived it a trick to put off the trial; ſo nothing was done. *Vide Salk. vol.* 1. *p.* 257.

Michaelmas, 1 *Ann.* *Withers* v. *Harris.*

An *habere facias poſſeſſionem* was ſued out on a judgment in *ejectment*, after a year and a day paſt after the judgment was obtained, without ſuing out a *ſci. fac.* and it was argued, that there ought to be a *ſcire facias*, and cited 1 *Sid.* 361. 2 *Keb.* 307. On the other hand it was allowed, there muſt be a *ſcire facias*, for the damages, but not as to the term; for till the reign of King *Charles* 2. it was doubted whether a *ſcire facias* would lie on a judgment in *ejectment*, as appears by 2 *Keb.* 55. 1 *Sid.* 317. and before that time no *ſcire facias* had been brought; and the plaintiff here, as in the caſe of a *real* action, may execute a judgment in *ejectment* by entry without a writ of execution. 2 *Sid.* 156. 1 *Rol. Rep.* 215. *Noy* 11. *Palm.* 263.

Holt, Chief Juſtice, ſaid, that as to the poſſeſſion of the land, an *ejectment* was *real*, and was the only remedy for a termor for years, and a recovery in *ejectment* binds the right and intereſt of him that has the inheritance, and makes a title in the plaintiff; and therefore the *ſcire facias* is as neceſſary in this as in any *real action*; and in a *ſcire facias* on a judgment on *ejectment*, he that hath the inheritance cannot falſify, nor can his

Heir in fee-ſimple, nor any one that claims under him, except the iſſue in tail; and he cannot falſify ſuch a recovery in the point tried, but only in the caſe of a judgment by *default*, or elſe by ſhewing that the defendant's anceſtor made but a feingned defence, and did not ſhew ſuch and ſuch pieces of evidence as he ought to have done; and therefore there is no reaſon why this caſe ſhould differ from the general rule of law; ſo it was ordered, that a *ſcire facias* ſhould go againſt the ter-tenants as well as the defendant: and *Powell*, Juſtice, obſerved, that on a writ of annuity a *ſcire facias* lay on the judgment. *Vide Salk. vol.* 1. *p.* 258. *Raym. vol.* 2. *p.* 806.

1 *Ann.* *Little* v. *Heatcn.*

An *ejectment* was brought by the leſſor againſt the leſſee on a condition of re-entry for non-payment of rent, and on a trial before *Holt*, Chief Juſtice, it was urged, that an actual *entry* and *ouſter* was neceſſary.

Holt, Chief Juſtice, anſwered, that true it was the law had been held ſo, and accordingly it was practiſed till the caſe of *Withers* v. *Gibſon*, 25 *Car*. 2. 3 *Keb*. 218. In which caſe, *Hale*, Chief Juſtice, ruled the law to be otherwiſe on a trial before him at the aſſizes in *Bucks*, and held that the confeſſion of *leaſe*, *entry* and *ouſter*, was ſufficient: that on this opinion of his, a caſe was made and moved in court, where all the judges concurred with him: that accordingly it was held by *Scroggs*, Chief Juſtice, in the caſe of Sir *Robert Pye* v. *Billing*. 1 *Vent*. 332. But that notwithſtanding this, it became a queſtion again after the revolution, and that he himſelf doubting about it, it was moved again in court, and that his brothers were all of opinion with *Hale*, and that accordingly he had ever ſince held it; and ſo it was ruled in this caſe. 3 *Keb*. 282.

N. B. Suppoſe an entry is requiſite to complete the title of the leſſor of a plaintiff. I take it that *entry* is not confeſſed by general rule, but only the *entry* of the nominal plaintiff; and therefore in ſuch a caſe the plaintiff muſt prove an actual *entry* by his leſſor. And *Hale* in 1 *Vent*. 248. ſeems to hint ſo. For the rule only confeſſes that the leſſor of the plaintiff made a *leaſe*, but not that he had a power ſo to do. He confeſſes the leſſor made ſuch a *leaſe*, that the plaintiff entered, and the defendant *ejected* him; but how does this relate to the leſſor's *entry*? *Vide Salk. vol.* 1. *p.* 259. *Raym. vol.* 2. *p.* 750.

Michaelmas, 1 *Ann.* *Anonymous.*

Per curiam. To have judgment againſt a caſual *ejector* ſtand, all things muſt be very fair on the plaintiff's ſide, for the defendant loſes his poſſeſſion by a a fictitious proceeding. *Vide Mod. Rep. vol.* 7. *page* 150.

Michaelmas, 1 *Ann.* *Anonymous.*

Holt, Chief Juſtice. In the caſe of *tenants in common*, there muſt be an actual *ouſter* of the one by the other, or elſe he ſhall not be compelled to confeſs *leaſe*, *entry*, and *ouſter*. *Vide Mod. Rep. vol.* 7. *p.* 39.

Eaſter, 2 *Ann.* *Fenwick* v. *Groſvenor.*

Mr. *Fenwick* obtained judgment on a verdict in *ejectment* on his demiſe againſt Lady *Groſvenor*; on this the Lady brought a *writ of error*, and pending the *writ of error* delivered a declaration in *ejectment* to the tenants in poſſeſſion, on her own demiſe; and now the plaintiff moved for the common rule, and it was denied.

Holt, Chief Juſtice. No new *ejectment* ſhall be brought by the defendant after the recovery againſt him, till he has quitted the poſſeſſion, or the tenants have attorned to the plaintiff, ſo as he be in poſſeſſion, and the defendant out; for if the plaintiff gets judgment in this laſt *ejectment*, and the firſt judgment is affirmed, then he renders it needleſs and ineffectual by this riding judgment, on which he takes out execution to recover his poſſeſſion. The rule for judgment againſt the *caſual ejector* is in the power of the court on what terms the court thinks fit. Lady *Groſvenor* muſt ſhew us a different title, or we will not grant the rule.

The ſame thing was done in another cauſe, *Hil* 2 *Ann. B. R.* where the defendant in *ejectment* pending a *writ of error* delivered a new declaration in *ejectment*, and the court was moved that the coſts might be firſt paid. The court thought the payment of coſts ſuſpended by the *writ of error*, but ſtaid all things for the reaſons before given. *Vide Salk. vol.* 1. *p.* 259.

Trinity, 2 *Ann.* *Turner* v. *Barnaby.*

In *ejectment*, if at the trial the defendant will not appear, and confeſs *leaſe*, *entry* and *ouſter*, the courſe is to call the defendant and his attorney, if he be within the rule; and then to call the plaintiff himſelf and nonſuit him; and then on the return of the *poſtea*, judgment will be given againſt the *caſual ejector*. Alſo the maſter will tax coſts on the rule for confeſſing *leaſe*, *entry* and *ouſter*; and, if theſe be demanded of the defendant, and not paid, the court on affidavit will grant an attachment. *Vide Salk. vol.* 1. *p.* 260.

Michaelmas, 2 *Ann.* *Saunders* v. *Melhuiſh.*

Melhuiſh had got an unknown perſon to aſſume the name of the tenant in poſſeſſion, and to perſonate him in receiving a declaration in *ejectment*; and on the uſual affidavits, tricked the plaintiff out of his poſſeſſion; and the matter being made out by *affidavits*, and even by the *affidavits* of the two parties concerned, *viz.* he that delivered, and the other that received the declaration, the court ordered reſtitution; for no man's poſſeſſion ought to be diſturbed on the *affidavits* of ſuch infamous witneſſes. And *Melhuiſh*, the plaintiff in *ejectment*, attending, was committed to anſwer interrogatories.

Holt, Chief Juſtice, ſaid, where a perſon is put to anſwer interrogatories for a fact fully proved againſt him, he ought to anſwer in cuſtody; but where it is any thing doubtful, the courſe is to put him to anſwer, that is, to bind him by recognizance to anſwer. And in either caſe if they purge themſelves by oath, they are diſcharged; but they may be proſecuted for perjury if they ſwear falſe. And if the interrogatories be not exhibited in four days, by the courſe of the court they are diſchanged. *Vide Mod. Rep. vol.* 6. *p.* 73.

Michaelmas, 2 *Ann.* *Ford* v. *Lord Grey.*

At a trial at *bar* in *ejectment*, the *ſtatute of limitations* being pleaded, theſe ſeveral points were ruled on evidence:

1ſt, That the poſſeſſion of one joint-tenant is the poſſeſſion of the other, ſo far as to prevent the *ſtatute*.

2dly, That in proving an *entry* and *claim*, it is neceſſary:

1ſt, To prove the claim to be on the land claimed, (without ſpecial cauſe).

2dly, That it be a real claim.

3dly, If a man makes an anſwer in *Chancery*, prejudicial to his title, and afterwards conveys away his eſtate, this anſwer cannot be read againſt the alinee by any claiming under the alienor.

4thly, That the recital of a *leaſe* in a deed of *releaſe*, is good evidence of a *leaſe* againſt the *releaſor*, and thoſe that claim under him.

5thly, A fine was produced, but no deed declaring the uſes; but a deed was offered in evidence, which recited a deed of *limitation* of the uſes; and the queſtion was, whether that was evidence? And the court ſaid, that the bare recital of a deed was not evidence; but that if it could be proved that ſuch a deed had exiſted, and was loſt, it would do if it was recited in another; and it not being proved that there ever was a deed leading to the uſes of the fine, the council of one ſide oppoſed the ſame deed of recital being at all read: but the court ſaid, we cannot hinder the reading of a deed under *ſeal*; but what uſe is to be made of it is another thing.

6thly, A deed bore date 22 *Car.* 2. *anno Dom.* 1671. and notwithſtanding that miſtake, the year of the King being certain, it was well.

7thly, If there are two joint-tenants in *fee*, and one of them levies a fine of the whole, this amounts to no *ouſter* of his companion, but is a *ſeverance* of the jointure, though he is in of the old uſe again; as if a man ſeized of a manor, levies a fine of the demeſnes, the manor is gone for ever: Sir *Moyle Finch*'s caſe; and after the fine, though he has the ſame old eſtate, yet he has it in another manner; for the fine being *ſur conuſance de droit come ceo* pre-ſuppoſes a *feoffment*; and if one ſeized as heir to the mother, levy a fine *ſur grant and render*, the eſtate ſhall go to the part of the father, otherwiſe of other fines.

8thly On a deed of title to the leſſor of a plaintiff of a will, the *ſtatute of limitations* being pleaded, and an *entry* and *claim* being offered in evidence to avoid it, they were to prove the *entry* to have been in another place than was excepted. *Vide Mod. Rep. vol.* 6. *p.* 44.

Eaſter, 3 *Ann. Anonymous.*

In *ejectment*, the term was made for *five* years, and after a verdict for the plaintiff, he was delayed of judgment and execution, by an injunction out of *Chancery*, till the term elapſed. And now it was moved to renew the term, and the caſe of *Dangdell* v. *Greenvill* was quoted where it was done, and that they uſed to do it frequently in the *Exchequer*.

Per curiam. We cannot do it without altering the record.

Gould, Juſtice, ſaid, they had held in Sir *John Roll*'s caſe, that it could be done by conſent, but not otherwiſe: therefore the motion was denied. *Vide Mod. Rep. vol.* 6. *p.* 130.

Michaelmas, 3 *Ann. Williams* v. *Hoſkins.*

See this caſe fully ſtated in page 63 of this work, under the head *Amendment.*

Michaelmas, 3 *Ann. Anonymous.*

Per curiam. If a perſon pretending a title to land, gives ſecurity to the tenants to ſave them harmleſs on paying him the rent, and after another recovers in *ejectment* againſt them, they have not yet a remedy on the ſecurity, till recovery of the *meſne* profits, which is from the time of the action brought; and without an actual entry, there can be no recovery of the profits.

If a man ſigns a *leaſe* in one county or vill of lands in another, yet the jury muſt come from the place where the land lies on an *ejectment* brought on ſuch *leaſe. Vide Mod. Rep. vol.* 6. *p.* 222.

Michaelmas, 3 *Ann. Anonymous.*

Per curiam. It is a great abuſe in *ejectment*, that people make nominal leſſees of perſons not exiſting or at beſt not known to the defendant; ſo that he thereby may loſe his coſts. And *by the whole court*, the attorney that does ſo, ought to pay coſts; and in this caſe an attorney was put to anſwer interrogatories for ſuch a practice. *Vide Mod. Rep. vol.* 6. *p.* 309.

Eaſter, 4 *Ann. Anonymous.*

Holt, Chief Juſtice. The plaintiff in *ejectment* is a mere nominal perſon, and truſtee for the leſſor, and if he *releaſes* the action, or if an action be brought in his name for the *meſne* profits, and he *releaſes* it, he ſhall be committed for the contempt. *Vide Salk. vol.* 1. *p.* 260.

Hilary, 8 *Ann. Foſter* v. *Burden.* Error.

The caſe was, judgment was given in *ejectment* on a demiſe of *three* years; the defendant brought a *writ of error* in this court, and the defendant ſued out a *ſci. fac. quare executio non*; to which the plaintiff in *error* pleaded, that he had paid 200*l.* in ſatisfaction of the term and damages; and on iſſue joined, the court was moved to change the *venue* out of *Yorkſhire* into *Middleſex*; but the court denied the motion, becauſe the *ejectment* is local; and the *ſci. fac.* being grounded thereon, the *venue* could not be changed *Vide Mod. Rep. vol.* 11. *p.* 263.

Michaelmas, 8 *Ann. Booth* v. *The Marquis of Lindſey and others.*

See this caſe fully ſtated in page 379 of this work, under the head *Dower.*

Michaelmas, 8 *Ann. Burridge* v. *The Earl of Suſſex and others.*

The plaintiff brought an *ejectment* for lands in *Chevely*, &c. in *Kent*, on the demiſe of Mrs. *Leonard*, third daughter of *Henry Leonard*, late brother of the Earl of *Suſſex*; on *not guilty* pleaded, the cauſe came to be tried at the *bar* of this court; and the leſſors, *&c.* made a title to a moiety of the lands in queſtion, (as the plaintiff had declared) as he is of the body of *Richard* Lord *Dacre*, under a ſettlement made by him in King *James* the firſt's time, the lands being of the nature of *Gavelkind*; to the other moiety whereof the Earl of *Suſſex* was admitted by the plaintiff to be intitled; for *Richard* Lord *Dacre*, who made the ſettlement, had iſſue, *Francis* Lord *Dacre*, and *Francis* Lord *Dacre* had iſſue the preſent Earl of *Suſſex*, *Francis*, and *Henry*, the father of the leſſor, *&c.* and *Francis*, the brother of *Henry*, died without iſſue. And firſt it was reſolved by the whole court, that the lands lying in *Kent* ſhould be preſumed *at firſt ſight* to be of the nature of *Gavelkind*, without farther proof, for it muſt lie on the other ſide to prove them *diſgavelled*: then the council produced an inquiſition taken *after the death* of *Richard* Lord *Dacre*, 5 *Car.* 1. wherein the deed was found in *theſe words*, whereby the *general tail* was created, under which the leſſors of the plaintiff claimed. And it was a deed whereby *Richard* Lord *Dacre* covenanted to ſtand ſeiſed to the uſe of himſelf for life, and afterwards to the uſe of ſuch wife as he ſhould marry, and after to *Francis*, his eldeſt ſon and heir apparent, (who was afterwards *Francis* Lord *Dacre*, grandfather of the leſſors, *&c.*) and the heirs of his body; *Richard* Lord *Dacre* did afterwards marry *Dorothy*, to whom an eſtate for life by a ſubſequent deed was limited, and ſhe enjoyed it during her life. The original inquiſition itſelf, with the writ annexed to it, was produced, being brought from the Roll's Chapel. And it was objected by the defendant's council, that it was not ſufficient evidence to prove the deed. But it was reſolved by the whole court, that it was good evidence, and did prove the deed and entail, and conſequently a title in the leſſors of the plaintiff, taking the lands not to be *diſgavelled*: but then the defendants gave evidence that the lands were *diſgavelled*, very clearly as to all but one farm of 30*l. per annum*, and as to that, though their evidence was defective, yet it being left to the jury, they gave a verdict for the whole for the defendants. *Vide Raym. vol.* 2. *p.* 1292.

Eaſter, 3 *Geo. Newman* v. *Holdmyfaſt.* Error.

On a *writ of error* brought on a judgment in *C. B.* in *ejectment*, for lands, *and alſo for common of paſture*, after a verdict for the plaintiff, it was moved in arreſt of judgment, that it ought to have been mentioned what ſort of common, becauſe an *ejectment* will not lie for all ſorts, ſuch as common *for cauſe of vicinage*, and that a common cannot maintain *treſpaſs*, and much leſs an *ejectment*. And *Co. Litt.* 4. *b. Bro. Common*, 24. *Treſpaſs*, 213. *Yelv.* 143. *Cro. Car.* 492. 1 *Lev.* 212. were cited.

Per curiam. After a verdict it ſhall be intended to be ſuch common for which an *ejectment* will lie; as common appendant, or appurtenant: and the general expreſſion of *common* muſt relate to that which is moſt uſual; juſt as the word *tenure* imports a tenure in ſocage; fines and recoveries are of *common of paſture,* generally. 1 *Co.* 301. 3 *Keb.* 738. 1 *Jan.* 315. *Michaelmas* 1 *Geo. Cave* v. *Hunt* in the *Exchequer Chamber*, this objection was over-ruled. He that has poſſeſſion of the land has poſſeſſion of the common, and the ſheriff, by giving poſſeſſion of one, executes his writ as to the other. Therefore the judgment was affirmed. *Vide Stra. vol.* 1. *p.* 54.

Michaelmas, 4 *Geo. Lord Kildare* v. *Fiſher*. Error.

On a *writ of error* brought on a judgment in *Ireland* in *ejectment*; it was objected, that it was brought *(among other things)* for one hundred acres of mountain, with a deſcription of the ſituation, and not the quality of the land. And 11 *Co.* 55. 2 *Roll. Rep.* 166, 189. *Palm.* 100. *Hardr.* 58. were cited.

After hearing council, and taking the opinion of the *Iriſh* judges, *Parker*, Chief Juſtice, delivered the opinion of the court as follows:

Since there are precedents with the preſent caſe, and the thing reaſonable in itſelf, and the ſheriff may as eaſily know how to deliver poſſeſſion of a *mountain* as of a *cave*, or an *ox gang:* and are all of opinion, that an *ejectment* will lie for a *mountain* in *Ireland*, and conſequently the judgment muſt be affirmed. *Vide Strange, vol.* 1. *p.* 71.

Michaelmas, 6 *Geo. Biron* v. *Philips*.

Per curiam. There muſt be the ſame notice of executing a *ſcire fieri inquiry*, as of executing a common *writ of enquiry*. *Vide Strange, vol.* 1. *p.* 235.

Eaſter, 8 *Geo. Jordan* v. *Harper*.

Sir *S. S.* brought a ſuit in *ejectment* againſt ſeveral perſons who lived in cottages on the waſte as *paupers*, to try whether the cottages belonged to him as lord of the manor. The pariſh made defence, and the plaintiff was nonſuited, and paid the coſts to one of the defendants, who was in his intereſt; and on motion, the court ſaid, they could not relieve the pariſh or the other defendants. *Vide Stra. vol.* 1. *p.* 516.

Hilary, 9 *Geo. Lord Coningſby's Caſe*.

His Lordſhip brought a ſuit in *ejectment*, and had a rule for a trial at *bar*; but it being on the demiſe of a *wrong perſon*, he delivered *new ejectments*, and coming again for a trial at *bar*, the court would not grant it, but on payment of coſts of the former *ejectment*. *Vide Stra. vol.* 1. *p.* 548.

Hilary, 9 *Geo. Smith* v. *Jones*.

The practice of this court is for the plaintiff in *ejectment* to deliver a copy of the declaration to the tenant in poſſeſſion, or to his wife, with an indorſement in *Engliſh* of the ſubſtance of ſuch declaration, *&c.* and if the tenant does not appear in the beginning of the next term, then on *affidavit* made of the delivery of the copy of the declaration, (affixed to the affidavit,) and of reading the indorſement, or of acquainting the tenant with the contents thereof, the court will make a rule for the tenant to appear, and plead on a certain day, at which time, if he appears, he muſt by his attorney file common bail, and enter into a rule to confeſs *leaſe*, *entry*, and *ouſter*, and leave it at a judge's chambers, and give notice thereof to the attorney for the plaintiff, that he may proceed.

But if the tenant in poſſeſſion does not appear, than after the day appointed by the court for his appearance, and to plead, judgment by *default* ſhall be entered againſt the caſual ejector.

Now, in this caſe, a declaration in *ejectment* was delivered, and a *rule made for the tenant in poſſeſſion to appear and plead*, which he did, *&c.* and afterwards withdrew his plea, and *confeſſed judgment*, which the plaintiff entered *againſt the caſual ejector*; and now the tenant in poſſeſſion moved by his council to ſet aſide this judgment; the reaſon was, becauſe he might bring a *writ of error*, for no ſuch writ would lie on a *judgment againſt the caſual ejector*, therefore the judgment ought to be entered againſt the tenant himſelf; for wherever the defendant is in court, the judgment muſt be entered againſt him, and not againſt the caſual *ejector*; now here he was in court, for he appeared, and pleaded to iſſue, and might come in at any time, and confeſs *leaſe*, *entry*, and *cuſter*, *&c.* And if the judgment had been entered againſt the tenant, it had been better for the plaintiff than to have it entered againſt the *caſual ejector*, becauſe in ſuch caſe the plaintiff will have his coſts, and will be intitled to an action to recover the value of the *meſne profits* in damages, which he can never recover by a judgment againſt the *caſual ejector*.

Thereon the court enquiring of the maſter of the office what was the practice of the court in ſuch caſes, both he and ſeveral old practitioners affirmed, that the practice was, to enter *judgment againſt the caſual ejector*, and that he had often denied to ſign judgment againſt the tenant in poſſeſſion, unleſs he had pleaded; it is true, he had pleaded in this caſe, but afterwards he withdrew his plea, and though he had pleaded, yet he is not a defendant till he enters into a rule to confeſs *leaſe*, *entry*, and *ouſter*, for then, and not before, he is a compleat defendant, and may plead to iſſue; but whether he appears or not, yet judgment ſhall be entered againſt the *caſual ejector*; it is true, it is ſometimes entered againſt the tenant in poſſeſſion, but that is by conſent of the parties, and on a promiſe not to bring a *writ of error*.

Pratt, Chief Juſtice, was of opinion, that there was no inſtance of a judgment being taken againſt the tenant in poſſeſſion for want of a plea; that the words of the rule are poſitively certain, that judgment ſhall be entered againſt the *caſual ejector*.

Now, the intent of the rule, for the tenant in poſſeſſion to appear on a certain day, and plead, is only to bring him into court, that when he comes in he may confeſs *leaſe*, *entry*, and *ouſter*, but not to ſtrip him of that right to which he is entitled by law, as it will if this judgment ſhould ſtand *againſt the caſual ejector*, becauſe no *writ of error* will lie in the *Exchequer Chamber* on ſuch judgment.

This way of delivering an *ejectment* is in nature of a proceſs to compel the tenant to appear in court, and was firſt inſtituted in Lord Chief Juſtice *Roll*'s time, and never queſtioned till now. There is a difference between appearing and pleading, and appearing and not pleading at all.

Eyre, Juſtice, was clear for the plaintiff, that judgment ſhould be entered againſt *caſual ejector*, but the other three judges were doubtful, therefore the matter was adjourned. *Vide Mod. Rep. vol.* 8. *p.* 118.

Trinity, 9 *Geo. Grumble* v. *Bodilly*.

There was a verdict for the defendant in *ejectment*, and the plaintiff brought a *writ of error*, and a *new ejectment*, and it was moved to ſtay the proceedings in the ſecond *ejectment* till the coſts of the firſt was paid. *Salk.* 255. 258.

Per curiam. Unleſs the plaintiff can ſatisfy us, that the *writ of error* is brought with ſome other view than to keep off the payment of coſts, we will not ſuffer the plaintiff to proceed in his new *ejectment*; and he not ſhewing ſufficient cauſe, the proceedings were ſtayed, unleſs coſts were paid in a fortnight. *Vide Stra. vol.* 1. *p.* 554. *Mod. Rep. vol.* 8. *p.* 226.

Trinity, 9 *Geo. The King* v. *Unitt*.

The court declared, that a declaration in *ejectment* was ſo far a proceſs of the court, that they puniſh contemptuous words ſpoken on the delivery of it, as a contempt of the court. *Vide Stra. vol.* 1. *p.* 567.

Michaelmas, 9 *Geo. Cooper* v. *Beale*.

An *ejectment* was brought to recover the poſſeſſion of a *Quaker*'s meeting-houſe; none of them would receive the declaration, and the meeting-houſe was never

ver open but on *Sundays*, on which day the delivery of a declaration was not good; thereupon the plaintiff took a judgment, by confeſſion of the nominal defendant, and now on motion that judgment was ſet aſide, becauſe in fact, it is the confeſſion of the plaintiff himſelf. *Vide Mod. Rep. vol.* 8. *p.* 109.

Michaelmas, 9 *Geo.* *Hooper* v. *Dale*

There being a vacant poſſeſſion, a leaſe was ſealed on the premiſes, and the defendant *ejected* the leſſee, and then gave a warrant of attorney to confeſs judgment: on which the court was moved to ſet it aſide, and it was argued, that the *caſual ejector* can in no caſe confeſs judgment. The council on the other ſide endeavoured to diſtinguiſh this from the common caſe, where the *caſual ejector* is only a nominal perſon; but the court ſaid it was a trick, and ſet it aſide. *Vide Stra. vol.* 1. *p.* 531.

Trinity, 10 *Geo.* *Gravener* v. *Salter*. Error.

On a *writ of error* brought to reverſe a judgment in *ejectment*, after verdict, the plaintiff in error's council excepted to the declaration, for that the writ recited therein, had miſtaken the plaintiff for the defendant, and ſo charged a demiſe of the lands to the defendant, inſtead of charging it to the plaintiff, and the declaration purſues the writ by referring thereunto, as *he demiſed the tenements aforeſaid*, or elſe it is void for uncertainty. 2dly, The *venire facias*, as contained in the *poſtea*, is ill, for the omiſſion of the words "*do ſay*": but after argument, the court over-ruled theſe objections, and affirmed the judgment. *Vide Mod. Rep. vol.* 8. *p.* 303.

Trinity, 10 *Geo.* *Waddy* v. *Newton*.

On a ſpecial verdict in *ejectment*, the caſe was: the tenants in tail covenanted to levy a fine, and ſuffer a common recovery of the lands now in queſtion, and of a fiſhery; and accordingly levied the fine thereof, by the name of 120 acres of land in *Stockwell hall*, in the county of, &c. and of 10 acres in a running *water*; and declared the uſe thereof to himſelf and his heirs.

But there being many more than 140 acres *ſtatute meaſure*, the defendant, who was heir in tail, would conteſt the right to all above the 140 acres; and thereon the plaintiff brought an *ejectment*, and ſuggeſted, that the whole eſtate was computed to be 140 acres, by the common computation in the country, &c. and on *not guilty* pleaded, the jury found a ſpecial verdict, *viz.* They found the fine was levied, and the recovery was ſuffered by the name of 120 acres of land, and of 10 acres of running water; and that the whole eſtate entailed was computed in the country to be 140 acres of land.

After hearing council on both ſides the court gave their opinion.

Per curiam. It is admitted by the council for the defendant, that if this fine had been levied, and recovery ſuffered, in purſuance of a former agreement or covenant, for a *valuable conſideration*, and if it had appeared to be the intent of the parties, to paſs the whole eſtate by the name of 140 *acres*, in ſuch caſe the whole would paſs.

Now here the jury has found that the whole eſtate entailed, was computed in the county to be 140 acres; and it will be difficult to comprehend a difference between a covenant for a valuable conſideration, and a voluntary covenant; for it cannot reaſonably be ſaid, that the ſame words ſhall paſs all the lands in one caſe, and ſhall not paſs the whole in the other caſe, eſpecially when the tenant had it in his power to word it as he pleaſed.

But they held that an *ejectment* would not lie of a fiſhery; ſo the defendant muſt have judgment as to that matter, but becauſe the Chief Juſtice who tried this cauſe, believed that the defendant was ſurpriſed by the finding of the jury, that the whole eſtate-tail was computed in the country to be 140 acres; they would not tie him down to this verdict, but admitted him to bring a new *ejectment* to try the truth of that matter. On which the matter was adjourned. *Vide Mod. Rep. vol.* 8. *p.* 276.

Michaelmas, 10 *Geo.* *Douglas* v. ——.

On an *affidavit*, that they had tendered a declaration in *ejectment*, and that the ſervants refuſed to call their maſter, or receive it, ſaying, they had orders to take no papers, the court was moved, that leaving it at the houſe might be ſufficient; which was ordered accordingly. *Vide Stra. vol.* 1. *p.* 575.

Hilary, 11 *Geo.* *Phillips* v. *Doelittle*.

A leaſe was made reſerving rent; and for non payment thereof, that the leſſor might re-enter; the rent was not paid, and thereon the plaintiff brought an *ejectment*, and had judgment; and now a motion was made to ſtay proceedings, on payment of what rent was due, and all the coſts to this preſent time; and thereon a rule was made, that the defendant ſhould go before the maſter, &c. and he to take an account of what rent was due, &c. and that proceedings ſhould ſtay in the mean time.

Afterwards, it was moved to diſcharge this rule, becauſe it was on an extraordinary motion; for the common motion is to ſtop proceedings on payment of what is due; now there can be no proceedings after judgment; to which it was anſwered, that though the plaintiff had judgment, yet this was a proper motion, where ſuch judgment was in *ejectment*; and this entirely depends on the rules of the court.

Per curiam. The court uſually ſtays proceedings in *ejectment*, on reaſonable terms, at any time before execution executed; but in this caſe it was ruled, that if the defendant did not bring in to the maſter, within three days, what rent was juſtly due, and the coſts, that then the plaintiff might take out execution. *Vide Mod. Rep. vol.* 8. *p.* 345.

Eaſter, 11 *Geo.* *Steed or Stead* v. *Lateward.* *Entered Eaſt.* 10 *Geo. Rol.* 234.

Per curiam. There muſt be ſame notice given of executing a *ſcire fieri inquiry*, as in the caſe of a common *writ of enquiry*; and ſaid it had been ſo formerly. *Michaelmas*, 12 *Ann.* *Cawley* v. *Hayward*, and *Mich.* 6 *Geo.* *Biron* v. *Philips*. *Vide Strange, vol.* 1. *p.* 623. *Mod. Rep. vol.* 8. 366.

Hilary, 12 *Geo.* *Short* v. *King*.

The plaintiff declared in *ejectment*, on one demiſe, to which *not guilty* was pleaded; but afterwards finding it neceſſary to add the demiſe of the truſtees, he delivered a new *ejectment*, on a double demiſe; whereupon his council moved to ſtay the proceedings on the laſt ſuit, till payment of the coſts, and for notice where the leſſors were to be found; and grounded his motion for the firſt ſuit, on Lord *Coningſby*'s caſe, and for the latter, on the common caſe of a *qui tam* action, becauſe here the leſſor was to enter into a rule for coſts: the court granted the laſt part, but as to the coſts, they ſaid it was never done, but where it appeared the party was vexatious, or had run the defendant to a great expence, which was Lord *Coningſby*'s caſe, who came for a trial at bar on his new *ejectment*, after the former cauſe was ready for the bar, which was a matter of mere favour in which they might make their own terms. *Vide Stra. vol.* 1. *p.* 681.

Eaſter, 12 *Geo.* *Noke* v. *Windham*.

The leſſor of the plaintiff being an *infant*, the court obliged him to name a good plaintiff, who might be anſwerable for coſts. *Vide Stra. vol.* 1. *p.* 694.

Eaſter, 12 *Geo.* *Sullivan* v. *Seagrave*. Error.

On a *writ of error* brought on a judgment in *Ireland*, in *ejectment*, for part of a houſe, known by the name of the *three Kings in* A —, it was objected, that an *ejectment* would not lie *for part of a houſe*, and that the ſheriff could not know of what part he was to deliver poſſeſſion, and 2 *Roll. Rep.* 483. 11 *Co. Saville's caſe.* 4 *Mod.* 166. *Mo.* 702. *Lutw.* 974. *March.* 97. *Salk.* 254. were cited.

But the court was of opinion, it was well enough, the ſituation of the houſe being ſufficiently deſcribed, and the ſame certainty is never required in an *ejectment* as in a *praecipe*; therefore the judgment was affirmed. *Vide Stra. vol.* 1. *p.* 695.

Trinity, 12 *Geo.* *Goodright* v. *Shuffill.*

In *ejectment*, the plea of *antient demeſne* was allowed to be well, without an affidavit to verify the fact. And ſuch plea had been before allowed to be good in Lord *Coningſby*'s caſe. *Vide Raym. vol.* 2. *p.* 1418.

Michaelmas, 12 *Geo.* *Baſs* v. *Bradford.*

In *ejectment*, the demiſe in the declaration againſt the *caſual ejector*, and artewards delivered to the tenant in poſſeſſion, as was laid of the ſecond of *June* laſt, to commence from *Lady-day* before; and after the tenant in poſſeſſion had entered into the common rule, in the declaration on the iſſue delivered to the defendant, the demiſe was laid to be as of the 2d of *Auguſt* laſt, the title of the leſſor of the plaintiff being on a breach of a condition for non-payment of rent due at *Midſummer* laſt. And the council moved for the defendant, that the iſſue might be made according to the declaration delivered to the tenant in poſſeſſion, becauſe the plaintiff ought not to recover on a title that accrued ſubſequent to the delivery of the firſt declaration: the plaintiff inſiſted, that the firſt declaration was only in nature of a notice, and therefore the ſecond declaration might vary from the firſt as to the demiſe.

Per curiam. By the courſe of this court there can be no alteration in the declaration in the iſſue from the firſt declaration delivered, only in the defendant's name. And a rule was made, that the iſſue ſhould be made according to the declaration delivered againſt the *caſual ejector*. *Vide Raym. vol.* 2. *p.* 1411.

Eaſter, 2 *Geo.* 2. *Goodright* v. *Hart and others.*

The defendant, as daughter and heir of the late Admiral *Hoſier*, brought an *ejectment*, and recovered, and was put in to poſſeſſion: the other ſide brought an *ejectment*, and *Hart* and his wife obtained a rule to be made defendants, with the tenants in poſſeſſion, and entered their appearance; but the tenants haing been practiſed on, refuſed to appear to make any defence; on which judgment was ſigned againſt the *caſual ejector*, after a trial at *bar* had been granted; and a writ of poſſeſſion was taken out, and poſſeſſion delivered. The defendant and wife, the landlords, moved to ſet it aſide, inſiſting that the only reaſon for making the landlord a defendant was to ſecure a trial in all events, and to prevent the tenant from betraying the poſſeſſion. But the court refuſed to ſet aſide the judgment; ſaying, that the rule was only that the landlord ſhould be made a defendant *with* the tenants in poſſeſſion; and therefore, if they would not ſtand the ſuit, the landlord could not be let in. But quere, for this is giving tenants much too great a power, and makes them abſolute maſters of the eſtate, and to chuſe their own landlords. See 11 *Geo.* 2. *c.* 19. *ſect.* 13.

The court refuſing to relieve the landlord, he went down into the country, and prevailed with the tenants, on giving them ſecurity, to attorn to him; and then the plaintiff in *ejectment* came and complained to the court, and moved for a new writ of poſſeſſion: but the court refuſed to relieve him, there having been a regular execution of the firſt writ; and ſaid, the diſtinction was, that if immediately after the writ had been executed, the tenants had attorned, there ſhould have been a new writ; but not where the poſſeſſion had continued as delivered for above a month, as it had in this caſe. *Vide Stra. vol.* 2. *p.* 830.

Trinity, 2 & 3 *Geo.* 2. *Anonymous.* Error.

In a ſuit in *ejectment* on two ſeveral demiſes of ſeveral diſtinct lands, the plaintiff had judgment in the *C. B.* which was entered, *that the plaintiff recover his term aforeſaid, in the tenements aforeſaid.* Now, on a *writ of error* being brought on this judgment, it was urged, that this judgment is quite uncertain, and therefore the ſheriff cannot know how to execute it. 2 *Cro.* 124. *Cro. El.* 186. *Hard.* 27. 11. *Co.* 55. *Yelv.* 114. For it ſhould have been, *that the plaintiff recover his term in* A. *and his term in* B.

On the other ſide it was argued, that the words *in the tenements aforeſaid*, aſcertain the firſt part, and it ſhall be taken *as rendering to each his particular ſhare*, but the plaintiff had two ſeveral terms in one and the ſame land, then poſſibly the judgment might not be right: wherefore the judgment was affirmed. *Vide Fitz-Gibbons*, *p.* 83.

Eaſter, 3 *Geo.* 2. *Hatton* v. *Hatton.*

See this caſe fully ſtated in page 378 of this work, under the head *Diſtribution.*

Trinity, 3 *Geo.* 2. *Worral* v. *Bent and others.* Error.

After verdict in *ejectment* on two demiſes, where the ſecond was laid to be of other lands, it was objected on *error*, that the judgment is only to recover *his term* in the ſingular number, and therefore uncertain.

Per curiam. It is *of and in the tenements aforeſaid*, which *rendering in the ſingular number*, is well enough, for there is but one term in each part of the premiſes: therefore the judgment was affirmed. *Vide Stra. vol.* 1. *p.* 835.

Eaſter, 4 *Geo.* 2. *Goodtitle* v. *Holdfaſt.*

After judgment was given againſt the *caſual ejector*, and before any writ of poſſeſſion was executed, the court made a rule to ſtay proceedings, on payment of all rents due, and coſts: it not being pretended that the *ejectment* was brought on any other title than a *re-entry* for non-payment of rent. *Vide Stra. vol.* 2. *p.* 900.

Eaſter, 4 *Geo.* 2. *Moore* v. *Goodright.* Error.

On a *writ of error coram vobis* being brought on a judgment in *ejectment*, it was aſſigned for *error*, that the plaintiff in *ejectment* died before the day of *niſi prius*. And it being in *ejectment*, the court ſet it aſide, and ordered the attorney to ſhew cauſe why there ſhould not be an attachment againſt him; for they ſaid it was to defeat the proceedings inſtituted by the court to try the right; and every body knows that the plaintiff is but nominal, or if a real perſon, yet his releaſe is a contempt. *Vide Stra. vol.* 2. *p.* 899.

Eaſter, 5 *Geo.* 2. *Throgmorton, on the Demiſe of Miller*, v. *Smith and others.*

The leſſor of the plaintiff being an *infant*, the court was moved that he might be obliged to name a good plaintiff, who might be anſwerable for coſts; and the caſe of *Noke* v. *Windham* was cited. And on ſearching for that rule, it appeared that the father of the infant entered into a rule to pay coſts: accordingly, in this caſe there was a rule to ſtay proceedings until ſecurity was given; and the laſt day of the term the infant's mother entered into the rule. *Vide Stra. vol.* 2. *p.* 932.

Trinity, 5 *Geo.* 2. *Fiſher* v. *Hughes.* Error.

On *error* from of the grand ſeſſions in *Wales* in *ejectment*, wherein the plaintiff declared, that *Robinſon* and *wife* demiſed to him one hundred acres of land; and that afterwards the ſame day, *Egerton* and *wife* demiſed to him the *premiſes aforeſaid*; on *not guilty* pleaded, the jury find for the plaintiff *as to* the lands demiſed by Robinſon *and wife: and as to the tenements aforeſaid, which* Egerton *and wife demiſed*, they find for the defendants: and the judgment was entered, that the plaintiff ſhall recover his term in the tenements demiſed by *Robinſon* and *wiſe*; *and as to the other premiſes, let him be in mercy, for his ſalſe claim againſt the defendant for the aforeſaid premiſes, which* Egerton *and his wife demiſed, and the defendant aforeſaid be diſmiſſed the court* ſine die, &c.

The *plaintiff in error's council* objected, that for want of purſuing the common form, in laying the ſecond demiſe to be of *other tenements*, the judgments here given are contradictory to each other: the defendant is put without day as to the ſame premiſes for which the plaintiff recovers.

Per curiam. This is certainly far from being a correct entry; but we will not reverſe it, if it be poſſible to ſupport it; we will conſtrue *the tenements aforeſaid, which* Egerton *and wife demiſed*, to mean the term in the premiſes, and then it will be good: therefore the judgment was affirmed. *Vide Stra. vol.* 2. *p.* 908.

Michaelmas, 5 *Geo.* 2. *Martin* v. *Davis.*

In a ſuit in *ejectment*, the court denied to let the parſon of *Hampſtead* defend only for a right to enter and perform divine ſervice, notwithſtanding the caſe in *Salk.* 256. ſaying, it had been often denied ſince. *Vide Stra. vol.* 2. *p.* 914.

Hilary, 7 *Geo.* 2. *Jefferies* v. *Dyſon.*

In an action of *treſpaſs* for *meſne profits*, the plaintiff offered a recovery in *ejectment* againſt the *caſual ejector*, on which no writ of poſſeſſion was iſſued. And when the defendant would have gone into the title, inſiſted he was *eſtopped* by the judgment.

But *Hardwicke*, Chief Juſtice, held, that though it would have been an *eſtoppel*, if the preſent defendant had been made defendant in the *ejectment*, and the verdict againſt him; yet this judgment to which he was no party nor privy, could be none; and therefore admitted the defendant to controvert the title. *Vide Stra. vol.* 2. *p.* 960.

Eaſter, 7 *Geo.* 2. *Dobbs* v. *Paſſer.*

The plaintiff ſigned judgment in *ejectment*, and before he had loſt any trial, the defendant applied to ſet it aſide, though ſtrictly regular, on payment of coſts, and taking notice of trial: which the plaintiff refuſed. And the court being applied to, a diſtinction was offered between *ejectments* and all other actions, becauſe the right was not bound, but a new *ejectment* might be brought.

Per curiam. That diſtinction held formerly in many inſtances where it is now exploded; you could not formerly have a new trial as you now may; and great inconveniencies may ariſe from changing the poſſeſſion; timber may be felled, &c. and as the *Common Pleas* makes no difference, and as we are got into their practice in all other actions, it is proper to follow it here. *Vide Stra. vol.* 2. *p.* 975.

Trinity, 7 *Geo.* *Bircham* v. *Noright.*

In a ſuit in *ejectment* brought by an *infant*, a motion was made for a rule to compel the leſſor of the plaintiff to make a *real* leſſee who might be reſponſible, or to give ſecurity for the payment of the coſts: this being determined to be the courſe of the court in the caſe of *Throgmorton on the demiſe of Miller* v. *Smith*, *Eaſter*, 5 *Geo.* 2. and before in the caſe of *Nokes* v. *Windham*, *Eaſter*, 12 *G.* therefore a rule for that purpoſe was granted. *Vide Caſes Temp. Lord Hardwicke*, *p.* 56.

Eaſter, 8 *Geo.* 2. *Bidgood* v. *Hawes.*

In a ſuit in *ejectment*, the court was moved for judgment againſt the caſual *ejector*, on an affidavit that the meſſuage in queſtion being empty, and the door ſhut, one *Brown* did enter thereon, by taking hold of the knocker and ſtanding on the threſhold, and being there in poſſeſſion, did there ſeal a *leaſe* to *Bidgood*; and *Brown* delivered poſſeſſion, by taking hold of the knocker, &c. and *Bidgood* took poſſeſſion, by taking hold of the knocker, &c. and afterwards *Hawes* diſpoſſeſſed *Bidgood* by taking hold of the knocker, &c. and then the deponent delivered an *ejectment* to the ſaid *Hawes*.

Per curiam. Let the plaintiff have judgment. *Vide Caſes Temp. Lord Hardwicke*, *p.* 112.

Trinity, 9 *Geo.* 2. *Holdfaſt* v. *Freeman and others.*

The notice in *ejectment* was to appear on the *eſſoign day* of this term; and held ill, for it ſhould be to appear the firſt day in full term, which is the appearance day. *Vide Strange*, *vol.* 2. *p.* 1049.

Michaelmas, 9 *Geo.* 2. *Thruſtout, on the Demiſe of Turner*, v. *Gray.*

The court was moved to enlarge the time of the demiſe.

Lord *Hardwicke.* Will the other ſide conſent?

The other party conſented; and it was ruled accordingly. *Vide Caſes Temp. Lord Hardwicke*, *p.* 165.

Michaelmas, 10 *Geo.* 2. *Barnes* v. *Peterſon.*

A ſuit in *ejectment* was brought for lands in *Norfolk*, and *among other things*, for *five* acres of *Aldar Carr*, and it was moved to be too uncertain; but on the certificate of *Norfolkmen* at the *bar*, that it is a term well known there, and ſignifies the ſame as *alienetum* which is mentioned by Lord *Coke*, and means land covered with *alders*, the court held it well enough, alluding to the caſe of Lord *Kildare* v. *Fiſher*, where it was held to lie for *mountain* in *Ireland*; and *Lee*, Juſtice, ſaid, that in *Yorkſhire* it is common to bring *ejectments* for *cattle gates*. *Vide Strange*, *vol.* 2. *p.* 1063.

Michaelmas, 10 *Geo.* 2. *Savage* v. *Dent.*

The leſſee of a public houſe took another, and removed his goods and family, but left beer in the cellar, and there being rent in arrear, the landlord ſealed a *leaſe* as on a vacant poſſeſſion, delivered an *ejectment*, and ſigned judgment; which was ſet aſide, the leſſee ſtill continuing in poſſeſſion; and a caſe was mentioned, where leaving hay in a barn at *Hendon*, was held to be keeping poſſeſſion; it further appeared in this caſe, that the attorney for the plaintiff knew where the leſſee removed, and might have ſerved him perſonally, which is not neceſſary to be done on the premiſes. And in the caſe of renting ground, to which there is no houſe or barn, if it is known where the tenant lives, he muſt be ſerved. *Vide Strange*, *vol.* 2. *p.* 1064.

Michaelmas, 10 *Geo.* 2. *Thruſtout, on the Demiſe of Turner*, v. *Grey and others.*

On a ſpecial verdict in *ejectment*, it appeared that the leſſor of the plaintiff claimed as tenant for life: and on *affidavit* made of his death, it was moved, that all proceedings might ſtay, ſince it would ſignify nothing to argue it on the merits.

Per curiam. The poſſeſſion cannot be obtained, yet the plaintiff has a right to proceed for damages and coſts: all we can do is, to oblige him to give ſecurity for coſts, now the leſſor is dead, as we do in the caſe of infant leſſors, who cannot enter into the common rule. *Vide Strange*, *vol.* 2. *p.* 1056.

Hilary, 11 *Geo.* 2. *Bennington* v. *Goodtitle.* Error.

On a *writ of error* brought on a judgment in *ejectment*, it was held, to lie for a *beaſt-gate*, which is a term common in *Suffolk*, and imports land and common for one beaſt; wherefore the judgment was affirmed. *Vide Strange*, *vol.* 2. *p.* 1084.

Hilary, 11 *Geo.* 2. *Berrington* v. *Parkhurſt and others.* Error.

On a trial at bar in *ejectment*, on the demiſe of *J. D.* Eſq; for a manor and lands in *Bucks*, a *ſpecial* verdict was found upon the family ſettlement; but as neither the *King's Bench* nor Houſe of Lords gave any opinion upon that part of the caſe, it is unneceſſary to ſtate the ſame.

As to the point on which the judgment was given, it was ſhortly thus. The defendants levied a fine in 1730. To avoid this, the leſſor of the plaintiff made an equal entry on the 6th day of *January* 1731, and in *Hilary* term after, brought his *ejectment*, and laid the demiſe on the 1ſt day of *October* 1731, which was three months before the actual entry.

And it was inſiſted on for the defendants, 1. That an actual entry was neceſſary to avoid the fine; and, 2. That the demiſe could not be laid before the leſſor had regained the poſſeſſion by the actual entry.

As to the firſt of theſe, it was argued for the plaintiff, that *ſtat.* 4 *Hen.* 7. *c.* 24. was in the disjunctive, *ſo as the claim is purſued by action or lawful entry*, and that therefore the *ejectment* is ſufficient, if the actual entry was out of the caſe.

And as to the ſecond it was argued, that on the entry, the leſſor's eſtate was re-veſted, and he might maintain *treſpaſs* for an act done during the *diſſeiſin*. And unleſs he was allowed to lay his demiſe backwards, be could never recover the *meſne profits*.

To which it was replied, 1ſt, That *ejectments* were not in uſe at the time of making the ſtatute, and real actions only were intended: and if *ejectments* would do, all the queſtions that have been made about actual entries muſt have fallen to the ground, by the anſwer, that an *ejectment* was a ſuit that came within the alternative; thoſe queſtions having all aroſe in *ejectments*. 1 *Saund.* 319. 1 *Vent.* 42. 1 *Mod.* 10. 2 *Keb.* 555. *Skin.* 423. And, *Hilary*, 2 *Ann*, 1703, at a meeting of all the judges (except *Price*) it was reſolved, that in the caſe of a fine, there muſt be an actual entry within five years, and that the confeſſion of an entry to deliver a leaſe in *ejectment*, ſhall not operate to avoid a fine. And the act for amendment of the law, which ſays, the claim or entry ſhall be of no effect to avoid a fine, unleſs an action is commenced within a year after, ſhews it muſt be an actual entry, to be proſecuted with an action, and that the action is not ſuch an entry as is required.

And as to the ſecond point, it was obſerved, that the conſtant doctrine has always been, that one out of poſſeſſion cannot make a leaſe; and therefore in verdicts it is always found, that the leſſor entered and was ſeiſed *as the law directs*; that here was a time, when certainly the leaſe was void, *viz.* from the making to the entry; and the queſtion in *ejectment* always is, whether the leſſor could then make the leaſe; and he is non-ſuited, if he lays the demiſe before his title accrued; that ſuppoſing this may affect him as to the *meſne profits*, it is his own *laches*, and the owner is ſuppoſed to live upon them all the while.

And upon this point the *King's Bench* gave judgment for the defendants; and on *writ of error* being brought in parliament, the judges were all ordered to attend; when, after two days argument at the bar, two queſtions were put to the judges: 1ſt, Whether an actual entry was neceſſary to avoid the fine? to which they all anſwered, that it was. 2dly, Whether the demiſe being laid before the time of the firſt entry, this *ejectment* could be maintained? To which they anſwered, it could not. So without putting any queſtion upon the merits, the judgment was affirmed with 10*l.* coſts. *Vide Stra. vol.* 2. *p.* 1086. *Caſes Temp. Lord Hardw. p.* 160.

Michaelmas, 12 *Geo.* 2. *Thruſtout* v. *Troubleſome, on the demiſe of Park and his wife.*

The leſſors of the plaintiff delivered three *ejectments* in *C. B.* and two in this court, for the ſame tenements, and made the defendants attend at *five* aſſizes, but countermanded in time to ſave coſts. The defendant applied to ſtay proceedings in the laſt *ejectment*, till coſts were paid of the former, on account of the vexation. But the court would not do it, inaſmuch as coſts were not demandable by the rules of the court. *Vide Stra. vol.* 2. *p.* 1099.

Eaſter, 13 *Geo.* 2. *Fitchet* v. *Adams.*

On a ſuit in *ejectment* on the demiſe of *R. H.* the jury found a ſpecial verdict to this effect: that *R. H.* (ſince deceaſed) being ſeiſed in fee of the premiſes in queſtion, and having a wife *M.* and a daughter *E.* of the age of *ſix years*, by his will, dated the 16th day of *May* 1722, deviſed to his wife and her heirs; but if ſhe married again, then he appointed two truſtees to receive the rents, and apply them to the education of his daughter till ſhe comes of age, and in caſe of ſuch marriage of the mother, he deviſes to the daughter in *fee*: That *Richard* died in *June* 1722, and the wife entered and married a ſecond huſband, on the 15th day of *April* 1723, and the daughter continued to live with and was educated by her, till her (the daughter's death), on the 5th day of *May* 1734, when ſhe died without iſſue, and unmarried; and the leſſor of the plaintiff was her couſin and heir: That on the 22d day of *May* 1738, *J. W.* on behalf of the leſſor of the plaintiff, did, without any previous authority, make an actual entry on the premiſes, claiming the ſame as the eſtate of the leſſor, by virtue of his heirſhip to *Elizabeth*, and that the leſſor having notice thereof, did, on the 5th day of *June* 1738, aſſent thereto.

Upon this caſe two points were made: 1ſt, Whether an actual entry was neceſſary. And, 2dly, If it was, whether this was a ſufficient one.

Theſe points were ſpoken to at the bar, but the court gave no opinion on them, being very clear on the ſecond point, that what was found, did amount to an actual entry, to ſupport an *ejectment*, being aſſented to before the day of the demiſe in the declaration. *Co. Lit.* 247, 258. *Co.* 106. 1 *Roll. Abr.* 738. *pl.* 2, 3, 4. And they alſo held, that there was no occaſion for its being by deed or in writing, therefore judgment was given for the plaintiff. *Vide Stra. vol.* 2. *p.* 1128.

Michaelmas, 13 *Geo.* 2. *Doe, on the Demiſe of the Dutcheſs of Hamilton,* v. *Robinſon and others.*

Several declarations in *ejectment* were delivered before the *eſſoign-day* of *Eaſter* term, and in *Trinity* term the defendants appeared, and moved for leave to plead to the juriſdiction, that the lands lay in the County Palatine of *Cheſter*. And on ſhewing cauſe, it was objected, that they came too late.

Per curiam. Though in ordinary caſes, the defendant muſt plead within the firſt *four days*; yet we all know, that in a *country cauſe*, the tenants cannot be compelled to appear till *four days* after *Trinity* term. As therefore they have come in voluntary before they could be obliged, it is hard to ſay they are out of time And therefore the rule for pleading to the juriſdiction was made abſolute. *Vide Strange, vol.* 2. *p.* 1120.

Hilary, 14 *Geo.* 2. *Smith* v. *Crabb.*

Ten declarations on the ſame demiſe were delivered for *ten* houſes in *Steyning* in *Suſſex*, in the occupation of *ten* perſons. And the court being applied to, to have them put in one iſſue, ſuggeſting that the title was the ſame in all; they, however, refuſed to do it, for they ſaid the leſſor might have ſued them at *ten* different times, and it would be obliging him to go on againſt all, when perhaps he might be ready in ſome of them only. *Vide Strange, vol.* 2. *p.* 1149.

Eaſter, 14 *Geo.* 2. *Doe, on the Demiſe of the Dutcheſs of Hamilton,* v. *Hatherly and others.*

There being judgment for the defendants in the cauſe of *Thornby* v. *Fleetwood*, and that judgment affirmed in this court and the Houſe of Lords, on the *ejectments* being brought by the remainder-man, in the life of Lord *Phillip*, who, though he had a foreign education, might conform; the Ducheſs now (Lord *Phillip* being dead) brought a new *ejectment*, in which ſome of the then defendants were defendants now. And on motion to ſtay proceedings till the coſts in the firſt *ejectments* were paid; the Dutcheſs inſiſted, that the former was on the demiſe of the Duke and her, and the rule was in the ſingular number, *that the demiſor of the plaintiff be chargeable.*

Per curiam. We are not going to order the Dutcheſs to pay coſts, but only prevent her from being vexatious; which in 4 *Mod.* 349. is ſaid to be the foundation of theſe rules. Beſides, in this caſe ſhe proceeded after the death of the Duke: and therefore let the rule be to ſtay proceedings in this cauſe till the coſts are paid in the other. *Vide Stra. vol.* 2. *p.* 1152.

Hilary, 16 *Geo.* 2. *Morres, Bart.* v. *Barry.* Error.

On a *writ of error* brought on a judgment in *ejectment* for lands in *Ireland*, where there were two demiſes laid of the ſame premiſes, for the ſame term, both as to commencement and duration; and the judgment was, that the plaintiff recover his *terms* (in the plural number) *in the premiſes.*

It was objected, that both leſſors could not have a title to demiſe the whole; and therefore there was an inconſiſtency in the judgment, *and it does not appear*, which of the leſſors right is eſtabliſhed.

Per curiam. As this is after a verdict, a bare poſſibility of a title conſiſtent with the judgment will be ſufficient. The two leſſors might be joint-tenants, and yet refuſe to join in a leaſe; and having an intereſt in every part of the land, it was not improper for each to demiſe the whole. The judgment does not intitle the plaintiff to hold one moment longer than he ought to do, if it had been the word *term*, in the ſingular number; therefore the judgment was affirmed. *Vide Strange, vol.* 2. *p.* 1180.

Trinity, 17 *Geo.* 2. *Goodtitle* v. *Meymott.*

See this caſe fully ſtated in page 73 of this work, under the head *Amendment.*

Michaelmas, 19 *Geo.* 2. *Jones* v. *Edwards.* Error.

By *ſtat.* 11 *Geo.* 2. *c.* 19. it is provided, that the landlord may make himſelf a defendant in *ejectment*, though the tenant refuſes to appear; and though judgment is ſigned againſt the *caſual ejector*, the court ſhall order a ſtay of execution, *till they make further order thereon.*

In this caſe the landlord appeared without the tenant; and after a verdict for the plaintiff, he brought a *writ of error*, on which the plaintiff moved to take out execution, which the court refuſed to grant; for though it is left to their diſcretion, yet that can only be a legal one; the act intended to put the landlord in the place of the tenant, that he ſhould not be ſtripped by any act of the tenant, and it ought to be conſidered as if the tenant had brought *error*, which would undoubtedly be a *ſuperſedeas.* This court cannot take on them to judge whether there is *error* in the proceedings or not. *Vide Strange, vol.* 2. *p.* 1241.

Trinity, 21 *Geo.* 2. *Oates* v. *Shepherd.*

The term in *ejectment* being near expiring, it was amended without any conſent, from *five* years to *ten* years. *Vide Strange, vol.* 2. *p.* 1272.

Hilary, 30 *Geo.* 2. *Taylor, on the Demiſe of Atkins, Eſq.* v. *Horde, Eſq. and others.*

Adjudged, that an *ejectment* is a *poſſeſſory* remedy, and only competent where the leſſor of the plaintiff may enter: therefore it is always neceſſary for the plaintiff to ſhew that his leſſor had a right to enter, by proving a poſſeſſion within twenty years, or accounting for the want of it under ſome of the *exceptions* allowed by the *ſtatute, twenty years adverſe* poſſeſſion is a *poſitive* title to the defendant. It is not only a *bar* to the action, or remedy of the plaintiff, but takes away his right of *poſſeſſion.* Every plaintiff in *ejectment* muſt ſhew a *right* of *poſſeſſion* as well as of *property*: and therefore the defendant need not plead *the ſtatute* as in caſe of actions. *Vide Bur. vol.* 1. *p.* 119.

Hilary, 30 *Geo.* 2. *Goodtitle, on the demiſe of Cheſter*, v. *Alker and Elmes.*

On a caſe ſtated to the court on a ſpecial verdict in *ejectment*, for an acre of land lying in the pariſh of St. *P.* and *J.* in the county of *G.* the jury found as to one piece of land, containing fourteen inches in length, and thirty-three feet in breadth, (parcel of the premiſes); and as to one other piece of land, containing three feet ſix inches in length, and ſeven feet in breadth, (other parcel of the premiſes). And as to one other piece of land, containing two feet in depth, and fourteen feet in length, (other parcel of the premiſes contained in the declaration); that *T. C.* Eſq. was in 1648 ſeiſed in his *demeſne*, as of *fee*, of and in the manor of *Barton Regis*, in the county of *G.* with the appurtenances; and being ſo ſeiſed, by articles of agreement, dated the 24th day of *June* 1648, between him and one *J. G.* whereby the ſaid *T. C.* diſcharged the ſaid *J. G.* from an encroachment made on certain ground belonging to the ſaid *T. C.*

And the jury further found, that the ſaid two pieces of land particularly mentioned in the verdict, are the ſame as were contained in the articles, and from which the ſaid *J. G.* was releaſed by the ſaid *T. C.*

And the jury further found, That the ſum of 6*s.* 8*d.* was duly and conſtantly paid in purſuance of the ſaid articles by the defendants, and thoſe whoſe eſtate they have to the ſaid *T. C.* and the ſucceſſive lords of the ſaid manor (his deſcendants) during a term of 100 years, in the ſaid articles mentioned, and from the end thereof till *Lady-day* 1750.

And the jury further found, That the defendants *Alker* and *Elmes*, in the year 1748, erected *paliſadoes*, and thereby took in and encloſed the third piece of land, above particularly deſcribed, and that the ſtreet where the encroachments were made, contained in breadth ſixty feet, and no more.

And the jury further found, *T. C.* the leſſor of the plaintiff to be heir at law to *T. C.* Eſq. deceaſed, who executed the articles, and as ſuch to be ſeiſed of the ſaid manor, with the appurtenances, as the law requires; and that being ſo ſeiſed, he made the demiſe to the plaintiff, by virtue whereof he entered, *&c.* and was *ejected, &c.*

The plaintiff's council made two queſtions on this caſe; *viz.*

1ſt, Whether an *ejectment* will lie for the premiſes, as deſcribed in the declaration?

2dly, Whether the defendants are at liberty to controvert the title of the plaintiff, or are *eſtopped* from ſo doing?

Note. Theſe *two* queſtions were afterwards reduced to one general queſtion, *viz.*

"Whether a part of a highway can be recovered in "an *ejectment*?"

After hearing the arguments of the council on both ſides, the court gave their opinion.

Lord *Mansfield.* As to the queſtion, "whether an "*ejectment* will lie by the owner of the ſoil for land "which is ſubject to a paſſage over it as the King's "highway?"

It is like the property in a *market* or *fair*, and there is no reaſon why he ſhould not have a right to *all* remedies for the *freehold, ſubject* ſtill indeed to the ſervitude or eaſement. A writ of *aſſize* would lie if he ſhould be *diſſeiſed*, and an action of *treſpaſs* might be brought for an injury done to it.

The caſe of the defendant is moſt unfavourable; for he inſiſts on holding the thing demanded, without any pretence of title, and inſiſts that the plaintiff ſhall have no ſpecific remedy for his land; I am therefore of opinion, that the plaintiff ought to recover on this *ſpecial* verdict.

Deniſon and *Foſter*, Juſtices, gave their opinions at large, but concurred with the Chief Juſtice.

Per curiam. Let judgment go for the plaintiff. *Vide Bur. vol.* 1. *p.* 133.

Eaſter, 30 *Geo.* 2. *Denn, on the Demiſe of Burges Widow*, v. *Purvis and others.*

On a ſpecial *caſe* in *ejectment* for the opinion of the court, the caſe ſtated was as follows:

R. B. being ſeiſed in *fee ſimple* of divers premiſes of the tenure of *gavel-kind*, by will deviſed the ſame to his wife *Elizabeth*, for life, with *remainder* to his brother *T. B.* in *tail-male*, with *remainder* to *W. B.* ſon of *J. B.* in *tail-male*, with *remainder* to his own right heirs for ever.

R. B. died without iſſue, and without revoking or altering his will.

T. B. and *W. B.* are ſince dead without iſſue.

On the 8th of *September* 1746. *T. B.* made his will, and deviſed his ſeveral *real* eſtates to *A. B.* his wife for her life.

On the 6th of *March*, 1755, *Elizabeth*, widow of *R. B.* died.

In *Eaſter* term, 29 *Geo.* 2. *A. B.* the deviſee of the ſaid *T. B.* brought her *ejectment* for a *moiety* of the before mentioned premiſes, on a preſumption that her teſtator *T.* (as brother of the ſaid *R.*) and *W. B.* (as nephew of the ſaid *R.*) were the only heirs of the ſaid *R.* at the time of his deceaſe, according to the cuſtom of *Gavelkind*; but it appeared on the evidence given, that *R.* B. left a neice, (named *M.*) the only child of *W. B.* one other brother of the teſtator, who by the cuſtom of *gavelkind* was entitled as *coheir*, together with the ſaid *T.* (the brother) and *W.* (the nephew of the ſaid teſtator) to the premiſes in queſtion.

By conſent of the parties, the court ordered that a verdict ſhould be given for the plaintiff *as to one third part* of the premiſes in the plaintiff's declaration, ſubject to the opinion of the court, on the following queſtion:

"Whether the plaintiff, on her declaration for a new *moiety* of the foregoing premiſes, can recover *one-third* part of the ſaid premiſes."

After hearing council on both ſides on this caſe, the court gave judgment.

Lord *Mansfield*. This caſe is extremely plain. The rule is undoubtedly right. That the plaintiff muſt recover according to the title. Here ſhe has demanded *half*, and ſhe appears only entitled to a *third*, and ſo much ſhe ought to recover.

Deniſon and *Foſter*, juſtices, concurred with the Chief Juſtice.

Per curiam Let the *poſtea* be delivered to the plaintiff. *Vide Bur. vol.* 1. *p.* 326.

Trinity, 31 *Geo.* 2. *Doe on the Demiſe of Hitchings, and another,* v. *Lewis, Eſq;*

On a *ſpecial* caſe from the *aſſizes* on an *ejectment* brought by a tenant againſt his landlord, who had formerly obtained a judgment by *default* in a former *ejectment* brought by him againſt this ſame tenant, the caſe ſtated to the court was as follows:

T. L. being ſeiſed in *fee* demiſed to *J. H.* in conſideration of a *fine* of 49 *l.* 13 *s.* 6 *d. to hold* for *ninety-nine years*, if *three perſons* ſhould ſo long live, at 11 *l.* 5 *s.* payable at *Michaelmas* yearly, *ſubject* to a *proviſo*; that if the rent ſhould be in arrear, &c. for the ſpace of *one month*, being lawfully demanded, and no ſufficient diſtreſs on the premiſes, &c. that then it ſhould be lawful for the ſaid *T. L.* his heirs and aſſigns, to re-enter, &c.

That *J. H.* the leſſee, entered, and was poſſeſſed, &c. and then died, having firſt made a will, *whereby* he deviſed the ſaid term to his ſon *E. H.* (the leſſor of the plaintiff) and made his wife executrix. The wife duly proved the will, and duly aſſented to the legacy; and the deviſee *E. H.* (the leſſor of the plaintiff) entered, and became poſſeſſed of the term, being then, and ſtill, unexpired, and continued in poſſeſſion till the 15th day of *April* 1737.

T. L. the original leſſor, by will deviſed to ſeveral truſtees the premiſes, *in truſt* for *M. L.* an infant, &c. The ſaid *T. L.* died, ſeiſed, &c. and the ſaid *deviſees in truſt* became ſeiſed, &c. And there being *three years* rent due and in arrear from the ſaid *E. H.* for the premiſes, a declaration in *ejectment* was ſerved on the ſaid *E. H.* under and by virtue of *ſtat.* 4 *Geo.* 2. *c.* 28. for the ſaid premiſes on the demiſe of the *truſtees* and *deviſees* aforeſaid. In this ſuit judgment was given by *default* againſt the *caſual ejector*, and a writ of poſſeſſion iſſued on the judgment, and poſſeſſion was delivered by the ſheriff to the truſtees on the 15th day of *April* 1737: and the ſaid *E. H.* has not ſince paid nor tendered the rent in arrear, or any part thereof, nor the coſts, nor filed any bill for relief in equity.

On the trial of the *ſecond ejectment* by *E. H.* againſt the ſaid *L.* no *affidavit* was produced; "that half a year's rent was due before the firſt declaration in *ejectment* was ſerved on the ſaid *E. H.* and that no ſufficient diſtreſs was to be found on the ſaid premiſes ſufficient to cover the arrears then due; and that the leſſors in that firſt *ejectment* had power to re-enter."

On the trial of the *ſecond ejectment* brought by *E. H.* a verdict was found for the plaintiff, *ſubject* to the opinion of the court,

"Whether or no the plaintiff therein ought to recover?"

"Whether *E. H.* the leſſor of the plaintiff in the preſent *ejectment* ought to recover or not?" depended on the following queſtion:

"Whether it was neceſſary for the defendant Mr. *L.* to produce an *affidavit* that half a year's rent, &c. and that the leſſors in the former *ejectment* had power to re-enter, &c.?"

After hearing council on both ſides, the court gave judgment.

Lord *Mansfield*. The general queſtion, "whether the plaintiff in the laſt *ejectment* ought to recover?" depends on this particular queſtion, *viz.* "whether the firſt *ejectment* was regularly brought and proſecuted by the truſtees under *T. L.*'s will, according to *ſtat.* 4 *Geo.* 2. *cap.* 28. this laſt *ejectment* being brought near *twenty years* after the firſt *ejectment*?"

E. H. being the tenant in poſſeſſion, muſt have been ſerved with the declaration in *ejectment*, whether it was a *common law* proceeding, or a proceeding on *ſtat.* 24 *Geo.* 2. and if ſo, the judgment muſt have been founded on ſuch an *affidavit* as the act directs.

The true intention of the ſtatute was, to take off from the landlord the inconveniency of his continuing always liable to an uncertainty of poſſeſſion, and to limit and confine the tenant to *ſix calendar months*, after execution executed for doing this, or elſe that the landlord ſhould from thenceforth hold the demiſed premiſes diſcharged from the leaſe; I am therefore clearly of opinion, that in this caſe the plaintiff ought not to recover.

Deniſon, *Foſter*, and *Wilmot*, Juſtices, gave their opinions at large, but clearly concurred with the Chief Juſtice.

Per curiam. Let judgment go for the defendant. *Vide Bur. vol.* 1. *p.* 614.

Hilary, 32 *Geo.* 2. *George on the Demiſe of Bradley and others* v. *Wiſdom.*

On a rule to ſhew cauſe why a writ of *habere facias poſſeſſionem* ſhould not be ſet aſide with *coſts*, as being irregularly iſſued and executed, and why poſſeſſion of the premiſes in queſtion ſhould not be reſtored to the defendant.

The caſe was on an *ejectment* brought, in which *W.* (the landlord) had (on the tenants refuſing to appear) made himſelf defendant in the place of the *caſual ejector* (againſt whom judgment was ſigned for want of appearance), and the plaintiff having obtained judgment againſt the defendant, *W.* the landlord had afterwards moved for leave to take out execution againſt the *caſual ejector*, from which he was reſtrained by the *conditional rule*, "for a ſtay of execution againſt the *caſual ejector* till further order," always made in conſequence of a clauſe in *ſtat.* 11 *Geo.* 2. *cap.* 19. *which gives leave for making* the *landlord defendant in the room of the non-appearing caſual ejector on the foregoing terms.*

The court on the whole ſtate of this affair were of opinion, that the day of ſhewing cauſe againſt the rule, was the *proper* time for the landlord to have made his ſtand againſt the plaintiff's taking out execution and getting into *poſſeſſion*, and that he ſhould have *then* ſhewn his *writ of error*, as cauſe why the plaintiff ought not to have had leave to take out execution, and *why* it ought ſtill to have been further ſtayed; but having omitted ſo to do, he had loſt his opportunity, and therefore the execution was *regular*, and ought not to be ſet aſide.

Per curiam. Let the rule to ſhew cauſe be diſcharged. *Vide Bur. vol.* 2. *p.* 756.

Note, In this caſe it was agreed, that a *writ of error* could not be taken out in the name of the *caſual ejector*.

Michaelmas, 32 Geo. 2. Aſtin v. *Parkin.*

On an action of *treſpaſs* for the *meſne* profits of a houſe in *Sheffield* in *Yorkſhire*, brought in the name of the leſſee or nominal plaintiff, in *ejectment* againſt the tenant in poſſeſſion, after judgment obtained againſt the *caſual ejector* by *default*.

Note. The *coſts* of *ejectment* were included and inſerted in the plaintiff's declaration, as *conſequential* damages of the treſpaſs on which the action was grounded.

On the trial of the cauſe, Lord *Mansfield* reſerved the point for the opinion of *all* the *judges*, which he now delivered.

Lord Mansfield. All the judges are unanimouſly of opinion, that the *nominal* plaintiff and *caſual ejector* are *judicially* to be conſidered as the *fictitious* form of an action really brought by the leſſor of the plaintiff againſt the *tenant in poſſeſſion*, invented under the controul and power of the court, for the advancement of juſtice, and to enforce the parties to go to trial on the merits, without being entangled in the nicety of pleadings on either ſide.

The leſſor of the plaintiff and the tenant in poſſeſſion are in truth the only parties to the ſuit. The tenant in poſſeſſion muſt be duly ſerved, and if he is not, he has a right to ſet aſide the judgment; if after he is duly ſerved, he does not appear, but lets judgment go by *default*, ſuch judgment is carried into execution againſt him by a *writ of poſſeſſion*.

There is no diſtinction between a judgment in *ejectment* on a *verdict*, and a judgment by *default*. In the *firſt* inſtance, the right of the plaintiff is tried and determined againſt the defendant; in the *laſt* it is confeſſed.

An action for the *meſne* profits is *conſequential* to the recovery in *ejectment*. This action may be brought by the leſſor of the plaintiff in his *own* name, or in the name of the *nominal* leſſee, and in either caſe it is equally the action of the leſſor of the plaintiff.

The tenant is *concluded* by the judgment, and cannot controvert the title, conſequently he cannot controvert the plaintiff's poſſeſſion, becauſe his poſſeſſion is part of his title. For the plaintiff, to entitle himſelf to recover in *ejectment*, muſt ſhew a *poſſeſſory* right not *barred* by the *ſtatute of limitations*.

The judgment given in this cauſe, like all others, *concludes* the parties, as to the ſubject-matter of it: any thing *beyond* the time laid in the demiſe proves nothing, becauſe *beyond* that time the plaintiff has *alledged* no title, nor could he prove any.

As to the length of time the tenant has occupied, the judgment proves nothing, nor as to the *value*, and therefore it was proved in this cauſe (and muſt be in all others) how long the defendant enjoyed the premiſes, and what the value of the ſame were. And it appeared, that the time the defendant occupied the premiſes, was within the time laid in the demiſe.

Per curiam. Let the *poſtea* be delivered to the plaintiff. *Vide Bur. vol.* 2. *p.* 665.

Hilary, 1 Geo. 3. Sprightly on the Demiſe of John Collins v. *Dunch.*

On a motion to *ſhew cauſe* why judgment ſhould not be entered up againſt the *caſual ejector*, on an affidavit, that *B.* the tenant in poſſeſſion *abſconded*, and that the plaintiff had perſonally ſerved his *neice*, who was the only manager of his houſe, and reſided in it, and had alſo fixed up another copy of the declaration on the premiſes.

The court taking into conſideration the inconveniencies, that landlords might ſuffer by being kept out of poſſeſſion, made a rule on the tenant in poſſeſſion to *ſhew cauſe*, "Why judgment ſhould not be "entered up againſt the *caſual ejector*." *And further ordered*, that notice of this rule being given to *any* perſon in the houſe ſhould be ſufficient; and if no perſon was in the houſe, then to be affixed to the door, &c. And on cauſe being ſhewn, the rule was made abſolute. *Vide Bur. vol.* 2. *p.* 1116.

Eaſter, 1 Geo. 3. Small on the Demiſe of Baker v. *Cole and Skinner.* Error.

See this caſe fully ſtated in page 74 of this work, under the head *Amendment*.

Trinity, 1 Geo. 3. Fenn on the Demiſe of Tyrrell and another v. *Denn.*

On a rule to *ſhew cauſe* why ſervice of a declaration in *ejectment* in this cauſe, which had been made on a woman who had declared her name was *M. C.* at the time when the declaration was ſerved on her, at her houſe, ſhould not be deemed good ſervice on the ſaid *M. C.* herſelf, (as tenant in poſſeſſion) and why the leſſors of the plaintiff ſhould not have leave to ſign their judgment againſt the *caſual ejector*, on *Wedneſday* next in *default* of her appearance. In which rule *it was further ordered*, that leaving a copy of the rule at the houſe of the ſaid *M. C.* with ſome perſon there, or if no one can be met with, affixing a true copy of ſuch rule on the door thereof, ſhall be deemed good ſervice thereof on the ſaid *M. C.*

The leſſor of the plaintiff produced an *affidavit*, that *M. C.* was either not at home, or (if at home) was denied, and that her ſervant maid was at home, but could not be ſerved, whereon a copy of the rule was affixed on the door of the houſe: and that at a a ſubſequent day (on a doubt whether what had been aleady done was ſufficient) the maid being at home and opening the window, but refuſing to open the door, and denying that her miſtreſs was at home, another copy of the ſaid rule was affixed on the door, and the maid was told the effect of ſuch rule, and another copy thereof was thrown into the window of the houſe, and the *original* rule was ſhewn to the maid.

Per curiam. Let the rule be made abſolute. *Vide Bur. vol.* 2. *p.* 1181.

Trinity, 1 Geo. 3. Denn on the demiſe of Lucas v. *Fulford.*

See this caſe fully ſtated in page 314 of this work, under the head *Coſts*.

Hilary, 2 Geo. 3. Fair-claim on the demiſe of Fowler and others, v. *Sham-title.*

On a motion to diſcharge a rule, *whereby it was ordered*, That *G.* Earl *G.* and *T. G.* Eſq; landlords of the tenant in poſſeſſion of the premiſes in queſtion in this cauſe, ſhould be joined and made defendants with the ſaid tenant, if he ſhall appear. And the ſaid Earl and *T. G.* deſiring, that if the ſaid tenant ſhall not appear, that they may appear for themſelves, and conſenting, that in ſuch caſe they will enter into the *common rule*, to *confeſs leaſe*, *entry*, and *ouſter*, "in ſuch manner as the ſaid tenant ought, in caſe he had appeared." On which the court gave leave to the ſaid *Earl* and *T. G.* purſuant to the ſtatute, if the ſaid tenant ſhould not *appear*, to *appear* for themſelves, and on their entering into the *common rule*, to become defendants, in the ſtead of the *caſual ejector*, and to defend their title to the ſaid premiſes, without the ſaid tenant. The plaintiff was nevertheleſs to be at liberty to ſign judgment againſt the *caſual ejector*, but execution thereon was to be ſtayed, until the court ſhould make further order therein.

The council for the motion made this objection to the rule, *viz.* That *Earl G.* and *Mr. G.* had never been in poſſeſſion of the premiſes, of which fact they produced an *affidavit*, and obtained a rule to ſhew cauſe.

After hearing council on both ſides on ſeveral arguments, the court gave their opinion.

Lord Mansfield. We have thought very fully of this matter ſince it came on laſt, and we are all of opinion, that it muſt be tried between the *two claimants*, the *heir* and the *Lord*. The *occupier* has no intereſt or concern in the queſtion; he ought not to take ſide or prejudice either; he does not appear; the queſtion ſhould be tried in a way to give neither any advantage from his poſſeſſion. It may be done in a *feigned iſſue*, or an *ejectment* may be brought by the *Lord*, with an admiſſion of his title, which will amount to the ſame thing.

It was at laſt agreed to by the parties, with the conſent of the court, that the *Lord*, (who never could come into poſſeſſion without an *ejectment* to be brought by him) ſhould immediately bring his *ejectment* againſt the preſent leſſors of the plaintiff, and that the ſaid leſſors, (who claimed as heirs of the deceaſed) ſhould be admitted to defend either alone, or together with the tenant in poſſeſſion, and ſuch *ejectment* was to be tried at the next *aſſizes*; and the council for the preſent plaintiffs were to admit, that all the lands lie in one and the ſame *manor*, and that ſuch *manor* belongs to *Earl G.* as lord thereof.

Note. The court reſerved the conſideration of the preſent motion and rule now depending, till after trial of the *ejectment*. *Vide Bur. vol.* 3. *p.* 1290.

Eaſter, 6 *Geo.* 3. *Armſtrong on the Demiſe of Tinker and others*, v. *Peirſe and others.*

On an action of *treſpaſs* and *ejectment*, for a meſſuage and lands at *Biſhop's Canning* in *Wilts*, a general verdict was found for the plaintiff, ſubject to the opinion of the court on the following queſtion:

" Whether a mere truſtee could diſpute the poſſeſ-
" ſion of his own *ceſtui qui truſt*?"

The court looked on it as a ſettled point, that the formal title of a truſtee ſhould not in an *ejectment* be ſet up againſt the *ceſtui qui truſt*, becauſe from the nature of the two rights, the *ceſtui qui truſt* is to have the poſſeſſion, yet in this caſe that was not the queſtion, for here the leſſors of the plaintiff were not truſtees for the *defendant*, but for the *mortgagee*.

Per curiam. Let judgment go for the plaintiff, and let the *poſtea* be delivered to him. *Vide Bur. vol.* 2. *p.* 1898.

Eaſter, 6 *Geo.* 3. *Oates on the Demiſe of Wigfall* v. *Brydon and others.*

On an action of *treſpaſs* and *ejectment* for meſſuages, *&c.* in *Sheffield*, a verdict was given for the plaintiff, ſubject to the opinion of this court, on the following queſtion:

" Whether the leſſor of the plaintiff be entitled to
" *three undivided fourth parts* of the premiſes, and can
" recover the ſame in this action?"

After hearing council on both ſides, the court delivered their opinion.

Lord *Mansfield*. We are all of opinion, that the confeſſion of *leaſe*, *entry*, and *ouſter* is ſufficient to *bar* a *nonſuit* for want of proof of *actual ouſter*.

In all caſes, the confeſſion of *leaſe*, *entry*, and *ouſter* is ſufficient, and it is now ſettled to be ſufficient for an *ejectment* brought on a *condition broken*, and alſo in caſes of a *tenant in common*, without proof of *actual ouſter*.

Per curiam. Let a *nonſuit* be entered againſt the plaintiff, and let the *poſtea* be delivered to the defendant. *Vide Bur. vol.* 3. *p.* 1895.

Michaelmas, 6 *Geo.* 3. *Wharod* v. *Smart.*

The defendant having brought a *writ of error* in parliament, on an *ejectment* on the demiſe of *B.*

The court obliged the defendant to enter into a " rule not to commit waſte or deſtruction pend-
" ing the *writ*," which not being oppoſed by the defendant's council, he entered into the ſaid rule, and alſo *juſtified* in 400 *l.* *Vide Bur. vol.* 3. *p.* 1823.

Elections.

Trinity, 2 *Ann.* *Prideaux* v. *Morris.* Error.

On a *writ of error* brought on a judgment in *C. B.* for a falſe return on an *election*, againſt the ſheriff, the plaintiff declared, that whereas he was duly *elected*, the ſheriff returned *A. B.* to be duly *elected*, who was, in fact, not duly *elected*. It was objected by the defendant's council, that the right of *election* was only to be determined in the Houſe of Commons, for that it was a parliamentary matter, which ought not to be tried here, no more than the right of precedency. On the other ſide it was argued, that this court may determine what is an act of parliament. 8 *Co.* 1. their privileges. *Mo.* 67. 1 *Rol.* 903. *Dyer* 275. The right of peerage: and here the right of *election* is no otherwiſe in queſtion, than as it is incident to the falſity.

Holt, Chief Juſtice. The cauſe of the plaintiff's ſuit is a wrong done out of parliament, and whatever falls under the regulation of law, and is done out of the houſes of parliament, is ſubject to the law of the land, for laws are to be executed out of parliament; but as for the rules of the houſe, as ſitting, meeting, *&c.* they are within the houſe, and the judges cannot know them, there being no practice of them out of parliament: but if the parliament ſhould make a law concerning them, or they ſhould become neceſſary to be determined on account of ſome other matter cognizable by the judges, the judges muſt take notice and determine them, as in *Bynion*'s caſe

And he ſeemed to be of opinion, *firſt*, that for a double return, no action lay againſt the ſheriff before *ſtat.* 7 & 8 *W.* 3. *c.* 7. not only becauſe it is the only method the ſheriff has to indemnify himſelf; but when the right comes to be determined in parliament, one indenture returned is taken off the file, and then there is no double return. *Secondly*, He ſeemed to think, that for a falſe return, the party could have no action, where there might be a determination in the houſe of Commons, becauſe of the inconvenience of contrary reſolutions; and ſo if a ſuit is between *A.* and *B.* and *A.* is voted *elected*, *B.* cannot bring an action, and ſay, that he was duly *elected* and returned; becauſe his name does not appear on record; and he is *eſtopped* to ſay, that *A.* was not duly *elected* and returned; but where the right of *election* either is determined, or cannot be determined in parliament, as in the caſe of a diſſolution, an action lies for the falſe return, for the courts of law can neither anticipate nor contradict their judgment. *Vide Salk. vol.* 2. *p.* 502.

Michaelmas, 2 *Ann.* *Aſhby* v. *White and others.*

See this caſe fully ſtated in page 29 of this work, under the head *Actions*.

Eaſter, 6 *Ann.* *Kendall or Coundell* v. *John.*

See this caſe fully ſtated in page 36 of this work, under the head *Actions*.

Michaelmas, 7 *Ann.* *Bendiſh* v. *Lindſey.*

The plaintiff declared, that he being a good, honeſt, and faithful liege ſubject of *Ann* our Queen, *&c.* and having good intereſt among the burgeſſes of the borough of *Cambridge*, and ſtanding as a *candidate* for that borough, the defendant *a burgeſs of the ſame borough of Cambridge, and having a vote in the election and return of a member of parliament for the borough aforeſaid*, &c. *being not ignorant of the premiſes, but falſely and maliciouſly intending him the plaintiff unjuſtly to aggrieve*, &c. and, to hinder him from being choſen, holding in his hand *three guineas*, in the preſence of many people, burgeſſes of the ſaid borough of *Cambridge*, *then and there, openly, publickly, falſely, and maliciouſly, ſaid, aſſerted, and ſpoke of the ſaid plaintiff theſe falſe, feigned, malicious, and opprobrious words following*, viz. theſe guineas (meaning the aforeſaid pieces of *gold coin called* guineas) and two more (meaning two other pieces of gold coin called *guineas*, and two half guineas) are Mr. *Bendiſh*'s (meaning him the plaintiff) money, and were given me to vote for him; and he has bought, (meaning the *vote* of him the defendant) and he ſhall have it; on iſſue joined, and a trial and verdict for the plaintiff, the court was moved in arreſt of judgment, and the following exceptions were taken by the defendant's council, *viz.*

1ſt. That theſe words are not actionable; for no words are actionable except they ſubject the plaintiff to a temporal puniſhment, or a ſpecial damage, and here nothing is ſpoken that will ſubject the plaintiff to an indictment on the ſtatute. And *Co.* 145. ſays, bribey is when a fee is taken in a judicial place.

2dly. That the words are inſenſible, for when the plaintiff has given the money to the defendant, it cannot be the plaintiff's money.

3dly. That it is not averred through the whole pleadings, that the plaintiff did not give the money, *&c.*

4thly. That the ſheriff *directed his precept to the Mayor of the aforeſaid borough of Cambridge, to elect and return two burgeſſes of the ſame borough to ſerve in that parliament for the borough aforeſaid*, &c. and it ſhould have been to the Mayor and burgeſſes; and therefore the ſpeaking theſe words is no offence in caſe of ſuch an *election.*

Holt, Chief Juſtice. It need not be averred, that the plaintiff did not give the money to the defendant to vote for him, for it is ſaid, *theſe falſe, feigned, malicious words*, which is well enough; and as to the precept being directed to the Mayor to chuſe, and not ſaid cauſe to be choſen, he ſaid it was well enough after verdict, becauſe it muſt be proved at the trial that the *election* was made by the burgeſſes; and as to the merits of the cauſe, he was clear of opinion that the action lay; ſo judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 11. *p.* 193.

Eaſter, 3 *Geo. Sir Saliſbury Cotton* v. *Davies.*

See this caſe fully ſtated in page 285 of this work, under the head *Corporations.*

Hilary, 8 *Geo. The King* v. *The Mayor and Common Council of Bedford.*

See this caſe fully ſtated in page 296 of this work, under the head *Corporations.*

Michaelmas, 9 *Geo. The King* v. *The Mayor and Aldermen of Carliſle.*

See this caſe fully ſtated in page 285 of this work, under the head *Conviction.*

Hilary, 10 *Geo. The King* v. *The Mayor of Whitchurch, &c.*

A rule was made againſt the mayor and other officers of the borough of *Whitchurch*, to ſhew cauſe why an information ſhould not go againſt them, being choſen into their reſpective offices, and not dwelling in the ſaid *borough*, and by a jury of *non reſidents* impanelled for that purpoſe; againſt which choice the inhabitants of this *borough* proteſted, it being contrary to their ancient uſage, as was now ſuggeſted.

The council for the defendants ſhewed for cauſe againſt this rule, that all the officers of this borough are to be conſtantly choſen by the freeholders thereof, and that ſome of the inhabitants who were freeholders, were ſummoned to be of the jury, but they refuſed to appear, pretending they would not ſerve with thoſe who were not inhabitants of the borough, but *out-dwellers*, and therefore excluded from being of the jury; and thereon others were returned who would ſerve.

That ever ſince the year 1641, the *out-dwellers* who had freeholds in the *borough*, were returned jurymen, which appeared by the entries made in their borough-books, and ſuch out-dwellers had ſerved in all the offices thereof.

That *Whitchurch* is an antient *borough by preſciption*, and that the jury thus impannelled as aforeſaid, did not ſerve in a *court-leet*, but in a *borough-court*; for if it had been to ſerve in a *leet*, then it muſt be by inhabitants, but that in a *borough-court* none but freeholders are to be of the jury, which freeholders might be *out dwellers*, ſo as they had a freehold within the borough.

That all the jury had freeholds in the borough, and by ſuch a jury aſſembled at a borough-court, the defendants were lawfully choſen.

But the rule was made abſolute by two judges againſt one, there being but three in court; for this being a matter of right, it was fit to be tried by a jury, who are the proper judges of evidence; and on another day the court was moved for a trial at bar, on ſome affidavits, that the freehold to the value of 1000 *l.* might come in queſtion, but it was denied for no other reaſon, but that it was a borough cauſe. *Vide Mod. Rep. vol.* 8. *p.* 210.

Eaſter, 10 *Geo. Tufton, Eſq*; v. *Nevinſon, Mayor of Appleby in Weſtmoreland.*

On a *mandamus* directed to the defendant, commanding him to ſwear the plaintiff into the office of an Alderman of that borough, being duly choſen; the defendant among ſeveral other facts, returned, that the plaintiff was not *elected* an Alderman, as by the writ is ſuppoſed; and iſſue being joined thereon it came to be tried at the *bar*, this term. The plaintiff gave evidence, that he was *elected* Alderman, on the *Monday* before *Michaelmas*, 1723. But it was objected by the defendant's council, that Mr. *Tufton* ought to prove he had received the ſacrament within a year before his *election*; the expreſs words of *ſtat.* 13 *Car.* 2. *cap.* 1. *ſect.* 12. being, that no perſon ſhall for ever hereafter be *elected, &c.* into any of the offices aforeſaid, that ſhall not have within one year next before ſuch *election*, taken the ſacrament, *&c.* and in *default* thereof, every ſuch *election* is declared to be void; to which the plaintiff's council anſwered for the plaintiff, that firſt, at the time of the *election* no ſuch objection was made to Mr. *Tufton*, as was proved by witneſſes, therefore the plaintiff could not expect this objection would be made at the trial; and came not prepared to make out that fact: but the defendant, if he intended to inſiſt on proof of this matter, ſhould have given notice to the plaintiff before the trial, and then he would have came prepared to have proved it, that *ſtat.* 5 *Geo. cap.* 6. for quieting and eſtabliſhing corporations, confirms perſons then in offices, &c. who had omitted receiving the ſacrament, as *ſtat.* 13 *Car.* 2. *cap.* 1. directs, and diſcharges them from all forfeitures for the ſame, and enacts, that no perſon, who ſhould be thereafter *elected, &c.* ſhould be removed by the corporation, or otherwiſe proſecuted for ſuch omiſſion; nor ſhould any incapacity or diſability, *&c.* be incurred, by reaſon of the ſame, unleſs ſuch perſon be ſo removed, or ſuch proſecution commenced, within ſix months after ſuch perſons being *elected, &c.* And Mr. *Tufton* was *elected* Alderman on *Monday* before *Michaelmas*, 1723, ſo that above ſix months are elapſed ſince the *election.* But the whole court was unanimouſly in opinion: *Firſt*, That this caſe was not within the act of the ſeventh of his Majeſty, becauſe the plaintiff never was admitted into the office, and therefore could not be removed, nor incur a forfeiture; *ſecondly*, that it was incumbent on the plaintiff to prove that he had received the ſacrament, *&c.* within a year before his *election*, by *ſtat.* 13 *Car.* 2. *cap.* 1. elſe his *election* was void, and ſo it was ſaid to have been ruled by Lord Chief Juſtice *Parker*, in the caſe of *Vavaſor* v. *Hammond.* And ſo it was held in the caſe of the *King* v. *Maſket*, concerning a member of the corporation of *Buckingham*, only a difference was there taken, that in caſe a member of a corporation had been long in poſſeſſion of his office, there ought to be notice given, that this would be inſiſted on at the trial. But here the plaintiff has never been admitted into the office, but ſued this *mandamus* to get himſelf ſworn in. As to this, which was the fifth iſſue concerning the plaintiff's *election*, the jury, by the direction of the court, found for the defendant. As to the four other iſſues, they found for the plaintiff. *Vide Raym. vol.* 2. *p.* 1354.

Eaſter, 10 *Geo. Machell* v. *Nevinſon, Mayor of Appleby.*

The plaintiff ſued a *mandamus* out of this court, directed to the defendant, commanding him to ſwear the plaintiff into the office of a Common Council-man of the corporation, being duly choſen; to which the defendant returned, that the plaintiff was not *elected* a Common Council-man, as by the writ was ſuppoſed; upon which iſſue being joined, the iſſue was tried at the *bar* this term; and on the evidence it appeared, that the corporation was a corporation by preſcription, conſiſting of a Mayor, twelve aldermen, and ſixteen Common Council-men, beſides the freemen at large; that the Mayor was to be choſen out of the Aldermen by the Common Council, the Aldermen to be choſen out of the Common Council or Freemen, and the Common Council to be choſen out of the Freemen by the Common Council; and if the Common Council were equally divided, then the Aldermen were to vote; and if they were equally divided alſo, then the Mayor had a caſting vote; that the Mayor was to ſerve for a year, and until another was choſen; that the members uſed to be ſummoned to meet to chuſe a Mayor, by order of the old Mayor, and no certain time was fixed for the choice of a Mayor; it uſed to be about *Michaelmas*; but on the 26th day of *May* 1674, an order was made by the Mayor, Aldermen, and Common Council-men, that they ſhould for the future meet on the *Monday* before *Michaelmas-day* in every year, to chuſe a Mayor, under a penalty inflicted on every one of them that wilfully abſented himſelf; that at other days, for filling up vacancies of all Aldermen or Common Council-men, the Mayor uſed to ſummon the body, and they never uſed to meet without ſuch a ſummons; and when they met, acquainted them with the vacancy, and with the occaſion of the meeting, and always ſent out a ſummons for the meeting on the day, which they called the *charter-day*: that the Mayor, eleven Aldermen, and fifteen Common Council-men met on the 23d day of *Sept.* 1723, being the *Monday* before *Michaelmas-day*, in the *Moot-hall*, the Mayor declared, their meeting was to elect a Mayor; on which ſome of the Common Council ſaid, there was a vacancy of an Alderman and Common Council-man, and they would firſt proceed to fill up thoſe vacancies; but the Mayor ſaid, they were filled up: on which nine of the Common Council withdrew into the Council-chamber; ſix of them ſtaying in the *Moot-hall* with the Mayor: the nine *elected* the plaintiff, a Common Council-man, and ſigned a paper, purporting their *election*, and brought it, and tendered it to the Mayor, and deſired him to ſwear the plaintiff, but he refuſed, and ſaid, *let the law take its courſe.* The plaintiff attempted to prove, that it was uſual to fill up vacancies on the *Monday* before *Michaelmas*, before they *elected* a Mayor; but only one inſtance was given in evidence, of one *G.* choſe Common Council-man on that day before the Mayor was *elected*, and that but two years before the *election* of the plaintiff; and it did not appear, but the Mayor directed the going to that *election*, and that all the Common Council then living were preſent, and conſenting. But all the witneſſes for the plaintiff agreed they never knew before this time an inſtance of proceeding to fill up a vacancy, without the Mayor's declaring the vacancy, and directing them to proceed to fill it up.

The facts appearing thus on the evidence, the defendant's council inſiſted, that on the plaintiff's own evidence the *election* of him to be a Common Council-man was a void *election*; for they ſaid, this being a corporation by preſcription, the right and manner of *election* was to be governed by the uſage: that for the *election* of Aldermen and Common Council-men at any other time but this *Monday* before *Michaelmas*, it was agreed, there ought to be a preceding ſummons from the Mayor for the corporation to meet: and ſo it was in caſe of *election* of a Mayor before the order in 1674: that ſince that time a ſummons uſed to go to meet that day; that that day was only for *electing* Mayors, founded on that order: that all the witneſſes agreed, the Mayor uſed to declare the vacancies of Aldermen and Common Council-men, and directed the Common Council-men to proceed to an *election*, and did not know an inſtance to the contrary till this time: But indeed they ſaid, the Common Council thought that they had a right to proceed to ſuch *election* when they were met, without ſuch direction; but that was a miſtake in them, for there was no uſage to found ſuch opinion on: that though ſome of the witneſſes ſaid, they had ſeveral times *elected* Aldermen and Common Council-men on this *Monday* before *Michaelmas*, before they *elected* the Mayor, yet they gave but one inſtance, which was of one *G.* ſo *elected* Common Council-man two years before the *election* in queſtion; and they could not ſay, in that as other caſes they had a general memory of, though they could not recollect particular names, the Mayor might direct the going to thoſe *elections*, and that all the Common Council-men concurred in it: that the Mayor's preſence being neceſſary at the meeting, he ought to preſide; and for avoiding confuſion, ought in reaſon to give directions, though he did not vote among the Common Council in the *election*; and that as the uſage gave the Common Council a right of *electing*, the ſame uſage gave the Mayor a right of directing when they ſhould proceed to the *election*. But in this caſe the Mayor refuſed it, ſaid the vacancies were filled up, *let the law have its courſe*; that ſix of the Common Council did not go into the Council-chamber, but ſtayed with the Mayor; and therefore this not being a day appointed for chuſing Common Council-men, nor no ſummons for that purpoſe, part of the Common Council, though the major part, could not *elect* to bind the reſt; and therefore they concluded, this *election* of the plaintiff was a void *election*.

The court were unanimouſly of opinion, that the *election* was void, for the reaſons given by the council for the defendant; and ſaid it was almoſt the ſame caſe with that of the *King* v. *The Corporation of Carliſle*, *Trinity*, 6 *Geo.* By the direction of the court, the jury gave a verdict for the defendant. *Vide Raym. vol.* 2. *page* 1355.

Eaſter, 10 *Geo.* *Sir Chriſtopher Muſgrave* v. *Nevinſon.*

See this caſe fully ſtated in page 296 of this work, under the head *Corporations*.

Eaſter, 10 *Geo.* *Stevenſon*, *Junior*, v. *Nevinſon*, *Mayor of Appleby*, *and the Common Council of Appleby.*

On a *mandamus* iſſued out of this court, directed to the defendants, commanding them to reſtore the plaintiff to the office of Common Council-man of the borough of *Appleby* in *Weſtmoreland*, they, among ſeveral other facts, returned, that the plaintiff was not *elected* a Common Council-man, as in the writ was ſuppoſed. To which return the plaintiff came in and denied the ſeveral material facts relied on by the defendants in their return; and among the reſt alledged, that the plaintiff was choſe a Common Council-man, as in the writ was alledged, and concluded to the country. On which, as well as the other facts, iſſue was joined; and the ſeveral iſſues were tried at the *bar*. And after the plaintiff had proved the fact of his having been *elected* Common Council-man, the defendants council inſiſted, that by the conſtitution of the borough, which was by preſcription, no perſon was capable of being *elected* a Common Council-man of the borough, who did not hold a *burgage tenure*, and alſo inhabit within the borough; but the plaintiff inhabited in *Bond-gate*, which was ſevered from the borough, and no part of it. To prove which conſtitution, the firſt witneſs produced was one *R. W.* But it being objected by the plaintiff, that he had a *burgage tenure*, and alſo inhabited in the borough, and could not be a witneſs to prove a right in himſelf, and in ſuch as had his qualifications, excluſive of all others; which fact being admitted, he was refuſed by the court to be admitted to prove this conſtitution. But then one *L.* was produced as a witneſs for the defendants, to prove it, who was an inhabitant of the borough, but it was admitted that he had no *burgage tenure*. Whereon he was allowed by the court to be a good witneſs, as to the right fixing in ſuch as held *burgage*, and alſo were inhabitants, ſince he did not attempt to eſtabliſh the right in the inhabitants only. But after a long examination, a verdict was given for the plaintiff on all the iſſues. *Vide Raym. vol.* 2. *p.* 1353.

Michaelmas, 10 *Geo.* *The King* v. *The Mayor of Tiverton.*

See this caſe fully ſtated in page 297 of this work, under the head *Corporations*.

Michaelmas, 11 *Geo.* *The King* v. *Plympton.*

An information was exhibited againſt the defendant for promiſing money, *&c.* to one *W. H.* a member of a corporation, to give his vote for the *election* of a Mayor of the corporation of *Tiverton* in the county of *Devon.* On *not guilty* pleaded, the defendant was found guilty. And the defendant's council moved in arreſt of judgment, that by ſo much of the charter as is ſet out in the information, it did not appear that the defendant or *H.* as *aſſiſtants*, had a right to vote at any *election* but that of a Mayor; and if there are any clauſes in the charter, which enable *aſſiſtants* to vote at the *election* of other officers, they ſhould have been ſet out; for want of which it is *informal:* and it is not ſufficient to aver, that *H.* had a right to vote at the *election* of the other members of the corporation; but the offence charged is, for ſoliciting *H.* to vote not only at the *election* of a Mayor, but alſo of the other members; which is laid as one intire offence, and the fine muſt be for the whole; but it ought not to be for ſoliciting *H.* to vote at the *election* of other members, becauſe he had no right to vote at them. Then the council further urged, here was no offence at all charged; for it is lawful for one member of a corporation to aſk or perſuade another to vote for his friend, and if he made ſuch a promiſe as in this information, it will be no crime, without ſhewing that the fact was done, that the money was paid and accepted by *H.* Beſides, the *election* of other members might only be of Common Council-men, who are not magiſtrates, but only in the nature of private perſons: and in ſuch caſe the offer of money to vote for them would be no offence puniſhable by information. And the promiſe here is void, becauſe there is no good conſideration for it.

But the court were of opinion, that to bribe perſons either by giving money or promiſes, to vote at *elections* of members of corporations, which are created for the ſake of public government, is an offence for which an information will lie, and that *H.*'s right to vote was ſufficiently laid: therefore judgment was given againſt the defendant. *Vide Raym. vol.* 2. *p.* 1377.

Eaſter, 6 *Geo.* 2. *The Caſe of the Borough of Eveſham.*

The cuſtom is to give *twenty-four* hours notice of of an *election:* a *mandamus* was granted to chuſe a capital burgeſs; and it was moved on the other ſide to fix a day, or that it might be on *ſix days* notice. But the court would give no directions, ſaying they could not alter the conſtitution of the borough. *Vide Strange, vol.* 2. *p.* 949.

Trinity, Geo. 2. *Stoughton* v. *Reynolds.*

See this caſe fully ſtated in page 45 of this work, under the head *Actions.*

Trinity, 9 *Geo.* 2. *The King* v. *Davis.*

Statute 10 *Ann. c.* 23. requires the ſheriff to deliver to the clerk of the peace, all the poll-books taken at the *election* of knights of the ſhire. In the *Radnorſhire election*, the ſheriff ſwore a clerk, and each of the candidates had *two* others, and *five* polls were taken, which were delivered to the ſheriff. He carried in only that which was taken by his clerk, as being the original poll, and the others only checks; and inſiſted, that the *ſtatute* in requiring all the poll-books to be lodged, meant only in caſes where the poll is going on at different booths, and all the books make but *one* poll. But the court held that all the books ought to have been carried in; and granted an information againſt the ſheriff for not doing it. *Vide Stra. vol.* 2. *p.* 1048.

Trinity, 2 *Geo.* 3. *The King* v. *Pitt.* *Idem* v. *Mead.*

Adjudged, that bribery at *elections* for members of *parliament* had always been conſidered as a crime at *common law*, and conſequently puniſhable by *indictment* or *information*, but that *ſtat.* 2 *Geo.* 2. *cap.* 24. has introduced a very *ſevere* penalty, in order to enforce the *laws* then in being, and remedy the evil. *Vide Bur. vol.* 3. *p.* 1338.

Michaelmas, 2 *Geo.* 3. *Sulſton* v. *Norton.*

See this caſe fully ſtated in page 357 of this work, under the head *Declaration.*

Michaelmas, 3 *Geo.* 3. *The King* v. *Heydon.*

The defendant being convicted of *bribery* at an *election* for a *member* of *parliament*, and the time limited for bringing the *qui tam* action, being about to expire in *March* following, the matter was adjourned till the firſt day of *Eaſter* term following, and the defendant entered into his own recognizance only in 100*l.* to appear at that time. *Vide Bur. vol.* 3. *p.* 1359.

Michaelmas, 5 *Geo.* 3. *Combe, Eſq.* v. *Pitt.*

This cauſe being tried, and a verdict given for the plaintiff, ſubject to the opinion of the court; it was *adjudged*, that the *crime* and the *penalty* under *ſtat.* 2 *Geo.* 2. *cap.* 24. for *bribing* at an *election* is the ſame, whether the *bribe* be given to vote for *one*, or to vote for *both* candidates. This caſe is more fully ſtated in page 10 of this work, under the head *Abatement.* *Vide Bur. vol.* 3. *p.* 1591.

Eaſter, 6 *Geo.* 3. *The King* v. *The Rector of St. Ann's Soho.*

On ſhewing cauſe againſt a *mandamus*, prayed againſt the Rector of *St. Anne's*, within the liberty of *Weſtminſter*, requiring him to nominate and appoint a *pariſh clerk*, for the ſaid pariſh, according to the form of a *ſtatute* made in the time of King *Car.* 2. in the room of ——— *Pynyot*, deceaſed.

After hearing council on both ſides, the court gave their opinion.

The court held this to be no diſſent to the rector's nomination; it was an attempt to put up another for *election*, ſuppoſing, "that they had a right to *elect*," which in fact they had not. This was a miſtake; and this demand of a poll was all *nugatory* and *void*; it was no diſſent to the nomination; if a poll had been taken, it does not appear that the nomination would have been diſſented to; if the majority were really *diſſentient*, they ſhould have declared their diſſent; but what was done in this caſe, was of no more effect than if they had gone away without giving either their aſſent or diſſent.

Per curiam. Let the rule be diſcharged. *Vide Bur. vol.* 3. *p.* 1877.

Error.

Michaelmas, 2 *W. & M.* *Wooldridge* v. *Cloberry.*

In an action for diverting a *water-courſe* from a *mill*, againſt ſeveral perſons, who joined in pleading *not guilty*, one of them died before a verdict.

Per curiam. It is an *error in the whole*, for when after joinder in pleading, one of the defendants dies, after the *venire facias*, you ought to come into court, and pray judgment againſt the living perſon only; otherwiſe the writ ſhall abate. *Vide Mod. Rep. vol.* 12. *p.* 1.

Michaelmas, 2 *W. & M.* *Cone* v. *Bowles.*

See this caſe fully ſtated in page 331 of this work, under the head *Damages.*

Eaſter, 3 W. 3. Temple v. *Killingworth.*

A *writ of error* muſt be of a *common return*, if on a *certain day*, it is naught; where the *writ of error* is *ubicunque*, &c. the *ſci. fac.* ought to be on a *common day*. *Vide Mod. Rep. vol.* 12. *p.* 5.

Trinity, 4 W. & M. Howard v. *Pitt.*

In *treſpaſs* againſt *four* defendants; the plaintiff recovered in this court, a *writ of error* was afterwards brought in the *Exchequer Chamber*, where it pended a year, and then abated by the death of one of the plaintiffs in *error*; then another writ was brought, which pended half a year, and abated by the death of another plaintiff. The plaintiff in the original action ſeeing no new *writ of error* brought a third time, and thinking himſelf at liberty, ſued out execution by *ca. ſa.* againſt the ſurvivors. The court was moved for a *ſuperſedeas* to this *ca. ſa.*

Per curiam. Here is no need of a *ſcire facias* to revive the judgment againſt the ſurvivors, that was ſufficiently revived by the ſeveral *writs of error.* 2dly, Where a *writ of error* determines in the *Exchequer Chamber* by *abatement* or *diſcontinuance*, the judgment is not again in this court till there is a *remittitur* entered; for without ſuch *remittitur* it cannot appear to this court, but that the *writ of error* is ſtill pending in the *Exchequer Chamber*. 3dly, The execution was *erroneous* for this cauſe, but not void; and 4 *Leon.* 197. was denied to be law. *Vide Salk. vol.* 1. *p.* 261.

Michaelmas, 4 W. 3. Parker v. *Harris.*

In an action of *debt* for rent in *C. B.* on *two* ſeveral demiſes, one of which was a *reddendum* after the rate of 18 *l. per annum.* After judgment for the plaintiff, the defendant brought a *writ of error* here, and the court held, that a *reddendum* after the rate, &c. was void for the uncertainty, and for this it was held the judgment ſhould be reverſed. Then it was a queſtion what judgment the court would give, whether as the court below ſhould have given, *viz.* judgment for part, and a *nil capiat* for the reſt, or a bare reverſal.

Per curiam. Where judgment is given for the plaintiff, and the defendant brings *error*, there ſhall only be judgment to reverſe the former judgment, for the ſuit is only to be eaſed and diſcharged of that judgment: but where the plaintiff brings *error*, the judgment ſhall not only be a reverſal, but the court ſhall alſo give ſuch judgment as the court below ſhould have given; for his *writ of error* is to revive the *firſt* cauſe of action, and to recover what he ought to have recovered by the *firſt* ſuit, wherein *erroneous* judgment was given. *Vide Salk. vol.* 1. *p.* 262.

Michaelmas, 5 W. & M. Dighton v. *Granville.*

See this caſe fully ſtated in page 342 of this work, under the head *Debt*.

Trinity, 6 W. & M. Philips v. *Berry.*

The plaintiff brought a ſuit in *ejectment* againſt the defendant for the rectory houſe of *Exeter College* in *Oxford*, and judgment was entered for the defendant.

But on a *writ of error* brought in *parliament* (becauſe this was by original) the judgment was reverſed. And afterwards in *Hilary* term it was moved, that this court would enter judgment for the plaintiff, for judgment ought to be entered, and that ought to be either by this court, or the Houſe of Lords; but the Houſe of Lords cannot enter judgment, becauſe they have only the tranſcript of the record, therefore this court ought to do it, *leaſt juſtice ſhould be deficient.*

Holt, Chief Juſtice. The houſe of Lords have in judgment of law, the true record before them, and not the tranſcript; for the *writ of error* ſays, the *record and proceſs*, and not the *tranſcript*; and he took this diſtinction; if ejectment is brought in this court, and on a ſpecial verdict, judgment is given for the defendant, if on a *writ of error* in the *Exchequer Chamber*, this judgment be reverſed, the *Exchequer Chamber* ſhall enter the new judgment for the plaintiff; but if it had been given in this court for the defendant on demurrer, and this judgment reverſed in the *Exchequer Chamber*, this court ſhall enter the new judgment for the plaintiff; becauſe the *Exchequer Chamber* could not award a *writ of enquiry* of damages. He further ſaid, if judgment be firſt given for the plaintiff, and this judgment reverſed on *error*, the defendant is in *his former ſtate*, and there he has no need to enter a new judgment. But when judgment is given firſt for the defendant, and this is reverſed on *error*, a new judgment ought to be entered, to put the plaintiff in poſſeſſion of that which he demands; and it was adjudged by all the court in the principal caſe, that this court cannot enter the new judgment for the plaintiff, becauſe when this court had given judgment on the original, it had wholly executed its authority, ſo that it could do no more. And there is no precedent that ever this court did enter a new judgment on a reverſal in *parliament* of a judgment given in this court. And afterwards, on application to the Houſe of Lords, they gave the new judgment, as *Holt*, Chief Juſtice, reported in this court, *Michaelmas*, 8 *W.* 3. 1696. *Vide Raym. vol.* 1. *p.* 5.

Trinity, 6 W. & M. The King and Queen v. *Knollys or Knolles.*

Holt, C. J. *Writs of error* to remove records out of this court into the *Houſe of Lords* run thus, *before us in our preſent parliament*: but in this ſuppoſed judgment the King is excluded. If one may give credit to an old advocate, *Fleta*, *c.* 17. he ſays, that all matters of authority and juriſdiction are derived from the King.

The *Houſe of Lords* has no juriſdiction in an original cauſe, becauſe that ſupreme court is the laſt reſort. Beſides, that for the moſt part, original cauſes are mixed with matter of fact, and it is unworthy of ſo ſupreme a court to try matters of fact, for which reaſon *error* in *fact* in this court muſt of neceſſity be brought before the judges of this court.

If the parliament took *conuſance* of original cauſes, the party would loſe his appeal, which the common law indulges in all caſes, for which reaſon, parliament is kept for the laſt reſort, and cauſes come not there until they have tried all other courts. Within theſe *four* years, judgment was given againſt the Earl of *Macclesfield* in the *Exchequer*; he brought a *writ of error* in the *Houſe of Lords*, and the queſtion was, if by *ſtat.* 31. *Edw.* 3. the *Exchequer Chamber* ought not to interpoſe; and adjudged that it ought, and the writ was abated. 4 *Inſt.* 21. The caſe of the Biſhop of *Norwich* was to the ſame effect. *Vide Raym. vol.* 1. *p.* 10.

Trinity, 6 W. & M. Lampton v. *Collingwood.*

Judgment was given againſt *A.* and *B.* and a *ſcire facias* taken out againſt *R.* adminiſtrator of *B.* and two *nihils* returned, and thereupon execution was awarded; and the *ſcire facias* ſuggeſted the recovery to be againſt *A.* and *B.* and that *A.* died, and *B.* ſurvived, and afterwards *B.* died inteſtate, and that *R.* is his adminiſtrator. Now *R.* brought a *writ of error coram nobis*, for *error* in the execution, and aſſigned for *error*, that *A.* ſurvived, and hereupon iſſue was joined, and found for the plaintiff: but the court, notwithſtanding, quaſhed the *writ of error*, holding this matter not a matter aſſignable for *error*, becauſe it is contrary to the ſurmiſe of the writ of *ſcire facias*: and if a *ſcire feci* had been returned, he might have pleaded it; and ſince it was not, he muſt bring his *audita querela*. *Vide Salk. vol.* 1. *p.* 262. *Ibid. vol.* 2. *p.* 145. *Mod. Rep. vol.* 4. *p.* 314. *Raym. vol.* 1. *p.* 27.

Michaelmas,

Michaelmas, 6 *W. & M.* *Wilſon* v. *Law.*

See this caſe fully ſtated in page 75 of this work, under the head *Appeal*; and in page 83, under the head *Appearance.*

Trinity, 7 *W.* 3. *Prinn* v. *Edwards.*

In an action of *debt* on a judgment, the defendant pleaded a *writ of error* depending in the *Exchequer Chamber*; and ſo prayed, *that he go hence without a day*, &c. Adjudged an ill plea, becauſe no reſummons lies in this caſe, as it does in excommunication, and other caſes. *Vide Salk. vol.* 3. *p.* 145. *Raym. vol.* 1. *p.* 47.

Mich. 7 *W.* 3. *Winchurſt* v. *Maſely.*

The plaintiff in *error*'s council moved the court for leave to quaſh his own *writ of error*, to reverſe a fine, becauſe one of the parties to the fine was omitted in the *writ of error.*

Holt, Chief Juſtice. We cannot do it. How can we take notice of any thing but what is on record? We cannot quaſh it on a foreign ſuggeſtion.

There was a caſe in *Pemberton*'s time, where a fine was levied by *three*, and *two* of them brought a *writ of error* to reverſe it; perhaps the other had nothing in the land, and it was reverſed.

But this is to be conſidered, if a man is intitled to be tenant by the *courteſy*, and he joins in a fine with his wife, of theſe lands; whether his title to be tenant by the courteſy is not extinguiſhed, if the fine is reverſed after her death. Indeed, if the fine is reverſed in her life-time, he may have a new title; if the huſband makes a *feoffment* on condition of his wife's lands, and ſhe dies, and then the condition is broken, ſhall he be tenant by the *courteſy?*

Then you cannot have any coſts, if the party enters a *non proſ.* for the ſtatute gives coſts on a *writ of error* only when it is in *delay of execution.*

We cannot let you quaſh it; but let them ſhew cauſe why you ſhould not diſcontinue. *Writs of error* are ſeldom diſcontinued, but ſometimes they may be. *Vide Mod. Rep. vol.* 4. *p.* 67.

Michaelmas, 7 *W.* 3. *Walker* v. *Slackoe.*

See this caſe fully ſtated in page 69 of this work, under the head *Amendment.*

Michaelmas, 7 *W.* 3. *Daſhwood's caſe.*

Per curiam. In an action of *debt*, on a judgment in this court, *error* pleaded pending in the *Exchequer Chamber*, is good in abatement; but if the defendant concludes *he ought not to anſwer until*, &c. it is not good, for we have no re-ſummons here. *Vide Mod. Rep. vol.* 5. *p.* 68.

Michaelmas, 8 *W.* 3. *Hartop* v. *Holt.*

In an action of *debt* brought in this court, the plaintiff had judgment; the defendant brought a *writ of error* in the *Exchequer Chamber*, and the judgment was affirmed. The plaintiff then ſued out a *ſcire facias* in this court, and had an award of execution. Hereupon the defendant brought a *writ of error* in the *Exchequer Chamber*, *as well in giving judgment*, *as in adjudication of execution*: notwithſtanding all this, the plaintiff in the original action went on and ſued out execution; and now a motion was made to ſet it aſide, becauſe it was ſued out when there was a *writ of error* depending.

Holt, Chief Juſtice. 1ſt, The intent of *ſtat.* 27 *Eliz.* was only to relieve on the very merits of the cauſe, as it ſtood on the judgment, which the juſtices and barons might either affirm or reverſe; but there can be no new *writ of error* after they have affirmed or reverſed. If this *ſcire facias* had been ſued out, and there had been no *writ of error*, then on the award of execution, a *writ of error* would have lain in the *Exchequer Chamber*, for then the merits of the firſt judgment had remained yet to be examined; but in the principal caſe the merits of the firſt judgment were examined before the *ſcire facias*, and thereby the *Exchequer Chamber* have executed their power and authority. If a plaintiff in *error* is nonſuited, he ſhall not have a *writ of error* again. In the caſe of *Exeter* college, the Lords reverſed the judgment of this court, and ſent their judgment down to be entered here; but this court refuſed it, becauſe the authority of the judges here, determined with the firſt judgment, and they had no more to do with it.

2dly, It was held that the *writ of error* could be no *ſuperſedeas* to the execution, and that what the plaintiff did was well, and no contempt. *Vide Salk. vol.* 1. *p.* 263. *Mod. Rep. vol.* 5. *p.* 228. *Raym. vol.* 1. *p.* 97. *Mod. Rep. vol.* 12. *p.* 105.

Eaſter, 9 *W.* 3. *Bennoyer or Pennoire* v. *Brace.*

On *error* brought on a judgment given in *treſpaſs* againſt *ſeveral* defendants, it was ruled, that where a *writ of error* is brought by *two*, and *one* of them dies, pending the *writ*, the plaintiff in the original action, by entering a ſuggeſtion on the roll, that one of the plaintiffs in error is dead, may take out execution on the judgment, without ſuing out a *ſcire facias*, either againſt the heir or executor of the dead perſon. *Vide Mod. Rep. vol.* 5. *p.* 338. *Ibid. vol.* 8. *p.* 108. *Ibid. vol.* 12. *p.* 130. *Raym. vol.* 1. *p.* 244.

Trinity, 9 *W.* 3. *Pechey* v. *Harriſon.*

The plaintiff being an infant, brought an action by guardian, after a verdict for him, it was moved in *arreſt of judgment*, that there was no warrant for him to appear by guardian entered upon record. And it was reſolved by the whole court, that the admittance of a guardian ought to be upon record, becauſe it is the act of the court; for the court takes care of infants, that none ſhall ſue for them but thoſe that are reſponſible: for if the infant be prejudiced, he may have his action againſt him. But judgment cannot be arreſted for this cauſe, no more than if no warrant of attorney be filed. But on a *writ of error* brought, and diminution alledged, and certified in this court, it will be ill, for which the judgment may be reverſed. But judgment can never be arreſted, but for that which appears on the record itſelf; now this admittance ought not to appear on this record, but on the remembrance roll of the prothonotary. In the ſame manner, if a record begins, that *A. B. was ſummoned*, which pre-ſuppoſes a *writ*, yet if there is no *writ*, judgment cannot be arreſted for this reaſon, but the party may have a *writ of error*. So in this caſe it is ſaid on the plea roll, that he appears *by his guardian for this purpoſe ſpecially admitted by the court*, which ſuppoſes there is a regular admittance upon the prothonotary's remembrance roll; but if there is none, it is not examinable here. Therefore judgment was given for the plaintiff. *Vide Raym. vol.* 1. *p.* 232.

Trinity, 9 *W.* 3. *Hodgeſon* v. *Segrave.*

On a *writ of error* brought on a judgment in the county palatine of *Cheſter*, the plaintiff in *error* delayed to bring in the record; whereon the defendant moved for a rule to bring it in, and for the plaintiff to aſſign his *errors*, or otherwiſe that they might return a *non proſ.*. to which the court ſaid, that their direct way was to take a certificate from this court, that the record is not come in, and on ſhewing thereof in *Chancery*, they will have a writ *of execution of juſtice* of courſe. *Vide Mod. Rep. vol.* 12. *p.* 127.

Michaelmas, 9 *W.* 3. *Donford* v. *Ellys.*

The plaintiff recovered in a ſuit in *ejectment* at *York*; the defendant brought a *writ of error*, and gave bail according to *ſtat.* 16 & 17 *Car.* 2. *cap.* 8. after which the plaintiff, pending the *writ of error*, brought an action of *treſpaſs* for the *meſne profits*; and the court was moved to ſtop this action; for if judgment ſhould be affirmed, or the plaintiff in *error* nonſuited, he is to have his damages on a *writ of enquiry*, according to the ſame ſtatute; and if he ſhould recover damages in this action, he would be doubly ſatisfied; but the court refuſed to ſtop the plaintiff, for it may be, the *writ of error* was brought for delay, and ſuppoſing it was not, and the plaintiff recovered in *treſpaſs*, that recovery might be given in evidence to a jury, on a *writ of inquiry* to leſſen the damages. *Vide Mod. Rep. vol.* 12. *p.* 138.

Michaelmas, 9 *W.* 3. *Ellis* v. *Thomas*.

In this caſe a denial of imparlance was generally aſſigned for *error*.

Holt, Chief Juſtice. If it appears on the record, that the defendant is intitled to the imparlance, and he prays it, and it is denied him, it is *error*. But if no ſuch thing appears on the record, a denial of imparlance cannot be aſſigned for *error*. Wherefore the judgment was affirmed. *Vide Raym. vol.* 1. *p.* 285.

Michaelmas, 9 *W.* 3. *Riccards or Richards*, v. *Corneforth Cornforth, or Cornford*.

See this caſe fully ſtated in page 374 of this work, under the head *Diſtreſs*.

Eaſter, 10 *W.* 3. *Burr and Drue* v. *Atwood*. Error.

The defendant obtained judgment in an action againſt *J. S.* in which *Burr* was bail; and afterwards he obtained judgment on a *ſci. fac.* againſt *Burr*; upon which *Burr* brought a *writ of error*, *as well in giving judgment as the adjudication of execution*, which was ill, becauſe the bail cannot maintain *error* on the principal judgment. On which the court was moved, that the *writ of error* ſhould be quaſhed, as to the principal judgment, and ſtand good as to the judgment on the *ſcire facias*. And a caſe adjudged in this court, *Eaſter*, 5 *W. & M. Brook* v. Sir *William Ellis* was cited; where Sir *William Ellis* obtained judgment in debt againſt *Brook* and *J. S.* two executors of *J. N.* and on a *ſcire fieri*, inquiry was awarded, and a *devaſtavit* returned againſt *Brook*, judgment was given againſt *Brook* on the *devaſtavit*; on which *Brook* ſued a *writ of error* without his co-executor *J. S.* to reverſe the principal judgment in the action of debt, and to reverſe the judgment of the *devaſtavit* againſt himſelf; and becauſe he alone, without *J. S.* could not ſue *error* on the principal judgment, the *writ of error* was quaſhed as to that, and ſtood good as to the judgment on the *ſcire facias* on the *devaſtavit* againſt himſelf; which cauſe *Holt* Chief Juſtice remembered well. And therefore herein the principal cauſe the *writ of error* was quaſhed as to the principal judgment, and was retained for the reſidue. *Vide Raym. vol.* 1. *p.* 328.

Eaſter, 10 *W.* 3. *Acourt* v. *Swift*.

On a *writ of error* brought by the bail on a judgment in *B. R.* in *Ireland* held ill. But the court refuſed to quaſh it, becauſe the tranſcript was not returned and filed. *Vide Raym. vol.* 1. *p.* 329.

Trinity, 10 *W.* 3. *The King* v. *Sir Henry Bond, Bart.*

See this caſe fully ſtated in page 53 of this work, under the head *Addition*.

Trinity, 10 *W.* 3. *Hunt* v. *Lawſon*.

A *writ of error* was brought to remove a record out of the *Common Pleas* of a *plaint* between *A.* plaintiff, and *B.* defendant, and the record certified, was between *A.* plaintiff, and *B.* together with *D. E. &c.* defendants. And it was moved, that this was not the ſame record; for a record between *A.* and *B.* cannot be the ſame as a record between *A.* and *B.* together with *D. E. &c.* but adjudged no variance. *Vide Raym. vol.* 1. *p.* 347.

Trinity, 10 *W.* 3. *Groenvelt* v. *Burwell, and others*.

It was held in this caſe by *Holt*, Chief Juſtice, that wherever a new juriſdiction is created by act of parliament, and the court or judge that exerciſes this juriſdictions, acts as a court or judge of record according to the courſe of the *common law*, a *writ of error* lies on their judgments; but where they act in a ſummary method, or in a new courſe different from the *common law*, there a *writ of error* lies not, but a *certiorari*. *Vide Salk. vol.* 1. *p.* 263. *Raym. vol.* 1. *p.* 454.

Michaelmas, 10 *W.* 3. *Gerrard* v. *Arnold*.

Judgment being obtained againſt *three* defendants, *two* of them brought a *writ of error*, and the record was tranſmitted: though in law the record is not removed, becauſe all did not join; yet the execution is ſuperſeded. And therefore in this caſe the other party being taken in execution, and having paid the money to redeem his body, reſtitution was awarded. *Stile* 105. 1 *Keb.* 12. *Vide Raym. vol.* 1. 405.

Michaelmas, 10 *W.* 3. *Coot* v. *Lynch or Linch*.

See this caſe fully ſtated in page 304 of this work, under the head *Coſts*.

Hilary, 11 *W.* 3. *The Biſhop of St. David's* v. *Lucy*.

The Biſhop of *St. David's* petitioned the Lord Chancellor *Somers*, to have a *writ of error* on being denied a *prohibition*; who having ſome doubt whether it would lie or not, referred it to the Attorney General, who certified his opinion, to be, that a *writ of error* would lie in this caſe; on which the ſuggeſtion was entered on record, and the denial of the *prohibition*; and the *writ of error* was granted, and the whole brought by the Chief Juſtice into *parliament*. And afterwards on hearing of his opinion, the Lords of *parliament* were of opinion, that a *writ of error* would not lie in this caſe. *Vide Raym. vol.* 1. *p.* 545.

Hilary, 11 *W.* 3. *Deſborough* v. *Kelby*. Error.

On a *writ of error* brought on a judgment in *aſſumpſit*, where the plaintiff declared on ſeveral promiſes; and in the count for an *inſimul computaſſet*, no time was laid when, nor place where the account was made between them.

Holt, Chief Juſtice. It is the ſame thing as if a man ſhould declare, that at *Cambridge* the defendant was indebted to him for goods ſold, and not ſay where they were ſold; it ought to be, *that they were then and there to him ſold*; therefore the judgment ought to be reverſed. *Vide Raym. vol.* 1. *p.* 533.

Eaſter, 11 *W.* 3. *Wicket and Foot* v. *Cremer*.

See this caſe fully ſtated in page 12 of this work, under the head *Abatement*.

Eaſter, 11 *W.* 3. *Anonymous*.

Holt, Chief Juſtice. A *writ of error* may be againſt the King without petition, though anciently that was uſed, and was a decency; but ſince 1640, *writs of error* have been made out *officially*. *Vide Salk. vol.* 1. *p.* 264.

Michaelmas, 11 *W.* 3. *Parry* v. *Villars*.

See this caſe fully ſtated in page 59 of this work, under the head *Amendment*.

Michaelmas, 11 *W.* 3. *Jenniſon* v. *Ellis*.

The want of an original was aſſigned for *error*; and the original certified, being of another term than the *plea*, and no continuance, the court would not allow it for an original. *Cro. Car.* 281. 272. *Yelv.* 108. That it muſt be an original of the ſame term with the pleading, or at leaſt pending the pleading. *Vide Mod. Rep. vol.* 12. *p.* 320.

Eaſter, 12 *W.* 3. *Roſiere* v. *Sawkins*.

Holt, Chief Juſtice. If a plea in *bar* is pleaded, and the court gives judgment only to anſwer over, it cannot be aſſigned for *error*, becauſe it is for the defendant's benefit; as if the court grants an *eſſoign*, where none lies by law. *Vide Raym. vol.* 1. *p.* 594.

Eaſter, 12 *W.* 3. *Anonymous.*

A *writ of error* was brought on a judgment on a recognizance on a *ſci. fa. which ran thus, viz. in adjudication of execution on the judgment aforeſaid*, inſtead of *on the recognizance aforeſaid*, and was for that reaſon quaſhed. *Vide Mod. Rep. vol.* 12. *p.* 371.

Eaſter, 12 *W.* 3. *Boiſe* v. *Bruerton.*

An original was ſued out into *Suffolk*, and the action laid in *Norfolk*, and the judgment thereon was reverſed for this *error*. *Vide Mod. Rep. vol.* 12. *p.* 371.

Trinity, 12 *W.* 3. *Coux* v. *Lowther.*

See this caſe fully ſtated in page 369 of this work, under the head *Diſcontinuance*.

Trinity, 12 *W.* 3. *Wilbraham* v. *Doyley.* Error.

The court was moved to ſtop a *writ of error* out of *Chancery*, for reverſing an outlawry in the County Palatine of *Cheſter*; the council grounding his motion on 4 *Inſt.* 214. where L. *Coke* holds, that in a *writ of error* to *Cheſter*, a day ſhould be given for ſo long time, as that three county courts might be held before the return of the *writ* into this court, which is *four* months; by which time the juſtices or lieutenants within the ſaid county, might redreſs the *error* if they would. On the other ſide it was argued, that though there was ſuch an ancient uſage, yet now *ſtat.* 33 *H.* 8. *cap.* 43. has taken away that ancient courſe, and *enacted*, that the adminiſtration of juſtice uſed heretofore to be had at *eight* ſhire days, ſhould be thereafter executed by the juſtice of *Cheſter*, twice in the year only, *viz.* at the ſeſſions next after *Eaſter*, and at the ſeſſions next after *Michaelmas*, (which by *ſtat.* 33 *H.* 8. *cap.* 13. is made moveable at the pleaſure of the juſtice, ſo as proclamation be made of the time, *fifteen* days before) in like manner as is uſed in the *County Palatine* of *Lancaſter*. And by that *ſtat.* it is made impracticable in point of time; for if it ſhould be executed now, it would delay the party at leaſt *two years*, inſtead of the *four* months delay before. 2d. This cuſtom, if it now remained, extends only to caſes of judgments given by the judges *by reaſon of the tenure* to ſave their fine; and therefore it does not extend to a fine, nor conſequently to this caſe, becauſe the judgment of *outlawry* is given by the coroner. 3dly, Before *ſtat.* 33 *H.* 8. *cap.* 13. there were no outlawries in *Cheſter*, the electing of coroners in the ſame county being *firſt* appointed by the ſaid *ſtat.* and therefore the cuſtom could not extend to judgments of outlawry.

Holt, C. Juſtice, allowed theſe points, and ſaid, that there was no colour for the motion; and ſaid farther, there was no Chief Juſtice of *Cheſter* before the time of Queen *Elizabeth*. *Vide Raym. vol.* 1. *p.* 591.

Trinity, 12 *W.* 3. *Dillon* v. *Walcot.*

On a *writ of error* brought on a judgment given in *K. B.* in *Ireland*. *Walcot*'s anceſtor having been attained of high-treaſon in *Ireland*, and his eſtate granted by letters patent by King *Charles* 2. to the Earl of *Roſcommon*; the judgment was reverſed by *writ of error* in this court, and that reverſal affirmed before the Lords; and therefore a *mandate* to the court of *K. B.* in *Ireland* to award reſtitution; which they did without any *ſci. fac.* againſt the ter-tenant; whereupon *Dillon* brought this *writ of error*, ſetting forth the attainder, and a grant to the Earl of *R.* and that the plaintiff was aſſignee of the ſaid *R.* and that an award of reſtitution *to the damage*, &c. The want of a *ſci. fac.* againſt the ter-tenants aſſigned for *error*, and *on no error* pleaded, iſſue was joined.

Per curiam. Here is an extravagant *error*, for on the reverſal the judgment is, that the party be reſtored to whatever he has loſt, &c. but that muſt be known; and the way is, to come and ſuggeſt he was ſeiſed of ſuch and ſuch land, &c. and to take out a *ſcire facias* againſt the ter-tenants, and they thereon ought to be ſummoned, and may come and ſhew cauſe againſt reſtitution, as perhaps a fine levied by the heir, &c. or the party himſelf; and it would be prudent in a purchaſer of an attainted perſon's eſtate, to procure ſuch a fine; and this has been done by the purchaſers of *H. Martin*'s eſtate, while he lay under ſentence of death in the tower. *Vide Mod. Rep. vol.* 12. *p.* 407.

Michaelmas, 12 *W.* 3. *Finch* v. *Ranow or Renew.*

A *writ of error* was brought on a judgment, *that partition might be made* on a *writ of partition*, before the final judgment; and therefore the record was held not moved, and the writ was quaſhed. *Vide Raym. vol.* 1. *p.* 610.

Hilary, 13 *W.* 3. *Gibbs* v. *Walkley.*

In this caſe a double *error* in *fact* was aſſigned.

Holt, Chief Juſtice. The way is to plead *no error*, and ſhew the duplicity for the cauſe to affirm the judgment. *Vide* 1 *Ro. Ab.* 763. But if apparent *error* appear on the record, notwithſtanding the ill aſſigning of the *error* in *fact*, by reaſon of the duplicity; yet judgment ought to be reverſed for ſuch apparent *error*; but here no ſuch *error* appearing on the record, the judgment was affirmed, becauſe of the duplicity of the *error* in *fact*. *Vide Mod. Rep. vol.* 12. *p.* 650.

Hilary, 13 *W.* 3. *Jones* v. *Sweetapple.*

On a *writ of error* brought on a judgment in an action of *debt* on a bond in the *C. B.* and the *error* aſſigned was, that it was a bond for appearance taken by the plaintiff, *under colour of office*, and it was no where ſaid that the plaintiff was a ſheriff but only that he took the bond *by the name of ſheriff*.

Holt, Chief Juſtice. Then you ſhould have pleaded the *ſtatute*, and that matter; and now you are too late; therefore the judgment was affirmed. *Vide Mod. Rep. vol.* 12. *p.* 634.

Eaſter, 13 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. In an action of *debt*, if the original is recited to be *attached* inſtead of *ſummoned*, yet we cannot reverſe the judgment, becauſe it is only a recital. *Vide Mod. Rep. vol.* 12. *p.* 513.

Eaſter, 13 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. If pending a *writ of error*, the plaintiff dies, and execution is taken out without acquainting the court therewith, it will be ſet aſide for irregularity; *otherwiſe* if the court is appriſed of it. *Vide Mod. Rep. vol.* 12. *p.* 494.

Trinity, 13 *W.* 3. *Bidolph* v. *Veal.*

On a *writ of error* from the court of *Ely*, on a judgment in *treſpaſs*, the record certified, ſet forth a ſummons on ſuch a day, returnable the ſame day generally; and a return the ſame day of the party's being ſummoned; and thereon an attachment, and a return the ſame day of a *nil*, and then a *capias*, returnable the ſame day; and thereon the defendant brought in in cuſtody, declaration, plea, demurrer, and judgment, *writ* of inquiry executed and returned, and judgment final, all in a day. And this was inſiſted on for *error*, that the ſummons being made returnable generally ſuch a day, the defendant had that whole day to appear; and then it was erroneous to compel his appearance by *capias* that day. And that was agreed to by the court; for though in *counties palatine* and in the *grand ſeſſions* of *Wales*, they ſplit days and hours, and perhaps they might do the like here; yet having not done ſo, *viz.* made the proceſs returnable at ſuch an hour of the day, but generally at ſuch a day as here, it was erroneous to award a *capias* till the day was over; for the *capias* is for the contempt in not appearing at the return of the ſummons, and in contempt he could not be till after the time of the return. 2dly. It was reſolved, that the bare appearance on the *capias* being compulſory, did not help this *error*, becauſe it was what the defendant could not avoid. 3dly. It was reſolved the omitting to take advantage of it then, but pleading over cured it, for he might have demanded judgment whether he ought to be put to anſwer on the *capias*, the return of the *pone* being not yet out. 4thly. It was reſolved it was not neceſſary to have *fifteen days* on the return of proceſs in a *franchiſe*; for the reaſon of them in the courts of *Weſtminſter* is, becauſe that time is judged neceſſary for the people to come from the remote parts, to which the proceſs of thoſe courts does extend, which does not hold in *franchiſes*. 5thly. The judgment was reverſed for this *error*, *viz.* that the *writ of error* is executed the ſame day with the *pone*'s return, and ſo might be before any *pone* iſſued out; and no appearance, and pleading can help that. Let the judgment be reverſed. *Vide Mod. Rep. vol.* 12. *p.* 523.

Trinity, 13 *W.* 3. *Oliver* v. *Hunning.*

On a *writ of error* brought on a judgment in *C. B.* in an action againſt two, where one of the defendants was *outlawed*. An exception was taken to the *writ of error*, becauſe it mentioned the writ to be brought againſt one only. But it was held good, becauſe the writ, as to the other, was determined by the *outlawry*. *Vide Raym. vol.* 1. *p.* 691.

Trinity, 13 *W.* 3. *Anonymous.*

A writ was brought to remove a record before Sir *J. N.* Knight, Sir *J. P.* Knight, and —— *Jo. B. C.* our juſtices of the bench, and the *placita*, i. e. *pleas* returned, were before *Geo. Treby*, Chief Juſtice, *&c.* and it was moved to quaſh the writ for variance.

Per curiam. The plaintiff's attorney might have ſued execution notwithſtanding this *writ*, for it was no authority to remove the record; and the *writ* was accordingly quaſhed *niſi*. *Vide Mod. Rep. vol.* 12. *p.* 523.

Michaelmas, 13 *W.* 3. *Peters* v. *Benning.*

A *writ of error* ran to the next ſeſſion of parliament, and before that time the parliament by proclamation was diſſolved, and a day fixed for the meeting of a new one: and on motion, the queſtion was, whether this writ were a *ſuperſedeas* of execution, or even could be a warrant to ſend up the record to the new parliament, there being no term intervening between the return of the *writ* and the time fixed for the parliament's meeting. It was agreed on, that the court can take no notice of any extrajudicial determination, or order of the Lords.

Per Holt, Chief Juſtice. If an impeachment be in one parliament, and ſome proceedings thereon, and then the parliament is diſſolved, and a new one called, there may be a continuance on the impeachment; and he quoted the caſe of *James* v. *Bertly*, *Eaſter* 5 *W.* & *M.* where a *writ of error* was *teſted* the 4th day of *May*, returnable the 19th day of *November* following, to which time the parliament was prorogued, ſo that a whole term intervened; and he ſaid, it was his opinion they might ſue out execution notwithſtanding that *writ*. And he remembered to have known it ruled in *Keeling*'s and *Hale*'s time, that a *writ of error* was no *ſuperſedeas* after a prorogation, if a term intervened; that diſſolution determines *error* actually depending. *Ray.* 5. That a prorogation, and a whole term intervening, is a *ſuperſedeas* of a *writ of error* in parliament; and ſo of a diſſolution, though the *errors* had been aſſigned. If before the tranſcript be left above, the parliament was diſſolved, the *writ* was no *ſuperſedeas* of execution; but if it had been left above, the diſſolution would be a *ſuperſedeas* of it; but the *writ of error* would not be diſcontinued, there being a day certain for the meeting of a new parliament, by the very act of diſſolution. It may be a queſtion, if a *writ of error to the next parliament*, when a parliament is to meet at a day certain, be a *ſuperſedeas*, though a term does not interpoſe between the *teſte* of the *writ* and the time fixed for the meeting of the parliament by the diſſolution of the former parliament; but the Chief Juſtice ſaid, that as the preſent caſe was, the *writ* in queſtion could not be an authority to carry up the record, neither could the Lords be equally poſſeſſed of it by virtue of that *writ*. And he ſaid, in caſe of prorogation, the *writ of error* was returnable *to the preſent parliament*; but in caſe of adjournment, it was *to the preſent ſeſſion*. *Vide Mod. Rep. vol.* 12. *p.* 605.

Michaelmas, 13 *W.* 3. *Anonymous.*

Per curiam. A plaintiff in *error* cannot move to quaſh his *writ of error* before *error* aſſigned. *Vide Mod. Rep. vol.* 12. *p.* 602.

Michaelmas, 13 *W.* 3. *Dundee* v. *Petty.*

See this caſe fully ſtated in page 162 of this work, under the head *Bail.*

Michaelmas, 13 *W.* 3. *Sir Richard Leving* v. *Lady Calvary.*

On *error* brought, the want of an original was aſſigned for *error*, the original having been loſt on the death of the plaintiff below's attorney; on affidavit of this fact, the Lord Keeper granted them a new original, and that ſhould be certified, and a *certiorari* being brought, and the original being certified, now the defendant in *error* would bring on the matter, in order to have his judgment affirmed, and coſts. And it was moved, that this would be very hard on the plaintiff, who at the time of the *writ of error* brought had good cauſe, though that were now cured by a new original; and for this the caſe of *Naydon* v. *Winterbotham*, about *three years* before, was cited.

Per curiam. The plaintiff cannot diſcontinue his *writ of error* without leave of the court; for if you do not aſſign *error*, we will affirm the judgment, therefore the court would make no rule. *Vide Mod. Rep. vol.* 12. *p.* 561.

Michaelmas, 13 *W.* 3. *Anonymous.*

Per curiam. If judgment be irregularly obtained, a releaſe of *errors* ſets it right to all purpoſes. *Vide Mod. Rep. vol.* 12. *p.* 560.

Michaelmas, 13 *W.* 3. *Watſon* v. *Huddleſton.*

See this caſe fully ſtated in page 339 of this work, under the heads *Day, Date, and Delivery.*

Anonymous.

Adjudged, that where a *writ of error* is brought, and no record certified at the day of the return of the writ, the defendant in *error* taking a certificate of this matter from the proper officer of the court, where the *writ* is returnable, he may take out a writ *de executione judicii* of courſe, and the party cannot hinder execution thereon, without he brings a new *writ of error*. *Vide Salk. vol.* 1. *p.* 264.

Hilary, 1 *Ann.* *Cutting* v. *Wilkins* or *Williams* v. *Cutting.*

See this caſe fully ſtated in page 327 of this work, under the head *Cuſtom.*

Hilary, 1 *Ann.* *Tilly* v. *Richardſon.*

See this caſe fully ſtated in page 181 of this work, under the head *Bail in Error.*

Eaſter, 1 *Ann.* *Atwood* v. *Burr.*

See this caſe fully ſtated in page 370 of this work, under the head *Diſcontinuance.*

Eaſter, 1 *Ann.* *Giggeer*'s *Caſe.*

An action having been brought by the name of *Giggeer*, a *writ of error* was brought as in an action between *Giggure* and the defendant, whereas his ſurname was *Gigger*; and it was moved that the defendant notwithſtanding the *writ of error* might take out execution; and the court held this was a fatal variance, and that the record was not removed by the *writ of error*, but would not meddle as to the execution.

Holt, Chief Juſtice. Where a *writ of error* abates by motion, the defendant in *error* muſt move for leave to take out execution; but where by reaſon of variance the record is not removed, he need not move the court for execution: but here the record was amended. *Vide Salk. vol.* 1. *p.* 265.

Michaelmas, 1 *Ann.* *Badger* v. *Lloyd or Eloyd.*

In this caſe it was ſaid, *per Holt*, Chief Juſtice, that it was adjudged, that pending a *writ of error*, the plaintiff in the original action may enter if he can; for though this writ forecloſes the court, and ties up their hands, yet it does not alter the right of the parties. *Vide Salk. vol.* 3. *p.* 145. *Raym. vol.* 1. *page* 145.

Michaelmas, 1 *Ann.* *Reginald* v. *Taylor.*

On a *writ of error* brought on a judgment in an action of *treſpaſs* in the *Stannary courts*, the following exceptions were taken:

1ſt, That in the record ſent up in the ſtile of the court, ſet forth; they do not ſay, that it was held within the juriſdiction of the court. 1 *Co.* 51. 1 *Inſt.* 58. 1 *Roll. Ab.* 533. 434.

Per curiam. Where you declare in the inferior courts, you ought to lay the fact or cauſe of action, to have ariſen within their juriſdiction; or if you declare, that at a court held, ſuppoſe at *Maidſtone*, ſuch a thing was done, there you muſt ſay, that the court was held within the juriſdiction of the court, but when you only ſet forth the ſtile of a court, you need not ſhew it.

Another *error* was, that it was not alledged, that the plaintiff was a *tinner*; and by ſeveral acts of parliament concerning their juriſdiction, they ought to ſhew it; and for this the judgment was reverſed, *niſi*, &c. *Vide Mod. Rep. vol.* 7. *p.* 103.

Michaelmas, 1 *Ann.* *Cole* v. *Henry.* Error.

On a *writ of error* brought on a judgment in *K. B.* in *Ireland*, in ejectment, the following *errors* were aſſigned:

1ſt, That no jurors name was entered on the record.

2dly, That the judge who tried the cauſe, calls himſelf the Queen's judge; and it no where appears, that the King was then dead.

Holt, C. J. We are to take *judicial* knowledge of who reigns over us, and to whom we owe allegiance, and though it is decent to take notice of the demiſe of the King, yet it is not of neceſſity. And when there is a full jury, there never is an entry of their names in a ſuperior court; wherefore the judgment was affirmed. *Vide Mod. Rep. vol.* 7. *p.* 103.

Michaelmas, 1 *Ann.* *Wood* v. *Branford.*

See this caſe fully ſtated in page 379 of this work, under the head *Dower.*

Michaelmas, 1 *Ann.* *Shortridge* v. *Lamplugh.*

See this caſe fully ſtated in page 333 of this work, under the head *Damages.*

Hilary, 2 *Ann.* *Croſſe* v. *Bilſon.*

Adjudged, on a *writ of error* brought on a judgment in an action of *replevin* in *C. B.* that if a *reſpondeas ouſter* was awarded, it would be no *error* aſſignable by the defendant, becauſe the ſame would be to his advantage. *Vide Raym. vol.* 2. *p.* 1016.

Eaſter, 2 *Ann.* *Burdett* v. *Wheatly.*

On a *writ of error* brought on a judgment in the *C. B.* in an action on the *caſe* on ſeveral promiſes, in which, on *non-aſſumpſit* pleaded, as to *two* of the counts, a verdict and judgment were given for the plaintiff, and as to the reſt for the defendant. And the *error* aſſigned was, that the defendant was an *infant* at the time of the promiſes made, and alſo appeared by attorney: to which aſſignment the defendant in *error* demurred *ſpecially*, becauſe it contained matter of *fact*, and of *law* alſo. And therefore the judgment was affirmed. *Vide Raym. vol.* 2. *p.* 883.

Eaſter, 2 *Ann.* *Andrews* v. *Lynton.*

On a *writ of error* brought on a judgment by *default* in an action of *treſpaſs* in *C. B.* the *error* aſſigned was, that the perſon who returned the original was not ſheriff; and urged, that the returning was not a miniſterial act, and that an averment lies againſt what the ſheriff does as an officer, but not as a judge. *Yelv.* 34. 2 *Cro.* 12. 7 *H.* 7. 4. 8 *H.* 4. 15. 1 *Cro.* 421. 1 *Ro.* 758, 760. 2 *Lev.* 184, 242. 2 *Jo.* 125.

Holt, Chief Juſtice. If the ſheriff did not return the writ, it was irregular, and you ſhould have complained; but that ſhould have been in time: when a writ comes in, the defendant has all the term to complain of irregularity, and in that time the ſheriff might have had leave in *C. B.* to diſavow the return; but after the term is elapſed, and the writ is filed, and becomes a record, it is then too late, and every one is *eſtopped* to ſay the ſheriff did not return it. But, The defendant in the principal caſe has admitted the original, by appearing and not challenging the original; as if a *venire* be returned by one that is not ſheriff, this is not aſſignable for *error*; becauſe he might have challenged the *array* for it at *niſi prius*. *Vide Salk. vol.* 1. *p.* 265. *Raym. vol.* 2. *p.* 884.

Trinity, 2 *Ann.* *Sir Edward Longueville* v. *The Inhabitants of Thiſtleworth.*

Holt, Chief Juſtice. The giving *oyer* of a writ where it ought not to be allowed, is *no error*, nor aſſignable by the defendant, being an advantage to him; but the denial of it, where it ought to be allowed, is *error*; to which *Powell*, Juſtice, agreed.

Per curiam. We will conſider of it. *Vide Raym. vol.* 2. *p.* 979.

Michaelmas, 2 *Ann.* *Gibbons* v. *Roberts.*

On a *writ of error* brought on a judgment in the court of *Briſtol* in an action of *debt* on a bond, the following objections were taken:

1ſt, It was objected, that the ſtyle of the court is laid to be *according to the law of merchants*, which cannot be but in a court of *ſtaple*; and *debt* on bond is not *within the law of merchants.*

Per curiam. We will intend this to be another ſort of cuſtomary court under that name; as where a court of *pie-powder* was to be held by *preſcription*, which could not be, this court held it to be a cuſtomary court under that denomination.

2dly, It was objected, that here was a *day given to the party aforeſaid*, and it was not alledged to be *given by the court.*

Holt, Chief Juſtice. Where an award of proceſs or judgment is alledged, it muſt be ſaid *by the court*, but a *day given* need not; for though it may be *by the prayer of the party*, yet it muſt be given by the court.

3dly, It was objected, that the *certiorari* was awarded to the ſheriff of the county of *Briſtol*, and the return is by the ſheriff of *Briſtol*. But not allowed.

Per curiam. We take notice of all counties, being to award proceſs to them every day, and the ſheriff is our officer.

4thly, It was objected, that the return was by a ſucceeding ſheriff, and not by the perſon to whom the writ was directed.

Per curiam. The writ is to the ſheriff as ſheriff, and not to him by this or that name; and therefore different from a *writ of error* to the Chief Juſtice of the *C. B.* *Vide Salk. vol.* 1. *p.* 266.

Michaelmas, 2 *Ann.* *Shepherd and Baily* v. *Orchard.*

See this caſe fully ſtated in page 141 of this work, under the head *Attorney.*

Michaelmas, 2 *Ann.* *Evans* v. *Roberts.*

In this caſe the anſwer to the *writ of error* was, that there came another *writ of error* to them before that *writ*, bearing the ſame *teſte* and return, and recited the *writ*, and made a return to it; and held good. See this caſe fully ſtated in page 328 of this work, under the head *Cuſtom.*

Hilary, 3 *Ann.* *Tyſon* v. *Hilliard.*

On a *writ of error* brought on a judgment in *C. B.* the declaration was of *Trin.* 1 *Ann*, and the want of an original aſſigned for *error*, and a *certiorari* was awarded, and the original returned with the continuances, by which it appeared the declaration was *Hil.* 13 *W.* 3. with imparlances till *Trin.* 1 *Ann*, and the original of that term; ſo that it appeared to be a ſuit pending in the *C. B.* before any original, which was the objection. 1 *Lev.* 69. 1 *Keb.* 177, 197, 238. 377. *Yelv.* 108. *But not allowed.*

Holt, Chief Juſtice. The *certiorari* as to the *continuances* was impertinent, and ſo is the matter returned; and as to the reſt the return is impoſſible, and contrary to the record, and therefore the imparlances ſhall be taken to be in another cauſe. *Style* 293. Therefore the judgment was affirmed. *Vide Salk. vol.* 1. *p.* 269. *Raym. vol.* 2. *p.* 1122.

Eaſter, 3 *Ann.* *Hale* v. *Clare or Claro.*

In a *borough-court*, a plaint was entered as the plaint of *A. B.* and the declaration was by *A. B.* executor of *J. S.* and on a *writ of error* brought in this court, this variance was aſſigned for *error*: and the court held, 1ſt. That want of a plaint in an inferior court is the ſame as the want of an original in the court of *C. B.* and that this could not be a plaint in this action: and though a verdict will cure the want of an original, yet there is no verdict in this caſe. 2dly. If ſuch variance had been in a record of the *C. B.* *diminution* might have been alledged, and a good writ certified; but in records out of inferior courts, no diminution can be alledged, and the court muſt take them as they find them. 1 *Ven.* 6. 2 *Cro.* 108, 109. *Jo.* 304. 1 *Cro.* 282. *Hob.* 130, 134, 264, 282. *Vide Salk. vol.* 1. *page* 266. *Mod. Rep. vol.* 4. *p.* 149.

Eaſter, 3 *Ann.* *Parkins* v. *Woollaſton.*

See this caſe fully ſtated in page 163 of this work, under the head *Bail.*

Trinity, 3 *Ann.* *Carlton* v. *Mortagh.*

See this caſe fully ſtated in page 255 of this work, under the head *Certiorari.*

Trinity, 3 *Ann.* *The Queen* v. *Foxby.*

The defendant was convicted at the ſeſſions for a *ſcold*, and adjudged to be ducked; ſhe brought a *writ of error*, (by leave of the Attorney General) and the Chief Juſtice ſaid, the court was well enough poſſeſſed of the cauſe by *writ of error*; but the beſt way was to remove it by *certiorari* into the *Crown Office*, and then bring a *writ of error coram nobis*, &c. and on that the courſe is, to give a rule to aſſign *errors*, and then to move for a peremptory rule; and in default thereof to have a *non proſ.* and then an award of execution. *Vide Salk. vol.* 1. *p.* 266.

Trinity, 3 *Ann.* *Burnaby* v. *Saunderſon.*

A *writ of error* was brought on a judgment in *C. B.* and the want of an original aſſigned for *error*: the defendant in *error* came in *gratis*, and alledged *diminution*, and prayed a *certiorari*, and thereon a *variant original* was certified: on this he came again at the day given, and ſuggeſted another original of ſuch a term, and prayed another *certiorari*. This appearing on the maſter's report, the queſtion was, Whether it was regular?

Holt, C. J. If a record below be of *Eaſter* term, and the want of an original be aſſigned for *error*, the defendant may alledge diminution, and then a *certiorari* goes to the *cuſtos brevium* only, to certify an original of *Eaſter* term, that being the term of which the *plea* is: if then the *cuſtos brevium* certifies a wrong original, or that there is no original, then the defendant may come and ſuggeſt, before *in no error* pleaded, that there is an original of another term, *viz.* *Hilary* or *Michaelmas*; and then there muſt go a *certiorari* to the *cuſtos brevium* to certify that, and another to the Chief Juſtice of the *C. B.* to certify the *continuances*. Alſo if the *cuſtos brevium* certifies a wrong original of the ſame term the *plea* is of, it has been held the defendant may ſuggeſt there is a right original even of that very term; and when both are before the court, the court will apply the record to that which is a good original. 2 *Cro.* 279. Therefore the judgment was affirmed. *Vide Salk. vol.* 1. *p.* 267. *Mod. Rep. vol.* 6. *p.* 174.

Michaelmas, 3 *Ann.* *The Queen* v. *Baines.*

Holt, C. Juſtice. A *writ of error* can be only of one judgment, but a *certiorari* may affect ſeveral orders or indictments, but then the writ muſt mention the *ſeveral* orders or indictments. *Vide Raym. vol.* 2. *p.* 1199.

Michaelmas, 3 *Ann.* *Davenant* v. *Raſtor.*

Holt, Chief Juſtice. Where the want of an original is aſſigned for *error*, the courſe is, for the plaintiff in *error*, before he can bring in the defendant to plead to the *errors*, to ſue out a *certiorari*; and get a certificate, that there is no original. But if the defendant will come in *gratis*, without proceſs, and plead a releaſe, he confeſſes the *error*; and if there be an original, he muſt take out a *certiorari*, and get it certified; or elſe it ſhall be taken that there is none, and the judgment ſhall be reverſed. *Vide Raym. vol.* 2. *p.* 1046.

Hilary, 4 *Ann.* *Redham* v. *Waters.*

On a *writ of error* brought on a judgment in the court of *Berwick*, the proceedings were returned in *Engliſh*.

Per curiam. It was held, that on a *writ of error*, this court is to take notice of the particular laws and cuſtoms of the place where the judgment was given, and the law of that place need not be returned, but the court muſt inform themſelves of it; alſo that if by law the proceedings below be in *Engliſh*, they may be ſo entered here; and a difference was taken between a *writ of error* and a *habeas corpus*, for in an *habeas corpus*, the inferior juriſdiction muſt in their return ſet forth the particular law or cuſtom of the place, whereby they juſtify their commitment, otherwiſe the court is not to take notice of it. *Vide Salk. vol.* 1. *p.* 269.

Hilary, 4 *Ann.* *Anonymous.*

See this caſe fully ſtated in page 328 of this work, under the head *Cuſtom.*

Hilary, 4 *Ann.* *Brown* v. *Dyer.*

See this caſe fully ſtated in page 80 of this work, under the head *Appeal.*

Eaſter, 4 *Ann.* *Smith and others* v. *Stoneard.*

On a *writ of error* brought on a judgment in *C. B.* after verdict, the plaintiff in *error* aſſigned for *error* the want of an original, but did not take out a *certiorari*, as the courſe is; the defendant in *error* pleaded *no error*: and when the cauſe came on in the paper, It was objected, that there ought to have been a *certiorari* taken out, and a return of the want of an original on that; for there might be an ill original, which is not aided by verdict, though the want of an original is.

Holt, C. Juſtice. If the want of an original be aſſigned for *error*, and the plaintiff in *error* does not ſue out a *certiorari*, the courſe is, for the defendant in *error* to go to the maſter of the office, and get a rule for the plaintiff in *error* to return his *certiorari*; and in caſe he does not get it done accordingly, the aſſignment of *errors* ſignifies nothing; but if the defendant in *error* will come in *gratis* and confeſs the *error*, there need be no *certiorari* returned; and as to the objection, that there may be a bad original in this caſe, that is another kind of *error*; for when the want of an original is aſſigned for *error*, the court will never intend a bad original: therefore the judgment was affirmed. *Vide Salk. vol.* 1. *p.* 267. *Raym. vol.* 2. *p.* 1156.

Eaſter, 4 *Ann.* *Gibbons* v. *Dove.*

See this caſe fully ſtated in page 181 of this work, under the head *Bail in Error.*

Trinity, 4 *Ann.* *Wilſon* v. *Ingoldſon.*

On a *writ of error* brought on a judgment in the *C. B.* in *ejectment*, *teſted* the firſt year of the Queen, judgment was not given in the *ejectment* till the *third* year of the Queen, and then the record was tranſcribed, and brought into this court. And the defendant in *error* ſued out a *ſcire facias quare executio non*, to compel the plaintiff to aſſign *errors.* And the plaintiff in *error* pleaded *nul tiel record*, and on bringing in the record, the council for the plaintiff in *error* moved, that here was a *failer* of the record, to which the court agreed. For they ſaid that the plea was, *there is no ſuch record*; which refers to the *ſcire facias*, which recites a record of a judgment in the *C. B.* removed hither by *writ of error*, which this record never was, no judgment having been given till after the return of the *writ* was out. The Chief Juſtice alſo ſaid, that this being a record of the ſame court, it would have been more proper to have prayed *oyer* of it. *Vide Raym. vol.* 2. *p.* 1179.

Eaſter, 6 *Ann.* *Wilkinſon* v. *Tireman.*

On a *writ of error* brought on a judgment in the *C. B.* in action of *dower*, brought by *Elizabeth Tireman* againſt *J. Wilkinſon*, an *infant*, who, by his guardian, aſſigned the general *errors.* And the *error* inſiſted on was in the judgment, that it appeared that the defendant was an infant, and yet *amerced.* But the judgment was affirmed, the court being all of opinion, that this was aided by *ſtat.* 16 & 17 *Car.* 2. *c.* 8. *Vide Raym. vol.* 2. *p.* 1284.

Michaelmas, 7 *Ann.* *Langthorn* v. *Taylor.*

On a *writ of error* brought on a judgment in *C. B.* in action of *debt*, on the return of an *elegit*; the declaration was, that *M. C.* by indenture demiſed an houſe, and certain goods mentioned in a ſchedule, for *twenty-one* years, if the tenant ſhould ſo long live. That the plaintiff recovered a *debt* of 300 *l.* againſt her, and had execution thereon.

It was excepted, that the the execution was taken out pending a *writ of error*; and that all the precedents are, that it ought to appear with an *affirmetur.* 1 *Saund.* 182, 233. 2 *Saund.* 238, or 233, and 317. And that it not appearing here that the judgment was affirmed, it is *erroneous.*

Holt, Chief Juſtice. It muſt either be a *non pros*, or an *affirmance.* You have indeed ſhewn, that the execution was ſuſpended by the *writ of error*, and therefore they ought to have ſhewn a declaration before they had taken out execution. *Vide Mod. Rep. vol.* 11. *p.* 197.

Eaſter, 8 *Ann.* *Nelſon* v. *Collins.*

On *writ of error* brought on a judgment in *C. B.* the *error* aſſigned was, that in the declaration it was Collins, by ——— Buſby *his attorney*, without any chriſtian name.

Holt, Chief Juſtice, ſaid, that he remembered a caſe, where it was aſſigned for *error*, that the attorney by whom the party appeared, was no attorney of that court. But it was diſallowed for *error*, that not being the merits of the cauſe; and may be helped by the late *ſtatute*, it being after verdict. Therefore the judgment was affirmed. *Vide Mod. Rep. vol.* 11. *p.* 219.

Michaelmas, 8 *Ann.* *Bull* v. *Clifton.*

See this caſe fully ſtated in page 181 of this work, under the head *Bail in Error.*

Michaelmas, 8 *Ann.* *Anonymous.*

The court was moved, that the plaintiff in a *writ of error* on a judgment given in *Ireland*, might aſſign his *errors* by attorney, on *affidavit* that he was reſident in *Ireland*, and offered to find ſufficient bail; which was granted.

The clerk of the crown ſaid, it had been done ſo in the caſe of *York* v. *Medley.* *Vide Mod. Rep. vol.* 11. *p.* 257.

Michaelmas, 8 *Ann.* *Ludlow, Eſq.* v. *Leonard.*

J. K. recovered a judgment in this court againſt the defendant by *nil dicit* in an action on the *caſe*, and a *writ of inquiry* being executed, final judgment was given againſt the defendant for 168 *l.* whereon the defendant brought a *writ of error*, returnable in the *Exchequer Chamber* in *Trinity* term, 1704, which was ſtill depending; afterwards *K.* became a bankrupt, and a commiſſion being taken out, the judgment was aſſigned to the plaintiffs; who, as aſſignees of the commiſſioners, ſued out two *ſcire facias*'s in this court on the judgment; in which, on two *nihils* returned, they obtained judgment, ſued out a *fieri facias* thereon, and took the defendant's goods in execution. On which the court was moved, that the judgment on the *ſcire facias* might be ſet aſide as irregular, the *writ of error* being ſtill depending, and that the defendant might have reſtitution. The matter being referred to the maſter, he reported the *fact* as above; with this addition, that *K.* died after the *writ of error* brought, and after in *no error* pleaded; and the court held, *firſt*, That the *writ of error* was not abated by the death of the defendant in *error*, after in *no error* pleaded; ſo that the *writ of error* was ſtill depending. *Secondly*, That a *ſcire facias* does not lie on a judgment pending the *writ of error* brought on that judgment, but the *writ of error* pending is a good plea to the *ſcire facias*, ſo that the *ſcire facias* was not regular: but then the three judges, *Powell*, *Powys*, and *Gould*, (*Holt*, Chief Juſtice, being abſent) made a queſtion; whether they ſhould ſet the judgment on the *ſcire facias* aſide on motion, and the execution ſued out thereon; or ſhould compel the defendant to take out an *audita querela?* But on conſideration they all held, the whole proceedings were irregular, and ſet them aſide on motion. *Vide Raym. vol.* 2. *p.* 1295.

Hilary, 10 *Ann.* *Silk* v. *Hill.*

The queſtion was, whether on a *writ of inquiry* it was not neceſſary that there ſhould be *fifteen days* between the *teſte* and the return, as well as on other writs.

The court ſeemed not to think it neceſſary. But the *C. B.* differing in their practice, in this particular, from *this court*, according to the reports of the clerks, it was judged proper, for the judges of both courts, to meet and eſtabliſh one uniform rule of practice. *Vide Mod. Rep. vol.* 10. *p.* 82.

Eaſter, 10 *Ann.* *Meredith* v. *Davies.*

On a *writ of error* brought on a judgment given for the plaintiff in *ejectment* in the *Grand Seſſion of Wales*; after verdict, the general *errors* were aſſigned, *and in no error* pleaded: on arguing of the caſe it appeared, that the declaration ſet forth a demiſe for a term of years to the plaintiff; but it did not ſhew that the plaintiff entered, or was poſſeſſed; and the truth was, that this line was omitted in the tranſcript, and the court held this defect to be fatal. Whereon the plaintiff prayed the court would award a *certiorari* to the Grand Seſſions. It was argued it could not be done, for that the party had *eſtopped* himſelf by pleading *no error*; and though the court might do it in order to be certified of the out-branches of the record, as in the original *writ*, or warrant of attorney, which are not returned with the body of the record on a *writ of error*, and which indeed are contained in another roll; yet the court could never do it, to be certified of any thing in the body of the record: they muſt ſuppoſe it to be returned as it ought to be, and muſt take it as it is, and are concluded by the admiſſion of the parties from taking it to be otherwiſe. 1 *Roll. Abr.* 264. 2 *Cro.* 6. 9 *E.* 4. 32.

On the other ſide it was inſiſted, that by pleading *no error* the defendant admitted the record perfect; for the effect of his plea is, that this record, as it is, is without *error*; therefore he cannot come and alledge diminution afreſh, and ſay, that there is *error* by reaſon of ſuch a defect, for that is againſt his former ſuppoſal; and by the ſame reaſon he might be let in to alledge a diminution more than once, and he may alledge it *ad infinitum*; that the party is therefore bound and foreclosed by this admiſſion, and that equally as to all parts of the record; but the court was not foreclosed, for the *writ of error* is a commiſſion to them to examine the *error*, viz. that by *inſpecting* the record and proceſs, *the court may cauſe to be done that which in juſtice ought to have been done*.

Therefore no admiſſion of the parties can or ought to reſtrain the court from looking into the record before them: that in the caſe of *Carleton* v. *Mortagh*, the plaintiff aſſigned for *error* the want of an original, and the defendant pleaded a releaſe, but miſpleaded it; and tho' this was a full confeſſion of the party, that there was no original, yet the court awarded a *certiorari*, and affirmed the judgment; but that had been otherwiſe if he had aſſigned for *error* infancy; becauſe this could not appear by inſpecting that record: and that wherever by inſpecting the record the court may affirm the judgment, they ought to award a *certiorari*. And as the party, by pleading *no error*, is *eſtopped* to pay a *certiorari* as to every part of the record, ſo the court is foreclosed as to no part; and the caſes of *Gwynn* 1 *Keb.* 55. and of *Fanſhaw* v. *Morriſon*, *Trinity* 3 *Ann*, in this court, on a *ſcire facias*, on a recognizance againſt bail, are in point.

The court granted a rule for a *certiorari* on theſe reaſons, ſupported by an affidavit that the record was right below. *Vide Salk. vol.* 1. *p.* 270.

Hilary, 12 *Ann.* *Skinner* v. *Newton.*

See this caſe fully ſtated in page 11 of this work, under the head *Abatement*.

Trinity, 12 *Ann.* *Groſvenor or Gravenor*, v. *Stephens.*

On this *writ of error*, an *error* in fact was aſſigned, *viz.* that the plaintiff was a *feme covert* at the time of the action brought; *but not allowed*; becauſe it might have been pleaded in *abatement*. And it is a general rule not to ſuffer *that* to be aſſigned for *error* in *fact*, which might have been taken advantage of, by being pleaded in *abatement*. *Vide Mod. Rep. vol.* 10. *p.* 166.

Michaelmas, 12 *Ann.* *Johnſon* v. *Altham.* Error.

See this caſe fully ſtated in page 7 of this work, under the head *Abatement*; and in page 351, under the head *Declaration*.

Eaſter, 13 *Ann.* *Shipley* v. *Shipley.* Error.

On a *writ of error* brought on a judgment in *dower* in *this court*, it was inſiſted on, that the judgment itſelf was *erroneous*, for want of the words *nil capiat per breve*; i. e. *that he take nothing by the writ*; and for this were cited 8 *Co. Rep.* 62. *Co. Ent* 320, 323. 326. 2 *Cro.* 284.

Per curiam. The utmoſt conſequence of this objection is, that we muſt give the ſame judgment that the court of *C. B.* ought to have done.

Therefore the judgment in the court of *C. B.* was affirmed *niſi*; and the Earl of *Clanrickard*'s caſe was relied on as a caſe in point. *Vide Mod. Rep. vol.* 10, *p.* 225.

Hilary, 1 *Geo.* *Holroi* v. *Ebizſon.*

See this caſe fully ſtated in page 334 of this work, under the head *Damages*.

Hilary, 1 *Geo.* *Hammond* v. *Webb.*

See this caſe fully ſtated in page 182 of this work, under the head *Bail in error*.

Hilary, 1 *Geo.* *Nutton* v. *Crow.*

See this caſe fully ſtated in page 54 of this work, under the head *Addition*.

Michaelmas, 2 *Geo.* *Dorſet* v. *Chaplin.*

On a return to a *certiorari*, directed to the *cuſtos brevium*; it appeared that the original was a *quare clauſum fregit*, an improper original for an action of *debt*. And though after a verdict, the want of an original is aided by the *ſtatute* of *jeofails*, yet an ill original is not aided. 5 *Co. Rep.* 37.

It was anſwered, that a *quare clauſum fregit* is no original in an action of *debt*; and therefore the caſe was to be conſidered, as if there was no original at all.

To this it was replied, that the certificate from the proper officer was the only way of trial what the original in the action was; and he has certified, that a *quare clauſum fregit* was the original; and this certificate the court is bound to give credit to. 2 *Cro.* 108. *Noy, fol.* 4. *Cro. Car.* 272, 281. *Brownlow*, 96. *Yelv.* 108. 2 *Cro.* 479.

The court were of the ſame opinion, and would have reverſed the judgment, becauſe of an ill original; but the council deſiring to ſpeak to it, it was adjourned. *Vide Mod. Rep. vol.* 10. *p.* 318.

Hilary, 3 *Geo.* *Cook* v. *Dutcheſs of Hamilton.* Error.

On a *writ of error* brought on a judgment in the *C. B.* the queſtion was, whether the record was removed; by reaſon of a variance between the record deſcribed by the *writ of error*, and the record returned?

The *writ of error* ran thus; *becauſe in the record and proceſs, and alſo in the rendering judgment on the plaint, which was in our court before you and your brethren, our juſtices of the Bench, by our writ between* J. S. *and thirty-one defendants there named, ſome error has happened*, &c. And by the record returned it appeared, that the original action was between *J. S.* and the *thirty-one* defendants before named, and one defendant more; and that the verdict was likewiſe had againſt the *thirty-two* defendants; but that the *thirty-ſecond* defendant died before judgment, and that notice was taken by an entry on the record of his death; and the judgment was given only againſt the *thirty one* defendants named in the *writ of error*.

This was argued, 1ſt. To be a variance between the *writ* in the record deſcribed by the *writ of error*, and the *writ* in the record returned.

2dly. It was inſiſted that the offence or treſpaſs mentioned in the *writ of error*, which was a treſpaſs by *thirty-one* defendants, muſt be a different treſpaſs from *that* in the record returned, which was a treſpaſs by *thirty two* defendants.

Per curiam. We are of opinion, that this *writ of error* is well brought, and the record well removed, notwithſtanding both theſe objections. Accordingly the judgment was affirmed. *Vide Mod. Rep. vol.* 10. *page* 368.

Hilary, 5 *Geo.* *Chartres* v. *Cuſack.*

On a *writ of error* from the *K. B.* in *Ireland*, on an affirmance of a judgment in *C. B.* there; the want of warrants of attorney on the *writ of error* in *this court* were aſſigned for *error*; the court ſet the aſſignment of *errors* aſide, and ſaid it had been done ſo ſeveral times, on account of the delay which would follow on awarding *certiorari's*. *Vide Stra. vol.* 1. *p.* 142.

Hilary, 5 *Geo.* *Thatcher* v. *Stephenſon.*

On a *writ of error coram vobis*, *&c.* infancy was aſſigned for *error*; and a *ſcire facias* to hear *errors* was taken out, and a *ſcire feci* returned; the defendant did not appear and join in *error*, and the plaintiff applied to the court to know what to do; and they directed him to put it in the paper, without taking out any rule to join in *error*. And when it came on, the judgment was reverſed. *Vide Stra. vol.* 1. *p.* 144.

Trinity, 5 *Geo.* *Bellew* v. *Aylmer.*

See this caſe fully ſtated in page 307 of this work, under the head *Coſts*.

Michaelmas, 5 *Geo.* *Cunningham* v. *Houſton.*

On a *writ of error* brought, the want of an original, and warrants of attorney, were aſſigned for *error*. The defendant pleaded a releaſe of *errors*; and on *not his deed* replied, the plaintiff was *nonſuited*. Thereon the the court was moved to affirm the judgment, but the court directed it to be put in the paper, and when it came on, they objected againſt affirming the judgment; becauſe the pleading the releaſe was a confeſſion of the *errors*, and ſo it would be to affirm an *erroneous* judgment. And beſides the tables were now turned; the queſtion not being whether *error* or not, but whether barred or not by the releaſe. The court quoted *Aſton's Entries* 339, where the entry is, *that the judgment be affirmed.* But notwithſtanding this the court gave judgment, that the plaintiff take nothing by the *writ of error*. *Vide Strange, vol.* 1. *p.* 127.

Michaelmas, 5 *Geo.* *Ogburn* v. *Berrington.*

On a *writ of error* brought on a judgment in C *B.* infancy was aſſigned. The court directed a ſeigned iſſue. Found with the plaintiff in *error*, and judgment reverſed on the return of the *poſtea*, on motion, without argument in the paper. *Vide Strange, vol.* 1. *p.* 127.

Michaelmas, 5 *Geo.* *Gould* v. *Coulthurſt.*

See this caſe fully ſtated in page 66 of this work, under the head *Amendment*.

Eaſter, 6 *Geo.* *Hackett* v. *Marſhall.*

On a *writ of error* brought on a judgment in *Ireland*, It was objected, that the defendant was an *infant*, and therefore there ought not to have been a *capiatur*, i. e. *let him be taken*. To which it was anſwered, and reſolved by the court, that there being a verdict in the caſe, and *ſtat.* 16 & 17 *Car.* 2. *c.* 8. here, being enacted in *Ireland* by *ſtat.* 17 & 18 *Car.* 2. *c.* 12. the fault was cured; although the adding a *capiatur*, where neither that or a *miſericordia* lies, is not expreſsly mentioned, but only the putting one for another, or omitting either of them, it being a matter of like nature not againſt the right of the matter of the ſuit, or whereby the iſſue or trial are altered, therefore the judgment was affirmed. *Vide Strange, vol.* 1. *p.* 3 3.

Michaelmas, 6 *Geo.* *Newell* v. *Pidgeon.*

Per curiam. If the plaintiff is nonſuited, and a judgment goes againſt him for coſts, *error* lies in the *Exchequer Chamber*. 1 *Roll. Abr.* 774. *Vide Strange, vol.* 1. page 235.

Michaelmas, 6 *Geo.* *The Ducheſs of Hamilton* v. *Incledon.*

On a *writ of error* brought on a judgment in C. B. in an action on the *caſe* on ſeveral promiſes, a verdict was given for the plaintiff, and the general *errors* aſſigned.

The plaintiff in *error*'s council argued, a *peer* (and conſequently a *peereſs*) cannot be attached, but ſhould be brought in by ſummons; *whereas* this declaration runs, that the ducheſs *was attached to anſwer*.

Per curiam. Whether that be right or wrong, is not material; for if it be wrong, yet according to the modern reſolutions, you cannot reverſe a judgment by the recital of the writ, but muſt bring the very proceſs itſelf before the court. *Vide Strange, vol.* 1. *p.* 225.

Michaelmas, 6 *Geo.* *Brewer* v. *Turner.* Error.

The court was moved to quaſh a *writ of error*, becauſe the judgment was againſt two defendants, and ſo deſcribed in the *writ of error*, but then it was laid to be only *to the great damage* of one of them. And it was urged, that the perſons who are named under the *to the great damage*, are they, and only they, who bring the *writ of error*. So that the caſe is no more, than that one defendant brings a *writ of error* on a judgment againſt *two*, whereas both ought to join. 6 *Co. Ruddock*'s caſe.

Per curiam. If it had any where appeared, that the other defendant was dead; there is no doubt but this defendant alone, without the executor of the other, might bring a *writ of error*; but as nothing of that appears, and the judgment is joint, it ſhould ſeem as if all muſt be mentioned under the *to the great damage*. And to this purpoſe was the caſe of *Pennoir* v. *Brace*, in the reign of *W.* 3. 5 *Mod.* 338. *Salk.* 319. 5 *Mod.* 16, 19. *Vide Stra. vol.* 1. *p.* 233.

Hilary, 7 *Geo.* *Leeds* v. *Power.*

On a motion in this court for a rule for the plaintiff to aſſign *errors* on a *writ of error* from the *K. B.* in *Ireland*, on a judgment in *ejectment* from the C. B. there, the court made a rule that unleſs *errors* were aſſigned within *four days* after fixing up a new note in the office, the defendant in *error* ſhould be at liberty to ſign a *non pros*.

Within the time allowed by the rule, *errors* were aſſigned; and it was objected, that it is an *ejectment* for lands in the county of *Dublin*. And the council offered a ſtatute made in *Ireland*, 17 & 18 *Car.* 2. *c.* 20. which appoints the trial of cauſes ariſing in the county of *Dublin*, to be at *niſi prius* in the ſame place where the King's courts ſit, in the county of the city of *Dublin*. So the judgment was affirmed. *Vide Stra. vol.* 1. *p.* 417.

Eaſter, 7 *Geo.* *Kent* v. *Kent.*

See this caſe fully ſtated in page 336 of this work, under the head *Damages*.

Trinity, 7 *Geo.* *Bellew* v. *Scott.*

On a *writ of error*, *as well* in the award of execution on a *ſcire facias* againſt executors on a judgment againſt their teſtator in C. B. in *Ireland*, *as in the affirmation in B. R.* there.

The plaintiff in *error*'s council took the following exceptions:

Firſt, The proceedings are againſt a man, and his wife as executrix, and the *devaſtavit* is returned in this manner, *viz.* that goods of their teſtator did come to their hands, ſufficient to pay the debt, which they (*i. e.* the huſband and wife) have waſted and converted to their own uſe, which a *feme covert* could not do; and 1 *Vent.* 12. 24. 33, were cited, where in *trover* it was held ill to ſay a *feme covert* converted goods to her own uſe; and though this be the caſe of an executrix, who has a particular intereſt in the goods, and may diſpoſe of them as ſhe pleaſes, yet that cannot alter the caſe; becauſe the converſion has quite extinguiſhed that particular intereſt of her's, and can enure only to the benefit of the huſband. 1 *Roll. Abr* 932. *F.* 1. ſpeaks of the ſheriffs returning, that the huſband had converted, and he ſays, that in that caſe, the execution ſhall be *of the proper goods* of the huſband, *whereas* here it is awarded againſt the goods of them both.

Per curiam. The precedents are the ſame as this in the caſe of a *feme* executrix. It is ſufficient to ſay, that the wife waſted the goods, without going on to ſpeak of a converſion; and therefore if the expreſſion be not proper, we may reject the *converting to his proper uſe.* In *trover* it is eſſential, but here it is not. 1 *Roll. Abr.* 930 *pl.* 9. *Cro. Car.* 519. are, that the judgment on ſuch a return ſhall be *the proper goods* of both.

Second exception on the *writ of error* in this court, before errors aſſigned, or diminution alledged, there muſt iſſue a *certiorari*, by which all the ſeveral proceſſes of execution are brought up and made parcel of the record: *whereas* the only ground for awarding it can be, to verify or falſify an aſſignment of *errors*, and therefore it ſhould not have iſſued before.

Per curiam. The court may take notice that the record is imperfect, and award the writ for their own ſatisfaction.

Third exception. In all judgments it muſt appear, that the court has fully conſidered the caſe, and are convinced that the judgment they give is right at the time of pronouncing it; and in *Salk.* 402. *Atwood* v. *Burr*, a judgment on demurrer was held erroneous, for want of the words, *becauſe it appears to the court that the plea being inſufficient in law.* In the caſe at bar it appears the judgment was affirmed, before the merits of the cauſe had been conſidered, for the record is, *becauſe it will appear*, in the future tenſe, inſtead of *it appears*; ſo that becauſe *it will appear* at a time to come, that the record is right, therefore do they before that time affirm the judgment.

Per curiam. That caſe of *Atwood* v. *Burr* was of an inferior court; neither (as *Eyre* Juſtice ſaid) is the report of it right: indeed that point was mentioned in *Mich.* 1 *Ann*, but the cauſe hung till *Hil.* 4 *Ann*, when the judgment was reverſed on another point; the clauſe, *it appears to the court*, is no judgment, *Cro. Eliz.* 145. and is implied in the *therefore in conſideration.* There was a caſe in the *Exchequer Chamber*, where the *becauſe it appears* was, that the defendant's plea is good, *therefore the conſideration is*, that the plaintiff have judgment. But the court ſaid, that if it did not appear to be *erroneous*, they would not traverſe it merely becauſe a wrong reaſon was given for the judgment, therefore the judgment was affirmed. *Vide Stra. vol.* 1. *p.* 440.

Trinity, 7 *Geo.* *Power* v. *Jones.*

The defendant brought a *writ of error coram vobis*, &c. and aſſigned *infancy*, and *appearance by attorney*, for *error*. The court was moved, that the attorney might be obliged to ſet it right, and *Goodright* v. *Right*, and *Stratton* v. *Burgeſs*, were cited as caſes in point. But the court ſaid they could not do it in this caſe, becauſe here was no expreſs undertaking to appear, as there was in thoſe caſes; if there had, the court would oblige the attorney to do it in a proper manner. *Vide Strange, vol.* 1. *p.* 445.

Trinity, 7 *Geo.* *Jeffry* v. *Wood.*

The plaintiff in *error* aſſigned *errors* in *law*, and in *fact*, and on demurrer for *duplicity*, the queſtion was, what judgment the court ſhould give; and after conſideration they ordered an entry, *that it be affirmed*, according to *Yelv.* 58. *Vide Strange, vol.* 1. *p.* 439.

Trinity, 7 *Geo.* *Everett* v. *Gery.*

On the return of the ſecond *ſcire facias* againſt bail, a *four day* rule was given, and on the *fourth day* the principal brings *error*, and thereon the court was moved to ſtay proceedings againſt the bail, pending the *writ of error*, and the caſes *Myer* v. *Arthur*, and *Church* v. *Throgmorton*, in the Houſe of Lords, were cited, where the Houſe threatened to commit the attorney, for proceeding againſt the bail pending *error* in parliament.

As to the firſt caſe, the court ſaid, it differed, for there the bail came in time, while they might ſurrender the principal, which they cannot do here, after the return of the ſecond *ſcire facias*, at which time *no writ of error* was brought, and as to the caſe in the Houſe of Lords, it was there agreed, that the court below could not reſtrain them; but the Lords ſaid they expected more reſpect.

Per curiam. We can make no rule. *Vide Strange, vol.* 1. *p.* 443.

Michaelmas, 7 *Geo.* *Mayo* v. *Parſons.*

See this caſe fully ſtated in page 257 of this work, under the head *Certiorari.*

Michaelmas, 7 *Geo.* *Gardner* v. *Claxton.*

The *court* was moved to ſet aſide an execution taken out on a judgment in a *ſcire facias quare executio non*, becauſe they had aſſigned their *errors* before; and the matter being referred to the maſter, he reported an old rule of court, that if the party pleads to the *ſcire facias*, and it goes againſt him, execution may be ſued out; but that the *writ of error* ſhould iſſue notwithſtanding. Whereon the court in conſideration of the delay, eſtabliſhed it as a ſtanding rule for the future, that if on the return of the *ſcire facias*, the plaintiff aſſigns his *errors*, then all farther proceedings ſhall be ſtayed on it; but where he chuſes to ſtand out on pleading to the *ſcire facias*, execution ſhall go if it be adjudged againſt him. *Vide Strange, vol.* 1. *p.* 390.

Hilary, 8 *Geo.* *The King* v. *The Dean and Chapter of Trinity Chapel, Durham.*

The *dean* and *chapter*, &c. denying the *archdeacon* of, *&c.* his ſeat therein, and his voice in the *chapter*, he brought a *mandamus* in the *K. B.* in *Ireland*, directed to them, ſuggeſting that his predeceſſors time out of mind had enjoyed the ſaid liberty, and that the franchiſes and liberties of their corporate body was confirmed by letters patent of *H.* 8. *&c.*

The return made by the *dean* and *chapter* being adjudged inſufficient in the ſaid court in *Ireland*, they granted a peremptory *mandamus*, and then the *dean* and *chapter* brought a *writ of error* in this court.

The principal point in queſtion was, whether a *writ of error* would lie on a peremptory *mandamus.*

Per curiam. We are of opinion that the *right* of any perſon is not to be determined on a *mandamus*, it gives a remedy where there is a ſeeming probability for it, and it ſettles people in their poſſeſſions, ſo that they may be able to defend their right, or by virtue thereof to bring any action for things incident to the poſſeſſion; and if a *writ of error* would lie in ſuch caſes, it would entangle all the public acts of annual officers in moſt corporations and pariſhes.

It is againſt the nature of a *writ of error* to lye on any judgment, but in cauſes where an iſſue may be joined and tried, or where judgment may be had on a demurrer, and joined in demurrer, and therefore it would not lie on a judgment for a *procedendo*, nor on the return of an *habeas corpus.*

It is true, if the defendant in *error* had traverſed the return of the *dean* and *chapter* to this *mandamus*, as by *ſtat.* 9 *Ann* he might, in ſuch caſe the *writ of error* would have been good, becauſe then a final judgment might be given; for on the traverſe of the facts in the return, the other ſide may take iſſue or demur; and ſuch proceedings might be had, as if the proſecutor of the *mandamus* had brought an action on the *caſe* for a falſe return; and if he had a verdict on judgment on a demurrer, he ſhall recover his damages and coſts, on which judgmeent a *writ of error* would lie on a peremptory *mandamus*: and therefore it was reſolved by the whole court it would not now lie.

Afterward a *writ of error* was brought on this judgment in the *Houſe of Peers*: and the *Lord Chief Baron*, who attended there, together with *ſeven* other judges, acquainted the Lords in parliament, that all the judges in *England* were of opinion that a *writ of error* would *not* lie; and thereon the judgment of this court was affirmed. *Vide Mod. Rep. vol.* 8. *p.* 27. 183.

Eaſter, 8 *Geo.* *Lawrence* v. *Jacob.*

On a *writ of error* brought in this court on a judgment in the *C. B.* the caſe was: the plaintiff who was executor of a ſecond indorſee of a promiſory note, brought an action againſt the indorſor for *default* of payment by him, and after a demurrer to the declaration, and judgment for the plaintiff in the *C. B.* and a *writ of error* in this court, the *error* aſſigned was, that the plaintiff in his declaration did not ſet forth, that the drawer had notice of the indorſement, nor any demand or *default* alledged in the drawer; *but not allowed*, it being the conſtant form, and this conſidered only as a matter of evidence; judgment was affirmed, on the authority of the caſe, and on the reaſon of the thing; for the defendant by his demurrer admits, that in conſideration of the premiſes, *viz.* the defendants making the indorſable note, and the indorſing it to the plaintiff, the defendant aſſumed to pay the money, according to the tenor of the note. *Vide Mod. Rep. vol.* 8. *p.* 43.

Trinity, 8 *Geo.* *Noke* v. *Coldecot.*

On a *writ of error* brought on a judgment in *C. B.* the court held, that if there be a warrant of attorney of any term *pending the ſuit*, it is enough to warrant the proceedings, and there is no neceſſity it ſhould be of the term in the *placita*. *Vide Strange, vol.* 1. *p.* 526.

Michaelmas, 8 *Geo.* *Pitt* v. *Coney.*

See this caſe fully ſtated in page 182 of this work, under the head *Bail in Error.*

Michaelmas, 8 *Geo.* *Stratford* v. *Neal.*

On a *writ of error* brought on a judgment given in the court of *K. B.* in *Ireland*; the caſe was thus:

One *Neal* libelled in the *ſpiritual court* there, for *two-third parts of the tithes due to him for dry cattle fed in ſuch a pariſh*, &c. The defendant ſuggeſted for a *prohibition*, that the cattle for which theſe tithes were demanded were *beaſts of plough*, and other dry cattle fed in the ſaid pariſh with hay and ſtubbles of corn, for which tithes had already been paid; whereon a *prohibition* was granted; and that the right might come in queſtion, the ſaid *Stratford* was ordered to declare on the *prohibition*, which he did, and in the ſame manner as before he had ſuggeſted, and concluded his declaration, that the defendant had proceeded in the *ſpiritual court* after a *prohibition* delivered, *&c.* and againſt the *prohibition*, *&c.*

The defendant pleaded, that the cattle for which he had demanded the ſaid tithes were not ſuch as the plaintiff had ſet forth in his declaration, nor fed with ſuch hay and ſtubbles, for which tithes had already been paid; and then pleaded, that he had a right to two *integral parts* of the tithes of all *dry cattle* fed in that pariſh, and that he had now proceeded *againſt the form of the prohibition*, &c.

On this they were at iſſue, and the defendant had a verdict, and judgment for a *conſultation*, which was awarded; on which judgment, the now plaintiff brought a *writ of error*; and it was inſiſted for him, that there was a variance in the pleadings, and that the verdict would not ſupport this judgment.

1ſt. As to the variance in the pleadings, *&c.* the plaintiff in the *ſpiritual court* had by his *libel* demanded *two-third parts* of the tithes due to him for dry *cattle*, *&c.* and being defendant in the action, he claimed a right to *two integral parts of the tithes*, &c. ſo that his *plea* varies from his *libel*, and therefore a *conſultation* ſhould not be awarded, becauſe that gives him a power to ſue for any thing not in the *libel*; therefore he has made no ſufficient title.

2dly. As to the verdict, it was objected, that the jury found that the cattle for which the ſaid tithes were demanded were not fed with hay and ſtubbles for which tithes had already been paid, but they did not find that there were any proceedings in the *ſpiritual court* after a *prohibition* delivered; and therefore it was inſiſted for the plaintiff in this action, that if all the iſſues are not found, this judgment cannot be ſupported, and it is part of this iſſue that the defendant had proceeded in the *ſpiritual court* after a *prohibition* delivered; and if this had been found, then the plaintiff would have been intitled to damages.

Per curiam. We are of opinion, that the awarding a *conſultation* is no more than ſetting aſide the *prohibition*, and giving the plaintiff in the *ſpiritual court* liberty to proceed on his *libel*; and that the variance between his *libel* and his *plea* is not material; for though in the one *two-third parts* are demanded, and in the other *two integral parts*, yet that muſt be underſtood *according to the ſubject of the matter.*

As to the other objection againſt the verdict, it is true, where ſeveral iſſues are joined, a verdict, which finds one and not the other, is not good; but in this caſe, the not finding any proceedings in the *ſpiritual court againſt the former prohibition* is but matter of form, however, this verdict hath found all the material parts in iſſue, and therefore it is ſufficient to ſupport this judgment.

Beſides, if the plaintiff would have any advantage by the defendant's proceeding after a *prohibition*, this being matter of evidence, he (the plaintiff) ſhould have proved it on the trial, and inſiſted on his damages, which he has not done; therefore the judgment was affirmed by the whole court. *Vide Mod. Rep. vol.* 8. *page* 2.

Michaelmas, 8 *Geo.* *The King* v. *The Archbiſhop of Armagh and Jackſon.*

On a *writ of error* brought on a judgment in the *K. B.* in *Ireland*:

The great queſtion was, whether ſince the one advowſon belongs to the crown, there can be any union by virtue of the act, *i. e.* whether the King is *bound* by the general words of *ſtat.* 17 *Car.* 2.? The *ſecond* point was, whether any union could be made when one of the churches was *vacant?*

Per curiam. We are of opinion that this ſtatute never intended any union ſhould be made of two churches after an *avoidance* in one, for by the *common law* (by which this act muſt be conſtrued) there could be no *union* but by the conſent of both patrons; neither could it be made in *immediately* but by the conſent of both the incumbents, though the patrons did agree to unite, though it might be made *in future* without the conſent of the incumbents.

Therefore it would be very hard to conſtrue this ſtatute ſo as to make an union good, where both the churches are not full at the time the union was made; for it is not ſo by the *cannon law* in caſes of preſentation and conſolidation, and it is that law which ſhould direct in this caſe.

It is clear, that the King cannot be deveſted of any of his prerogatives by general words in an act of parliament, but that there muſt be plain and expreſs words for that purpoſe, though all his other rights are no more favoured in law than the rights of his ſubjects; and it is likewiſe clear, that general words in an act of parliament may be qualified by ſubſequent ſentences or clauſes in the ſame ſtatute; but certainly it was never the intent of the legiſlature by this act to work a wrong to any patron; but if this union ſhould be good, it would diveſt the King of that right which was already veſted in him to preſent to this vicarage; and ſuch a conſtruction of the ſtatute would be a damage not only to the crown, but it may happen ſo to be to ſeveral other patrons.

Beſides, in this caſe there being two benefices united after an avoidance in one, it is plain that the *Archbiſhop* made the union for his own benefit, which is againſt a principle in law.

As to the *plenarty* which the defendant pleaded to this *writ of quare impedit*, the whole court agreed that it was not a good plea in *bar* to the King's right, and that was the principal reaſon why the court of *K. B.* in *Ireland* gave judgment for the King.

And for the reaſons before mentioned, the whole court agreed, *that the judgment in Ireland ſhould be affirmed.* *Vide Mod. Rep. vol.* 8. *p.* 6.

Hilary, 9 *Geo.* *Alcock* v. *Carter*.

The *court* was moved to ſet aſide ſo much of the aſſignment of *errors* in a cauſe out of *Ireland* as related to the want of a warrant of attorney; which was oppoſed by the defendant in *error*'s council, who produced an *affidavit* ſworn before one of the judges in *Ireland*, with a certificate from the proper officer, that there was no warrant filed; and alſo an *affidavit* of the agent here, that he received both from *Ireland*, and believed them to be authentick; and inſiſted that it now appearing they were not ſham *errors* aſſigned merely for delay, the reaſon, on which the common motion is made, failed.

Per curiam. This is ſufficient to ſatisfy us that there is ſome foundation for our ſending a *certiorari*, and therefore the *errors* muſt ſtand; the defendant in *error*'s council moved for time till the next term to return a *certiorari*, which was granted accordingly. *Vide Stra. vol.* 1. *p.* 545.

Eaſter, 9 *Geo.* *The King* v. *Earbery*.

See this caſe fully ſtated in page 179 of this work, under the head *Bail*.

Eaſter, 9 *Geo.* *Waller's Caſe*.

See this caſe fully ſtated in page 168 of this work, under the head *Bail*.

Trinity, 9 *Geo.* *Belt* v. *Collins*.

A *writ of error coram vobis, &c.* was brought on a judgment given in this court, and the queſtion was, whether it was a *ſuperſedeas* before it was allowed by the court.

The *Chief Juſtice* and *two* other *judges* were of opinion, that it would be hard, that the execution of a judgment in this court ſhould be delayed by a *writ of error*, allowed by a *ſecondary*; for if that ſhould be ſo, then any man may avoid execution for a whole *vacation*, at the expence of no more than *one ſhilling*.

There is certainly ſome variance between a *writ of error coram vobis, &c.* and other *writs of error*, for the one is directed to the juſtices of this court, and therefore ſhould be allowed by the court; but the other is directed to the *Chief Juſtice* only.

But *Eyre*, Juſtice, was of another opinion; he cited the caſe of *Lowns* v. *Carter* in Chief Juſtice *Holt*'s time, where a *writ of error* was adjudged a *ſuperſedeas* before it was allowed.

It is true, there is a difference between this caſe and other *writs of error*; but the reaſon is plain, for where *writs of error* are brought in the *Exchequer Chamber*, or in the *Houſe of Peers* to reverſe the judgment of this court, they are all directed to the *Chief Juſtice* alone, becauſe he is to certify the record; but where a *writ of error coram vobis, &c.* is brought, there is no record certified.

Beſides, there never was a motion in a court of *law*, to allow a *writ of error*, becauſe it is a *writ of right*, and due to the ſubject of right.

But admitting this writ is no *ſuperſedeas* before the allowance, yet it is a good *ſuperſedeas* after it is allowed, as this was by the ſecondary, and before notice; and ſo it was *adjudged* in the caſe of *Smith* v. *Cave*, in which caſe an execution executed was ſet aſide; but the want of notice excuſed the contempt. *Vide Mod. Rep. vol.* 8. *p.* 147.

Trinity, 9 *Geo.* *Colebrook* v. *Diggs*.

See this caſe fully ſtated in page 182 of this work, under the head *Bail in Error*.

Eaſter, 10 *Geo.* *Hawker* v. *Hinton*.

On a *writ of error* brought on a judgment in *C. B.* the *error* aſſigned was, a *variance* between the original and the declaration, the one being *Jemiman* and the other *Jememan Force*.

On the other ſide it was ſaid, that the record was right; and on producing, it was, but it was of another number roll.

Then it was objected, that the original was *anno*, 7 *Geo.* and the declaration was *anno* 9, and no *continuances* entered between the one and the other.

To which it was anſwered, that the *continuances* might be entered at any time, and that when entered, the plaintiff is intitled to his judgment.

The court was of opinion, that the attorney ought to be puniſhed for making up a ſecond record, but that the plaintiff muſt have judgment. *Vide Mod. Rep. vol.* 8. *p.* 243.

Eaſter, 10 *Geo.* *Chriſty* v. *The Bail of Anſtruther*.

See this caſe fully ſtated in page 168 of this work, under the head *Bail*.

Eaſter, 10 *Geo.* *Wilkinſon* v. *Meyer*.

See this caſe fully ſtated in page 68 of this work, under the head *Amendment*.

Trinity, 10 *Geo.* *Gravenor* v. *Salter*.

See this caſe fully ſtated in page 396 of this work, under the head *Ejectment*.

Trinity 10 & *Eaſter* 11 *Geo.* *Martin* v. *Budgell*.

This was a motion for leave to file a bill to warrant the proceedings in this court after a *writ of error* brought in parliament, and the want of a bill aſſigned for *error*; and on a *certiorari* directed to the *Chief Juſtice*, he certified to the *Houſe of Lords* that there was no bill filed in *Hilary* term; therefore it was now moved to file a bill as of another term; and a rule was made to move the *Houſe of Lords* for another *certiorari*; and the houſe ordered, that the plaintiff ſhould have leave to bring another *certiorari* to certify a bill filed of another term; and now the court was moved that the plaintiff might have leave to file a bill as of another term, *viz.* as of *Michaelmas* term, and to enter *continuances* to warrant the proceedings; the like having been done in the caſe of *Walmſey* v. *Cerer*, where in the *C. B.* the *memorandum* was allowed to be amended, and ſet right by the bill, it being to affirm the judgment of this court, which had been affirmed on a *writ of error* in the *Exchequer Chamber*.

Raymond, Chief Juſtice. I ſee no difference between giving leave to file this bill, and granting an amendment after a *writ of error*.

Forteſcue, Juſtice. It is expreſsly reſolved, 8 *Co.*— that what is amendable at *common law* is amendable at any time. This is the ſame as the caſe of *Winchworth* v. *Clarke*, *Trinity*, *Geo.* in this court, where *continuances* were permitted to be entered to the bill of *Middleſex* after a *writ of error* was brought. I have often heard it ſaid, that a bill of *Middleſex* may be filed at any time. *Calvert* v. *Caſtilian*.

Reynolds, Juſtice. No *writ of error* will be ever brought if after an aſſignment of it for *error*, it may be aided by filing a bill.

Per curiam. It cannot be filed but by motion in court; and on conſidering the circumſtances of the caſe, as here appears to have been the moſt affected delay, the bill may be filed of a term precedent, with *continuances*, ſo as to agree with the *memorandum*. But the court took further conſideration of the matter. *Vide Mod. Rep. vol.* 8. *p.* 284. 368.

Michaelmas, 10 *Geo.* *Anonymous*.

The plaintiff brought an action in *C. B.* and laid *four counts* in his declaration; the defendant demurred to one of them, and the plaintiff joined in demurrer, and had judgment, and then he entered a *nolle* *proſequi* as to the other *three*, but without any *miſericordia;* which the defendant believing to be *erroneous*, brought a *writ of error* in this court and aſſigned this matter, there being a precedent in *Coke's Entries*, that it is *erroneous*.

Per curiam. If the entry of a *miſericordia* had been neceſſary at *common law*, there is no *ſtat.* of *jeofails* which cures the want of ſuch entry; for thoſe *ſtatutes* extend to judgments entered by *confeſſion*, *nil dicit*, or *non ſum informatus*, but the principal judgment is neither of theſe, for it is a judgment on a demurrer joined.

Now at *common law* there was no entering a *miſericordia* in ſuch caſes, becauſe ſuch entry is only *for a falſe claim*, and here is no colour of any falſe complaint, becauſe the plaintiff ſays, *he will not further proſecute*; and as for that caſe in the Lord *Coke's Entries*, many of them have been condemned, therefore the judgment was affirmed. *Vide Mod. Rep. vol.* 8. *p.* 198.

Trinity, 11 *Geo. Moorfoot* v. *Chivers.*

On a motion to ſet aſide an *execution*, the caſe was, that a *writ of error* was allowed about *two* of the clock in the afternoon, and about the ſame time the execution was ſerved; now it was inſiſted, that from the time of the allowing the *writ of error*, the hands of the court are tied up, and if ſo, the execution is irregular, and ought to be ſet aſide.

All which was admitted on the other ſide, if notice had been given of the allowance of the *writ of error* before the ſerving the execution, otherwiſe it is regular; but here the plaintiff in the *writ of error* did not give the defendant any *notice*, that it was allowed.

The court was of opinion, that if the plaintiff in *error* could ſhew, that the writ was ſued out, and allowed before the execution was ſerved, it muſt be ſet aſide, though the defendant had not any notice of it. *Vide Mod. Rep. vol.* 8. *p.* 373. *Strange, vol.* 1. *p.* 631.

Trinity, 11 *Geo. Turner* v. *Moſſe.*

On a *writ of error* brought on a judgment in *C. B.* in an action on the *caſe*; the *error* aſſigned was, for that there being but one defendant, the plaintiff had declared, *for that to wit, that whereas ipſi idem*, i. e. *they the ſame*, the defendant, *&c.* inſtead of *ipſe idem*, i. e. *he the ſame*, &c.

Per curiam. The word *ipſi* is but *ſurpluſage*; and if it had been left out, the declaration would have been good without it; therefore the judgment was affirmed. *Vide Mod. Rep. vol.* 8. *p.* 377.

Trinity, 11 *Geo. Iles* v. *Pitt.*

On a *writ of error* brought on a judgment given in the *C. B.* by *default*; and one of the *errors* aſſigned, was the want of a *writ of inquiry* of damages; and on a *certiorari* taken out by the plaintiff in *error*, to verify his *error*, it was certified, that there was no *writ of inquiry*.

Per curiam. The judgment muſt be affirmed, becauſe the want of a judicial *writ* is helped by 18 *Eliz. c.* 14. after a verdict; and by 4 *Ann. cap.* 16. for the amendment of the law, *&c.* all the *ſtatutes* of *jeofails* are extended to judgments given on *default*. And afterwards in *Michaelmas* term. 4 *Geo.* 2. in the caſe of *Mallory* v. *Jennings*. Accordingly by *Raymond*, Chief Juſtice, *Proby* and *Lee*, Juſtices, the judgment of the *C. B.* was affirmed. *Vide Raym. vol.* 2. *p.* 1397.

Michaelmas, 11 *Geo. Ginger* v. *Cowper*, or *Cowper* v. *Ginger.*

See this caſe fully ſtated in page 8 of this work, under the head *Abatement.*

Michaelmas, 11 *Geo. Wyvil* v. *Stapleton.*

On an action brought in the *C. B.* on a *South Sea* contract, the defendant had judgment, and on a *writ of error* brought in this court, judgment was reverſed, and the judgment was that the plaintiff in *error* ſhould recover his debt and coſts, as he ſhould below.

The court was moved, that the plaintiff in the original action might recover his coſts thereof; but it was objected, no coſts were recoverable at the *common law* on a *writ of error*, and that neither *ſtat.* 3 *H.* 7. *c.* 10. nor *ſtat.* 8 *&* 9 *W.* 3. *c.* 11. extend to *writs of errors*, where judgment is reverſed; only when judgment is affirmed, or a *writ of error* diſcontinued, there is no precedent for coſts on the reverſal of a judgment.

This court are to give the ſame judgment as the *C. B.* ought to have done; and how could they adjudge coſts for the *writ of error*. *Holt*, Chief Juſtice, called a *writ of error* a revivor of the cauſe, and removal thereof. Adjourned. *Vide Mod. Rep. vol.* 8. *p.* 315.

See this caſe more fully ſtated in page 16 of this work, under the head *Accord.*

Michaelmas, 11 *Geo. Hunſton* v. *Howard.*

The plaintiff had judgment in the court of *C. B.* which was now above *ten* years ſtanding, when the defendant brought a *writ of error* in this court, and aſſigned the want of an original for *error*; and now the defendant in *error* pleaded *no error*, and the want of an original being not yet certified, he moved to put it off till next term, that he might in the mean time procure an original to be filed, this being a contrivance of his own attorney to defraud him.

Per curiam. This motion ſhould have been made before the cauſe was put in the paper; but it having the countenance of fraud, it was ruled to go over on payment of the coſts of the day. *Vide Mod. Rep. vol.* 8. *p.* 327.

Hilary, 12 *Geo. Lambell* v. *Pretty John.*

A judgment was given in this court in an action of *treſpaſs*, and on a *writ of error* being brought in the *Exchequer Chamber*, the judgment was affirmed. The defendant then brought a *writ of error coram vobis*, *&c. in this court*, which the plaintiff's council moved to quaſh, and cited 1 *Vent.* 207. 2 *Lev.* 38. 3 *Keb.* 28, 29. that it will not lie after an affirmance.

On the other ſide it was inſiſted, that the record was never removed from this court, and that an action of *debt* will lie on it.

Per curiam. Before the ſtatute of *Elizabeth* we could not examine our own *errors* in *fact* after an affirmance in *parliament*: and the *Exchequer Chamber* is now in the ſame degree with regard to us as the *parliament* was before: therefore the *writ of error* muſt be quaſhed. *Vide Stra. vol.* 1. *p.* 690.

Hilary, 12 *Geo. Helbut* v. *Held.*

On a *writ of error* brought on a judgment in *C. B.* it was aſſigned for *error*, that *E. R.* who was ſworn as a juror returned on the principal panel, was never returned by the ſheriff; *And alſo* that there was a diminution in the record for want of the *venire facias*, and *habeas corpus*, and to this *in no error* was pleaded.

Per curiam. The caſe 1 *Roll. Abr.* 758. *pl.* 8. is exactly in point, and according to the reaſon of the law in other caſes: therefore the judgment muſt be affirmed. *Vide Stra. vol.* 1. *p.* 684. *Raym. vol.* 2. *p.* 1414.

Hilary, 12 *Geo. Parker* v. *Stanton.*

To a *ſci. fac.* ſued out by the defendant in *error*, *quare executio non*, &c. in order to compel the plaintiff in *error* to aſſign his *errors*, the plaintiff in *error* pleaded, that the defendant in *error* had ſued execution in the *C. B.* and levied his debt recovered. And on motion, this plea was ſet aſide as a ſham plea, (as a plea of payment in the like caſe was ſet aſide in *Hilary* 10 *Geo.*) for the meaning of ſuing out this *writ* is only to compel the plaintiff in *error* to aſſign his *errors*; and if ſuch pleading as this ſhould be encouraged, ed, it would occaſion great delay, and vexation in the recovery of debts. *Vide Raym. vol.* 2. *p.* 1414.

Eaſter, 12 *Geo.* *Eden* v. *Wills.*

An action was commenced in *C. B.* by a *writ of privilege*, which was returnable at a day certain: after judgment for the plaintiff, a *writ of error* was brought, and a *ſcire facias quare executio non*, was taken out, returnable at a general return. And on motion to ſet it aſide, the matter was ſtirred ſeveral times. And after conſideration and ſearch of precedents, the *ſcire facias* was ſet aſide, for that it ought to purſue the nature of the firſt proceſs; and *whereas*, as in the common caſe of actions by original in *C. B.* the proceſs on *error* in this court muſt purſue that, and be returnable at a general return; ſo where the proceeding below is by *attachment of privilege*, which is returnable at a day certain, the proceedings here muſt be returnable in the ſame manner. And a caſe was cited of *Vavaſor* v. *Parker*, *Trinity* 11 *Ann*, where it was ſo ruled. *Theſ. Bre.* 121. The *writ* was quaſhed, but without coſts. *Vide Stra. vol.* 1. *p.* 694.

Trinity, 13 *Geo.* *Merryfield* v. *Berry.*

The plaintiff in *error* took out a *certiorari* of a wrong term, which did not verify his *error*; and now he moved for a ſecond *certiorari*, which was denied; the court ſaying it may be granted to affirm, but not to reverſe a judgment. *Vide Stra. vol.* 1. *p.* 765.

Michaelmas, 1 *Geo.* 2. *Freſcobaldi* v. *Kinaſton.*

A *writ of error* was brought by two executors of a judgment againſt them, to the *great damage* of both. A *ſcire facias* was taken out, and *ſcire feci* returned; and then one of the plaintiffs in *error* moved for time to aſſign *errors* till there could be a ſummons and ſeverance of the other, on an affidavit that the other executor was in the intereſt of the defendant in *error*, and would not join. And time was given accordingly. *Vide Strange, vol.* 2. *p.* 783.

Hilary, 2 *Geo.* 2. *Lewis* v. *Lewis.*

See this caſe fully ſtated in page 41 of this work, under the head *Actions.*

Eaſter, 2 *Geo.* 2. *Anonymous.*

Per curiam. A *writ of error* being brought in the *Exchequer Chamber* of a judgment by original in *this court* is merely void, and no *ſuperſedeas* of execution; for the *Exchequer Chamber* has no *juriſdiction*: but the *writ of error* ſhould have been made returnable in *parliament.* *Vide Fitz-Gibbons, p.* 67.

Trinity, 2 *Geo.* 2. *King and Wife* v. *Jones.*

See this caſe fully ſtated in page 8 of this work, under the head *Abatement.*

Trinity, 2 *Geo.* 2. *Bottomley* v. *Harriſon.*

See this caſe fully ſtated in page 355 of this work, under the head *Declaration.*

Trinity, 2 *Geo.* 2. *Jacob Lopes Henriques and others* v. The general privileged *Dutch Company, trading to the Weſt Indies.*

On a *writ of error* brought on a judgment in *C. B.* the plaintiffs in *error*'s council inſiſted on two *errors.*

The *firſt* was, want of warrants of attorney on record, and that on a *certiorari* directed to the Chief Juſtice of the *C. B.* he had certified there were no warrants of attorney of *Hilary* and *Eaſter* terms in the 11 *Geo*, but the defendants in *error* having ſuggeſted, that there were warrants of attorney of *Eaſter* term, 11 *Geo.* another *certiorari* was granted to the Chief Juſtice of the *C. B. &c.* to which he returned warrants of attorney in this cauſe, both by the plaintiffs and defendants of *Eaſter* term, 11 *Geo.* Now the plaintiffs in *error*'s council inſiſted, that thoſe were not good warrants, becauſe they were warrants of *Eaſter* term, whereas the *ſci. fa.* was returnable in *eight days of the purification in Hilary* term, at which day the plaintiff below came by his attorney, but the warrant returned being a warrant of *Eaſter* term following, could not be a warrant to appear the *Hilary* term before. To which it was anſwered by the defendants in *error*'s council, that a warrant of attorney might have been entered at any time before judgment. 41 *Ed.* 3. 1. *b.* 1 *Roll. Abr. tit. Attorney.* 1. But by *ſtat.* 32 *H.* 8. *cap.* 30. *par.* 2. attornies are to enter their warrants of record of the ſame term the iſſue is entered on record, and by *ſtat.* 18 *Eliz. cap.* 14. attornies are to deliver in their warrants to be entered or filed on record, in ſuch manner and form as theretofore by the laws or ſtatutes they ought to have done. And *ſtat.* 4 *Ann. c.* 16. gives no direction when the warrants of attorney are to be filed; but only ſays, ſo that there be warrants of attorney duly filed, according to the law as is now uſed; and in the preſent caſe the warrant of attorney is entered of the ſame term the *placita* is of, *Eaſter* term, 11 *Geo.* And he cited a caſe adjudged in this court, *Trinity*, 8 *Geo.* between *Noke* v. *Caldicot*; where in *error* on a judgment in *C. B.* want of a warrant of attorney was aſſigned for *error*, and a warrant was returned on a *certiorari* directed to the Chief Juſtice of the *C. B.* of a term ſubſequent to the *placita*; and it was held to be *no error.* And the court were unanimouſly of opinion, that this was *no error* in the preſent caſe, for the reaſons given by the defendants in *error*'s council.

The other *error* aſſigned was, that by *ſtat.* 8 & 9 *W.* 3. *c.* 10. *par.* 3. coſts of ſuit are only given to the plaintiffs on a *ſci. fac.* if he obtains judgment or an award of execution againſt the defendant after plea pleaded, or demurrer joined: but in this caſe the court of *C. B.* have given judgment, that the plaintiff ſhall recover againſt the defendant 6 *l.* 10 *s. for damages and coſts occaſioned by the delay of execution, &c.* whereas they have no power to give damages for the delay of execution.

The court were all of opinion, that the judgment as to the 6 *l.* 10 *s. for damages and coſts, &c.* was *erroneous*, and therefore they reverſed the judgment as to that, and affirmed the judgment as to the adjudication of execution, and awarded execution againſt the ſeveral plaintiffs in *error*, only for the ſums in the recognizance.

Afterwards, the plaintiffs in *error* brought a *writ of error* in *parliament* on this judgment, where the judgment of this court was affirmed, and the plaintiffs in *error* ordered to pay 100 *l.* coſts. *Vide Raym. vol.* 2. *p.* 1532.

Trinity, 2 *Geo.* 2. *Canning* v. *Wright.*

See this caſe fully ſtated in page 70 of this work, under the head *Amendment.*

Michaelmas, 2 *Geo.* 2. *Bowers* v. *Mann.*

See this caſe fully ſtated in page 258 of this work, under the head *Certiorari.*

Hilary, 3 *Geo.* 2. *Sir John Forteſcue Aland* v. *Maſon.*

See this caſe fully ſtated in page 70 of this work, under the head *Amendment.*

Trinity, 3 *Geo.* 2. *Worral* v. *Bent and others.*

See this caſe fully ſtated in page 397 of this work, under the head *Ejectment.*

Trinity, 3 *Geo.* 2. *Rutter* v. *Redſtone.*

After *error* brought in the *Exchequer Chamber*, the *tranſcript* was brought back and amended in *this court*, by the original record. And it was held neceſſary to make the amendment here, as this differs from the caſe of a *writ of error* from *C. B.* becauſe the *C. B.* ſends up the very record, and the *King's Bench* ſends only a tranſcript. *Vide Strange, vol.* 2. *p.* 837.

Trinity, 3 *Geo.* 2. *Higgs* v. *Evans.*

The court was moved to quaſh the *writ of error* becauſe it appeared there was *twenty-nine years* between the judgment and bringing the *writ*, *whereas* the party is reſtrained to *twenty* years.

Per curiam. So he is, but this will be to deprive him of the benefit of replying to the exceptions in the *ſtatute*; therefore the motion was denied. *Vide Stra. vol.* 2. *p.* 837.

Hilary, 4 *G.* 2. *The Sword Blade Company* v. *Dempſey.*

See this caſe fully ſtated in page 71 of this work, under the head *Amendment.*

Eaſter, 4 *Geo.* 2. *Gardner* v. *Merrott.*

See this caſe fully ſtated in page 71 of this work, under the head *Amendment.*

Eaſter, 4 *G* 2. *Moore* v. *Goodright.*

On a *writ of error coram vobis*, it was aſſigned for *error*, that the plaintiff in the *ejectment* died before the day of *niſi prius*. And it being in *ejectment*, the court ſet it aſide, and ordered the attorney to ſhew cauſe why there ſhould not be an attachment againſt him; for they ſaid it was to defeat the proceedings inſtituted by the court to try the right; and every body knows that the plaintiff is but *nominal*, or if a *real* perſon, yet his releaſe is a contempt. *Vide Strange, vol.* 2. *p.* 899.

Michaelmas, 4 *Geo.* 2. *Buller* v. *Luſitano de Pinna.*

A writ of *error* was brought by a *feme ſole*, which abated by her marriage, and then ſhe and her huſband bring a ſecond; and the court gave leave to take out execution, it being a delay occaſioned by the act of the plaintiff in *error.* 1 *Mod.* 285. 1 *Vent.* 100. *Vide Stra. vol.* 2. *p.* 880.

Michaelmas, 4 *Geo.* 2. *Sweetapple* v. *Goodfellow.*

After notice of a *writ of error*, the plaintiff in the original action took out a *capias* againſt the defendant, which was returned *non eſt inventus*, i. e. *is not to be found*, and ſo proceed by *ſcire facias* againſt the bail; hereon it was moved to ſet aſide the proceedings againſt the bail: the plaintiff's council urged, that though the proceedings are irregular *as to* the principal, yet they are right *as to* the bail.

Raymond, Chief Juſtice, ſaid, he believed there was a reſolution 4 *Ann*, that after notice of a *writ of error*, the plaintiff might ſue a *capias* againſt the principal, in order to charge the bail, which he thought againſt reaſon: if the plaintiff directs the ſheriff to return his *capias non eſt inventus*, he cannot bring an action againſt him for a falſe return, though he had been in the company of the defendant before the return made: in this caſe the proceedings againſt the bail was laid aſide. *Vide Fitz-Gibbons, p.* 175.

Eaſter, 5 *Geo.* 2. *Lampen* v. *Hatch.*

In an action on the *caſe* for words, the jury on the *writ of inquiry* gave 10 *s.* damages, the coſts were taxed at 13 *l.* and a judgment given to recover them. On *error* it was objected, that by *ſtat.* 21 *Jac.* 1. *c.* 16. *ſect.* 6. if the jury that inquire of the damages find under 40 *s.* there ſhall be no more coſts: and it was therefore prayed to be reverſed as to the coſts.

For the plaintiff in the action it was inſiſted, on account of the ſmallneſs of the damages, that the judgment ſhould be reverſed *in toto*, it being a joint judgment, and not like the caſes where no coſts can be given, and there is a diſtinct judgment. And the court without any difficulty reverſed the judgment *in toto. Vide Stra. vol.* 2. *p.* 934.

Trinity, 5 *Geo.* 2. *Berkley* v. *Howard.*

On a *writ of error* brought on a judgment by *default*, the plaintiff in *error* aſſigned the want of an original, and warrants of attorney. And the defendant, without putting him to the expence of returning a *certiorari*, pleaded *no error.* And on argument the plaintiff inſiſted, that it was a confeſſion of the *errors*; and it was agreed ſo to be. But on application to the court, and affidavit, there was an original and warrants of attorney, the court awarded *certiorari's*, it being in order to affirm a judgment. *Vide Stra. vol.* 2. *p.* 907.

Michaelmas, 5 *Geo.* 2. *Marſhall* v. *Cope.*

The rule to aſſign *errors* was ſet aſide, becauſe given before any rule on the *ſcire facias executio non. Vide Stra. vol.* 2. *p.* 917.

Eaſter, 6 *Geo.* 2. *Horne* v. *Buſhell.*

A *writ of error* was brought on a judgment in the *Marſhalſea Court*, and *error* in *law* aſſigned, and the judgment affirmed: then a *writ of error coram vobis*, which the court ſaid could not be allowed without leave, and therefore held it no *ſuperſedeas. Vide Stra. vol.* 2. *p.* 949.

Trinity, 6 *Geo.* 2. *Duckett* v. *Martin.*

Pending *error* to reverſe an *outlawry* on *meſne proceſs*, the defendant in *error* moved to quaſh the *writ*, becauſe no bail was given.

Per curiam. That is never done till the *outlawry* is reverſed, and then we take bail to appear to an original to be brought within *two* terms: and ſo it was done in this caſe. *Vide Stra. vol.* 2. *p.* 951.

Hilary, 7 *Geo.* 2. *Deſbordes* v. *Horſey.*

The condition of a bond was for the payment of 500 *l.* at ſuch a day, being the ſame ſum mentioned in certain indentures of ſuch a date. And *error* being brought, the plaintiff in *error* would have been excuſed from giving bail, becauſe the words of *ſtat.* 3 *Jac.* 1. *c.* 8. are, *bonds for payment of money only*, whereas this was rather a bond for performance of *covenants.* But the court held that it ought to be given; for the material part of the condition was the payment of 500 *l.* and the other words were only added; they were no diſtinct debts, but only different ſecurities for the ſame. *Vide Stra. vol.* 2. *p.* 959.

Eaſter, 7 *Geo.* 2. *Burleigh* v. *Harris.*

A judgment was recovered in the *Marſhalſea Court*, and a *writ of error* being brought here, *error in law* was aſſigned, and the judgment affirmed: then a *writ of error coram vobis* was brought, and *error* in *fact* aſſigned; and the court ſtaid proceedings on it, and gave leave to take out execution. For as *error* in fact and law cannot be both aſſigned on one *writ*, there is no reaſon to do it by a more dilatory method: and it is like the caſe of *Lambell* v. *Prettyjohn*, where it was held that *error coram vobis* would not lie after affirmance in the *Exchequer Chamber*; beſides, it would be very odd, that the ſame court ſhould affirm and reverſe. And as to the caſe in *Salk.* 337. where it is reported to lie after affirmance, is not warranted by the record which is entered. *Hilary*, 3 & 4 *Jac.* 2. *rol.* 420. by which it appears the *writ of error* abated, and there was no affirmance; which is agreeable to 1 *Roll. Abr.* 753. *Vide Stra. vol.* 2. *p.* 975.

Michaelmas, 7 *Geo.* 2. *Horton* v. *Kilmore*.

See this caſe fully ſtated in page 44 of this work, under the head *Actions*.

Trinity, 8 *Geo.* 2. *Ratcliff* v. *Burton*.

Judgment was given in the *C. B.* againſt *Ratcliff* the now plaintiff in *error*, and another defendant; on which judgment, *Ratcliff* alone brought a *writ of error*.

The defendant in *error's* council moved to quaſh the *writ of error*; for that as the judgment was againſt *two*, this *writ of error* cannot be brought by one of them only; and for that he cited the caſe of *Brewſter* v. *Turner*, *Stra.* 233. *Michaelmas* 6 *Geo.* 1. and *Cooper* v. *Ginger*. *Stra.* 606. 8 *Mod.* 305. 2 *Raym.* 1403. *Michaelmas* 11 *Geo.* 1.

On the other ſide it was argued, that the *writ of error* was amendable under *ſtat.* 5 *Geo. c.* 13. which ſays, that all *writs of error* wherein there ſhall be any variance from the original record, or other defect, may and ſhall be amended, and made agreeable to ſuch record, by the reſpective courts where ſuch *writs of error* ſhall be returnable. Or however, the record being removed here, ſhall remain here, and we may have a *writ of error coram vobis*, &c. *Yelv.* 6. Lord *Cromwell* v. *Andrews*. *Godbolt* 375. *Dean and Chapter of Carliſle*, and 1 *Roll. Abr.* 753. So likewiſe the caſe cited, and the caſe of *Cooper* v. *Ginger*, are exactly in point.

Lord *Hardwicke*. It cannot be doubted but this *writ of error* muſt be quaſhed; and I am not at all ſatisfied that by *ſtat.* 5 *Geo.* 1. we can amend it; the way is, if one defendant will not proſecute a *writ of error*, for the other to proceed by ſummons and ſeverance, I ſhould think that as the act ſays, not only variance from the record, but other defects, may be amended; we might on thoſe words amend any defect in form; but the fault in this caſe is ſubſtance; for it is want of parties. The party who brings a *writ of error* has a right to a *ſcire facias to hear errors*; and how can we at the ſingle inſtance of one of the defendants bring a party into the cauſe?

Page, Juſtice. Suppoſe we ſhould think fit to reverſe this judgment, can we reverſe it in favour of a party that is not before the court?

Probyn, Juſtice. If you can bring the other defendant to be joined in this *writ of error*, why it may ſubject him to a penalty of coſts, though he is now fully ſatisfied what is the judgment below.

Lee, Juſtice. This would be to force a man to join a ſuit *nolens volens*.

Per curiam. The *writ of error* muſt be quaſhed, and by *ſtat.* 4 & 5 *Ann*, *c.* 16. for amendment, it muſt be with coſts for the defendant in *error*. *Vide Caſes Temp. Lord Hardw. p.* 135.

Hilary, 9 *Geo.* 2. *Collins* v. *Muxworthy*.

On a *writ of error*, directed to the Mayor, Recorder, and Aldermen of the city of *Bath*, whereas the ſtile of the court, as appears by the record returned, is the Mayor, &*c.* juſtices of the city of *Bath*.

The court was moved on *ſtat.* 5 *Geo.* 1. *c.* 13. that the *writ* might be amended by the record, and a rule had to ſhew cauſe, and nobody appearing at the day, the rule was made abſolute. *Vide Caſes Temp. Lord Hardwicke, p.* 194.

Michaelmas, 9 *Geo.* 2. *Franklyn* v. *Reeve*.

On a *writ of error* brought on a judgment in the *C. B.* in an action of *treſpaſs*, where, after the recital of the *writ*, the plantiff counted for taking and carrying away ſeveral loads of dung and ſoil, without ſaying *the property of him the ſaid plaintiff*. And after a verdict, that was objected, and held that this was ſuch a defect of title in the count as could not be aided by the verdict; which aids not a defective title, but only a title defectively ſet forth.

But though the count was held ill,' yet the court thought it might be made good by the recital of the *writ*, which had ſhewn them to be the dung and ſoil of the plaintiff, and was to be taken as part of the declaration, according to the caſes in *Cro. Jac.* 536. 1 *Sid.* 150. 187. 1 *Keb.* 699. 727. *Lutw.* 1509. 1 *Mod.* 219. And though it was agreed there was no original, (which otherwiſe they would have ſent for up by *certiorari*) yet as the want of that was aided by the verdict, the judgment ſhould be affirmed. *Vide Stra. vol.* 2. *p.* 1023.

Hilary, 10 *Geo.* 2. *Goodright* v. *Hugeſon*.

The plaintiff in *error's* council moved to ſet aſide a *ſcire facias quare executio non teſted* the laſt day of laſt term, and returnable the firſt day of this term, becauſe there was no tranſcript of the record below yet returned, and therefore there could be no ground for the ſuggeſtion of the *writ*, which is that judgment was given below *as by inſpection of the record which we have cauſed to be brought before us, appears on record*; and he cited a caſe, *viz. Eden* v. *Wills*, *Hilary* 12 *Geo.* where ſuch a *ſcire facias* was ſet aſide for the ſame reaſon.

Lord *Hardwicke*. The practice is, that if the plaintiff in *error* is dilatory, the defendant muſt give a rule to tranſcribe, and then, if he will not, the defendant may *non pros* the *writ of error*.

The court inclined the *ſcire facias* was not maintainable, but made no rule to ſhew cauſe, becauſe the defendant in *error*, rather than be delayed, conſented it ſhould be ſet aſide. *Vide Caſes Temp. Lord Hardw. p.* 351.

Michaelmas, 10 *Geo.* 2. *Blackwood* v. *The South Sea Company*.

On a *writ of error* brought on a judgment in the *C. B.* which was directed as uſual to Sir *R. Eyre*, Chief Juſtice, and was returned as uſual likewiſe, *viz.* the anſwer of Sir *R. Eyre*, Chief Juſtice, within named; but the return not ſigned with the Chief Juſtice's hand, as the practice is always to do; and objected, that this was not a return, and therefore the proceedings were not regularly before the court. On this objection the court took a day to conſider, and then the ſenſe of the court was given.

Lord *Hardwicke*. If this be conſidered as an objection taken on the record, we have formerly determined, that there is no ground for ſuch an exception, for that there is no law requires ſuch a ſigning. There was no need for any name to appear in a return till the *ſtatute* of *York*, *ſect.* 12 *E. c.* 2. *ſect.* 5. but that ſtatute does not require that the ſheriff ſhould ſign it, but only that his name ſhould be put with the return, ſo that the court may know of whom they took ſuch return, if need be; and therefore, as the cauſe now ſtands in the paper, this judgment muſt be affirmed. But to put an end to objections of this ſort, we are of opinion that it is no objection in this court; though we are informed the court of *C. B.* require it ſhould be done, but that it is only a matter of irregularity in that court, with which we have no more to do than we ſhould have with any irregularity in obtaining a judgment there, when returned here to us on record by *writ of error*; and as we can take no notice of that, ſo here the fact of the return is a matter intirely under the conſideration of the court below; but as this matter ſtands now before us, it is a return in the name of the *C. B.* and the record is properly before us: therefore the judgment was affirmed. *Vide Caſes Temp. Lord Hardw. p.* 344.

Mihcaelmas, 10 *Geo.* 2. *Street* v. *Hopkinſon*.

A *writ of error* was brought, and *errors aſſigned, as well in the rendering judgment* againſt the teſtator, *as in the adjudication of execution* againſt the executors. As to the principal judgment, the defendant in *error* pleaded the ſtatute of limitations, and prayed that the judgment be affirmed. As to the award of execution, *no error* was pleaded. And that appeared to be in a *ſcire facias* againſt two executors, one of whom pleaded *not at any time executor*, and the other pleaded payment by the teſtator: and on this plea there was a verdict againſt it, but no verdict as to the other, and then followed the award of execution.

As to the principal judgment, the only doubt was, whether, as the defendant in *error* had concluded with a prayer that the judgment be affirmed, the court could give the proper judgment, which was, *that the plaintiffs be barred of their writ of error*. But the court held they were not bound by the prayer of an improper judgment, and therefore pronounced the rule, that the plaintiff in *error* ſhould be barred.

And as to the award of execution, they were of opinion it was wrong, and that not being in the ſame court, they could not award a *venire facias de novo*; and this being a diſtinct judgment, might be reverſed without affecting the other: and it was reverſed accordingly. The caſes cited on the firſt point were, *Show* 30. *Carth.* 369, 370. *Lutw.* 1386. 3 *Lev.* 58. And on the ſecond point, 1 *Roll. Abr.* 803. 1 *Inſt.* 127. 3 *Salk.* 372. *Cattle* v. *Andrews*, *Hilary* 5 *W.* & *M. rot.* 826. in this court. *Cumb.* 259. *Salk.* 4. 363. *Vide Stra. vol.* 2. *p.* 1055. *Caſes Temp. Lord Hardw. p.* 345.

Hilary, 12 *Geo.* 2. *Dent* v. *Lingood*.

The defendant in *error* pleaded a releaſe of *errors*, which was found for him; and the court ordered the entry to be, that the plaintiff ſhould be *barred of his writ of error*, not *quod affirmetur*. *Vide Strange, vol.* 1. *p.* 683.

Eaſter, 12 *Geo.* 2. *The King* v. *The Inhabitants of All Saints in Derby, and Others*.

A *writ of error* was brought on a judgment by the commiſſioners of *oyer* and *terminer* for *Derby*, on an indictment for not repairing an highway. And the indictment ſet forth, that the inhabitants of ſuch a part of the three pariſhes in *Derby* as the way lies in are bound to repair. The *writ of error* was on a judgment on an indictment againſt the inhabitants of the three pariſhes in general, to the *great damage* of them; and for this variance the *writ of error* was quaſhed: and *Michaelmas*, 3 *Geo.* the caſe of *Dawſon et al.* v. *Lowther* was cited, where in *treſpaſs* againſt *four*, *two* were convicted and two acquitted; and a *writ of error* being brought to the *great damage of three*, was quaſhed. *Vide Strange, vol.* 2. *p.* 1110.

Eaſter, 12 *Geo.* 2. *Smith* v. *Nicholſon*.

The plaintiff in order to proceed againſt the bail, took out a *capias ad ſatisfaciendum* on the *third* of *December*, on the *fourth* a *writ of error* was allowed, notwithſtanding which, he called for a return of *non eſt inventus*; and then waiting till the *writ of error* was at an end, proceeded by *ſci. fac.* againſt the bail. And now on motion, the whole proceedings were ſet aſide; for the ground of them, *viz.* the return of *non eſt inventus*, was obtained after notice of the *writ of error*, which in its nature, ſtopt all ſort of proceedings, and the ſheriff could not ſo much as look after the defendant, in order to ground ſuch a return. *Vide Strange, vol.* 2. *p.* 1186.

Michaelmas, 12 *Geo.* 2. *Bertie* v. *Clutterbuck*.

After a judgment of a year's ſtanding, the plaintiff ſued out a *ſcire facias*, on which he obtained an award of execution; of this only the defendant brought *error* in the *Exchequer Chamber*; and it was held, that *ſtat.* 27 *Eliz. c.* 8. does not extend to this caſe, and leave was given to take out execution. *Vide Stra. vol.* 2. *p.* 1102.

Trinity, 13 *Geo.* 2. *The King* v. *The Archbiſhop of Armagh and Nathaniel Whaley, Clerk*.

See this caſe fully ſtated in page 9 of this work, under the head *Abatement*.

Trinty, 17 *Geo.* 2. *Walmſley* v. *Roſon*.

After judgment for the defendant, the plaintiff brought a *writ of error*, and aſſigned *infancy* in the defendant, and appearance by attorney; then took out a *ſcire facias* to hear *errors*, and after a *ſcire feci* returned, entered the *default*, and on producing the record, the judgment was reverſed on motion, without making it a *concilium*, or putting it in the paper. *Vide Strange, vol.* 2. *p.* 1210.

Michaelmas, 18 *Geo.* 2. *Landon* v. *Pickering*.

On *error* of a judgment in *C. B.* of *Michaelmas*, term, 10 *Geo.* 2. in *debt* on a *mutuatus*, after aſſigning the want of an original, and verifying the ſame, the defendant in *error* pleaded a releaſe of *errors*, dated the 13th of *November*, 10 *Geo.* 2. with an averment, that there was no other judgment between the parties. And the plaintiff in *error* craving *oyer* thereof, it appeared, that the warrant of attorney and releaſe of *errors* were both in one inſtrument, dated the 13th of *November*; and therefore on demurrer it was inſiſted, that it could not be applied to the judgment in queſtion, which on the *oyer* appeared to take its riſe only on the 13th of *November*, whereas the judgment on record was generally of *Michaelmas* term, and referred to the *firſt* day of the term: and there was nothing for the releaſe to operate on when it was given. And *Cro. El.* 837. 5 *Co.* 70. *b.* 28 *Allen* 71. and *Salk.* 197, were cited.

Per curiam. The two inſtruments are very conſiſtent, if we take in the legal relation, as we ought to do, in order to give every part of the deed its proper operation; and then it will ſtand as a judgment the 23d of *October*, and a releaſe after. It would overturn many judgments by confeſſion, if what the plaintiff in *error* contends for ſhould be allowed: the judgment therefore muſt be, that the plaintiff in *error* take nothing by his *writ*. *Vide Strange, vol.* 2. *p.* 1215.

Trinity, 19 *Geo.* 2. *Lloyd* v. *Vaughan*.

On a *writ of error* brought to reverſe a *common recovery* ſuffered at the grand ſeſſions in *Wales* 5 *Ann*; the *error* aſſigned was, that *Jane Lloyd*, the tenant in *tail*, who was vouched as a *feme ſole*, was then under *coverture*, and died without iſſue in 1739, whereof the plaintiff, who was the reverſioner, brings the *writ of error*. The defendant in *error* pleads a *bar* by *ſtat.* 10. *W.* 3. *c.* 14. as not being a *writ of error* brought within *twenty* years after ſuffering the recovery. To this it was replied, that her title did not accrue till 1739, the time of the death of *Jane*. And to this there was a demurrer, and joinder in demurrer.

After ſeveral arguments at *bar*, both on the point of the *error*, and the *ſtatute of limitations*, it was this term determined on the latter point, the court ſaying they had no occaſion to go into the other queſtion, being of opinion the *writ of error* did *not* lie.

And they grounded their opinion on the ſtatute to quiet poſſeſſions, and to fix one certain period, beyond which fines and recoveries ſhould not be impeached. The words are expreſs, *twenty years after the recovery ſuffered*, and it has not the words that are in the ſtatute of fines, *after the title accrued*. And though there is a proviſo for perſons under diſabilities within the *twenty years*, yet that can only introduce the diſabled perſon, and not one who never was under any diſability. The *terminus a quo* is the ſuffering the recovery, and if we exceed it, there will be no end; a reverſioner, after an eſtate-tail that ſubſiſts an hundred years, might at this rate reverſe a recovery; whereas theſe reverſioners were never the object of the legiſlature's care. It is enough that he has a chance of the reverſion's falling within *twenty years*, and then he may have *error*. They ſaid, they muſt keep to the words, as in 1 *Lev.* 31. where the courts not being open, was held no anſwer to the *ſtatute of limitations*, as not being one of the exceptions in it: therefore they gave judgment that the plaintiff ſhould take nothing by his *writ of error*. *Vide Stra. vol.* 2. *p.* 1257.

Hilary, 30 *Geo.* 2. *Taylor on the Demiſe of Atkyns, Eſq;* v. *Horde, Eſq;* &c. *and others*.

On a *writ of error* brought in *parliament*, on a judgment of this court in *ejectment*, the council were allowed to argue the following point for the judgment of the houſe; because if their Lordſhips ſhould be of the ſame opinion with this court, *viz.* " That this

“ *ejectment* was *barred* by the *ſtatute of limitations*:” on which all the judges were ordered to attend, and the houſe propoſed the following queſtion to them, *viz.*

Whether ſufficient appears by the ſpecial verdict in this cauſe, to prevent the leſſor of the plaintiff, by force of the *ſtatute of limitations* of the 21ſt of *Jac.* 1. from recovering in this *ejectment?*

On which the *Chief Juſtice* of the *C. B.* delivered the opinion of his brethren.

Willes, Chief Juſtice. Sufficient appears by the ſpecial verdict in this cauſe, to prevent the leſſor of the plaintiff, by force of the *ſtatute of limitations* of the 21ſt of *Jac.* 1. from recovering in this *ejectment*. Therefore the judgment of this court was affirmed with 5 *l.* coſts. *Vide Bur. vol.* 1. *p.* 126.

Eaſter, 30 *Geo.* 2. *Capron* v. *Archer*.

Per curiam. It is the allowance of the *writ of error*, that is the *ſuperſedeas* to the proceedings. The notice of the writ's being allowed, is only to bring the party in poſſeſſion of the judgment below into *contempt*, in caſe he ſhould perſiſt in proceeding thereon ſubſequent to ſuch notice. *Vide Bur. vol.* 1. *p.* 340.

Trinity, 30 *Geo.* 2. *Hall and Wife* v. *Woodcock*.

On a *writ of error* brought to reverſe a *common recovery*, the *error* aſſigned was, “ That the vouchee, “ before the rendering of the judgment, died without “ iſſue.” On the *ſcire faciaſes* previouſly iſſued againſt the demandant in the *writ of entry*, and againſt the terre-tenants, &c. who were returned to have been ſummoned, &c. and thereon *errors* aſſigned; *L.* the demandant comes in and pleads, “ That there is no “ *error*.” And one of the terre-tenants ſuffered judgment by *default*; but *W.* who was alſo one of the terre-tenants, prays *oyer* of the *ſcire facias*, and pleads *non tenure*, and that *B.* and his wife are the terre-tenants, and prays judgment on the *ſcire facias*. To this plea there was a demurrer by the plaintiffs in *error*, and a joinder in demurrer by *W.* the terre-tenant.

After hearing council on both ſides, the court gave judgment.

Lord *Mansfield*. By the eſtabliſhed method of proceeding, there muſt be a *ſcire facias* againſt the terre-tenants, otherwiſe indeed it is an irregularity, but no more.

The terre-tenant has nothing to do with the matter, all that he can do, is only what any *friend of the court* may do, *viz.* produce a *releaſe of errors*; but he has nothing to do in intereſt: therefore there ought to be a *reſpond. ouſter*.

Deniſon and *Foſter*, Juſtices, gave their opinions at large; but concurred with the *Chief Juſtice*.

Per curiam. Let there be a *reſpondeas ouſter*. *Vide Bur. vol.* 1. *p.* 360.

Trinity, 30 & 31 *Geo.* 2. *Far*, *Spinſter*, v. *Denn*.

On a *writ of error* brought to reverſe a judgment in *ejectment*, the plaintiff in *error*'s council aſſigned the following *errors*:

“ That there is no record of *niſi prius*;” and “ that “ judgment is given for the plaintiff below, *whereas* it “ ought to have been given for the defendant:” then a *certiorari* iſſued to certify the record of *niſi prius*, which was certified accordingly, and *no error* was pleaded by the defendant in *error*.

The plaintiff's council *urged*, that this writ was brought by the approbation of the *C. B.* on a conſent to waive a motion there in arreſt of judgment; and to ſhew that he was at liberty to make *exceptions* not aſſigned for *error*, he cited *Biſhop*'s caſe, 5 *Co.* 376. and 1 *Salk.* 268. *Carlton* v. *Mortagh*, and made the following objections to the judgment, *viz.*

1ſt. The *niſi prius* roll is *erroneous* in itſelf.

2dly. The *niſi prius* record varies materially from the *plea roll*.

3dly. This may be taken advantage of after a verdict.

4thly. The omiſſion of, *that the plaintiff take nothing by his writ* as to *R. S. Far*, makes the judgment *erroneous*.

5thly. The judgment ought not to have been for more than a moiety of the lands demanded.

After hearing council on both ſides, the court affirmed the judgment.

Lord *Mansfield*. There is no difficulty in the *objections*; they are reducible to *three*; for the *three* firſt are no more than whether the judge had juriſdiction to try the cauſe between the plaintiff and the living defendant only; the ſuggeſtion, the award, and all the proceedings, ſhew *one* of the defendants to be dead, and there is an award for the proceedings to ſtay as to that defendant, and to go on againſt the other only, the jury is awarded as againſt the living *one*, the other being dead; both were alive when the iſſue was joined, and it is properly awarded on the iſſue-roll, and acknowledged. The *niſi prius* roll is only for the direction of the judge to try it, and it is not traverſable on this roll, and the two laſt points are as plain.

The judgment is right enough, and the execution muſt be taken out according to the right and juſtice of what is really recovered.

Deniſon and *Foſter*, Juſtices, concurred with the Chief Juſtice in opinion.

Per curiam. Let the judgment be affirmed. *Vide Bur. vol.* 1. *p.* 363.

Trinity, 31 *Geo.* 2. *Cottingham* v. *King*.

On a *writ of error* brought in this court on a judgment of the court of *K. B.* in *Ireland*, who had affirmed a judgment in *ejectment* given for the plaintiff by the court of *C. B.* there.

After a general verdict for the plaintiff, the plaintiff in *error* took ſeveral *exceptions* to the uncertainty of the deſcription of the premiſes ſpecified in the declaration, *viz.*

1ſt. No *vill* at all is mentioned thoughout the whole declaration; the lands, &c. are only deſcribed to lie *generally* in the county of *Roſcommon*.

2dly. The words are, “ with the town and tene- “ ment of *Boyle*, and fairs and markets thereunto be- “ longing.”

3dly. A *quarter*, is another term uſed in the declaration, which term is totally uncertain, and even appears to conſiſt of different numbers of acres, ſome more, ſome leſs.

4thly. It is of “ part of *S. M.* and *D.*” which is abſolutely uncertain and vague.

5thly. And of “ a large deer park in the county of “ *Roſcommon*,” which is vaſtly too uncertain and indeterminate.

6thly. Of “ a ſmall park or field, in the poſſeſſion of — &c.” and not ſpecified where.

7thly. The *quantity* and *quality* of the land is not ſufficiently ſhewn.

After hearing the arguments of the council on both ſides, the court affirmed the judgment.

Lord *Mansfield*. This is after a trial and verdict in the *C. B.* in *Ireland*, and the objection is the uncertainty of the claim, or deſcription of the premiſes in the declaration.

It is frequent there to deſcribe the lands of great eſtates even in their ſetttlements, by “ *towns*.”

Ireland was planted and ſettled by degrees both formerly and lately, and *towns* came by degrees to be known by certain deſcriptions; and ſo “ quarters” might be after *Cromwell*'s ſettlements there, and the diviſion of it into quarters; “ *town*,” and “ *tenement*,” are here uſed as *ſynonymous* terms.

As the jury of that country underſtood it; and the two courts of that country underſtood it, and have made no difficulty about it: I am ſure I will not after this ſay, “ *that it is not to be underſtood*.”

Deniſon and *Foſter*, Juſtices, gave their opinion at large, but concurred with the Chief Juſtice.

Per curiam. Let the judgment be *affirmed*. *Vide Bur. vol.* 1. *p.* 623.

Hilary, 32 *Geo.* 2. *Chauvet and another* v. *Alfray*.

On a *writ of error* brought on a judgment on an action of *debt*, on a bond given to the plaintiff and another, being creditors of one *Sutton*, by a *third* perſon, as a ſecurity for a partial payment of a debt of the ſaid *Sutton*, (which was thereby liquidated and aſcertained) to his ſeveral creditors, *viz.* 15 *s.* in the pound by *inſtallments*; which bond was to be forfeited, if *Sutton* ſhould make *default* in the ſaid payment.

The defendant brought this *writ of error* on the judgment given for the plaintiff, but putting in no bail to the *writ of error*, the plaintiffs ſued out execution; and this motion was to ſet aſide the judgment for irregularity, on which the queſtion for the opinion of the court was:

> "Whether this bond given to a *third* perſon, for "payment of a ſum certain by *inſtallments*, (the "laſt payment being ſtill to come) be an obliga"tion conditioned for the payment of money "only within *ſtat.* 3 *Jac.* 1. *cap.* 8. (made to "avoid unneceſſary delays of execution)?"

After hearing council on both ſides on this motion, the court diſcharged the rule.

Lord *Mansfield.* The court will not contract the conſtruction of that *beneficial ſtat.* beyond any *precedent*, and this bond is clearly *for the payment of money only*, and liquidated as to the ſum too; all the debts are liquidated, the money is only to be paid by another perſon.

Deniſon, *Foſter* and *Wilſon*, Juſtices, concurred with the Chief Juſtice in opinion.

Per curiam. Let the rule on the plaintiffs, to ſhew cauſe "Why the *writ of ſcire facias* ſhould not be "ſet aſide for irregularity and the goods levied be re"ſtored," be diſcharged. *Vide Bur. vol.* 2. *p.* 746.

Hilary, 32 *Geo.* 2. *George, on the Demiſe of Bradley and others*, v. *Wiſdom.*

In this caſe it was *adjudged* that a *writ of error* could not be taken out in the name of the *caſual ejector*. *Vide Bur. vol.* 2. *p.* 756.

Eaſter, 32 *Geo.* 2. *Ballard and another, Chamberlains of Worceſter*, v. *Bennet. The ſame* v. *Clement.*

Adjudged, That no *writ of error* lies hither from the courts of the city of *London*; but in all other cities and corporations, if a *habeas corpus cum cauſa* iſſues, and a *bye-law* is returned as the foundation of the action below, the method is not for the defendant to object to the *bye-law* on motion, but the plaintiff is to begin *de novo*, and declare over again in this court. *Vide Bur. vol.* 2. *p.* 776.

Michaelmas, 32 *Geo.* 2. *Hawks* v. *Crofton.*

On a *writ of error* brought in this court on a judgment of the *K. B.* in *Ireland*, in an action of *treſpaſs*, *vi et armis*, for an *aſſault* and *battery*, brought there about *fifteen years* before, charging ſpecial damages for a violent *battery* on the plaintiff, whereby he loſt an arm: to this action the defendant pleaded *not guilty* as to the *vi et armis*, and iſſue was joined thereon; as to the ſpecial damages, he pleaded *ſon aſſault demeſne*. To which the plaintiff replied; on which iſſue was likewiſe joined. On the trial of theſe iſſues, the verdict finds the defendant *generally guilty of the treſpaſs within written*, and gives the plaintiff 850 *l.* damages; and judgment for the plaintiff.

The plaintiff in *error*'s council *objected*, that this verdict is incomplete, and the court cannot give judgment on it; it is no *verdict* at all as to the material iſſue which affects the true queſtion between the parties, or the merits of the cauſe, *whereas* a verdict ought to be ſufficient both in point of matter and of form.

Here are two iſſues, "whether *guilty* or *not guilty*," on which iſſue is joined, "whether the defendant "beat the plaintiff, without the *alledged cauſe*;" and the verdict is, that the defendant is guilty of the *treſpaſs generally*; which is no more than the mere *fact*, which the defendant has acknowledged; but has inſiſted at the ſame time, that he had a cauſe for ſo doing.

After hearing council on both ſides on this *writ of error*, the court affirmed the ſame.

Lord *Mansfield.* The queſtion is, whether this verdict is ſo uncertain that the court cannot give judgment on it, but muſt award a *venire facias de novo?*

It is true, "that where the intention of the jury is "manifeſt, and beyond a doubt, the court will recti"fy matters of form, and the mere act of a *clerk*."

I think the preſent caſe is ſo clear, that the court may give judgment on the ſubſtantial finding, tho' the *clerk* may have been irregular and faulty in point of form; it being clear what the jury meant.

Deniſon, *Foſter*, and *Wilmot*, Juſtices, gave their opinions at large, but concurred with the Chief Juſtice.

Per curiam. Let the judgment be affirmed. *Vide Bur. vol.* 2. *p.* 698.

Trinity, 4 *Geo.* 3. *Bidleſon, Eſq. Adminiſtrator, &c.* v. *Whytel, Eſq.*

See this caſe fully ſtated in page 183 of this work, under the head *Bail in Error.*

Michaelmas, 5 *Geo.* 3. *Trinder* v. *Watſon and another.*

On a *writ of error* returnable in *parliament* on a judgment of this court in an action of *debt* on a *recognizance in error*; the plaintiff in *error* in *parliament*, not having entered into a *recognizance* purſuant to *ſtat.* 3 *Jac.* 1. *cap.* 8. the defendant in the *writ of error* obtained a rule to *ſhew cauſe*, why the defendant in *error* ſhould not be at liberty to ſue out execution for want of ſuch recognizance.

After hearing the arguments of council on *ſhewing cauſe*, the court ordered the matter to ſtand over.

Lord *Mansfield*, ſaid, he ſhould have thought "That theſe caſes ought to be liberally conſtrued," as they ariſe on *remedial* laws; but in the caſe of *Bidleſon* v. *Whytel* it appeared, "That the determinations had "been otherwiſe;" and we muſt not depart from ſettled determinations.

Wilmot, Juſtice, concurred with the *Chief Juſtice*.

Per curiam. Let this matter ſtand over to inquire into the practice. On the laſt day the Attorney General moved to enlarge the rule; but it was never drawn up; ſo it may be ſuppoſed, the motion was given up, and the plaintiff had liberty to ſue out execution. *Vide Bur. vol.* 3. *p.* 1566.

Michaelmas, 6 *Geo.* 3. *Leith* v. *Macferlan.*

Adjudged, that a *writ of error* could not be *nonproſſed*, without a rule to *aſſign errors*. *Vide Bur. vol.* 3. *p.* 1772.

Michaelmas, 6 *Geo.* 3. *Johnſon* v. *Jobb.*

Adjudged, that where the plaintiff brings a *writ of error* to reverſe his own judgment, the common method of bringing a *ſcire facias quare executionem non*, or a *ſcire facias ad audiendum errores*, would be improper; therefore if the plaintiff in *error* will not proceed, this court may and ought to make a rule to oblige him to *aſſign errors* within a limited time.

Per curiam. Let a rule be made on the plaintiff in *error* to *aſſign errors* within *four days*, or elſe let this *writ of error* be *non proſſed*. *Vide Bur. vol.* 3. *p.* 1772.

Michaelmas, 6 *Geo.* 3. *Wharod* v. *Smart.*

See this caſe fully ſtated in page 403 of this work, under the head *Ejectment*.

Michaelmas, 6 *Geo.* 3. *Knox, Eſq.* v. *Coſtello.*

On a *writ of error* brought here on a judgment from the *K. B.* in *Ireland*, to reverſe a judgment of their's, *affirming* a judgment in the *C. B.* there, in an action of *debt* for 1800 *l.* brought againſt *W. Knox*, by *C. Fallon*, deceaſed: *and alſo*, affirming the adjudication of the *C. B.* in *Ireland* of execution of the ſame judgment on writs of *ſcire facias* iſſued out of the ſaid court of *C. B.* in *Ireland* againſt the ſaid *Knox*, at the ſuit of *E. Coſtello*, and *E. Fallon*, ſurviving executors of the ſaid *C. Fallon*.

That a *ſcire facias, quare executionem non*, iſſued at the ſuit of the ſaid *E. Fallon* and *E. Coſtello*, ſuggeſting, "that *C. Fallon* was dead, and that they were his ſurviving executors; that on this *ſcire facias*, the defendant pleaded payment, which was found againſt him with 6 *d. damages*, ; whereon it was adjudged, "That they, as his executors, ſhould have execution "againſt *Knox* for the *debt and damages* aforeſaid." And it was *alſo* adjudged, "That they do recover againſt "the ſaid *W. Knox* their *coſts* and *expences* aforeſaid to "6 *d.* by the jury aforeſaid, in form aforeſaid, *aſſeſſed*." *And alſo* 17 *l.* 14 *s.* 8 *d.* for their *coſts* and *expences* aforeſaid, adjudged to them at their own requeſt by the court here, by way of increaſe, according to the form of the *ſtatute* in ſuch caſe made and provided.

Only one of the executors appeared to the *writ of error* in the *B. R.* in *Ireland*, *viz.* *E. Coſtello*, who alone ſued out the writ *of ſcire facias quare executionem non* in that court, and yet the court affirmed the judgment of the *C. B.* for *both*; and the *adjudication* was, "that *both* ſhould recover."

The plaintiff in *error*'s council took the following exceptions to the judgment, *viz.*

1ſt, The court below have given *damages* for non-payment of the money; *whereas damages* cannot be given on a *ſcire facias*.

2dly, The *ſcire facias, quare executionem non*, in the *K. B.* in *Ireland* is prayed by *E. Coſtello* only, though the *writ of error* is brought againſt the *two executors*; and yet there is no ſuggeſtion, "that either of them "is dead," though only one appeared to ſuch writ, and prayed the *ſcire facias*.

After hearing the arguments of the council on both ſides on this writ, the court affirmed the judgment.

Wilmot, Juſtice. The *firſt objection* turns on a *fact* which does not ſupport the objection. *Damages* for delay of execution cannot be given on a *ſcire facias*, nor could *coſts*, till *ſtat.* 8 & 9 *W.* 3. *c.* 11. and if the preſent caſe was ſo, the judgment might be *reverſed* as to the 6 *d.* and *affirmed* as to the *reſt*.

But here the being damnified, and put to coſts to the amount of 6 *d.* is only meant as a foundation for the *increaſed* coſts; and the judgment is, "that the plain-"tiffs ſhall recover 17 *l.* 14 *s.* 8 *d.* for their coſts and "expences, &c."

The *ſecond objection* is, "that the *ſcire quare execu-"tionem non*, is brought by only *one* of theſe *two execu-"tors*."

A *ſcire facias executionem non* is only to bring the plaintiff in *error* to *aſſign his errors*: he comes in on it, and aſſigns his *errors*. Therefore he waived any objection, and admitted the one executor to be ſufficient to call on him merely to aſſign *errors*. He might perhaps have moved to quaſh it: but as he did not challenge it, he has waived the objection to it; and we are not to *preſume* the other executor to be alive.

Yates and *Aſton*, Juſtices, gave their opinions at large, but concurred with their brother *Wilmot*.

Per curiam. Let the judgment be *affirmed*. *Vide Bur. vol.* 3. *p.* 1789.

Eſcape.

Michaelmas, 4 *W.* & *M.* *Scott* v. *Peacock*.

To a *ſcire facias quare executionem non* on a judgment, the defendant pleaded that he was formerly taken in execution by a *ca. ſa.* on the ſame judgment, and the ſheriff ſuffered him to *eſcape*, to which *eſcape* the plaintiff then and there conſented: *but not allowed*; for the aſſent ſubſequent will not make it an *eſcape* with the conſent of the plaintiff, and therefore he has either his remedy againſt the ſheriff, or may retake the party. *Vide Salk. vol.* 1. *p.* 272.

Michaelmas, 4 *W.* & *M.* *Ball* v. *Briggs*.

On an action of *debt* brought on an *eſcape*, the defendant pleaded *freſh purſuit* and *re-taking* of the party the ſame day the bill was filed; and *adjudged* no plea, the action being once attached in the plaintiff. 1 *Jones* 145. *Vide Mod. Rep. vol.* 12. *p.* 31.

Hilary or Michaelmas, 6 *W.* & *M.* *Wate or Waytes*, v. *Briggs*.

See this caſe fully ſtated in page 149 of this work, under the head *Averment*.

Eaſter, 7 *W.* 3. *Williams* v. *Cray*.

An executor brought an action on the *caſe* againſt a ſheriff, for a falſe return of a *fieri facias* delivered to him by the teſtator; after a verdict for the plaintiff, it was objected in arreſt of judgment, that this action would not lie, becauſe it was only a *perſonal tort* done to the teſtator, which *dies with the perſon*.

Per curiam. An executor cannot have an action for an *eſcape* on *meſne proceſs*, becauſe that is merely perſonal, but he may for an *eſcape* on a *capias ad ſatisfaciend'*, or for a falſe return of a *fieri facias*, and this by the equity of *ſtat.* 4 *Ed.* 3. becauſe the right being determined after judgment, the *tort* is more than *perſonal*. *Vide Raym. vol.* 1. *p.* 40. *Salk. vol.* 3. *p.* 149.

Eaſter, 8 *W.* 3. *Wolfe* v. *Daviſon*.

In an action of *debt* againſt the ſheriff for an *eſcape*, the plaintiff ſet forth that he had obtained a judgment in the *C. B.* againſt one *D.* for 160 *l.* and coſts; and that the ſaid *D.* not appearing to ſatisfy the ſaid judgment, was *outlawed* at the ſuit of the plaintiff, who thereon ſued out a *capias utlegatum* againſt him, directed to the then ſheriff of *Newcaſtle*; and that the plaintiff, before the return of the ſaid writ, delivered it to one *J. A.* then ſheriff of the ſaid *vill*, who by virtue thereof arreſted the ſaid *D.* and detained him in priſon for the ſaid *debt*, and damages, till the ſaid *A.* was diſcharged from his office of ſheriff; that the defendant was afterwards under-ſheriff, and the ſaid *D.* was delivered to him in cuſtody, and in execution for the ſaid *debt* and damages; and that afterwards he ſuffered him to *eſcape*, the ſaid *debt* not being paid.

On *nil debet* pleaded, the jury found a ſpecial verdict.

It was argued for the plaintiff, that when a man was *outlawed* after judgment, the *capias utlegatum* is the proper proceſs, and then the plaintiff is at an end of his ſuit; and therefore there can be no default in him for not continuing his proceſs, ſo as to have the priſoner brought into court; and then, on prayer, the defendant is to be committed in execution at his ſuit.

But admitting there was any *laches* in the plaintiff, or diſcontinuing of the proceſs, yet if the party is in ecution on a *capias utlegatum* after judgment, he is in execution at the ſuit of the plaintiff if he pleaſes; for though the *outlawry* is in the King's name, yet it is at the ſuit of the party, and for his benefit: and the ſheriff muſt take notice of the law, that he has him in cuſtody for that purpoſe, *whereof he is convicted*; for theſe are the words of the *writ*.

If the defendant promiſes to pay a *debt*, in conſideration of forbearance to proſecute a *capias utlegatum*, this is good in law, which proves that an *outlawry* is at the ſuit of the party; for ſuch a promiſe would be void to ſtay any proceſs at the ſuit of the King.

And the court were of opinion, that it was in vain for the plaintiff to ſue out an *outlawry*, if he had no benefit thereby, when the party was taken by the *capias*, without continuing the proceſs; for to what purpoſe ſhould he take out a *ſci. fa.* after a judgment, when the party cannot be found, and nothing can be done on it? Therefore judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 5. *p.* 200.

Hilary, 10 *W.* 3. *The King* v. *Fell*.

See this caſe fully ſtated in page 264 of this work, under the head *Commitment*.

Michaelmas, 10 *W*. 3. *Bidolph* v. *Bruce*.

Holt, Chief Juſtice. A ſheriff has no power to receive money from the defendant on a *capias*, for his buſineſs is only to execute his writ; and if in ſuch caſe a defendant paid the ſheriff, and he afterwards becomes inſolvent, and does not pay the plaintiff, ſuch payment ſhall not excuſe the defendant; if the ſheriff ſuffers one in execution to *eſcape*, the plaintiff has his election to ſue the ſheriff on an *eſcape*, or elſe the defendant; but he cannot have a *capias* againſt the defendant, without a *ſci. fac. Vide Mod. Rep. vol.* 12. *p.* 230.

Michaelmas 10 *W*. 3. *Odes* v. *Clark*.

On an action of *eſcape* brought againſt the ſheriff, the plaintiff in his declaration ſtated, that the defendant did arreſt *J. S.* by virtue of a *latitat*; but ſaid not of what court, and afterwards ſuffered him to *eſcape*; and now the ſheriff moved in *arreſt of judgment*, and pretended, that the proceſs was not well ſet forth in the declaration; and that the ſheriff cannot take advantage of erroneous proceſs.

On reading the declaration, the words appeared to be, *by a writ of latitat of the court of our Lord the King at Weſtminſter*, without ſaying out of what court it iſſued.

Per curiam. Let it ſtay. *Vide Mod. Rep. vol.* 5. *p.* 13.

Michaelmas, 10 *W*. 3. *The King* v. *Fell*.

The defendant was indicted for the *eſcape* of one *Wray*, convicted of a miſdemeanor for attempting to counterfeit *Exchequer bills*; and after judgment, that he ſhould ſtand in the pillory, the ſheriff out of favour delayed the execution beyond the uſual time, and in that time *Wray eſcaped*; and on the indictment *Fell* being found guilty, was now in court to be fined.

Holt, Chief Juſtice. In this caſe the ſheriff ought to be proſecuted and fined grievouſly, for the judgment ought to be executed in a convenient time, and the ſheriff's reſiſting it is an affront to the juſtice of the nation; but however, that is no excuſe to *Fell*. But if *Fell* had *retaken* the malefactor before an indictment was found againſt him for the *eſcape*, he ought not afterwards to be troubled for the *eſcape*; in this caſe he was fined *forty* merks. *Vide Mod. Rep. vol.* 12. *p.* 227.

Hilary, 13 *W*. 3. *King* v. *Croſſe*.

Per curiam. The tipſtaffs are the Marſhal's officers, and he ought to have the putting them in; and the cuſtody of the tipſtaff is the cuſtody of the Marſhal. And it is abſolutely neceſſary in order to charge the Marſhal in *debt* for an *eſcape*, that he ſhould have notice of the party's being charged in execution. *Vide Mod. Rep. vol.* 12. *p.* 634.

Michaelmas, 13 *W*. 3. *Watſon* v. *Sutton*.

In *debt* againſt the Marſhall for an *eſcape*, at the trial a *reddidit ſe* i. e. *he has rendered himſelf* in diſcharge of his *bail*, and a *committitur* in execution to the Marſhall, was produced in evidence; and after verdict it was moved, that it ſhould be ſet aſide, for the *committitur* was irregular; for the courſe of the court is, that when any one on a render is charged in execution, there ought to be notice thereof to the Marſhal, without which it were hard to charge him with the *eſcape*; and the courſe of giving ſuch notice is by making an entry of the *committitur* in a book kept for that purpoſe by the Marſhal in the *King's Bench* office; and the Marſhal has an officer on purpoſe in the office to take notice of ſuch entries; and it is not enough that the *committitur* be entered with the entering clerk: which was agreed by all the clerks to be the practice.

Per curiam. A *reddidit ſe* in the judge's book is an immediate diſcharge of the bail; but he is not in cuſtody till the plaintiff makes his election by entering a *committitur*; nor then is he in cuſtody, ſo as to charge the Marſhal, till there be a notice by rule or entry as aforeſaid: but this matter ſhould have been ſhewn, and inſiſted on at the trial; it is now too late: ſo the motion was denied. *Vide Mod. Rep. vol.* 12. *p.* 583. *Salk. vol.* 1. *p.* 273.

Michaelmas, 13 *W*. 3. *Spencely* v. *Hutton*.

See this caſe fully ſtated in page 151 of this work, under the head *Averment*.

Trinity, 1 *Ann*. *Shirley* v. *Wright*.

The ſheriff had the defendant in cuſtody on a *ca. ſa.* which iſſued *after the expiration of a year and a day* without a *ſci. fac.* and let him *eſcape*; and it was held that he was liable, and ſhould not take advantage of the *error*; but otherwiſe, had it been on a *capias ad reſpond. teſted in Trinity term*, and returnable in *Hilary*, becauſe ſuch proceſs muſt be returnable from term to term, otherwiſe it is out of court. *Vide Salk. vol.* 1. *p.* 723.

Hilary, 2 *Ann*. *Parker* v. *Sir William Moore or More*.

See this caſe fully ſtated in page 340 of this work, under the head *Date, Day, and Delivery*.

Trinity, 2 *Ann*. *Daniel* v. *Morewood*.

The defendant being in the *Marſhalſea* priſon of this court on a *meſne proceſs* at the plaintiff's ſuit for debt, *eſcaped*. Whereon the plaintiff, on an *affidavit* of the *eſcape*, procured an *eſcape warrant* from Mr. Juſtice *Gould*; by virtue whereof the defendant was took up in *St. Clement*'s pariſh, and carried to *Newgate*. The defendant moved by his council, that he might be ſet at liberty, inſiſting that he was abroad by virtue of a *day rule*, when he was took up by the *eſcape warrant*, it being term time; and on examination, and *affidavits*, the fact appeared to be, that he was taken by the *eſcape warrant* before this court ſat that morning; and that after this court ſat, he was in the petition for a *day rule* among the other priſoners; and a *day rule* as uſual was made, in which he was. And though there are no fractions in a day, yet the court held, that they ought not to ſet him at liberty, it appearing to them that when he was arreſted he had not any *day rule*. *Vide Raym. vol.* 2. *p.* 927.

Michaelmas, 2 *Ann*. *The Queen* v. *Ball*.

The defendant was in the ſheriff's cuſtody on an *excommunicato capiendo*, and committed to the *Fleet*, charged therewith, and from thence to the priſon of this court, from whence he was ſuffered to *eſcape*; and what in this caſe could be done, was the queſtion.

1ſt. It was agreed, that if the firſt writ was not returned, they might take out a new one, and thereon take him up *de novo*; *otherwiſe* if it was returned, 1 *Roll. Rep.* 174. And here it was doubted, whether there could be a new writ in caſe the former had not been returned; becauſe by the *hab. corp.* and return thereof here on the record, it appears he was in execution on that writ: if the *eſcape* had been in the preſent Marſhal's time, we could make a rule on him to take him up, but we cannot do it now, the *eſcape* having been in a former Marſhal's time; becauſe if the *eſcape* was voluntary, the former Marſhal could not juſtify doing it himſelf, and let us conſider whether we cannot make a record of his having *eſcaped*, and award a new writ.

Per curiam. Let it ſtay till we know whether the former writ was returned. *Vide Mod. Rep. vol.* 6. *p.* 78.

Michaelmas, 2 *Ann*. *Cotton* v. *Martin*.

On an action of *debt* brought on a bond, the caſe was; the plaintiff had been a priſoner in the *Fleet*, and having *eſcaped*, was taken up by a warrant, according to the late ſtatute, and committed to *Newgate*. And an *affidavit*

davit being made that nothing was due, and the plaintiff, by his being in *Newgate*, being diſabled from coming before a judge to ſhew his cauſe of action, and that diſability coming from his own wrong, *viz.* the *eſcape*, the court ordered *common bail*; and if he had not *eſcaped*, he might have got out by a day rule. *Vide Mod. Rep. vol.* 6. *p.* 63.

Michaelmas, 2 *Ann.* *Hotherſhell* v. *Bows.*

The defendant being in cuſtody on *meſne proceſs*, *eſcaped*, and was taken on a warrant by virtue of the late ſtatute; and the court was moved, that on bringing the money into court, he ſhould be ſet at liberty; but the court ſaid they could not do it. And on this occaſion Mr. *Clerke* ſaid, that if a man comes in on an *habeas corpus*, and the plaintiff does not declare againſt him in *two terms*, the defendant ſhall be diſcharged on filing *common bail*, without any rules; and if one come in on an *habeas corpus*, tho' he afterwards puts in bail; if it be not at the return of the proceſs, he cannot give rules, but muſt wait *two terms*; and then, if there be no declaration, he ſhall be diſcharged on *common bail*, without coſts; whereas if he had put in bail at the return of the proceſs, he might ſpur on the plaintiff by rules; or if the plaintiff had paſſed two terms without declaring, he ſhould pay coſts: and the court ſaid, the rules were very hard on one in cuſtody; and they ſaid it was not the intent of the act to make *eſcaping* priſoners pay the debt right or wrong, or to be in goal for ever; and therefore ordered Mr. *Clerke* to draw up a rule, that in caſe the plaintiff did not declare in *two terms*, he ſhould be *non proſſed*, and thereon the defendant diſcharged. *Vide Mod. Rep. vol.* 6. *p.* 21.

Michaelmas, 2 *Ann.* *Anonymous.*

Holt, Chief Juſtice. If there be *two* coroners, *one* whereof being inſolvent, ſuffers an *eſcape*, it is very hard to charge the other with it. The caſe came before me once, and I would not take on myſelf to determine it, though my brother *Levinz* reports that I would have over-ruled him in the exception. And that caſe has been ſeveral times argued in the *C. B.* but not adjudged; but the court thought it would be hard to charge the other. *Vide Butcher* v. *Porter*'s caſe, in the time of the late King. *Vide Mod. Rep. vol.* 6. *p.* 37.

Eaſter, 3 *Ann.* *Rich* v. *Doughty.*

The defendant *eſcaped* out of priſon, and was retaken by virtue of an *eſcape warrant* on *ſtat.* 5 *Ann*, by a rabble, without any officer, as the ſtatute directs, and was by them brought to the ſheriff, who detained him by virtue of that warrant, and on an *habeas corpus* brought, the ſheriff returned, that *Doughty* was brought to him by *W. R.* and others, to him unknown, by virtue of a warrant, *&c.* and that he (the ſheriff) detained him in cuſtody *agreeable to the command of the writ.*

Holt, Chief Juſtice. This is an inſufficient return; it is true, the warrant was good, but being illegally executed, the ſheriff ought not to detain him, for he ſhall not graft a legal impriſonment on an illegal act; he ought to receive the priſoner from no perſon but an officer, or from one under that denomination. *Vide Salk. vol.* 8. *p.* 149. *Mod. Rep. vol.* 6. *p.* 154.

Trinity, 3 *Ann.* *Grant* v. *Southers.*

The plaintiff had been in the cuſtody of a former Marſhal, and voluntarily ſuffered to *eſcape* by him, and he afterwards came voluntarily and returned, and being found in cuſtody by the ſucceeding Marſhal, was detained by him. Whereas, he having brought an action of *falſe impriſonment*, the court granted an imparlance till the next term, affirming at the ſame time, that it was lawful to detain him, and that to ſuffer him to go at large would be an *eſcape* in the *ſecond* Marſhal; and that *Hale* had been of the ſame opinion. And they declared that they knew no ſuch thing as a *perpetual imparlance*, though they had known *perpetual* injunctions. *Vide Mod. Rep. vol.* 6. *p.* 183.

Michaelmas, 3 *Ann.* *Fox* v. *Tilly.*

In an action of *debt* on a bond conditioned to ſave the plaintiff harmleſs againſt all *eſcapes*, which he had ſuffered as warden of the *Fleet Priſon*; on demurrer to the rejoinder, which was itſelf a departure from the plea, which was, *he was not damnified*, and a ſpecial damage replied, and a continuance given to the firſt day of this term, the court took a diſtinction between a bond to ſave harmleſs againſt future *eſcapes*, for that would be void, and a bond to ſave harmleſs againſt paſt *eſcapes*; for though it were unlawful to ſuffer them, yet a perſon may contract to indemnify himſelf againſt a penalty already incurred againſt law. *Vide Mod. Rep. vol.* 6. *p.* 225.

Michaelmas, 3 *Ann.* *Tilſden* v. *Palſriman* or *Parſriman.*

Per curiam. If a perſon who is in cuſtody of the Marſhal *eſcapes*, and is taken on a judge's warrant, that is no new impriſonment, but a continuation of the old; and a diſcharge of that commitment will be a diſcharge of the firſt; but if he had *eſcaped* out of the county goal without the conſent of the goaler, there the Marſhal may retake him: as for example, if a perſon is in the cuſtody of the Marſhal for debt, and *eſcapes*, and afterwards the ſame plaintiff takes him up on another debt, and lets him go again, yet the Marſhal may retake him for the *eſcape*. *Vide Mod. Rep. vol.* 6. *p.* 353.

Eaſter, 4 *Ann.* *Luttin* v. *Benin.*

See this caſe fully ſtated in page 112 of this work, under the head *Arreſt.*

Michaelmas, 4 *Ann.* *Anonymous.*

On an action of *debt* for 200 *l.* on bond, conditioned to pay 100 *l.* for want of bail the defendant was committed to the *Marſhal*, and he applied to the juſtices of peace of *Surry*, and procured a diſcharge on the late act for the relief of *inſolvent debtors*. The plaintiff obtained an *eſcape warrant*, on which the defendant was taken up; and on a motion to be diſcharged, the court held this was an *eſcape*; for being a priſoner, both indebted and alſo charged in above 100 *l.* *debt* and damages, the juſtices had no authority for what they did, and therefore the diſcharge was illegal and void. *Vide Salk. vol.* 1. *p.* 273.

Eaſter, 5 *Ann.* *The Queen* v. *Belwood.*

On an indictment, the caſe was: a juſtice of peace had power to commit to *ward*, which is the word in the ſtatute: the juſtice committed one to the goaler of the county.

Per curiam. The ſheriff, and conſequently his goaler, is the proper officer; and if he ſuffers him to go at large, it is ſuch an offence as is indictable. *Vide Mod. Rep. vol.* 11. *p.* 79.

Trinity, 5 *Ann.* *Jackſon* v. *Humphry.*

In an action of *eſcape* brought againſt the ſheriffs of *London*, the plaintiff declared that he levied a plaint in the ſheriff's court againſt *J. S.* being then in the Compter in cuſtody on a former plaint levied againſt him by *J. N.* and that the defendant being ſo in cuſtody was ſuffered to *eſcape*: the defendant demurred, and inſiſted, that there ought to have been a *precept* ſued out on the latter plaint, on which the ſheriff might have returned a *cepi corpus*; as if *H.* is arreſted by the ſheriff at the ſuit of *A.* and afterwards another *writ* is delivered at the ſuit of *B.* he is now in cuſtody for *B.* and the very delivery of the *writ* to the ſheriff was an arreſt in law, and in debt for *eſcape*, *B.* muſt declare that *H.* was arreſted on this *writ*; for the declaration muſt be according to the operation of law, and not according to fact. *Vide* 5 *Co.* 89. But after this matter had been *two terms* in debate, *Holt*, Chief Juſtice, having looked at *Mackally*'s caſe, ſaid, that on entering a plaint in the

Compter, there never is any precept awarded; but the *ſerjeant at mace* arreſts the party by his general authority, and therefore there is nothing more to be ſet forth than is ſet forth in this caſe; for by entering the plaint, and charging the defendant in the Compter, he is in actual cuſtody of the ſheriff: ſo if the ſheriff of *Northumberland* have a man in cuſtody in *Northumberland*, and the ſheriff is himſelf here in town, and a *writ* is delivered to him againſt that perſon, he is in his cuſtody immediately on that *writ*; otherwiſe if the man was out of the county at the delivery of the *writ*, as in caſe the ſheriff was bringing him to *Weſtminſter* on a writ of *habeas corpus*. *Vide Salk. vol.* 1. *p.* 274.

Michaelmas, 3 *Geo.* *Parks* v. *Crawford.*

An action of *eſcape* was brought againſt the Marſhal of this court on *ſtat.* 8 & 9 *W.* 3. *c.* 27. *ſect.* 9. The words of the *ſtatute* are, *That if any Marſhal or Warden for the Time being, or their reſpective deputies, ſhall after one day's notice in writing, given for that purpoſe, refuſe to ſhew any priſoner, committed in execution, to the creditor at whoſe ſuit ſuch priſoner was committed, or to his attorney, every ſuch refuſal ſhall be adjudged an eſcape in law.*

In this caſe, the notice was given by the creditor on the *Friday* to produce the priſoner on the *Tueſday* following. At *twelve* o'clock the priſoner was demanded of the turnkey; but not being produced, this action was brought.

This being the ſtate of the caſe, the *poſtea* was ſtayed by the direction of *Parker*, Chief Juſtice, who tried the cauſe.

It was now objected, *firſt*, that the notice was inſufficient; and *ſecondly*, if the notice was ſufficient, the demand and refuſal were not alledged as they ought to be.

The queſtion before the court was, whether the time appointed by this notice is certain enough? Or whether it ought to have been confined to ſome particular part of the day; and not ſaid on ſuch a day *generally?*

It was further argued, that the demand was faulty, being made at *twelve* o'clock at noon, when the defendant had till the cloſe of the evening for the performance of it.

A ſecond objection as to the demand, was in reſpect to the perſon on whom the demand was made, *viz.* the turnkey. It was obſerved from the other clauſes in the *ſtatute*, that by the word *deputy*, was to be underſtood a *deputy marſhal*, *viz.* ſuch a *deputy* as an action may be brought againſt; and not any inferior officer, as a turnkey, &c.

The court inclined to think that the Marſhal had all that day for producing of the priſoner. They ſeemed likewiſe to think that by the word *deputy* was to be underſtood a *deputy marſhal*, and not a more inferior officer; but that, however, the plaintiff could not ſuffer by their non-attendance, becauſe a demand at the priſon, though nobody was there, would be ſufficient. *Vide Mod. Rep. vol.* 10. *p.* 394.

Trinity, 4 *Geo.* *Hinchliffe* v. *Payne.*

See this caſe fully ſtated in page 281 of this work, under the head *Contempt.*

Michaelmas, 6 *Geo.* *Lord Cornwallis* v. *Hoyle.*

See this caſe fully ſtated in page 341 of this work, under the head *Date, Day, and Delivery.*

Eaſter, 7 *Geo.* *Crompton* v. *Ward.* *Entered Hilary* 4 *Geo.*

In an action for the *eſcape* of *M. O.* the declaration ſet forth, that in *Mich.* term 2 *Geo.* in *C. B.* the plaintiff recovered judgment againſt her for 232 *l.* which coming into this court by *writ of error*, the writ was *nonproſſed*, and execution awarded, which judgment is ſtill in force: that on the 12th of *June* 2 *Geo.* the ſaid *O.* ſurrendered herſelf to the *Fleet* in diſcharge of her bail, from whence ſhe was removed by *habeas corpus* to *Newgate*, &c. where the plaintiff intended to have charged her in execution, but the defendant, ſheriff of *Middleſex*, voluntarily permitted her to *eſcape*. The defendant confeſſes, that the ſaid *O.* was in his cuſtody, as, &c. but ſays, that on the 20th *June* a *hab. corp.* was delivered to him, requiring him to bring her to the Chief Juſtice's chamber, on which he made a warrant to his bailiff, commanding him to carry and bring her ſafe back again, by virtue of which he took her out of *Newgate*, and in carrying her along ſhe was reſcued. The plaintiff demurred. And in *Michaelmas* term 5 *Geo.* the plaintiff's council took three *exceptions* to the defendant's manner of pleading.

1ſt. It is improperly pleaded: the defendant ſhould not have ſet forth the fact, but the operation of law reſulting from that fact; therefore pleading the *reſcue* from the bailiffs is wrong; it ought to have been from the ſheriff, for the law takes no notice of a bailiff or his acts. *Cook*'s caſe, *Hilary* 2 *Geo.* 2 *Saund.* 97. 2 *Vent.* 149 2 *Co.* 266. 3 *Lev.* 290.

2dly. The defendant ought to have averred, that ſhe was not afterwards found *in his bailiwick*. *Dalt*, 215. 216. *Officina Brevium*, 203, 204, 217, 226.

3dly. The *habeas corpus* requires her to be brought *under ſafe and ſecure conduct*, but the defendant has not ſhewn that he complied with this direction; and this he ought to do when he pleaded a *reſcue*.

Pratt, Chief Juſtice. Here the fact pleaded is true, that ſhe was in the cuſtody of the bailiff, and *reſcued* from him; and though this amounts in law to the cuſtody of the ſheriff, yet it differs from the caſes of *grants*, for there the fact was not true: it was not for a grant but a releaſe, and a covenant to ſtand ſeiſed, but here the fact is true, and properly pleaded. 2dly. The defendant has confeſſed and avowed, and therefore it lay on the plaintiff to ſhew a *re-caption* in *his* replication. The *third objection* likewiſe has nothingin it.

As to the principal point, I cannot ſee how this caſe is diſtinguiſhed from a cuſtody on a *meſne proceſs*, where a *reſcue* is pleaded. The ſheriff was obliged to bring her out; and as ſhe was not in execution, ſhe can only be ſaid to be in on a *meſne proceſs*.

Powys, *Eyre*, and *Forteſcue*, concurred with the Chief Juſtice. But the matter was adjourned.

In *Hilary* term 7 *Geo.* it was argued a ſecond time, when the queſtion was, whether after judgment, and before any charge in execution, a *reſcue* on the party's being brought out on an *habeas corpus*, is a good excuſe for the ſheriff in an action of *eſcape*.

After argument, the judgment was again affirmed, and this term *Pratt*, Chief Juſtice, delivered the reſolution of the court.

Pratt, Chief Juſtice. It was admitted at the *bar*, and is not now to be diſputed, but that on the one hand, if the ſheriff arreſts the party by virtue of a *meſne proceſs*, and he is *reſcued* as he carries him to goal, it will be a good excuſe for the ſheriff, *Cro. Jac.* 19. And on the other hand, if the party is once within the walls of the priſon, tho' the cuſtody is on *meſne proceſs* only, yet a *reſcue* from thence by any but *common enemies*, will be no excuſe: if a company of rebels break the priſon, and let out the priſoners, yet the ſheriff is anſwerable, becauſe the law ſuppoſes the ſheriff and his *poſſe* are ſufficient to reſiſt ſuch a force. 1 *Roll. Abr.* 811. 4 *Co* 84. theſe, I ſay, are grounds that are not to be diſputed.

The caſe at the *bar* is new, and differs from both theſe; but, however, we muſt take it up on the different reaſons of theſe caſes. In the caſe of a *meſne proceſs*, the ſheriff, if he meets the party againſt whom he has ſuch proceſs by accident, and is told it is the defendant, he is bound to arreſt him; and then, becauſe it is not ſuppoſed that he always has the *poſſe* along with him, he is excuſed againſt a *reſcue*. But in the preſent caſe there is no danger of a ſurpriſe, he has notice before, that on ſuch a day he is to bring the party out of priſon; and it is his duty, and ſo he is directed by the *writ*, to provide for the ſure and ſafe conduct of the party. Here he has not taken that caution, whereby the plaintiff, who had an intereſt, a ſort of property in the body of the priſoner, has ſuſtained a damage. This damage has happened by the neglect of the ſheriff, and therefore he muſt anſwer it to the plaintiff in this action. Accordingly judgment was given for the plaintiff. *Vide Stra. vol.* 1. *p.* 429.

Eaſter, 7 *Geo.* *Anonymous.*

Per curiam. If a man *eſcapes*, and returns again, and afterwards commits a *ſecond eſcape*, he cannot be taken up for the *firſt eſcape*, it being purged by his return. *Vide Strange, vol.* 1. *p.* 423.

Michaelmas, 7 *Geo.* *Webb* v. *Thompſon.*

In *Michaelmas*, 6 *Geo.* the plaintiff brought his action, and the defendant put in bail, and in *Hilary* term following, iſſue was joined, and notice of trial given and countermanded, and the defendant was the ſame term ſurrendered in diſcharge of his bail. He lay all *Eaſter* and *Trinity* terms, and in the *vacation* made his *eſcape*, on which in the beginning of this term an *eſcape warrant* iſſued againſt him, which the court was moved to *ſuperſede*, becauſe the plaintiff having ſlept *three* terms, the defendant was intitled to be diſcharged on *common bail*. This was oppoſed by the plaintiff's council, becauſe he had been guilty of an *eſcape*, and therefore intitled to no favour, but ought to lie till he has tried the cauſe by *proviſoe*.

Per curiam. He is not indeed a proper perſon to pray a favour, but it would be hard he ſhould lie by till you think fit to try the cauſe; for it is not to be ſuppoſed one who cannot find bail ſhould be able to bring it on by *proviſoe*. And beſides, as ſoon as he is in cuſtody by means of the *eſcape warrant*, he will be intitled to his diſcharge by the rules of court; ſo that to prevent vexation and expence, we think proper to *ſuperſede* the *warrant*. *Vide Strange, vol.* 1. *p.* 401.

Trinity, 9 *Geo.* *Wilkinſon* v. *Matthews.*

On a motion to diſcharge a perſon taken up on an *eſcape warrant*, *after he had obtained a day rule*, it was ruled, that the defendant ſhould ſhew cauſe on ſuch a day; and on that day he ſhewed for cauſe, that the taking on this *warrant* was about *eight of the clock* in the morning, and long before the court ſat, ſo that the plaintiff could not have a day rule at that time; but this was over-ruled, becauſe in this caſe there ſhall be no fraction of a day; and the opinion of the late Chief Juſtice, *Holt*, was now mentioned, *viz.* that where a perſon is taken on an *eſcape warrant*, who had obtained a rule for that day, that the proſecutor ſhall be committed; and it was ſufficient if the party had delivered in his name in writing to the clerk the night before the day he moved for a day rule as ſoon as the court ſhould ſit; but it appearing in the principal caſe, that the day rule was obtained after the party was taken on the *eſcape warrant*, on purpoſe to avoid the commitment by virtue of that *warrant*; and that his name was not delivered to the clerk the night before, but while the court was ſitting; it was ruled that he ſhould continue in cuſtody. *Vide Mod. Rep. vol.* 8. *p.* 80.

Michaelmas, 9 *Geo.* *The Goaler of Shrewſbury's Caſe.*

The court was moved for an attachment againſt him for a voluntary *eſcape* of one in execution for obſtructing an exciſe officer in the execution of his office; but the court refuſed to grant it, there being no precedent for that purpoſe; however, they ordered him to ſhew cauſe why there ſhould not be an *information*. *Vide Sttra. vol.* 1. *p.* 532.

Michaelmas, 9 *Geo.* *Ceaſar or Sheather* v. *Holt and others.*

See this caſe fully ſtated in page 135 of this work, under the head *Attachment*.

Eaſter, 10 *Geo.* *The King* v. *Dunbar*.

See this caſe fully ſtated in page 136 of this work, under the head *Attachment*.

Michaelmas, 13 *Geo.* *Huggins* v. *Durham and Wife.*

See this caſe fully ſtated in page 214 of this work, under the head *Baron and Feme*.

Eaſter, 4 *Geo.* 2. *Cook qui tam* v. *Champneys.*

In an action for the *eſcape* of *S. C.* who was taken on a *writ of outlawry* on a *meſne proceſs*, the defendant's council moved in *arreſt of judgment*, that the action would not lie, for the plaintiff is at the end of his ſuit, and the King only has intereſt in the forfeiture; and the body is kept for the contempt; and cited *Cro. El.* 706. 13 *H.* 4. 1 *Salk.* 80.

Per curiam. She may never be taken again, and the confinement would have enforced her appearance to action, to reverſe the *outlawry*; ſo the plaintiff has an intereſt and a damage, and muſt have judgment. *Vide Strange, vol.* 2. *p.* 901.

Trinity, 4 *Geo.* 2. *Stonehouſe* v. *Mullins.*

The plaintiff in *Trinity* term laſt brought an action of *eſcape* againſt the *Marſhal*, who imparled to *Michaelmas* term, and then pleaded a *recaption* on the 20th of *October*. The plaintiff demurred, and judgment was given for the plaintiff, becauſe to *ouſt* him of his action it ſhould have appeared, that the *recaption* was before the action was brought; and this appears to be long after. 3 *Co.* 44. 52. 1 *Jon.* 148. *Cro. Jac.* 657. 1 *Roll. Abr.* 808.

It was alſo held, that *debt* lies by *ſtat.* 1. *R.* 2. *c.* 12. as well where the *eſcape* is *negligent*, as where it is *voluntary*. *Vide Strange, vol.* 2. *p.* 873.

Trinity, 5 *Geo.* 2. *Willing* v *Goad.*

The court was moved to diſcharge the defendant out of the cuſtody of the *Marſhal*, the plaintiff in the actoin having ſent an order for his diſcharge. On a rule to ſhew cauſe, the Marſhal inſiſted, that the defendant had broke the priſon, and let out himſelf and another priſoner, who was in execution for 500 *l.* and that though the plaintiff's diſcharge came whilſt he was out of priſon, yet he had ſince taken him for his fees, and had charged him in cuſtody with a declaration for the *eſcape* of the other. But there being no caſe to warrant the goaler's retaking for fees, and the plaintiff in the action being ſatisfied; the court held the retaking to be illegal, and conſequently the delivery of a declaration to him void, and that the Marſhall ought to diſcharge him. *Vide Strange, vol.* 2. *p.* 909.

Trinity, 6 *Geo.* 2. *Gambier* v. *Wright.* Error.

On a *writ of error* brought on a judgment in *C. B.* in an action of *eſcape* againſt the warden of the *Fleet*: the declaration ſet forth, that *W. W.* being indebted to the plaintiff in 200 *l.* for goods ſold and delivered, he ſued out a *latitat* againſt him, by virtue whereof the defendant was arreſted and brought by *hab. corp.* before Mr. *J. Denton*, a judge of the *C. B.* who committed him to the *Fleet*, charged with the plaintiff's *latitat*, and that the plaintiff ſued him to judgment, and then the defendant permitted him to *eſcape*. On not guilty pleaded there was a verdict and judgment for the plaintiff.

The plaintiff in *error*'s council argued, that the priſoner being in the cuſtody of this court, could not be taken from thence without ſome proceſs of the *C. B.* which ought to be ſet out, and without which the judge had no power to commit him. And if he was there illegally, the warden was in the right to let him go. And he cited 1 *Roll. Rep.* 217, 276. *Cro. El.* 223. 31 *H.* 6. 10. *Lutw.* 1468. *Mo.* 274. 2 *Leon.* 84. 2 *Bulſt.* 62. *Cro. El.* 877. *Cro. Jac.* 394. *Salk.* 273. 70.

The court ſeemed ſtrongly inclined to think the declaration was well enough, but ordered the matter to be *further conſidered*, and this term, on the plaintiff in *error*'s council declining to argue it, the judgment was affirmed. *Vide Strange, vol.* 2. *p.* 951.

Trinity, 9 *Geo.* 2. *Wilkinſon* v. *Salter and Perry Sheriffs of London.*

In an action of *debt* for an *eſcape*, the plaintiff declared, that he recovered a judgment againſt one *H. C.* and by a *ca. ſa.* on that judgment, he charged him in execution,

cution, in the cuſtody of *L.* and *W.* the late ſheriffs; who, at the going out of their office on the 29th day of *September*, delivered the priſoner over to the preſent defendants, who have voluntarily permitted him to *eſcape*. The defendants pleaded *nil debent*, and likewiſe that the ſaid *H. C.* broke the goal and made his *eſcape*, and that they purſued and retook him, and have him now in cuſtody to anſwer the plaintiff. The plaintiff replied, that the defendants voluntarily permitted him to *eſcape*.

The defendants having pleaded *nil debent*, put the plaintiff to prove his whole declaration, and accordingly, a copy of the record of the judgment was firſt read; then an examined copy of the *ca. ſa.* and the return, that the ſheriff had him in cuſtody, and on the *writ* an indorſement, that the *writ* and the priſoner were delivered to the preſent ſheriffs, at the other's going out of their office.

Then an objection was made by the defendant's council, that as the plaintiff had laid the particular day of the defendant's being turned over, and it not being under a *ſcilicet*, i. e. *tow it*, it was material to be proved; now, the day laid in the declaration is the 29th day of *Sept.* but they ſaid, the time when the old ſheriffs quitted their office, and turned over the priſoners, was the 28th, and for that purpoſe they examined the ſteward of the ſheriff's court, who confirmed it, and ſaid, the plaints are levied on the 28th before the new ſheriffs; but he had no plaints ready to produce as evidence thereof; and the deputy recorder being in court, the *Chief Juſtice* aſked him as to this matter, who anſwered, that it is generally taken, that the new ſheriffs are chargeable with the priſoners from the time of their being turned over, which is always on the 28th day of *September*, about *ſeven* in the evening.

However, the *Chief Juſtice* ſaid, they are not ſworn in at the *Exchequer* till the 29th, and he thought they did not enter into their office till that time, and therefore over-ruled the objection, but ſaid, if the defendants had a mind he would ſave the point to them.

The evidence of the *eſcape* was, that the priſoner was ſeen at large out of the priſon; that the plaintiff's attorney aſked the goaler if he was in cuſtody, who told him he was gone out of the priſon on an errand for the priſoners, and that the goaler had made him turnkey of the priſon, ſo that he had the keys of the priſon in his cuſtody, and let people in and out of the priſon.

Lord *Hardwicke*. Here is plain evidence of an *eſcape*, the only queſtion is, whether there is a *voluntary* or *negligent eſcape*; for if it is a *negligent eſcape*, the ſheriff may juſtify by *re-caption*; but if it is a *voluntary eſcape*, he may not juſtify; and this appears plainly to me to be a *voluntary eſcape*; for as he has been truſted with the keys of the priſon, he may go out when he will; the only doubt that could poſſibly be raiſed in this caſe would be the queſtion, which was in the caſe of the *King* v. *Huggins* in the *Exchequer*. An information of *eſcape* was exhibited againſt *Huggins* for the *eſcape* of *B.* a ſmuggler, and the defendant pleaded a *re-caption*; and the *Attorney-General* replied, a *voluntary eſcape*: and the evidence was, that the turnkey let him out of priſon; and the court was of opinion, that the turnkey, not being the warden's deputy, therefore his permiſſion did not make it a *voluntary*, but only a *negligent eſcape* in the warden; but they held, that a permiſſion by the warden's deputy would make a *voluntary eſcape* in the warden. So that even that doubt is now cleared on this evidence, becauſe it appears that the goaler himſelf appointed him to be turnkey; therefore you muſt find for the plaintiff for his debt; and accordingly they found for the plaintiff, and 12 *d.* damages.

N. B. By *ſtat.* 8 & 9 *W.* 3. *c.* 27. if a goaler refuſes to ſhew his priſoner on demand, it is evidence of an *eſcape*, that no retaking or freſh purſuit ſhall be given in evidence, unleſs ſpecially pleaded; nor ſuch plea received, unleſs oath made in writing, that the priſoner *eſcaped* without his knowledge or conſent. *Vide Caſes Temp. Lord Hardw. p.* 310.

Eaſter, 18 *Geo.* 2. *Wightman* v. *Mullens*.

In an action againſt the *Marſhal* for an *eſcape*, it was laid, that the priſoner being brought before Sir *William Chapple*, one of the juſtices of our Lord the King, at his chambers in *Serjeant's Inn*, was there committed to the cuſtody of the Marſhal, at the ſuit of the plaintiff, as by the ſaid commitment may more at large appear.

To this the defendant demurred, and ſhewed for cauſe, that it did not appear that the commitment was of record. And on argument the court held it ill; for he is not in point of law in Marſhal's cuſtody, till the commitment is entered on record; nor can the court take notice that Sir *William Chapple* had any power to commit him, he being only ſtiled one of the juſtices of the King, which every common juſtice of the peace is. *Vide Strange, vol.* 2. *p.* 1226.

Hilary, 31 *Geo.* 2. *Roſe* v. *Green*.

See this caſe fully ſtated in page 199 of this work, under the head *Bankrupts*.

Eſtates,

Freehold and Copyhold.

Hilary, 3 & 4 *W.* & *M.* *Glover* v. *Cape*.

See this caſe fully ſtated in page 127 of this work, under the head *Aſſignments*.

Eaſter, 5 & 6 *W.* & *M.* *Benſon* v. *Scott*.

In a ſuit in *ejectment* a ſpecial verdict was found, *viz.* a cuſtom, that the tenants of the manor having a mind to *alien*, might ſurrender into the hands of two *copyholders*, &c. That *Scot* being a *copyholder* in *fee*, and ſurrenders, &c. to the uſe of the plaintiff in *fee*, and died, leaving his wife, who claimed her *free-bank* by the cuſtom, and at the next court the ſurrender was preſented, and thereon the plaintiff was admitted; and the queſtion being, whether the ſurrenderee, or the wife, or the wife, for her *free-bank*, ſhould have theſe lands? It was *adjudged* for the plaintiff, for the wife's title does not commence till after the death of the huſband, and then only to thoſe lands of which he died *ſeiſed*; but the plaintiff's title began by the ſurrender; for the admittance relates to that; and the caſe of two joint-tenants, 1 *Inſt.* 59. *b.* rules this caſe. *Vide Salk. vol.* 1. *p.* 185. *Mod. Rep. vol.* 4. 251. *Ibid. vol.* 12, *p.* 49.

Trinity, 7 *W.* 3 *The King* v. *Kempe or Kemp*.

A *ſcire facias* iſſued out of the *petty bag-office* in *Chancery* to repeal letters patent bearing date the 29th day of *December*, 27 *Car.* 2. by which the King granted to the defendant the office of *ſearcher* in *Plymouth*. The caſe was ſhortly this; King *Charles* 2. granted this office to *J. M. during good pleaſure*. Afterwards, by other letters patent, reciting the grant to *M.* he granted this office to one *Fryar* for life, to commence after the death, ſurrender or forfeiture of *M. F. M. F.* afterwards ſurren- his letters patent to the King; who afterwards, in conſideration of the ſurrender of the letters patent of *F.* granted by letters patent this office to *Henry Kempe* for life, to commence after the death, ſurrender, forfeiture, or other determination, of the eſtate of *F.* and afterwards to *W. Kempe* for life, (the now defendant) to commence after the death, ſurrender, forfeiture, or other determination of the *eſtates* of *F.* and *H. Kempe*. *H. Kempe* died, and then King *Charles* 2. died; and now, this *ſcire facias* is ſued out againſt the defendant to repeal theſe letters patent.

Holt, Chief Juſtice. The queſtion is, whether *Fryar's* letters patent were good? For if they were not, thoſe of *Kempe* will not be good neither. But I am of opinion thoſe of *Fryar* are good.

1ſt. It has been objected, that they were void, becauſe they were not to commence on the determination of the *eſtate* of *Martin*, but on his death, ſurrender, or forfeiture, becauſe it was but an *eſtate at will.*

To which I anſwer, that an *eſtate at will* among common perſons cannot be ſurrendered, becauſe, being at the will of both parties, either of the parties may determine his will. But in the caſe of the King, it is not at the will of both parties, but of the King only, and the party cannot determine his will, but by ſurrender. For if it be an office of truſt, forbearance of execution is fineable; and ſurrender in ſuch caſes is conſtantly practiſed, as in the caſe of *Hall* v. *Scroggs*, *C. J.*

Then, if this office granted at will was ſurrenderable, as it certainly was, the expreſſion of the King in his letters patent was proper enough.

2dly. It has been objected, that it was not forfeitable.

To which I anſwer, that the King's tenant at will may be ſaid to forfeit. For perhaps the King on ſuggeſtion of crimes committed by the party, before he determined his will, ſhall be informed by inquiſition of the record, and then, on the very return of the inquiſition, the record is forfeited. But if it was an *eſtate for life*, then there ought to be a *ſcire facias* to repeal the letters patent.

Admitting the law to be ſo, this grant to *F.* was good, and might have commenced after the death, ſurrender, or forfeiture of *M.*

3dly. It has been objected againſt this grant to *F.* that ſuppoſe the King had determined his will during *M.*'s life, yet the grant to *F.* could not have taken effect, becauſe the *eſtate* of *M.* did not determine by the death, ſurrender, or forfeiture of *M.* and then, if the grant to *F.* was good, there would be a *freehold* to commence *in future*, which is againſt the rules of law.

To which I anſwer, that this grant would neverthel eſs have taken effect, but not till the time limited by the letters patent, which muſt have been after *M.*'s death, and in the mean time the King might have granted it to whomſoever he pleaſed; and when *M.* died, *F.*'s grant would have commenced.

As to the objection, that a *freehold* cannot be granted to commence *in future*, I anſwer, that this muſt be underſtood of a *freehold in eſſe*, as 5 *Co.* 93. *Berwick*'s caſe; but a rent *de novo* may be granted to commence *in future*, or may be granted in *fee*, with fractions, 1 *Co. Corbet*'s caſe, or to commence on any contingency; becauſe it is a creature of the grantor, who may mould it in what form he pleaſes. And the grant of this new office reſembles the grant of a rent *de novo*; for ſince there is no *eſtate in eſſe*, but it is new created by the King, he may mould it as he pleaſes. And altho' there is ſuch an office as this of *ſearcher*, yet the *eſtate* is new, and ſubject to any limitations. And no reaſons can be given why a grant *in future* of ſuch a new office ſhould not be good, as well where there is ſuch a *precedent eſtate*, as where there is none at all. For ſuppoſe, there being before a grantee for life, the King grants to another, to commence after the death of the grantee for life; this firſt grant is of no avail to make good the laſt grant, for the laſt grant is not a remainder, for then it ought to have been created at the creation of the *particular eſtate*; nor is it a reverſion, for neither the King, nor any other, has any reverſion of the office, and a grant by ſuch a name is void; but the King may grant an office in reverſion; not in reſpect of the *particular eſtate*, but it is only a future intereſt to commence *in future.* 1 *Cro. Young* v. *Stanwell*, and *Young* v. *Fowler*.

But if the King has the inheritance of an office, ſuch a grant as this had been void. And it ſeems to me, that the King's intent was, not to determine his will during *M.*'s life, but that after his death the grant to *F.* ſhould commence; and not to give an opportunity for any ſolicitation, to determine the *eſtate* of *M.* before his death. Laſtly, *F.*'s letters patent being good, the ſurrender of them was a good conſideration in the grant to *Kempe*, ſo that the letters patent granted to *Kempe* are good: and therefore judgment was given for the defendant. *Vide Raym. vol.* 1. *p.* 49. *Mod. Rep. vol.* 4. *p.* 275. *Salk. vol.* 2. *p.* 465.

Trinity, 8 *W.* 3. *Warſopp* v. *Abell.*

In *treſpaſs* and *ejectment* for a *copyhold*, on the demiſe of *J. S.* the jury found a ſpecial verdict, the ſubſtance whereof was, that *J. S.* purchaſed this *copyhold*, and on the 23d day of *October*, *anno* 1652, made a ſurrender thereof to the uſe of himſelf for life, and then to *Alice* his wife, and to the ſurvivor of them; and after their deceaſe, then to the uſe of the laſt will of the ſaid *J. S.* and for default of ſuch will, to his own right heirs; and that he was admitted, &c. that he made a will, and deviſed all his whole eſtate, both real and perſonal, to *A.* his wife, after his deceaſe, the remainder to be divided between his relations on both ſides, according to the diſcretion of his executors, and ſome time after died.

They find that the executors did enter with an intent to divide the *eſtate*, purſuant to the will; but that they were not admitted to this *copyhold.*

So that the queſtion was, what *eſtate* was veſted in them before admittance, and what paſſed by this will.

And it was held, that the admittance of a tenant for life, on a ſurrender, is an admittance of thoſe in remainder. *Vide Mod. Rep. vol.* 5. *p.* 306.

Michaelmas, 8 *W.* 3. *Page* v. *Smith.*

In this caſe, *Holt*, Chief Juſtice, held, whatever may paſs by deed without *ſurrender*, though it may be neceſſary to inrol the deed, is no *copyhold*: likewiſe whatſoever may paſs by ſurrender *according to the cuſtom of the manor*, without ſaying, *at the will of the lord*, is no *copyhold.* *Vide Salk. vol.* 3. *p.* 100.

Michaelmas, 8 *W.* 3. *Leigh or Lee* v. *Brace.*

On a ſpecial verdict in *ejectment*, the caſe was:

W. B. being *ſeiſed* of the lands in queſtion, did on the 25th day of *July*, *anno* 1622, make a *feoffment* thereof in *fee* to *T. W.* and *T. F.* and their heirs, to the uſe of himſelf for life; and after his deceaſe to the uſe of his ſon *T. B.* and his heirs for ever; *and for default of iſſue of the body of the ſaid* T. B. then to the uſe and behoof of the right heirs of the *feoffor* for ever.

That *W. B.* afterwards died ſo *ſeiſed*, and *T.* his ſon entered on the lands, who, on the 16th day of *April* 1661, made his will, and, among other things, deviſed the ſame to his ſon-in-law *J. C.* and his heirs, on the body of *R.* his then wife begotten, or to be begotten, paying his debts and legacies. That the ſaid *T. B.* died *ſeiſed* of the ſaid lands; and after his death *J. C.* entered by virtue of the ſaid deviſe. That *S. B.* the defendant, is ſon and heir of the ſaid *T. B.* and that the ſaid *S.* after the death of his father, did likewiſe enter on theſe lands; that *J. C.* afterwards entered, and made a leaſe to the plaintiff for *ſeven years*, by virtue whereof he entered, and was poſſeſſed until *S. B.* ejected him, and ſo make a general concluſion.

The ſingle queſtion was, what *eſtate T. B.* took by this *feoffment?*

It was argued, that he had a *fee ſimple*, for ſuch an *eſtate* was expreſsly limited to him; and if the deed had gone no further, it muſt be an *eſtate in fee*, and no otherwiſe. But the words which immediately follow, raiſe a doubt, *viz. and for default of iſſue of the body of the ſaid* T. B. *then to the grantor and his heirs.*

Per curiam. The intention of the *feoffor* is plain, that an *eſtate in fee* ſhould not paſs to his ſon, for the ſubſequent words ſhew, that he intended no *abſolute eſtate* ſhould veſt in him; it is no more than if a gift had been made to a man and his heirs, *viz.* to the heirs of his body. Wherefore judgment was given for the defendant. *Vide Mod. Rep. vol.* 5. *p.* 266. *Raym. vol.* 1. *p.* 101.

Eaſter, 9 *W.* 3. *Head* v. *Tyler.*

Holt, Chief Juſtice. If there be a *copyhold eſtate* for life, remainder to *B.* if the tenant for life forfeits, it is not ſuch a determination as to let in the remainder; but the lord enjoys it during the life of the tenant for life. *Vide Mod. Rep. vol.* 12. *p.* 123.

Michaelmas, 9 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. A tenancy *eſcheated* to the lord, becomes part of the manor; but if the lord purchaſe part, it is only holden of the manor, and not part of it; but the rent and ſervices are part. *Vide Mod. Rep. vol.* 12. *p.* 138.

Michaelmas, 9 *W.* 3. *Winter* v. *Lovedore*, *Lovedure*, *or Loveden: or Loveday* v. *Winter.*

In *ejectment*, a ſpecial verdict was found, that *G. P.* was ſeiſed in *fee* of the manor of *M.* and on the marriage of his ſon, ſettled the ſaid manor to the uſe of himſelf for life, remainder to his wife for life, remainder to his ſon in *tail*, with a *proviſoe*, that he ſhould have power during his life, and his wife alſo after him, to demiſe the premiſes in poſſeſſion, for *one*, *two*, or *three* lives, or *thirty* years, or for any number of years determinable; on *one*, *two*, or *three* lives, ſo as ſuch demiſe be not of the *demeſne* lands. *G. P.* reciting, that *J. S.* and his wife held a *copyhold* tenement for life, demiſed the ſaid *copyhold* tenement to the leſſee for *thirty* years, to begin after the death, ſurrender, or forfeiture of *J. S.* and his wife; and the queſtion being, whether this leaſe of a *copyhold* was purſuant to, and warranted by the power? It was held in this caſe by *Holt*, Chief Juſtice.

1ſt. That any leaſe to commence *in future* is in ſome ſenſe a leaſe in reverſion, as it is oppoſed to a leaſe in poſſeſſion; but a leaſe within ſuch a power muſt be conſtrued of a leaſe to commence in poſſeſſion after another leaſe or intereſt already created before the reverſion of the power, and not after; and that a leaſe to commence after any other leaſe, is properly a leaſe in reverſion; but that a leaſe for life, to commence after another leaſe in being, is a concurrent leaſe, becauſe a *freehold* cannot expect, but muſt commence in poſſeſſion preſently; however, this may be ſaid to be a leaſe in reverſion within ſuch powers.

2dly. That *G. P.* might make a leaſe in reverſion abſolutely for *thirty* years, by virtue of this power, becauſe the limitations and reſtrictions are disjoined, and the latter part is carried on by way of enlargement of the power; to which *Turton* and *Eyre*, Juſtices, agreed; but *Rokeby*, Juſtice, was of a different opinion.

3dly. That this leaſe was void, becauſe it was of *copyhold* lands; for by a grant of the *demeſnes* the *copyholds* will paſs; and for the ſame reaſons, by excepting the *demeſnes*, the *copyholds* are excepted; and the rather, becauſe the power is derived out of the inheritance, and the tenant at will by his leaſes might deſtroy the *copyhold*, which is unreaſonable; and if there were nothing elſe for the power to work on in this caſe, he may by virtue thereof demiſe the rents and ſervices: therefore judgment was given for the plaintiff. *Vide Salk. vol.* 2. *p.* 537. *Mod. Rep. vol.* 5. *pag* 244. 378. *Ibid. vol.* 12. *p.* 147. *Raym. vol.* 1. *p.* 267.

Summer Aſſizes, 10 *W.* 3. *Clerk* v. *How.*

See this caſe fully ſtated in page 270 of this work, under the head *Condition.*

Hilary, 11 *W.* 3. *Aſhmead* v. *Ranger.*

See this caſe fully ſtated in page 327 of this work, under the head *Cuſtom.*

Hilary, 12 *W.* 3. *Fiſher* v. *Nicholls.*

In this caſe, *Holt*, Chief Juſtice, held, that *Copyhold Eſtates* are ſubject to the rules of law, and will not paſs by ſuch words in a conveyance as are improper to paſs other *eſtates*, unleſs there is a cuſtom for that purpoſe, for that may and often does diſtinguiſh them; thus by cuſtom in ſome manors a grant to *A. B.* and *C.* ſhall be conſtrued as a gift to *A.* for life, remainder to *B.* for life, remainder to *C.* for life. *Vide Salk. vol.* 3. *p.* 100.

Hilary, 12 *W.* 3. *Fiſher* v. *Wegg*

Copyhold lands were ſurrendered to the uſe of *A. B.* and *C.* and their heirs, equally to be divided between them and their heirs reſpectively.

Gould and *Turton*, Juſtices, held this a *tenancy in common*, by reaſon of the apparent intent of the parties.

And ſaid, that it was here as in the caſe of an uſe, which muſt be conſtrued according to wills to fulfil the intent; and in the caſe too of a *copyhold*, wherein, to ſupport the intention of the parties, limitations of the *eſtate* have been admitted, which are not allowed in *freeholds.* 1 *Ro. Ab.* 67. 2 *Cro.* 434. *Pop.* 125. 1 *Saund.* 151. 2 *Vent.* 365.

Holt, Chief Juſtice, on the contrary held it a *joint tenancy*, for that the words *equally*, *&c.* import no more than was implied in the foregoing words, to have alike, which they cannot but have as *joint-tenants*; and that *copyholds* will not paſs by more improper words than *freeholds.*

If a *feoffment* be to *A.* and *B.* equally to be divided, they are *joint-tenants*; for they have the land by one title and *eſtate*, and equally to be divided, imports nothing but what was implied before; but if it be to *A.* and *B.* *to hold* one moiety to *A.* and the other to *B.* they are *tenants in common*, for they have ſeveral titles, and there muſt be ſeveral *liveries*, and the words *to hold* are conſiſtent. But if it were *to hold* ten acres to *one*, and *ten* to the *other*, the words *to hold* would be void for repugnancy.

As for the word *divided*, he held that did not import a tenancy in common, for their poſſeſſion muſt be entire *and undivided*; to divide would be to deſtroy it, and it is ſtrange to create an *eſtate* from a word which implies only what would deſtroy it.

Tenants in common hold by ſeveral titles, or ſeveral rights; but their poſſeſſion is entire. At common law they were not compellable to make partition. And therefore in ſuing out a writ of partition, the party never ſhews whether he is tenant in common or joint-tenant; the poſſeſſion of the one is the poſſeſſion of the other, and he cannot be a diſſeiſor without an actual *ouſter.* *Hob.* 120. *Mo.* 868.

A deviſe to two and their heirs, equally to be divided, was formerly looked on as a *joint eſtate.* *Vide Dy.* 25, 158. *Bent.* 19. 3 *Cro.* 330. Now indeed it is an *eſtate* in *common*, not by force of the words, but that it appears to be the intention of the party, that there ſhould be no ſurvivorſhip: a deviſe to two equally to be divided *to hold* to them and the heirs of the ſurvivor, is a *joint-tenancy.* *Style* 211. 434.

Laſtly, He ſaid, *joint-tenancies* were favoured, for the law loves not fractions of *eſtates*, nor to divide and multiply tenures.

N B. Whilſt the *eſtate* continues in *joint-tenancy*, there is no alteration of the tenure. But if you turn it into a *tenancy in common*, all the entire ſervices multiply.

Judgment however was given according to the opinion of the other two juſtices. *Vide Salk. vol.* 1. *p.* 392. *Raym. vol.* 1. *p.* 622. *Mod. Rep. vol.* 12. *p.* 296.

Hilary, 13 *W.* 3. *Smartle* v. *Penhallow.*

In a ſuit in *ejectment*, a ſpecial verdict was found, *viz.* that the lands in queſtion were parcel of the manor of *Tregoan*, of which the biſhop of *Exeter*, leſſor of the plaintiff, was *ſeiſed*; and that by the cuſtom of the manor the ſaid lands were demiſeable by copy of *court roll* to *two* or *three* perſons for their lives, and the life of the ſurvivor, *to have and to hold ſucceſſively in the manner mentioned in the charter*, *and not otherwiſe*, and that the lord was to have a *heriot* on the death of every tenant dying ſeiſed. They farther find that one *N.* was tenant for life of the manor by grant from the predeceſſor of the biſhop; and that he by copy granted the tenement in queſtion to *A.* and his aſſigns, for the lives of *B.* and *C.* and of the ſaid *A.* and that *N.* is dead. The queſtion was, whether this grant be warranted by the cuſtom? And it was urged for the plaintiff, that *A.* had the *whole eſtate*, and that *B.* and *C.* were not named to take an intereſt but by way of limitation; and that if *A.* dies, here is room for an occupant, which is to put a tenant on the lord without his conſent: alſo if *A.* ſhould become a bankrupt, this *eſtate* would be aſſignable; and on this leaſe the lord can have but *one heriot*; whereas in the cuſtomary leaſes the lord is to have *three*. They admitted that where a power or cuſtom warrants a *greater eſtate*, it will warrant a leſſer, as if the lord may grant for *three* lives, he may for *one*: but then it muſt be of the ſame nature. If *H.* has a power to leaſe for *three* lives, he cannot leaſe for 500 years, though it be a *leſſer eſtate* in law. If a biſhop makes a leaſe for *thirty* years, it is wholly void as to the ſucceſſor, becauſe his power is exceeded: ſo in this caſe.

On the other ſide it was argued, that this was no greater eſtate than what the cuſtom allowed; that if this grant had been made to *A. B.* and *C. To have and to hold ſucceſſively* for their lives, they might have ſurrendered to *three* others, and the lord was compellable to admit them, and they would have an *eſtate pur auter vie*, that if the tenant may by his own act make ſuch an *eſtate*, it is moſt unjuſt to ſay that the lord cannot. As to the lord it is the ſame thing, whether *A.* takes for his own life, and the life of *B.* and *C.* or *A. B.* and *C.* take for their lives: and that cannot be an occupant of *copyhold lands*, neither are they within the ſtatute of frauds to be *aſſets* or deviſeable, 2 *Ch. caſ.* 201. and as to the *heriot*, it will be due on the death of every aſſignee that is admitted.

Holt, Chief Juſtice. 1ſt. There can be no occupant of a *copyhold eſtate* for the prejudice it would do to the lord: but if the *copyholder* being tenant *pur auter vie* dies, the lord ſhall enter. As if there be a tenant for life of a *copyhold*, remainder to another for life, and the tenant for life commits a forfeiture, the lord ſhall enter. If *H.* grants a rent out of his lands to *A. pur auter vie*, and *A.* dies, ſhall not the rent ceaſe? What is the reaſon? Becauſe here wants a grantee. So it is here; an occupancy is for ſupplying a *freehold*: in *copyholds* the *freehold* is in the lord; the tenant has only an *eſtate at will*.

2dly. He held that the cuſtom conſiſted in three parts: 1ſt. The conſtitution of the *eſtate*, viz. by *copy*. 2dly. The extent for *three lives*. 3dly. The manner of the *eſtate*, which by operation of the cuſtom differs from the conſtitution at *common law*, viz. to *three*, *to have and to hold ſucceſſively*.

What is done here is not ſo much as the cuſtom: the cuſtom enables him to grant for *three* lives, and he grants but for *one*. If the cuſtom be to grant in *fee, and not otherwiſe*, yet the lord may grant for life, or to *A.* for life, and remainder to *B.* in tail. If the cuſtom be to grant for life, the lord may grant *during life*. 3 *Cro.* 323, 373. This is not like the caſe of a biſhop's leaſe: that cannot be good for any part, becauſe the ſtatute ties it up to an expreſs form. *Otherwiſe* perhaps, had it been that biſhops ſhould make leaſes for any number of years not exceeding ſuch a number.

As to the ſuppoſal of the bankruptcy, *Powell* at firſt doubted on that inconvenience, ſaying it could not be good if it prejudiced the lord; but *Holt* thought that made no difference; for if the *copyholder* being a bankrupt, his *eſtate* was aſſigned, the aſſignee would have the *eſtate* determinable on the death of the *copyholder*, and then the *heriot* would be due, and not by the death of the aſſignee; for ſo it was originally, and cannot be altered by any act of the *copyholder*.

Per curiam. This is a ſuppoſal not in the caſe, and therefore it was not determined: judgment was given for the defendant. 1 *Roll. Abr.* 511. *Vide Salk. vol.* 1. *p.* 188. *Raym. vol.* 2. *p.* 994. *Mod. Rep. vol.* 6. *p.* 63.

Eaſter, 13 *W.* 3. *Parker* v. *Kett*.

In *ejectment*; on trial, the following caſe was ſtated for the opinion of the court, viz. *Charles Kett* being ſeiſed in fee of a *copyhold*, demiſed it to his wife for life, remainder to *Elizabeth* his wife in fee. Mr. *Keck*, the maſter in Chancery, was ſteward of this manor by patent, *to act by himſelf or deputy*. Mr. *Keck* appointed one *Clerk* to be his deputy, who acted as ſuch many years, and was ſent for by *Charles Kett* to take a ſurrender of the lands. *Clerk* went himſelf, but by a writing under his hand and ſeal appointed *A.* and *B.* to be his deputies jointly and ſeverally, only to take this ſurrender, which was done by *A.* accordingly, and afterwards preſented; and *Elizabeth Kett* the defendant admitted thereon, by *Clerk*.

Holt, Chief Juſtice, delivered the opinion of the court as follows:

Clerk, who was Mr. *Keck*'s deputy, (and ſo it is of any other deputy, where a deputy may be appointed,) had full power to do any act or thing which his principal might have done. This is ſo eſſentially incident to a deputy, that a man cannot be a deputy to do any ſingle act or thing, nor can a deputy have leſs power than his principal: and if his principal makes him covenant that he will not do any particular thing which the principal may do, the covenant is void and repugnant: as if the under-ſheriff covenants that he will not execute any proceſs for more than 20 *l.* without ſpecial warrant from the high-ſheriff; this is void, becauſe the under-ſheriff is his deputy, and the power of the deputy cannot be reſtrained to be leſs than that of his principal; ſave only that he cannot make a deputy, becauſe it implies an aſſignment of his whole power, which he cannot aſſign over. That by conſequence *A.* was as well authoriſed by *Clerk*'s writing, given him under his hand and ſeal, as if Mr. *Keck* himſelf had given it; of which there could be no queſtion, it being to do a particular act.

Though *A.* acted in his own name, without reciting his power or any relation to it, yet this taking of a ſurrender muſt be good; for he muſt be conſidered either as an attorney, or an under-deputy. Suppoſe the firſt, the law is plain; where a man does ſuch an act as he cannot do, ſo as to be effectual, any otherwiſe than by virtue of his authority, that ſhall be taken to be in execution of his authority: but where a man has an intereſt and authority, and does an act without reciting his authority, it ſhall be taken to be done by virtue of his intereſt. 6 *Co.* 17. And though an under-ſheriff muſt act in the name of the high-ſheriff, becauſe the writs are directed to the high-ſheriff, and for other particular reaſons; yet any other deputy may act either in his own name or in the name of his principal. So is the judgment of *Comb*'s caſe, though in arguing it, it is ſaid otherwiſe; and ſo it is of an attorney, but it is more regular to act in the name of the principal. *Laſtly*; ſuppoſing him to be an under-deputy, as if he had not been conſtituted to do a particular thing, but to be *Clerk*'s deputy, this had been void, and he had no real authority: yet even that conſtitution would have given him the colour and reputation of an authority, to act as a ſteward *de facto*. And what he does as ſuch, is ſufficient among the tenants, for they have no power to examine his authority, nor is he to render them any account of it. The caſes of *Mo.* 109, 110. 1 *Lev.* 288. 2 *Cro.* 552. 2 *Ro.* 7, 101, 130. are ſtronger. And ſo it is of an executor *de facto*, i. e. *de tort executor*.

Authorities by letter of attorney are either general or ſpecial; thus a letter of attorney may be to ſue *in all caſes moved or to be moved*, or to defend a particular ſuit. Sir *Philip Sidney*, when he went to travel, gave a letter of attorney to Sir *Thomas Walſingham* to act and ſell all his lands, and all his goods and chattels; and this was held good: where the authority is particular, the party muſt purſue it: if the act varies from it, he departs from his authority, and what he does is void; but that muſt be intended of a variance, not in circumſtance, but of a variance material and ſubſtantial; as where the perſon, the thing, the *eſtate*, or the date is miſtaken. *Vide Salk. vol.* 1. *p.* 96. *Raym. vol.* 1. *page* 658.

Trinity, 1 *Ann.* *Machil* v. *Clerk*. Error.

On a *writ of error* brought in this court, on a judgment given in the *C. B.* where the queſtion on a ſpecial verdict in *ejectment* was, *viz.* a *tenant in tail*, in conſideration of a marriage of his ſon, covenants to ſtand *ſeized* to the uſe of himſelf for life, remainder to the uſe of his ſon and heir, and the heirs male of his body by his intended wiſe, with ſeveral remainders over; and after he ſuffers a recovery in which he himſelf is tenant to the *precipe*, and vouches over the common vouchee; which recovery was to other uſes than thoſe mentioned by the covenant: ſo the queſtion was, whether the *tenant in tail*, notwithſtanding the covenant to ſtand *ſeiſed*, continued *ſeiſed in tail*, for then the recovery was good, otherwiſe it could not be good in this caſe, he coming in as tenant to the *precipe*.

Per curiam. We are of opinion that the recovery notwithſtanding the covenant to ſtand ſeiſed was good. And the *Chief Juſtice*, ſaid, it would be reaſonably expected from them to give the reaſons of their opinion, for though there were ſeveral authorities expreſs to the point, yet the reaſons of theſe judgments were not ſo obvious; for it has been a queſtion if a *tenant in tail*, by bargain and ſale, leaſe, and releaſe, or covenant to ſtand *ſeiſed*, conveyed the lands whereof he is *ſeized in tail*, to another and his heirs; whether that *eſtate* ſo conveyed does actually determine, (as Lord *Littleton* ſeems to hold) on the death of the *tenant in tail*; or does continue till entry of iſſue in *tail*: and *we hold*, that notwithſtanding the covenant has not that operation here; yet if a *tenant in tail*, bargain and ſell, leaſe and releaſe, or covenant to ſtand *ſeiſed* to the uſe of one of his blood in *fee*, that ſuch bargainee, *&c.* has a *baſe fee*, not determined by the death *in tail*, but continuing in the bargainee or releaſee, *&c.* till the iſſue *in tail* make an actual entry: this indeed ſeems to differ from the opinion we now give, but we will by and by make the diſtinction.

And it will be worth while to know and conſider the reaſon hereof, becauſe it ſeems to contradict *Littleton*.

The *firſt* reaſon then is, becauſe the *tenant in tail* himſelf has an *eſtate* of inheritance in him, which is not denied, before the *ſtatute de donis* he had it, and it was called a conditional fee; and the *ſtatute de donis* does not make any alteration of the *eſtate*, ſo as to make it not an inheritance, but only fixes it, ſo that there ſhall not be an alienation of it to the diſinheritance of the iſſue *in tail*, yet ſo as a baſe fee, may be made of it: and of baſe fees, ſee 1 *Inſt*. 18. *a*. If lands be given to a *villain in tail*; and the Lord enters, he has a *baſe fee*, that is, to his heirs, while the villain has heirs, of the *entail*; ſo that the tenant *in tail* has an inheritance in him, which may be turned into a *baſe fee*, then when he bargains and ſells, leaſes and releaſes, *&c.* this inheritance to another and his heirs, it is but reaſonable it ſhould paſs a *baſe fee*, eſpecially if nothing in the *ſtatute* be againſt it.

2dly. The *tenant in tail* has the whole *eſtate tail* in him; and why ſhould not he that has the whole *eſtate* by bargain and ſale, leaſe and releaſe, or covenant to ſtand *ſeized*, diveſt himſelf of the whole, and put it in the bargainee for the power of diſpoſing is an incident inſeparable to his *eſtate*.

3dly. Turning of the *eſtate tail* into a *baſe fee*, is not at all contradictory to the *ſtatute de donis*, nor any branch of it: that *ſtatute* has very ſtrong words to hinder an alienation to the prejudice of the iſſue *in tail*; yet we know the conſtruction that has been made of them. If a *tenant in tail* make a feoffment or buy a fine, it is ſo far a prejudice to the iſſue, that he ſhall be put to his action; and his entry is taken away, and he has no remedy but by a *formedon in diſcender*, and yet ſuch fine or feoffment was never taken as a breach of the *ſtatute de donis*. Sure then it ſhall be no breach of the *ſtatute* to have him put to his entry to recover the *eſtate*: ſince then it is his inheritance, and all is in him, and that a power of alienation is incident to the property that he has, and that an alienation made by him to put the iſſue to entry, is no breach of the *ſtatute* of *donis*.

From hence I infer, that ſuch *eſtate* by bargain and ſale, *&c.* made by him to one and his heirs, is not actually determined by his death; *Seymour*'s caſe, 10 *Co*. 95. is in point.

Another inſtance comes home to the caſe in queſtion, and that is the caſe of an *exchange*; the *eſtates* muſt be equal, you cannot give an *eſtate* for *life* in change for an *eſtate* in *fee*; you may indeed give an *eſtate* for life, in exchange for another *eſtate* for life; an *eſtate* in *fee* for an *eſtate* in *fee*, that is, each party muſt take an *eſtate* of equal extent; if one gives an *eſtate tail*, and takes a *fee*, it is bad: if a tenant in *tail* and a *tenant in fee* make an exchange, they both have a *fee ſimple* (1 *Inſt*. 51. *a*.) without more ado, for in caſe of change there needs no *livery*, but only a reciprocal execution by both parties, and this is notwithſtanding a good exchange, and a *fee ſimple* paſſes from the *tenant in tail*, and ſhall continue till avoided by the iſſue; and here he is not put to his action to avoid it, becauſe here being no *livery*, there was no *diſcontinuance*. 1 *Inſt*. 332. Then the exchange muſt have this effect, that it paſſes a *baſe fee* till avoided by his iſſue: and if the iſſue will not agree to it, he may wave the land in *fee* conveyed to him, and enter into the other. But if he does not do ſo, but continue in the land given, the exchange ſtands good during his life; and after his death, his iſſue may avoid it by entering, and ſo on, *from time to time*. It therefore follows, that a *baſe fee* does paſs, otherwiſe it could not be a good exchange; if ſo, then, there is the ſame reaſon, that when a *tenant in tail* bargains and ſells, leaſes, and releaſes, and covenants to ſtand ſeiſed to uſes in *fee*, ſuch conveyances ſhould paſs a *baſe fee*, ſhould continue till determined by the act of the iſſue in *tail*. So the judgment was affirmed. *Vide Mod. Rep. vol*. 7. 18.

Hilary, 4 *Ann*. *Brown* v. *Dyer*.

If a *copyholder* dies, and his wife has her *free bench*, *Quere*, if this excreſcent *eſtate* does not ſo take away the deſcent, as if the ſon dies before the *eſtate* actually comes to him, that then the next heir to the father ſhall claim; and if this will not make a poſſeſſion of the brother? *Vide Mod. Rep. vol*. 11. *p*. 70.

Hilary, 4 *Ann*. *Anonymous*.

Holt, Chief Juſtice. A *copyholder* has only a poſſeſſory property in *timber trees*, which if ſevered from the *freehold* by tempeſt or otherwiſe, the property would be in the lord. He ſaid further, and ſo was the opinion of the court, that it would be a hard cuſtom for the tenant to claim ſuch trees; for ſuch cuſtom would be to give away the property of the lord; eſpecially in this caſe, which was occaſioned by the act of God. He alſo queſtioned if there could be ſuch a cuſtom, as for a *copyholder* to cut timber; he having only a poſſeſſory intereſt, by reaſon of its being annexed to the *copyhold* land. *Vide Mod. Rep. vol*. 11. *p*. 69.

Eaſter, 4 *Ann*. *Anonymous*.

Holt, Chief Juſtice. For the nature of *freehold* lands, and lands held by *copy* of court, *Roll. vol*. 4. *Rep*. 31. 5 *Rep*. 84. or 34. *At the will of the Lord*, is the diſtinguiſhing mark of a *copyhold*, *vol*. 2. *Lutt*. 1165. 1171. 3 *Bulſt*. 230. 2 *Vent*. 143. *Cro. El*. 185. As to ſetting forth a cuſtom, *Raſtal's Ent*. 62. 2. *Brownlow's Decla*. 96. *Cro. Car*. 418. Where a cuſtom is, that all lands held of that manor ſhall paſs by ſurrender, and admittance; yet the lands may be *freehold*; and the manner of conveyance is cuſtomary in as much as livery is not requiſite. The *freeholders themſelves can never be parcel of the manor*, but it is the *ſervices*. *Vide Mod. Rep. vol*. 11. *p*. 85.

Eaſter, 4 *Ann*. *Crowther or Crowder*, v. *Oldfield*.

See this caſe fully ſtated in page 28 of this work, under the head *Action*.

Eaſter, 4 *Ann*. *Idle* v. *Cook*.

A ſurrender was made of a *copyhold eſtate* for life, the remainder to a man and his wife for life, and their heirs and aſſigns; and for default of ſuch iſſue, the remainder over: the queſtion is, what *eſtate* the man and his wife have? there not being the words, *of their bodies*. *Gould*, J. held it an *eſtate tail*; and he ſaid, he made a difference between a *copyhold* and *freehold eſtate* as to this; he compared this caſe to *Beriſford's* caſe, in *Jones's Rep*. and *Peck's* caſe, in *Littleton's Rep*. he ſaid, ſuch iſſue qualified the general words. *Litt. Rep*. 347. *Moor* 424. He took a difference between a grant to a man and his heirs, and the heirs of him. *Plowd.* 541. 1 *Lev.* 50. *Powis* held it a *fee-ſimple*; to make an *eſtate tail*, it muſt appear from what body the iſſue muſt come. *Litt. ſect.* 31. But in caſe of a deviſe, it is otherwiſe, becauſe of the intention. *Hob.* 32. *Co. Litt.* 27. And in a conveyance, the words *of the body* are an eſſential part, but there may be words tantamount. 37 *Aſſ. pl.* 17. 5 *H.* 5. 6. *Cro. El.* 473. *Fitz Abr.* 743. It being an *eſtate* to the huſband and wife, and their heirs; the words, *and for default of ſuch iſſue*, are uncertain, whether it is meant the iſſue of both, or of the ſurvivor; made no difference between the limitation of a *freehold* and a *copyhold*; and cited *Cro. Car.* 367. 2 *Sid.* 41. The will of the donor is to be obſerved in *eſtates-tail*, but then the will muſt be *manifeſtly expreſſed*. In conveyances, the limitation of *eſtates* have known words; and he ſaid, it would be of dangerous conſequence to allow a latitude. *Powell* held it a *fee-ſimple*; for the words were, *and to the heirs of the aforeſaid baron and feme, and for default of ſuch iſſue*. He was not for confounding *eſtates tail* and *fee*; for though the intent of the parties might be to make an *eſtate-tail*, yet he would ſuffer a miſchief rather than an inconvenience. He inquired if there was any thing in this caſe to make it a *fee-ſimple* conditional at *common law*, which the ſtatute *de donis* has now made a *fee-tail*; for this ſtatute was made to prevent the abuſes of the wills of donors, by letting a ſecond huſband or wife be dowable, or tenant by curteſy. He could not ſee the difference that *Gould* took between a gift to a man and his heirs, and to the heirs of that man; he thought they had gone too far already in matters of intent, which made the law ſo uncertain; and in this caſe there was nothing but general words, for the words *ſuch iſſue* to refer to. *Holt* held, that this is a *fee*, and by no means can be conſtrued a *fee-tail*. He owned the intention was to make it a *tail*, but it could by no rule of law be ſo done, without manifeſt violation of law. He ſaid, ſurrenders muſt be conſtrued as deeds. *Litt. ſect.* 31. To make a *tail*, there muſt be a deſcription of the body from whence the heirs muſt come. *Co. Litt.* 27. There is a great deal of difference between a man's expreſſing his intent in a will, and in a conveyance; for in the laſt, the law has eſtabliſhed certain legal words, and no other, though they are tantamount, will do; but in a will, the ſtatute 33 *H.* 8. gives him power to convey away his lands at his will and pleaſure; and he relied on the words *will and pleaſure*: had the ſubſequent words, *for default of ſuch iſſue*, been conſiſtent with the firſt words, they would have qualified the general words. If a man gives an *eſtate* to a baſtard, and his heirs, if he dies without iſſue, the remainder over is void; for it is a limitation on a *fee*, to defeat and defraud the lord of his *eſcheat*. *Jones* 342. *A.* v. *T.* he ſaid was a great authority in this caſe; and he ſaid he could not diſtinguiſh between them. *Co. Litt. fol.* 20. He ſaid, a grant to a man and his heirs lawfully begotten, would be a *fee*, but to a man and the heirs of him would be a *tail*.

To conſtrue this an *eſtate-tail* would be repugnant to the premiſes, becauſe it is to them and their aſſigns, ſo that it is deſigned an *aſſignable eſtate*, which is contrary to an *eſtate-tail*, for that is reſtrained by the ſtatute. *Hob.* 170. *Dyer* 264. As the intent of the parties is to be conſidered, ſo the rules of law are to be obſerved. *Vide Mod. Rep. vol.* 11. *page* 57. *Raym. vol.* 2. *p.* 1144. *Salk. vol.* 2. *p.* 620.

Eaſter, 5 *Ann.* *Brown* v. *Dyer.*

In the caſe of a ſurrender to the uſe of *A.* the lands were found to be ſurrendered into the hands of the lord himſelf in full court; and that the lord aſſeſſed a fine on the ſurrenderee, but never admitted him.

Per curiam. The heir of the ſurrenderee had no title; for the title of the ſurrenderee is wholly by the copy of the court roll, made from the entry on the court roll, which before admittance cannot be. But in caſe of a deſcent, the heir may ſurrender before admittance, becauſe he has a title by deſcent; but the lord in this caſe ſhall have a fine. *Vide Mod. Rep. vol.* 11. *p.* 73.

Michaelmas, 5 *Ann.* *Anonymous.*

Holt, Chief Juſtice. A *copyholder* has a poſſeſſory property, and when his poſſeſſion is gone, his property is gone; now ſhall the ſeverance transfer the property? &c.

Powell, J. Suppoſe a cuſtom, that if the houſe fall, the materials ſhould be the tenant's, could that be good? Again, ſhall the act of God do a wrong to the lord? *Frank-bank* was to encourage the tenant to go into the wars; if they were killed, the lord would not take the benefit, but gave the *eſtate* to the wife, to encourage them to fight, and this, I think, was the original of *frank-bank*. *Vide Mod. Rep. vol.* 11. *p.* 94.

Michaelmas, 7. *Ann.* *Adams* v. *Hincloe.*

On a ſpecial verdict the queſtion was, whether a *copyhold* could be entailed without laying a ſpecial cuſtom for ſo doing? Adjudged by the whole court that it might.

Holt, Chief Juſtice, rejected the notion of Lord *Coke* about the *ſtat. de donis*, co-operating with the cuſtom; and held that that ſtatute turns all thoſe *eſtates*, which at common law were *fee-ſimple* conditional, into *eſtates-tail*; and if a *copyholder* by licence make a leaſe for years, the *ſurrenderee* (*leſſee*) of that *copyhold* is within the *ſtat.* 32 *Hen.* 8. to bring *debt* as aſſignee. *Vide Mod. Rep. val.* 11. *page* 199.

Trinity, 10 *Ann.* *Thomlinſon* v. *Dighton.*

See this caſe fully ſtated in page 160 of this work, under the head *Deed.*

Trinity, 10 *Ann.* *Backhouſe* v. *Wells.*

The caſe was, *Thomas Backhouſe* deviſed lands to *John Backhouſe* for his life only, without impeachment of *waſte*, and after his deceaſe, then to the iſſue male of his body lawfully to be begotten, and then goes on, with remainder to the heirs male of the body of ſuch iſſue lawfully to be begotten, with two remainders over in the ſame words.

In *Hilary*, 12 *Ann.* the Chief Juſtice delivered the reſolution of the court in this caſe, as follows:

Parker, Chief Juſtice. The queſtion is, whether this is an *eſtate for life*, or an *eſtate-tail?* It is an *eſtate for life*, and not an *eſtate tail.* I do not know how there can be clearer words than theſe; the words are proper and legal, and ſuch as a lawyer would make uſe of, and the vulgar ſenſe of the words is the ſame as the legal ſenſe.

The word *iſſue* has been made equivalent to *heirs* of the body, but that is not always ſo; for otherwiſe the ſubſequent words of limitation muſt be rejected. One may indeed gueſs from other parts of the will, what the party might mean, but that is no concluſive argument.

As to the word *only*, that is, in ſome caſes that may be put, of no effect; but though in a clear caſe it may make no alteration, yet it does not follow, but in a doubtful caſe it may be explanatory and reſtrictive. It would change the ſenſe of the word *iſſue*, only to reject the ſubſequent words; ſtronger words could not be invented to make iſſue *in tail* take as a purchaſer, than the words in this caſe. Therefore judgment was given for the plaintiff. *Vide Forteſcue*, *p.* 133. *Mod. Rep. vol.* 10. *p.* 181.

Hilary, 11 *Ann.* *Thornley* v. *Fleetwood*, *otherwiſe the Ducheſs of Hamilton's Caſe.*

In a ſuit in *ejectment* in the court of *C. B.* the jury found a ſpecial verdict, *viz.* 1ſt. That *Charles*, Lord *Gerard*, in *Nov.* 1660, ſettled the *eſtate* in queſtion, to the uſe of himſelf and the heirs male of his body, with remainder to the heirs male of the body of *Thomas*,

mas, the firſt Lord *Gerard*, remainder to his own right heirs. 2dly, In 1684, *Charles*, Lord *Gerard*, on the death of *Digby*, Lord *Gerard*, (only ſon of Lord *Charles*,) without iſſue male, entered on the *eſtate* in queſtion (not in jointure) claiming the ſame as heir male of the body of *Thomas*, the firſt Lord *Gerard*, by virtue of the ſame limitation in that ſettlement, and the reſidue when the jointure fell in; and during the time of this his enjoyment, ſuffered ſeveral recoveries, and ſettled the *eſtate* on his marriage, in the year 1689, and died without iſſue in the year 1767, leaving *Philip* his only brother then ſurviving, who is heir male of *Thomas*, firſt Lord *Gerard*, and is now living.

Charles and his brother *Philip* were in the year 1676, ſent by their father to *St. Omers*, and educated there for *five* years in the *Romiſh* religion, which religion they profeſſed. The laſt Lord *Charles* died in the year 1707, and on his death the Ducheſs of *Hamilton* claimed the *eſtate*, as right heir of the *firſt Charles*, Lord *Gerard*; notwithſtanding the *eſtate tail*, limited to the heirs males of the body of *Thomas*, firſt Lord *Gerard*, ſtill ſubſiſts in *Philip*; alledging that the laſt Lord *Charles* and his brother *Philip*, having been educated in a popiſh ſeminary, are utterly incapable of taking any *eſtate*, and that ſhe has the right of entry.

The principal queſtion was, whether one brought up in a popiſh ſeminary, was, notwithſtanding any incapacity by him incurred on that account, ſtill capable of ſuffering a *common recovery?* Judgment having been given for the defendant in *C. B.* a *writ of error* was brought here; but the court being divided in their opinion as to the judgment given in the *C. B.* by conſent of the plaintiff in *error*, a *writ of error* was brought in parliament, where after ſolemn argument, and the opinion of all the judges taken thereon, who were of opinion, that the Ducheſs could not enter during the life of *Philip* (who was a monk) and the houſe thinking that to be a material objection, affirmed the judgments given in the courts below. *Vide Mod. Rep. vol.* 10. *p.* 113. 356. 406. *Strange, vol.* 1. *p.* 318.

Michaelmas, 8 *Geo.* *Smith* v. *Trigg*.

On an iſſue directed out of *Chancery*, for the opinion of this court, the caſe was, *H. H.* being *ſeized in fee* of the premiſes in queſtion, married *J.* the widow and relict of *J. T.* the leſſor of the plaintiff's great uncle. That after the marriage *H. H.* ſurrendered the premiſes to the uſe of his will, and afterwards deviſed the ſame to *J.* his wife, and her heirs, and died without iſſue by her; after whoſe death *J.* was admitted, and likewiſe ſurrendered to the uſe of her will, and deviſed the ſame to *J. D.* her daughter and heir by her firſt huſband *J. T.* and to her heirs for ever, and ſoon after died. That *J. D.* before admittance, made her will, and thereby gave the premiſes to the defendant, in the words following: *Item*, I give and bequeath all my *freehold*, and alſo all my *copyhold eſtate, which I intend to ſurrender to the uſe of this my will*, lying in *Edmonton*, in the county of *Middleſex*, unto my couſin *T. T.* (the defendant,) for and during the term of his natural life, with remainder over. That after making the will, and before any court-day, *J.* the deviſor died, having never ſurrendered to the uſe of her will; but the defendant, who is the deviſee, is notwithſtanding admitted under the deviſe.

Per curiam. Adjudged, That *J.* was in by deſcent, becauſe ſhe was heir at law to the teſtatrix; and that where two rights meet together in one perſon, (as they did in this caſe,) the one being by *deviſe*, and the other by *deſcent* as heir at law; the *deſcent* is the moſt noble means to come to an eſtate, and therefore the law adjudges that the beſt title ſhall ſtand.

So where a *feoffment* is made to ſeveral uſes, the reverſion in *fee* to the heirs of the *feoffor*, in ſuch caſe the heir ſhall take the reverſion by *deſcent*, becauſe it was part of the old *eſtate* of the *feoffor*; for ſo much of the uſe of the lands which he did not diſpoſe of by the *feoffment* ſtill remained in him as part of the old *eſtate*.

But in the caſe of a will, if a man deviſe any other *eſtate* to the heir at law than what he was to take by *deſcent*, (as for inſtance, if the teſtator deviſes a leſs *eſtate* to him, or any *eſtate* in *fee* to ariſe on a condition,) there it is otherwiſe. *Vide Mod. Rep. vol.* 8. *page* 23. *Strange, vol.* 1. *page* 487.

Eaſter, 11 *Geo.* *Shaw* v. *Weigh et al'*.

On an *ejectment* brought in the court of Great Seſſions in *Wales*, by the plaintiff againſt the defendant, and fourteen others, on two demiſes, on trial of the iſſue, the jury find one of the defendants *not guilty*, and as to the others, find a ſpecial verdict, to the following effect, *viz.*

That *T. R.* was *ſeiſed in fee* of the premiſes in queſtion on the 1ſt day of *Auguſt* 1675; that on the 2d day of *Auguſt*, in the ſame year, he made his will, and deviſed the ſaid premiſes to his wife *D.* for her life, and for her better ſupport, he alſo deviſed her 500 *l.* to be raiſed by the ſale of timber, or digging of coal; and after her deceaſe, he deviſed the premiſes to three truſtees, and the ſurvivor of them, in truſt for his two ſiſters, *A. L.* and *D. E.* equally between them, during their natural lives, without committing any manner of waſte; *provided* that whatever part of the 500 *l.* ſhould be paid his wife by either of his ſiſters, the ſame ſhould be re-imburſed to them, by getting of coal on the premiſes only; and if either of his ſiſters ſhould happen to die, leaving iſſue or iſſues of either of her or their bodies, lawfully begotten, then in truſt for ſuch iſſues of the mother's ſhare, or elſe in truſt for the ſurvivor or ſurvivors, and their reſpective iſſue or iſſues; and if it ſhould happen that both the ſiſters ſhould die without iſſue, as aforeſaid, and their iſſue or iſſues to die without iſſe or iſſues lawfully begotten, then in truſt for *J. S.* in *tail male*, remainder to *R. G.* (the leſſor of the plaintiff) and the heirs male of his body, with ſeveral remainders over: that the deviſor died, and his wife entered and enjoyed for life; and on her deceaſe, the two ſiſters entered, and were poſſeſſed: that *A.* one of the ſiſters, died without iſſue, and *D. E.* (the other ſiſter) ſurvived her, and on the 29th day of *April* 1683, levied a *fine*, and ſuffered a recovery, to the uſe of herſelf in *fee*: that *J. S.* died without iſſue in the lifetime of *D. E.* who is ſince dead without iſſue; on whoſe death *R. G.* entered, and made the leaſe to the plaintiff, who entered, and was poſſeſſed till ejected by the defendant, *&c.*

On this ſpecial verdict judgment was given in the court of *Grand Seſſions* for the defendant, and on *error* brought in this court, the *general errors* were aſſigned.

Per curiam. We are all of opinion that the judgment given below is erroneous, and ought to be reverſed.

We are all of opinion that the ſiſters took an *eſtate for life* only, with contingent remainders to their children; and this both from the words and intent of the will. As to the words: it is to them during their natural lives, without committing any manner of waſte, and theſe are the ſtrongeſt words that can be uſed in a will for that purpoſe. As to the intent: 1ſt. The precedent deviſe to his wife is in the ſame words, and it is plain and manifeſt he intended ſhe ſhould have it but *for life*. 2dly. The proviſo for raiſing the 500*l.* is a ſtrong argument that he meant they ſhould take only for life; for if it was in *tail* they might fell timber, and dig what coals they pleaſed; and it is obſervable, that he has given the two ſiſters leſs power in that reſpect than he gave his wife; for the wife could raiſe money by the ſale of timber or digging of coal, but the ſiſters are to raiſe it by the getting of coal only. 3dly. It is very obſervable, that the iſſue of the two ſiſters have not that power given them, which ſhews he knew the general power they would have, tenants *in tail*, did not need to have ſuch a clauſe added to them. 4thly. The clauſe by which he reſtrains his ſiſters from committing waſte is an evidence of his intent to give it *but for life*. 5thly. The words, *and if either of my ſiſters happen to die, leaving iſſue, then in truſt for ſuch iſſue*, do not make *iſſue* a word of limitation, *but only a ſhewing of the perſon* he intended ſhould take after his ſiſters. The word *iſſue* has not one determinate ſenſe, in which it is to be taken in all caſes, no not in a common law conveyance, and much leſs in a will, where the intent of the party is chiefly to be regarded. If a man makes a feoffment to *A.* and his iſſue male, this is not an *eſtate-tail* in the feoffee, for want of the word *heirs.* 1 *Roll. Abr.* 837. *r.* 1.

The words *ſurvivor or ſurvivors* of them, if they are of any uſe, muſt refer to the iſſue, and not to the two ſiſters, out of which there can be no ſurvivors; and ſince they may, conſiſtently with the other words of the will, be applied to the iſſue, we think they are too material to be rejected; and rejected they muſt be, unleſs they are ſo applied. The word *iſſue* may have a different conſtruction even in the ſame will. A deviſe to *A.* and his iſſue will make it a word of limitation; but if it be to *A.* for life, and after to his iſſue, and the iſſue or heirs of the body of ſuch iſſue, in the firſt part it will be a *pointing out of the perſon,* and in the ſecond a word of *limitation*; and that was the opinion of the court in the caſes of *Loddington* v. *Kime,* and *Backhouſe* v. *Wells,* where they did not intirely found their judgment on the word *only.*

So that on the whole we are of opinion, that the two ſiſters took only an *eſtate* for life; the conſequence of which is, that the fine and recovery, though they were a forfeiture of the *eſtate* for life, could not bar the remainder to the leſſor of the plaintiff, againſt whom judgment was given below; which we think ought to be reverſed, and judgment given for the plaintiff to recover damages, but not the poſſeſſion.

Afterwards this cauſe by *writ of error* was brought before the Houſe of Lords, where the judgment of this court was reverſed. *Vide Stra. vol.* 2. *p.* 798. *Forteſcue, page* 58. *Mod. Rep. vol.* 8. *p.* 253. 382.

Mich. 12 *Geo.* *The Duke of Somerſet* v. *France & al.*

See this caſe fully ſtated in page 329 of this work, under the head *Cuſtom.*

Eaſter, 9 *Geo.* 2. *Sir William Hatton, Bart.* v. *Haſſel.*

At *niſi prius* in *Middleſex,* in an action brought for a fine of 75 *l.* for an admiſſion of the defendant to a *copyhold,* it appeared that the premiſes were of the value of 50 *l. per annum,* and a year and half, being 75 *l.* was aſſeſſed: the defendant inſiſted on paying only 24 *l.* it appearing his rent was but 16 *l.* the reſt ariſing from improvements made under an old leaſe, by licence of the Lord. And Lord *Hardwicke* was of opinion, that the fine ſhould be ſet according to the preſent improved value, which is all the Lord has to look after; and if it was otherwiſe, this might open a door to defeat the Lord in a great meaſure. Therefore there was a verdict for the plaintiff for 75 *l.* *Vide Strange, vol.* 2. *p.* 1042.

Michaelmas, 9 *Geo.* 2. *Dubber* v. *Trollop.* Error.

A remainder was deviſed to the teſtator's ſon for life, and his heirs male, and ſeveral remainders over; and the heir of one of theſe remainder men being plaintiff in *ejectment* in the *C. B.* judgment was given on a ſpecial verdict for the defendant; and on a *writ of error* in this court, the only queſtion was, as below in the *C. B.* whether theſe words in the will do make an *eſtate-tail* in the teſtator's ſon, or only an *eſtate* for life? The opinion of the court below was, that it was an *eſtate-tail.*

After hearing council on both ſides, the court gave their opinion.

Lord *Hardw.* ſaid, he thought it a plain caſe; and cited the caſe of *Millar* v. *Seagrave, Mich.* 10 *Geo.* in *C. B.* where a deviſe was to Serjeant *Miller* and *Charrock* his wife for life, remainder to the next heir male of their bodies; and the court held, that if the word heir male be in, no addition of *firſt, next, right, &c.* makes any variation, but it will go in courſe of deſcent, unleſs there are other words, *viz.* words of *purchaſe,* and not of *limitation,* as in *Archer*'s caſe; and cited 8 *Roll. Abr.* 832. let. *k.* where land given even in a grant to a man, and his heir paſſes a *fee,* becauſe the word is a *collective term.*

Page and *Lee,* Juſtices, were of the ſame opinion clearly, and *Lee* mentioned a caſe cited by Lord *Hale* in 1 *Vent.* 230, where the words were next heir male, and determined to make an *eſtate tail*; and he obſerved, that this caſe is ſtronger than that, becauſe of the words which follow, *viz.* for want of heir male, which are reſtrictive. Therefore the judgment was affirmed. *Vide Caſes Temp. Lord Hardwicke, p.* 160.

Hilary, 10 *Geo.* 2. *Moor* v. *The Mayor and Jurats of Haſtings.*

On a *mandamus* to admit the plaintiff to his freedom, on great debate in court, the *poſtea* was ordered to be delivered to the plaintiff; the proof being well enough, for a reaſonable fine does not *from the force of the term* import an uncertain fine; and if it may be applied either way, it is well enough. *Vide Strange, vol.* 2. *p.* 1070.

Michaelmas, 17 *Geo.* 2. *Everall* v. *Smalley.*

In *ejectment,* a caſe was made for the opinion of the court, *viz.* that by the cuſtom of the manor of *Collingham,* a *tenant in tail* of a *copyhold* might ſurrender the ſame and *bar* his iſſue, without ſuffering a recovery; and that by the ſame cuſtom a recovery might be ſuffered in the manor court, and have the ſame effect. The leſſor of the plaintiff in this caſe claimed under a bare ſurrender; and it was objected, that the cuſtom to *bar* by ſurrender could only be ſupported *from neceſſity,* where there was no other way; whereas here it could be done by recovery, and therefore no neceſſity appeared.

Per curiam. There is no caſe to warrant any ſuch diſtinction, and there is nothing unreaſonable in allowing two ways of alienating *eſtates*; the cuſtoms are both of equal antiquity, and we cannot prefer one to the other. The ſurrender is the moſt natural way, and the cheapeſt. The *poſtea* muſt be delivered to the plaintiff. *Vide Strange, vol.* 2. *p.* 1197.

Hilary, 30 *Geo.* 2. *The Earl of Bath* v. *Abney, Spinſter.*

On a caſe out of *Chancery* for the opinion of this court on the two following queſtions, *viz.*

1ſt, Whether the ſurviving executor of the ſurviving truſtee of a term of 99 *years,* ought to come in to be admitted *tenant* of certain *copyhold* premiſes?

2dly, In caſe he ought, whether the Lady of the *manor* will be entitled to any *fine* on ſuch admittance?

After hearing council on both ſides, and taking time maturely to conſider this matter, the court gave their opinion.

Per curiam. We are of opinion, that the ſurviving executor of a ſurviving truſtee of a term of 99 *years,* ought to come in to be admitted *tenant* of the *copyhold* premiſes, and that the Lady of the *manor* will be entitled to a *fine* on ſuch admittance. *Vide Bur. vol.* 1. *p.* 206.

Eaſter, 33 *Geo.* 2. *Martin on the demiſe of Henry Weſton* v. *Mowlin.*

This was a ſpecial caſe from *Dorſetſhire aſſizes,* on an *ejectment* brought for the recovery of a cloſe of paſture of *twelve acres,* called *New Cloſe,* part of the *manor* of *Wyke Regis* and *Ellwell,* in the county of *Dorſet.* On *not guilty* pleaded, and iſſue joined thereon, the cauſe was tried; and a verdict was found for the plaintiff, *ſubject* to the opinion of the court on a caſe ſtated, which was by the conſent of the plaintiff's council reduced to two queſtions, *viz.*

1ſt. Whether any *eſtate-tail* was created by the will of old *Hen. Weſton* the grandfather to *Hen. Weſton* the ſon, and *Ann* his wife, and the heirs of their two bodies?

2dly. If any ſuch *eſtate-tail* was thereby created, then whether it was barred by the *ſurrender* of *Hen. Weſton* the ſon without his wife *Ann*?

After hearing council on both ſides, the court gave judgment.

Lord *Mansfield.* As to the conſtruction of the will of old *Hen. Weſton,* if it appeared that the teſtator really meant and intended to deviſe this cloſe *as land*, it would then be a deviſe of *land*, the mortgage being forfeited by law, and the *eſtate* in the land become abſolute; but if it appears that the teſtator meant and intended it as a bequeſt of money only, then it would be conſidered in a court of *equity* as a ſpecific bequeſt of money, and a court of *equity* would not direct the money to be laid out in land without expreſs words in the will to ground ſuch direction on.

As to the *eſtate*'s being *barred* in caſe it had paſſed by the deviſe, there is no doubt but it would have been well *barred* by this *ſurrender*.

By the cuſtom of the *manor*, intailed *copyhold eſtates* are *barrable* by ſurrender in the lord's court, and *Hen. Weſton* the ſon here actually made ſuch a *ſurrender*, though he would not *bar* it in *one* form he might do it in *another*. Wherever the tenant in *tail* of a *freehold eſtate* could by any means *bar* the *eſtate*, there this tenant in *tail* of this *copyhold* might do it by *ſurrender*, and his *ſurrender* ſhall operate as a good *recovery*, conſequently on this point the leſſor of the plaintiff can have no title.

Per curiam. Let the *poſtea* be delivered to the defendant, and judgment entered for him as in the caſe of a *nonſuit*. *Vide Bur. vol.* 2. *page* 969.

Hilary, 2 *Geo.* 3. *Stephenſon, Gent.* v. *Hill.*

Adjudged, That a *lord* cannot *preſcribe* for his *cuſtomary freeholders*, though he may *preſcribe* for his tenants and farmers of *copyholds* holden at *will*. *Vide Bur. vol.* 3. *page* 1275.

Trinity, 4 *Geo.* 3. *Baddeley* v. *Leppingwell.*

On an action of *treſpaſs* for breaking *&c.* the plaintiff's cloſe, called the *Hop-ground*, the defendant pleaded *not guilty*; *and alſo* a juſtification of his entry under a grant in *fee* from *T. A.* Eſq; lord of the *manor* of *Hedingham*-borough, *com. Eſſex*, made to him on the 10th *Dec.* 1761, at a *court-baron*, *to hold* to him and his heirs, by copy of court-roll. The plaintiff in her *replication* admitted, that *T. A.* Eſq; was lord of the *manor* aforeſaid, and was ſeiſed in *fee* of the cloſe aforeſaid, but alledged, that at a court held for the ſaid *manor* on the 3d *July*, 1754, the lord made a prior grant of the ſame premiſes to the plaintiff and one *E. B.* her ſiſter, *to hold* in *coparcenary*; and that *E. B.* died, and thereon at a ſubſequent court the lord granted her moiety to the plaintiff in *fee*, and ſhe was admitted to the ſame on the 25th *June* 1765, and ſo became ſolely ſeiſed. The defendant in his *rejoinder* alledged, that the lord had made a former grant to *T. J.* in *fee*, who died, and the premiſes thereon deſcended to *T. J.* his nephew and heir, who conveyed the ſame to the defendant, and *traverſes* the *grant* alledged in the *replication* to have been made by *T. A.* Eſq; to the plaintiff and her ſiſter *E. B.* On the *traverſe* iſſue was joined, and the cauſe was tried at *Eſſex aſſizes*, and a ſpecial caſe was ſtated for the opinion of the court, which was afterwards reduced to the two following queſtions, *viz.*

1ſt. Whether *S. B.* took an *eſtate* in *fee*, or for *life only*, under the will of *T. J?*

2dly. If ſhe took an *eſtate* for *life only*, then whether the defendant could take advantage thereof on the iſſue joined on theſe pleadings?

After hearing the arguments of council on both ſides, and taking time to conſider the caſe, the court gave judgment thereon.

Wilmot, Juſtice. On the firſt queſtion, which is the material point, we are clearly of opinion, "That "*S. B.* took an *eſtate* of *inheritance*."

As to the ſecond queſtion, it is extremely clear, it depends on the nature of *copyhold eſtates*.

Formerly *copyhold eſtates* were mere tenancies at *will*; a *middle eſtate* between *freeholders* and *villains*: at length they acquired *ſtability* by *cuſtom*. The lord is not intitled to his *fine* till *admittance*, but the *admittance* is merely form. On a *ſurrender* of a *copyhold*, the *eſtate* remains in the *ſurrenderer* till *admittance*. The lord, by the *cuſtom*, has only a *cuſtomary* power to make an *admittance*, according to the form and effect of the *ſurrender*.

The preſent *admittance* was on a *deſcent*: for the plaintiff and her *ſiſter E. B.* held in *coparcenary*. The defendant could *traverſe* nothing here, but the *grant* which the plaintiff had alledged in her *replication*; and if ſhe was not heir, the *admitting* of her as ſuch is *void*.

If *Sarah* took a *fee* under the will, then the *admiſſion* of the plaintiff in *fee* is good; but if ſhe took only an *eſtate* for *life* under the will, then the *grant* to the plaintiff was void, and the *grant* to the defendant *L.* would be *ſubſtantiated*, he claiming under the heir at law of the teſtator; and in that caſe the defendant would not be a *wrong-doer*. If it had reſted on that, I ſhould think that the *validity* and *operation* of the *grant* would have come in queſtion on this iſſue.

On the other hand, if ſhe took an *eſtate of inheritance*, (as we hold that ſhe did) this totally varies the caſe, for then the plaintiff had a good title under her deviſe, and the ſubſequent deſcent, and the defendant could have none under the heir at law, and poſſeſſion alone would be ſufficient for her to maintain this action againſt the defendant, though it could not have been ſo in caſe the *real title* had been in the defendant.

Per curiam. Let the *poſtea* be delivered to the plaintiff. *Vide Bur. vol.* 3. *p.* 1533.

Evidence.

Hilary, 2 *W. & M.* *The King and Queen* v. *Fezat.*

Pending a ſuit in the *ſpiritual court*, the woman exhibited an indictment in this court againſt all the *witneſſes* who might prove the marriage, and it was for a conſpiracy by force and arms to carry her away againſt her will, *&c.*

The court would not ſtay the proceedings on the indictment, but it was tried at the *bar*, and the woman being produced as a *witneſs*, it was objected againſt her, that ſhe ought not to be allowed to give her *evidence*, becauſe there was a marriage proved in the *ſpiritual court*; and where the conſequence of the *evidence* will redound to the benefit of the *witneſs*, he is always rejected.

Per curiam. *Brown* was executed for ſtealing Mrs. *R.* and ſhe was allowed to be a *witneſs* in that caſe.

And in *Fulwood*'s caſe on the ſtat. of *H.* 7. the woman was allowed to be a *witneſs*; and ſo ſhe was in this caſe. *Vide Mod. Rep. vol.* 4. *page* 8.

Anonymous. Before Holt, Chief Juſtice. At Niſi Prius at Hertford, 1690.

In *debt* for rent, on *nil debet* pleaded, the ſtatute of limitations may be given in *evidence*, for the ſtatute has made it *no debt* at the time of the plea pleaded, the words of which are in the preſent tenſe; but in *caſe* on *non aſſumpſit*, the ſtatute of limitations cannot be given in *evidence*, for it ſpeaks of a time paſt, and relates to the time of making the promiſe. *Vide Salk. vol.* 1. *p.* 278.

Michaelmas, 3 *W. & M.* *The King* v. *The Inhabitants of Hornſey.*

Holt, Chief Juſtice. On a preſentment for not repairing a highway, on *not guilty* pleaded, you cannot give any thing in *evidence*, but only that the way is repaired. If they plead, they ought not to repair, they muſt ſet forth who ought. You cannot give in *evidence* no highway, but may traverſe it.

Eyres, Juſtice, was of a contrary opinion. *Dolbin*, Juſtice. They may give in *evidence*, that it is no highway, but not that they ought not to repair. *Vide Mod. Rep. vol.* 12. *p.* 13.

Michaelmas, 3 W. & M. The King v. *Lord Preſton.*

Lord *Preſton* was committed by the court of Quarter-Seſſions for refuſing to be ſworn to give *evidence* to the grand jury on an indictment of *high-treaſon*. He was brought by *habeas corpus* into this court, and *Holt*, Chief Juſtice, ſaid, it was a great contempt, and that had he been there he would have fined him, and committed him till he paid the fine; but being otherwiſe, he was bailed. *Vide Salk. vol.* 1. *p.* 278.

Eaſter, 4 W. & M. On a Trial on the Cuſtom *of the Manor of Bray.*

On *evidence*, the court ſaid, that a copy of a court roll of a manor is good *evidence*; for where ever the original is *evidence*, there a copy is. The copy of a probate is good *evidence*. Sir *F. L.* was refuſed to be a witneſs of a cuſtom, becauſe he claimed by it; but any tenant of a manor, that claims not by the cuſtoms is a good witneſs. *Vide Mod. Rep. vol.* 12. *p.* 24.

Michaelmas, 4 W. & M. Howard v. *Tremaine or Tremain.*

On a bill exhibited in Chancery to *perpetuate teſtimony*, &c. the defendant (who was heir at law) ſtood in *contempt*, and would not anſwer, and thereon the plaintiff had a commiſſion, and examined witneſſes to the matter of his bill *de bene eſſe*, and the defendant joined in the commiſſion, and croſs-examined ſome of the witneſſes produced for the plaintiff, and before the anſwer came in, the witneſſes died: and on a trial in *ejectment*, in which the plaintiff made title under this will, the queſtion was, whether theſe depoſitions could be given in *evidence?* And a verdict was taken for the plaintiff, but the *poſtea* ſtayed till the opinion of the court was had on this point: and it was not queſtioned, but if the defendant had anſwered, and theſe depoſitions had been taken after, they had been good *evidence* againſt the ſame parties, and thoſe that claim under them.

Eyre, Juſtice. It might be very inconvenient if this ſhould not be allowed as *evidence*: how otherwiſe can a deviſee examine witneſſes *to perpetuate teſtimony?* For the heir at law will not anſwer to the plaintiff's bill; and on the other ſide, he will not call in queſtion the title of the deviſee, as long as he has witneſſes alive to prove the will; but as ſoon as they are dead, then he will commence his ſuit. *Shower*, 463. *Vide Salk. vol.* 1. *p.* 279. *Mod. Rep. vol.* 4. *p.* 146.

Eaſter, 5 W. & M. Brook v. *Smith. At Niſi Prius, Middleſex.*

On an action of *aſſumpſit*, *evidence* was given, that the debt was attached by the cuſtom of *London* before the action brought, and condemnation had there before plea pleaded, and it was *urged* that this ſhould relate to defeat the action.

Per curiam. It has been ruled, that if an attachment and condemnation be before the writ purchaſed, it may be given in *evidence* on the *general iſſue*, becauſe that is an alteration of the property before the action brought; but if the attachment only be before the writ purchaſed, it ought to be pleaded in abatement of the writ; and if the condemnation be after the action commenced and before the plea pleaded, then it may be pleaded in *bar*, but ſhall not be given in *evidence* on the plea of *non aſſumpſit*, for that the property is not altered until condemnation; and in this caſe the plaintiff had a verdict. *Vide Salk. vol.* 1. *p.* 280.

Eaſter, 5 W. & M. Anonymous.

Adjudged, That where ſeveral defendants are joined in an information, and ſome of them have not pleaded, the Attorney General may enter a *noli proſ.* as to them, and they are *good witneſſes*. *Vide Mod. Rep. vol.* 12. *p.* 40.

Michaelmas, 5 W. & M. Anonymous.

In an action of *debt* on a bond brought by *J. S.* ſheriff of the county of ——. the defendant pleaded that the ſaid bond was acknowledged by *J. N.* to the plaintiff, for the office of under-ſheriff, and that he was ſurety in the ſaid bond; and then he pleaded *ſtat.* 5 & 6 *Ed.* 6. *c.* 16. againſt buying and ſelling offices, &c. and on the trial *A.* was produced as a *witneſs*, to prove on what account, or on what occaſion this bond was acknowledged, &c.

Holt, Chief Juſtice, refuſed to admit *A.* to be a *witneſs*, becauſe it appeared, that he was privately intruſted by both parties, to make the bargain, and keep it ſecret. And alſo ſaid, a truſtee ſhall not be a witneſs, in order to betray the truſt. *Vide Raym. vol.* 1. *p.* 733.

Eaſter, 6 W. & M. Smartle on the Demiſe of Newport v. *Williams.*

On a trial at *bar* in this cauſe, a deed of bargain and ſale acknowledged by the bargainee and inrolled, by which a term for years was aſſigned, was given in *evidence* without any proof made of the bargainor's ſealing and delivery thereof; and after debate it was allowed: for the acknowledgement of the party in a court of record, or before a *maſter extraordinary* in the country (as this was) is *good evidence* of its being ſealed and delivered; and ſuch an acknowledgment *eſtops* a man from pleading *it is not his deed*. Alſo inrollments of deeds on the ſtatute are admitted every day in *evidence* without witneſſes of the ſealing and delivery; and it is the acknowledgment which gives it credit, and not its operation or contents. Alſo they held a ſworn copy of a deed inrolled *good evidence*. *Vide Salk. vol.* 1. *p.* 281.

Eaſter, 6 W. & M. Anonymous.

A ſhop-book is not *evidence* for the tradeſman, but is good *evidence* againſt him, or for a ſtranger. The ſame law holds of a ſcrivener's book, for money paid by him, or received to the uſe of aſtranger, or the book of a burſar of a college. *Vide Raym. vol.* 1. *p.* 745.

Lent Aſſizes at Cambridge, 6 W. 3. Anonymous.

The diſpute was between the Lord of the Manor and the deviſee of a *copyhold* of the ſame manor. It was ruled by *Holt*, Chief Juſtice, that the recital of the will in the copy of the admittance was good *evidence* of the *deviſe* againſt the Lord or any other ſtranger. But if the ſuit had been between the heir of the *copyholder* and the deviſee, the will itſelf ought to have been produced.

2dly, He ruled that the foul draught of admittance made by the ſteward was good *evidence*. *Vide Raym. vol.* 1. 735.

Michaelmas, 6 W. & M. The Earl of Bath v. *Batherſea.*

It was agreed, that the depoſitions which were read againſt my Lord *Bath* in the othe rcauſe, are no *evidence* in this, becauſe that trial is not between the ſame parties; and depoſitions are never *evidence*, but where they are mutual; and this defendant does not claim under any one that was party to the former ſuit.

Per curiam. They may be read, becauſe the defendant ſhelters himſelf under the other's title, and the title of the land is not in queſtion, but to whom the rent ſhall be paid. If the defendant gives the plaintiffs anſwer in *Chancery* in *evidence*, he may inſiſt only to read ſuch part as he will, for it is like the examination of *witneſſes*; but then the other ſide may inſiſt to have the whole read after. Therefore a verdict was given for the plaintiff. *Vide Mod. Rep. vol.* 5. *p.* 9.

Hilary, 7 W. 3. The King v. *Paine.*

On an *information* for a *libel* againſt the government, on *not guilty* pleaded, on trial the *Attorney-General* offered in *evidence* depoſitions taken before a *juſtice of* *peace* relating to the *fact*, the deponent being ſince dead.

Per curiam, on advice with the *juſtices* of the *C. B.* In caſes of *felony* ſuch *depoſitions* before a juſtice, if the deponent die, may be uſed in *evidence* by *ſtat.* 1 & 2 *Ph.* & *Mar. c.* 13. But this cannot be extended farther than the particular caſe of *felony*, and therefore not to this caſe. *Vide Salk. vol.* 1. *p.* 281. *Raym. vol.* 1. *p.* 729. *Mod. Rep. vol.* 5. *p.* 163.

Eaſter, 7 *W.* 3. *The King* v. *Croſby.*

On a trial at *bar* for *high-treaſon*, the priſoner, Mr. *Croſby*, took exception to *Aaron Smith's evidence*, having ſtood in the pillory on a judgment on an information againſt him for a libel. Mr. Solicitor General inſiſted, that the infamy flowed from the crime and not from the puniſhment, and that Mr. *Smith*'s crime was not infamous, nor did it deſerve ſuch puniſhment.

Holt, Chief Juſtice, without determining this point, held, that *Aaron Smith* was reſtored by the general pardon of 2 *W.* & *M.* which operated by way of reſtoration, and made him a new creature. 3 *Lev.* 427. *Vide* the caſe of *Cheſter* v. *Hawkins*, that the diſability flows from the infamous judgment, and not the nature of the crime; for if a man be convicted for a cheat, and adjudged to ſtand in the pillory, he cannot be a witneſs; otherwiſe if he be not adjudged to ſtand in the pillory: alſo they held the infamy was by the judgment to ſtand in the pillory, and not from the actually ſtanding there, and that he was diſabled to be a witneſs, though he never ſtood.

Note. In theſe caſes the diſability is a conſequence, and the pardon, which makes him *de cætero* a new creature, diſcharge all conſequences, dependencies, &c. And therefore in the caſe of the *King* v. *Weeden Ford*, *Michaelmas* 12 *W.* 3. in this court, the queſtion being where the King could pardon the diſability, and where not?

Holt, Chief Juſtice, took this difference; where the diſability is only the conſequence of the judgment, the King may pardon it; but where the diſability is part of the judgment itſelf, the King's pardon will not take it away; therefore if a man be convicted of perjury on the ſtatute, the King's pardon will not reſtore; for it is not a conſequence, but part of the judgment, *viz. that in future he be not received as a witneſs. Vide Co. Ent.* 368. But a pardon by act of parliament will reſtore him in that caſe. *Quære* of a perjury at *common law*, and if the law be the ſame; for there the diſability is only a conſequence, and not part of the judgment; otherwiſe if a jury be convict in an attaint. *Raſt.* 86. *a. Vide Salk. vol.* 2. *p.* 690. *Raym. vol.* 1. *p.* 39. *Mod. Rep. vol.* 5. *p.* 15. *Ibid. vol.* 12. *p.* 72.

Michaelmas, 7 *W.* 3. *Stainer* v. *The Burgeſſes of Droitwich.*

On an iſſue directed out of *Chancery*, wherein the queſtion was, whether by the cuſtom of *Droitwich* ſalt-pits could be ſunk in any part of the town, or in a certain place only? On the trial at *bar Cambden's Britannia* was offered in *evidence*, but refuſed; for the court held, that a general hiſtory might be given in *evidence* to prove a matter relating to the kingdom in general, becauſe the nature of the thing requires it; but not to prove a particular right or cuſtom: ſo in the caſe of St. *Catharine*'s hoſpital, *Hale*, Chief, Juſtice, allowed a chronicle to be *evidence* of a particular point of hiſtory in *Edw.* the 3d.'s time: ſo a year book may be *evidence* to prove the courſe of the court; yet in this caſe it was admitted, that *heralds books* are good *evidence* as to pedigrees, and *pariſh-regiſters* as to births and marriages, from the nature of the thing; and it was ſaid that in the *Exchequer* the queſtion being, whether the abbey *de Sentibus* was an inferior abbey or not? *Dugdale's Monaſticon Anglicanum* was refuſed for *evidence*, becauſe the original records might be had in the *Augmentation Office.*

N. B. In this cauſe was cited a caſe about *twelve years* before of one *Neale* v. *Fry*, where a deed was produced ſaid to be made 1 *Ph.* & *Mar.* wherein all the titles were given *Philip*, which he uſed after the ſurrender of *Charles* 5. Now, tho' *Charles* had then ſurrendered, yet *Philip* did not take thoſe titles on him till that ſurrender had been received by the council of *Spain*, which was *ſix months* after; ſo that the deed muſt needs have been forged; and to prove the time of receiving that ſurrender, chronicles were produced and admitted as *evidence. Vide Salk. vol.* 1. *p.* 282. *Mod. Rep. vol.* 12. *p.* 85.

Michaelmas, 7 *W.* 3. *The King* v. *Davis and Carter.*

The defendants *Davis* and *Carter* being convicted for forging a bill under the Seal of the bank of *England*, and having ſtood in the pillory for it, were now brought to the *King's Bench*, and prayed, that they might be turned over to the *Marſhalſea*, becauſe the ſheriff of *London* oppreſſed them in *Newgate*; where they were detained till they paid the fine, &c. and there their own affidavits were offered to prove the oppreſſion.

It was objected, that a perſon who has had an infamous judgment, and has ſtood in the pillory for an offence which is contrary to the faith, credit, and truſt of mankind, as a forger cannot be a *witneſs* in any cauſe; to which it was anſwered, that one *Cunning*, who was convicted of a libel, and ſtood in the pillory, was allowed to be a *witneſs* before the *court of delegates*, and ſo *Aaron Smith* was an *evidence* in *Croſby*'s caſe.

Holt, Chief Juſtice. *Aaron Smith* was pardoned, and we gave no opinion to this point: I do not underſtand the nature of his offence: it was only for giving *Stephen College* notes how to defend himſelf on his trial.

In the principal caſe the affidavits were not read, but the laſt day of term, the court ordered the ſheriffs to return the money which they had taken from them; and remanded them to *Newgate. Vide Mod. Rep. vol.* 5. *p.* 74.

Hilary, 8 *W.* 3. *Hoe* v. *Nelthrope or Nathrop.*

Reſolved by the court, that the immediate copy of an original is *good evidence*, where the original itſelf is *evidence*. Therefore the copy of a church regiſter, the copies of town books, of proceedings in courts *baron*, and the copy of a probate of a will, which concerns perſonal goods, is *good evidence*, but the copy of a probate of a teſtament, as to the *real* eſtate, is not *evidence*, becauſe the probate itſelf is not *evidence* in ſuch caſe. *Vide Raym. vol.* 1. *p.* 154. *Salk. vol.* 3. *p.* 154.

Hilary, 8 *W.* 3. *Anonymous.*

Ruled *per Holt*, Chief Juſtice, that on *non aſſumpſit* pleaded, the defendant cannot give the *ſtatute of limitations* in *evidence*, becauſe the iſſue is joined in the *præter tenſe*, *viz.* on what was done, and the *evidence* only proves the effect thereof to be now avoided; but on *nil debet*, the *ſtatute* may be given in *evidence*, for it proves, there is nothing now owing according to that iſſue. *Vide Salk. vol.* 3. *p.* 154.

Hilary, 8 *W.* 3. *Lynch* v. *Clerke.*

Holt, Chief Juſtice. The ſubſtance of a deed cannot be proved, but by the deed itſelf, unleſs it is burnt, or in the poſſeſſion of the plaintiff himſelf; and if ſo, then this matter, as it happens, muſt be ſworn, and that the deed was executed: and in this caſe he ſaid, that a copy of a *fine or recovery*, is *good evidence*, ſo as it be ſworn to be a true copy and examined; ſo likewiſe an *old deed* is *good evidence*, without any *witneſs* to ſwear that it was executed: that where-ever an original is of a public nature, and would be *evidence*, if produced, an immediate ſworn copy thereof will be *evidence*, as the copy of a *bargain and ſale*, or *of a deed inrolled*, *of a church regiſter*, &c. but where an original is of a private nature, a copy is not *evidence*, unleſs the original is loſt or burnt: he likewiſe ſaid, that if the plaintiff will read the defendant's anſwer in *Chancery* againſt him in *evidence*, the defendant may likewiſe take advantage thereof, for all is *evidence*, or none. *Vide Salk. vol.* 3. *p.* 154.

Eaſter, 8 *W.* 3. *Anonymous.*

In an action on the *caſe* for money had and received to the plaintiff's uſe, on the *evidence* it appeared, that the plaintiff's wife was executrix, and that the money was paid to the defendant as due to her; and the plaintiff was *nonſuited*, becauſe the action ought to have been brought by huſband and wife as executrix, for it being paid without any authority from the huſband, it remains as a debt due to the executrix; and if the huſband dies, the wife may bring an action for it; but if the money had been received by authority from the huſband, then it had been as his receipt, and as his money, and the action might well have been brought in his name, and the money would have been *aſſets* in her hands. *Vide Salk. vol.* 1. *p.* 202.

Eaſter, 8 *W.* 3. *Kingſtone* v. *Grey.*

A creditor was admitted by *Holt*, Chief Juſtice, to prove his bond, and the debt due on it, on *he has fully adminiſtered* being pleaded, he having before received it of the adminiſtrator, and delivered up the bond. *Vide Raym. vol.* 1. *p.* 745.

Eaſter, 8 *W.* 3. *Haines Barley's Caſe.*

In a ſuit in *ejectment* for lands in *Eſſex*, it happening that one *Francis Douglas* had at that time an eſtate for life in theſe lands as her jointure, but the jointure-deed could not be produced: but they proved that in 1661 ſhe levied a fine *ſur conceſſit*, and did demiſe the ſame to one *Woolley* for *ninety-nine* years, if ſhe lived ſo long, for ſecuring the payment of 400*l.* which mortgage was afterwards aſſigned to one *Monteatz*, and both of them joined in a leaſe to *W. Wade* for *ſixty* years, if the ſaid *Francis* lived ſo long, under the yearly rent of 200*l.* this was admitted to be a ſufficient proof of the jointure. And to the like purpoſe depoſitions in *Chancery* were produced, which were offered to be read, the bill and anſwer being taken off the file and loſt; and the council offered to give *evidence* that it was once filed, which was by the *ſix clerks* book; and produced an inrollment of the decree, which mentioned both bill and anſwer. The court gave their opinion, that the *jointure deed* being loſt, they might ſupply the proof by memorials thereof, ſince it was impoſſible to ſhew the deed itſelf. *Vide Mod. Rep. vol.* 5. *p.* 211.

Michaelmas, 8 *W.* 3. *Breedon* v. *Gill.*

See this caſe fully ſtated in page 77 of this work, under the head *Appeal.*

Michaelmas, 8 *W.* 3. *Pyke* v. *Crouch.*

It was reſolved in this court on *evidence* in a trial at *bar.* 1ſt, That a legatee cannot be a *witneſs* to prove the will, becauſe the legacy is deviſed to him, unleſs he has releaſed the legacy. But after ſuch releaſe, he will be a good *evidence* to prove the will. But if the council on the other ſide has permitted ſuch legatee to be ſworn, and to be examined as a *witneſs*, without having taken exception againſt him, they cannot aftewards except againſt his *evidence* becauſe he was a legatee.

2dly, If the duplicate of a will be written by the direction of a teſtator, and ſent by him to a ſtranger, to keep it ſafely, and the ſtranger ſends back a letter to the teſtator, in which he makes mention, that he has received the ſaid will; after the death of the ſtranger, ſuch letter may be read as circumſtantial *evidence*, to prove that ſuch duplicate of the will was ſent by the teſtator to the ſaid ſtranger.

3dly, If a man produced as a *witneſs* for the plaintiff in *ejectment*, confeſſes that there was ſuch a will made as the defendant's council pretends, and under which the defendant makes title to the lands in queſtion: yet that is not ſufficient proof, to prove that there was ſuch a will; but the will itſelf ought to be produced, or other legal proof made of it.

4thly, If ſeveral *eſtates* in *remainder* be limited in a deed, and one of the remainder-men obtains a verdict for him in an action brought againſt him for the ſame land, that verdict may be given in *evidence* for the *ſubſequent* remainder-man, in an action brought againſt him for the ſame land, though he does not claim any *eſtate* under the *firſt* remainder-man; becauſe they all claim under the ſame deed.

5thly, If a man ſworn a *witneſs* at a former trial, who gave *evidence*, and ſince died; the matter that he depoſed at the former trial, may be given in *evidence* at another trial, by any perſon who heard him ſwear it at the former trial. *Vide Raym. vol.* 1. *p.* 730.

Hilary, 9 *W.* 3. *The Earl of Suſſex* v. *Temple*, &c.

In *evidence* brought on a trial at *bar* in *ejectment*, the caſe was thus, Sir *A. T.* ſeized in *fee* of the lands in queſtion, levied a fine, to the uſe of himſelf for life, remainder to his wife for life, remainder to Sir *P. T.* and *Ann*, ſecond daughter of Sir *A. T.* and wife to Sir *P. T.* for their lives, and the life of the ſurvivor of them, remainder, to the *firſt*, *ſecond*, *third*, &c. ſons in *tail*, remainder to the iſſue female of their bodies, and the heirs of their bodies begotten, remainder to *E. T. third* daughter to Sir *A. T.* in *tail*, &c. Sir *P. T.* had iſſue by *Ann*, two daughters, *Ann* the eldeſt, and *Martha*. *Martha* died without iſſue, afterwards *Ann* died, and the Earl of *Suſſex* as grandſon and heir of the body of *Elizabeth*, by *T.* Lord *Dacres*, claimed the moiety of *M.* by virtue of the remainder limited to *Elizabeth* in *tail*, and the defendant *T.* claimed as heir at law to *Ann*, who in her life-time ſuppreſſed the deed.

1ſt, To prove the deed the plaintiff gave in *evidence* an anſwer in *Chancery*, in which *Ann* acknowledged the deed, and referred to a *ſpecial verdict* for greater certainty, in which the deed was found *in theſe words.* And this was admitted as ſufficient *evidence*, without ſcruple, to read the deed againſt *T.* but the other defendants, who were purchaſers under *Ann*, objected, that they had been in poſſeſſion 20 *years*, and therefore the credit of that poſſeſſion was ſufficient for them *prima facie*, ſo as they ſhall not be compelled to ſhew their title; and therefore the anſwer of *Ann* in *Chancery* ſhall not be read againſt them, till the plaintiff proves, that they derive their title under *Ann*. But the plaintiff proving conſtant reputation, that theſe lands belonged to *Ann*; the court permitted the anſwer of *Ann* to be read againſt them alſo, unleſs they ſhewed another title from a ſtranger. *Vide Raym. vol.* 1. *p.* 310.

Hilary, 9 *W.* 3. *Thompſon* v. *Leach.*

In *ejectment* on a trial at *bar*, the jury find a ſpecial verdict, *viz.* that *Nicholas Leach* was ſeiſed in *fee* of the lands in queſtion, and on the 9th day of *November*, 14 *Car.* 2. made his will in writing, by which he deviſed the lands to *Simon Leach* for life, remainder to his *firſt*, *ſecond*, *third*, &c. ſons in *tail*, remainder to Sir *Simon Leach* (who is the now defendant) in *tail*, remainder to the righ theirs of *Simon Leach*; afterwards *Nicholas Leach* died, and *Simon Leach* entered, and was ſeiſed for life; and being ſo ſeiſed, by deed, bearing date the 20th day of *Auguſt*, 25 *Car.* 2. purporting a ſurrender, ſurrendered the eſtate to Sir *Simon Leach*; afterwards *Simon Leach* had iſſue *C. Leach*, the leſſor of the plaintiff, and died; the jury further find, that *Simon Leach*, at the time of the deed of ſurrender made to Sir *Simon Leach* was *non compos.*

Per cur. This deed of ſurrender made by *Simon Leach*, the inſane perſon, was abſolutely void. The caſes of infants and inſane perſons are parallel in all things, except that an inſane perſon cannot ſtultify himſelf ſo as to avoid his grant. Now, the ſurrender of an infant is adjudged void, 1 *Cro.* 502. *Lloyd* v. *Gregory*, which is a caſe in point, for there is the ſame reaſon why the ſurrender of an inſane perſon ſhould be void. If an infant grants a rent charge, the grantee diſtrains, the grantor may maintain *treſpaſs*. The ſame law in the preſent caſe of *Perk. ſect.* 21. which proves the grant to be void; for if it was only voidable, ſome act ought to be done to avoid it. And where it is ſaid in 5 *Co. Whelpdale's* caſe, that the deed of an infant, is not void, but voidable; the book only means, that the infant ſhall not plead *not his deed*, and give infancy in *evidence*, but ſhall plead his *infancy ſpecially*; becauſe the deed by all appearance has all the things neceſſary to a deed, and ſeems to be juſtly executed, but for ſome latent cauſe has no operation in law; which cauſe ought to be ſhewn, whereby it may appear to be ineffectual. In the ſame manner, if an infant makes a letter of attorney, it is void, but he cannot plead *not his deed*. So if an inſane perſon ſigns a letter of attorney to make a *livery* on a deed of feoffment, he cannot avoid it, no more than if he had made a feoffment in perſon, yet the feoffment is void. But the reaſon why the feoffments of *infants* and inſane perſons are voidable only, proceeds from the ſolemnity of livery of *ſeiſin* in the ſight of the country, which takes notice of the notorious alteration of the poſſeſſion. But *otherwiſe* of a deed, which may be delivered in a private manner. As to the objection to the writ of, *while he was non compos*, &c. which has the words *has demiſed*, we anſwer, that means only a feoffment, with livery to himſelf; for feoffments and fines were the ancient conveyances, and the only conveyances uſed in thoſe days. And for theſe reaſons we are all of opinion, that this ſurrender is void, and all ſtrangers may take advantage of it, and that the eſtate remained in *Simon Leach* notwithſtanding, and ſo the contingent remainder veſted in the leſſor of the plaintiff before the particular eſtate determined. *Vide Raym. vol.* 1. *page* 313.

Lent Aſſizes, 9 *W.* 3. *Hockley* v. *Lamb.*

It was ruled by *Holt*, C. J. at *Wincheſter*, that if *A. B. C. D.* and *E.* claim *common* in a place called —— *Dale*, excluſively of all other perſons, and the common of *A.* comes in diſpute, *B.* may be a *witneſs* to prove that *A.* has *right of common* there; becauſe in effect it charges himſelf, *viz.* he admits another to have *common* with himſelf. But if the preſcription be, that all the inhabitants of *Blackacre* ought to have *common* there, one of the inhabitants cannot be a *witneſs*, to prove that another of the ſaid inhabitants ought to have *common* there, becauſe in effect he would ſwear to give himſelf *right of common* there. *Vide Raym. vol.* 1. *p.* 731.

Eaſter, 9 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. Where a perſon is convicted of *perjury on the ſtatute*, and is afterwards pardoned, yet he cannot be a witneſs, for the puniſhment is part of the judgment appointed by the *ſtatute*; but it is otherwiſe if the conviction is at common law. *Vide Salk. vol.* 3. *p.* 155.

Michaelmas, 9 *W.* 3. *The King* v. *Sir Richard Raines, Judge of the Prerogative Court.*

On a motion to ſuperſede a *writ of mandamus* granted againſt the defendant, on a ſuggeſtion that one *J. G.* died inteſtate, commanding him to grant adminiſtration; the court directed a *ſuperſedeas*, and *Holt*, Chief Juſtice, ſaid, that ſuppoſing the court ſhould not *ſuperſede* the writ, yet it would not be of any advantage to the other party; for ſuppoſing Sir *Richard Raines* ſhould return that there was a will made, he might go and prove the will, and in their action on a falſe return, give the *probate* in *evidence*; which *probate* as long as it ſtands in force, ſhall conclude all others from ſaying the contrary. *Vide Mod. Rep. vol.* 12. *p.* 136.

Michaelmas, 9 *W.* 3. *Dr. Groenvelt* v. *Dr. Burrell, &c.*

Dr. *Groenvelt* brought an action of falſe impriſonment againſt the defendant, under a judgment given againſt the plaintiff by the college of phyſicians, and a fine impoſed by them, and commitment to priſon. See p. 213. And now the court was moved in behalf of the plaintiff, that they would make an order, that the regiſter of the college of phyſicians ſhould permit the plaintiff to have copies of the proceedings and judgment, to enable the plaintiff to reply to the plea of the defendants, who were cenſors of the college. But not allowed.

Per curiam. This court cannot oblige the college of phyſicians to permit the plaintiff to have any copy of their proceedings; for they act in a judicial manner by authority of an act of parliament, and therefore it ſhall be preſumed, that they have done right, and this record may be pleaded without a *profert in curia*, and therefore the defendants ſhall not be bound to give a copy, for it would be in effect to diſcover their *evidence*. *Vide Raym. vol.* 1. *p.* 252.

Eaſter, 10 *W.* 3. *Cox* v. *Copping.*

On an *ejectment* brought for a houſe by the impropriator againſt the churchwardens of the pariſh of *Aldgate*. The council for the plaintiff moved, that he might have a rule to ſee the pariſh books, on ſuggeſtion that they would make the title appear, and that they were common books belonging to all the pariſh; and that it did not differ from the caſes where a rule is granted, for the defendant to ſee court-rolls, and the books of a corporation. But denied.

Per curiam. Where the parſon claims a diſtinct intereſt from that of the pariſh, it is not reaſonable to compel the pariſh to ſhew their title, by ſhewing the books, which are kept only for their own uſe. But the title of the *copyholder* depends on the court rolls. So of corporation books, which differ from the preſent caſe. *Vide Raym. vol.* 1. *p.* 337.

Eaſter, 10 *W.* 3. *Anonymous.*

It was ruled by *Holt*, Chief Juſtice, at *Guildhall*, that in an action on a policy of aſſurance of a ſhip, if the plaintiff's witneſs ſwears that the ſhip was condemned by proceſs of law, it is good *evidence* to prove it; but if the defendant had offered that matter in *evidence* by his witneſſes, it would not have been ſufficient without producing the ſentence of condemnation. *Vide Raym. vol.* 1. *p.* 732.

Michaelmas, 10 *W.* 3. *Middleton* v. *Fowler & al.*

On an action on the *caſe* on the *cuſtom of the realm*, brought againſt the defendants as maſters of a ſtage-coach, the plaintiff ſet forth, that he took a place in the coach for ſuch a town, and that in the journey the defendants by their negligence loſt a trunk of the plaintiff's: on *not guilty* pleaded, on the *evidence* it appeared, that this trunk was delivered to the perſon that drove the coach, and he promiſed to take care of it, and that the trunk was loſt out of the coachman's poſſeſſion; and if the maſter was chargeable with this action, was now the queſtion.

Holt, Chief Juſtice, was of opinion, that this action did not lie againſt the maſter, and that a ſtage-coach was not within the cuſtom of the realm as a carrier is, unleſs ſuch as take a diſtinct price for carriage of goods as well as perſons, as waggons with coaches; and tho' money be given to the driver, yet that is a gratuity, and cannot bring the maſter within the cuſtom: for no maſter is chargeable with the acts of his ſervant, but when he acts in execution of the authority given by his maſter, and then the act of the ſervant is the act of the maſter; and therefore the plaintiff was *nonſuited*. *Vide Salk. vol.* 1. *p.* 282.

Michaelmas, 10 *W.* 3. *The King* v. *Whiting.*

On an information againſt the defendant for a *fraud*, on trial the fact appeared to be, that he had a promiſe of a note for 5 *l.* from his mother-in-law, and by ſome device got her hand to a note of 100 *l.*

Per Holt, Chief Juſtice. The mother cannot be a *witneſs*, being concerned in the conſequence of the ſuit, which is a means to diſcharge her of the 100 *l.* For though the verdict on this information cannot be given in *evidence* in an action on the note for the 100 *l.* yet we are ſure to hear of it to influence the jury; and he ſaid he could not diſtinguiſh this from the caſes of *perjury* or *forgery*, where the party, whoſe intereſt is defeated or prejudiced by the deed, *&c.* is *no evidence* to prove the *perjury* or *forgery*. *Vide Salk. vol.* 1. *page* 283. *Raym. vol.* 1. *p.* 396.

Michaelmas, 10 *W.* 3. *Anonymous.*

It was held by *Holt*, Chief Juſtice, in *this court*, that if a man deſtroys a thing that is deſigned to be *evidence* againſt himſelf, a ſmall matter will ſupply it. And therefore the defendant having torn his own note, ſigned by him, a copy thereof ſworn to was admitted to be good *evidence* to prove it. *Vide Raym. vol.* 1. *p.* 731.

Michaelmas, 10 *W.* 3. *Anonymous.*

At a trial at *bar*, an anſwer in *Chancery*, though not ſworn to, was given in *evidence*, becauſe it was proved to have been filed in the Six Clerk's Office. *Vide Mod. Rep. vol.* 12. *p.* 231.

Michaelmas, 10 *W.* 3. *Dupays* v. *Shepherd.*

In an action on the *caſe* on a wager concerning the day of the concluſion of the peace, to prove it to be the 10th day of *September*, the printed proclamation was produced; and it was objected that it ought not to be given in *evidence*, unleſs it had been examined by the roll in *Chancery*, or proved to have been under the Great Seal.

Holt, Chief Juſtice, held it good, notwithſtanding; and that ſuch things as theſe in print, as are of as public a nature, as a public act of parliament, and that even a private act of parliament in print, that concerns a whole country, as the act relating to *Bedford Levell*, may be given in *evidence* without comparing it with the record. *Vide Mod. Rep. vol.* 12. *p.* 215.

10 *W.* 3. *Kent* v. *Wright.*

On a trial held at *Hertford ſummer* aſſizes in *caſe* for ſtopping the plaintiff's lights, the defendant pleaded *not guilty*; and gave in *evidence*, that the corporation of *Hertford* were lords of the ſoil where *&c.* and preſcribed to ſet up ſtalls there, being near the market-place. And it was admitted by *Holt*, Chief Juſtice, to be given in *evidence* on the general iſſue, becauſe this is to claim property in the ſoil; but where the defendant or he, under whom he claims, claim only a particular benefit, as *common* or *eaſement*, as a way, and not the property in the ſoil; he ought to plead it *ſpecially*, and cannot give it in *evidence* on the *general iſſue*. *Vide Raym. vol.* 1. *p.* 732.

10 *W.* 3. *St. Legar* v. *Adams.*

At a trial in *ejectment* at the *ſummer aſſizes* for *Kent*, on *evidence* it appeared, that a will was made by *W. H.* in 1647, of the lands in queſtion, which will was loſt, but mention was made of it in the Calendar, of the regiſter of the *Spiritual Court*, and alſo in the ſeal book. A commiſſion iſſued in *April* 1648, to examine the executors on their oaths, *&c.* and that being returned, a probate was granted the 11th day of *May* 1648, which probate was produced in *evidence*.

Holt, Chief Juſtice, allowed it to be good proof of the will, but he reſerved it for his further conſideration. Afterwards the parties agreed.

Holt, Chief Juſtice, afterwards, as well in this court, as at *niſi prius* on other trials, declared that he held it to be good *evidence*, and that he continued of his former opinion, and that without doubt the regiſter's book is good *evidence* to prove a will. *Vide Raym. vol.* 1. *p.* 731.

11 *W.* 3. *Lake* v. *Billers and others.*

In an action of *treſpaſs* brought againſt the ſheriff for goods taken, on *not guilty* pleaded, he gave in *evidence*, that he levied them in execution by virtue of a *fieri facias*. The plaintiff made title to the goods by a prior execution, but fraudulent, and by a bill of ſale made of them to him by the officer, *viz.* the ſheriff, a predeceſſor to the defendant. And on this trial before *Holt*, Chief Juſtice, at *Hertford*, it was held by him, after argument of the council on both ſides, that the defendant, though ſheriff, ought to give in *evidence* a copy of the judgment. But it would have been otherwiſe if the *treſpaſs* had been brought by the perſon againſt whom the *fieri facias* iſſued. *Vide Raym. vol.* 1. *p.* 733.

Lent Aſſizes at Eaſt Grinſtead, 11 *W.* 3. *Goring* v. *Evelin.*

It was held by *Holt*, Chief Juſtice, that if an anſwer to interrogatories in Chancery be given in *evidence* at a trial, they ought to be proved by the examiner himſelf, to have been taken the ſame day that they are dated. *Vide Raym. vol.* 1. *p.* 734.

Michaelmas, 11 *W.* 3. *The King* v. *The Warden of the Fleet.*

In this caſe a *witneſs* who had really been a priſoner and voluntarily ſuffered to eſcape, was produced to prove the *eſcape*.

To whoſe being a *witneſs* it was objected, that he had given a bond for his being a true priſoner, which he had forfeited by eſcaping; and beſides, he had been retaken.

Per curiam. If this were a bond for true impriſonment, it would be good; but if for eaſe and favour, void, and is an *eſcape*.

2dly. A conviction here could be no *evidence* againſt the warden, in an action of *debt* on the bond, nor for the priſoner in an action of *falſe impriſonment* againſt the warden, becauſe it would not be between the ſame parties; for a conviction at the ſuit of the King for *battery*, &c. cannot be given in *evidence* in an action of *treſpaſs* for the ſame *battery*, nor *vice verſa*; the like law of an uſurious contract.

3dly. That no record of conviction or verdict can be given in *evidence*, but ſuch where the benefit may be mutual, *viz.* where the defendant as well as the plaintiff might make uſe of it, bring it into court, and give it in *evidence*, in caſe it made for him. So if the record had been for the plaintiff's advantage, and that they could not give it in *evidence*, the defendant ſhall not give it in *evidence* for that very reaſon: and this point was determined this *term* in the caſe of Sir *Walter Clarges* v. *Sherwin*. (See page 446 of this work.) Suppoſe there had been no bond or retaking in this caſe, he would have been a *good witneſs*, for he would be ſubject to be retaken *by his plaintiff*, and then his ſwearing would not avail him; for ſince he is liable to be retaken, no matter to him at whoſe ſuit it is: then there is no objection againſt him but the bond; and ſure the bond being a diſtinct and collateral matter to the eſcape, ſhall not hinder a witneſs; and it is not like the caſe of an uſurious contract, for there the very bond is part of the crime, and no diſtinct act from it; and the party's coming to prove it, is a diſcredit to the bond, it being part of the crime. In ſecret tranſactions, if any of the parties concerned be not, for the neceſſity of the thing, admitted for *evidence*, it will be impoſſible to detect the practice; as in caſes of the ſtatute of *hue and cry*, the party robbed ſhall be a witneſs to charge the *hundred*. And in the caſe of *Cook* v. *Watts* in the *Exchequer*, where one, who had been prejudiced by the will, was admitted an *evidence* to prove it forged. So in the caſe of *The King* v. *Harris*, 1 *Sid.* 431. where a *feme covert* was received as a witneſs to convict one on an information, for fraudulently drawing her in when *ſole*, to give a warrant of attorney for confeſſing a judgment on an unlawful conſideration, whereby execution was ſued out againſt the huſband; and *Holt*, Chief Juſtice, held, that a *feme covert* could not by law be a witneſs for or againſt her huſband; yet in Lord *Audley*'s caſe, it being a rape on her *perſon*, ſhe was received to give *evidence* againſt him. And the court concurred with him, becauſe it was the beſt *evidence* the nature of the thing would allow, and a verdict here could not be given in *evidence* againſt the bond.

But *Holt*, Chief Juſtice, denied what was urged, that at *common law* the party whoſe deed was forged, or to whoſe prejudice the perjury was, could be a witneſs, and that the ſtatute has made any alteration.

Another exception to the ſame perſon's *evidence* was, that he had been convicted of *common barratry*; but in anſwer to this exception was read *ſtat.* 6 & 7 *W.* & *M.* which pardoned all that the King could pardon; and the court held, that pardon made him a *legal witneſs*; and that even the King's pardon by charter would make him a *legal witneſs*.

And it was agreed, that the conſent of the parties at whoſe ſuit the commitment was to the eſcape, is good *evidence* for the defendant.

Holt, Chief Juſtice, ſaid, if there be an executor in truſt, and *ceſtuy que truſt* agree to the enlargement of the priſoner, that is *evidence* of the conſent of the executor, but not *concluſive evidence*.

Another queſtion ariſing, whether a perſon who had been attorney for the defendant ſhould be compelled to be a witneſs?

Holt, Chief Juſtice, ſaid, he had differed from his brethren ſome years before in the caſe of one *Holford*, they holding, that an attorney ought not on any account to be received *to reveal* his client's ſecrets; but that in his opinion, any thing an attorney knew otherwiſe than as an attorney, he ought to declare, and if a client brings a forged deed to his council, the council ought to proſecute him.

And in reſpect to a perſon who had been burnt in the hand, if it were for *manſlaughter*, and afterwards pardoned, it would be no objection to his credit; for if it was an accident which did not denote an ill habit of mind; but otherwiſe if it were for *ſtealing*, for that would be a great objection to his credit even after pardon; but the record of the conviction ought to be produced. *Vide Mod. Rep. vol.* 12. *p.* 337. *Salk. vol.* 2. *p.* 691.

Hilary, 11 *W.* 3. *Pitman* v. *Maddox*.

Indebitatus aſſumpſit on a taylor's bill; at the trial, *Holt*, Chief Juſtice, a ſhop-book was allowed for *evidence*, it being proved that the ſervant that writ the book was dead, and this was his hand, and he accuſtomed to make the entries; and no proof was required of the delivery of the goods; and the Chief Juſtice ſaid it was as good *evidence* as the proof of a witneſs's hand to an obligation; and he held, that though *ſtat.* 7 *Jac.* 1. *c.* 12. ſays, a ſhop-book ſhall not be *evidence* after the year, *&c.* that it is not of itſelf *evidence* within the year. *Vide Salk. vol.* 2. *p.* 690. *Raym. vol.* 1. *p.* 732.

Michaelmas, 11 *W.* 3. *The King* v. *Kirk and Caſe*.

The defendants were indicted on the coroner's inqueſt for *murder*. On the trial the caſe appeared to be as follows: *Popham* and *Seymour* having a ſudden quarrel in *St. James*'s Park; after ſome blows there, *Popham*, *Seymour*, *Kirk*, and *Caſe*, immediately walked out of the Park, and *Seymour* in his way took up one *Morely* as his friend with him; and as ſoon as they got out of the Park, they all *four* fought, where *Seymour* received a wound from *Kirk*, which threw him in a fever, whereof he died; and *Holt*, Chief Juſtice, held, that the *evidence* ſworn before the coroner could not be offered here, if they could have the witneſſes themſelves. And though their going out of the Park was by mutual conſent; and though they had done it for more conveniency, yet it being on a *ſudden falling out*, and in purſuance of that heat, it cannot be *murder*; nor is it material who drew firſt, ſince both had their weapons drawn; and if one be guilty the other muſt be ſo too; and it may be a queſtion, whether the deceaſed's ſecond may not be deemed an acceſſary likewiſe: and though the wound were not the immediate cauſe of *Seymour*'s death, it ſuffices that it be the mediate cauſe. *Vide Mod. Rep. vol.* 12. *p.* 304.

Michaelmas, 11 *W.* 3. *Richardſon* v. *Williams*.

Adjudged, that a verdict in a *civil* cauſe may be given in *evidence* in a *criminal* cauſe; but not *vice verſa*; and the court ſaid, they would hardly grant a new trial where a verdict might become *evidence* in a *criminal* cauſe. *Vide Mod. Rep. vol.* 12. *p.* 319.

Michaelmas, 11 *W.* 3. *Anonymous*.

In an action on a bill of exchange, the original drawer was offered as an *evidence*, to prove that he did not draw the bill, but was denied, becauſe at laſt the burthen muſt fall on him; but the party gave him a releaſe in court, and that was ſufficient. *Vide Mod. Rep. vol.* 12. *p.* 345.

Michaelmas, 11 *W.* 3. *Sir Walter Clarges* v. *Sherwin*

At a trial at *bar* in *ejectment* of lands in *Yorkſhire*, part of the Duke of *Albermarle*'s eſtate, wherein the legitimacy of Duke *Chriſtopher* was the only queſtion, it was ruled by the court, that a former verdict between other parties concerning other lands depending on the ſame queſtion and title, could not be read in *evidence*; for if it was in affirmance of the plaintiff's title, they could not read it as being between other parties; and what would not be *evidence* for one ſhould not be *evidence* for the other.

But notwithſtanding, the verdict was read, to let them in to give *evidence*, that a witneſs produced by the plaintiff had ſworn now directly contrary to what he had ſworn at the trial. *Vide Mod. Rep. vol.* 12. *p.* 343.

Michaelmas, 11 *W.* 3. *Bignoll* v. *Rogers*.

See this caſe fully ſtated in page 344 of this work, under the head *Debt*.

Michaelmas, 11 *W.* 3. *Anonymous*.

A man deviſed a legacy out of his lands, and died, leaving ſufficient *aſſets* for the payment of all his debts and legacies.

Holt, Chief Juſtice. This legacy ought to be paid out of the land, for it is a charge on the land, and not on the goods. Though it was ſaid by the King's council, that in *Chancery*, if it is not expreſſed that the legacy ſhould be paid out of the land, and not out of the goods, if there is ſufficient *aſſets*, they will charge them in caſe of inheritance. To which *Holt*, Chief Juſtice, anſwered, if *Chancery* meddle with wills they ought to proceed according to law; and in this caſe a probate of a will was given in *evidence*, it being of *fifteen years* ſtanding, and the witneſſes being *three*, and all dead; poſitive proof was made of the death of *two* of them, and circumſtantial proof of that of the *third*. *Vide Mod Rep. vol.* 12. *p.* 343.

Michaelmas, 11 *W.* 3. *Robins* v. *Robins*.

See this caſe fully ſtated in page 24 of this work, under the head *Actions*.

Summer Aſſizes at Durham, 11 *W.* 3. *Sherwood* v. *Adderley*.

On an action of *debt* againſt the heir on the bond of the anceſtor, *&c. Reins per deſcent* was pleaded. The heir gave in *evidence* an extent againſt him on a *debt* owing by father on bond to the King. It was ruled by *Holt*, Chief Juſtice, that a copy of the bond ſworn to, or the bond itſelf, ought to be given in *evidence*, the ſuit being by a creditor, otherwiſe the extent ſhould not be allowed. And for want of this, *Holt* diſallowed ſuch extent.

And next morning, in another trial between *Thorn* and the ſaid defendant *Adderley*, the bond acknowledged by his anceſtor to the King, was produced in *evidence*, the iſſue being the ſame as in the other action. *Vide Raym. vol.* 1. *p.* 734.

Summer Aſſizes, 11 *W.* 3. *Sir John Bridgeman.* v. *Jennings*.

It was ruled by *Holt*, Chief Juſtice, at *Warwick* aſſizes 1699, that if *A.* be ſeiſed of the manors of *B.* and *C.* and during his *ſeiſin* of both, cauſes a ſurvey to be taken of the manor of *B.* and afterwards the manor of *B.* is conveyed to *E.* and after a long time there are diſputes between the lords of the manors of *B.* and *C.* about their boundaries; this *old ſurvey* may be given in *evidence.* And ſo it was done in this caſe. *otherwiſe*; if the *two manors* had not been in the hands of the ſame perſon at the time of the *ſurvey* taken. *Vide Raym. vol.* 1. *p.* 734.

Hilary, 12 *W.* 3. *Ford* v. *Hopkins.*

In an action of *trover* for *million bank lottery-tickets*, on the *evidence* it appeared, that the plaintiff had given the tickets in queſtion to a goldſmith to receive the money due on them; that ſome payments were due, and ſome were not; that this goldſmith had received tickets of the defendant, and given a note to pay him ſo many *million bank lottery-tickets*; that the plaintiff's tickets were delivered to the defendant by the goldſmith on this note. It was inſiſted on, that this note under the goldſmith's hand could be no *evidence* againſt the plaintiff; but it was read.

Holt, Chief Juſtice, ſaid, that the way and manner of trading is to be taken notice of, and the beſt proof, that the nature of the thing will afford, is only required; when goldſmiths give their notes, no witneſſes are by; and their notes to pay money or tickets are *evidence* of the receipt of money. If money is ſtolen and paid to another, the owner of the money can have no remedy againſt him that received it: but if *bank-notes, Exchequer-notes, or million bank-notes*; or the like, are ſtolen or loſt, the owner has ſuch an intereſt or property in them, as to bring an action againſt whoſoever has them: money or caſh is not to be diſtinguiſhed, but theſe notes or bills are diſtinguiſhable, and cannot be reckoned as caſh, and they have diſtinct marks and numbers on them. He agreed in this caſe, that if the *Exchequer*, or any private perſon had paid to the goldſmith the money or the tickets, it would have been a good payment againſt the owner; but whether it would be ſo where tickets not due are bought for a valuable conſideration, he doubted; but as the caſe was, the goldſmith having tickets of the plaintiff, and of the defendant, the delivery of the plaintiff's tickets to the defendant was no change of the property, or any conſideration; for though the owner gave the goldſmith power to receive money for the tickets, he did not give him power to change them for other tickets: and accordingly a verdict was given for the plaintiff. *Vide Salk. vol.* 1. *p.* 284.

Lent Aſſizes at Thetford, 12 *W.* 3. *Smith* v. *Veale.*

Holt, Chief Juſtice, refuſed to admit depoſitions in *Chancery*, to be given in *evidence*, after the bill was diſmiſſed. But it was reſerved as a point for his further conſideration. And after conſideration and conference had with the practiſers in *Chancery*, he gave his opinion, that notwithſtanding ſuch diſmiſſion of the bill, the depoſitions were good *evidence*. And ſo he held it afterwards at *Guildhall* the ſittings after *Hilary* term, 1 *Ann. Vide Raym. vol.* 1. *p.* 735.

Eaſter, 12 *W.* 3. *The Leſſees of Newgate Market* v. *The Dean and Chapter of St. Paul's*

At *niſi prius*, before *Holt*, Chief Juſtice, the queſtion on *evidence* was, whether every houſe round the market had not ſo many feet of ground towards the market belonging to it.

Holt, Chief Juſtice. If the *ſtatute* for building of *London* orders a man to build his houſe contiguous to his neighbour's ſoil, it of neceſſary conſequence gives him all the eaſements over his neighbour's ſoil, as lights, paſſage, *&c.* without which a perſon cannot uſe his houſe, but it thereby gives no intereſt in the ſoil: and in this caſe a houſe-keeper, who pretended the like intereſt before his door, though he derived his title under another perſon, was denied to be a *witneſs*. *Vide Mod. Rep. vol.* 12. *p.* 372.

Eaſter, 12 *W.* 3. *Anonymous.*

On an *avowry* for a rent charge deviſed to the plaintiff, he could not produce the will that belonged to the deviſee of the lands charged, who claimed them by the ſame will; but he produced the ordinary's regiſter of the will, and proved former payments; which was held ſufficient *evidence*. *Vide Mod. Rep. vol.* 12. *p.* 375.

Eaſter, 12 *W.* 3. *Adams* v. *Arnold.*

In an action of *treſpaſs* for an aſſault on the plaintiff's wife, and getting her with child, what the wife declared in her labour was rejected to be *evidence*. And in this caſe *Holt*, Chief Juſtice, would not ſuffer the plaintiff to diſcredit a *witneſs* of his own calling, he ſwearing againſt him. *Vide Mod. Rep. vol.* 12. *p.* 375.

Eaſter, 12 *W.* 3. *Car* v. *King.*

See this caſe fully ſtated in page 207 of this work, under the head *Baron and Feme.*

Eaſter, 12 *W.* 3. *Crow* v. *Brown.*

Holt, Chief Juſtice. I have known it held, that a legatee ſhould not be a *witneſs* to prove aſſets in the hands of the executor in an action of *debt* by a creditor; and it has been an old exception, but I ſee no reaſon for it, for he ſwears to leſſen the aſſets, and one creditor may be a *witneſs* to prove aſſets in an action brought by another creditor: and in this caſe the legatee was ſworn. *Vide Mod. Rep. vol.* 12. *p.* 385.

Eaſter, 12 *W.* 3. ——— v. *Cutts.*

In a trial at *bar* concerning the right of members of a corporation, it was moved on one ſide, that the town clerk ſhould attend with the corporation charter.

Per curiam. Of right you are not intitled to that, becauſe you may have a copy of it at the Rolls; but it being merely to try the right, it was thought hard to put them to the charge; and the clerk was ordered to attend at the charge of them that made the motion.

Per curiam. If a tenant claims by copy, the Lord, on motion, is only ordered to let him have a ſight of the court rolls, but not to bring them into court. *Vide Mod. Rep. vol.* 12. *p.* 394.

Trinity, 12 *W.* 3. *Gallaway* v. *Suſach.*

Holt, Chief Juſtice. On an action of *debt* for rent, if the defendant pleads a levy by diſtreſs, *and not indebted*, a releaſe or payment is good *evidence*; for it proves there is no *debt*, and that is the iſſue. *Vide Cro. El.* 140. which agrees; but if the defendant pleads *eraſure, and ſo not his deed*, nothing elſe is *evidence* but eraſure. *Vide Salk. vol.* 1. *p.* 284.

Trinity, 12 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. We never order charters to be brought into court on trials, when copies of them may be had at the *Rolls*; but we will compel them to give you ſight of them. *Vide Mod. Rep. vol.* 12. *p.* 414.

Michaelmas, 12 *W.* 3. *Thurſton* v. *Slatford.* Error.

In an action on the *caſe* in *C. B.* on an *indebitatus aſſumpſit* for 5 *l.* received to the plaintiff's uſe, being fees of the office of clerk of the peace of *Oxfordſhire*: On *non aſſumpſit* it was inſiſted on that the plaintiff had forfeited his office by not qualifying himſelf according to law: they ſhewed he was admitted in *April*, and produced the record to prove he had not taken the oath: the plaintiff tendered a bill of exceptions to this *evidence*, which was brought into this court with the record by *writ of error*.

Holt, Chief Juſtice. If a judge admits that for *evidence*, which is not, the other ſide cannot demur for that cauſe, but muſt tender a bill of exceptions: but he held that this record was *evidence*: that indeed, if there be a miſ-entry, it might be ſupplied and corrected by other *evidence*; for the defendant in *error* ſhould not be concluded by the miſtake or negligence of the officer; but ſtill it is a record, and ſome proof, though not a complete proof, and might be left to the jury. He remembered a caſe where the univerſity of *Oxford* entitled themſelves to a preſentation, by the conviction of the Earl of *Shrewſbury* for *recuſancy*, and on giving *evidence* that the record was loſt, the Univerſity was permitted to prove the effect of it by other *evidence:* but judgment was afterwards given on another point. *Vide Salk. vol.* 1. *p.* 284.

Lent Aſſizes, 13 *W*. 3. *Dike* v. *Polhill.*

In a ſuit in *ejectment* on the trial at *Maidſtone*, the copy of the regiſter of a will was produced in *evidence*, to prove a pedigree, and not to derive any title by the will; and alſo the probate of the ſame will was offered for the ſame purpoſe. But *Holt*, Chief Juſtice, refuſed to admit them.

1ſt. As to the probate, it is only *evidence* of a will as to chattels.

2dly. He ſaid, that there was the ſame reaſon to admit the copy of the regiſter to be *evidence*, as the copy of court rolls, or of a regiſter of a church; but the practice having been always otherwiſe, he would not ſubvert it: and therefore the copy of the regiſter not being *evidence* to prove the will, it cannot prove the pedigree, becauſe that depends on the credit of its being a will, which is not proved by the copy of the regiſter: therefore the *evidence* was denied to be admitted by him. But afterwards, the ſame circuit, at the aſſizes at *Eaſt Grinſtead*, on an iſſue directed out of Chancery to try in a feigned action heir or not, the ſaid probate was offered to Baron *Tracy* to prove the pedigree; and he admitted it, notwithſtanding the other caſe was cited to be ruled as aforeſaid; becauſe, he ſaid, the other caſe was in *ejectment*, and this only in *caſe*; and he could not know that the title of land would come in queſtion, *&c.* but it ſeems there is no difference, becauſe the title to the land was not derived under the will in *ejectment*, *Vide Raym. vol.* 1. *p.* 744.

Eaſter, 13 *W*. 3. *Anonymous.*

If a *witneſs* going to ſea be by rule of court examined on interrogatories before a judge, and the trial comes on before he is gone, his depoſition ſhall not be read, but he muſt appear; for the rule was made on a preſumption of his abſence. *Vide Salk. vol.* 2. *p.* 691.

Eaſter, 13 *W*. 3. *Weſt* v. *Chamberlain.*

On debate concerning *evidence* to be given about the corporation of *Tiverton:*

Per curiam. Wherever an original is *evidence*, a copy of that original will be *evidence* alſo; and it was alſo directed, that the adverſe party in this caſe ſhould have the ſight of the corporation books, and leave to take copies; but not that the books themſelves ſhould be produced. *Vide Mod. Rep. vol.* 12. *p.* 494.

Eaſter, 13 *W*. 3. *How* v. *Acton.*

Per curiam. If a *witneſs*, not likely to be had at a trial, be examined before a judge, and croſs-examined by the other party, and his depoſitions put into writing; yet if at the trial it be proved, that the party might have him there, his depoſitions are not to be read. *Vide Mod. Rep. vol.* 12. *p.* 493.

Eaſter, 13 *W*. 3. *The King* v. *Sims.*

Holt, Chief Juſtice. On an indictment for *oppreſſion*, *battery*, *&c.* the party oppreſſed may be a *witneſs*. *Vide Mod. Rep. vol.* 12. *p.* 511.

Eaſter, 13 *W*. 3. *Dillon* v. *Crawly.* Error.

On a *writ of error* brought on a judgment, on demurrer to the *evidence* in *C. B.* the witneſs to the ſealing and delivery of a deed, being *ſubpœnaed*, did not appear. But to prove it the party's deed, they proved an indorſement made by him thereon *three years* after; reciting a proviſo therein, that if he paid ſuch a ſum, the deed ſhould be void, and acknowledging that the ſaid ſum was not paid; and a fine was levied of the very lands mentioned in the deed to *Crawly*, and by the indorſement he expreſsly owned it to be his deed; and on this the deed was read. And now it was objected, that this was not good *evidence*, becauſe not the beſt the nature of the thing would admit of, but only circumſtantial; which never ought to be admitted where better may be had *from the nature of the caſe*, becauſe circumſtances are fallable and doubtful; and it is on this reaſon that a copy of a record is good, becauſe one cannot have the record itſelf; but a copy of a copy will not do. On the plea of *not his deed* to a bond, one of the witneſſes being *ſubpœnaed*, did not appear; and it was offered to prove, that he owned it to be his bond, but denied.

Holt, Chief Juſtice. Can there be any better *evidence* of a deed than to own it, and recite it under his own hand and ſeal?

Per curiam. The judgment muſt be affirmed. *Vide Mod. Rep. vol.* 12. *p.* 500.

Eaſter, 13 *W*. 3. *The King* v. *Croſs.*

The defendant was indicted for a miſdemeanor, in receiving ſtolen goods, knowing them to be ſtolen; and the very thief was produced as an *evidence*, who confeſſed the fact, he being brought up by an *hab. corp. ad teſtificand.* from the *Compter.*

Holt, Chief Juſtice. Theſe indictments were never thought good by me before I came on the Bench, though I have been over-ruled in it once; but let us try the fact firſt, and it ſhall be conſidered afterwards, whether the indictment is maintainable. And he ſaid, ſome judges would try a *trover* for the goods before an indictment for the taking; but he never would do it, but rather get a juror withdrawn, if the matter had proceeded ſo far, that the plaintiff might not be nonſuited. And the plaintiff in this action was bound in a recognizance to proſecute the principal. *Vide Mod. Rep. vol.* 12. *p.* 520.

Eaſter, 13 *W*. 3. *Key* v. *Gordon.*

On an *indebitatus aſſumpſit* brought by an under-officer againſt his colonel for his pay, *proof* was admitted of the hand-writing of a perſon proved beyond the ſeas. *Vide Mod. Rep. vol.* 1. *p.* 521.

13 *W*. 3. *Chattle* v. *Pound.*

On an action of *debt* for rent. On *nil debet* pleaded, the plaintiff gave in *evidence* a note in writing, by which the defendant agreed, to hold for one year, rendering the rent of 15 *l.* And in fact he was grantee of a reverſion expectant on an *eſtate* for life; which life was dead at the time of the giving of the note. Which grant was forty years before, and he was never in poſſeſſion, but the tenant for life was all the time in poſſeſſion during life. The defendant gave in *evidence* a *prior* grant of the ſaid reverſion. And it was ruled by *Holt*, Chief Juſtice, that the defendant in this caſe may give in *evidence he had nothing in the tenements*, the plaintiff having never been in poſſeſſion, notwithſtanding the note ſigned by the defendant, by which he agreed to hold, *&c.* but if the plaintiff had been in poſſeſſion, though but tenant at will, *&c.* then the defendant could not have given this in *evidence* without having been evicted: and the plaintiff was nonſuited. *Vide Raym. vol.* 1. *p.* 746.

Trinity, 13 *W*. 3. *Anonymous.*

Adjudged, That to maintain an action for the being bit by a dog, it muſt be proved, that the defendant knew his dog was accuſtomed to bite; but one inſtance is ſufficient in that caſe, though to ſatisfy the words of the *ſtatute* of *Eliz.* concerning leaſes of lands uſually letten, the lands muſt have been letten twice at leaſt. *Vide Mod. Rep. vol.* 12. *p.* 555.

Trinity, 13 *W*. 3. *Anonymous.*

Adjudged, That none can be admitted to give *evidence* of what was done at the former trial, without the proceedings at ſuch trial are proved. *Vide Mod. Rep. vol.* 12. *p.* 555.

Summer Aſſizes at Warwick 1699. *Wood* v. *Drury.*

A deed was produced, to which there were *two witneſſes*, *one* of whom was blind. It was ruled by *Holt*, Chief Juſtice, that ſuch deed might be proved by the other witneſs, and read, without proving that this *blind witneſs* is dead; or without having him at the trial, proving only his hand. And ſo it was done in this caſe. *Vide Raym. vol.* 1. *p.* 734.

Summer Aſſizes at Maidſtone, 13 *W.* 3. *Broughton* v. *Harpur.*

In *ejectment*, the plaintiff made title to his leſſor to the lands in queſtion, as ſon and heir of *J. J.* and *H.* his wife, in right of *H.* The defendant gave in *evidence*, that *J. J.* was married, before he was married to *H.* and the woman, to whom it was ſuppoſed he was married before, was produced at the trial at *Maidſtone*, to prove this marriage. The council for the plaintiff oppoſed her teſtimony, becauſe ſhe ſwore for her advantage, *viz.* to have a huſband, the huſband then being living. But nevertheleſs, *Gould*, Juſtice, then judge of aſſize, admitted her teſtimony. But afterwards, the ſame cauſe on the ſame title, between the ſame parties was tried before *Holt*, Chief Juſtice, at the aſſizes in *March* at *Maidſtone*, 1 *Ann*, and he refuſed after debate to admit the former wife to be a witneſs for this purpoſe; but on other *evidence*, the former marriage was proved to the ſatisfaction of the jury, being gentlemen, whereon they found a verdict for the defendant. But in the former trial before *Gould*, Juſtice, the jury found a verdict for the plaintiff. *Vide Raym, vol.* 2. *p.* 752.

Michaelmas, 13 *W.* 3. *Holden* v. *Sutton.*

Adjudged, That a perſon cannot give *evidence* of any thing done at a former trial, without producing the record of ſuch trial. *Vide Mod. Rep. vol.* 12. *p.* 565.

Michaelmas, 13 *W.* 3. *The King* v. *Daws.*

Adjudged, That the copy of a *charter* under the Great Seal cannot be given in *evidence*, but a copy of the record thereof may. *Vide Mod. Rep. vol.* 12. *p.* 579.

Michaelmas, 13 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. In an action of *debt* on a bond, on iſſue of *not his deed*, if the plaintiff proves that the *witneſſes* are dead, beyond the ſeas, or that he has made ſtrict enquiry after them, and cannot hear of them, he ſhall be permitted to prove their hands. *Vide Mod. Rep. vol.* 12. *p.* 607.

Michaelmas, 13 *W.* 3. *Anonymous. At Niſi Prius.*

The caſe was, *A.* being indebted to *B.* gives him a note in a feigned name for the debt; afterwards the wife of *B.* ran away with another man, and took the note with her; *A.* pays the money to *C.* the perſon with whom the wife ran away, *B.* ſues *A.* for the money in the feigned name. And at the trial *C.* offered to make oath of all this, but was rejected by *Holt*, Chief Juſtice, for it was to prove a right in himſelf to the money received from *A.* for which otherwiſe he was accountable to *A.* *Vide Mod. Rep. vol.* 12. *p.* 565.

Michaelmas, 13 *W.* 3. *The King* v. *Worſenham and others.*

An *information* was preferred againſt the defendants being cuſtom-houſe officers, for forging a bond, ſuppoſed to be given by a merchant to the King for his *cuſtoms*. A motion was made on behalf of the proſecutor, to have the cuſtom-houſe book, in which the entries were made, *&c.* brought into court, to convict the defendants. But the motion was denied, becauſe the ſaid books are a private concern, in which the proſecutor has no intereſt; and therefore it would be in effect, to compel the defendants, to produce *evidence* againſt themſelves. And the court never makes ſuch releaſe, but only of records, or deeds of a publick nature. *Vide Raym. vol.* 1. *p.* 705.

Michaelmas, 13 *W.* 3. *Anonymous.*

In an action of *debt* brought by the huſband, it appeared to have become due to the wife as a ſeparate dealer, and a diſcourſe of the wife's concerning it was given in *evidence* for the defendant, by leave of the court. *Vide Mod. Rep. vol.* 12. *p.* 566.

14 *W.* 3. *Tyley* v. *Cowling. At Niſi Prius.*

Mr. *R. V.* ſent a box with 100 *guineas*, *&c.* in it by *Tyley*, the *Bath* carrier, to *London*, on which box the direction was only to Mr. *Vaughan.* member of parliament; *Tyley*, carried the box to *London*, and on his arrival, *Cowling* an inn-keeper in *Piccadilly*, came to *Tyley*'s inn, for goods directed to be left at *Cowling*'s houſe. Afterwards, this box being loſt, *Tyley* pretended that it was delivered to *Cowling* among other goods, on which *Tyley* brought an action of *trover* againſt *Cowling*. And at the trial at the ſittings at *Weſtminſter*, before *Holt*, Chief Juſtice, Mrs. *Vaughan*, the wife of Mr. *V.* was produced to be a *witneſs* to prove what was in the box.

Holt, Chief Juſtice, refuſe to admit her to be a *witneſs*, becauſe whether *Tyley* recovered or not, this verdict might be given in *evidence* by Mr. *Vaughan*, in an action to be brought by him againſt *Tyley*, on oath made of what was ſworn for *Tyley* on this trial. *Vide Raym. vol.* 1. *p.* 744.

Hilary, 1 *Ann.* *Geery* v. *Hopkins.*

The plaintiff brought an action againſt the defendant for money received to his uſe, and on other counts. The queſtion was on the acceptance of one of Mr. *S.* the goldſmith's notes, who was become a bankrupt, *&c.* and on notice for trial being given the court was moved, 1ſt. For a *habeas corpus ad teſtificandum*, to bring *S.* out of the *Marſhalſea*, where he was in execution, to *Guildhall*; which was granted, 2dly. To have a rule, that the caſh book of the *Old Eaſt India Company*, kept by their treaſurer, and alſo their *transfer book*, and alſo a note of acceptance of 1000 *l.* bank ſtock, ſigned by the defendant, kept by the accountant of the company, ſhould be brought to the trial at the plaintiff's expence; and it was granted.

Holt, Chief Juſtice. If the Bank deal in the transfer of their ſtock, and that cannot be done by any other means than by entry made in their books, it is very reaſonable that they ſhould be produced for the benefit of the party, as well as corporation books. *Vide Raym. vol.* 2. *p.* 851. *Mod. Rep. vol.* 7. *p.* 555.

Trinity, 1 *Ann.* *George* v. *Pierce.*

In order to a new trial, an *affidavit* was read, that one of the *witneſſes* had declared he had received a guinea to ſtifle the truth.

Gould, Juſtice. An *affidavit* of him who received the guinea were ſomething, but his ſaying is nothing. A *witneſs* laying a wager in the cauſe is no hinderance to his being a *witneſs*, for the other has an intereſt in his *evidence*, which he cannot deprive him of. *Vide Mod. Rep. vol.* 7. *p.* 31.

Trinity, 1 *Ann.* *The Queen* v. *Templeman.*

After pleading *guilty* to an indictment, any thing may be given in *evidence* that juſtifies the fact, or proves the perſon *was not guilty* of the fact; for the entry is, *he will not contend with our Sovereign Lady the Queen, but throws himſelf on the mercy of the court.* And ſo it is not like the caſe where one is found guilty by verdict. *Vide Mod. Rep. vol.* 7. *p.* 40.

Michaelmas, 1 *Ann.* *Lord Wharton* v. *Sir John Robinſon.*

On a trial at *bar* conerning the boundaries of lands, the parſon of the pariſh, the land lying in two pariſhes, was refuſed as a *witneſs*, becauſe he might *enlarge* his own pariſh, and by conſequence the *tithes*. But one who about *ſeven* years before had taken the profits under the title of one of the parties, was allowed as a *witneſs*, becauſe now he might plead the *ſtatute of limitations*. *Vide Mod. Rep. vol.* 7. *p.* 63.

Michaelmas, 1 *Ann.* *Brown and Wife* v. *Gibbons.*

In an action on the *caſe* for words ſpoken of the wife, *viz.* Mrs. *B. is a whore, and has done as all whores do*; whereby, *&c.* the defendant on *not guilty* pleaded at *niſi prius*, gave *evidence* by way of mitigation of damages, that Mrs. *Brown* was a whore; and the *evidence* was very ſtrong. On which the jury gave only 20 *s.* damages to the plaintiffs. *Vide Raym. vol.* 2. *p.* 831.

Michaelmas, 1 *Ann.* *The Queen* v. *Sewell, alias Beaus.*

The defendant was indicted for *uſury* in taking 9 *l.* for the uſe of 45 *l.* for a year, *againſt the form of the ſtatute, &c.* The caſe was, the defendant lent the proſecutor 45 *l.* on a pledge of jewels, and it was agreed to pay the ſaid intereſt; afterwards, the proſecutor gave his bond for the ſame money, and the bond not being diſcharged, the proſecutor was produced as an *evidence*, and ſworn by *Holt*, *de bene eſſe*, as he ſaid; and he ſaid, it was a queſtion, whether the new bond was void or not; and he put this caſe, a man makes an uſurious contract, and gives the lender unlawful intereſt, and agrees to give him a bond for the principal; and after, by a ſubſequent agreement, gives a bond, for the ſum lent, to one *J. S.* to whom the lender owes ſo much in ſatisfaction of his debt; this bond is not voidable by the *ſtat.* If a man lend money at the legal intereſt, and after a ſubſequent agreement is made for more intereſt, which is uſury, yet it will not avoid the firſt contract. 2 *Mod.* & 1 *Saund.*

Holt, Chief Juſtice, declared it to be law, that where a man is intereſted in the conſequence of that which he ſwears for; if ſo be, the doing of the act which he is now *evidence* to invalidate or ſet aſide, was a means to obtain his liberty from impriſonment, or an exemption from corporal puniſhment, he ſhall be a *witneſs*; as in the caſe of *Dureſs*, though it be to ſet aſide his own bond, yet it being given to obtain his liberty, he ſhall be a *witneſs* alſo, where the nature of the thing allows him no other *evidence*: as for example, if a woman give a note or bond to a man, to procure her the love of *J. S.* by ſome ſpell or charm; in an indictment for the cheat, though it tend to avoid the note, yet ſhe ſhall be a *witneſs*.

Here it could not be given in *evidence*, that the defendant was a common uſurer, becauſe he could not be ready to give an anſwer to that matter. *Vide Mod. Rep. vol.* 7. *p.* 118.

Michaelmas, 1 *Ann.* *Marsfield or Blainfield* v. *March or Marſh.*

The plaintiff brought an action of *trover* as adminiſtrator, and declared on the poſſeſſion of the inteſtate; and on *not guilty* pleaded, at the trial, the counſel for the defendant offered to give in *evidence*, that the pretended inteſtate made a will and an executor; but *Holt*, Chief Juſtice, over-ruled it, and made this diſtinction, that where an adminiſtrator brings an action of *trover* on his own poſſeſſion, the defendant may give in *evidence* a will, and ſo may an executor, on *not guilty* pleaded; otherwiſe, if it be on the poſſeſſion of the inteſtate, (as in the principal caſe) for there the defendant ought to plead it in *abatement*, and if he does not, he ſhall not give it in *evidence*. *Vide Salk. vol.* 1. *p.* 285.

Hilary, 2 *Ann.* *Norris* v. *Napper.*

Holt, Chief Juſtice, held in this caſe, that if *A.* advances money to carry on a cauſe, and has a ſecurity depoſited in his hands for it, part of which is the thing in demand, though the reſidue of the ſecurity, excluſive of this, is ſufficient ſecurity for the money, yet he cannot be a *witneſs* in the cauſe, becauſe he ſwears with a view to mend his own ſecurity. *Vide Raym. vol.* 2. *p.* 1007.

Hilary, 2 *Ann.* *Title* v. *Grevett.*

On an *ejectment* brought, *Holt*, C. J. held, that if a tenant at will enters on a quarter, though but one day, he cannot determine his will, but the leſſor may determine his will at any time; but if he does in the middle of a quarter, he loſes that rent. 2dly. A man that conveys lands may be a *witneſs* to prove he had no title, becauſe that is ſwearing againſt himſelf, but he is not compellable to give ſuch *evidence*. *Vide Raym. vol.* 2. *p.* 1008.

Hilary, 2 *Ann.* *Tilly's Caſe.*

On a trial at *bar* in the *C. B.* in the courſe of the *evidence* it appeared, that depoſitions had been taken in *Chancery* to perpetuate the memory of a fact, and it happened afterwards, that the inheritance of the land deſcended to the party, who was ſworn as a *witneſs*, and was a party in the *ejectment*; the juſtices of that court not being agreed whether theſe depoſitions could be read in the cauſe, requeſted the opinion of this court, who unanimouſly agreed that they ought not to be read, the intent of ſuch depoſitions being to perpetuate teſtimony in caſe the witneſſes died, and therefore could not be read in any caſe between other parties till after the witneſs's death, who ought to appear and give *evidence* ſo long as he lived; much leſs in the preſent caſe, where the witneſs is a party. *Vide Raym. vol.* 2. *p.* 1008.

Hilary, 2 *Ann.* *Ford* v. *Grey.*

In *ejectment* on a trial at *bar*, the *ſtatute of limitations* was inſiſted on, and theſe points were ruled by the court.

1ſt. That a claim or entry to prevent the *ſtatute of limitations* muſt be on the land, unleſs there be ſome ſpecial reaſon to the contrary.

2dly. If a perſon ſwears an anſwer in Chancery which is prejudicial to his eſtate, it may be given in *evidence* againſt him, but not againſt his alienee.

3dly. That a recital of a leaſe in a deed of releaſe is good *evidence* of ſuch leaſe againſt the releaſor, and thoſe that claim under him; but as to others it is not, without proving there was ſuch a deed, and it was loſt and deſtroyed.

4thly. If one joint-tenant levies a *fine*, it ſevers the jointure, but does not amount to an *ouſter* of his companion. *Vide Salk. vol.* 1. *p.* 268.

Hilary, 2 *Ann.* *Martyn* v. *Hendrickſon.*

In an action on the *caſe*, for managing the defendant's ſhip ſo negligently, that it ran over the plaintiff's barge, the declaration ſet forth that he was poſſeſſed of the ſaid barge, laden with divers goods and merchandizes: and, 1ſt. *Holt*, Chief Juſtice would not ſuffer the pilot to be a *witneſs*; becauſe he was anſwerable, if faulty in ſteering, to the maſter. 2dly. He would not ſuffer any damages to be recovered for the goods, becauſe not ſet forth particularly, ſaying, they ought to be ſet forth ſpecially, as where an action is brought for burning his houſe: ſo in caſe for words, *whereby* ſhe loſt her marriage with *J. S. and other perſons*, he ſaid he would not ſuffer them to give in *evidence* a loſs of marriage with any one but *J. S.* *Vide Salk. vol.* 1. *p.* 287. *Raym. vol.* 2. *p.* 1007.

Eaſter, 2 *Ann.* *Green* v. *Waller.*

In this caſe *Holt*, Chief Juſtice, held, that the exemplification of a ſentence in the Admiralty, under the ſeal of the court, was concluſive *evidence*. *Vide Raym. vol.* 2. *p.* 893.

Eaſter, 2 *Ann*, *Lucas* v. *Haynes*.

See this caſe fully ſtated in page 230 of this work, under the head *Bills of Exchange*.

Trinity, 2 *Ann*. *The Queen* v. *Mead, an Attorney, &c.*

The defendant and *eight* others were incorporated under an act made in the 39th *Eliz.* by the name of the *Surveyors of the Highways at Ayleſbury* in the county of *Bucks*, and were truſtees of a charity called *Bedford's Gift*. An information was preferred againſt the defendant, for executing this office, being an office of truſt, without having took the oaths, contrary to *ſtat.* 25 *Car.* 2. *c.* 2. to which he pleaded *not guilty*. And the court was moved for a rule, that the proſecutor might have two books produced, which theſe ſurveyors kept, in which they entered their elections, and alſo their receipts and diſburſements; and that he might take copies of what he thought neceſſary, and that the books might be produced at the next *aſſizes* at the trial. But the propoſal was denied, becauſe they are perfectly of a private nature, and it would be to make a man produce *evidence* againſt himſelf in a criminal proſecution. *Vide Raym. vol.* 2. *p.* 927.

Trinity, 2 *Ann*. *Price* v. *The Earl of Torrington*.

The plaintiff being a brewer, brought an action againſt the Earl of *Torrington* for beer ſold and delivered; and the *evidence* given to charge the defendant was, that the uſual way of the plaintiff's dealing was, that the dray-men came every night to the clerk of the brewhouſe, and gave him an account of the beer they had delivered out, which he ſet down in a book kept for that purpoſe, to which the draymen ſet their hands; and that the drayman was dead, but that this was his hand ſet to the book: and this was held good *evidence* of a delivery; otherwiſe of the ſhop-book itſelf ſingly, without more. *Vide Salk. vol.* 1. *p.* 285.

Michaelmas, 2 *Ann*. *Ford* v. *Lord Grey*.

See this caſe fully ſtated in page 393 of this work, under the head *ejectment*.

Michaelmas, 2 *Ann*. *The Queen* v. *Mackartny & al.*

The defendants were indicted for defrauding *J. S.* by impoſing on him a quantity of beer mixed with vinegar, and grounds of coffee, for *Port* wine; one of the defendants pretending to be a broker, and the other a *Portugueze* merchant, for the better carrying on of the cheat.

J. S. was allowed by *Holt*, Chief Juſtice, to be a *witneſs* to prove the fact on the trial, for in ſuch private tranſactions no body elſe can be a *witneſs* of the circumſtances of the fact, but he that ſuffers. *Vide Salk. vol.* 1. *p.* 286.

Eaſter, 3 *Ann*. *The Queen* v. *Chapman, late Mayor of Bath*.

On an information againſt the defendant for making a falſe return to a *mandamus*, which commanded him to proceed to the election of a town-clerk for the corporation, it was held by *Holt*, Chief Juſtice.

1ſt. That there needs no other *evidence* to prove this return to be the Mayor's, but the copy of the writ, and the return thereof into the *Crown Office*.

2dly. That though on the conſultation the majority is againſt him, and make a return in his name, yet it ſhall be taken to be his, if he does not come and diſavow it.

3dly. That it is not neceſſary to prove a delivery of the writ to the Mayor, no more than to a ſheriff in a falſe return againſt him. *Vide Mod. Rep. vol.* 6. *page* 152.

Eaſter, 3 *Ann*. *Turner* v. *Nurſe*.

Adjudged, that an order of the *Court of Chancery* is not to be given in *evidence*, without producing a copy of the bill on which it was made; yet a commiſſion out of *Chancery* to fix the boundaries of certain lands, returned and acquieſced under, and an enjoyment accordingly, is good *evidence* that the land ſo bounded, is rightly bounded, but a bare commiſſion returned without more, is *no evidence* at all. *Vide Mod. Rep. vol.* 6. *p.* 149.

Eaſter, 3 *Ann*. *Dove* v. *Smith*.

In an action of *treſpaſs* for breaking the plaintiff's cloſe, and treading on his graſs, it appeared on *evidence*, that the plaintiff had a cloſe adjoining to the back part of the defendant's houſe, which was a public-houſe: the defendant uſed, ſometimes, to ſet a table for his gueſts in the ſaid cloſe, and ſerve them there: that he often uſed to walk there for his pleaſure, and with others, who ſhot with bows and arrows there.

Holt, Chief Juſtice. You muſt give *evidence* of the value of the damage done, or you cannot recover, for the law goes by *evidence*. And if in this caſe the jury give under 40 *s.* damages, though the title of the land does not come in queſtion, yet will I certify for coſts, for this is a voluntary malicious treſpaſs, and the ſtatute is only to be underſtood of ſmall accidental treſpaſſes. And here it being on *not guilty* pleaded, they could not give any matter of right in *evidence*, not even in mitigation of damages. *Vide Mod. Rep. vol.* 6. *p.* 153.

Eaſter, 3 *Ann*. *Oſbourne* v. *Hoſier*.

An action of *debt* was brought on a ſingle bill for the payment of 230 *l.* on demand. On *not his deed* pleaded, one of the ſubſcribing witneſſes was produced, and gave *full evidence* of the ſealing and delivery of the bond. On the other ſide was produced a perſon of the ſame name and ſurname with the other ſubſcribing witneſs, who acknowledged that the hand was very like his, but it was not his; that he never knew either of the parties, nor the other witneſs; nor could the other witneſs ſay he was the man; and both their reputations being made good in proof, *Holt*, Chief Juſtice, ordered them both to write their names, and thereon left it to the jury, who found for the plaintiff. *Vide Mod. Rep. vol.* 6. *p.* 167.

Trinity, 3 *Ann*. *Wilſon* v. *Gary*.

See this caſe fully ſtated in page 32 of this work, under the head *Actions*.

Trinity, 3 *Ann*. *Johnſon et Ux.* v. *Browning*.

See this caſe fully ſtated in page 32 of this work, under the head *Actions*.

Michaelmas, 3 *Ann*. *Stillingfleet* v. *Sir Harry Parker*.

On a trial at *bar* in *ejectment*, the queſtion in debate was concerning the time of the commencement of the leaſe, which was to commence on the determination of a leaſe then in being, to Queen *Elizabeth*; and to prove ſuch a leaſe to the Queen, an ancient book, in which were entries of leaſes of the premiſes ever ſince *Henry* the *ſeventh*'s time, and found among the *evidences* of the biſhops (this being biſhop's land) was offered, and oppoſed, becauſe not ſuch *good evidence* as they might have had, for this being to the Queen muſt have been inrolled, wherefore they might have brought a copy of the inrolment.

Per curiam. An inrolment is better *evidence* of a leaſe in fact than the book; therefore it muſt be produced. *Vide Mod. Rep. vol.* 6. *p.* 248.

Michaelmas,

Michaelmas, 3 Ann. Stanyon v. *Davis.*

See this caſe fully ſtated in page 153 of this work, under the head *Averment.*

Michaelmas, 3 Ann. Anonymous.

Per Holt, C. Juſtice. In a caſe in Lord *Hale*'s time, *viz. Combe* v. *Mayo*, a counterpart of an ancient deed was admitted as *evidence* of the deed, and the ſpecial verdict was drawn up as finding the deed with a *prout patet* by the counterpart, which he ſaid was done to preſerve the *precedents*; and now by all the court, the counterpart of a deed, without other circumſtances, is ſufficient *evidence*, unleſs in caſe of a *fine*, in which caſe a counterpart is good *evidence* of itſelf. *Vide Salk vol.* 1. *p.* 287.

Eaſter, 4 Ann. Kinſman v. *Crooke.*

On a trial at *bar* of an iſſue directed out of *Chancery*, to try if a leaſe was made in purſuance of a power to make leaſes for the beſt rent that could be got, a *witneſs*, named *Ruſhley*, was examined in *Chancery* concerning the value of the land, having been collector of the rents; and at the time of his examination in *Chancery*, he referred to and conſulted his rental. But now at this trial he was become blind, and therefore his examination in *Chancery* and depoſitions there were admitted to be read; becauſe if he had been ſo ill as that he could not have come to the trial, they had been *good evidence*, and now he is diſabled to conſult the rental by the act of God, and therefore the ſame reaſon holds. He alſo gave *evidence* of what he remembered beſides.

Secondly, 6000 *l.* was divided to *A.* and *B.* in truſt to purchaſe lands to be ſettled on *F. G.* for life, with remainder to his ſons in tail in contingency, remainder to *W. G.* for life, with contingent remainder to his ſons in tail, remainder to *H. K.* in *fee*, with power to make leaſes, *as above*, *&c. F. G.* made a leaſe to *C.* rendering 170 *l. per annum* rent, and died; and the queſtion was, whether the value was 270*l. per annum*, at the time of the purchaſe or not. Lord *G.* and *M. L.* the truſtees, were produced as *witneſſes* to prove it; and it was objected, that they were not *legal witneſſes*, becauſe *K.* the remainder man not joining in the purchaſe, and who now conteſted the leaſe, if the lands were not of that value, it would be a breach of truſt in the truſtees, and they would be liable in *Chancery* to make ſatisfaction to the *ceſtuy que truſt*, and therefore they were to give *evidence* to excuſe themſelves: but not allowed, and they were ſworn and gave *evidence*. *Vide Raym. vol.* 2. *p.* 1166.

[*Michaelmas, 5 Ann. Watſon* v. *Sparks.*

In an action of *treſpaſs*, *wherefore he broke his cloſe*, *&c.* On *not guilty* pleaded, on the trial the defendant gave *evidence*, that it was in a highway.

Per curiam. It is a *ſpecial* juſtification, and ought not to be allowed to be given in *evidence* on the general iſſue.

Holt, C. Juſtice ſaid, in *caſe* for diſturbing the plaintiff of his *common*, on *not guilty* pleaded, he had known the defendant permitted to give in *evidence*, that he had a right to *common* there; but he never thought it right, and never allowed it. *Vide Salk. vol.* 1. *p.* 288.

Charnock's Caſe.

Charnock was indicted, for that he, on the 10th day of *February*, 9 *W.* 3. *and divers other days and times, as well before as after*, in the pariſh of *St. Clement Danes*, did traiterouſly conſpire to kill the King.

Holt, Chief Juſtice. *Evidence* may be given of a *treaſonable conſpiracy*, &c. any time before or after the time alledged in the indictment: 1ſt. Becauſe it is only a circumſtance, and of form: ſome day muſt be alledged, but it is not material. 2dly. The indictment lays it to be at divers days and times, as well before as after, and thereby comprehends what was done laſt year, as well as this; and as the *evidence* may be of matters before that time, ſo it may be of matters alſo at any time after the time ſpecified in the indictment, provided it be not after the time the indictment was found; neither is the *evidence* tied up to the place; for it may be of any place, provided it be not out of the county; and ſo it is in all *criminal* caſes. *Vide Salk. vol.* 1. *p.* 288.

Eaſter, 7 Ann. Wright v. *Sharp.*

A corporation-book was offered in *evidence* at the aſſizes to prove a member of the corporation not in poſſeſſion; but was refuſed. No *bill of exceptions* was then tendered, nor were the exceptions reduced to writing; ſo the trial proceeded, and a verdict was given for the plaintiff. Next term the court was moved for a bill of exceptions, and the matter was debated in court. It was urged, that the law requires *that the party ſhould propoſe his exception*, and no time is appointed for the reducing it into writing, and the party is not aggrieved till a verdict be given againſt him; and the ſame memory, that ſerves the judges for a new trial, will ſerve for bills of exceptions. *Vide* 2 *Inſt.* 437. *N. B.* 21. 540. *b. Vet. Intr.* 96, 136. *Raym.* 405. *Brownl. Red.* 433. 2 *Lev.* 236. *Stat. Weſt.* 2. *c.* 31. On the other ſide it was ſaid, that this practice would prove a great difficulty to judges, and a delay of juſtice; that the precedents and entries ſuppoſe the exception to be written down on its being diſallowed, and the *ſtatute* ought to be conſtrued ſo as to prevent inconvenience; beſides, the words of the act are in the preſent tenſe, and ſo is the writ formed on the act.

Holt, Chief Juſtice. If this practice ſhould prevail, the judge would be in a ſtrange condition: he forgets the exceptions, and refuſes to ſign the bill, ſo an action muſt be brought: you ſhould have inſiſted on your exception at the trial: you wave it if you acquieſce, and ſhall not reſort back to your exception, after a verdict againſt you, when perhaps, if you had ſtood on your exception, the party had *other evidence*, and need not have put the cauſe on this point: the *ſtatute* indeed appoints no time, but the nature and reaſon of the thing requires the exception ſhould be reduced to writing when taken and diſallowed, like a *ſpecial verdict*, or a demurrer to *evidence*; not that they need be drawn up in form; but the ſubſtance muſt be reduced to writing while the thing is tranſacting, becauſe it is to become a record: accordingly the motion was denied. *Vide Salk. vol.* 1. *p.* 288.

Hern v. *Nichols. Before Holt, Chief Juſtice. At Niſi Prius.*

In an action on the *caſe* for a *deceit*, the plaintiff ſet forth, that he bought ſeveral parcels of ſilk, for ——ſilk, *whereas* it was another kind of ſilk; and that the defendant well knowing this *deceit* ſold it him for —— ſilk; on the trial, on *not guilty* pleaded, it appeared that there was no *actual deceit* in the defendant, who was the merchant, but that it was in his factor beyond the ſeas: and the doubt was, if this *deceit* could charge the merchant?

Holt, Chief Juſtice, was of opinion, that the merchant was anſwerable for the *deceit* of his factor, though not *criminally*, yet *civilly*; for ſeeing ſome-body muſt be a loſer by this *deceit*, it is more reaſonable that he that employs and puts a truſt and confidence in the deceiver, ſhould be a loſer than a ſtranger: and on this opinion the plaintiff had a verdict. *Vide Salk. vol.* 1. *p.* 289.

Anonymous. Before Holt, C. J. At Niſi Prius.

In an action of *trover* for money received, it appeared on *evidence*, that the plaintiff's ſon had a general authority from his father to receive and pay out his father's money. The ſon took a bill for money due to his father, and received it without a particular authority for that purpoſe, and this receipt was with an intent to embezzle and ſpend it; but he gave a receipt as for money had to his father's uſe, and this money was given to the defendant. The queſtions were, 1ſt. If the ſon could be a *witneſs* in this caſe to prove the delivery: And, 2dly. Whether the father could maintain an action of *Trover*?

Holt, Chief Juſtice, was of opinion, that the ſon might be admitted as a good *witneſs*, his teſtimony being corroborated by other circumſtances; and that the action was maintainable for the father, for that the general authority that the ſon had to take his father's money, made the receipt of the money to be to his father's uſe, and a good diſcharge of the debt, ſo as that the father could not avoid the payment, and charge the perſon that paid the money with an action; and then, if the payment was a good diſcharge, it is reaſonable it ſhould be his money, and the poſſeſſion of the ſon is the poſſeſſion of the father, the ſon being to this purpoſe as his father's ſervant; and according to this opinion the plaintiff had a verdict, who ſaid he was willing to have a caſe made of it; but the defendant acquieſced. *Vide Salk. vol.* 1. *p.* 290.

Hilary, 7 *Ann.* *Blackham's Caſe.* *At Niſi Prius in Middleſex.*

In an action of *trover*, at the trial the plaintiff proved the goods to be in his poſſeſſion, and to be taken away by the defendant: the defendant ſhewed that theſe were the goods of *Jane Blackham* in her life-time, and that the defendant had taken out letters of adminiſtration to her, and ſo was intitled to the goods: on this the plaintiff proved that ſome few days before her death, ſhe was actually married to him; and in anſwer to this it was inſiſted, that the *ſpiritual court* had determined the right to be in the defendant; for they could not have granted adminiſtration to the defendant, but on ſuppoſing there was no ſuch marriage, and that this ſentence being of a matter within their juriſdiction, was concluſive, and could not be contradicted by *evidence*.

Holt, Chief Juſtice. A matter, which has been directly determined by their ſentence, cannot be contradicted: their ſentence is concluſive in ſuch caſes, and no *evidence* ſhall be admitted to prove the contrary; but that is to be intended only in the point directly tried; it is otherwiſe if a collateral matter be collected or inferred from their ſentence, as in this caſe, becauſe the adminiſtration is granted to the defendant, therefore they infer that the plaintiff was not the inteſtate's huſband, as he could not have been taken to be, if the point there tried had been married or unmarried, and their ſentence had been, *not married*. *Vide Salk. vol.* 1. *p.* 291.

Trinity, 7 *Ann.* *Brown* v. *Hedges*.

In an action of *trover*, on *not guilty* pleaded, it appeared on *evidence*, that the defendant was tenant by the curteſy of lands in *Ireland*, and had cut down and ſold the trees off the eſtate, and that the reverſion belonged to the plaintiff, and *two* others in *coparcenary*: on a caſe made for the opinion of the court, it was reſolved, 1ſt. That in local actions, as in *treſpaſs*, *wherefore he broke his cloſe*, the plaintiff cannot prove a *treſpaſs* but where he lays it, nor lay it in any other place than where it is; but it is otherwiſe in tranſitory actions, as *trover*: therefore, in the preſent caſe he may lay the converſion here, and prove it in *Ireland*. *Style* 331. 2dly. One joint-tenant, or tenant in common, or parcener, cannot bring *trover* againſt another, becauſe the poſſeſſion of one is the poſſeſſion of both; if he does, it is *good evidence* on *not guilty* pleaded: but if one joint-tenant brings *trover* againſt a ſtranger, in that caſe the defendant may plead it in abatement, but cannot take advantage of it in *evidence*. 2 *Lev.* 113. *Cro. El.* 544. *Vide Salk. vol.* 1. *p.* 290.

Eaſter, 8 *Ann.* *Lord Altham* v. *Lord Angleſea*.

On an iſſue directed out of *Chancery*, to try the validity of *J.* late Earl of *Angleſea*'s will, there were two points argued, which were ſaved at the trial.

1ſt, As to the matter of *evidence*, whether depoſitions taken in *Ireland*, by virtue of a *dedimus*, certifying, that the papers ſent over were true copies of certain fines and recoveries ſuffered there, and witneſſes ſwearing that they were the ſame, and had received no alteration, &c. were *good evidence*. 2dly, Whether there being no deed to lead the uſes, according to the *ſtatute of frauds and perjuries*, the uſe reſulted to the *conuſor*, or went to the *conuſee*, ſo as to make a good tenant to the *praecipe*.

Holt, Chief Juſtice. As to the *firſt* point the law requires the beſt *evidence* that can be had. But we cannot compel any one to come out of *Ireland*; nor oblige any one to go and inform himſelf, in order to be a *witneſs*: but this rule is to be interpreted with reſpect to the perſon depoſing; as that a man's affidavit ſhall not be read when he is here to give his *evidence* by word of mouth; but when the perſon cannot be brought into the court, tho' there be other *witneſſes* to give *verbal evidence*, yet the depoſitions of thoſe that are abſent may be read.

To the *ſecond* point, he held that this caſe was out of the *ſtatute* of *fraud and perjuries*, for in his opinion ſince the *ſtatute*, there muſt be a parol averment to make the uſe reſult; for at common law, if a fine was levied, it was for the uſe of the conuſee till ſuch averment: and that this ſtatute extends only to ſtrangers, and not to the *conuſee* of the *fine*. Accordingly the plaintiff had judgment. *Vide Mod. Rep. vol.* 11. *p.* 210.

Eaſter, 8 *Ann.* *Anonymous*.

In an action of *aſſault* and *battery*, brought by the huſband againſt the defendant for an intent to raviſh his wife, ſhe was admitted an *evidence* (which *Holt* ſaid, was becauſe the wife cannot give any conſent, though it be not *felony*) and held that *A.* having laid 5 *l.* of the event of the cauſe, was no objection to the wife of *A.* being admitted to be an *evidence*; becauſe it ſhall not be in the power of a *third* perſon to diſqualify one, who otherwiſe would be a *good evidence*; and thereon ſhe was admitted to give *evidence*. *Vide Mod. Rep. vol.* 11. *p.* 224.

Eaſter, 8 *Ann.* *Maſon* v. *Hogſden*.

Holt, Chief Juſtice, ſaid, that barely being a factor, does not incapacitate a man for being an *evidence* in a cauſe; otherwiſe if he be intereſted. *Vide Mod. Rep. vol.* 11. *p.* 226.

Eaſter, 8 *Ann.* *Anonymous*.

An action of *debt* was brought on a bond againſt an executor, who pleaded he had *fully adminiſtered*; the plaintiff's counſel gave into court the inventory taken in the *ſpiritual court*, and put it on the defendant to diſcharge himſelf.

Holt, Chief Juſtice, ſaid, that where in the inventory it was ſet down deſperate debts, thoſe ſhall not be aſſets, unleſs the plaintiff can prove that the defendant has received them. But thoſe debts, which are not ſet down deſperate, whether arrears of rent, or any other, ſhall be accounted aſſets, whether paid or not. *Vide Mod. Rep. vol.* 11. *p.* 225.

Trinity, 8 *Ann.* *Young* v. *Slaughterford*.

On a trial at *bar* in an appeal of murder; a perſon being produced to be an *evidence* againſt the appellee, who was under *twelve* years of age; the appellee's counſel objected to him for that reaſon; and beſides, they ſaid he had taken money.

Holt, C. J. held, that if the party knew the danger of an oath, he might be an *evidence*; (and that appearing he was admitted) and ſuppoſe he had taken money, that is no reaſon why his *evidence* ſhould not be taken: but if it be proved, the jury may give the leſs credit to his *evidence*.

But ſuppoſe one gives or promiſes a *witneſs* money if the cauſe go on that ſide, he cannot be admitted to give *evidence*.

It was objected, that in an indictment, *evidence* of diſcourſe preceding the fact, is not to be given.

Holt, Chief Juſtice, replied, that they might give in *evidence* any thing that explains the fact. *Vide Mod. Rep. vol.* 11. *p.* 228.

Michaelmas, 8 *Ann.* *Tybbald* v. *Tregott.*

On an action on the *caſe*, brought by a ſilk dyer againſt his ſervant for money received to his uſe; on the *evidence* it appeared, that *A.* ſending ſilk to be dyed by the plaintiff, the plaintiff ſent his ſervant, the defendant, home with it, and *A.* paid him for every parcel as he received it; *A.* was produced as an *evidence*, that he paid the money to the defendant.

Holt, Chief Juſtice, would not admit his *evidence*; for that would be to admit a creditor to ſwear in diſcharge of himſelf: he ſaid, that if a man pays money by his ſervant, the ſervant may be a *witneſs*; but that is allowed for the neceſſity of the thing. *Vide Mod. Rep. vol.* 11. *p.* 261.

Michaelmas, 8 *Ann.* *Taylor* v. ———.

Holt, Chief Juſtice, ſaid, a perſon who has not ſet his hand to the *witneſſing* a leaſe, may be *witneſs* to it, if thoſe that ſigned it do not appear; and ſo he ruled it. For in the caſe of a leaſe of years, it is ſufficient if the leſſor only ſigns in the *witneſs*'s preſence; and ſo it ſeems in other grants of chattels. *Quere*, if ſo in freeholds, *&c.* *Vide Mod. Rep. vol.* 11. *p.* 262.

Michaelmas, 8 *Ann.* *Burridge* v. *The Earl of Suſſex, and others.*

See this caſe fully ſtated in page 394 of this work, under the head *Ejectment.*

Michaelmas, 8 *Ann.* *Lady Dowager Lindſey* v. *Lord Lindſey.*

In a ſuit in *ejectment*, the plaintiff made title by a recovery in *dower*, and produced in *evidence* the record of the judgment, the *habere facias ſeiſinam*, &c. the defendant offered to prove a term of *ninety-nine years* ſubſiſting, and that prior to this title, but it was diſallowed; for if he had pleaded this in *bar* of the *writ of dower*, yet the plaintiff muſt have recovered with a *let execution be ſtayed*, and the defendant had a proper time to have pleaded it then, and has ſlipped his opportunity: alſo a chattel-intereſt was at *common law* bound by a recovery in a *real* action, ſo that the defendant had an intermediate execution, without regard to the ſubſiſting term: and though by *ſtat. H.* 8. a termor may falſify, yet it muſt be the termor himſelf, and not another for him. *Vide Salk. vol.* 1. *p.* 291.

Michaelmas, 8 *Ann.* ——— v. *Layfield et al'.*

In an action on the *caſe* for money had and received to the plaintiff's uſe, it appeared on *evidence*, that *Layfield* and the other defendants were bankers and partners, and that the plaintiff had given *Layfield* 20*s.* for which he received a ticket in the *double exchange* lottery, and *Layfield* undertook to pay what benefit ſhould happen thereon: that the ticket came up a 40 *l.* prize, and for that money the action was brought; and it was objected for the defendants, that the action was brought againſt *Layfield* and his partners, and it did not appear that any had undertaken to be truſtees in the lottery but *Layfield*, and therefore he ought to be charged, and not his partners; to which *Holt*, Chief Juſtice, anſwered, that it appeared they were partners in their trade, and goldſmiths, and the adventurers put in their money on the credit of ſeveral goldſmiths, who had undertaken to pay the prizes, and it ſhould be preſumed the act of *Layfield* was the act of the others, and ſhould bind them, unleſs they could ſhew a diſclaimer, and a refuſal to be concerned in it; and accordingly the plaintiff had a verdict for 40 *l.* *Vide Salk. vol.* 1. *p.* 292.

Michaelmas, 10 *Ann.* *The Queen* v. *Sutton.*

On an information in nature of a *quo warranto* againſt *Sutton*, for uſurping the office of a common burgeſs of the town of the *Deviſes* in *Wiltſhire*, on the trial at *bar* it appeared, that the recorder had made a deputy-recorder, by writing under his hand and ſeal, and afterwards had revoked this deputation by another writing, a copy of which was offered in *evidence* of the revocation. But this held not good *evidence*, becauſe it did not appear, but they might have produced the original. *Vide Mod. Rep. vol.* 10. *p.* 74.

Michaelmas, 10 *Ann.* *Lord Say and Seals's Caſe.*

See this caſe fully ſtated in page 142 of this work, under the head *Attorney.*

Hilary, 11 *Ann.* *The Queen* v. *The Inhabitants of Hornſey.*

Parker, Chief Juſtice. No one living in a *hundred* ſhall be allowed an *evidence* for any matter in favour of that *hundred*, though ſo poor as on that account to be excuſed from the payment of taxes, becauſe though poor at preſent, he may become rich. *Vide Mod. Rep. vol.* 10. *p.* 150.

Hilary, 11 *Ann.* *The Caſe of the Univerſity of Cambridge.*

Adjudged, That a copy of an act of parliament was *no evidence*, unleſs the act had been before allowed of, and ſo made a record of this court; for otherwiſe nothing ſhall be allowed of, as ſufficient *evidence* of the act, but the exemplification of it under the Great Seal. And the reaſon is, becauſe the court is party, which cannot pray *oyer* as the party may; ſo that the court would be in a worſe condition than a common perſon if they were to receive for *evidence* a copy offered them. 35 *H.* 6. 14. *Vide Mod. Rep. vol.* 10. *p.* 126.

Michaelmas, 11 *Ann.* *Stennil* v. *Brown.*

A condemnation of a ſhip as a prize, in the *Admiralty Court* of *France*, was attempted to be proved by a copy of the condemnation, ſubſcribed by the officer of the court.

Parker, Chief Juſtice, who tried the cauſe, would admit of no *evidence*, but an exemplification of the condemnation under the ſeal of the court.

A copy of a rule of court, ſigned by the officer of the court, is no *evidence* in any other court, unleſs the judge of the court ſet his hand to it himſelf: but at *niſi prius*, the hand of the officer is enough, becauſe it is the ſame court. *Vide Mod. Rep. vol.* 10. *p.* 109.

Michaelmas, 11 *Ann.* *Lord Lanſdown's Caſe.*

On an *ejectment* brought by *three* co-heirs againſt Lord *Lanſdown*, on the trial his Lordſhip offered in *evidence* parol declarations of the teſtator, that it was his intention the iſſue male ſhould take by the will: but this was oppoſed by the counſel for the plaintiffs, and refuſed by the court:

The reaſon of the law in this point being clear and ſtrong; for if parol *evidence* be once allowed to explain a will, and give it another ſenſe than what can be collected from the will ſtanding alone, what purchaſer under a will can be ſafe? or what lawyer can give his opinion on a point that depends on will? *Vide Mod. Rep. vol.* 10. *p.* 97.

Eaſter, 12 *Ann.* *Caſe of the Corporation of Bewdley.*

Thoſe that produce an *evidence* ought to examine him in *chief* only: but they, *againſt whom* he is brought, may examine him on a *voyer dire*, if they pleaſe, whether he is concerned in intereſt.

The matter in iſſue was, which was the charter by which the corporation of the town of *Bewdley* was to act, whether by the ancient one, or by one of later date.

Now, an *evidence* being brought to eſtabliſh the ancient charter, his *evidence* was excepted againſt, as being a mortgagee under the old corporation, which they proved by an anſwer of his to a bill in Chancery. But this anſwer being ſo uncertainly penned, as that it might be true, and yet his mortgage of ſuch a nature as not to prevent his *evidence*; it was inſiſted that he might be called to explain the ambiguity of his anſwer.

The court was of opinion he might, ſince his anſwer depended on his veracity, as much as the *evidence* he could then give; and if the one be to be credited, why not the other?

But afterwards his *evidence* was rejected on another conſideration, *viz.* that in his anſwer he lays the whole ſtreſs of his defence on the matter then in iſſue, *viz.* the ſubſiſting of the preſent corporation. *Vide Mod. Rep. vol.* 10. *p.* 151.

Michaelmas, 12 *Ann. The Queen* v. *Muſcot or Muſket.*

A queſtion was ſtarted on an indictment for a judicial *perjury*, whether one produced as evidence for the Queen might not be exempted on a *voyer dire*, as the common uſage is in civil actions?

Parker, Chief Juſtice. It is a principle of the common law, that every man ſhall be tried by a fair jury, and that evidence ſhall be given by perſons diſintereſted. The law gives the party tried his election, to prove a perſon offered as *evidence*, *intereſted*, two ways, *viz.* either by bringing another *evidence* to prove it, or elſe by ſwearing the perſon himſelf on a *voyer dire*; but though he may do either he cannot have recourſe to both. It was never objected before, that a perſon ſhould not be ſworn on a *voyer dire*; nor will (I hope) ever hereafter. Objections have indeed been ſtarted as to the nature of thoſe queſtions, that ſhall be put to a witneſs on taking ſuch an oath.

As to the caſe of the robbery, that is founded on the neceſſity of it, and *that* only.

As to the caſe grounded on the ſtatutes, where *forty* pounds reward, *&c.* they admit of this anſwer, that the intention of thoſe acts will be quite defeated, if the reward is to take of their *evidence*.

The ſame anſwer likewiſe may ſerve to the caſe of an indictment for *felony*, for ſtolen goods, and where the indictment is removed by *certiorari*, &c. For who in the firſt caſe but the owner can prove the property of the goods? And in the ſecond, if the giving of coſts would take off the *evidence* of the proſecutor, that act of parliament which was deſigned to diſcountenance the removing of ſuits by *certiorari*, would give the greateſt encouragement to them that is poſſible. As to the diſtinction taken between the intereſt of the witneſs appearing on record, and its appearance ſome other way, it is an irrational diſtinction, and a reflexion on the wiſdom of the law. *Vide Mod. Rep. vol.* 10, *page* 193.

Hilary, 1 *Geo. Reeves* v. *Symonds, at Niſi Prius.*

This was an action brought by *Reeves* for a quantity of ſtockings ſold to *Symonds*, who in his defence ſaid, that it was not he that bought the ſtockings, but his ſon, who ſent them to *France* in the way of trade, and to prove this, he would have called his ſon.

Parker, Chief Juſtice, ſaid, he cannot be an *evidence*, becauſe here is an advantage made by way of trade; and to whom this advantage ſhall accrue, depends intirely on this queſtion, who made this contract? And now one comes to ſwear, that he made the contract himſelf.

The defendant's council argued he may be a witneſs, becauſe he will neither get nor loſe by the event of this cauſe; for what is now given in *evidence*, cannot be given in *evidence* in another action.

Parker, Chief Juſtice. If an action be brought by a commoner for his right of *common*, ſhall another perſon that claims a right of *common*, or the ſame title, be allowed to give *evidence*. No, and yet it is certain that he can neither get nor loſe in that cauſe; for the event of that cauſe will no way determine his right. But though he is not intereſted in that cauſe, he is intereſted in the queſtion on which the cauſe depends; and that will be a bias on his mind. It is not his ſwearing the thing to be true that gives him any advantage; but it is the thing's being true; and the law does judge, that it is not proper to admit a man to ſwear that to be true, which it is plainly his intereſt ſhould be true. *Vide Mod. Rep. vol.* 10. *p.* 292.

Trinity, 2 *Geo. Clark* v. *Elwick.*

See this article fully ſtated in page 105 of this work, under the head *Arbitration and Award.*

Hilary, 3 *Geo. Godfrey* v. *Norris.*

In an action of *debt* on a bond, on *not his deed* pleaded, iſſue was joined thereon.

The plaintiff was adminiſtrator *de bonis non* of the obligee, and the only ſurviving witneſs to the bond; and the proof given on this iſſue was only a perſon who ſwore to the hand-writing, and alſo ſeveral letters from the obligor, making mention of this bond.

To this it was objected by the other ſide, that the hand-writing is not ſufficient proof where the witneſs is living. That it was the fault of the plaintiff to bring himſelf under this incapacity, that he might have let another perſon have taken adminiſtration to his uſe, or adminiſtration *as to* this bond only.

But it was ruled by *Parker*, Chief Juſtice, that this was *good evidence*; and he compared it to the caſe of a will, where the witneſs happens to be a deviſee under the will, in which caſe, if there is no other witneſs, the proof of the hand is allowed: whereon a verdict was given for the plaintiff. *Vide Stra. vol.* 1. *p.* 34.

Trinity, 3 *Geo. Dyer* v. *Mills et al'.*

In an action of *treſpaſs* for taking the materials of an houſe; on *not guilty* pleaded, *Parker*, Chief Juſtice, would not admit the defendant to give *evidence* of taking the goods as a *deodand*, becauſe he might have juſtified, and then the plaintiff would have had an opportunity to have given an anſwer to it. *Vide Stra. vol.* 1. *p.* 61.

Eaſter, 4 *Geo. Anonymous.*

The queſtion in *ejectment* being parcel or not parcel, a *ſurvey* was offered in *evidence* on the plaintiff's ſide, which was taken by one under whom the leſſor claimed, wherein the lands in queſtion were not included. But this being an act to which the defendants were not privy, and conſequently not bound, and being dangerous, and tending to encourage people to take more than their own in a ſurvey, *Pratt*, Chief Juſtice, rejected it. *Vide Stra. vol.* 1. *p.* 95.

Eaſter, 4 *Geo. The King* v. *Motherſell.*

On a motion for a new trial, the queſtion being, whether a particular matter offered in *evidence* was well over-ruled by the judge? The court ſaid, that if he had rejected that which was good *evidence*, it would be ground for a new trial; but if the matter offered was not legal *evidence*, then the firſt verdict ought to ſtand. And as to that, the fact was, that on an information in the nature of a *quo warranto*, the proſecutor produced in *evidence* a book, which appeared only to be minutes of ſome corporate acts *ten* years ago, all written by the proſecutor's clerk, who was no officer of the corporation. And this being oppoſed by the other ſide, as being never kept amongſt, or eſteemed as one of the corporation books, in which the entries were always made by the town-clerk, and there being ſome ſuſpicion that this book was not genuine, the judge, before he admitted it to be read, required an account where it had been kept for theſe *ten* years, and whether any body had ſeen it before, concerning which the proſecutor not being able to give any *evidence*, he rejected it.

Per curiam. Corporation books are generally allowed to be given in *evidence*, when they have been publicly kept as ſuch, and the entries made by the proper officer; not but the entries by other perſons may be good, if the town-clerk be ſick, or refuſes to attend, but then, that muſt be made appear. Whoever produces a book muſt eſtabliſh it before he delivers it in. We often make people, when they produce deeds, give an account where they have been kept, and how they came by them. Therefore we are of opinion this *evidence* thus offered was well over-ruled, and conſequently there is no ground for a new trial. *Vide Stra. vol.* 1. *p.* 93.

Trinity, 4 *Geo. The King* v. *Arnold.*

The defendants were indicted, for that they being churchwardens, and *two* others, overſeers in *due man-*

ner appointed, did refuſe to join with the overſeers in making a poor's rate.

Pratt, Chief Juſtice, held, the proſecutor ought to ſhew an appointment of the overſeers under the hands and ſeals of two juſtices, as the ſtatute requires: and he rejected *parol evidence*, becauſe he ſaid it muſt be produced, that he might judge whether it was a ſufficient appointment. He quoted the caſe of *Willoughby* v. *Dixey* in *C. B.* where a will entered in the *ſpiritual court* books, to be delivered out to the executor, was refuſed to be read, till application and refuſal of the executor was proved. And the ſame in Sir *Edward Seymour*'s caſe: wherefore the defendant was acquitted. *Vide Stra. vol.* 1. *p.* 101.

Trinity, 4 *Geo.* *Baker* v. *Lord Fairfax.*

On an iſſue directed out of *Chancery*, one of the witneſſes, after his depoſitions were taken, became intereſted, and confeſſing it now on a *voyer dire*, he was rejected. Then it was deſired to read his depoſitions as if he was dead; and a caſe was quoted, where in *Chancery* a witneſs was made executor, and revived the ſuit, and his depoſition was read at the hearing.

Pratt, Chief Juſtice, remembered the caſe in *Salk.* 286. which was the reſolution of two courts on a trial at *bar*; and ſo he refuſed to hear the depoſitions read. *Vide Stra. vol.* 1. *p.* 101.

Michaelmas, 4 *Geo.* *Jones* v. *White.*

On a trial at *bar* on a feigned iſſue out of Chancery, where the queſtion was, *deviſed or not deviſed*, to overthrow the will, the defendant inſiſted, that the teſtator was *non compos* at the time of making it, which was on the 29th, having ſhot himſelf on the 31ſt. And among other circumſtances, the coroner's inqueſt, which found him lunatic, was offered to be read, which being oppoſed by the other ſide, the court delivered their opinions as follows:

Parker, Chief Juſtice. The plaintiff in this caſe is executrix, and the inqueſt for her advantage, ſince the perſonal eſtate is ſaved by finding *lunacy*; and therefore I think it may be read againſt her. In Lord *Derby*'s caſe, an inqueſt *after death* was allowed to be given in *evidence*; if this is read, it will have but very little weight, for it only finds him lunatic on the 31ſt, which is no *concluſive evidence* that he was ſo on the 29th.

Powys, Juſtice, concurred with the Chief Juſtice.

Eyre, Juſtice. This is a criminal matter, and ought not to be given in *evidence* on a civil proceeding. A verdict on an indictment of *battery* cannot be read in an action for the *battery*. An inquiſition *after death* was in the nature of a civil proceeding, but this is criminal, for it might induce a forfeiture of the goods, if he had been found *felo de ſe*.

Pratt, Juſtice. If a verdict is given in *evidence*, it muſt be between the ſame parties; and therefore an indictment, which is at the ſuit of the King, cannot be read in an action, which is at the ſuit of the party. The wife is no *witneſs* here, as ſhe was before the coroner; ſo that this would be to give *evidence* againſt herſelf. The reaſon why an inquiſition *after death* may be read is, becauſe of the antiquity of it, or to prove a pedigree.

The court being divided, the depoſition was not read, till *Pratt*, Juſtice, deſired it might for this time, being only to inform the conſcience of the Chancellor, and that nothing might ſeem to be omitted that might tend to clear this queſtion. *Vide Stra. vol.* 1. *p.* 68.

Hilary, 5 *Geo.* *Pitton* v. *Walter*, *at Surry Aſſizes.*

Pratt, Chief Juſtice. The bare producing the *poſtea* is *no evidence* of the verdict, without ſhewing the copy of the final judgment; becauſe it may happen that the judgment was arreſted, or a new trial granted. But it is good *evidence* that a trial was had between the ſame parties, ſo as to introduce an account of what a witneſs ſwore at that trial, who is ſince dead.

The queſtion being, whether the leſſor of the plaintiff was heir at law to him that laſt died ſeiſed, to prove the pedigree, the Chief Juſtice admitted a viſitation in 1623 made by the heralds, entered in their books, and kept in their office, to be read in *evidence*: he alſo admitted the minute book of a former viſitation, ſigned by the heads of the ſeveral families, which was found in the library of Lord *Oxford*. *Vide Stra. vol.* 1. *p.* 162.

Michaelmas, 5 *Geo.* *The King* v. *Smith.*

The court was moved for a rule on a juſtice of peace to produce an examination at a trial; and the court doubting, the matter was adjourned. And afterwards *Pratt*, Chief Juſtice, delivered the opinion of the court as follows:

Where things are *evidence* of themſelves, as corporation books, we make no rule to produce them, but only that the party may have copies, which copies are *evidence*: but this examination is not *evidence* of itſelf, without proving the hand writing of the party; and ſo it is of *warrants* and *affidavits*, and therefore a copy of them is *no evidence*; and we muſt have the original, for nothing elſe concludes the party. Make the rule, that the juſtice *cauſe to be produced* the examination at the trial, and give the party a copy in the mean time. *Vide Stra. vol.* 1. *p.* 126.

Michaelmas, 5 *Geo.* *Fotheringham* v. *Greenwood.*

A. having money of the plaintiff's in his hands, loſes it at play. The plaintiff brings an action after *three* months on *ſtatute*, 9 *Ann*, *c.* 14. *againſt gaming* and produces *A.* as a *witneſs*. On a *voyer dire* he confeſſed, that if the plaintiff recovered he was not to be anſwerable; but if he failed, the money was to be deducted out of his fortune in the plaintiff's hands.

Pratt, Chief Juſtice. Though the recovery againſt the defendant will not ſink the demand for the money embezzled by *A.* yet his apprehenſion, that the plaintiff will not trouble him for it, is a bias on him; for if a *witneſs* thinks himſelf intereſted in the queſtion, though in ſtrictneſs of law he is not, yet he ought not to be ſworn.

In this caſe was quoted the caſe of Mr. *Chapman* of *Bucks*, who owned himſelf to be under an honorary, though not a binding engagement, to pay the coſts; and *Parker*, Chief Juſtice, on ſolemn debate, rejected his *evidence*, and ſo it was done in this caſe. *Vide Stra. vol.* 1. *p.* 129.

Eaſter, 6 *Geo.* *Moody* v. *Thurſton.*

In this caſe, acceſs was granted to the books of the commiſſioners for ſtating and determining the debts of the army, at the prayer of the defendant, being an officer's widow. *Vide Stra. vol.* 1. *p.* 304.

Eaſter, 6 *Geo.* *Leighton* v. *Leighton.*

On a trial at *bar*, the defendant made title under an old *in-tail*, and among other things offered as *evidence* an inquiſition taken *after death* in 25 *H.* 8. whereby it was found, that the deceaſed tenant was ſeiſed in *fee*, and on traverſe of this it went down to be tried, and found to be only a *ſeiſin in tail*, on which judgment was given, and an *amoveas manus* iſſued. This was objected to by the council for the plaintiff, becauſe it was taken and tried in the county of *Salop*, whereas the lands lay in *Wales*, and this being before *ſtat.* 27 *H.* 8. which united *Wales* to *England*, was *before no judge*, and a *miſ-trial.* But the court ordered it to be read, ſaying, it was not void but voidable; and cited *Murrey* v. *Wiſe*, where on a trial at *bar* depoſitions regularly taken were allowed to be read. *Vide Stra. vol.* 1. *p.* 308.

Eaſter, 6 *Geo.* *Brocas* v. *The Mayor*, &c. *of the City of London.*

The plaintiff moved that he might have a copy of the poll, and that Sir *John Ward*, who, as Mayor, preſided at the election, might produce the *original* at the trial; and his council cited *two* caſes, and produced the rules, where a copy of the poll was ordered to be given, and the original to be produced. 12 *Ann*, Sir *Peter Delme*'s caſe, and *Trinity* 4 *Geo. Parminter*'s caſe.

Eyre, Juſtice. In the caſe of *Marlborough* the original was ordered to be produced, but then it was on *affidavit* of an eraſure.

Forteſcue, Juſtice. This poll is a public thing, like corporation books; or elſe it is only in nature of the officer's own private *memorandum*. If the *firſt*, then a copy thereof is as much as you can aſk, without ſome particular foundation. If it be only of a private nature, then you cannot have ſo much as a copy: therefore the plaintiff took nothing by his motion. *Vide Stra. vol.* 1. *p.* 307.

Trinity, 6 *Geo.* *The King* v. *Tilly*.

A conviction for *deer-ſtealing* was quaſhed, becauſe the ſame perſon was both informer and *witneſs*, and was intitled to a part of the penalty. *Vide Stra. vol.* 1. *p.* 316.

Michaelmas, 6 *Geo.* *Leighton* v. *Leighton*.

The court was moved, that the keeper of records and fines in the county of *Monmouth* might attend the trial at *bar* with ſome of the original records, to anſwer an objection that had been made on a former trial, that all the records were worn out and obliterated.

Per curiam. We cannot do it: you may have a rule for copies. And though the officer cannot be examined as to matter of record, yet he may give *evidence* to the condition of them in general, without producing them, and that will anſwer your purpoſe as well. *Vide Stra. vol*, 1. *p.* 210.

Hilary, 7 *Geo.* *Dunſley* v. *Weſtbrown*.

In an action of *treſpaſs* for beating his ſervants, *whereby he loſt their ſervice*; the plaintiff called one of the ſervants to prove the caſe. It was objected, that he having a right to bring an action in his own name, it was in effect ſwearing for himſelf, and he muſt be under a bias, becauſe what he ſays now on his oath, may be given in *evidence* againſt him in his own action.

Pratt, Chief Juſtice, inclined to the objection, ſo the plaintiff ſet him aſide; and in the debate of it the Chief Juſtice put this caſe: A ſailor ſues for wages, and the queſtion turns on the loſs of the ſhip: no ſailor, who has wages due, ſhall be a *witneſs* as to the ſalvage of the ſhip, becauſe he is concerned in the event of that queſtion. *Vide Stra. vol.* 1. *p.* 414.

Hilary, 7 *Geo.* *The King* v. *Hall*.

On an information for a *libel* againſt the doctrine of the Trinity, the *witneſs* for the crown, who produced the *libel*, ſwore that it was ſhewn to the defendant, who owned himſelf the author of that book; errors of the preſs, and ſome ſmall variations, excepted. The council for the defendant objected, that this *evidence* would not intitle Mr. Attorney to read the book, becauſe the confeſſion was not abſolute, and therefore amounted to a denial that he was the author of that identical book. But *Pratt*, Chief Juſtice, allowed it to be read, ſaying, he would put it on the defendant to ſhew that there were material variances. *Vide Stra. vol.* 1. *p.* 416.

Trinity, 7 *Geo.* *Buſby* v. *Greenſlate*.

In this caſe, a perſon, who had ſold the inheritance without any covenant for good title or warranty, was allowed to be a *witneſs* to prove the title of the vendee. *Vide Stra. vol.* 1. *p.* 445.

Michaelmas, 7 *Geo.* *Hawkins* v. *Perkins*.

In an action on the *caſe* on a note, the plaintiff called one of the defendant's bail to prove the hand writing; and whether he was bound to give *evidence* was the queſtion. The Chief Juſtice ſaid, if he was a ſubſcribing *witneſs* he would oblige him; but otherwiſe he would leave him to his liberty. *Vide Stra. vol.* 1. *p.* 406.

Michaelmas, 7 *Geo.* *The King* v. *Guyn*, *Mayor of Chriſt-Church*.

On a trial at *bar*, the queſtion was, whether *A. B.* at the time he did a corporate act, was an out-burgeſs or not. And to prove he was, the defendant, who had a rule for copies of *all the books and records of the borough aforeſaid*, produced a copy of a letter *fifty years* old, and found in one of the corporation cheſts, wherein *A. B.* was mentioned to be of another place: but the court refuſed to hear it read, becauſe not a corporate act within the rule, ſo that a copy is not *evidence*, but the original ought to be produced. *Vide Stra. vol.* 1. *p.* 401.

Hilary, 8 *Geo.* *The King* v. *Reaſon and Tranter*.

The defendants being indicted for the murder of Mr. *Lutterel*, were brought to the bar and arraigned, when they pleaded *not guilty*.

On the trial (which was at *bar*) the council for the King offered to give in *evidence* ſeveral declarations made by the deceaſed on his death bed, whereby he charged the defendants with barbarouſly murdering him; and without much heſitation, the court permitted that *evidence*. Whereon a clergyman, who attended him, was called, and when that gentleman had finiſhed his *evidence*, the court called on the council to produce a paper that had been written from the mouth of the deceaſed, ſaying, it was *better evidence* than the memory of the *witneſs*; whereon they informed the court, that they had not got the original, it being in the cuſtody of one of the Juſtices, whom, on attempting to *ſubpœna*, they found was in *Wales*, but the clergyman ſaid, he had a copy of it, which he took for his own ſatisfaction, before he delivered in the original to the coroner, and he offered to ſwear this to be a true copy.

Whereon a debate aroſe, whether this copy was *evidence* or not? The council for the King inſiſted, that the firſt paper being only the writing of the *witneſs*, not ſigned by the examinant, this, which, he now produced, was as much an original as that. But the court refuſed to let it be read, unleſs they could ſhew that the original was loſt; whereas they might have had it to produce, if they had ſent after it in time.

It was then objected by *Pratt*, Chief Juſtice, that ſince the written *evidence* was not produced, the whole *evidence* of the deceaſed's declaration ought to be rejected, for the firſt, ſecond, and third being all to the ſame effect, are but one fact, of which the beſt *evidence* was not produced; and therefore he was of opinion that they could not be let in to give any account of the firſt and third conference.

But the other judges were of opinion they might, ſaying, they were three diſtinct facts, and there was no reaſon to exclude the *evidence* as to the firſt and third declarations, merely becauſe they were diſabled to give an account of the ſecond.

Thereon the *witneſs* was directed to repeat his *evidence*, laying the examination before the juſtices out of the caſe, which he did accordingly. *Vide Raym. vol.* 1. *p.* 449.

Hilary, 8 *Geo.* *Brownſon* v. *Avery*.

The caſe was, *A.* ſells goods to *B.* and afterwards *C.* deſires *D.* to pay *A.* and promiſes to repay him; *D.* pays *A.* and afterwards *B.* allows the money to *D.* on account; and in an action againſt *C. B.* was called to prove the account, (it amounting to payment.) And it was objected, that the contract being originally between *A.* and *B.* *B.* was ſtill liable to *A.* and was therefore ſwearing to diſcharge himſelf. But *Pratt*, Chief Juſtice, ſaid, he would allow him to be a *witneſs* to prove the payment as a ſervant to *C.* *Vide Stra. vol.* 1. *p.* 507.

Hilary, 8 *Geo.* *Denniſon* v. *Spurling*.

In an action brought by an *infant*, the wife of the *procbein amy* was called; and *Pratt*, Chief Juſtice, allowed her to be a good *witneſs*. *Vide Stra. vol.* 1. *page* 506.

Hilary, 8 *Geo.* *Lord Bernard* v. *Saul.*

On a motion for leave to plead *double*, the court declared, that on *non aſſumpſit*, the defendant might give in *evidence* an unſurious contract, becauſe it makes it a void promiſe; but in the caſe of a *ſpecialty*, it muſt be pleaded. And on the trial the defendant was admitted to that *evidence* on the general iſſue, and the plaintiff was nonſuited. *Vide Stra. vol.* 1. *p.* 498.

Hilary, 8 *Geo.* *Shuttleworth* v. *Bravo.*

By the *bankruptcy act* it is provided, that if the bankrupt has within one year before loſt 5 *l.* in one day at gaming, he ſhall not have his certificate, nor the uſual allowance: and on an iſſue out of *Chancery* to try the point of gaming, a creditor of the bankrupt was called to prove the gaming. But *Pratt*, Chief Juſtice, would not allow him to be a *witneſs*, becauſe he would be intitled to a ſhare out of the uſual allowance of the bankrupt, which if he has not, by having forfeited on account of gaming, the dividend to the creditors will be the larger. *Vide Stra. vol.* 1. *p.* 507.

Hilary, 8 *Geo.* *Hammond* v. *Stewart.*

The defendant ſummoned one *T.* as a *witneſs* to attend the trial of the cauſe, who, on ſervice of the *ſubpœna*, ſaid, he would not attend, but run the hazard of forfeiting the 100 *l.* penalty: on *affidavit* of this, the court was moved for an *attachment*, that they might not be put to bring this action on the ſtatute, ſaying, they do it every day in Chancery, even for not attending a maſter on his ſummons. And in the principal caſe, the court made a rule to ſhew cauſe.

And this term the rule for the attachment *niſi* againſt the *witneſs* was diſcharged, it appearing that the *ſubpœna* was not ſerved till two in the afternoon in the city, to attend the ſitting that day in *Middleſex*, which the court ſaid was too ſhort a notice, and that *witneſſes* ought to have a reaſonable time to put their own affairs in ſuch order, that their attendance on the court may be of as little prejudice to themſelves as poſſible. *Vide Stra. vol.* 1. *p.* 510.

Trinity, 8 *Geo.* *Anonymous.*

Pratt, Chief Juſtice, allowed the wife's declaration, that ſhe agreed to pay 4 *s. per* week for nurſing a child, was *good evidence* to charge the huſband; this being a matter uſually tranſacted by the women. *Vide Stra. vol.* 1. *p.* 527.

Trinity, 8 *Geo.* *Robinſon* v. *Davis.*

On *affidavit* that the original award was loſt by coming up in the *Briſtol* mail, which was robbed; the court was moved on a copy of it, and a rule was granted for an attachment *niſi*. *Vide Strange, vol.* 1. *p.* 526.

Michaelmas, 8 *Geo.* *Atwood* v. *Dent.*

The plaintiff called a *witneſs*, who was ſet aſide on an exception taken by the defendant; but afterwards the defendant thought fit to call him, and then the plaintiff oppoſed his being examined. But *Pratt*, Chief Juſtice, ordered him to be ſworn, for he is a *good witneſs*, (nay a better) *witneſs* for the defendant, though he is not to be admitted againſt him. *Vide Strange, vol.* 1. *p.* 480.

Michaelmas, 8 *Geo.* *Moody* v. *Thurſton.*

By the *ſtatute* for ſtating the debts of the army, the commiſſioners have power to call the officers and agents before them, and if it appears there is any money due from one to the other, the commiſſioners are to give the party a certificate, and he may maintain an action for the money as on a ſtated account. The plaintiff in this cauſe produced his certificate; and the defendant offered in *evidence* his accounts, by which he ſaid it would appear, he had at that time no money in his hands; and beſides the commiſſioners had never heard him, but on the *firſt* ſummons made the certificate, and refuſed to give him time to produce his accounts. But *Pratt*, Chief Juſtice, would not let him into this *evidence*, being of opinion, that the certificate was concluſive. *Vide Strange, vol.* 1. *p.* 481.

Hilary, 9 *Geo.* *Alcock* v. *Carter.*

See this caſe fully ſtated in page 419 of this work, under the head *Error*.

Hilary, 9 *Geo.* *Moſſe* v. *Bennet.*

In *treſpaſs* on the *caſe* againſt the defendant, for diſturbing the plaintiff in his *common*; wherein he ſet forth, that the defendant had *covered three acres* of the common field with hurdles, and had incloſed *three acres* more, *&c.*

The defendant pleaded that the *college* of *Newelme* in the county of *Oxford*, was ſeized in *fee* of the lands in the declaration mentioned, and being ſo ſeized, made a leaſe thereof to the defendant for life, and that he the defendant had a right by preſcription to have a *fair* on the ſaid common every year, on ſuch days in the year, and to have hurdles to keep and encloſe cattle there, and a right to ſo much of the ground on the ſaid common as would keep the ſaid hurdles from fair to fair, and ſo juſtified the encloſing *three acres* with hurdles, and the *covering three acres, with the hurdles aforeſaid*, and avers it to be the ſame treſpaſs.

And on a demurrer to this plea, it was objected, that it was ill and repugnant, becauſe a *ſeiſin was laid in the college, and an eſtate for life in the defendant*; but it was diſallowed, for it is good, *rendering to each his own*.

It was further objected, that the defendant had juſtified the *encloſing three acres*, but did not ſay, that the covering was *in three other acres*; that the plaintiff having declared for a diſturbance in *ſix* acres, the defendant had only juſtified in *three acres*, which the court held to be a fault incurable, and the rather becauſe this being an action on the *caſe* for diſturbing the plaintiff in the enjoyment of his *common*, the defendant might have pleaded the *general iſſue*, and have given this ſpecial matter in *evidence*. *Vide Mod. Rep. vol.* 8. *p.* 120.

Trinity, 9 *Geo.* *Dale* v. *Johnſon.* *At Niſi Prius.* Error.

The defendant in an action aſſigned for *error*, that the plaintiff died before judgment, and to prove it he called the wife of the plaintiff, and *Pratt*, Chief Juſtice allowed her to be a *witneſs*. *Vide Strange, vol.* 1. *p.* 568.

Trinity, 9 *Geo.* *Hiliard* v. *Phaly.*

On a trial at *bar* on an iſſue directed out of *Chancery*; the queſtion was, whether Mr. *H.* the plaintiff's brother (who was ſeized in *fee* of the lands in queſtion, of the yearly value of 600 *l.*) was married to *S. P.* the mother and guardian of the defendant, before ſuch a day, which was his birth day; there were three other iſſues to the ſame purpoſe, ſhe having three other ſons.

On the trial it was proved on the plaintiff's ſide, that on the death of Mr. *H.* this woman got into her cuſtody all the writings concerning the inheritance of thoſe lands; and on a bill in *Chancery*, exhibited againſt her to diſcover the ſame, ſhe anſwered, that ſhe was married to Mr. *H.* about *three* years before he died, and ſo inſiſted to keep the writings, which anſwer was now offered to be given in *evidence*; but it was oppoſed on the other ſide; for though it might be concluſive againſt herſelf, if ſhe pretended to any dower, or to a jointure, yet it cannot be given in *evidence* againſt a *third* perſon not deriving any title under her; and the court being of that opinion, the anſwer was not read.

Then they offered to give the proceedings in the *ſpiritual court* in *evidence*, but that was likewiſe denied, becauſe what was done in the *ſpiritual court* cannot be *evidence* at *common law*, where the title of lands is in queſtion.

So the jury gave a verdict for the defendants. *Vide Mod. Rep. vol.* 8. *p.* 180.

Michaelmas, 9 *Geo.* *Burr* v. *Davall.*

On an iſſue directed out of *Chancery* to try the validity of Sir *Thomas Davall*'s will, at the trial the council for the plaintiff objected againſt a *witneſs* produced by the defendant to prove that the teſtator was not *compos mentis*, *viz.* that he was intereſted in the ſucceſs of the cauſe: to which it was anſwered, that there were but *two* ways of excepting againſt a *witneſs*, either as to his oath, or by proving that he was a diſabled perſon, and this muſt be done on the other ſide. Then if there ſhould be any doubt, whether the words in the will were *dying with iſſue*, *or without iſſue*, it ought to be taken in that ſenſe which makes the will conſiſtent with reaſon and good ſenſe: the plaintiff had judgment. *Vide Mod. Rep. vol.* 8. *p.* 60.

Michaelmas, 9 *Geo.* *Collier* v. *Morris and others.*

One *Ridings* was *ſupœnaed* as a *witneſs* on behalf of the plaintiff in a cauſe which was tried at the ſittings after the laſt term in *Middleſex*, and was three times called, but did not appear, wherefore an application was made to the court from the plaintiff for an attachment againſt him.

And now his council ſhews cauſe, and produces an *affidavit* of *Ridings*, that he did attend at the trial, and was ready to give *evidence*, but came too late, after he was called, and that he could give no *other evidence* than was given by one of the *witneſſes* who was ſworn, and that notwithſtanding his abſence, the plaintiff had a verdict and 90 *l.* damages.

As to that it was anſwered for the plaintiff, that *two* of the defendants were acquitted, whereby the plaintiff has been obliged to pay 20 *l.* coſts.

Lord *Hardwicke.* I do not ſee any reaſon in this caſe to proceed by this extraordinary way of *attachment*, for the ancient and ordinary remedy is by action on the *ſtat.* which if you think yourſelves wronged, you may purſue. The rule was diſcharged. *Vide Caſes Temp. Lord Hardwicke. p.* 180.

Michaelmas, 9 *Geo.* *The King* v. *Layer.*

The defendant being indicted for *high treaſon*, one Mr. *D'Oyley* depoſed, that ſome papers in a bundle, were as he believed of the priſoner's hand writing; for that he, this *witneſs* was acquainted with his hand, he being his clerk about *fourteen* years ſince, and that he had received a letter from the priſoner about *five* years paſt, which he believed was written by him.

Then the papers were produced to be read, which was oppoſed by the council for the priſoner, becauſe ſimilitude of hands was *no evidence*, and ſome caſes were cited to prove that matter.

But this was over-ruled by the court, who were of opinion, that if theſe papers were not written by the priſoner, yet being found in his cuſtody, they ought to be read; and ſo it was reſolved in Lord *Preſton*'s caſe. *Vide Mod. Rep. vol.* 8. *p.* 89.

Eaſter, 10 *Geo.* *Stevenſon* v. *Nevinſon.*

See this caſe fully ſtated in page 405 of this work, under the head *Elections.*

Trinity, 10 *Geo.* *The King* v. *Smart.*

On a *certiorari* to remove an indictment, the defendant entered into a *recognizance* to try it at the next aſſizes, which he could not do by reaſon of the indiſpoſition of ſome *witneſſes*; and this appearing to the court on *affidavit*, it was moved to ſtay the *eſtreating* of the *recognizance*, which was granted on payment of *coſts*, and entering into a rule to try it at the next aſſizes following, eſpecially ſince the proſecutor can get nothing by the eſtreat of the *recognizance*, but now he gets his coſts. *Vide Mod. Rep. vol.* 8. *p.* 288.

Trinity, 10 *Geo.* *Serle or Searle* v. *Barrington.*

See this caſe fully ſtated in page 244 of this work, under the head *Bonds.*

Trinity, 10 *Geo.* *The King* v. *Moiſe.*

The defendant was indicted for tearing a note, whereby he promiſed to pay to *A. B.* ſo much money, *A. B.* was produced as a *witneſs*, and it was objected, that it was ſwearing to ſet up his own demand, becauſe if the defendant was convicted, the court would oblige him to give a new note. But *Forteſcue* and *Raymond*, Juſtices, allowed her to give *evidence*. *Vide Strange*, *vol.* 1. *p.* 595.

Trinity, 10 *Geo.* *Duel* v. *Harding.*

In an action for beating his ſervant, *whereby he loſt his ſervice*, *Forteſcue* and *Raymond*, Juſtices, allowed the ſervant to be a *witneſs*. *Vide Strange*, *vol.* 1. *p.* 595.

Trinity, 10 *Geo.* *The King* v. *Purſell.*

The defendant being proſecuted for oppreſſing an honeſt man, under colour of a warrant of the Chief Juſtice, was ordered to anſwer on *interrogatories*; and on his examination he forſwore himſelf, and was indicted and convicted of *perjury*; and now he moved to ſet aſide the ſaid conviction, it appearing on *affidavit*, he could not be ready to make any defence at the trial; and on this motion the verdict was ſet aſide on payment of coſts, and entering into a rule to try it forthwith. *Vide Raym. vol.* 8. *p.* 289.

Eaſter, 11 *Geo.* *The King* v. *The Biſhop of Cheſter.* Error.

On *error* brought of a judgment in a *quare impedit* brought in the *County Palatine of Lancaſter* againſt the *Biſhop of Cheſter*, for refuſing to admit one *Peploe* to the *wardenſhip of Mancheſter-College*, on the preſentation of the King.

The Biſhop pleaded, that he claimed nothing but as ordinary, and ſet forth, that this College was founded by *Car.* 2. who appointed a warden thereof, and that all ſucceſſive wardens ſhould be *batchelors* of divinity; and that the ſaid *Peploe* was not a batchelor of divinity; therefore he (the Biſhop) could not admit him to be *warden.* And on iſſue joined, whether he was a batchelor of divinity or not, the cauſe was tried, and *evidence* was given, that the *Archbiſhop of Canterbury* had granted a faculty or degree of batchelor of divinity to the ſaid *Peploe inſtanter*, which faculties were grantable by the *Archbiſhop of Canterbury* for the time being, by cuſtom and uſage immemorial, and this was confirmed to them by *ſtat.* 25 *H.* 8.

The council for the defendant tendered a *bill of exceptions* to this *evidence*, which was over-ruled below: and thereon a verdict was found for the King: and now the defendant brought a *writ of error*, and aſſigned theſe *errors* following:

1ſt. It did not appear that this faculty was ſtamped, or that the duty was paid at the time it was enrolled in Chancery, as it ought to be by virtue of *ſtat.* 9 *W.* 3. therefore it not being ſtamped when enrolled, it is void.

2dly. This faculty was not ſubſcribed and regiſtered by the Archbiſhop's clerk of the faculties, as required by the ſaid *ſtat.* 25 *H.* 8.

3dly. That it was not ſubſcribed and enrolled by the King's clerk of the faculties in *Chancery* as it ought, becauſe he is empowered by the ſtatute to tender an oath to the perſon who hath obtained it, which ſtatute was made to reſtrain the extravagant grants of the Pope in thoſe days; and therefore ſhould be fully and ſtrictly performed by the *clerks themſelves*, and not by their deputy clerks.

But theſe objections were over-ruled, and the judgment was affirmed. *Vide Mod. Rep. vol.* 8. *p.* 365.

Trinity,

Trinity, 11 Geo. The King v. Fletcher.

Two perſons were indicted for an *aſſault*, one ſubmitted, and was fined 1 s. and paid it: the other pleaded *not guilty*, and on the trial, *Raymond*, Chief Juſtice, allowed him to call the other defendant, the matter being now at an end as to him. *Vide Stra. vol.* 1. *page* 633.

Trinity, 11 Geo. Bourne v. Turner.

The court was moved on *affidavit* that the tenant in poſſeſſion was a material *witneſs* for the landlord, that therefore the landlord might be made a defendant in the room of the tenant in poſſeſſion.

The council on the other ſide inſiſted, that it was never done, and that it would not make him a *witneſs* when done.

Per curiam. He is liable for the *meſne profits*. The declaration is regularly delivered to the defendant in poſſeſſion. It was never done in this court. *Vide Stra. vol.* 1. *p.* 632.

Trinity, 11 Geo. Shank, qui tam v. Payne.

In an action on the *ſtatute of uſury*, *Holt*, Chief Juſtice, refuſed to let the party to the contract be a *witneſs* to prove the re-payment of the money, becauſe till that was proved he was *no witneſs* at all. *Vide Stra. vol.* 1. *p.* 633.

Trinity, 11 Geo. The King v. Azire.

On an indictment againſt the huſband for an *aſſault* on the wife, *Raymond*, Chief Juſtice, allowed her to be a good *witneſs* for the King; and cited Lord *Audley*'s caſe, in the *State Trials*. *Vide Stra. vol.* 1. *p.* 633.

Trinity, 11 Geo. Philips v. Fiſh.

In an action on the *caſe* for words ſpoken of the plaintiff, the court held, that where a *treſpaſs* is with a *whereby*, &c. whatever comes under the *per quod* muſt be proved, otherwiſe the plaintiff cannot have a verdict, becauſe that is the *giſt* of the action. *Vide Mod. Rep. vol.* 8. *p.* 372.

Michaelmas, 11 Geo. Sir John Walrond v. Jacob Senior Henricus Van Moſes.

See this caſe fully ſtated in page 170 of this work, under the head *Bail*.

Michaelmas, 11 Geo. Anonymous.

On a motion made by the plaintiff to examine *witneſſes* at a judge's chamber, they being *mariners*, and now going to ſea on a long voyage, it was oppoſed on the other ſide, becauſe this would be to deprive the party of the benefit of this *evidence* by croſs-examining them at the trial; it is true, ſuch motions have been made where the defendant would put off a trial, or where he deſires ſome other favour of the court; but here it is in the power of the plaintiff to bring on the trial when he pleaſes; and the defendant cannot bring it on but by *proviſo*, and then this motion might be proper.

This motion would have been granted, if the defendant had agreed to it; or if he had deſired any favour of the court, it ſhould not be granted, unleſs he would admit the plaintiff to examine his *witneſſes*; but that not being the caſe, the plaintiff took nothing by this motion. *Vide Mod. Rep. vol.* 8. *p.* 326.

Hilary, 12 Geo. Price v. Brown.

Payment after the day, and before bringing the action, was pleaded to be a payment of the principal and all intereſt then due: on *evidence* it appeared a groſs ſum was paid, which on computation did not amount to the full intereſt, but it was ſworn that the plaintiff accepted it in full. It was objected, that they ought to prove it, as they had pleaded; but the Chief Juſtice thought it well enough, on which there was a verdict. And the next term the court was moved on *affidavits* of the falſity of the defence, and that no defence was expected, and therefore they were not ready to contradict the *ſingle witneſs*, who ſwore to the payment of the money. But the court would not grant a new trial, ſaying, it would be of dangerous conſequence to ſuffer people to ſet up *new evidence*, after they knew what was ſworn before. *Vide Stra. vol.* 1. *p.* 691.

Hilary, 12 Geo. Chambers v. Robinſon.

In an action for a *malicious proſecution* of an indictment for *perjury*, *Raymond*, Chief Juſtice, allowed the plaintiff to give in *evidence* an advertiſement put in the papers by the defendant, of the finding the indictment, with other ſcandalous matter, though an information had been granted for it as a libel, not (as he ſaid) that the jury were to conſider it in damages, but only as a circumſtance of malice. *Vide Stra. vol.* 1. *p.* 691.

Eaſter, 12 Geo. The King v. Travers.

The defendant was indicted the laſt ſummer aſſizes at *Kingſton*, for a *rape* on the body of a child, then *ſix* years old. And becauſe Lord Chief Baron *Gilbert* refuſed to admit the child as an *evidence* againſt him, he was acquitted.

But at the ſame aſſizes an indictment was found againſt him for an *aſſault* with an intent to raviſh the ſaid child, and this indictment coming now to be tried before *Raymond*, Chief Juſtice, the ſame objection was now taken, *viz.* that the girl being now but *ſeven* years of age, could not be a *witneſs*: the council inſiſting, that it had formerly been held, that none under *twelve* years of age could be admitted to be a *witneſs*.

On the other ſide it was ſaid, that in capital caſes, which concerned life, this objection might be allowed, but in caſes of miſdemeanor only, as this was, ſuch a *witneſs* might be admitted: the council inſiſted, that the objection went only to the credit of the *witneſs*.

Raymond, Chief Juſtice, held, that there was no difference betwixt capital offences and leſſer offences, in this reſpect. And that a perſon who could not be a *witneſs* in the one caſe, could not in the other. The reaſon why the law prohibits the *evidence* of a child ſo young is, becauſe the child cannot be preſumed to diſtinguiſh betwixt right and wrong: no perſon has ever been admitted as a *witneſs* under the age of *nine* years, and very ſeldom under *ten*. And in the preſent caſe, the child was refuſed to be a *witneſs*: and there not being *evidence* ſufficient without her, the defendant was acquitted. *Vide Stra. vol* 2. *p.* 700.

Trinity, 12 Geo. Hill v. Bateman et al.

The defendant *Bateman* being a juſtice of peace, had convicted the plaintiff for deſtroying game, and though (as it was proved) the plaintiff had effects of his own, which might have been diſtrained, ſufficient to anſwer the penalty he had incurred, yet the defendant ſent him immediately to *Bridewell*, without endeavouring to levy the penalty on his goods: and an action of *treſpaſs* and *falſe impriſonment* being brought againſt *Bateman* for this commitment, the Chief Juſtice was of opinion that this action will lay.

And it was agreed, that where actions of this kind are brought againſt juſtices of peace, they are obliged to ſhew the regularity of their convictions; and the informations, &c. laid before them, on which their convictions are grounded, muſt be produced and proved in court. *Vide Stra. vol.* 1. *p.* 711.

Michaelmas, 12 Geo. The Duke of Somerſet v. France, and other Tenants in Cumberland.

In this caſe an admiſſion under the hand of the ſteward, though above *forty* years old, was rejected in *evidence*, becauſe they could not prove the ſteward's handwriting. See this caſe fully ſtated in page 329 of this work, under the head *Cuſtom*.

Michaelmas, 12 *Geo. Martin et al*, v. *Horrell*.

The plaintiffs were goldſmiths, and one *S.* their apprentice, over-paid a bill 10 *l.* and in an action brought for the money had and received to the plaintiff's uſe,

Raymond, Chief Juſtice, allowed *S.* to be a *witneſs*; though it was objected, that unleſs the money was recovered back from the defendant, *S.* would be anſwerable to the plaintiff. But the Chief Juſtice ſaid, he did it *on the neceſſity* of the thing, and it would be of miſchievous conſequence, if in tranſactions of this nature a goldſmith's ſervant ſhould not be a *witneſs*: therefore the plaintiffs recovered the 10 *l.* *Vide Stra. vol.* 1. *p.* 647.

Michaelmas, 12 *Geo. The King* v. *Fox*.

On an indictment for an *aſſault*, it was proved, that the proſecutor had laid a wager, that he would convict the defendant. And the Chief Juſtice held him to be a *good witneſs* for the King, though it might affect his credit. *Vide Stra. vol.* 1. *p.* 652.

Michaelmas, 12 *Geo. Powell* v. *Hord*.

See this caſe fully ſtated in page 336 of this work, under the head *Damages*.

Michaelmas, 13 *Geo. The King* v. *Reeks*.

An information in the nature of a *quo warranto*, was filed againſt the defendant, to ſhew by what authority he claimed and exerciſed the office of a burgeſs of the borough of *Chriſt-Church*, *Twineham*, in the county of *Southampton*, from the 19th day of *December* 1721, to the time of exhibiting the information. On the trial at *bar*, an admittance of the defendant to his freedom, written *two months* after the time, and not ſigned, *&c.* was refuſed to be admitted in *evidence*. *Vide Raym. vol.* 2. *p.* 1445.

Michaelmas, 13 *Geo. Batſon et al'*, v. *Sayer*.

In an action for a falſe return to a *mandamus* to ſwear the plaintiff into the office of churchwarden, the plaintiff ſet out, that he was elected, and preſented himſelf to be ſworn, but was refuſed; and that *he was not elected* was returned.

The Chief Juſtice held, that by law there may be a ſelect veſtry, and that in this caſe the plaintiff need not prove the preſenting himſelf to be ſworn, becauſe that is but a circumſtance, and not to the point of the truth or falſity of the return. *Vide Stra. vol.* 2. *p.* 728.

Michaelmas, 13 *Geo. Murray* v. *Thornhill*.

The court refuſed to make a rule on the *Eaſt-India* Company to inſpect their private books relating to the appointment of their ſervants. *Vide Stra. vol.* 2. *page* 717.

Michaelmas, 13 *Geo. The King* v. *Rhodes*.

The defendant was indicted for forging a letter of attorney, whereby he transferred Mr. *Heyſham*'s ſtock; and *Forteſcue*, Juſtice, refuſed to let *Heyſham* be a *witneſs*. *Vide Stra. vol.* 2. *p.* 728.

Hilary, 1 *Geo.* 2. *Wilſon* v. *Poulter*.

In an action of *trover*, the defendant was charged with his confeſſion in a depoſition taken before the commiſſioners of bankruptcy.

Raymond, Chief Juſtice, refuſed to let the defendant into any *parol evidence* to explain it. *Vide Stra. vol.* 2. *p.* 794.

Hilary, 2 *Geo.* 2. *Field* v. *Curtis*.

It was held, that no releaſe could make the bankrupt a *witneſs* to prove his own act of bankruptcy. *Vide Strange, vol.* 2. *p.* 829.

Eaſter, 2 *Geo.* 2. *Jones* v. *Maſon*.

John Ward of *Hackney* (who had been convicted of *forgery*) was a *ſubſcribing witneſs* to a bond, and on producing the record of his conviction, the plaintiff was allowed to prove his hand as if dead. *Vide Strange, vol.* 2 *p.* 833.

Trinity, 2 *Geo. Wyatt* v. *Winkworth*.

An attachment was granted againſt *Rolfe Bayley*, an attorney, for not attending at the aſſizes on a *ſubpœna* and tender of his charges, whereby the plaintiff was non-ſuited. *Vide Strange, vol.* 2. *p.* 810.

Michaelmas, 3 *Geo.* 2. *Caſtel, Widow*, v. *Bambridge and Corbet*.

See this caſe fully ſtated in page 81 of this work, under the head *Appeal*.

Trinity, 3 & 4 *Geo.* 2. *Baynham* v. *Matthews*.

Raymond, Chief Juſtice. The plaintiff in this caſe having declared on a note of a ſpecial date, cannot give in *evidence* a note bearing a different date: and hereon the plaintiff had leave to diſcontinue, without coſts, he having brought the action as executor. *Vide Fitz-Gibbons, p.* 130.

Hilary, 4 *Geo.* 2. *King* v. *Morrice*.

In an action on the *caſe*, the plaintiff declared that he brought an action of *debt* againſt one *H.* in this court, and obtained judgment for 200 *l.* that thereon he ſued out a *fi. fa.* againſt the effects of the ſaid *H.* and that on the delivery of the ſaid execution, the ſheriff of *Middleſex* made out his warrant to the defendant, being high bailiff of *Weſtminſter*, commanding him, " That he cauſe to be levied of the " goods and chattles of the ſaid *H.* 200 *l.* which the " aforeſaid King has recovered, as it is ſaid againſt " the aforeſaid *H.* to ſatisfy, *&c.*" That the ſaid warrant was delivered to the defendant, who though the ſaid *H.* had goods in the liberty of *Weſtminſter* ſufficient to ſatisfy the ſaid judgment, yet falſely and maliciouſly returned that the ſaid *H.* had not goods within, *&c.* to the plaintiff's damage, *&c.* On the trial the plaintiff to make out the declaration, produced the ſheriff's warrant to the defendant, which ran thus: " To levy 200 *l.* of the goods of the ſaid *H.* which the plaintiff recovered againſt —— to ſatisfy the plaintiff for the debt and coſts, whereof —— is convicted, *&c.*

To this it was objected, that the warrant ſtated in the declaration ran, that the judgment was recovered againſt *H. whereas* the warrant produced runs againſt —— and ſo varies from the declaration, and conſequently the plaintiff had failed in *evidence*. Hereon the plaintiff had a verdict, but the *poſtea* was ordered to be ſtayed till the court ſhould give their opinion on the above point.

Afterwards on motion, *Raymond*, Chief Juſtice, obſerved, that the *fieri facias*, which iſſued on the judgment againſt *H.* was given in *evidence* at the trial; and then the warrant being laid in the declaration to have iſſued *thereon*, viz. the *fi. fa.* muſt be underſtood to be in purſuance of it: ſo that by reference to that, the words *againſt H.* muſt be ſupplied: ſo the *poſtea* was delivered to the plaintiff. *Vide Fitz-Gibbons, p.* 198.

Hilary, 4 *Geo. Lord Ferrers* v. *Shirley*.

On a feigned iſſue out of *Chancery*, directed to be tried at *bar*, whether a deed pretended to have been executed by *Robert* Earl *Ferrers*, in the year 1683, was his deed or not. Several *witneſſes* were called to ſwear to the hand-writing of the *ſubſcribing witneſſes*, now dead; and among others, one *J. J.* who would have ſwore to the hand-writing of one *J. C.* whoſe name was to the deed as a *witneſs*, becauſe he had ſeen ſeveral letters wrote by *J. C.* whereon he was aſked whether he had ever ſeen the ſaid *J. C.* write, to which he anſwered, that he never had, nor ever ſaw the perſon who wrote the ſaid letters; but that his maſter, to whom the letters were wrote for the rent of a part of the eſtate of the late Earl *Robert Ferrers*, which his ſaid maſter held, informed him that they were the letters of *J. C.* Lord *Ferrers's* ſteward, who was the perſon pretended to have atteſted the deed in queſtion. Hereon it was objected to his teſtimony, becauſe he could not ſay with any certainty whether or no the writer of the letters was the ſame perſon that atteſted the deed; for that *J. C.* who was ſuppoſed to write the letters, might get ſome other perſon to write thoſe very letters for him; and the council inſiſted, that in all caſes, where a *witneſs* would ſwear to the hand-writing, he muſt be able to ſay, that he ſaw ſuch perſon write: therefore the court rejected the ſaid *J. J.* becauſe he could not aſcertain the identity of the perſon.

Raymond, Chief Juſtice, ſaid, that it is not neceſſary in all caſes that the *witneſs* has ſeen the perſon write, to whoſe hand he ſwears; for where there has been a fixed correſpondence by letters, and that it can be made out that the party writing ſuch letters is the ſame man that atteſted a deed, that will intitle a *witneſs* to ſwear to that perſon's hand, tho' he never ſaw him write.

It was further objected to the ſaid *witneſs*, that he ſhould produce the letters, that the court and the jury might be able to judge of the reſemblance between the hand-writing to the letters, and that to the deed: but this was over-ruled by the court, becauſe the *witneſs* might have acquired a knowledge of *C.*'s character, by having ſeen ſeveral letters wrote by him.

Againſt the deed one *J. N.* was produced, who ſwore that he wrote the body of the deed in diſpute in 1720, by the direction of the late Earl *Waſhington Ferrers*. To deſtroy whoſe *evidence*, the council on the other ſide would have read a bill preferred in *equity* by the now defendants againſt the ſaid Earl *Waſhington* in 1719, by which it would appear, the deed now in queſtion was then in being; and likewiſe the anſwer of the ſaid Earl to the ſaid bill, put in on the 17th day of *September* 1720, which was ſome months before the time on which the ſaid *J. N.* ſwore he ingroſſed the ſaid deed. But the court would not ſuffer the ſaid bill and anſwer to be read. *Vide Fitz-Gibbons, p.* 195.

Michaelmas, 6 *Geo.* 2. *Lewis* v. *Fog.*

In an action by the maſter for the defendant's dog's biting his apprentice, *whereby he loſt his ſervice*,

Raymond, Chief Juſtice, allowed the apprentice to be a *witneſs*. *Vide Stra. vol.* 2. *p.* 944.

Michaelmas, 7 *Geo.* 2. *Ruding* v. *Newell.*

In an action brought for a falſe return to a *mandamus*, the queſtion was, whether the office of regiſter to the Archdeacon, had been uſually granted for *three* lives. And in order to prove the uſage, it was offered to be given in *evidence*, that other Archdeacons in the ſame dioceſe, had made grants for *three* lives, as the plaintiff's grant was. But the Chief Juſtice refuſed to admit this *evidence*, and compared it to the caſe of cuſtomary manors, where the cuſtoms of other manors are never allowed, except in the north of *England*, where they are conſidered as *border laws*, and an *evidence* of the law of the country. *Vide Strange, vol.* 2. *p.* 957.

Michaelmas, 7 *Geo.* 2. *Wariner* v. *Giles.*

After the fire of *London*, power was given to the city to ſet out the public markets, which was done in a very accurate manner, and entered in their books. An *ejectment* was brought by the leſſee of one of the markets, wherein the boundaries were in queſtion. And it was moved on behalf of the plaintiff to have liberty to inſpect the books, and take copies; which was granted: and the court compared it to the caſe of the *Court of Rolls*, which are not conſidered as the *evidence* of the Lord, but in the nature of public books, for the benefit of the tenant as well as of the Lord. *Vide Strange, vol.* 2. *p.* 954.

Hilary, 8 *Geo.* 2. *Crew qui tam* v. *Saunders.*

On an action brought againſt the defendant on *ſtat.* 9 *Ann, c.* 10. *ſect.* 44. for intermeddling in elections, being *poſt-maſter* of *Namptwich*; it was moved on behalf of the plaintiff, for liberty to inſpect the *poſt-office* books, and take a copy of his *deputation*.

Per curiam. Inſpecting *court-rolls* was the original of theſe motions; but then it was confined to the caſe of perſons intereſted, the *rolls* being the *common evidence*, which of neceſſity muſt be kept in ſome one hand. But lords and tenants of different manors have always been denied as ſtrangers. In the caſe of public companies, it is reſtrained to the entry which concerns the party himſelf. And as to the *cuſtom-houſe*, they are really the merchants books for that purpoſe. The conſtitution of the officer is private, and therefore not neceſſary for the plaintiff to prove: and againſt the defendant his acting will be ſufficient. The plaintiff took nothing by his motion. *Vide Stra. vol.* 2. *p.* 1005.

Trinity, 8 *Geo.* 2. *Collet* v. *Jennis.*

See this caſe fully ſtated in page 172 of this work, under the head *Bail*.

Michaelmas, 8 *Geo.* 2. *The King* v. *Reading.*

See this caſe fully ſtated in page 223 of this work, under the head *Baſtards*.

Hilary, 9 *Geo.* 2. *Hopkins* v. *Neale and another.*

The plaintiff, an infant, *ſeventeen* years of age, being riding on horſeback behind her father, was aſſaulted by the defendants, and therefore ſues them by one *Wright* her next friend; and her father being called on as a *witneſs* for her, was objected to, he owning that the ſuit was carried on at his expence.

Lord *Hardwicke*. It is no crime in the father to be at the expence of a ſuit for his child; but ſince he is, he cannot be a *witneſs*; for he can never be reimburſed without the plaintiff recovers; becauſe ſhe being an *infant*, is not bound, if ſhe ſhould promiſe to pay at all events: and if ſhe has no property, ſhe might be admitted in *forma pauperis*, for the *ſtatute* only requires an oath that the perſon has no property. *Vide Caſes Temp. Lord Hardw. p.* 202.

Eaſter, 9 *Geo.* 2. *Hill* v. *Fleming.*

In an action of *aſſault*, one *A.* was joined in the *ſimul cum*, and was offered to be examined for the defendant, but was objected to by the plaintiff, becauſe he had kept out of the way after being ſerved with the proceſs, but the plaintiff could not ſhew he had been ſerved, and ſo he was examined at the ſittings after term in *London*. *Vide Caſes Temp. Lord Hardwicke, p.* 264.

Eaſter, 9 *Geo.* 2. *The King* v. *Nunez.*

On the trial of an indictment for *perjury*, committed in an anſwer in the *Exchequer*, the caſe made by the plaintiff was, that ſhe gave the defendant a note for *twenty* guineas, which he promiſed not to put in ſuit againſt her, but to take it of a debtor of the plaintiff's; notwithſtanding which he had ſued her, and therefore ſhe prayed an *injunction*. The defendant denied any ſuch agreement, and on this denial the *perjury* was aſſigned, and the plaintiff called as a *witneſs* on the authority of *Paris*'s caſe. 1 *Vent.* 49. 1 *Sid.* 431. and the *King* v. *M. Trin.* 10 *Geo. Ante.* 595.

Lord *Hardwicke* ruled, that ſhe could not be a *witneſs*, and relied on the caſe of *The King* v. *Whiting* in *Salk.* 283. He ſaid *Paris*'s caſe was againſt *Twyſden*'s opinion, and had not been much liked ſince. *Vide Stra. vol.* 2. *p.* 1043. *Caſes Temp. Lord Hardwicke, p.* 265.

Trinity, 9 Geo. 2. Gibſon v. *M'Carty.*

On an iſſue out of *Chancery*, to try whether ſome notes, under the hand of Lady *M'Carty* deceaſed, payable to the plaintiff's inteſtate, to the value of 1500 *l.* were the real notes of the ſaid Lady, or forged notes?

The preſent plaintiff was a few days ſince convicted of forging a note under the ſaid Lady *Margaret M'Carty*'s hand, payable to himſelf, and the plaintiff having read in *evidence* the depoſition in *Chancery* of a *dead witneſs*, to prove Lady *Margaret*'s acknowledgment of the notes in queſtion, to be her notes; and the ſame *witneſs* having likewiſe ſworn to her acknowledgment of the note, for forging whereof the plaintiff was ſince convicted,

The council for the defendant offered to give the record of that conviction in *evidence* for two reaſons; 1ſt, Becauſe it goes to the credit of the *witneſs's evidence*, as to the acknowledgment of the notes in queſtion. 2dly, Becauſe there is at all times liberty to examine into the plaintiff's character.

Lord *Hardwicke*. This is a pretty tender thing, and the general rule is, and has been ſo ſtrictly adhered to, that in the caſe of the family of the *Hilliards*, on a trial at *bar*, in a queſtion of *legitimacy*, the court refuſed to admit a ſentence of excommunication in the *ſpiritual court*, for fornication between the father and mother of the party whoſe *legitimacy* was impeached, to be given in *evidence*, but you may produce the paper for *forgery*, whereof he was convicted, and ſhew the marks of forgery attending it; and give that in *evidence*, as to the credit of the *witneſs*, which was accordingly done. *Vide Caſes Temp. Lord Hardwicke, p.* 311.

Trinity, 9 Geo. 2. The King v. *Sherman and Idle.*

The defendants were indicted for aſſaulting and beating *A.* and his wife; *Idle* pleaded *miſnomer* of his ſurname in *abatement*, and for want of a replication by the King's coroner, judgment was entered, that he be diſmiſſed and diſcharged from the premiſes ſpecified in the ſaid indictment, and that he depart without a day; the reſt of the defendants pleaded *not guilty*; and at the trial of this iſſue, at the ſittings in *Middleſex* after term, the proofs to charge the defendants were only *A.* and his wife; and the *witneſſes* for the defendants one woman, who was not indicted, that was there preſent, and the ſaid *Idle*; and no objection was made to *this evidence*, though the proſecutor ſwore *Idle* was in the affray; but on the contrary, Lord *Hardwicke*, in ſumming up the *evidence*, left it to the jury on the credit of the *witneſſes*, and ſaid, here are *two witneſſes* againſt *two*. *Vide Caſes Temp. Lord Hardwicke, p.* 303.

Trinity, 9 Geo. 2. Bliedſtyn v. *Sedgwick.*

In an action brought on a *policy of inſurance* of a ſhip, the ſhip had been condemned by the *Court of Admiralty*, in *Carolina*, and the acts of condemnation given to the Captain, were ſince loſt by bad weather at ſea, and the queſtion was, whether the Captain might give *parol evidence* of the reaſon that court went on in condemning the ſhip.

Lord *Hardwicke*, would not ſuffer it to be done, for the rule is, that you cannot give *evidence* of *written evidence* that may be produced, without ſhewing that it is loſt; but what was here loſt, was only a copy of the *evidence*, and if you thought it material, you ſhould have the proceedings themſelves here, and not give *parol evidence* of what they were. *Vide Caſes Temp. Lord Hardwicke, p.* 304.

Trinity, 9 Geo. 2. Tireman v. *Henwell.*

In an action brought on a *policy of inſurance* of a ſhip; a *witneſs* for the defendant proved a deviation, to diſcredit which *witneſs*, the plaintiff offered to give in *evidence*, an examination on oath of this man before the Mayor of the town where they got on ſhore, wherein they ſaid he ſwore otherwiſe; this examination was ſigned by the Mayor, but not by the *witneſs*, nor any of thoſe who were ſuppoſed to have made oath.

But Lord *Hardwicke*, would not let it be read, for no examination ſhall be read, unleſs ſigned by the party. *Vide Caſes Temp. Lord Hardwicke, p.* 306.

Trinity, 9 Geo 2. Cary v. *King.*

In an action brought on a *policy of inſurance*, for inſuring goods on the ſhip *A.* the plaintiff declared, that the ſhip ſprung a leak, and ſunk in the river, whereby the goods were ſpoiled; and the *evidence* was, that many of the goods were ſpoiled, but ſome were ſaved; and the queſtion was, whether the plaintiffs might give in *evidence* the expences of *ſalvage*, that not being particularly laid as a breach of the policy in the declaration.

Lord *Hardwicke*. I think they may give it in *evidence*, for the inſurance is againſt all accidents. The accident laid in this declaration is, that the ſhip ſunk in the river; it goes on and ſays, that by reaſon thereof the goods were ſpoiled, that is the only *ſpecial damage* laid; yet it is but the common caſe of a declaration that lays *ſpecial damage*, where the plaintiff may give *evidence* of any damage that is within his cauſe of action as laid; and though it was objected that ſuch a breach of the policy ſhould be laid, as the inſurer may have notice to defend it; it is ſo in this caſe, for they have laid the accident, which is ſufficient notice, becauſe it muſt neceſſarily follow, that ſome damage did happen. *Vide Caſes Temp. Lord Hardwicke, p.* 334.

Trinity, 9 Geo. 2. Witherington v. *Buckland.*

In an action on the *caſe*, the plaintiff declared, that in conſideration, that the plaintiff undertook to pay to the defendant what he ſhould deſerve for his labour, the defendant undertook to repair, alter, and enlarge the ſaid houſe, particularly a room in the ſaid houſe, called the *club-room*; but repaired it ſo ill, that the rain beat into the ſaid room, whereby the plaintiff loſt the uſe of his room, for *four* or *five* months, which he laid to his damage. On *non-aſſumpſit* pleaded, the *evidence* was, that the plaintiff's houſe having been damaged by fire, and he applying to one of the inſurance offices to make it good, they employed the defendant to repair the damage of the ſaid houſe for a certain ſum; and the plaintiff agreed with him likewiſe to make at the ſame time ſome alterations in the *club-room*.

Lord *Hardwicke*. You have not declared on any general cuſtom of the realm, that workmen are bound to do what they undertake in a workman-like manner; nor as the declarations are againſt a ſmith for pricking a horſe in ſhoeing him, but you have declared on a *ſpecial contract*, and therefore you ought to prove the contract as laid; now the contract you have proved, was made with the *aſſurance company*, for the repair of the houſe; and if any contract was made by the plaintiff with the defendant, it was but for one room's alteration. Therefore you muſt call the plaintiff, who not appearing was nonſuited. *Vide Caſes Temp. Lord Hardwicke, p.* 309.

Michaelmas, 9 Geo. 2. Savage and Haddon v. *Field.*

In an action of *debt on a judgment*, to which the defendant pleaded under *ſtat.* 2 *Geo.* 2. *c.* 20. that he was a fugitive for debt, and intitled to return and ſurrender himſelf, and was duly diſcharged according to that act by the quarter-ſeſſions for the county of *Surry*, the plaintiffs replied, that they had not notice of his diſcharge, as they ought to have had by the act; and iſſue was joined thereon, and at the trial of the cauſe, the *evidence* to prove the notice was, the duplicate of the priſoner's diſcharge, which ſays, "notice having been given to the creditors;" likewiſe the wife of the perſon employed to give notice, the perſon himſelf being dead; who ſwore that her huſband went with an intent to give notice: alſo another *witneſs* who ſaw that perſon attending at the ſeſſions, but was not in court, and ſo did not hear him give *evidence* of the notice.

Lord *Hardwicke*. This queſtion ariſes on a *ſpecial iſſue*, whether *thirty* days notice was given to the creditors according to the act; for the act has made the notice in the Gazette, and particular notice, to be both neceſſary. There is no clauſe in the act which makes the duplicate to be concluſive *evidence*; the duplicate ſays, it was made to appear on oath, that due notice was given, but it does not ſay that notice for the ſpace of *thirty* days was given, which would have been much ſtronger; but the ſeſſions have taken on them to determine that due notice was given: according to the rule of law, that the beſt *evidence* ſhould be produced, the way would have been here to prove the duplicate as they prove records, and then to have proved what the *witneſs* had ſworn. On the circumſtances of this caſe, I am of opinion, that the *evidence* to prove the notice was ſufficient; the act directs as to fugitives, that they not being priſoners at the ſuit of any one creditor, they are to ſurrender themſelves, *&c.* and their oaths are to be allowed, unleſs the creditor diſproves it; and the fugitive is to give *thirty* days notice; then the queſtion is, whether ſuch notice is neceſſary to found the juriſdiction of the quarter-ſeſſions, or only matter of proceeding; if it be neceſſary to their juriſdiction, I ſhould think the duplicate not *evidence* of notice, becauſe then their judgment muſt be taken in a matter to found their juriſdiction; but their juriſdiction is found on the party's being a fugitive, and applying to be diſcharged; but the notice ſeems to me to be only their manner of proceeding, and not an eſſential to found their juriſdiction, for the act requires the notice to be proved before them on oath, ſo that they are judges thereof; and therefore as they have ſaid there was due notice; I think it is ſufficient, and in this caſe the perſon that gave the notice being dead, it is the *beſt evidence* of notice that could be produced.

The *poſtea* muſt be delivered to the defendant. *Vide Caſes Temp. Lord Hardwicke, p.* 186.

Hilary, 10 *Geo.* 2. *The King* v. *Robins.*

On a motion for a *new trial* on behalf of the defendant, on an information in the nature of a *quo warranto*, for the office of Mayor of *Tintagel*, the queſtion on which the defendant's title turned was, whether the former Mayor had a right to name *two eliſors* to return a jury, if the town-clerk, who might nominate *one*, was abſent, or refuſed. The *ſecond eliſor* nominated by the Mayor was called as a *witneſs* to prove the *cuſtom*, and it was objected to his competency, that he having acted under ſuch a nomination, was liable to an information, and therefore could not be examined. And the judge who tried the cauſe in *Cornwall*, rejected him. It was now moved for a *new trial*, for that the objection went only to his credit; and 2 *Roll. Abr.* 685. *pl.* 3. was cited, where *A. B.* and *C.* were ſeverally indicted for *perjury*, in proving a bond, and allowed to be *witneſſes* for each other. 2 *Lev.* 231. 236. 2 *Sid.* 109. *Salk. vol.* 2. *p.* 690.

Per curiam. The boundaries between what goes to the credit, and what to the competency, are very nice, and the latter carried too far: in this caſe he was but an officer for the day, whoſe power has long ſince been at an end. It was a bare authority, and not an intereſt: and nothing is more common than to examine former Mayors as to the right, though there is no limitation to informations. We think this goes only to his credit, and there ought to be a new trial on payment of coſts. *Vide Stra. vol.* 2. *p.* 1069.

Hilary, 10 *Geo.* *The King* v. *Bray.*

On an information againſt the defendant *quo warranto*, he acted as Mayor of *Tantagin* in *Cornhill*: the defendant pleaded a *cuſtom*, that at the *court-leet* for electing a Mayor, the former Mayor is to nominate *one eliſor*, and the town-clerk another; or in caſe of the abſence or refuſal of the town-clerk, the Mayor is to nominate *two eliſors*, which *eliſors* are to return a jury of freemen, who are to elect a new Mayor; and on the trial of this iſſue, one *P. H.* was produced as a *witneſs*, and rejected as ſuch by Mr. Baron *Thompſon* who tried the cauſe at the aſſizes, he being one of the *eliſors* named by the former Mayor to return the jury; and one *J. H.* was likewiſe rejected as an incompetent *witneſs*, he being one of the ſame jury; by which jury the defendant was named as Mayor. And thereon, without examination of any *witneſſes* for the defendant, a verdict was given againſt him.

But the court was now moved for a new trial: 1ſt. As this was a miſ-direction of the judge of aſſize. And 2dly. Becauſe the merits did not come in queſtion.

Many caſes were cited *pro* and *con*; and the court took a day to conſider, and then were unanimous of opinion that there ought to be a *new trial*.

Lord *Hardwicke*, It is proper to conſider the caſes of theſe two *witneſſes* ſeverally, for the objection is the ſtrongeſt againſt *P. H.* the *eliſor*; and with regard to him, it conſiſts of two parts; 1ſt. That he is intereſted in the event of the cauſe, becauſe his authority aroſe under the *cuſtom*, which he was produced to proved. 2dly. That if there was no ſuch *cuſtom*, then the Mayor had no authority to nominate him, and that therefore he was liable to an information *quo warranto*. The general queſtion which ariſes from theſe two objections is, whether it appears he was intereſted in the event of this ſuit. There have been variety of opinions as to what ſhall go to the competency, and what to the credit of a *witneſs*, and I think it is impoſſible to reconcile all the caſes; moſt of them have happened at *niſi prius*, where points have not ſo much conſideration as in court, and in ſome points the boundaries ſet between what goes to competency, and what to credit, are extremely nice; and I believe there have been many, where, when a judge has ſeen a *witneſs* inclined to be partial, he has carried the incompetency further than he could be warranted; and ſo it was in the caſe of the *King* v. *Whiting*, where in an information for a cheat in drawing in a perſon by ſlight to ſet her hand to a promiſory note, Lord *Holt* repelled the teſtimony of the perſon ſuppoſed to be cheated, becauſe, though the verdict in that information could not be given in *evidence* on an action for the note, yet he ſaid, we ſhall be ſure to hear of it to influence the jury, *&c.* and yet, if that were examined into, it would be found to be rather an objection to the credit, than the competency; nevertheleſs, that has been followed ever ſince. The true notion of this matter may be gathered from the queſtion which is aſked on a *voyer dire*, *viz.* whether the *witneſs* is to get or loſe by the event of this ſuit? For if he can anſwer that fully, he muſt be a *witneſs*: and therefore there is a diſtinction between what will take away the competency of a *witneſs*, and what is matter of *challenge* to a juror, becauſe a juror muſt ſtand abſolutely indifferent as he ſtands unſworn, but a *witneſs* need not be ſo; and the reaſon is, becauſe you may make the objection to his credit, but if a juror be once ſworn, he ſtands equally a juror with the reſt: the queſtion is therefore, whether the matter here objected to this *witneſs* goes to his competency or to his credit only? and I am of opinion it goes only to his credit; for the authority under which he claimed was over long ago; it was not an office, but merely an authority, for it is no more than an *eliſor* nominated by a court of juſtice, or to return a jury to try a cauſe when there is ſome defect in the *ſheriff* or *coroner*: and I know no inſtance where a man by having a bare authority, which gives no intereſt, can be hindered from being a *witneſs*, if he is not a party in the cauſe: and ſo a bailiff who executed a writ may be a *witneſs*, if he is not a party; but an office is always an intereſt. Then, as to the objection, that he was liable to an information *quo warranto*, that ſeems to me to be more immaterial than the other; for I do not know that it has ever been ruled, that becauſe a man is liable to an information for a paſt fact, there his teſtimony is to be refuſed; if we ſhould allow of ſuch doctrine it would go too far, for it is daily experienced, that perſons who have executed offices in corporations, when that office has afterwards been called in queſtion, have been allowed as *witneſſes* to prove, if it depends on *cuſtom*, what was uſually done; and yet they are liable to informations *quo warranto*, if the *cuſtom* ſhould not warrant the office, and thoſe are commonly the *beſt witneſſes* in ſuch caſes: therefore if we ſhould allow that the perſon *whoſe office is over*, *ought not* to be a *witneſs*, becauſe liable to ſuch an *information*, it would be a great damage to many corporations; nay, it would go further, for at that rate, if an information were brought for an act done at a corporate aſſembly, and the perſons there preſent could be *no witneſſes*, there then could be *no witneſſes* at all. The caſe in 2 *Roll. Abr*, 685. *Pl.* 5. which is cited by Lord *Hale* in his *Hiſt. Plac. Coron.* 20. *p.* 280. is full as ſtrong as this, and went only to the credit of the *witneſſes*. The caſe of *Champion* and *Atkinſon* in 3 *Keeble* 90. on the reaſon of it is ſomething material in the preſent caſe, for the queſtion was, whether a fine was due to the lord during minority on the tenant's admiſſion, and the ſteward was allowed to be a *witneſs* for the *infant* Lord, though it was objected, that he was entitled to a *fee* on admiſſion, which he would loſe if not admitted; therefore, on the authority of this caſe, and the reaſon of the thing, I am of opinion that the objection in the preſent caſe goes only to the credit of the *witneſs*. As to the objections made to the other *witneſs*, who was one of the jury, they are ſtill weaker.

For my own part, whenever an objection of this ſort is made at *niſi prius* before me, I am always inclined to reſtrain it to the credit, rather than the competency of the *witneſs*, unleſs it is like to introduce great perjury, becauſe it tends to let in light to the cauſe, and there may be ſtill an objection made to his competency. Therefore I think there muſt be a new trial. *Vide Caſes Temp. Lord Hardw. p.* 358.

Eaſter, 10 *Geo.* 2. *May* v. *May*.

On a queſtion as to the plaintiff's *legitimaey* he produced the general regiſter of the pariſh, wherein he was entered as the ſon of his father and mother, in the ſame manner as lawful children are entered; this regiſter the clerk ſaid, was a book into which the entries were made once in *three months*, out of the day-book, wherein the entries are made immediately after chriſtening, or next morning.

To encounter this, the defendants aſked him if any notice was taken of baſtards; and he ſaid, their method was, to add *B. B.* which ſtood for *Baſe-born*, and then they offered the day-book, from whence the other entry was poſted, in which *B. B.* was inſerted; and inſiſted that was the original entry. And this being oppoſed, the opinion of the court was taken.

Page, Juſtice, was for allowing it to be read; but the other *two* judges were againſt it, ſaying, the other was the only regiſter, and there could not be *two* regiſters in *one* pariſh, ſo the book was rejected. *Vide Strange, vol.* 2. *p.* 1073.

Michaelmas, 10 *Geo.* 2. *Small* v. *Whitmill*.

An *attachment* was moved for againſt a *witneſs* for not attending, being *ſubpœnaed*, and having a *ſhilling* left. But it appearing not to be perſonal ſervice, the court held it not ſufficient to warrant proceeding criminally againſt him: whether it would do in an action, they would not declare. It was alſo ſaid, that tho' a ſhilling is what is conſtantly given with a *ſubpœna*, yet if the *witneſs* comes a long way, there ought to be a tender of reaſonable charges. *Vide Strange, vol.* 2. *p.* 1054.

Michaelmas, 10 *Geo.* 2. *Wakefield's Caſe*.

The plaintiff moved for an *attachment* againſt one *Wakefield*, for not attending to give *evidence*, being ſerved with a *ſubpœna*. The ticket and *ſubpœna* were not ſworn to have been ſerved *perſonally*; but delivered to a ſervant at the *witneſs*'s houſe, who carried it up to his maſter, and brought down word that he had delivered it to his maſter, who ſaid he would attend.

Lord *Hardwicke*. This way of proceeding by attachment, is a new method; I do not know that it has been determined, that ſerving a *ſubpœna* on a ſervant, would be ſufficent ſervice to maintain an action; but however, to be ſure, it is not a ſufficient ground for an attachment; ſo the court refuſed this motion. *Vide Caſes Temp. Lord Hardwicke, p.* 313.

Trinity, 11 *Geo.* 2. *Hall* v. *Hill and Wife Adminiſtratrix*.

In an action brought for wages earned by the plaintiff's wife of the defendant's *inteſtate*, the Chief Juſtice would not allow the wife's owning the receipt of 20 *l.* to be given in *evidence* againſt the huſband. *Vide Strange, vol.* 2. *p.* 1094.

Trinity, 11 *Geo.* 2. *The King* v. *Frederick and Tracy*.

The defendants were indicted for a joint *aſſault*; and at the trial in *Middleſex*, it was inſiſted on to examine the wife of the defendant *Tracy*, as a *witneſs* for the other defendant: but there having been *material evidence* given againſt the huſband, and it being a joint treſpaſs, and impoſſible to ſeparate the caſes of the *two* defendants in the account to be given of the tranſaction.

Lee, Chief Juſtice, refuſed to let her be examined. *Vide Strange, vol.* 2. *p.* 1095.

Michaelmas, 11 *Geo.* 2. *Jarvis* v. *Hayes*.

In an action againſt the defendant as maſter, for his carman's negligently driving his cart, *whereby* the plaintiff was thrown off from a ladder, and bruiſed. On ſhewing a releaſe from the maſter to the ſervant,

Lee, Chief Juſtice, allowed the maſter to examine the ſervant; though it was urged, that if the plaintiff fails againſt the maſter, he may ſue the ſervant, which is a bias on the ſervant. *Vide Strange, vol.* 2. *p.* 1083.

Eaſter, 12 *Geo.* 2. *The King* v. *Hebden*.

On an *information* in nature of a *quo warranto* againſt the defendant, as bailiff of *Scarborough*, he made title as elected under the bailiffſhip of *B.* and *A.* and on iſſue joined, whether they were bailiffs or not; the record of a judgment of *ouſter* againſt them was read in *evidence*. And on a motion for a *new trial*, it was held, that it was properly admitted in *evidence*, and was ſo done lately in a trial at *bar*, relating to the corporation of *Oxford*; and a new trial was denied. *Vide Strange, vol.* 2. *p.* 1109.

Michaelmas, 12 *Geo.* 2. *The King* v. *Ellis*.

On an indictment for *perjury* on the *evidence* given at the trial of an *ejectment*, *Lee*, Chief Juſtice, refuſed to let any of the defendants in the *ejectment*, againſt whom the verdict was given, be examined as *witneſſes* for the proſecutor. And it was ſaid to have been ſo ruled on conference with all the judges. 4 *Geo. The King* v. *Newens*. *Vide Strange, vol.* 2. *p.* 1104.

Michaelmas, 12 *Geo.* 2. *Yates* v. *Boen*.

In an action of *debt* brought on *articles*, the defendant pleaded *not his deed*, and on the trial offered to give *lunacy* in *evidence*.

Lee, Chief Juſtice, at *firſt* thought it ought not to be admitted, on the rule in *Beverley*'s caſe. 4 *Co.* 123. *b.* that a man ſhall not *ſtultify* himſelf: but on the authority of *Smith* v. *Carr*, 5 *July*, 1728. where C. Baron *Pengelly* in the like caſe admitted it, and on conſidering the caſe of *Thompſon* v. *Leech*, in 2 *Vent.* 198. *Lee*, Chief Juſtice, ſuffered it to be given in *evidence*; and the plaintiff on the *evidence* became *nonſuited*. *Vide Strange, vol.* 2. *p.* 1104.

Hilary, 13 *Geo.* 2. *Ruſſel* v. *Boheme*.

To prove a property in the cargo on an action on a *policy of inſurance*, the plaintiff produced a bill of parcels of one *G.* at *Peterſburgh*, with a receipt to it, and proved his hand-writing. The defendant objected, that this was no *evidence* againſt the inſurers; but *Lee*, Chief Juſtice, allowed it. *Vide Strange, vol.* 2. *p.* 1127.

Eaſter, 13 *Geo.* 2. *Goater* v. *Nunnely.*

The diſpute was between the plaintiff, a factor in *Smithfield*, and the defendant, a grazier: and on the defendant's motion, the court made a rule for the plaintiff to ſhew cauſe, why he ſhould not produce at the trial the ſeveral books, wherein he entered the accounts of beaſts ſold, and of monies received on the defendant's account. The plaintiff ſhewed no cauſe, therefore on *affidavit* of ſervice, the rule was made abſolute. *Vide Strange, vol.* 2. *p.* 1130.

Michaelmas, 13 *Geo.* 2. *The King* v. *Watkinſon.*

On an indictment for *perjury* in an anſwer in *Chancery*, the maſter who took the anſwer was called, but could not ſwear to the identity of the perſon. On which the proſecutor inſiſted to examine the defendant's ſolicitor, who was preſent at the putting in of the anſwer, and had been *ſubpœnaed*; but inſiſting on his privilege, the Chief Juſtice would not compel him to be ſworn: ſo the defendant was acquitted. *Vide Stra. vol.* 2. *p.* 1122.

Michaelmas, 13 *Geo.* 2. *Jordan* v. *Lewis.*

The plaintiff and another was indicted at the *Old Bailey* for *forgery*, and acquitted, and a copy of the indictment granted to the other only. In this action, which was for a malicious proſecution, the plaintiff offered the copy of the indictment in *evidence*; and the order at the *Old Bailey* was read by way of objection.

Lee, Chief Juſtice, ſaid, he could not refuſe to let the plaintiff read it, for an order was not neceſſary to make it *evidence*, nor is it ever produced in order to introduce it; ſo it was read, and a verdict obtained for the plaintiff. *Vide Strange, vol.* 2. *p.* 1122.

Eaſter, 13 *Geo.* 2. *Warren, on the demiſe of Webb* v. *Greenville.*

On a trial at *bar*, the leſſor of the plaintiff claimed under an old intail in a family ſettlement, by which, part of the eſtate appeared to be in jointure to a widow at the time her ſon ſuffered a common recovery, which was in 1699. And the defendants not being able to ſhew a ſurrender of the mother's eſtate for life, it was inſiſted that there was no tenant to the *precipe* for that part, and the remainder under which the leſſor claimed was not barred.

To obviate this, it was inſiſted by the defendant, that at this diſtance of time a ſurrender ſhould be preſumed: according to 1 *Vent.* 257. and what is laid down in Mr. *Pigot*'s book of *Common Recoveries*, and to fortify this preſumption, they offered to produce the debt book of *M. E.* an attorney at *Briſtol*, long ſince deceaſed, where he charges 32 *l.* for ſuffering the recovery, *two* articles of which are, for drawing a ſurrender of the mother 20 *s.* and for engroſſing *two* parts thereof 20 *s.* more, and that it appeared by the book the bill was paid.

And this being objected to as *improper evidence*, the court was of opinion to allow it, for it was a circumſtance material on the inquiry into the reaſonableneſs of preſuming a ſurrender, and could not be ſuſpected to be done for this purpoſe; that if *E.* was living, he might undoubtedly be examined to it, and this was now *next beſt evidence*; and it was accordingly read. After which the court declared, that without this circumſtance they would have preſumed a ſurrender; and deſired it might be taken notice of, that they did not require any *evidence* to fortify the preſumption, after ſuch a length of time. *Vide Strange, vol.* 2. *p.* 1129.

Hiliary, 14 *Geo.* 2. *Walker* v. *Kearney.*

A rule for an attachment *niſi* being granted on the *affidavit* of the defendant, the party complained of, ſhewed for cauſe, that the defendant had been convicted of *forgery*, and ſtood in the pillory, and produced the record, and an *affidavit* of the identity of the perſon.

Per curiam. The rule muſt be diſcharged, for we cannot ſuffer this *affidavit* to be read. *Salk.* 461. 5. *Mod.* 74. *Hawk.* 461. *Mich.* 12 *Geo.* 2. in *C. B. Niccol*'s v. *Delahunt*, the *affidavit* to hold to bail, being made by one convicted of *forgery*, his *affidavit* was read; but that was to defend himſelf againſt a complaint, where the proſecutor had in a manner appealed to his *affidavit*: but even there it was ſaid, that to ſupport a complaint it ſhould not be read. If he cannot be a *witneſs* in a civil ſuit, where a *third* perſon is intereſted in his *evidence a fortiori* he ſhall not be received here. *Vide Strange, vol.* 2. *p.* 1148.

Eaſter, 14 *Geo.* 2. *Chapman* v. *Pointon.*

A *witneſs* was ſerved with a *ſubpœna* at *Cheſter*, to attend at the ſittings at *Guildhall*, and *two guineas*, were tendered by the perſon who ſerved it, and being objected to as too little, he declared he would give no more.

The *witneſs* not coming up, an attachment was moved for; and on ſhewing cauſe diſcharged: the court ſaying it was too little, and that the *witneſs* is not obliged to truſt to the court's allowing him more when he comes to the book, for perhaps the party may not call him, and then it may be difficult for him to get home again: that this way of puniſhing as for a contempt was new, and practiſed only in this court; the *C. B.* not doing it to this day, but leaving the party to his remedy on *ſtat.* 5 *Eliz. c.* 9. and therefore they would not enter into any nice calculations of the expence, but confined their inquiry to the queſtion, whether the non-attendance was through obſtinacy or not. *Vide Strange, vol.* 2. *p.* 1150.

Eaſter, 14 *Geo.* 2. *Neal, on the Demiſe of the Duke of Athol* v. *Wilding.*

On a trial at *bar*, where the Duke was to make out his pedigree as heir of the *Derby* family, he offered (amongſt other *evidence*) a *ſpecial verdict* in 1706 (to which the preſent defendants were not parties) to prove *three* of the deſcents, which verdict was given in a cauſe where the premiſes in queſtion were recovered on a *general verdict*, and the *ſpecial verdict* related, only to other premiſes. *Wright*, Juſtice, was for receiving it, becauſe in the caſe of pedigrees many things are received, which are not allowed in other caſes, as entries in family books, monumental inſcriptions, heralds books, recitals in deeds, *&c.* which were introduced from the difficulty of proving pedigrees ſince *inquiſitions after death* were left off. But the reſt of the court refuſed to let it be read, being (as they ſaid) *a thing between other acts*, and the ſame *evidence*, for any thing they knew to the contrary, might be ready to be laid before this jury, that was laid before that. *Vide Carth.* 79. 181. 5 *Mod.* 386. *Sir T. Jones* 221. 2 *Mod.* 142. *Vide Strange, vol.* 2. *p.* 1151.

Hilary, 17 *Geo.* 2. *The King* v. *Bridgman.*

A rule being made for the defendant to ſhew cauſe why an *information* in nature of a *quo warranto* ſhould not be granted, to ſhew by what authority he claimed to hold a *court-leet* in the borough of *Wigan* in *Lancaſhire*: he moved for the common rule to inſpect the books of the corporation, who were the proſecutors, and it was granted. But on a ſpecial motion it was afterwards diſcharged, this being a matter of a private claim between the defendant and the corporation; and if this ſhould prevail, one private man would have as good a right to inſpect the deeds and *evidences* of another. *Vide Strange, vol.* 2. *p.* 1203.

Trinity, 17 *Geo.* 2. *The King* v. *Cornelius et al.*

An *information* was granted againſt the defendants for a miſdemeanor in taking money on granting licences to ale-houſe-keepers at *Ipſwich*.

The proſecutor moved for a rule to inſpect the books of the corporation, alledging the defendants were only juſtices as they were bailiffs.

But the court on conſideration refuſed to grant it, their right to be bailiffs or juſtices not being in queſtion. And it is in effect obliging a defendant indicted for a miſdemeanor, to furniſh *evidence* againſt himſelf. *Vide Strange, vol.* 2. *p.* 1210.

Michaelmas, 17 *Geo.* 2. *Underwood* v. *Parks*.

In an action for *words*, the defendant pleaded *not guilty*, and offered to prove the words to be true, in mitigation of damages: which the *Chief Juſtice* refuſed to permit, ſaying, that at a meeting of all the judges on a caſe that aroſe in *C. B.* a large majority of them had determined not to allow it for the future, but that it ſhould be pleaded, whereby the plaintiff might be prepared to defend himſelf, as well as to prove the ſpeaking of the words. That this was now a general rule among them all, which no judge would think himſelf at liberty to depart from, and that it extended to all ſorts of words, and not barely to ſuch as imported a charge of *felony*. *Vide Stra. vol.* 2. *p.* 1200.

Michaelmas, 17 *Geo.* 2. *Green* v. *Brown*.

The ſhip *Charming Peggy* was inſured in 1739 from *North Carolina* to *London*, with a warranty againſt captures and ſeizures. And in an action, the loſs was laid to be by the ſinking at ſea. All the *evidence* given was, that ſhe ſailed out of port on her intended voyage, and had never ſince been heard of. And ſeveral *witneſſes* proved, that in ſuch caſe the preſumption is, that ſhe foundered at ſea, all other loſſes being generally heard of. The underwriters inſiſted, that as captures and ſeizures were excepted, it lay on the *aſſured* to prove that the loſs happened in the particular manner declared on. But the Chief Juſtice ſaid, it would be very unreaſonable to expect *certain evidence* of ſuch a loſs, as where every perſon on board is preſumed to be drowned; and all that can be required is the beſt proof the nature of the caſe admits of, which the plaintiff has given; he therefore left it to the jury, who found the loſs according to the plaintiff's declaration. *Vide Stra. vol.* 2. *p.* 1199.

Hilary, 18 *Geo.* 2. *The King* v. *The Fraternity of Hoſtmen in Newcaſtle upon Tyne*.

A *mandamus* was granted to admit a perſon into this company: and by the return it appeared to be a queſtion, whether the maſter he ſerved had been admitted to his freedom in the corporation at large: whereon he moved for a general rule to inſpect the books of the corporation. This motion was oppoſed on behalf of the corporation, as they were no parties to the diſpute: and the caſes of *Cobb* v. *Oldfield Hilary* 4 *Geo.* 1. *Shelling* v. *Farmer*; *Crew* v. *Saunders*; and *The Caſe of Dr. Bridgman*, were cited. But the court ſaid every member of the corporation had, as ſuch, a right to look into the books for any matter that concerned himſelf, though it was in a diſpute with others. And the return having pointed out the neceſſity of inſpecting them for a particular purpoſe, they would aſſiſt him with a rule; but it ſhould be confined to the book wherein admiſſions of freemen are entered. *Vide Stra. vol.* 2. *p.* 1223.

Hilary, 18 *Geo.* 2. *Lekeux* v. *Naſh*.

In an action of *debt* for rent brought againſt the defendant as aſſignee of a term, he pleaded that he had made a further aſſignment to one *R.* before the time for which the rent was demanded. To which the plaintiff replied, *he has not aſſigned*. And on the trial it appeared, that the defendant being weary of the aſſignment he had taken, employed a perſon to find him one who would take it off his hands; and *R.* a poor woman then in the *Fleet*, was prevailed on to accept it; and the defendant, in conſideration of 5 *s.* (which it appeared he had lent her for that purpoſe) made a formal aſſignment. The defendant inſiſted that this was not *proper evidence* on *non aſſignavit*, but that the plaintiff ſhould have replied *by fraud*. The Chief Juſtice held it could not be gone into on this iſſue, according to the caſe in *Hob.* 72. 166. Therefore the plaintiff became nonſuited. *Vide Stra. vol.* 2. *p.* 1221.

Eaſter, 19 *Geo.* 2. *Holdfaſt on the Demiſe of Anſtey*, v. *Dowſing*.

On an *ejectment* brought for lands in *Cambridgſhire*, on the demiſe of *C. A. D. D.* and *M.* his wife, on a trial at *bar* the jury found a *ſpecial verdict*.

That *J. T.* Eſq; being ſeiſed in *fee* of the premiſes in queſtion, and of ſound mind, ſigned, ſealed, and publiſhed a paper writing, purporting to be his laſt will, dated the 10th day of *February* 1742, and which is found in *theſe words*: by this he declares that he deviſes to the defendant the lands in queſtion for life, remainder to his firſt and every other ſon and ſons in tailmale; remainder to his daughters as tenants in common, with a reverſion in fee to the right heirs of the deviſor; then he charges all his real and perſonal eſtate with particular annuities and legacies, and particularly with an annuity of 20 *l. per ann.* to *E.* the wife of *J. H.* for her life, and to her ſeparate uſe; and he alſo gives a legacy of 10 *l.* each to *J. H.* and his wife for mourning. That to this will there are *three* perſons who ſubſcribe their names as *witneſſes*, whereof *J. H.* is one, and that in their preſence, and of nobody elſe, he ſigned, ſealed, and publiſhed the paper-writing as and for his laſt will: and they *three* atteſted the ſame in his preſence. They find the identity of *J. H.* the legatee, and ſubſcriber, and that *E.* his wife was ſtill living. That the deviſor died the 28th day of *May* 1743, without iſſue, and ſeiſed as aforeſaid; and that Mrs. *A.* (one of the leſſors) is his aunt and heir at law: they find that before and at the time of the trial, the defendant made a tender to *J. H.* of 20 *l.* for his and his wife's legacies, which he refuſed to accept, and that thoſe legacies are not diſcharged. Then they find the entry and demiſe by the leſſors, &c.

Per curiam. The queſtion on this ſpecial verdict is, whether in the light in which *H.* now ſtands, he is to be conſidered as a credible *witneſs* within the intent of the *ſtatute of frauds*? And we are all of opinion he is not.

We therefore hold this not to be a good atteſtation of a will of lands; and then the title of Mrs. *A.* the leſſor of the plaintiff, as heir at law, is not defeated by what is ſet up as a will: and conſequently the plaintiff muſt have judgment. *Vide Stra. vol.* 2. *p.* 1253.

Michaelmas, 19 *Geo.* 2. *Wilſon* v. *Rogers et al'.*

The plaintiff was ſued in the *court of conſcience* in *London*, and was taken in execution, for which he brought an action of *treſpaſs* and *falſe impriſonment*; and now moved for liberty to inſpect the books of their proceedings; which on debate was granted, ſo far as related to the ſuit againſt himſelf only, on this ground, that every man has a right to look into proceedings to which he is a party. *Vide Stra. vol.* 2. *p.* 1242.

Michaelmas, 20 *Geo.* 2. *Lowfield* v. *Stoneham*.

On the plea of *fully adminiſtered*, a queſtion aroſe, whether 1000 *l.* received by the defendant, was due to her in her own right, or as executrix of her huſband, and conſequently *aſſets*. The queſtion aroſe on the following deviſe: *I give to my loving brother John Stoneham* 1000 *l. and in caſe of his death to his wife Suſanna*, (who was the defendant.) It appeared that *John Stoneham* ſurvived the teſtator; and therefore the plaintiff inſiſted, that this legacy (which the defendant admitted to have received) veſted abſolutely in him, and was *aſſets* in her hands.

On the part of the defendant it was offered to give in *evidence*, that the teſtator in his *laſt moments* declared he meant to give his brother the intereſt of 1000 *l.* and that the defendant ſhould have the principal in caſe ſhe ſurvived him.

This *parol evidence* was oppoſed by the plaintiff's council, as being contradictory to the plain words of the will. And *Lee*, Chief Juſtice, ſaid, it could not be allowed; and in the caſe of *Selwin* v. *Brown*, the *Houſe*

Houſe of Lords had refuſed it, even where it was to ſupport the legal interpretation of the will; and Lord *Hardwicke* about *two* years ago held it in the ſame manner in the caſe of the Earl of *Inchiquin* v. *Obrian*. *Vide Strange, vol.* 2. *p.* 1261.

Hilary, 30 *Geo.* 2. *Tooker* v. *The Duke of Beaufort.*

On a motion for a *new trial* on a ſuppoſed miſ-direction of the judge who tried the cauſe, in admitting a commiſſion under the ſeal of the court of *Exchequer*, *P.* 33 *Eliz. Roll.* 290, to be given in *evidence*, although objected to at the trial; which commiſſion was of things among others, of which the *Beaufort* family could have no notice, nor opportunity to defend, and therefore could not affect them, conſequently it ought not to be admitted as *evidence*, on the ſame principle that a verdict in a cauſe between other parties cannot be given in *evidence* in a cauſe between ſtrangers to the former cauſe.

This matter, after being debated at the *bar*, and fully conſidered by the court, they gave their opinion as follows:

Per curiam. The *evidence* given at the trial was *admiſſible*, though not *concluſive*, and therefore the *evidence* was well and properly received, and the rule for ſhewing cauſe muſt be diſcharged.

N. B. Pending this queſtion before the court, the Duke of *Beaufort* died, on which the plaintiff's council moved for leave to enter up this judgment as of the term next after the verdict.

Lord *Mansfield.* This motion ſeems reaſonable, therefore let the plaintiff take a rule to ſhew cauſe, which was afterwards made *abſolute*. *Vide Bur. vol.* 1. *p.* 146.

Trinity, 30 & 31 *Geo.* 2. *Harris* v. *Huntbach.*

See this caſe fully ſtated in page 49 of this work, under the head *Actions.*

Michaelmas, 2 *Geo.* 3. *Wright on the Demiſe of William Clymer* v. *Littler and others.*

Adjudged, that the competency of *evidence* depends on the circumſtances under which ſuch *evidence* is given, and that the declarations of a perſon in his laſt *illneſs* are competent, and material *evidence* of the matter to which ſuch declarations of the party relate. *Vide Bur. vol.* 3. *p.* 1255.

Michaelmas, 2 *Geo.* 3. *Morris* v. *Pugh and Harwood.*

See this caſe fully ſtated in page 358 of this work, under the head *Declaration.*

Eaſter, 3 *Geo.* 3. *Plumer Spinſter* v. *William Marchant, Adminiſtrator of Peter Marchant.*

A caſe from the *aſſizes* for the county of *Suſſex*, was reſerved for the opinion of the court, on the following queſtion:

"Whether the defendant as adminiſtrator of the inteſtate *Peter Marchant* the younger could on the plea of *plene adminiſtravit* give in *evidence* the following covenant" to ſupport ſuch plea.

The ſaid *Peter Marchant* the younger by articles of agreement, dated the 7th day of *Auguſt* 1759, between him and his uncle of the firſt part, *M. L.* mother and *S. L.* daughter of the ſaid *M. L.* of the ſecond part, and the defendant *William Marchant*, and *J. B.* of the third part. The ſaid *Peter Marchant* the younger *covenanted* that he would in and by his laſt will and teſtament, or that his executors and adminiſtrators ſhould within *ſix months* after his death, pay and deliver either in money, goods, chattels, or effects, out of his perſonal eſtate, the full ſum of 700 *l.* to the ſaid *William Marchant* the defendant and *J. B.* or the ſurvivor of them, or to the executors or adminiſtrators of the ſurvivor of them; the intereſt to be paid to the ſaid *Sarah L.* for life, for the maintenance of herſelf and children, and after her deceaſe the money to be equally divided among the children of the marriage, as they attained their reſpective ages of *twenty-one years*; if daughters, on their attaining ſuch age, or day of marriage; and in default of iſſue of ſuch marriage, to be paid to ſuch perſons as the ſaid *Peter Marchant* the younger ſhould by his laſt will appoint.

After hearing council on both ſides, the court gave judgment.

Lord *Mansfield.* It is now ſettled, that a retainer of a debt may be given in *evidence.*

Deniſon and *Wilmot*, Juſtices, concurred with the Chief Juſtice.

Per curiam. Let there be judgment of *nonſuit.* *Vide Bur. vol.* 3. *p.* 1380.

Eaſter, 3 *Geo.* 3. *D'Ayrolles, Eſq*; v. *Howard.*

On ſhewing cauſe againſt a rule obtained for a new trial on the ground of a *miſ-direction* of the judge who tried the cauſe; it was an action of *treſpaſs* brought by the lord of the manor againſt the *commoner* for ſpoiling and deſtroying his peat, and filling up the holes out of which it was dug.

The principal queſtion on the trial was,

"Whether the plaintiff could on this iſſue give in *evidence*, that there was a ſufficiency of *common* left?"

The court were of opinion that it could not be given in *evidence*, but thought the preſent verdict for the defendant ſhould be ſet aſide, on payment of coſts by the plaintiff, and a new action brought by the *commoner* againſt the lord, in which all the matters inſiſted on (which were many) might be given in *evidence*. *Vide Bur. vol.* 3. *p.* 1385.

Michaelmas, 5 *Geo.* 3. *Combe, Eſq*; v. *Pitt.*

Adjudged, that in *penal actions* the material facts muſt be charged, and a fact muſt be *proved* in ſuch a manner, that *all* thoſe conſequences will follow the verdict which ought to attend it; but aggravations, and all circumſtances that do not vary the offence are out of the caſe as to the neceſſity of *proving* them. *Vide Bur. vol.* 3. *p.* 1589.

Execution, *ſee* Judgment.

Executors and Adminiſtrators.

Trinity, 1 *W.* & *M.* *The King* v. *Ayloff.* Error.

An *executor* brought a *writ of error* to reverſe an attainder of *high treaſon* of his teſtator, and *Holt*, Chief Juſtice, doubted whether it lay for the *executor*; for by reverſal the blood and land is reſtored, which is of no advantage to him, and the goods were forfeited by the conviction of the teſtator, and not by the attainder. But the other *three* judges were againſt him; for he is privy to the judgment, and may have loſs thereby. 3 *Cro.* 225. 273. 558. *Vide Salk. vol.* 1. *p.* 295.

Hilary, 2 *W.* & *M.* *Hodge* v. *Clare.*

On a *ſci. fa.* brought by the plaintiff as *adminiſtrator* to *A. Hodge*, during the abſence of *H. Hodge*, on a judgment recovered in this court, on which a *writ of error* was brought in the *Exchequer Chamber*, and the judgment affirmed.

To this *ſci. fa.* the defendant *demurred*, and for cauſe ſhewed,

1ſt, That it does not appear, that any judgment was given in the *Exchequer Chamber* (on which this *ſci. fa.* is now brought) to have execution, for the words *was adjudged*, were left out.

2dly, It is not averred, that *Hannah* was abſent at the time of *adminiſtration* committed to *J. Hodge*, and ſo continued.

N. B. The court obſerved, that this objection ought to have been pleaded.

3dly, That the *adminiſtration* was void, becauſe of the uncertainty, for having prayed *oyer* of the *adminiſtration*, which being read *in theſe words*, it appeared to be granted during the abſence, *&c.* and does not ſay from what place the perſon was abſent.

This objection was anſwered by the court, that it it ſhall be intended to be out of the kingdom.

4thly, That it muſt be void, becauſe the *ordinary* has no power to grant *adminiſtration* by the *common law*; the authority under which he acts, being given him by particular *ſtatutes*.

Per curiam. Theſe objections will not hold, for all of them may as well be made againſt an *adminiſtrator during his minority*, which is ſimilar to the preſent caſe, and yet ſuch an *adminiſtration* is held good, becauſe it is in a manner granted to the right perſon, who has thereby good authority to receive the eſtate. *Vide Mod. Rep. vol.* 7. *p.* 17.

Eaſter, 2 *W. & M. Whitehall* v. *Squire.*

On an action of *trover* brought by the plaintiff as *adminiſtrator* of *J. M.* for a *gelding*, on *not guilty* pleaded, the jury found a *ſpecial verdict*, *viz.* that *J. M.* was poſſeſſed of the gelding, and put him to the defendant to paſture, and died inteſtate: that before *adminiſtration* was granted, the plaintiff deſired the defendant to bury *J. M.* decently, who accordingly buried him, and laid out 93 *l.* therein; whereon the plaintiff agreed, that the defendant ſhould have the horſe in part of ſatisfaction of funeral charges, and for 13 *l.* reſidue thereof, gave him his note; afterwards the plaintiff took out *adminiſtration*, and now brought an action of *trover* for the horſe.

Holt, Chief Juſtice, was of opinion, that the action lay; for that the defendant was a *tort executor*, and the plaintiff's conſent, when he had nothing to do with the matter, would not alter the caſe; for if he had then releaſed, yet he might have taken *adminiſtration*, and brought an action afterwards; but *Dolben* and *Eyre*, Juſtices, diſſented, and the defendant had judgment. *Vide Salk. vol.* 1. *p.* 295.

Hilary, 3 *W & M. Anonymous.*

Adminiſtration may be granted to the next of kin; or to the wife, or to the next of kin to the *inteſtate*, as the ſpiritual judge pleaſes; the wife ſhall come in for a ſhare by the *new ſtat.* and as to creditors, they are all one *adminiſtrator*; the court may divide the *adminiſtration*, or give it all away as they pleaſe. But the huſband ſhall have *adminiſtration* of the wife before all others; ſo if ſhe has credits. *Vide Mod. Rep. vol.* 12. *p.* 16.

Trinity, 3 *W. & M. Newport* v. *Godfrey.* Error.

On an action of *debt* brought in the *detinet* againſt the defendant as *executor* of one *Turner*, *for rent in arrear, in the life-time of the teſtator, on a parol leaſe*, it appeared on the declaration, that the leaſe expired in the life-time of the ſaid *Turner*.

The defendant pleaded ſeveral bonds entered into by the ſaid *Turner*, for the payment of money, which he averred to be juſt debts, and that he had *adminiſtered* all *beſides*, *&c.* which he retained to ſatisfy the ſaid bonds.

On *demurrer* to this plea, judgment was given in the *C. B.* for the plaintiff, that the rent ought to be paid before the bonds. For though it was objected, that if the leaſe had not been determined, the rent then due might be preferable to a bond debt, becauſe the goods of the *teſtator* are liable to a *diſtreſs*: but now the leaſe was determined, it was only a *perſonal* thing, and could not take place of *ſpecialties*; yet the court was of opinion, that the debt for this rent did ſtill favour of the *realty*, and that the determination of the leaſe made no alteration in the contract; but that the action might be maintained by reaſon of the profits of the lands which the teſtator had received.

On this judgment a *writ of error* was brought in this court, and the judgment given in the *C. B.* was affirmed. 2 *Cro.* 233. *Barwick* v. *Foſter. Fitz. Abr. tit. Avowry* 240. *Vide Mod. Rep. vol.* 4. *p.* 44.

Michaelmas, 3 *W. & M. Anonymous.*

Per curiam. Where there be *ſeveral executors*, and only *ſome* of them appear and plead, judgment muſt be given againſt them all; but *execution againſt his own effects* ſhall go againſt him that has appeared. Alſo ſubmiſſion to award by an *executor* is a *devaſtavit*. *Vide Mod. Rep. vol.* 12. *p.* 10.

Michaelmas, 3 *W. & M. Hill* v. *Mills.*

Adjudged, That the bankruptcy of an *executor* is no cauſe of granting *adminiſtration* to another. Where there is a natural diſability, there is a neceſſity of doing it; but it muſt be *to the uſe and benefit* of the *executor*, ſo the laſt granting of *adminiſtration* is a nullity, and *ipſo facto* void. *Vide Mod. Rep. vol.* 12. *p.* 9.

Michaelmas, 3 *W. & M. Beak* v. *Kent.* Error.

On an *indebitatus aſſumpſit* brought againſt an *executor*, *&c.* for wares ſold, the defendant pleaded ſeveral judgments, *&c.* and that he had not aſſets *beyond*.

The plaintiff replied particularly to each judgment, and that they were kept on foot by fraud.

The defendant in his rejoinder put all the judgments together, and ſaid they were not kept on foot by fraud.

On *demurrer*, the queſtion was, whether he ſhould have made ſeveral rejoinders to all the judgments in particular, and not have put them all together, like the caſe of *Warkhouſe* v. *Symonds*, which was an *indebitatus aſſumpſit* for *fees*, where the defendant pleaded ſeveral judgments, as in this caſe, *&c.* and the plaintiff made the like replication.

The defendant rejoined and ſaid, that the judgments were all ſatisfied, and that he did not keep the ſeveral judgments on foot by fraud (and had left out, *nor any of them)* and on *demurrer*, judgment was given for the plaintiff in the *C. B.* which judgment was affirmed on a *writ of error* brought in this court.

Per curiam. The plaintiff need not aver in his replication, that every judgment, but that *the ſeveral judgments aforeſaid*, are kept on foot by fraud, which had been a good averment, and then this rejoinder had been likewiſe good.

If the jury had found but one judgment kept on foot by fraud, there muſt have been a verdict for the plaintiff, becauſe ſufficient matter of iſſue would then be found for him: for it is enough if the ſubſtance entitles the plaintiff to an action, and avoids the defendant's plea. *Vide Mod. Rep. vol.* 4. *p.* 63.

Michaelmas, 3 *W. & M. Hills* v. *Mills.*

A *prohibition* was prayed and granted to the eccleſiaſtical court of *Canterbury*, to ſtay a ſuit there, to repeal or revoke the probate of a will, becauſe the *executor* was become a bankrupt, and to grant *adminiſtration* to another. And though one *Coates*'s caſe was cited, where an *adminiſtration* was revoked for that cauſe, yet the court ſaid that caſe differed: for the *executor* is conſtituted by the teſtator himſelf, and by him entruſted: but it ſeemed to be agreed, that if an *executor* become *inſane*, the *ſpiritual court* may commit *adminiſtration*, becauſe that is a natural diſability. *Vide Salk. vol.* 1. *p.* 36.

Michaelmas, 3 *W. & M. Fawtry* v. *Fawtry.*

H. died inteſtate, leaving a wife and a brother: the *ordinary* had granted the *adminiſtration* of ſome particular debts to the brother, and of the reſidue to the wife. The court was moved for a *mandamus* to grant *adminiſtration* to the wife.

Per curiam. Where the huſband dies, the ordinary is at election either to grant *adminiſtration* to the wife, or the next of kin; for this is grounded on *ſtat.* 21 *H.* 8. *c.* 5. Yet in that caſe ſhe ſhall have her ſhare on the ſtatute of diſtributions. But where the wife dies, *adminiſtration* muſt be granted to the huſband by *ſtat.* 31 *Ed.* 3. Alſo the court held, the ordinary may grant *adminiſtration* to the brother as to part, and to the wife for the reſt; in which caſe neither can complain, ſince the ordinary need not have granted any part of the *adminiſtration* to the party complaining. But if the inteſtate leave a bond of 100 *l.* the ordinary cannot grant *adminiſtration* for 500 *l.* to one perſon, and 50 *l.* to another, becauſe this is an entire thing. *Vide Salk. vol.* 1. *p.* 36.

Trinity, 4 *W.* & *M.* *Manning* v. *Napp.*

H. died inteſtate, leaving no children or kindred: the King appointed the plaintiff to take out *adminiſtration*, the defendant, though he knew there was no kindred, entered *caveats*, and put the plaintiff to great charge; whereon the plaintiff brought an action, and on *demurrer* the court doubted, whether an action would lie; becauſe, there was a damage *without injury*; for the property of the goods till *adminiſtration* was in the *ordinary*, and the plaintiff had neither *right in the one nor the other.* Otherwiſe, had the plaintiff been next of kin, becauſe he had a right to *adminiſter* by the *ſtatute*; and the King's appointment by letters patent was, but a kind of recommendation. And the court further held, that in the caſe of an inteſtate without kindred, the *ordinary* may diſpoſe *in pious uſes*; but the uſual courſe is for ſome perſon to procure the King's letters patent, and then the *ordinary* admits the patentee to *adminiſtration*; yet they thought this was rather out of reſpect, than of right, and denied the opinion in 9 *Co Henſloe*'s caſe; and held that *adminiſtration* originally belonged to the biſhops, and the inſtance of ſome Lords of manors is not a proof to the contrary. *Vide Salk. vol.* 1. *p.* 37.

Trinity, 4 *W.* & *M.* *Maſon* v. *Hanſon.*

On an action of *debt* for rent by an *adminiſtrator*, due in the life-time of the inteſtate, on *nil debet* pleaded, they were at iſſue, and the plaintiff had a verdict; and it was moved in *arreſt of judgment*, that the plaintiff had made out no title; for he had ſet forth, that *adminiſtration* was committed to him by the *official the Reverend* John Hall, *prebend of the prebendary and peculiar juriſdiction of* Brampton, *in the cathedral church of* Lincoln, and does not ſay that it belonged to him to grant *adminiſtration*, &c.

It was argued, that this *official* is neither *biſhop*, *ordinary*, or *archdeacon*; and therefore it ſhall not be intended, that he had an authority, if not ſhewn by the plaintiff, it is otherwiſe in the caſe of a defendant.

This is a peculiar juriſdiction, and therefore in entitling himſelf, the plaintiff ought to ſay, *to whom adminiſtration belonged*, &c. and ſhew that he had a lawful power to grant it, for it ſhall not be preſumed to be proved at the trial; he may have a peculiar juriſdiction to be exempt only from the viſitation of the biſhop, but not to grant *adminiſtration*.

On the other ſide it was argued, that this might have been a good objection on a *demurrer*, but it is cured by the verdict ſince *ſtat.* 17 *Car.* 2. and before the making of that *ſtatute*, it has been held, that in an action brought by an *adminiſtrator*, omitting *the bringing into this court the letters of adminiſtration*, was good after verdict; ſo the judgment in this caſe was affirmed. *Vide Mod. Rep. vol.* 4. *p.* 133.

Trinity, 5 *W.* & *M.* *Shelley's Caſe.*

In an action on the *caſe* againſt an *executor*, on the plea of *he has fully adminiſtered;* three points were adjudged by *Holt*, Chief Juſtice; 1ſt. That the plaintiff muſt prove his debt, otherwiſe he ſhall recover but 1 *d.* damages, though there be *aſſets*, for the plea admits a debt, but not the quantity. 2dly. That all the debts mentioned in the inventory ſhall be counted *aſſets* in the *executor*'s hands; for that is as much as to ſay that they may be had for demanding, unleſs the demand or refuſal be proved. 3dly. That in ſtrictneſs, no funeral expences are allowable againſt a creditor, except for the coffin, ringing the bell, parſon, clerk, and bearers fees, but not for pall or ornaments. *Vide Salk. vol.* 1. *p.* 296.

Michaelmas, 5 *W.* & *M.* *Harding* v. *Salkill.*

In *debt* againſt the defendant as executor, the defendant pleaded in *bar*, that he was *adminiſtrator*; relying on *Dyer* 305. *pl.* 61. But the court held it no plea in *bar*; for if an action be brought againſt an *adminiſtrator* by the name of *executor*, and judgment had therein, this judgment may be pleaded in *bar* to another action brought againſt him as *adminiſtrator*. *Vide Salk. vol.* 1. *p.* 296.

Michaelmas, 5 *W.* & *M.* *Gale* v. *Till.*

See this caſe fully ſtated in page 303 of this work, under the head *Coſts*.

Eaſter, 6 *W.* & *M.* *Newton* v. *Richards.*

A *ſcire facias* on a judgment againſt the teſtator was now ſued againſt his executor, who pleaded *he had fully adminiſtered*, &c. The plaintiff demurred *ſpecially*, and ſhewed for cauſe, that the defendant did not ſhew how he had *adminiſtered*; and had judgment; for againſt a judgment he ought to ſhew how he *adminiſtered*, but it had been good on general demurrer. *Mo.* 158. *All.* 48. 3 *Keble* 258. 2 *Keb.* 736. 3 *Cro.* 575. *Vide Salk. vol.* 1. *p.* 296. *Mod. Rep. vol.* 4. *p.* 296. *Raym. vol.* 1. *p.* 3.

Hilary, 6 & 7 *W.* & *M.* *Wate* v. *Briggs.*

An action was brought by the plaintiff *in his own proper right*, for the eſcape of a priſoner in execution on a judgment recovered by the plaintiff as *adminiſtrator*.

Per curiam. The action is ill brought, for the firſt judgment being in right of the inteſtate, the action of eſcape ought to be in right of the inteſtate alſo. *Vide Raym. vol.* 1. *p.* 36.

Eaſter, 7 *W.* 3. *Williams* v. *Crey or Carey.*

See this caſe fully ſtated in page 20 of this work, under the head *Actions*.

Michaelmas, 7 *W.* 3. *Fooler* v. *Cooke.*

The plaintiff brought *aſſumpſit* againſt the defendant as *executor*, who prays judgment, whether he ought to anſwer the bill aforeſaid, becauſe, he ſays, that *adminiſtration* was granted to him, in which caſe he ought to be ſued as *adminiſtrator*, and not as *executor*, and concludes, with praying judgment, whether he ought to be compelled to anſwer the aforeſaid bill, &c. The plaintiff demurred, and it was objected, 1ſt. That he had not traverſed, *abſque hoc* that he *adminiſtred* as *executor*. 2 *Brownl.* 184. *But not allowed:* for it is better without a traverſe, and the plaintiff's declaration is well confeſſed and avoided; for an intermeddling with the goods intitles the plaintiff to an action againſt the defendant, and now he has ſhewed the cauſe of his intermeddling, and on what account, which, if true, he ought to be charged accordingly; it is true, if he intermeddled before *adminiſtration*, he may be charged as an *executor of his own wrong*, but that ſhall not be intended; for all acts are intended to be rightful till the contrary appears; and if the caſe were ſo, the plaintiff ought to reply it: a traverſe would be impertinent; for though the declaration ſuppoſes an intermeddling, yet it does not ſuppoſe how nor in what manner; and to deny an intermeddling as *executor de ſon tort*, is to traverſe that which is not alledged.

Holt, Chief Juſtice. The diſtinction is between ſuing one as *executor*, as in this caſe, for then there needs no traverſe, and ſuing one as *adminiſtrator* to *J. S.* for then, if the defendant pleads he is an *executor*, he muſt go on and traverſe *abſque hoc* that the ſaid *J. S.* died inteſtate, and the reaſon is, becauſe, unleſs there was a dying inteſtate, no action could be brought againſt one as *adminiſtrator*, and to ſay he was made *executor*, is by implication only an anſwer to the dying inteſtate. 2dly. It was objected, that the bill could not be abated on the concluſion of this plea, which was to the juriſdiction of the court, and not to the bill; and the court inclined that every plea ought to have its apt concluſion, and that they ought not to abate the plaintiff's writ or bill in this caſe, becauſe the defendant had not prayed it. *Vide Salk. vol.* 1. *p*, 298.

Trinity, 8 *W*. 3. *Petit* v. *Smith*.

See this caſe fully ſtated in page 378 of this work, under the head *Diſtribution*.

Michaelmas, 8 *W*. 3. *Truelock* v. *Hartfield*.

In *debt* on a bond as *adminiſtrator*; the plaintiff in his declaration ſays, that *adminiſtration* was committed to him by *J. S. official of the Dean of* Sarum, *lawfully conſtituted ordinary of that place, to whom adminiſtration of right belonged*, without ſaying, *at that time belonged*, or *how conſtituted*, and held good notwithſtanding. *Vide Mod. Rep. vol.* 12. *p.* 100.

Michaelmas, 8 *W*. 3. *Yeoman* v. *Bradſhaw*.

See this caſe fully ſtated in page 226 of this work, under the head *Bills of Exchange*.

Hilary, 9 *W*. 3. *Trevillian* v. *Andrew*.

In a ſuit in *ejectment*, the jury find a leaſe for *ninety-nine* years, if *three* perſons ſhould ſo long live, and that *one* of the ſaid perſons was living.

They alſo find another leaſe made to the leſſee for *ninety-nine* years, if he ſhould ſo long live, and that he aſſigned his term to the other, who died *inteſtate*, and that this perſon was living.

One *Spry*, who had a grant of the reverſion, entered before *adminiſtration de bonis non* was granted, and died ſeiſed. The queſtion was, whether that had taken away the entry of the *adminiſtration*?

Per curiam. The term had an exiſtence as ſoon as *adminiſtration* was granted, and the *adminiſtrator* may have a ſpecial action of *treſpaſs*. *Vide. Mod. Rep. vol.* 5. *p.* 384.

Trinity, 9 *W*. 3. *Powers or Bowers*, v. *Coot or Cook*.

The plaintiff brought *debt* on an obligation againſt the defendant as *executrix* of *J. S.* The defendant pleaded that *J. S.* died inteſtate, and that *adminiſtration* was committed to her, and prays judgment, whether ſhe ought to anſwer the aforeſaid bill, *&c.* On this the plaintiff demurred, and inſiſted that the defendant ſhould have traverſed; *abſque hoc* that ſhe intermeddled before *adminiſtration* committed to her; for if ſhe did, ſhe made herſelf liable as a tort *executrix*; and cited 3 *Cro.* 566, 810, 102. 3 *Leon.* 197. *Yelv.* 115. *Brownl.* 97.

Per curiam. Such a traverſe had been ill; for ſuch intermeddling is not alledged, and the defendant ought not to traverſe that which the plaintiff doth not alledge in his declaration. *Vide Salk. vol.* 1. *p.* 298. *Mod. Rep. vol.* 5. *p.* 136. *Raym. vol.* 1. *p.* 63.

Michaelmas, 9 *W*. 3. *Aſton or Aſhton*, v. *Sherman*.

In *debt* on a bond againſt an *executor*, the defendant pleaded *ſix* ſeveral judgments for 100 *l.* each, and that he had not *aſſets* beyond 10 *l.* which was bound by them; the plaintiff replied ſeverally as to *five* of the judgments, that they were kept on foot by fraud, and prayed judgment for his debt and damages in the concluſion of each plea; and as to the *ſixth* he pleaded that the defendant had *aſſets* beyond the 10 *l.* ſufficient.

Holt, Chief Juſtice. *Adjudged*, 1ſt. That the plaintiff may reply ſeverally as to each, and that it is at his election to reply to all, or ſome, or any one of the judgments ſet up by the *executor*. But, 2dly. That the plaintiff's replication is wrong in this, that he pleaded as to *five* judgments *by fraud*, and as to the laſt, that he has *aſſets*, concluding to the country; for when a man pleads *ſix* judgments, he confeſſes *aſſets* for above *five*, ſo that it is an allegation of what is already confeſſed, and driving him to an unneceſſary iſſue thereon; but becauſe there are precedents this way, as 1 *Saund.* 336. the plaintiff had leave to *diſcontinue*, and afterwards amended on payment of coſts. *Vide Salk. vol.* 1. *p.* 298. *Raym. vol.* 1. *p.* 263. *Mod. Rep. vol.* 12. *p.* 153.

Michaelmas, 9 *W*. 3. *Sparks* v. *Crefts*.

The plaintiff brought an action againſt the defendant as *adminiſtrator* generally to *J. S.* The defendant pleaded, that he was *adminiſtrator during the minority* of his wife; and this was in *abatement*; to which plea the plaintiff demurred.

Adjudged, that the defendant ſhall anſwer over. For though a man cannot charge an *adminiſtrator during minority* generally as *adminiſtrator*, becauſe it is a particular ſort of *adminiſtration*, and if a man obtains judgment againſt ſuch an *adminiſtrator*, if afterwards the *adminiſtrator* or *executor* comes of age, a *ſci. fa.* lies againſt him on this judgment; yet the defendant ought to aver, that he continues *adminiſtrator during the minority*, which he has not done here, for he has not ſaid that his wife is living, and under the age of *ſeventeen*. 5 *Co.* 29. *Pigot*'s caſe. Afterwards the defendant came and pleaded, that *adminiſtration* were committed to him during the minority of his wife, and that his wife died ſince the laſt continuance.

Holt, Chief Juſtice. 1ſt. This plea is contradictory to the admiſſion of the defendant; for by ill-pleading before, the defendant admitted himſelf *adminiſtrator* generally, and therefore this plea is ill. 2dly. I doubt whether a man can plead a plea *puis darrien continuance* after a demurrer; although *Hob.* 81. *Stoner* v. *Gibſon* is ſo. *Vide Raym. vol.* 1. *p.* 265.

Eaſter, 10 *W*. 3. *Atkinſon* v. *Corniſh*.

The plaintiff brought an action as *adminiſtrator* to *J. S. during the minority* of *A. B.* and *C. adminiſtrators* of *J. S. with the will annexed*, and averred that *A.* was within the age of *twenty-one* years; the defendant pleaded that *A.* was of the full age of *twenty-one* years, whereon the plaintiff tendered iſſue, and the defendant demurred. And it was argued, that judgment ought to be given for the defendant; for if *A.* is *ſeventeen* years of age, the *adminiſtration* granted during his minority ceaſes: therefore the plaintiff could not have an action after.

Holt, Chief Juſtice. The difference is: if *adminiſtration* is granted during the minority of an *executor*, the *adminiſtration* ceaſes when the *executor* obtains the age of *ſeventeen* years; but if *adminiſtration* be granted during the minority of a perſon who is not *executor*, but only *adminiſtrator*, the *adminiſtration* does not ceaſe till the *adminiſtrator* attains the age of *twenty-one* years: and therefore judgment was given for the plaintiff.

And in the caſe of *Thomas* v. *Freake Eaſter* 13 *W*. 3. it was adjudged accordingly, that the *adminiſtration* during the minority of an *adminiſtrator*, does not ceaſe till the *adminiſtrator* attains the age of *twenty-one* years; where the plaintiff brought his action as *adminiſtrator* during the minority of an *adminiſtrator*, and averred he was under the age of *twenty-one* years, *viz. eighteen* years; and on demurrer to the declaration, judgment was given for the plaintiff. *Vide Raym. vol.* 1. *p.* 338. *Mod. Rep. vol.* 12. *p.* 194.

Michaelmas, 10 *W*. 3. *The King* v. *Sir Richard Raynes*.

A *mandamus* iſſued to grant a probate of the will; the *ordinary* returned, that the *executor* was an abſconding perſon, incapable, *&c.*

Holt, Chief Juſtice, held this return was inſufficient; for that there is a will admitted, and ſince the teſtator has thought the *executor* a proper perſon to be intruſted

truſted with his affairs, the *ordinary* cannot adjudge him otherwiſe on a diſability by the *canon law*, for that is not admitted here, but as far as it has been received from time immemorial; ſo a peremptory *mandamus* was granted.

Neither can the *ordinary* inſiſt on ſecurity from the *executor*; for the teſtator has thought him able and qualified, and he has a temporal right which he cannot ſue for before *probate*; and there have been no precedents nor practice of this nature. *Vide Salk. vol.* 1. *p.* 299. *Mod. Rep. vol.* 12. *p.* 205.

Lent Aſſizes, 11 *W.* 3. *Anonymous.*

See this caſe fully ſtated in page 445 of this work, under the head *Evidence.*

Eaſter, 11 *W.* 3. *Cage* v. *Acton.*

See this caſe fully ſtated in page 206 of this work, under the head *Baron and Feme.*

Michaelmas, 11 *W.* 3. *Richardſon* v. *Seiſe.*

A *feme covert*, by the conſent of her huſband, made her will, and another *feme covert* her *executor*; her father, on oath of her dying a widow, obtained *adminiſtration*; and being cited below by the *executrix* to have the *adminiſtration* revoked, moved for a *prohibition*, on ſuggeſtion that ſhe was *covert* at the time of her death, and had a rule *niſi*; but the matter being opened to the court, they diſcharged the rule.

Holt, Chief Juſtice, ſaid, a married woman cannot make a will, even as *executrix*, without the conſent of her huſband. *Ro. Abr.* 912. If a *feme covert* be *executrix* and *legatee*, *adminiſtration de bonis non* ought to be to the huſband; if ſhe be not *legatee*, and others are, it ought to be given to them; if there be no legacies, to the next of kin to the firſt teſtator.

A papiſt *convict* cannot be *executor*, otherwiſe he may. *Vide Mod. Rep. vol.* 12. *p.* 306.

Michaelmas, 11 *W.* 3. *Blank* v. *Newcomb.*

Holt, Chief Juſtice. A perſon may be ſued as *executor*, and as *heir* both; for why may not a man make uſe of both his ſecurities. *Vide Mod. Rep. vol.* 12. *page* 327.

Hilary, 12 *W.* 3. *Grant* v. *Baily.*

See this caſe fully ſtated in page 305 of this work, under the head *Coſts.*

Hilary, 12 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. Tho' an *executor de ſon tort* pays debts duly, with all the *aſſets* that comes into his hands, yet the *rightful executor* ſhall maintain *treſpaſs* againſt him; indeed he may give ſuch payment in mitigation of damages, but the right of the action and verdict ſhall go againſt him. *Vide Mod. Rep. vol.* 12. *p.* 441.

Hilary, 12 *W.* 3. *Gidley* v. *Williams.*

In *debt*, the plaintiff declared on a bill obligatory as *adminiſtrator*, not ſaying in the body of the declaration by whom *adminiſtration* was committed, concluding with, and he *brings into court the letters of adminiſtration of the aforeſaid* Richard, who was the inteſtate; the defendant pleaded *not his deed*; and a verdict for the plaintiff. And now exception was taken to the declaration.

Per curiam. 1ſt, Want of ſhewing by whom *adminiſtration* was committed, is naught on *demurrer*; for it might be by a *peculiar*, and then it muſt be averred, *to whom the right of granting adminiſtration of right belonged*, or, *ordinary of that place.* And there is a good reaſon why it ſhould be ſet forth by whom *adminiſtration* was committed; for the defendant may conteſt the right of the perſon granting, and may plead *adminiſtration* was granted to another, or that there were *bona notabilia.*

2dly, A verdict does not help this, for it is not a matter neceſſary to be proved on this iſſue, the title of *adminiſtrator* being not then in queſtion.

3dly, This defect was cured by the defendant's plea in chief, which admits the plaintiff to be a *good adminiſtrator.*

4thly, Though the verdict did not cure it at *common law*, yet it is now remedied by *ſtat.* 16 & 17 *Car.* 2. *c.* 8. And the plaintiff had judgment. *Vide Salk. vol.* 1. *p.* 37. *Raym. vol.* 1. *page* 634. *Mod. Rep. vol.* 12. *p.* 443.

Eaſter, 12 *W.* 3. *Tilny* v. *Norris.*

The plaintiff brought an action of *covenant* againſt an *adminiſtrator*, and declared on a leaſe for years to the inteſtate, wherein was a covenant for him, his *executors* and *aſſigns*, to repair, and ſhews *that the eſtate of and in the premiſes came* to the defendant, and that he entered, and after that the premiſes fell into decay, and he had not repaired: the queſtion was, whether an *adminiſtrator* was liable *in his own proper right*, as an aſſignee? And Mr. *Williams* argued, that this covenant runs with the land, and binds the aſſignee; and for that reaſon an *executor* may may be charged as a ter-tenant; as in caſe an *executor* enters and does waſte. 1 *And* 52. And he prayed judgment *of the proper goods*, and inſiſted, that where he anſwers as aſſignee, the judgment againſt him is *of the proper goods*; but where as *executor*, though the breach be in his time, it is *of the goods of the teſtator.* *Vide Salk. vol.* 1. *p.* 309. *Raym. vol.* 1. *p.* 553.

Eaſter, 12 *W.* 3. *Hilliard or Siliard* v. *Cox.*

On an *aſſumpſit* brought by an *adminiſtrator*: plea in *bar*, the inteſtate died at ſuch a place in another dioceſe than that from whoſe *ordinary* the *adminiſtration* was committed to the plaintiff, and was inhabitant there at the time of his death; on *demurrer*, *judgment for the defendant.* For if a man has *two* houſes in divers dioceſes, his dying in *one* of them without known effects in the other, intitles the *ordinary* of that dioceſe to *adminiſtration*; otherwiſe, if he were on a journey, and ſo died. *Vide Mod. Rep. vol.* 12. *p.* 385.

Michaelmas, 12 *W.* 3. *Rock* v. *Leighton, or Layton, Sheriff of Salop.*

An action was brought for a falſe return of a *fieri facias* againſt an *adminiſtratrix of the goods of the inteſtate*, and on *not guilty* pleaded, the plaintiff had a verdict and a caſe was made for the opinion of the court, *viz.* the plaintiff being an *adminiſtratrix*, was ſued by *A.* and, pending that ſuit, let judgment be obtained againſt her by *B.* and did not plead this judgment in *bar* of the ſaid action, but ſold the goods of the inteſtate to pay *B.* *A.* recovered, and ſued a *fi. fa.* on which the ſheriff levied part, and as to the reſt returned a *devaſtavit*: and it was ſaid for the plaintiff, in maintenance of the action, that the judgment by *default*, was no confeſſion of *aſſets*, and alſo that the ſheriff ought not to have returned a *devaſtavit* on the *fi. fa.* but a *nulla bona*, and on that there ought to have been a *ſci. fa.* inquiry.

Per curiam. 1ſt, The ſheriff may return a *devaſtavit* on the firſt *fi. fa.* if he will: it is at his peril if falſe, and the *inquiry* is only for his ſafety.

2dly, If an *executor* confeſſes or ſuffers judgment by *default*, he admits aſſets in his hands, and is eſtopped to ſay the contrary.

3dly, He might have pleaded the *firſt* judgment obtained by *B.* againſt the action of *A. and nothing beyond*, but not having done it, he has confeſſed he has aſſets to anſwer the judgment in this as well as the *firſt* action; and if a *ſci. fa. inq.* had been awarded on the ſaid judgment, and a *devaſtavit* returned, and *non devaſtavit* pleaded, the *adminiſtrator* could not have given in evidence the *firſt* judgment, becauſe he had not pleaded it when he might; ſo there was no occaſion for an inquiry, nor is he injured by this return of a *devaſtavit* on the *fi. fa.* ſince it could not have been avoided if there had been an inquiry.

4thly, The *adminiſtrator's* not pleading the firſt judgment, and *nothing beyond*, when he might, is an admiſſion of aſſets as to the *ſecond* judgment, ſo that he has ſlipped his time, and is *eſtopped*; ſo the jury are *eſtopped* as well as the plaintiff, and their verdict is void, and the ſheriff ſhall take advantage of all *eſtoppels* between the parties; as if an action be brought againſt a *feme ſole*, and ſhe marries, and judgment is againſt her, and then execution, and the ſheriff takes her by that name, ſhe ſhall be *eſtopped* to ſay the contrary. Judgment was given for the defendant. *Vide Salk. vol.* 1. *p.* 310. *Raym. vol.* 1. *p.* 589.

Michaelmas, 12 *W.* 3. *Dubois* v. *Trant.*

Adminiſtration being committed to one during the minority of an *executor*, the queſtion was, whether on his dying under age it might be repealed and committed to his reſiduary legatee?

Holt, Chief Juſtice. Where there is an *executor* under age, if there be legacies, the reſiduary legatee ought to have *adminiſtration during the minority*, and not the next of kin to the inteſtate, becauſe by *ſtat.* 31 *Edward* 3. it is to be committed to the next friend of the inteſtate: and the making a reſiduary legatee in ſuch a will is a manifeſt indication that ſuch teſtator took that perſon whom he has ſo made to be his next friend. If a *feme covert* dies inteſtate, leaving divers debts due to her before coverture, and *adminiſtration* is committed to her brother, or other next of kin, it ſhall be repealed, and granted to her huſband; and that has been ſo adjudged in the *C. B.* in the caſe of *Duncomb* v. *Maſon*. But the principal caſe is very conſiderable; and there was the like point in *C. J. Pemberton's* time, and a *prohibition* granted, but the point not determined: moſt certainly, by this grant of *adminiſtration* an intereſt is granted and veſted in the *adminiſtratrix*. If *adminiſtration* be granted to a creditor, and afterwards a more principal creditor comes, it ſhall not be revoked for him.

Before *ſtat.* 31 *Ed.* 3. the *adminiſtrator* was but a mere ſervant of the *Ordinary*, removeable at pleaſure, but ſince he has the abſolute property. Indeed an *adminiſtrator during the minority* ſhall do nothing to the prejudice of the *executor*, and there is a diverſity in point of determination between an *adminiſtrator during the minority* of an *executor*, for that ſhall only endure till the *executor* attains *ſeventeen* years, at which age he may act as *executor*, and a grant of *adminiſtration during the minority* of *J. S.* for that ſhall hold till he comes to *twenty-one*.

Gould, Juſtice, agreed, and ſaid, it was hard to maintain that a grant of *adminiſtration* to one during the minority of one that has a right to *adminiſtration*, is a bare authority.

Per curiam. It is a point worthy of conſideration, and much may be ſaid to prove that the *Ordinary* has *executed* his authority; therefore let a *prohibition* go, and declare thereon immediately. *Vide Mod. Rep. vol.* 12. *p.* 436.

Hilary, 13 *W.* 3. *Ingram* v. *Foot.*

Adjudged, That when an *executor* pleads a *recognizance*, he muſt ſet it forth to the court, that they may judge whether it ought to be performed. If it be on an action of *debt* brought againſt him, he need only ſay, that a judgment was obtained againſt him in ſuch a court, if in any of the courts at *Weſtminſter*: but if brought in an *inferior court*, he muſt allow their *juriſdiction*. *Vide Mod. Rep. vol.* 12. *p.* 613.

Hilary, 13 *W.* 3. *Jackſon* v. *Bridge.*

The defendant covenanted to ſerve the plaintiff's teſtator, and his aſſigns for *eight* years; and the queſtion was, whether the plaintiff as *executor* was an aſſignee in *law*; for by the agreement it is not fixed to the perſon of the teſtator; for if it were, the *executor* ſhould have it, and it would be aſſets in his hands. *Plowd.* 287. *b.* 288. *a.* And it was ſaid, that if the *executor* did ſet up ſuch a trade as the ſervant was to be employed in by the covenant, it ought not to be determined by the death of the covenantee; otherwiſe, it were hard to transfer the ſervant to another ſervice: and ſo it was ſaid, it would be in the caſe of an apprentice; and here it being averred, that the plaintiff, uſed the ſame trade in which the defendant had covenanted to ſerve, he had judgment. *Vide Mod. Rep. vol.* 12. *p.* 650.

Eaſter, 13 *W.* 3. *Parker* v. *Kett.*

In this caſe, *Holt*, C. J. held that an *executor de ſon tort*, who is but an *executor de facto*, if he does lawful acts with the effects as paying of debt in their degrees, it ſhall alter the property againſt the *lawful executor*, who ſhall not avoid that payment; and yet it is an act done by one that has no right; it is true, he is not quit againſt the rightful *executor*, but he ſhall maintain *trover* againſt him: but what ſhall he recover in damage? only for ſo much as he has miſapplied, and all that he has well applied ſhall be abated in damages. And what is the reaſon of this? Why, becauſe the medling with the goods is that which gives the creditor notice who is *executor*, and bound to pay the debts; and the creditor is not bound to inquire into the *executor's* title, if there be a colour and appearance of it, it ſuffices; if an *executor de ſon tort* gets 300 *l.* of the teſtator's goods, and pays it duly to a juſt creditor, there the lawful *executor*, in my opinion, ſhall not even maintain *trover* againſt the wrongful *executor*, becauſe it is a good payment, and no prejudice to the *executor*. *Vide Mod. Rep. vol.* 12. *p.* 472.

Eaſter or Trinity, 13 *W.* 3. *Blackborough* v. *Davis*, *or Davies.*

See this caſe fully ſtated in page 378 of this work, under the head *Diſtribution*.

Eaſter, 13 *W.* 3. *Freke or Beck* v. *Thomas.*

An *adminiſtrator* during the minority of an *adminiſtrator*, may act and ſue till the *adminiſtrator*, in whoſe right he acts, be of the age of *twenty-one* years; for *adminiſtrators* are by the ſtatute, and he is not a legal perſon in the eye of the law, capable to act for another as truſtee, till *twenty-one*. So that during the minority of an *adminiſtrator* ſhall be underſtood during legal minority, *i. e.* under *twenty-one*, before which age he is not by judgment of law fit for the truſt; otherwiſe, where it is the act and judgment of the party, as where one is made *executor*; for by the *ſpiritual law* he may be an *executor* at *ſeventeen*, and therefore an *adminiſtration during the minority* of an *executor* ceaſes at that time: *adjudged* ſo in *debt* on a bond.

Note. There is a neceſſity for this; for the *ſpiritual court* will not grant *adminiſtration* to any one under *twenty-one*; and this is by conſtruction on the ſtatute of diſtributions, becauſe they are to give bond, &c. *Vide Salk. vol.* 1. *p.* 39. *Raym. vol.* 1. *p.* 667. *Mod. Rep. vol.* 12. *page* 500.

Trinity, 13 *W.* 3. *Hall* v. *Bond.*

On an action of *debt* brought by an *adminiſtrator*, *to whom adminiſtration in due manner was committed*; the defendant pleaded over.

Per curiam. This had been bad if demurred to, but it is now helped by pleading over; for you thereby admit he has a right of ſuit, and is *adminiſtrator*. *Vide Mod. Rep. vol.* 12. *p.* 537.

Trinity, 13 *W.* 3. *Parker* v. *Atfeild*, *or Atfield*, v. *Parker.*

In *debt* on a bond brought againſt an *adminiſtrator*, he pleaded ſeveral judgments, and *nothing beyond* 5 *s.* which was found: the plaintiff as to *one* judgment replied, there was but ſo much due, which the debtee was willing and ready to accept in full, and that the defendant by fraud deferred the payment of that money, and the judgment was kept in force to defraud the creditors; and replied the ſame matter as to *another*, and demurred as to the reſt: the defendant rejoined, that as to *one* judgment, it was not kept on foot by fraud, &c.

and as to the *ſecond*, no *aſſets* beyond ſo much, which was liable to the judgment, the ſame to the *third*, and as to the reſt joined in demurrer.

Per curiam. 1ſt. The beſt way for an *adminiſtrator* to plead, is to plead truly and honeſtly, and though there is a judgment for a penalty, he ought to plead the judgment, and ſhew how much is due.

2dly. If he pleads ſeveral judgments, and any one judgment be ill pleaded, or ſound fraudulent, the plaintiff ſhall have judgment.

3dly. If an *adminiſtrator* pleads twenty judgments, it a confeſſion of *aſſets* to ſatisfy twenty judgments, and the *nothing beyond* 5*s.* is but form, not material nor traverſable.

4thly. If a judgment being pleaded, and *by fraud* replied thereto, and iſſue is taken thereon, and by evidence it appears the debtee was willing to take leſs than is recovered, it is evidence of fraud; but if it be ſhewn that the *adminiſtrator* had not *aſſets* to pay that ſum, it is no fraud.

5thly. If an *adminiſtrator* pleads two or more judgments, and the plaintiff confeſſes the plea to be true, and prays judgment of aſſets in *future*, if afterwards *aſſets* come to his hands, he may ſatisfy the judgments pleaded; for the judgment of *aſſets* in *future* is only to be paid off after the other judgments are ſatisfied, and therefore there is no inconvenience in making the pleading of fraudulent judgments a confeſſion of *aſſets*.

6thly. The concluſion of the replication with *and this he is ready to verify* to every judgment, is well; but a general concluſion to the whole had been better. 2 *Saund.* 338. *Vide Salk. vol.* 1. *p.* 312. *Raym. vol.* 1. *p.* 678. *Mod. Rep. vol.* 12. *p.* 496.

Michaelmas, 13 *W.* 3. *Holdin* v. *Sutton.*

An action of *debt* was brought by the plaintiff on an *eſcape* permitted by the defendant, who was marſhal of this court in the time of the teſtator, and it was brought in the *debet & detinet*. On *nil debet* pleaded, a verdict was given for the plaintiff. And now the court was moved in *arreſt of judgment*, that this action could not be maintained in the *debet* and *detinet*, but ought to have been brought in the *detinet* only. And it was admitted, that after *demurrer* it would have been ill. But at another day it was argued for the plaintiff, that this was aided after verdict, by *ſtat.* 16 & 17 *Car.* 2. 8. 1. and 1 *Sid.* 342. *Comber* v. *Watton* was cited, where in an action of *debt* againſt the heir, brought in the *detinet* only, on a bond of the anceſtor, in which he bound himſelf and his heirs, the action was held good after verdict, though it ought to have been in the *debet* and *detinet*; and 1 *Sid.* 379. *Fruen* v. *Porter.* But the court inclined to the contrary, becauſe it would alter the nature of the action, and therefore the right was not tried; and judgment ſtayed, *niſi*, &c. *Vide Raym. vol.* 1. *p.* 698.

Sir George Sands's Caſe.

Sir *George Sands adminiſtered* to his ſon, and afterwards a woman pretending to be his wife, ſued for a repeal, but a *prohibition* was granted, becauſe the *Ordinary* had an election to grant it either to the father or wife, and had executed his power by granting it to the father.

Holt, Chief Juſtice. Where a *feme covert* died inteſtate, and the next of kin to her obtained *adminiſtration*, and the huſband ſued for a repeal, a *prohibition* was denied; becauſe in this caſe the *Ordinary* had no power or election to grant it to any perſon but to the huſband; and this is not within the *ſtatute* of *H.* 8. but within the *ſtatute* of *Ed.* 3. *Vide Salk. vol.* 3. *p.* 22.

Hilary, 1 *Ann.* *Sir Richard Rains* v. *The Commiſſary of the Dioceſe of Canterbury.*

One *R.* a ſeamen died beyond ſea; the place of his habitation while in *England*, was *Sandwich*, within the dioceſe of *Canterbury*, and he had *no effects* in any other dioceſes within the province of *Canterbury*, the commiſſary of the dioceſe committed *adminiſtration* to the wife, and a creditor of the inteſtate was ſet up in the *prerogative court*, to cite the woman to have her *adminiſtration* repealed; and to this ſuit, a *prohibition* was moved for, and a rule *niſi* was granted. And now the judge of the *prerogative court*, alledging that this was in derogation of his juriſdiction, which he deſired to maintain; and it appearing on the very ſuggeſtion, that there were *effects*, it was urged, that that was a confeſſion, that the *adminiſtration* committed by him was void, and no perſon ought to be *prohibited* from repealing a void *adminiſtration*.

Holt, Chief Juſtice. We do not *prohibit* you from committing *adminiſtration*, which you may do if the *adminiſtration* committed by the commiſſary, be void as you ſay; but we *prohibit* the repealing of an *adminiſtration*, which for ought we know, is duly committed; and if it be by the archbiſhop, as he is a *metropolitan*, though there be no *effects*, it is good till repealed; and if it be void, he may commit a new *adminiſtration* without more ado, and then let the *two adminiſtrators* contend the matter between them: but we will not repeal this, becauſe it is in derogation of your juriſdiction below; for you would commit it to this perſon that now has it. But all the queſtion is, whether you or they ought to grant it of right? And where you both pretend a right, it will be hard to let you be your own judge; and all depends on the conſtitution of the province of *Canterbury*; for if there is ſuch a uſage for them to grant *prerogative adminiſtration*, it is hard to hinder them of it; and the matter being thus, it is fit a *prohibition* ſhould go, and then we will give final judgment, and you may bring a *writ of error* if you pleaſe.

And here it was ſaid, that if *adminiſtration* be committed in a dioceſe where there are no *effects*, though ſuch grant be *ipſo facto* void, yet they do not grant a new *adminiſtration* in the *prerogative court* before they repeal that, and in that caſe they ſhall not be *prohibited*: but this caſe is different, being a queſtion of right. At laſt it was propoſed as an expedient to try the queſtion, that Sir *R. Rains* ſhould bring an action on the *caſe* againſt the commiſſary, for granting *prerogative adminiſtration* to the prejudice of his juriſdiction, or that he ſhould bring an *indebitatus aſſumpſit* for the *fees*, as for money received to his uſe, and the laſt was done by conſent. *Vide Mod. Rep. vol.* 7. *p.* 146.

Hilary, 1 *Ann.* *Taylor* v. *Rains.*

See this caſe fully ſtated in page 207 of this work, under the head *Baron and Feme*.

Hilary, 1 *Ann.* *Shardelow* v. *Naylor.*

A *woman* by deed ſettled her eſtate in truſt, reſerving a power to herſelf to give by her laſt will and teſtament, as ſhe ſhould think fit, ſo much of her eſtate in legacies; and this was done before marriage, with the conſent and privity of the intended huſband, who refuſed nevertheleſs to be a witneſs or a party to the deed: the marriage took effect; the wife made a will and died, and the *executor* proved the will.

Holt, Chief Juſtice. This is not a will, neither ought the *Ordinary* to prove it; if he does, a *prohibition* lies. Where a woman is an *executor* and marries, there ſhe may make a will with conſent of her huſband, and cannot without. 1 *Jon.* 157. So if a woman having debts due to her marries, ſhe may make a will *as to* theſe, and the *Ordinary* may prove it. In other caſes ſhe cannot, for it is only a writing in form of a will. However, in the principal caſe it appearing, that the *Ordinary* had only granted *adminiſtration as to* the goods in this will, it was allowed as reaſonable. *Cro. Car.* 219. *Vide Salk. vol.* 1. *p.* 313.

Eaſter, 1 *Ann.* *Rouſe* v. *Etherington.*

On an action brought in the *C. B.* againſt *two executors* a *capias* iſſued againſt both, which as to one was returned *non eſt inventus*, but the other appeared, and judgment was given againſt both; whereon he that appeared brought a writ of *error*, and concluded *to the damage of him*, &c.

Holt, Chief Juſtice. By *ſtat.* 9 *E.* 3. If *debt* be brought againſt *ſeveral executors*, and one appears, and the other makes *default* on the *grand diſtreſs*, the court may proceed againſt him that appears; and if the plaintiff recovers, judgment ſhall be againſt all the *executors* for the goods of the teſtator; and *ſtat.* 25 *E.* 3. *c.* 17. which gives a *capias* in *debt*, has been always conſtrued within the equity of *ſtat.* 9 *E* 3. ſo that if there be ſeveral *executors* defendants, and a *cepi corpus* is returned as to one, and a *non eſt inventus* as to the reſt, the plaintiff ſhall proceed againſt him that appears, and ſhall have judgment againſt all; for the *default* on the *capias* is the ſame as on the *grand diſtreſs*.

Thus the judgment being againſt all, one only ought not to bring the *writ of error*; for the judgment is *to the great damage* of them all, and the coſts, which are only adjudged againſt him that appeared, are but an acceſſary to the principal judgment, which cannot be reverſed as to them only. *Vide Salk. vol.* 1. *p.* 312. *Raym. vol.* 2. *p.* 870.

Trinity, 1 *Ann. Anonymous.*

Holt, Chief Juſtice. If *H.* gets goods of an inteſtate into his hands after *adminiſtration* is actually granted, it does not make him *executor* of his own wrong; but if he gets the goods into his hands before, though *adminiſtration* be granted afterwards, yet he remains chargeable as a wrongful *executor*, unleſs he delivers the goods over to the *adminiſtrator* before the action is brought, and then he may plead that he has *fully adminiſtered*. 5 *Co.* 33. *b. F. N. B* 44. But if he takes on him to act as *excutor*, he is chargeable with the event. *Vide Salk. vol.* 1. *p.* 313.

Trinity, 1 *Ann. Brook* v. *Stroud.*

Two perſons were made *executors*, and in an action brought by them, they ſet forth that they were made *executors*, and that they both did prove the will, and by the probate produced, it appeared, that *one* only proved it, and the matter being pleaded in *abatement*: the plaintiff had judgment of *ouſter* awarded. *Vide Mod. Rep. vol.* 7. *p.* 39.

Trinity, 1 *Ann. George* v. *Pierce.*

Holt, Chief Juſtice. If an *executor de ſon tort*, delivers the goods to the *adminiſtrator* before the action brought, he may plead *plene adminiſtravit*; if *adminiſtration* be *firſt* granted, and then another perſon takes the goods, he is not thereby an *executor de ſon tort*. *Vide Mod. Rep. vol.* 7. *p.* 31.

Michaelmas, 1 *Ann. Goodwin* v. *Hilton.*

Per curiam. An *executor* ſhall pay coſts for not going on to trial. *Vide Mod. Rep. vol.* 7. *p.* 98.

Michaelmas, 1 *Ann. Anonymous*

Per curiam. An *adminiſtrator* ſhall pay coſts for not going on to trial. *Vide Mod. Rep. vol.* 7. *p.* 118.

Michaelmas, 1 *Ann. Burſton* v. *Ridley.*

One *H.* entered into a recognizance of 100 *l.* before *Glyn*, Chief Juſtice of the upper bench in 1658, to *A.* On a certificate of this into *Chancery*, there iſſued a *writ of extent* reciting a recognizance for the ſame debt, taken before *Glyn*, Chief Juſtice of the *Common Pleas*, requiring the ſheriff to extend the lands of the conuſor. Accordingly certain lands were extended, and on a *liberate* delivered to *J. S.* who died poſſeſſed of goods of the value of 5 *l.* in the dioceſe of *London*, and alſo in *Durham*, the leſſor of the plaintiff in ejectment, took out *adminiſtration* in *Durham* and alſo in *London*, and in that right took out a new extent, and brought an ejectment. And the court held, that unleſs the *firſt* extent was void, the *ſecond* could not be good, for the party could not have two extents, nor two ſatisfactions. But it was objected to the plaintiff's title, that he ſhould have had a *prerogative adminiſtration*.

Per curiam. Neither *Archbiſhop* has to do in the other's province. If a man leaves effects in ſeveral dioceſes of the ſame province, there muſt be a *prerogative adminiſtration*. If one leaves effects in two dioceſes of *Canterbury*, and in two dioceſes in the province of *York*, there muſt be two *prerogative adminiſtrations*; but if it be as here, it is otherwiſe, and this *adminiſtration* in the one dioceſe and the other was held good. *Vide Salk. vol.* 1. *p.* 39. *Mod. Rep. vol.* 11. *p.* 223.

Michaelmas, 1 *Ann. Marſfield or Blainfield* v. *Marſh.*

See this caſe fully ſtated in page 349 of this work, under the head *Declaration.*

Eaſter, 2 *Ann. Elwes or Eaves, Executrix of Elwes* v. *Mocata or Mocato.*

See this caſe fully ſtated in page 306 of this work, under the head *Coſts.*

Michaelmas, 2 *Ann. Berwick* v. *Andrews.*

A judgment was obtained againſt *J. S.* as *executor*, and now the *executor* of him that obtained the judgment brought an action of *debt* on that judgment againſt the ſaid *J. S.* ſuggeſting a *devaſtavit* in the life-time of his teſtator, and had judgment by *nihil dicit* in C. B. And on a *writ of error* being brought in this court, it was objected, that the plaintiff was not privy to the judgment, and therefore ought firſt to have brought his *ſcire facias*, and then have ſuggeſted a *devaſtavit* according to the caſe of *Wheatly* v. *Land*, 1 *Saund.* 216, and that this was carrying *devaſtavits* a ſtep farther than they had yet gone.

Per curiam. It lies for the *executor* of him to whom the wrong was done, though it lies not againſt the *executor* of him that did the wrong. Here the defendant is the perſon againſt whom the recovery was, and he has admitted *aſſets*; and the *executor* may as well maintain this action, as he may an action of *debt* for an eſcape where his teſtator might. So an *executor* of a *parſon* ſhall maintain debt for tithes, as the teſtator might: for in this caſe the *tort* was to the property of the teſtator, and veſted an intereſt in him, and is within the equity of the ſtatute *de bonis eſportatis*; and the ſame reaſon holds for an action of *debt* as for a *ſci. fac.* 2 *Sid.* 102. *Vide Salk. vol.* 1. *p.* 314. *Raym. vol.* 2. *p.* 971. *Mod. Rep. vol.* 6. *p.* 125.

Hilary, 3 *Ann. Wangford legatee of Shelly* v. *Wangford Debtor and Executor to Shelly.*

See page 242 of this work, under the head *Bonds*, and alſo page 350, under the head *Declaration.*

Eaſter, 3 *Ann. Clerk* v. *Dealy*,

The plaintiff as *executor*, brought an *indebitatus* for money of the *teſtators*, received after his death to the plaintiff's uſe, and produced the *teſtator*'s debtor, who paid it, as a witneſs; but he was rejected.

Holt, Chief Juſtice. The plaintiff by bringing this action, determines the election he had of ſuing the original debtor, or the receiver, and allows of the payment; but if he is nonſuited, the matter is at large again, and he may ſue the debtor, and therefore the debtor ſwears to diſcharge himſelf, and by conſequence is no witneſs.

It appeared alſo, that another ſum of money mentioned in the declaration, was found by the defendant in the *teſtator*'s room after his death, which he took.

Holt, Chief Juſtice. As to that, the plaintiff miſtook his action; for he ſhould brought *trover*, and not an *indebitatus* for money received to his uſe: therefore the plaintiff was nonſuited. *Vide Mod. Rep. vol.* 6. *p.* 151.

Eaſter, 3 *Ann.* *Adams* v. *The Ter-tenants of Savage.*

On a *ſci. fac.* brought on a judgment in this court, the plaintiff as *adminiſtrator* of *J. S.* by his *profert*, ſhews an *adminiſtration* granted to him by the Archdeacon of *Dorſet*. The heir and *ter tenants* pleaded *riens per deſcent*, &c. and the plea being adjudged naught, the *ſci. fa.* was abated by judgment *that he take nothing by his writ*; which in this caſe the court ſaid was a bar to the action of the writ, but not to the action; and the reaſon of their judgment was, becauſe the plaintiff having made this *adminiſtration* his title, the court could not intend any other, and the pleading over could not admit *that* to be a title which to the court appeared to be no title. *Vide Salk. vol.* 1. *p.* 40. *Raym. vol.* 2. *p.* 854. *Mod. Rep. vol.* 6. *p.* 134.

Eaſter, 3 *Ann.* *Smith* v. *Harman.*

The plaintiff as *adminiſtrator* to *J. S.* ſued out a *ſci. fac.* againſt the defendant, ſetting forth that his inteſtate ſued the defendant as *executor* in ſuch an action, that judgment was given againſt the defendant by *nihil dicit*, and a writ of inquiry of damages awarded, which abated by the death of the inteſtate before the return of the writ; and that *adminiſtration* was granted to the plaintiff; and the writ of *ſci. fa.* commanded the ſheriff to ſummon the defendant to ſhew cauſe, why the plaintiff ſhould not have judgment? The defendant pleaded, that the plaintiff ought not to recover, becauſe his teſtator was indebted to *A.* in 100 *l.* by bond, on which *A.* ſued him and recovered judgment, and that he had no *aſſets* beyond, *&c.* To this the plaintiff demurred, and had judgment; for that the ſtatute never intended that the *executor* ſhould ſtand in any other circumſtances to make another defence than the party to the contract himſelf might have made againſt the inquiry, and he could have pleaded nothing but a releaſe, or other matter in *bar* ariſing *puis darrien continuance*. He is by the words of the ſtatute to ſhew cauſe why damages in ſuch caſe ſhall not be aſſeſſed and recovered; and if he ſhall appear at the return, and not ſhew any matter ſufficient to arreſt the final judgment, then a writ of inquiry ſhall be awarded, *&c.* And arreſting judgment is by matter apparent in the record, and not extrinſic; and heretofore they pleaded in arreſt of judgment, as now we move. 5 *H.* 7. 23. 2 *Ro.* 716. 12 *H.* 4. 24. *Co. Ent. Error* 95. *Yelv.* 152. 2 *Cro.* 220. And the *executor* cannot be hurt by this, for the judgment is only *de bonis teſtatoris*, as if recovered againſt the teſtator himſelf. *Vide Salk. vol.* 1. *p.* 315. *Mod. Rep. vol.* 6. *p.* 142.

Trinity, 3 *Ann.* *Jenkins and Wife* v. *Plombe.*

See this caſe fully ſtated in pages 208 and 306 of this work, under the heads *Baron and Feme*, and *Coſts*.

Michaelmas, 3 *Ann.* *Trail* v. *Edwards.*

Per curiam. If an *executor* ſuffers judgment to go againſt him by *default*, on *executing* a *writ of enquiry*, he ſhall not give in *evidence* the want of *aſſets* if he is *eſtopped*, as if it had been the caſe of an heir; for he ſhould have pleaded that he had *fully adminiſtred*, or ſpecially what *aſſets* he has. *Vide Mod. Rep. vol.* 6. *p.* 308.

Michaelmas, 3 *Ann.* *Trevivan or Treviban* v. *Lawrence and others.*

On a *ſci. fa.* brought by an *adminiſtrator*, on a judgment in *Trinity* term, the record being in truth of that term, but no judgment till *Michaelmas* term following; and the defendants being all except *one* ſummoned, and returned, pleaded *nul tiel record*, and the record of *Michaelmas* term produced, and judgment on the *ſci. fa.* returned and an award of *execution* given, an *elegit* taken out, and an extent thereon, and an *ejectment* brought to get poſſeſſion; and now it was found out, that there was no ſuch judgment as the *ſci. fa.* recited.

Per curiam. All the tenants here but one are *eſtopped*, from ſaying, that there was no ſuch judgment; and as to him too, he is *eſtopped* if he does not ſhew a title *paramount* to the judgment on the *ſci. fa.* for this is an *eſtoppel* that works on the intereſt of the land. So the plaintiff had judgment. *Vide Mod. Rep. vol.* 6. *p.* 256. *Raym. vol.* 2. *p.* 1048.

Michaelmas, 3 *Ann.* *Clerk* v. *Withers.*

See this caſe fully ſtated in page 5 of this work under the head *Abatement*.

Michaelmas, 3 *Ann.* *Denham* v. *Stevenſon.*

In an action of *debt* brought by an *adminiſtrator* againſt the heir on a bond of the anceſtor, he *declared to whom adminiſtration belonged of all the goods*, &c. by ſuch a *Peculiar in a lawful manner was committed*; without ſaying that he had *Ordinary* juriſdiction, or that it did belong to him to commit *adminiſtration*; the defendant demurred to the declaration,

Firſt. Becauſe he had not ſhewn how the defendant was heir; and to ſhew the neceſſity thereof was quoted *Hob.* 333.

Per curiam. The diſtinction is where he ſues as heir; there, becauſe he is preſumed conuſant of his pedigree, he ought to ſhew it; *otherwiſe* where he is ſued, becauſe ſtrangers ſhall not be compelled to ſhew what lies not in their knowledge.

The *ſecond exception* was, that he makes title by virtue of *adminiſtration* committed by a *Peculiar*, without alledging any right in the *Peculiar* to commit *adminiſtration*, and that is matter of ſubſtance and traverſable; for of *common right* here in *England* it belong to the *Ordinary*.

Holt, Chief Juſtice. It cannot be ſaid to be form only; for it is the committing *adminiſtration* by a perſon having legal authority that veſts the cauſe of action in the plaintiff; and the *Ordinary* by law is to commit *adminiſtration*; and in all caſes of *Peculiars*, you muſt ſhew title and right to grant *adminiſtration*, and the leaſt averment that can do it, is to ſay that of *right* it belonged to him to grant *adminiſtration*; for the court cannot take notice of *Peculiars*, but may of *Biſhops*; and *bringing into court letters of adminiſtration*, is not enough, for they only certify what is on the face of them, *viz.* that *adminiſtration* was committed to the plaintiff by ſuch a one, but it does not import that he had any right ſo to do. *Vide Mod. Rep. vol.* 6. *p.* 41.

Michaelmas, 3 *Ann.* *Slaughter or Slater*, v. *May.*

One *H.* being an *adminiſtrator during the abſence* of *J. S.* brought an action of *debt* on a bond, but did not aver where *J. S.* was abſent, or that he was abſent.

Per cur. It is but reaſonable the *Ordinary* ſhould have power to grant *adminiſtration* during abſence, as well as minority, or; *pending a ſuit*; and ſuch *adminiſtrator* is accountable to the *executor*: we will intend he is abſent beyond ſea, but the plaintiff ought to aver that he was abſent: therefore judgment was given for the defendant. *Vide Salk. vol.* 1. *p.* 42. *Raym. vol.* 2. *p.* 1071.

Michaelmas, 4 *Ann.* *Wallis* v. *Lewis.*

In an action on the *caſe*, the plaintiff declared as *executrix*, and the declaration ſet forth, that the defendant was indebted to her as *executrix* for monies of the teſtator received after his death by the defendant to the plaintiff's uſe as *executrix*; and being ſo indebted, promiſed, *&c.* the plaintiff had judgment by *nil dicit*, and a *writ of inquiry* of damages returned. And the court was moved in arreſt of judgment, that the plaintiff had not in the declaration made any *profert* of the *letters teſtamentary*, &c.

Holt, Chief Juſtice. This declaration being grounded on a promiſe made to the *executrix* herſelf, the naming her *executrix* was but *ſurpluſage*. For if an *executor* gives an authority to another to receive the teſtator's money, payment to that perſon is payment to the *executor*. So where *J. S.* receives the teſtator's money of his own head, the *executor* may, if he pleaſes, allow the receipt; and then it is money received to the uſe of the *executor*. So if an *executor* be poſſeſſed of the goods of his teſtator, and they are taken out of his poſſeſſion, and the *executor* brings *trover* or *treſpaſs*, he may in the declaration name himſelf *executor* if he will, but he need not produce the will in court, becauſe he is ſufficiently intitled to the action on his poſſeſſion.

And *Powell*, J. ſaid, that he might bring the action in his own name, though he never had actual poſſeſſion.

And afterwards, at another day, on motion, judgment was given for the plaintiff. *Vide Raym. vol.* 2. *p.* 1216.

Michaelmas, 4 *Ann.* *Lamine* v. *Dorrell.*

In an *indebitatus aſſumpſit* brought for money received by the defendant to the uſe of the plaintiff as *adminiſtrator* of *J. S.* the defendant pleaded *non aſſumpſit*, and on evidence it appeared, that *J. S.* died inteſtate, poſſeſſed of certain *Iriſh debentures*; and the defendant pretending a right to be *adminiſtrator*, got *adminiſtration* granted to him, and by that means got theſe *debentures* into his hands; then the defendant's *adminiſtration* was repealed, and *adminiſtration* granted to the plaintiff, who brought this action againſt the defendant for the money he ſold the *debentures* for. And it being objected, that this action would not lie, becauſe the defendant ſold the *debentures* as one that claimed a title and intereſt in them, and therefore could not be ſaid to receive the money to the uſe of the plaintiff, which indeed he ſold to his own uſe; but that the plaintiff ought to have brought an action of *trover* or *detinue* for the *debentures*: the point was ſaved to the defendant, and now the court was moved, and the ſame objection made.

Powell, Juſtice. It is clear the plaintiff might have maintained *detinue* or *trover* for the *debentures*; but when the act that is done is in its nature *tortious*, it is hard to turn that into a contract, and againſt the reaſon of *aſſumpſits*. But the plaintiff may diſpenſe with the wrong, and ſuppoſe the ſale made with his conſent, and bring an action for the money they were ſold for, as money received to his uſe. It has been carried thus far already, *Howard* v. *Wood*'s caſe goes as far: there the title of the office was tried in an action for the profits.

Afterwards on the laſt day of the term, on motion, judgment was given for the plaintiff.

Holt, Chief Juſtice, ſaid, that he could not ſee how it differed from an *indebitatus aſſumpſit* brought for the profits of an office by a rightful officer againſt a wrongful one, as money had been received by the wrongful officer to the uſe of the rightful officer. *Vide Raym. vol.* 2. *p.* 1216.

Hilary, 6 *Ann.* *Archbiſhop of Canterbury* v. *Wills.*

In an action of *debt* brought on a bond entered into by an *adminiſtrator* to the *Ordinary* on taking out *letters of adminiſtration*, the queſtion was, whether an *adminiſtrator* by virtue of this obligation was bound to give in his account in the *ſpiritual court* without being cited?

Holt, Chief Juſtice, who delivered the opinion of the court, ſaid, 1ſt. That it appears by the ſtatute of *Edward* 3. that an *executor* was compellable to account before the *Ordinary*, and ſo was an *adminiſtrator*: but then the *Ordinary* was to take the account as given in, and could not oblige them to prove the *items* of it, nor ſwear to the truth of them. *Noy* 78. 2 *Inſt.* 6. So it was if a creditor ſued in the *eccleſiaſtical court*, for he had a proper remedy at *common law*: but if a legatee had ſued for an account in the *eccleſiaſtical court*, the defendant, before the ſtatute, was compellable to prove the whole account, for the legatee had no other remedy, and the *eccleſiaſtical court* which had a juriſdiction of legacies could not otherwiſe do right: yet in ſuch a caſe, if the *executor* would pay him, he could not ſue further, for he had right done him, and the *executor* was not liable, but of neceſſity that right might be done. *Raym.* 407, 470, 471.

2dly. A perſon intitled to diſtribution on *ſtat.* 22 *Car.* 2. is in conſequence intitled to ſue for an account as a legatee is; for the next of kin is a legatee by the ſtatute, and as a ſtatute-legatee ſhall have the ſame remedy as the other legatee might before the ſtatute. The condition of an *adminiſtration-bond* was to account when required: ſo it appears by *Co. Ent.* therefore he was not to account before he was legally cited, which could not be *officially*, and therefore *ſtat. Jac.* 2. whereby the *Ordinary* is prohibited from citing him in *officially*, had really no effect at all, for the law was ſo before; but ſince 22 *ſtat. Car.* 2. the condition of *adminiſtration-bonds* being, that he account on a day certain, he muſt account accordingly at his peril, and that without citation or ſuit; and this account muſt be in court, and if he comes at the day, and no court is held, he ſhall be excuſed, for he may plead he was there ready, and no court, *&c.* But then this account is not examinable, unleſs a party intereſted comes in and controverts it: and whereas by the words of the condition he is to adminiſter well and truly, that ſhall be conſtrued in bringing in his account, and not in paying the debts of the inteſtate; and therefore a creditor ſhall not take an aſſignment of the bond and ſue it, and aſſign for breach the non-payment of a debt to him, or a *devaſtavit* committed by the *adminiſtrator*, for that would be needleſs and infinite. *Vide Salk. vol.* 1. *page* 316.

Eaſter, 7 *Ann.* *Billingſworth or Billinghurſt*, v. *Spearman.*

See this caſe fully ſtated in page 211 of this work, under the head *Baron and Feme.*

Michaelmas, 8 *Ann.* *Hutchinſon* v. *Savage.*

George Hutchinſon, *adminiſtrator* of *J. D.* brought an action againſt *Robert Savage* for goods ſold by the inteſtate to the defendant. The defendant pleaded that the plaintiff on the 15th day of *December* 1708 releaſed to the defendant, his heirs, *executors*, and *adminiſtrators*, all and all manner of actions, cauſe and cauſes of actions, ſuits, bills, bonds, writings obligatory, debts, dues, duties, accompts, ſum and ſums of money, judgments, executions, extents, quarrels, controverſies, treſpaſſes, damages, and demands whatſoever, as well in law as in equity or otherwiſe, which the plaintiff had againſt the defendant, *&c.* The plaintiff replied, and craved *oyer* of the releaſe; on which a general releaſe is ſet out of all debts, dues, and demands, *&c.* of *Hutchinſon*, ſo that *George Hutchinſon*, as creditor of *Savage*, (it ſays, that he and others, the creditors of *Savage*, do releaſe him) and then ſays, that at the making of that releaſe the defendant was indebted to him in his own right in the ſum of 6 *l.* and that he gave the releaſe to releaſe that debt, *&c.* to which the defendant demurred.

The defendant's council argued, that ſuch general releaſes did diſcharge the debt due to him as *adminiſtrator*, and cited 1 *Roll. Abr.* 404.

Powell, Juſtice, ſaid, that the caſe in *Roll. Abr.* was taken out of the year-book of *E.* 3. 39. *Ed.* 3. 96. at which time the law was held, that a grant of *all his goods* by an *executor* or *adminiſtrator*, paſt goods which he had as *executor* or *adminiſtrator*; but now that caſe is held contrary, and there is no difference between a grant and a releaſe; therefore that caſe of a grant of all his goods will govern this preſent caſe: but if there had been no other debts for the releaſe to work on, then it had releaſed this debt. On this argument the caſe was adjourned, and the laſt *paper-day* of this term, the defendant's council argued, that it was plainly the intent of the parties, that it ſhould diſcharge all the debts, as well in his own right as *adminiſtrator*; for it ſays, *all actions, that we, every or any of us*, &c. and every man's deed muſt be taken moſt ſtrongly againſt himſelf, as a releaſe to *A. B.* of all actions, releaſes as well joint-actions as ſeveral; and as to the objection, that a *grant of all his goods* does not paſs goods as *adminiſtrator*; he ſaid that the caſe in 1 *Roll.* was well adjudged, and a good authority. He cited 1 *Leon.* 203. *Plowd.* 209. *Noy*, 106. and *Cro. Jac.* 318. where the huſband granted him his *right, title, and intereſt of and in the tithes*, which he had in right of his wife; and it was held, that they paſs, tho' he had them in his wife's right.

Holt, Chief Juſtice. If he had no goods but as *adminiſtrator*, that muſt paſs by a grant of *all his goods*. Adjourned. *Vide Raym. vol.* 2. *p.* 1306.

Michaelmas, 8 *Ann.* *Jones* v. *Wilſon*.

On an action brought by an *adminiſtrator*, he declared on two counts; one on a promiſe to the inteſtate in his life-time, the other on a promiſe to the plaintiff himſelf, and names himſelf *adminiſtrator* in both; and on the trial the plaintiff was nonſuited; and the queſtion was, whether he ſhould pay coſts?

Per curiam. Theſe two counts could not be joined; and if an intire judgment had been given, judgment ſhould have been arreſted. But it is a queſtion, whether it might not have been made good by taking judgment on one count only. But in this caſe the plaintiff muſt pay coſts, becauſe the nonſuit goes to the whole. *Vide Mod. Rep. vol.* 11. *p.* 256.

Eaſter, 9 *Ann.* *Weſton* v. *James*.

In an action of *debt* on a bond brought againſt an *adminiſtrator*, the defendant pleaded *aſſets* in his hands to the value of 200 *l.* only, and that *A.* obtained a judgment againſt the inteſtate in an *aſſumpſit* by *nil dicit*, and that the inteſtate died, and that after a *ſcire facias* was awarded againſt the defendant for damages on the ſaid judgment, on which he having no cauſe, a *writ of inquiry* iſſued, and damages thereon found to the value of 300 *l.* and judgment given thereon for the plaintiff, *that he recover his damages aforeſaid* againſt the ſaid inteſtate, and avers that he had no *aſſets beſides*. To this plea the plaintiff demurred, and it was admitted that this plea at *common law* had been naught, for by the death of the defendant the action had abated, and judgment could not be given againſt him after his death; but the queſtion was on *ſtat.* 8 & 9 *W.* 3. *c.* 10. which after interlocutory judgment gives a *ſci. fac.* againſt the *adminiſtrator* in caſe of the defendant's death, which was compared to the caſe of a judgment on *ſtat.* 17 *Car.* 2. *c.* 8. where the defendant dies after a verdict. But to this it was anſwered, that the ſaid ſtatute makes the judgment good againſt the defendant himſelf only, and makes not a judgment againſt his *executor* or *adminiſtrator*; but by this ſtatute it is to be a judgment againſt the *executors* or *adminiſtrators* of the party, for they are expreſsly taken notice for this end, and the *ſcire facias* is to be againſt them; and all this appears on the ſame record, and therefore this can never be made a judgment againſt the inteſtate himſelf, nor ſo pleaded; to which the court inclined. *Vide Salk. vol.* 1. *p.* 42.

Michaelmas, 9 *Ann.* *Bukley* v. *Pirk*.

See this caſe fully ſtated in page 125 of this work, under the head *Aſſets*.

Eaſter, 10 *Ann.* *Sadler* v. *Daniel*.

The queſtion was, whether a man might be ſued in the *ſpiritual court* for taking the goods of an inteſtate from the *adminiſtrator*, or whether a *prohibition* ſhould not go?

Reſolved, that there ſhould be a *prohibition*, for when an *adminiſtration* is made, the power of the *Ordinary* is determined; and there being a competent remedy at the *common law*, for the *adminiſtrator* in an action of *trover*, the party would by this means be doubly harraſſed; for an *excommunication* could never be pleaded in *bar* to an action of *trover*.

It is difficult to ſay when this power was firſt veſted in the *Ordinary*, but probably ſuperſtition was the cauſe. However, now by the ſtatute law, the *Ordinary* muſt grant *adminiſtration*, and then his power is determined; and the *adminiſtrator*, when put in by the *Ordinary*, derives his power not from the *Ordinary*, but the law. *Vide Mod. Rep. vol.* 10. *p.* 21.

Michaelmas, 10 *Ann.* *D'Eath* v. *Baux*.

See this caſe fully ſtated in page 212 of this work, under the head *Baron and Feme*.

Trinity, 12 *Ann.* *Nutton* v. *Crow*. Error.

An *indebitatus aſſumpſit* on *three promiſes* was brought by the plaintiff as *executor* to *B.* As to the *two firſt* promiſes, the declaration ſtood thus; that *Crow*, on the 22d day of *January* 1708, *in the life of the teſtator*, being indebted, &c. and on the defendant's craving *oyer* of the *letters teſtamentary*, a probate is recited as made *four months* before the time of the promiſes.

The *third promiſe* was a promiſe to the executor himſelf, on the ſtating the accounts between the executor and the defendant, touching *only* the dealings between the teſtator and himſelf.

The plaintiff entered a *remittitur damna* on the *two* firſt promiſes given, and obtained judgment on the *third* in the court of *C. B.*

On *error* brought, two things were chiefly inſiſted on, *viz.* 1ſt. That it appeared from the plaintiff's own ſhewing, that this will was proved in the life-time of the teſtator, and was a void probate.

The *ſecond objection* to the judgment was, that here were promiſes made to the teſtator, and a promiſe made to the *executor*, all joined in one action, which ought not to be.

The court were of opinion, that the promiſes might very well be joined in one action: that the taking of the account did not at all vary the nature of the debt: that the plaintiff lay under a neceſſity, to introduce the cauſe of the action, of naming himſelf *executor*: that the pleading being here the ſame, the judgment the ſame, and the effect of the judgment the ſame, as would have been in ſeparate actions, there could be no reaſon given for dividing them, but multiplying actions, which the law abhors, and is againſt *Magna Charta*.

Hobart 88. held to be a ſtrong authority for the defendant in *error*.

The court agreed that an *executor* could not be ſued for debts due from the teſtator and himſelf in one and the ſame action, becauſe the judgment is different. Adjourned. *Vide Mod. Rep. vol.* 6. *p.* 171.

Trinity, 13 *Ann.* *Johnſon* v. *Gardiner*.

See this caſe fully ſtated in page 352 of this work, under the head *Declaration*.

Trinity, 13 *Ann.* *Miles* v. *Williams*.

See this caſe fully ſtated in page 194 of this work, under the head *Bankrupts*.

Eaſter, 1 *Geo.* *Betts, Executor of* —— v. *Mitchell*.

In an action on the *caſe* for ſeveral promiſes made by the defendant to the teſtator:

As to the *fifth* promiſe; the plaintiff declared, that the defendant on the 13th of *Auguſt*, 1713, made a promiſory note to him as *executor* to ſuch a *one*, payable to the plaintiff or order; and then the plaintiff concludes, that the defendant not minding his promiſe, did not pay, &c. To this declaration the defendant demurred.

It was inſiſted on, that this *fifth* promiſe was of ſuch a nature, as could not be joined with the other promiſes made to the *teſtator*. For though the note is made to him as *executor*, that is only a deſcription of his perſon. The note is payable to the plaintiff or order; and by virtue of the *ſtatute*, concerning promiſory notes, it is transferable by indorſement; and the indorſee might maintain an action.

This is as much a new contract, as if a bond had been given to the plaintiff for his money.

The defendant cannot plead to this note *fully adminiſtered*; but muſt plead *non aſſumpſit*.

The plaintiff might have brought an action on this note, without naming himſelf *executor*.

This note will go to the *adminiſtrator* of the *executor*, and not to the *adminiſtrator de bonis non*, &c.

The court were clearly of this opinion, and judgment was given for the defendant, *niſi*, &c. *Vide Mod. Rep. vol.* 8. *p.* 315.

Hilary, 2 *Geo.* *Baldwin* v. *Church.*

See this caſe fully ſtated in page 346 of this work, under the head *Debt.*

Trinity, 2 *Geo.* *Carrington* v. *Warren.*

The court was moved, that the *executor*, being likewiſe *heir at law*, might have leave to plead double, *viz. payment at the day*, and *nothing by deſcent*, to an action of *debt* on a bond.

The court refuſed to grant the motion, without an *affidavit* that he had *nothing by deſcent*. The ſame law in the caſe of an *adminiſtrator*, who ſhall not be allowed to plead *fully adminiſtred*, and *no aſſets*, without an *affidavit*; for this is a matter incumbent on the plaintiff to prove, and yet lies more in the knowledge of the defendant than of the plaintiff. It is the duty of the court not to aſſiſt the defendant by giving leave to plead *double*, but on probable ground, that the demand of the plaintiff *as to* the defendant, cannot be maintained. *Vide Mod. Rep. vol.* 10. *p.* 335.

Michaelmas, 2 *Geo.* *Baldwin* v. *Church.* Error.

A *writ of error* was brought to reverſe a judgment of the *C. B.* in favour of the defendant. The original action was an action of debt for 20 *l.* againſt *two executors*. The *one* pleaded *fully adminiſtred* as to all the *aſſets* in his hands, *except* 40 *s.* the other pleaded that *he had fully adminiſtred* generally.

Per curiam. The judgment muſt be reverſed; and the ſame judgment given here, as ſhould have been given in the *C. B.* the plaintiff muſt take care to take his judgment rightly.

The plea is undoubtedly ill; for it ſets forth ſuch matter, as ſhews plainly, that the plaintiff had good cauſe of action: and yet concludes, *quare actio non*, which imports that the plaintiff ſhould not have brought this action.

If a man brings an action of *debt* for 20 *l.* and the defendant ſhould plead, that he has paid 40 *s.* and concludes *quare actio non*, this would be bad; and yet here the plaintiff might have brought his action for the 18 *l.* only: whereas in the caſe of an *executor*, the creditor muſt bring the action for the ſum, the debt that is really due, let the *aſſets* be ever ſo ſmall. *Vide Mod. Rep. vol.* 10. *p.* 323.

Michaelmas, 3 *Geo.* *Elwell* v. *Quaſh and others.*

There were *three executors*, one of which gave a warrant of attorney to confeſs a judgment againſt himſelf and his *co-executors*, purſuant to which a judgment was entered againſt all the *executors* of the *goods of the teſtator* for the debt, and againſt the *executor* who gave the warrant, *of his own proper goods* for the coſts.

On motion to ſet this aſide, it was held to be ill, for *executors* may plead different pleas, and that which is moſt for the teſtator's advantage ſhall be received. 1 *Roll. Abr.* 929. *A.* 1. *B.* 5.

So in the caſe of *Baldwin* v. *Church*, *Eaſter*, 1 *Geo.* in *C. B. one executor* pleaded a good plea, and the other a bad one; and on *demurrer* judgment was given in *C. B.* for both defendants, but reverſed on a *writ of error*, and a new judgment given for the plaintiff againſt one *executor* only. This is really *eſtopping* the others from ſaying they are not *executors*, and being without their knowledge, it may be ſubjecting them to a *devaſtavit* for the paying of other debts. The judgment accordingly was ſet aſide. *Vide Strange, vol.* 1. *p.* 20.

Trinity, 4 *Geo.* *Waring* v. *Duberry or Newman.*

Goods being taken in *execution*, and the money levied thereon, the landlord's *adminiſtrator* moved the court to have a year's rent paid him out of the effects ſo levied.

Per curiam. He comes too late, the fiction of law by relation, will not diveſt an intereſt veſted in a ſtranger. See *ſtats.* 8 *Ann. c.* 17. 2 *W.* & *M. c.* 5. *Vide Forteſcue, p.* 360. *Strange, vol.* 1. *p.* 97.

Trinity, 4 *Geo.* *The King* v. *Earle.*

See this caſe fully ſtated in page 309 of this work, under the head *Coſts.*

Michaelmas, 4 *Geo.* *Young* v. *Holmes.*

On *not guilty* pleaded in *ejectment*, the caſe was, that the leſſee for years, deviſed the term to the *executor* for life, paying 50 *l.* to *J. S.* remainder to the leſſors of the plaintiff. The *executor* died, and his *executrix* entered on the reſidue of the term, and poſſeſſed herſelf of the leaſe.

1ſt, It being proved, that the defendant had the leaſe in her cuſtody, and refuſing to produce it; an attorney who had read it, was allowed to give evidence of the contents. And the Chief Juſtice ſaid, he would intend it made againſt the defendant, it being in her power if it was otherwiſe to ſhew the contrary.

2dly, For the defendant it was inſiſted, and agreed to by the Chief Juſtice, that *James Holmes* took the term as *executor*, and not as legatee; and then the remainder over was not executed, and that it was incumbent on the remainder-men to prove a ſpecial aſſent thereto as a legacy. On this they called a witneſs, to prove payment of the 50 *l.* charged on the term in the hands of the legatee; and this was held a ſufficient aſſent, and the plaintiff had a verdict. *Plowd.* 544. *a.* 8 *Co.* 95. *a.* *Vide Strange, vol.* 1. *p.* 70.

Michaelmas, 6 *Geo.* *Palgrave* v. *Windham.* Error.

In an action on the *caſe* brought by the plaintiff as *adminiſtrator* of *J. S.* againſt the defendant as bailiff of the liberty of the Dutchy of *Lancaſter*, for *executing* a *fieri facias*, and removing the goods off the premiſes, before the landlord was paid his year's rent, purſuant to *ſtat.* 8 *Ann. c.* 17. the general iſſue was pleaded, and a verdict and judgment given for the plaintiff in *C. B.* on which a *writ of error* was brought, and the *general errors* aſſigned.

The plaintiff in *error's* council made the *three* following points, 1ſt, Whether on this *ſtatute* any action lies againſt the officer? 2dly, Admitting it does, whether in this caſe the plaintiff has diſcloſed ſufficient matter to maintain an action? And 3dly, whether it will lie for an *adminiſtrator*.

Powys, Juſtice, held, that the action lay againſt the officer for the *tort*, and that though notice is requiſite, yet the want of alledging it is helped by the verdict. And that the removal of the goods was a wrong done to the eſtate of the inteſtate, for which his *adminiſtrator* might maintain an action.

Eyre, Juſtice. As the officer had notice, that is enongh to ſubject him, though it does not amount to a demand of the money of the plaintiff in the *execution*; which though the *ſtatute* is ſilent, yet on the reaſon of the thing, I take to be neceſſary. *Executors* and *adminiſtrators* may ſue for an *eſcape*, and here the inteſtate had an intereſt, for which his *adminiſtrator* may bring an action. To which *Forteſcue*, Juſtice, agreed, and the judgment of the *C. B.* was affirmed. *Vide Strange, vol.* 1. *p.* 212.

Hilary, 7 *Geo.* *Shepherd* v. *Shorthoſe.*

In an action on the *caſe* brought by the *executors* of the aſſignee of a commiſſion of bankruptcy for goods ſold and delivered by the bankrupt: the defendant prayed *oyer* of the letters teſtamentary, which were ſet out, and then *demurred*. And the defendant's council objected, that the declaration was of *Trinity* term, when the *executor* ſays, that he brings into court the letters teſtamentary, by which, ſays he, it *ſufficiently appears* to the court, that I am *executor* of the will, *and* *therefore ought to have execution*, &c. *Whereas* on *oyer* it appears, that the inſtrument produced under the ſeal of the *Ordinary*, does not bear date till *November* following, ſo the objection is, that the *executor* declares before the probate, contrary to all the caſes, where it is held, that though he may commence an action, yet he can not declare on it before probate.

Per curiam. The inſtrument here produced is not the probate, but an exemplification of it; and that ſhewing there was a probate before the action is ſufficient: this is their conſtant way, when the probate is loſt; for they never grant a *ſecond* probate, only exemplify the *firſt*, and thoſe exemplifications have been allowed to be given in *evidence*. *Vide Strange, vol.* 1. *p.* 412.

Trinity, 7 *Geo.* *Bellew* v. *Scott.*

See this caſe fully ſtated in page 416 of this work, under the head *Error*.

Trinity, 9 *Geo.* *Anonymous.*

The court was moved for a *mandamus* to the *official* of the Biſhop of *Glouceſter*, to commit *adminiſtration* to the widow of the inteſtate.

Per curiam. That will be to deprive the next *Ordinary* of his election, in granting to her, or to the next of kin; therefore take your *mandamus* generally, to grant *adminiſtration* of the goods of the inteſtate. *Vide Strange, vol.* 1. *p.* 552.

Michaelmas, 9 *Geo.* *Coatſworth and Wife, Adminiſtrator of W.* S. v. *Shaftoe.*

On an action of *trover*, the plaintiff declared, that their teſtator, *W. S.* on the 8th of *December* 1718, was poſſeſſed of *ten horſes, and being ſo poſſeſſed thereof, the ſame day and year died inteſtate*, after whoſe death, *to wit*, on the 23d of *April*, 1720, *adminiſtration* was committed to the plaintiffs; and that afterwards, *to wit*, on the 28th day of *April*, the ſaid horſes were loſt; and the ſame day and year were found by the defendant, who converted them, *&c.* on *not guilty* pleaded, a verdict was given for the defendant.

On a motion that the defendant might recover his full coſts, the court ſaid; all the caſes were conſidered, and the point ſettled in the caſe of *Pauler* v. *Delander*. The true diſtinction is, wherever an *executor* brings an action, and on his declaration ſhews matter ſufficient to enable him to ſue in his own name, without ſtiling himſelf *executor*, if a verdict paſs againſt him, he ſhall pay coſts; but otherwiſe where he is obliged to ſue as *executor*. *Vide Mod. Rep. vol.* 8. *p.* 109.

Trinity, 10 *Geo.* *Seviniack* v. *Marſhall.*

This was an action brought againſt an *adminiſtratrix*, who pleaded, that ſhe had not aſſets *at the day of exhibiting the original bill*, when the action was brought by *bill*, and not by *original*; and for this cauſe the plaintiff demurred, and had judgment. *Vide Mod. Rep. vol.* 8. *p.* 288.

Eaſter, 11 *Geo.* *Burland* v. *Tyler.*

See this caſe fully ſtated in page 346 of this work, under the *Debt*.

Michaelmas, 11 *Geo.* *Anonymous.*

An *executor* moved the court to enlarge the time for pleading, the rules being out; which was oppoſed, unleſs he would enter into a rule not to plead any judgments obtained againſt him after the rules were out; for otherwiſe he might confeſs judgments in the mean time, and plead them in *bar* to the plaintiff's demand.

The court ſaid they would not deprive the plaintiff of any advantage he had by law to recover his debt, unleſs the defendant would enter into ſuch a rule; which he refuſing, the court would not enlarge the time. *Vide Mod. Rep. vol.* 8. *p.* 308.

Hilary, 12 *Geo.* *Portman* v. *Cane.*

See this caſe fully ſtated in page 309 of this work, under the head *Coſts*.

Trinity, 12 *Geo.* *The King* v. *Betteſworth.*

See this caſe fully ſtated in page 217 of this work, under the head *Baron and Feme*.

Michaelmas, 13 *Geo.* *Gradell* v. *Tyſon.* Error.

In an action of *debt* brought on a bond by the *executor* of the ſurviving *executor* of the obligee, the plaintiff had a verdict; and on a *writ of error* brought, it was objected, that it was not ſhewn, that the *firſt executor* proved the will; and if not this *executor* could not maintain an action, but it muſt be brought by the *adminiſtrator with the will annexed*. But being after a verdict, the court held that it was well enough, and affirmed the judgment. *Vide Strange, vol.* 2. *p.* 716. *Raym. vol.* 2. *p.* 1441.

Michaelmas, 1 *Geo.* *Holiday* v. *Fletcher.*

See this caſe fully ſtated in page 156 of this work, under the head *Averment*.

Hilary, 2 *Geo.* 2. *Chace* v. *Chace.*

The *executor* of a landlord, after the death of his teſtator, had rent due, and the goods of the tenant were taken in execution, and the *executor* gave notice before the removal of the goods.

Per curiam. An *executor* ſhall have the benefit of the ſtatute as well as the landlord himſelf; for it is an intereſt veſted, as in the caſe of *Wyndham* and *Dalgrave*, *Vide Forteſcue, p.* 359.

Hilary, 4 *Geo.* 2. *The King* v. *Betteſworth.*

On a *mandamus* to grant *adminiſtration* to *John Cullom*, of *Joan* his wife, the return was, that by articles before marriage it was agreed, that the wife ſhould have power to make a will, and diſpoſe of her leaſehold eſtate; that purſuant to this power ſhe made a will, and named her mother *executrix*, who has duly proved the ſame.

To this return it was objected, that ſhe might have *choſes en action* not covered by the deed, and the huſband was at all events intitled to an *adminiſtration as to* them.

Per curiam. A general conſent to make a will does not ſeem ſufficient, but there ſhould be a conſent to that particular will; beſides, this is going beyond her power, which did not extend to the making an *executor*: this is rather an appointment (which in equity will controul the *adminiſtrator* as to the leaſehold eſtate) than a will; and as there may be other effects not covered by the deed, the return is ill, and therefore there muſt be a peremptory *mandamus*. *Vide Stra. vol.* 2. *p.* 891.

Hilary, 4 *Geo.* 2. *Smith's Caſe.*

The court was moved for a *mandamus* to Dr. *Betteſworth*, commanding him to grant *adminiſtration* to *Smith* of the goods of his deceaſed ſon, *during the minority* of his grandſon.

Per curiam. When we grant a *mandamus*, it is to oblige the judge to do right to the party who ſues the writ; but as there is no law which ſays to whom theſe *adminiſtrations* during minority ſhall be granted, there is no law to be put in execution; in the caſe of the next of kin he is intitled of *right*, and therefore in that caſe we grant a *mandamus* of courſe. But we will grant no *mandamus* in this caſe. *Vide Stra. vol.* 2. *p.* 892.

Hilary, 4 *Geo.* 2. *Woollaſton* v. *Walker*. Error.

The plaintiff in the original action declared on a promiſory note, as *adminiſtrator pending the ſuit*. On a *writ of error* brought, it was inſiſted on, that there being a will, the *Ordinary* has no power to grant *adminiſtration*. *Mod. Rep.* 636. *pl.* 874. rules this caſe in point. The council on the other ſide argued, that it is as juſt the *Ordinary* ſhould grant *adminiſtration* pending the ſuit, *as during minority or abſence*; for otherwiſe the inconvenience would be great; for in that interval, any one may take and embezzle the *teſtator*'s goods, and yet be anſwerable to nobody. It was anſwered, that the reaſon why the *Ordinary* may grant *adminiſtration during minority* is, that for that time there is a *dying inteſtate*, becauſe the *executor* is not able to perform the will of the dead; and the reaſon of *during abſence* is, that there the *executor* commits a *default*, which the *Ordinary* muſt ſupply.

After ſeveral arguments, Mr. Juſtice *Page* and Mr. Juſtice *Probyn* held this a good *adminiſtration*, and that the judgment of *C. B.* in favour of the defendant in *error* ought to be affirmed.

But *Lee*, Juſtice, doubting, the caſe was adjourned. *Vide Fitz-Gibbons*, *p.* 202. *Stra. vol.* 2. *p.* 917.

Trinity, 4 *Geo.* 2. *Baynham* v. *Matthews*.

In this caſe the plaintiff prayed leave to *diſcontinue*, and being an *adminiſtrator*, it was granted without coſts. *Vide Stra. vol.* 2. *p.* 871.

Trinity, 5 *Geo.* 2. *Harriſon* v. *Weldon*.

W. Weldon died inteſtate, leaving *Ann* his wife, and *Amphillis* his ſiſter; the ſiſter on the common oath, that ſhe believed he died inteſtate without wife or children, obtained *adminiſtration*. And in a ſuit to repeal it, as obtained by ſurpriſe, it appeared to be the courſe of the court never to grant it to the next of kin, until the wife is *cited*.

The ſiſter moved for a *prohibition*, and inſiſted that the *Ordinary* had executed his authority, and cited 1 *Sid.* 179, 370. 1 *Lev.* 186.

But the court held, that the *Ordinary* could not be ſaid to have executed his authority, having never had the opportunity to make the election which *ſtat.* 21 *H.* 8. *c.* 5. gives him: that it was incident to every court to rectify miſtakes they were led into by the miſrepreſentation of the parties: that if there was no ſurpriſe, (of which the court below were judges) there ought to be a *prohibition*, becauſe then the *adminiſtration* will have been duly and regularly granted: but here was a plain ſurpriſe, and therefore a *prohibition* was denied. *Vide Stra. vol.* 2. *p.* 911.

Trinity, 5 *Geo.* 2. *Harriſon and Wife* v. *Mitchell*.

A. dies inteſtate, and his ſiſter having obtained *adminiſtration*, a citation iſſued at the ſuit of the *inteſtate's widow* againſt the *adminiſtratrix*, to ſhew cauſe why the *adminiſtration* ſhould not be repealed; to which ſuit a *prohibition* was now moved for; the plaintiff's council admitted, that the *Ordinary* has an election to grant the *adminiſtration* either to the wife or to the next of kin; but that election being once determined, the *Ordinary* has choſen his power, and cannot repeal the *adminiſtration* ſo granted. Sir *G. Sands*'s caſe, 1 *Sid.* 179.

The council for the defendant brought *affidavits* to prove that the courſe of the *ſpiritual court* is, to ſuſpend the granting of *adminiſtration* for *fourteen* days after the inteſtate's death, and that during that time the plaintiff had amuſed the widow, by aſſuring her that nothing ſhould be done in prejudice of her right, which prevented any oppoſition to the *adminiſtration* granted to the ſiſter: for the ſiſter, before the letters of *adminiſtration* granted to her, had made oath in the *ſpiritual court*, not only that ſhe was the next of kin, but alſo that the inteſtate was never married; and therefore they argued that the *adminiſtration* was obtained by ſurpriſe and fraud, and that the *Ordinary* not having had an opportunity to exerciſe the election which he has within *ſtat.* 21 *H.* 8. it is but reaſonable he ſhould now be ſuffered to proceed in the repeal of the *adminiſtration*; that ſo the matter being left at large, he may judge who is the fitteſt perſon for the *adminiſtration*.

Page, Juſtice, and *Probyn* Juſtice, ſaid, that the *adminiſtration* having been obtained by ſurpriſe, and by a falſe ſuggeſtion to the court, the ſuit for a repeal was reaſonable; that this differs from Sir *G. Sand*'s caſe, becauſe it does not appear what the circumſtances of that caſe were.

Lee, Juſtice, ſaid, that it was the common courſe of the *ſpiritual court* to require an *affidavit* that the party is the perſon intitled before they grant the *adminiſtration* to him, and therefore the ſame ſurpriſe muſt be ſuppoſed to have been in *Sands*'s caſe as here, tho' as to that the book is ſilent: and the reaſon there given is, that the power being once executed, the *Ordinary* cannot go back: if ſuch ſuits are allowed, it cannot be ſaid in what time after the *adminiſtration* granted, they may proceed to repeal it. Adjourned.

This caſe being moved at another day, the court unanimouſly denied the *prohibition*. *Vide Fitz-Gibbons*, *p.* 303.

Michaelmas, 7 *Geo.* 2. *The King* v. *Betteſworth*.

J. Kynaſton, Eſq; made his will, and appointed two perſons *executors*, and left the reſidue of his *perſonal eſtate* to his youngeſt ſon *Edward*. The *executors* renounced, and the reſiduary legatee moved for a *mandamus* to be admitted to prove the will, and have *adminiſtration* with the will annexed. And a rule was made to ſhew cauſe. On ſhewing cauſe it was inſiſted on, that this caſe differed from Lord *Londonderry*'s, *Hilary* 3 *Geo.* 2. where the commiſſion of appraiſement was ſet up againſt the immediate grant of a probate, which *ſtat.* 21 *H.* 8. *c.* 5. requires ſhall be without any fruſtratory delay. And the *Ordinary* has no election there; whereas in the preſent caſe he is not bound to grant *adminiſtration* to the reſiduary legatee, none of the ſtatutes mentioning him; on the contrary, *ſtat.* 21 *H.* 8. *c.* 5. which takes notice of the renunciation of *executors*, leaves the matter to the election of the *Ordinary*.

And of this opinion were the court, who ſaid, if the commiſſion of appraiſement was a *grievance*, it would be proper matter of appeal; but they could not break into the practice of the court below. And Lord *Hardwicke* mentioned the caſe of *Wheeler* v. *The Archbiſhop of Canterbury*, in *Chancery* before Lord *Macclesfield*, where it was held, that theſe ſort of *adminiſtrations* are not within the ſtatute of diſtributions, which brings it to *Smith*'s caſe, *Hilary* 4 *Geo.* 2. Therefore the rule for a *mandamus* was diſcharged. *Vide Stra. vol.* 2. *p.* 956.

Hilary, 9 *Geo.* 2. *The Bank of England* v. *Morrice*.

See this caſe fully ſtated in pages 72 and 126 of this work, under the heads *Amendment* and *Aſſets*.

Eaſter, 10 *Geo.* 2. *Saltern* v. *Wynne Executor*. Error.

In an action of *debt* on a bond in *C. B.* judgment was given for the plaintiff; and on a *writ of error* brought in this court that judgment was *affirmed*; and an action being brought on that judgment in this court; on motion it being referred to the maſter to tax the principal, intereſt and coſts; a doubt aroſe before the maſter, whether this being the caſe of an *executor*, he ſhould allow the coſts of the affirmance of the judgment on the *writ of error*; and thereon application was made to the court for their direction.

The court were clearly of opinion not to allow coſts, becauſe the *executor* is not liable by law to pay coſts on a judgment affirmed in *error*, and that the coſts to be paid in theſe caſes are only what the defendant is by law liable to pay; and the maſter was directed not to tax any coſts on the judgment affirmed.

It was ſtrongly urged for the plaintiff in the above caſe, that the penalty being forfeited in law, the defendant ought not to be ſaved from it, but on equitable terms, *&c.* but the court thought otherwiſe. *Vide Caſes Temp. Lord Hardw.* *p.* 367.

Hilary, 12 *Geo.* 2. *Vaughan* v. *Brown*.

The defendant was ſued as *executor*; and pleaded a judgment given to himſelf in the life of the deceaſed, and a retainer: the plaintiff replied, that he was *executor* only *de ſon tort:* and the defendant, by way of plea *puis darrein continuance* rejoins, that he has ſince obtained letters of *adminiſtration.* On a demurrer it was objected, that this is to abate the plaintiff's writ, which was well brought, by the ſubſequent matter not depending on any act of the plaintiff's; and that a rejoinder a departure from the plea.

But the court held that it was well enough; for the firſt plea does not ſay there was a will, and the defendant could not at that time do otherwiſe than admit an acting as *executor:* and they ſaid, it would be very hard to lay it down, that if a man who ſues for *adminiſtration* is oppoſed, and the cauſe runs out into any length, that the acting *during the ſuit* ſhould be conſtrued ſuch a wrongful *executorſhip*, as never can be purged, ſo as to give him the benefit of retaining: beſides, theſe *pleas* of *puis darrein continuance* begin with a *relinquiſhing of the verification* of the former, which ſhews it may be departed from: therefore the defendant had judgment. *Vide Stra. vol.* 2. *page* 1106.

Hilary, 12 *Geo.* 2. *Marſh* v. *Yellowly.*

In an action brought by the plaintiff as *executor* of an attorney, one count was, that the teſtator in his lifetime was employed by the defendant, and did buſineſs for him, but dying in the midſt of it, the plaintiff cauſed the ſame to be finiſhed, and the defendant in conſideration thereof undertook to pay, *&c.* The plaintiff was nonſuited at the trial. And now the defendant moved for coſts, on the authority of the caſes where it has been held, that if the plaintiff might have declared on a promiſe made, or wrong done to himſelf, he ſhall pay coſts, it being a cauſe of action ariſing in his own time.

Per curiam. We are all of opinion, that the plaintiff ought to pay coſts. The reaſon why *executors* have been excuſed, ariſes from the words of *ſtat.* 23 *H.* 8. *c.* 15. which ſpeaks of contracts *with*, or wrongs done *to* the plaintiff, here is a demand for which the *executor* might undoubtedly maintain an action in his own right: and it falls within the reaſon of paying coſts where an *executor* declares on a converſion in his own time. *Vide Strange, vol.* 2. *p.* 1106.

Trinity, 13 *Geo.* 2. *Folkes* v. *Docminique.*

The plaintiff declared on a bond in the *detinet* againſt the defendant as *adminiſtrator during minority*, with the will annexed: and on *oyer*, the condition appeared to be, for exhibiting an inventory, and duly *adminiſtering* by paying debts and legacies, the performance of all which the defendant avers, the plaintiff replies, that he had not paid a legacy of 1500 *l.* though he had more than ſufficient to pay all the debts, *to wit*, 500 *l.* and on *demurrer* it was objected, that this was a void bond, not warranted by *ſtat.* 21 *H.* 8. *c.* 5. or at *common law*, by requiring an *adminiſtrator* to pay legacies or diſtribute according to the *eccleſiaſtical* deciſion; and ſhould be taken to be obtained by *compulſion.*

Per curiam. Theſe *adminiſtrations* are not within *ſtat.* 21 *H.* 8. and therefore we deny a *mandamus.* We muſt therefore conſider it as a bond at *common law*; and then it is ſufficient, if it be good in that part on which the breach is aſſigned; as we think this is, and we cannot take it to be a bond by *compulſion.* Therefore the plaintiff muſt have judgment. *Vide Strange, vol.* 2. *p.* 1137.

Michaelmas, 13 *Geo.* 2. *The King* v. *Betteſworth.*

On a *mandamus* to grant *adminiſtration* to the huſband it was returned, that the wife's mother having by her will given her ſeveral effects for the ſeparate uſe of the wife, excluſive of the huſband, and to be by her diſpoſed of as ſhe ſhould think fit, ſhe had accordingly made a will, whereby ſhe deviſed her ſeparate eſtate to truſtees, with whom the huſband was now litigating the validity thereof in the *eccleſiaſtical court*, pending which ſuit the Dean of the Arches could not grant *adminiſtration.*

Per curiam. This is an inſufficient return, for here is no act of the huſband's to expreſs his aſſent to her making a will; and ſhe may have *choſes* in action, or other rights, beſides what are included in her mother's will: in theſe caſes there muſt be ſome act done by the huſband, to exclude himſelf, which not being pretended in this caſe, there muſt be a peremptory *mandamus.* *Vide Strange, vol.* 2. *p.* 1118.

Michaelmas, 14 *Geo.* 2. *Elletſon* v. *Cummins.*

In an action of *debt* on an arbitration bond, wherein the plaintiff and defendant ſubmitted all matters between them or either of them, the arbitrators awarded 30 *l.* to the plaintiff in full of all demands, either in her own right, or as *executrix* to her huſband. And on *demurrer*, it was inſiſted, that the arbitrators had exceeded their authority. And *Carth.* 118 was cited, and a caſe put of a grant of *all goods and chattles*, which does not paſs goods *the property of another.*

But the court held, that the ſubmiſſion was general enough. For the demand as *executrix* was a matter depending between them. And 1 *Roll. Abr.* 246, *pl.* 2. 3. 3 *Bulſt.* 65. are ſtrong to this purpoſe. And though in *Cro. Car.* 433. there is an *averment*, that both ſorts of demands were ſubmitted, yet the court held it was not neceſſary. Therefore the plaintiff had judgment. *Vide Strange, vol.* 2. *p.* 1144.

Trinity, 21 *Geo.* 2. *Hookin* v. *Quilter.* Error.

There were *three* counts in the declaration as *executrix*, and the *fourth* was for the uſe and occupation of the plaintiff's houſe, judgment was obtained by *default* in the *C. B.* and on a *writ of error* brought, the court delivered their opinion as follows.

Per curiam. There being no verdict, we can preſume nothing, but the *fourth* count is, as it appears, in her own right, which cannot be joined with the others; and the damages are intire; therefore the judgment muſt be reverſed. *Vide Strange, vol.* 2. *page* 1271.

Hilary, 3 *Geo.* 3. *Howard, Widow, and another, Executors* v. *Jemmet, Executor.*

See this caſe fully ſtated in page 203 of this work, under the head *Bankrupts.*

Eaſter, 3 *Geo.* 3. *Plumer, Spinſter* v. *William Marchant, Adminiſtrator of Peter Marchant.*

See this caſe fully ſtated in page 468 of this work, under the head *Evidence.*

Hilary, 4 *Geo.* 3. *Harris, Executor* v. *Jones.*

See this caſe fully ſtated in page 314 of this work, under the head *Coſts.*

Hilary, 4 *Geo.* 3. *The King* v. Sir *Edward Simpſon.*

On ſhewing cauſe againſt a rule made on the judge of the prerogative court of the Archbiſhop of *Canterbury*, for him to ſhew cauſe why a *writ of mandamus* ſhould not iſſue, requiring him "to admit of the re-"traction of *E. B.* one of the *executors* named in the "will of *S. E. A. Latour*, widow, of his renunciation "of the ſaid will, and to grant a probate thereof, with "the codicils annexed, to the ſaid *E. B.* and *A. Layton*, "being the ſurviving *executors* named in the ſaid will."

After hearing the arguments of the council on both ſides on this rule, the matter was adjourned, and afterwards by the concurrence of all the parties, a conſent rule was made.

Lord *Mansfield.* As neither of theſe two perſons have any intereſt of their own in the effects, and each charges the other with *inſolvency*, and here is *no council* at all on behalf of the *ceſtui qui truſt*; it would be much the beſt method, and moſt agreeable to reaſon and prudence, that *adminiſtration* ſhould be by conſent of all parties, granted to ſome *third ſolvent* perſon;

therefore let the *ceſtuy qui truſt* have notice of this propoſal, that they may give their anſwer thereto.

On this matter coming on again, a rule was made by conſent of all parties, "that the *probate* ſhould be "granted to *both*; but that Mrs. *L.* ſhould not receive "any more money, or further intermeddle, but that ſhe "was to be paid her own legacies and coſts, and to be "indemnified." *Vide Bur. vol.* 3. *p.* 1463.

Exceptions, *ſee* Pleas *and* Pleadings.

Factors *ſee* Merchants.

Fairs, Markets, and Tolls.

Michaelmas, 6 *W.* & *M.* *Warrington* v. *Moſely*. Error.

On a *writ of error* brought on a judgment in the County Palatine of *Cheſter*, they preſcribed for *toll* of goods bought within a manor, and the queſtion on the pleadings was, whether ſuch a *toll* independant of all *markets* and *fairs* can be good?

It was argued, that the preſcription was unreaſonable.

1ſt, For the manner, *viz.* the Lord only claims the toll in his manor, and it is not for goods bought or ſold in a *market*, &c.

2dly, For the matter, *viz.* he preſcribes to a *toll* of 2 *d.* for every pack bought in *Mancheſter*, called *Mancheſter wares*, except of the burgeſſes there.

Per curiam. We are not ſatisfied with this *preſcription*, becauſe there was no recompence for it, and every preſcription to charge a ſubject with a duty, muſt impart a benefit or recompence to him, or elſe ſome reaſon muſt be ſhewn why a duty is claimed. *Vide Mod. Rep. vol.* 4. *p.* 319.

Michaelmas, 11 *W.* 3. *Burch* v. *Scory.*

On an action of *trover* brought for goods; to which it was pleaded by the defendant, that he had bought them in the *market overt*.

Holt, Chief Juſtice. You muſt prove the ſale in a *market overt*, and at a convenient time. If goods be bought on liking, the vendee muſt return them, otherwiſe his detaining, or not ſending them back, is ſufficient evidence of a liking; ſo if he declares his diſlike, but afterwards diſpoſes of them; ſo if goods be ſold on liking, and before the day on which the party by the agreement is to return them, he ſells or diſpoſes of all or part of them, it is a liking; and the time of liking or diſliking of goods, is *eight* days by *ſtat.*. *Vide Mod. Rep. vol.* 12. *p.* 309.

Eaſter, 13 *W.* 3. *Anonymous.*

On an action of *trover* brought for a ſilver cup againſt a goldſmith in the *Strand*, it appeared his apprentice had bought it in the ſhop.

Per curiam. A ſale of goods in a ſhop in the *Strand*, or elſewhere out of *London*, does not alter the property.

Holt, Chief Juſtice. Even in *London*, if the felon be convicted on the owner's evidence, it is ſufficient; and here, becauſe he could not prove a demand of the maſter, but only of the apprentice, he was nonſuited. The reaſon why it alters the property in *London* is, becauſe the ſale in a ſhop there is deemed to be in a *market overt*. *Vide Mod. Rep. vol.* 12. *p.* 521.

Eaſter, 1 *Ann.* *Anonymous.*

Holt, Chief Juſtice. A *toll* is not of common right incident to a *market*. *Vide Mod. Rep. vol.* 7. *p.* 12.

Trinity, 8 *Ann.* *Burdett's Caſe.*

In an action of *treſpaſs*, the defendant juſtified as *clerk of the market* within the diſtrict of *Whitechapel*, for a diſtreſs of 3 *s.* 4 *d.* for not uſing meaſures marked according to the ſtandard of the *Exchequer*. On *demurrer*, it was urged for the defendant, that this was an authority given by *ſtat.* 14 *E.* 3. *c.* 12. *ſect.* 2.

Holt, Chief Juſtice, held, that the *clerk of the market* could not have power to *eſtreat fines* and *amerciaments*, otherwiſe than as a *franchiſe*; and it is more reaſonable the clerk ſhould bring the ſtandard with him, than that the people ſhould follow him, or attend at a place out of the market. *Vide Salk. vol.* 1. *p.* 227.

Eaſter, 16 *Geo.* 2. *Hartop* v. *Hoare and others.*

See this caſe fully ſtated in page 191 of this work, under the head *Bailment*.

Michaelmas, 16 *Geo.* 2. *Holloway* v. *Smith.*

In an action of *treſpaſs*, the defendant juſtified for a *toll*, and ſet forth a cuſtom in *Daventry* to hold a *fair* on *St. Auſtin*'s day, and to take *toll*; and that Queen *Elizabeth* reciting all this, had granted them *two* new *fairs*, *one* on the *Tueſday* after *Eaſter*, and the other on *St. Matthew*'s day, *with all profits, commodities, emoluments, liberties, and free cuſtoms to ſuch fairs belonging.* On *demurrer* the juſtification was held ill, for *toll* is not incident to a *market* or *fair* of common right, and therefore not within the words of reference; and theſe being new *fairs*, on which *no toll* is granted by expreſs words, the cuſtom cannot extend to them. So the plaintiff had judgment. *Vide Strange, vol.* 2. *p.* 1171.

Michaelmas, 19 *Geo.* 2. *The Mayor*, &c. *of Northampton*, v. *Thomas Ward.*

The plaintiffs declared for a *treſpaſs* committed by the defendant in breaking and entering their cloſe called the *Butcher Row*, and erecting a ſtall there. The defendant pleaded ſeveral pleas, which went to iſſue, and were found againſt him. But his *third* plea was, that there is a public *market* held every *Saturday in the ſaid place*, for ſelling of butcher's meat; wherefore he entered the *market* with his meat, in order to ſell it, and for that purpoſe erected a ſtall in the *open market*, for the neceſſary expoſing his meat to ſale, and laid his meat on the ſtall, *as he had a right to do*, &c. The plaintiffs replied, that they were ſeized in *fee* of the cloſe and *market*, and that the defendant, without their licence, and of his own wrong, entered and ſet up the ſtall. To this there was a frivolous rejoinder, and a demurrer.

It was *three* times argued at the bar, and inſiſted on for the defendant, that he had not only a right to come into the *market*, but alſo to erect a ſtall there; and that if he had not, yet *treſpaſs* was not the proper remedy.

Per curiam. As to the firſt point, we are all of opinion, that though every perſon has of common right a liberty of coming into a public *market* for the purpoſe of buying and ſelling; yet he has not of common right a liberty of placing a ſtall there; but he muſt acquire that by a compenſation, which is called *ſtallage*; and in *Blunt's Law Dictionary*, *Minſhew's*, *Boyer*, and *Spelman's Gloſſary*, the word *eſtallage* is defined to be a ſatiſfaction to the owner of the ſoil, for the liberty of placing a ſtall on it; and if in the erecting one the ſoil is broke, it is called *piccage*. And this right of ſtallage is ſo fixed to the owner of the ſoil, that in *Mo.* 474. it is held to deſcend to the *borough-Engliſh* heir, though the right to hold the *market* goes to the eldeſt ſon. It is not properly a *toll*, which can only be due by grant or preſcription, whereas *ſtallage* is demandable in the caſe of a new erected *market*; and the ſoil is no farther conſidered as dedicated to the public, than the common right of entry goes. 2 *Inſt.* 220. 1 *Raym.* 149.

As to the *ſecond* point, we are of opinion that an action of *treſpaſs* is the proper remedy for the owner of the ſoil againſt one who wrongfully places a ſtall there: and he could have no other remedy; he could not diſtrain *damage feaſant*, or if he could, it would not follow that *treſpaſs* does not lie. He cannot bring debt or *aſſumpſit*, for there is no certain duty, or implied contract:

They held therefore that the plaintiffs had a right to a ſatisfaction as owners of the ſoil, and that they had purſued the proper remedy: wherefore judgment was given for the plaintiffs. *Vide Stra. vol.* 2. *p.* 1239.

Trinity, 3 *Geo.* 3. *The Mayor of Yarmouth* v. *Eaton.*

See this caſe fully ſtated in page 358 of this work, under the head *Declaration.*

Fees.

Michaelmas, 3 *W.* & *M. Stockwell or Stockhold*, v. *Colliſon or Collington.*

In an action brought by the plaintiff againſt the defendant for his trouble, in ſerving the defendant as a commiſſioner to examine witneſſes in a ſuit between him and one *B.* for that the defendant promiſed to pay him for his pains; it was alledged, that a commiſſioner could not bring *aſſumpſit* on ſuch a promiſe, for he ought to be indifferent, and it is unlawful to be paid for ſuch ſervice.

Per curiam. A commiſſioner is named by the party, and it is intended he ſhould favour him, and therefore it is a challenge to the favour, that he is a commiſſioner at the nomination of the party, though no principal challenge. 1 *Inſt.* 157. *b.* and a commiſſioner takes pains to attend the examination of witneſſes, and therefore deſerves recompence as well as a commiſſioner of bankruptcy, and there is a difference between him and a ſheriff: ſo the plaintiff had judgment. *Vide Mod. Rep. vol.* 12. *p.* 9. *Salk. vol.* 1. *p.* 330.

Hilary, 5 *W.* & *M. Johnſon* v. *Oxendon.*

A *prohibition* was moved for to the *Arches* to ſtay a ſuit there commenced for *fees*, againſt which it was urged, that they are the proper and beſt judges of their own *fees*, which generally ariſe by conſtitutions provincial; and for this reaſon a *prohibition* was denied in *C. B.* to a *proctor*, who libelled in the *ſpiritual court* for his *fees*; and for the like cauſe it was denied in this court, *Hilary* 16 *Jac.* and the reaſon then given was, that it is juſt a *proctor* ſhould be recompenced for his trouble and charge, though a ſuit was commenced in a *court chriſtian* for a cauſe of which that court had not an original juriſdiction.

It is true, in *Hilary* 35 & 36 *Car.* 2. the *Court of Exchequer* made a queſtion of this matter, but afterwards they refuſed to grant a *prohibition* in the caſe of *Skelton* v. *Lee*; and ſince that time the court of *C. B. Hilary* 2 *W.* & *M.* would not *prohibit* them in the caſe of *Froggat*, the *official* of *Wells* v. *Joſſelin.*

Per curiam. It is *cuſtom*, and not the authority of the conſtitutions, which intitles *proctors*, &c. to take *fees*, for which an action will lie at *common law*, and therefore the *ſpiritual court* ought to be *prohibited*; the rule was, that they ſhould declare on the *prohibition.* *Vide Mod. Rep. vol.* 4. *p.* 254.

Hilary, 5 *W.* & *M. Goſlin* v. *Elliſon.*

A *prohibition* was moved for and granted to ſtay a ſuit in the Archdeacon of *Litchfield*'s court againſt church-wardens, for a *fee* for ſwearing them, and taking their preſentments; the court was moved afterwards to diſcharge the rule, but the motion was over-ruled: it being inſiſted, that no *fees* could be due but by *cuſtom* for work done; in which caſe an action might be brought on a *quantum meruit.* *Vide Salk. vol.* 1. *p.* 330.

Michaelmas, 6 *W.* & *M. Heſcot's Caſe.*

An Under-ſheriff refuſed to execute a *capias ad ſatiſfaciendum* till he had his *fees*. And on motion againſt him, the court ſaid, that the plaintiff might bring an action againſt him for not doing his duty, or might pay him his *fees*, and then indict him for extortion. *Vide Salk. vol.* 1. *p.* 330.

Hilary, 7 *W.* 3. *Anonymous.*

The court was moved, that an Under-ſheriff might attend for refuſing to execute a *fi. fac.* till his *poundage* was paid: the court would not grant the rule, but ſaid it was extortion, for which he might be indicted. *Vide Salk. vol.* 1. *p.* 331.

Trinity, 7 *W.* 3. *Brockwell* v. *Lock*,

In an action of *debt* by the bailiff of the *palace court* of the Biſhop of *Rocheſter* for *fees*, on the execution of a judgment in that court, being 12 *d. per* pound for any ſum under 100 *l.* and 6 *d. per* pound over and above that ſum; and this is by virtue of *ſtat.* 29 *Eliz.* in which there is a proviſo, *that it ſhall not extend to fees taken or had within a city or town-corporate.*

The plaintiff had a verdict; and on a motion in arreſt of judgment, becauſe of that clauſe in the ſtatute, it was alledged that this caſe was not within that proviſo, it being neither a city nor *town-corporate*, where the execution was made.

Now the reaſon why *execution fees* are not to be taken in ſuch places is, the juriſdiction is narrow, the ſheriff is at leſs trouble, and not ſo much in danger of an eſcape; but here the juriſdiction of the Biſhop is as large as his dioceſe, and ſo not within the like reaſon.

Bailiffs of franchiſes and liberties are named in the ſtatute, and the plaintiff being ſuch, and the place not within the proviſo, he is intitled to this action; and it has been ruled, that where a bailiff of a franchiſe made execution on a *fi. fac.* he ſhould have his *fees* by virtue of this ſtatute.

Per curiam. An officer of a liberty ſhall have his *fees* for executing the proceſs of this court; but it was never intended by the ſtatute that he ſhould have any for executing judgments obtained in inferior courts; therefore this judgment was ſtayed. *Vide Mod. Rep. vol.* 5. *p.* 97. *Salk. vol.* 1. *p.* 331.

Trinity, 8 *W.* 3. *Johnſon* v. *Lee.*

See this caſe fully ſtated in page 382 of this work, under the head *Eccleſiaſtical Matters*, &c.

Hilary, 9 *W.* 3. *Burdeaux* v. *Dr. Lancaſter*, *Vicar of St. Martin's, and R. Greſdale, Pariſh Clerk there.*

Dr. *Lancaſter* and *Greſdale* ſued *Burdeaux* in the *Conſiſtory Court* of the Biſhop of *London*, alledging therein, that Dr. *Lancaſter* was Vicar, and *R. Greſdale* was Clerk of *St. Martin*'s, and that by *reaſon of the premiſes*, and alſo of an *immemorial cuſtom*, the vicar was intitled to 2 *s.* 6 *d.* for every child born and baptized within the pariſh; and 12 *d.* for the churching every woman; and the clerk was intitled to 12 *d.* for the regiſtering every child; and that *Burdeaux* was an inhabitant within the pariſh, and had a daughter born therein, and had not paid the ſaid *fees*. *Burdeaux* denied the cuſtom in the *ſpiritual court*, and moved here for a *prohibition*; ſuggeſting that a clerk is a *lay officer*, and his *fees lay*, for which he can only ſue in the *temporal courts*: that of common right no *fees* are due for ſacraments; that there was no ſuch cuſtom as was alledged; that all *cuſtoms* are triable by the *common law*; and that this child was not baptized, nor his wife churched by the vicar; nor his child regiſtered by the clerk.

Holt, Chief Juſtice. Nothing can be due for theſe matters by the *common law*; and as for the *canon law*, it is of no authority of itſelf in *England*, but only ſo much as has been through cuſtom received here. The convocation cannot by their *canons* take money out of people's pockets. *Lingwood* ſays, if a parſon takes any thing for chriſtening, it is *ſimony*; but indeed, ſays he, ſomething may be due by *cuſtom*, but then this *cuſtom* can never be good, to take money for chriſtening a child which never was chriſtened by them. This is like the caſe in *Hob.* 175. where a man died in one pariſh, and was buried in another, and a *fee* was demanded for his burial in the pariſh where he died. If you ſay you ought to chriſten their children, you ought to libel againſt them for not chriſtening their children according to the *canon law*, but you can never have money for chriſtening them when you do not: therefore let a *prohibition* go. *Vide Mod. Rep. vol.* 12. *p.* 171.

Eaſter, 9 *W*. 3. *Earle* v. *Plummer*.

If an erroneous writ be delivered to the ſheriff, and he executes it, he ſhall have his *fees* though the writ be erroneous. *Vide Salk. vol.* 1. *p.* 332.

Eaſter, 11 *W*. 3. *The Biſhop of St. David's.* v. *Lucy*.

Holt, C. J. By the *common law*, and of *common right*, no parſon ought to take any thing for chriſtening of children, burials, *etc.* but by *cuſtom* they are allowed to take ſomething. *Vide Raymond, vol.* 1. *p.* 450.

Michaelmas, 13 *W*. 3. *Pollard* or *Ballard* v. *Gerard*.

See this caſe fully ſtated in page 265 of this work, under the head *Commitment*.

Michaelmas, 1 *Ann*. *Gifford's Caſe*.

He was libelled againſt in the *Eccleſiaſtical Court* for *fees*, and on motion a *prohibition* was granted, for no court has a power to eſtabliſh *fees*; the judge of a court may think them reaſonable, but that is not binding: but if on a *quantum meruit* brought, a jury think them reaſonable, then they become *eſtabliſhed fees*. *Vide Salk. vol.* 1. *p.* 333.

Michaelmas, 4 *Ann*. *Tyſon* v. *Paſke*.

The ſheriff having executed an *elegit*, brought an action of *debt* for *his fees*: And it was objected, that this was not within the ſtatute, that the execution is not complete, and the plaintiff cannot enter, but muſt bring his *ejectment*.

Holt, Chief Juſtice, There is the ſame reaſon for *fees* for executing an *elegit* as an *extent*. On an *elegit* the ſheriff returns, that he has taken an inquiſition, extended the lands, and delivered them to the plaintiff; and there is a *liberate* in the body of the writ of *elegit*, and the plaintiff on this return may enter, for by the return he becomes tenant by *elegit*, and may maintain an *ejectment*, and aſſign his intereſt on the land; but the defendant's continuing in poſſeſſion after the return of the writ, turns the plaintiff's eſtate to a right, and therefore he muſt enter to aſſign. The execution is complete and perfect, and his being put to an *ejectment* is no reaſon; for in caſe of an extent on a ſtatute where the *liberate* is diſtinct, he cannot enter by force; 'tis true he may without force; and ſo he may here.

Powell, Juſtice, ſaid, that extent *generally* is the word of the ſtatute of *Eliz.* and that an extent on an *elegit* was an extent within the ſtatute, as well as an extent on a ſtatute. *Vide Salk. vol.* 1. *p.* 334. *Raym. vol.* 2. *p.* 1212.

Hilary, 5 *Ann*. *The Dean and Chapter of Exeter's Caſe*.

Cauſe was ſhewn againſt a rule for a *prohibition* to the *ſpiritual court*, to ſtay a ſuit there for a *cuſtomary fee* of 10*l.* due to the Dean and Chapter of *Exeter*, for burying in the cathedral church: *but not allowed*; for *no fee* is due for *burial* of common right: but where a licence is neceſſary, the perſon giving it may ſtand on his own price; and if there be ſuch a cuſtom, it is triable at *common law*. 3 *Keble* 527, 523. If the cuſtom be not denied, the *ſpiritual court* ſhall proceed; for there is no other remedy: but if the cuſtom be denied, a *prohibition* ſhall go: burials at *common law* ought to be in the church-yard, and *without fee*. 2 *Keb.* 1778. *Vide Salk. vol.* 1. *p.* 334.

Michaelmas, 2 *Geo*. 2. *Hopman* v. *Barber*.

On a motion againſt *Bambridge*, the warden of the *Fleet*, it was held, that if an *hab. corp.* is brought, he muſt obey it, tho' the party refuſes to pay *his fees*; for he has a remedy for them. *Vide Strange, vol.* 2. *p.* 814.

Michaelmas, 20 *Geo*. 2. *White* v. *Haugh*.

The ſheriff had the defendant in execution on a *capias ad ſatisfaciendum*; and the plaintiff delivered him an *hab. corp.* in order to remove him to the *King's Bench* priſon: the ſheriff on this inſiſted to be paid his *poundage* on the execution before he parted with the body of the defendant, and would have diſtinguiſhed this from the caſes in *Salk.* 330, 331, 332, inaſmuch as he had here actually executed the proceſs, and thoſe caſes go only againſt his inſiſting to be paid before hand. And that there is nothing in the ſtatutes 29 *Eliz. cap.* 4. or 3 *Geo. cap.* 15, § 17, againſt it, and offered on payment of his *poundage*, to bring up the body.

But the court ſaid, they could not think of making bargains with people to obey their proceſs, which they would enforce an obedience to, and leave the ſheriff to his action of *debt* for the *fees*, which was his legal remedy. It went off at laſt, on the ſheriff's ſubmitting to carry him to a judge's chambers. But *Foſter*, Juſtice, ſaid, if he was brought before him, he would not turn him over till the *poundage* was paid. *Vide Strange, vol.* 2. *p.* 1262.

Fines and Amerciaments, &c.

The Caſe of the Lord of the Manor of Hampſtead.

A cart met a loaded waggon upon the road, and the cart endeavouring to paſs by the waggon was driven on a high bank, and overturned, and threw the perſon that was in the cart juſt before the wheels of the waggon, and the waggon ran over the man and killed him. In the *home circuit* this was referred to *Pollexfen*, Ch. Juſtice, and *Gregory*, Juſtice, and they gave their opinions, That the cart, waggon, loading, and all the horſes are *deodands*, becauſe they all contributed to his death: *Pollexfen* at firſt doubted concerning the forfeiture of the cart, but looking into his common-place-book he grounded his opinion on this caſe: one riding upon a horſe in a river, the horſe threw him, and the ſtream carried him to a mill, and the wheel of the mill killed him; and it was *adjudged*, that the horſe and the wheel were *forfeited*. If a man be thrown from his horſe by the violence of the water, then the horſe is not forfeited, 2 *Cro.* 483. Lord *Chandos*'s caſe; where the inqueſt found him killed by the ſtream of the water. It is ſaid in the books, that if a tree ſhall fall on the branch of another tree, and both fall to the ground, and the branch kills a man, the tree and branch are both forfeited. *Vide Salk. vol.* 1. *p.* 220.

Michaelmas, 3 *W*. & *M*. *Parker* v. *Winch*.

Holt, Chief Juſtice, an ancient *demeſne* manor is impleadable at *common law*, but the lands holden of the manor are only impleadable in the court of the manor; and laying it in the declaration to be part of the manor, ſhews it is not impleadable in the court of the manor; for land holden of the manor cannot be ſaid to be part of the manor.

Eyre, Juſtice, the rent may be parcel of the manor, and ſo may the ſervices, though the land is *frank-fee*; and whatever is holden of the manor is not part thereof. *Vide Mod. Rep. vol.* 12. *p.* 13.

Hilary, 7 *W*. 3. *Lord Gerard* v. *Lady Gerard*.

See this caſe fully ſtated in page 379 of this work, under the head *Dower*.

Michaelmas, 7 *W*. 3. *Fletcher* v. *Ingram*.

See this caſe fully ſtated in page 276 of this work, under the head *Conſideration*.

Michaelmas, 8 *W.* 3. *Linſey* v. *Clerk.*

In *treſpaſs*, *aſſault*, and *battery*, &c. there can be no *capiatur pro fine* entered ſince *ſtat.* 5 & 6 *W.* & *M.* but the plaintiff is to have 6s. 8d. in coſts to pay ſo much to the King for the *fine*. In this court judgment is entered up without any notice taken of the *fine*; for the law is altered and taken away in effect by this ſtatute. Therefore it is not like the caſe of a pardon; for that does not alter the law, but excuſes the party. *Vide Salk. vol.* 1. *p.* 54.

Michaelmas, 9 *W.* 3. *Courtney* v. *Collet.*

Adjudged, after two arguments at bar, that *treſpaſs* and *treſpaſs* on the *caſe*, were two diſtinct actions of different natures; and although if *vi et armis* is put in *treſpaſs* on the *caſe* for *malfeaſance*, this will not vitiate it; yet the judgments in *treſpaſs* and *caſe* are different. For in *treſpaſs* always the judgment is, *that he be taken*; but in *treſpaſs* on the *caſe*, tho' *vi et armis* be inſerted, yet the judgment is, *that he be in mercy*; and actions can never be joined which have different judgments. *Vide Raymond*, *vol.* 1. *p.* 272.

Eaſter, 1 *Ann.* *The Queen* v. *Summers.*

On an indictment for a *treſpaſs* and *riot*, the defendant pleaded *not guilty*, and the indictment was removed here by *certiorari*, &c. The defendant went before the maſter, and coſts were taxed; and the court was moved that he might go before the maſter again, and that the proſecutor might be conſidered for his charges below, the maſter's taxation being only for coſts ſince the *certiorari* was brought.

Per curiam. The maſter ought not to conſider the coſts below, but only ſince the *certiorari*, and on it: then the court was moved to increaſe the *fine*.

Per curiam. You ought not to increaſe the *fine* after every party has been before the maſter; if you do, we will ſet aſide the taxation of coſts. *Vide Salk. vol.* 1. *p.* 55. *Raym. vol.* 2. *p.* 854.

Trinity, 1 *Ann.* *The Queen* v. *Templeman.*

On a motion to ſubmit to a *ſmall fine*, after a confeſſion of the indictment, which was for an *aſſault*

Holt, Chief Juſtice, made this diſtinction, *viz.* where a man confeſſes an indictment, and where he is found *guilty*; in the *firſt* caſe a man may produce *affidavits* to prove *ſon aſſault* on the proſecutor in mitigation of the *fine*; otherwiſe, where the defendant is found *guilty*; for the entry on a confeſſion is only *he will not contend with our Lady the Queen, but throws himſelf on the mercy of the court.*

The defendants may ſubmit to a *fine*, though abſent, if they have a clerk in court that will undertake for the *fine*. *Hilary* 2 *Ann*, *Hickeringil*'s caſe was, that he and his daughters were indicted for a *treſpaſs*; and *Hickeringil* only appeared on the motion to ſubmit to a *ſmall fine*. But where a man is to receive any corporal puniſhment, judgment cannot be given againſt him in his abſence, for there is a *capias pro fine*; but no proceſs to take a man and put him on the *pillory*. *Vide Salk. vol.* 1. *p.* 56.

Trinity, 3 *Ann.* *The Queen* v. *Wheeler.*

On an inquiſition before the coroner, *on view of the body*, that the wheel of a forge cauſed the death of the deceaſed. And now it was moved to ſtay proceſs for ſeiſing it as a *deodand*, becauſe parcel of a freehold, as the wheel of a mill or millſtone, which were agreed to be freehold, and *therefore* not capable of being a *deodand.*

Holt, Chief Juſtice. A mill is a known thing in law, and ſo are the parts thereof; and therefore if the owner of a mill take out one of the millſtones to pick or gravel it, and deviſe the mill while the ſtone is ſevered from it, yet it ſhall paſs as part of the mill: and a bell cannot be a *deodand.*

Per curiam. Let the proceſs on the inquiſition ſtay. *Vide Mod. Rep. vol.* 6. *p.* 187.

Eaſter, 4 *Ann.* *Anonymous.*

The court was moved to *amerce* an *under-bailiff* of *Weſtminſter*, for not making a return of a writ. But the court thought the motion improper; for that the ſheriff is the officer of this court. The court in this caſe made a rule for the bailiffs to return it, and on their diſobeying, that an attachment of contempt ſhould iſſue. *Vide Mod. Rep. vol.* 11. *p.* 19.

Eaſter, 4 *Ann.* *Cockcroft* v. *Smith.*

Holt, Chief Juſtice, ſaid, a juſtice who has a power to *fine*, has power to bail; for he is not obliged and bound to commit a perſon; but after he is once committed in execution it is too late to move for bail. *Vide Mod. Rep. vol.* 11. *p.* 52.

Eaſter, 5 *Ann.* *Anonymous.*

Holt, Chief Juſtice, affirmed, that he never underſtood the caſe in *Hob.* 126. in caſe of an *amerciament* at a *Court-Baron* the certain ſum need not be ſet by the court, but it is enough if it be aſcertained by the *affeerors*, though he obſerved many authorities were otherwiſe. *Vide Mod. Rep. vol.* 11. *p.* 71.

Eaſter, 5 *Ann.* *Brook* v. *Huſtler.* Error.

A *writ of error* being brought on a judgment in *debt* in *C. B.* for an *amerciament* in a *court leet*; the defendant made a *default* of ſuit after a general notice; and the *amerciament* was affeer'd.

Holt, Chief Juſtice. The jury may *amerce* in a certain ſum if they will, and then there needs not an *affeerment*, though the proper way is *therefore in mercy*, and then an *affeerment*.

The council took an exception, that the court being uncertain when it will be held, (that is, where the lord may hold it when he pleaſes) a particular and convenient notice ought to be given when and where the court is to be held, 32 or 22 *Ed.* 4. 27. *b.* 28. *a.* 3 *Cro.* 353, 555, 556. A general notice in the church is not notice to incur a *forfeiture* unleſs there be a particular cuſtom for it.

Holt, Chief Juſtice. We cannot judge of the notice, becauſe you ought to have ſhewn particularly, that he was ſummoned to the court at ſuch a day and place, there to be held, &c.

Powell, Chief Juſtice. To take advantage of a *forfeiture*, notice ſhould be perſonal, unleſs a particular cuſtom to the contrary. In *antient leets*, perſonal notice perhaps, is not neceſſary; but notice in the church and market may be well. But otherwiſe, where it is not an antient leet. 1 *Brown.* 166. *Winch.* 987. *Co. Ent. tit. Error*, 280, 284. Adjourned. *Vide Mod. Rep. vol.* 11. *p.* 76.

Trinity, 3 *Geo.* *Dryer* v. *Mills* & *al.*

In an action of *treſpaſs* for taking away materials of an houſe; on *not guilty* pleaded, *Parker*, Chief Juſtice, would not admit the defendant to give evidence of taking the goods as a *deodand*, becauſe he might have juſtified, and the plaintiff would have had an opportunity to give an anſwer to it. *Vide Strange*, *vol.* 1. *p.* 61.

Michaelmas, 6 *Geo.* *The Ducheſs of Hamilton* v. *Incledon.* Error.

On *error* brought on a judgment in the *C. B.* in an action on the *caſe*, on ſeveral promiſes, wherein the plaintiff had judgment, and *error* was aſſigned.

Per curiam. It was held that *in miſericordia*, &c. is a a good entry of the *amerciament* of a peer. *Vide Stra. vol.* 1. *p.* 225.

Michaelmas, 10 *Geo.* *Davis* v. *Hoyle.* Error.

On *error* brought from the *C. B.* on an action on the caſe on ſeveral promiſes, there was judgment on *demur-*

rer as to *one* count, whereon the plaintiff entered a *nolle proſequi* as to the reſt, and the defendant was put without a day.

It was objected, that this is a confeſſion, that the plaintiff had no cauſe of action as to thoſe counts, and therefore he ſhould be *amerced for a falſe plaint.*

Eyre, Juſtice, thought it agreeable to all the entries; and the judgment was affirmed. *Vide Strange, vol.* 1. *p.* 574.

Michaelmas, 2 *Geo.* 2. *Stephens* v. *Howard or Haughton.*

In *replevin*, the defendant avowed for a *diſtreſs* by a precept from the *court leet* of the Dean and Chapter of *Weſtminſter*, and ſet forth the holding of the court; and that the plaintiff being a baker, and an inhabitant within the ſaid liberty of *Weſtminſter*, it was preſented at a court holden at ſuch a time, that the plaintiff ſold bread under the aſſize, for which he was *amerced* ſo much by the jury, and ſo ſet out *ſeveral amerciaments* at ſeveral times, which the plaintiff, although he was *guilty*, refuſing to pay, the defendant diſtrained, and avowed, *&c.* to which the plaintiff *demurred.*

The following exceptions were taken to the *conuſance:* 1ſt, It is not averred, that the plaintiff was an inhabitant within the liberty of *Weſtminſter*, at the time of the *amerciament* ſet. *Cro. El.* 698. 2dly, It is not averred that he committed the fact, but only that it was preſented by the jury, which is not enough in an *avowry*, where the defendant is an actor, making a title; and therefore an *avowry* differs from a *bar* to an action of *treſpaſs*, where the party is only to excuſe the ſuppoſed wrong. 1 *Salk.* 107, 108. 3. In the preſent caſe, the *amerciament* is by the jury, whereas it ſhould be by the court, but aſſeſſed by the jury. *Hob.* 129. and there ſhould be a ſpecial *affeerment.* 3 *Lev.* 206.

Raymond, Chief Juſtice. The want of an averment that the fact was committed is fatal, and the difference between *treſpaſs* and *replevin* is very well founded in reaſon, and ſupported by authority: and here the *although*, *&c.* is not an iſſuable averment; then the *avowry* is naught, not becauſe the *amerciament* is not laid to have been affeered, for that is not neceſſary; and *Hob.* 129. has been denied by *Holt*, Chief Juſtice, in the caſe of *Matthews* v. *Cairy*; but the fault is in this, that the *amerciament* is by the jury; whereas it ſhould be by the judgment of the court, *that he be amerced*, and the part of the jury is only miniſterial, for they are to carry the act of the court into a certainty. And the plaintiff had judgment. *Vide Fitz-Gibbons, p.* 108. *Strange, vol.* 2. *p.* 847.

Hilary, 30 *Geo.* 2. *The Earl of Bath* v. *Abney, Spinſter.*

See this caſe fully ſtated in page 439 of this work, under the head *Eſtates.*

Trinity, 5 *Geo.* 3. *Evelyn, Bart. Executor of Sir John Evelyn, Bart.* v. *Chicheſter, Eſq;*

On a ſpecial caſe from the *Surry* aſſizes, on an action on an *indebitatus aſſumpſit*, in which the plaintiff declared as executor to his father for 150 *l.* aſſeſſed for a *fine* for the admiſſion of the defendant to a cuſtomary tenement, called *Daniel's*, within the manor of *Abinger*, of which Sir *J. E.* the father was Lord, which cuſtomary tenement conſiſted of a large capital manſion houſe, and a ſmall parcel of land, which land was let for 7 *l.* a year, *ſubject* to the land-tax, quit-rent, and other out-goings.

The jury being of opinion, that the *fine* was reaſonable, found a verdict for the plaintiff, *ſubject* to the opinion of the court on the following queſtion:

> "Whether this action will lie againſt the de-
> "fendant, he being a minor at the time of the
> "*fine* being aſſeſſed."

After hearing council on both ſides, the court gave judgment.

Lord *Mansfield.* There is no giving an opinion on this caſe ſeriouſly; here is a *reaſonable fine* aſſeſſed, the ſame, as the father paid, an enjoyment for 16 years, and a part of it ſince he came of age, and no renunciation of the eſtate, on the contrary a confirmation of the tranſaction.

Wilmot and *Yates*, Juſtices, concurred with the Chief Juſtice in opinion.

Per curiam. Let the *poſtea* be delivered to the plaintiff. *Vide Bur. vol.* 3. *p.* 1717.

Fines and Recoveries.

Hilary, 2 *W. & M.* *Symonds* v. *Cudmore:*

See this caſe fully ſtated in page 12 of this work, under the head *Acceptance.*

Eaſter, 2 *W. & M.* *Price* v. *Langford.*

One *H.* was ſeized in *fee* as heir on the part of his mother; he and his wife levied a *fine* to *A.* and *B.* with warranty; *A.* and *B.* by the ſame *fine* did grant and render the lands to the huſband and wife in *tail*, remainder to the heirs of the huſband: the huſband and wife died without iſſue, and the queſtion was, whether the heir by the father's ſide, or by the mother's ſide ſhould take theſe lands? It was argued on the one ſide, that the ſeiſin of the conuſee is fictitious; for if the conuſee was tenant for years, the term would not be thereby extinguiſhed; and he is like to the ſurrenderee of a copyhold, nothing but a mere inſtrument: therefore nothing is altered by the *fine*, but the uſe and eſtate remains as before. On the other ſide it was ſaid, that the conuſee could not render if he had not the eſtate in him, and that it is a re infeoffment; and of this opinion was the court, who held, that the eſtate was once in the conuſee, and the *fine* and render is a conveyance at common law, and the render makes the conuſor a new purchaſer as much as a feoffment, and re-infeoffment would do at common law. *Vide Salk. vol.* 1. *p.* 336.

Hilary, 3 *W.* 3. *Anonymous.*

Per curiam. The court will not reverſe a *fine* without a *ſcire facias* returned againſt the ter-tenants; for the conuſees are but nominal perſons: and though it was otherwiſe in the precedent in *Co. Ent. Hern's plead.* 375. and the law perhaps does not ſtrictly require it, yet the courſe of the court does. *Vide Salk. vol.* 1. *p.* 339.

Eaſter, 4 *W. & M.* *Winchurch* v. *Belwood.* Error.

A *writ of error* being brought in this court of a *fine* in the *C. B.* the *fine* was affirmed; and now a *writ of error coram vobis*, *&c.* was brought here, and an exception was taken, that the writ ought to abate, for that no ſuch writ lies in this caſe, becauſe only a tranſcript of the *fine* is removed into this court. And it was compared to the caſes of *error* in the *Exchequer Chamber*, where only a tranſcript goes up, and if the writ abates, no *writ of error coram vobis*, *&c.* lies.

Per curiam. The reaſon of that is not becauſe they in the *Exchequer Chamber* have only a tranſcript, but becauſe they have only a particular authority to affirm or reverſe. It was admitted, that a tranſcript of a record of a *fine* is only removed, becauſe on a judgment of reverſal a *certiorari* goes for the very foot of the *fine*, and it is cancelled. But notwithſtanding that, the court held, that a *writ of error coram vobis*, *&c.* lay. *Vide Salk. vol.* 1. *p.* 338. *Mod. Rep. vol.* 5. *p.* 67.

Eaſter, 5 *W. & M.* *Davis* v. *Speed.*

In *ejectment*, the huſband and wife being ſeized in *fee* in right of the wife, levied a *fine* to *J. S.* and his heirs, to the uſe of the heirs of the body of the huſband, begotten on the wiſe; the wiſe died, and the huſband died without iſſue; the queſtion was, who ſhould have the land, the leſſor of the plaintiff as heir to the huſband, or the defendant as heir to the wife.

Holt, Chief Juſtice. The *firſt* uſe may be a ſpringing uſe; for if I bargain and ſell to the uſe of another *five* years hence, this is a good future uſe; for there is a difference between a covenant to ſtand *ſeized*, and a *feoffment* to uſe; for till a contingency happens, or the time comes for the future uſes ariſing, it ſhall return again to the *feoffor*: a *feoffment* to the uſe of the right heirs of *J. S.* after the death of *J. S.* is a future uſe; but if it were limited to ariſe after the death of one without iſſue, this is void without a particular eſtate to ſupport it. So is the caſe of *Pell* v. *Brown*, unleſs the dying without iſſue be within a certain term, as within the life of a man; for otherwiſe the law will not expect the veſting of it, but will conſtrue the limitation to be void, becauſe the poſſibility is foreign; *Holcroft*'s caſe in *Moor* is expreſs to this point. So judgment was given for the defendant. *Vide Mod. Rep. vol.* 12. *p.* 38.

Eaſter, 5 *W.* & *M.* *Lloyd* v. *Evelin.* Error.

On a *writ of error* brought on a *common recovery*, the tenant to the *præcipe* in the *common recovery* was made by a *fine*, the *recovery* was ſuffered, and the *fine* was reverſed, yet it was held a *good recovery*; for there was a tenant to the *præcipe* at the time. *Vide Salk. vol.* 2. *p.* 568.

Hilary, 6 & 7 *W.* & *M.* *Tipping* v. *Cozens.*

In this caſe the jury found a *ſpecial verdict*, that *Edward Cozens* was ſeized in *fee* of the lands in queſtion, by indenture dated the 16th day of *October* 1654, in conſideration of a marriage intended to be celebrated between him and Mrs. *Grace Fry*, and of 1000 *l.* portion, conveyed theſe lands to truſtees, to the uſe of himſelf and his heirs till the marriage took effect, and then to the uſe of Mrs. *Grace Fry* for life, for her jointure, then to truſtees and their heirs during the life of of *Edward Cozens*, in truſt to ſupport contingent remainders, and for that purpoſe to make entries, &c. but to permit *Edward Cozens* to receive the rents and profits during his life; remainder to the uſe of the *firſt*, *ſecond*, *third*, &c. ſons of that marriage in *tail-male* ſucceſſively, remainder to the heirs male of *Edward Cozens* and his then intended wife, remainder to the heirs of their bodies; remainder to the heirs male of *Edward Cozens*, remainder to the right heirs of *Edward Cozens*; and in this indenture *Edward Cozens* covenanted to levy a *fine* to thoſe uſes; which *fine* was levied accordingly. They further found that this marriage took effect, and that *Edward Cozens* had iſſue of that wife one daughter, *Elizabeth*, who afterwards married *G. Tipping*. They further find, that *Edward Cozens* in 1686 covenanted with *J. Shepherds*, &c. to levy a *fine* to the uſe of himſelf for life, remainder to his wife for life, with divers remainders over for life and in *tail*, excluſive of his daughter, remainder to his own right heirs; in purſuance of which covenant a *ſecond fine* was levied, with a warrantry againſt *Edward Cozens* and his heirs, with proclamations according to the ſtatute; and at the time of the *fine* levied, *Edward Cozens* was in actual poſſeſſion, and had no iſſue male: that on the 1ſt day of *Auguſt* 1686, *Elizabeth*, the daughter, died in the life-time of her father, and left an infant daughter *Lucretia Tipping*, leſſor of the plaintiff; and on the 1ſt day of *February* 1690, *Edward Cozens* died, and *Grace* his wife entered and enjoyed the lands during her life, and that *Lucretia* was an infant at the time of the death of *Edward Cozens*; and that when *Grace*, the wife of *Edward Cozens*, died, the defendant entered, claiming under the ſettlement in 1686; and that the leſſor of the plaintiff entered on them, and leaſed to the plaintiff, that the defendant re-entered on him, and the plaintiff brought this *ejectment*.

The defendant's council argued, that *Edward Cozens* had an eſtate *tail* in himſelf, and that he barred it by his *fine* in 1686, and by conſequence the title was in the defendant. And to prove this, he ſaid, that where the anceſtor took an eſtate for life, and afterwards a limitation is made to his right heirs, or his heirs male, &c. the fee, be it *ſimple* or *tail*, veſts in the anceſtor, and the heir ſhall take only by deſcent.

It was further argued, that by a reſulting uſe and operation of law, an eſtate of *freehold* ſhall be raiſed to *Edward Cozens*, for which *Co. Li.* 22. *b.* *Fenwick* v. *Mitford*'s caſe was relied on. *But not allowed.*

Per curiam. There cannot be here any reſulting uſe to *Edward Cozens*, becauſe he has made a full diſpoſition of the intire eſtate, and then the law has no need to make it. But in the caſe of *Fenwick* v. *Mitford* the party had not diſpoſed of the freehold during his life, and the law caſt it on him, becauſe whatſoever part of the uſe the feoffor has not aliened, will remain to himſelf. But in this caſe the deſign was, that the whole eſtate be diſpoſed of, ſo that it ſhould not be in the power of *Edward Cozens* to deſtroy the contingent remainders: ſo that if the court raiſes a reſulting uſe here, it will be contrary, as well to the intent of the parties, as to the rules of the law. 2dly. The warranty had no operation, becauſe the leſſor of the plaintiff was an infant at the time of the deſcent. *Litt. ſect.* 726. Wherefore judgment was given for the plaintiff *niſi*, &c. *Vide Mod. Rep. vol.* 4. *p.* 380.

Michaelmas, 7 *W.* 3. *Winchurſt* v. *Maſely.*

See this caſe fully ſtated in page 408 of this work, under the head *Error*.

Eaſter, 8 *W.* 3. *Haines Barley's Caſe.*

On an *ejectment* for lands in *Eſſex* being tried at *bar*, the plaintiff claimed as heir at law to one *James Wade*, who had iſſue *William Wade*, and one daughter, who was now the Lady *Baſh*, and leſſor of the plaintiff.

William Wade had likewiſe iſſue, one ſon and two daughters, who were all dead without iſſue.

The defendant made a title under a conveyance by leaſe and releaſe, dated 21 *May* 21 *Car.* 2. and made between *William Wade* of the one part, and *Haines Barley* and *John Turner* of the other part, by which the lands in queſtion were ſettled on them and their heirs to the uſe of *William Wade* for life; then to his firſt, ſecond, and third ſon in tail male; remainder to *John* and *William Haynes* and *Charles Barley*; remainder to *Haines Barley* the father; remainder to the right heirs of *William Wade* for ever.

The plaintiff then produced a deed made in the year 1633, between the ſaid *James Wade* of the one part, and *Charles Mordaunt* and his wife, and *John Mordaunt* of the other part; which deed was atteſted by three witneſſes, two of which were proved to be dead, and the other could not be found: by which deed it appeared, that a *fine* was levied, and the uſes thereof were declared to *James Wade* for life, remainder to his firſt ſon, and the heirs male of his body, then to his ſecond, third, and all other the ſons of the ſaid *James Wade* in tail male, remainder to the iſſue female, then to the wife of *William Mordaunt* for life, remainder to *Charles Mordaunt* and his heirs for ever; ſo that *William Wade* was *tenant in tail*, and could not bar the remainder without a *recovery*, which was then produced, and a deed to lead the uſes thereof, and livery and ſeiſin endorſed to make a tenant to the *præcipe*. The court were of opinion, the jointure deed being loſt, that they might ſupply the proof by memorials, and therefore gave the plaintiff a verdict for ſo much as was in jointure. *Vide Mod. Rep. vol.* 5. *p.* 210.

Michaelmas, 8 *W.* 3. *Hulbert* v. *Watts* and *Wife.*

See this caſe fully ſtated in page 270 of this work, under the head *Condition*.

Hilary, 9 *W.* 3. *Jones* v. *Morley.*

On a ſpecial verdict in *ejectment* it was found, that Miſs *Bowyer* being ſeiſed in *fee*, in conſideration of a marriage, by indenture of leaſe and releaſe conveyed to *A.* and *B.* to the uſe of herſelf in *fee*, till the intended marriage with *Edward Morley* ſhould take effect, and till the ſaid *Morley* ſhould ſettle on her a jointure of 300*l. per ann.* and then to the ſaid *Morley* and his heirs: the marriage took effect, and on the 29th day of *January* 1665, they covenanted and agreed to levy a *fine* next *Hilary* term; and the uſe thereof was declared by the ſame deed to be to *E. Morley* and his heirs. Afterwards, *viz.* on the 31ſt day of the ſame month, by indenture between the huſband and wife, it was agreed and declared, that the uſes of the deed of the 29th ſhould be revoked. After this, in the ſame *Hilary* term, a *fine* was levied; and this writing of the 21ſt being no deed, it was reſolved,

1ſt. That by the agreement of the 29th, the parties meant a *fine* to be levied *Hilary* term come twelve months, and not the *Hilary* term then current, and therefore this *fine* was not purſuant to that covenant.

2dly. That if the *fine* had been levied purſuant to that covenant, no *parol* averment could have been allowed to declare other uſes, or that the *fine* was not to the uſes of that deed, and all parties had been *eſtopped* to aver the contrary by *parol*; but by deed ſubſequent, and before the *fine*, other uſes may be averred.

3dly. That ſince the *fine* is not according to the deed, other uſes may be averred, though they were declared by writing, and not by deed; for by the variance there is room and occaſion given to inquire and receive information, that the old agreement was relinquiſhed; and by the ſame reaſon the uſe of a *fine* may be declared by *parol* on an original agreement, it may now, as in this caſe, where the original agreement was relinquiſhed: yet without ſuch averment the *fine* ſhall be intended to the uſe of the *firſt* agreement, notwithſtanding the variance.

4thly. That this is a good revocation of the uſes of the *firſt* deed, though it be but a writing; for where the conveyance enures by way of tranſmutation, the uſe is according to the intent of the party, and it is no matter how that intent is manifeſted, ſo as it may be known; but where the conveyance is by way of a covenant to ſtand ſeiſed, there muſt be a valuable conſideration, or a binding agreement by deed. *Vide Salk. vol.* 2. *p.* 677. *Mod. Rep. vol.* 12. *p.* 159. *Raym. vol.* 1. *p.* 287.

Eaſter, 9 *W.* 3. *Stokes* v. *Oliver*. Error.

A *Writ of Error* was brought to reverſe a *common recovery*, and a *ſci. fac.* againſt the ter-tenants, who are ſummoned and appear, and the ſheriff returned, that there were no other tenants. The error aſſigned was, that the vouchee was a *feme covert*, under age, and *appeared by Attorney*. If ſhe had vouched in perſon, or by guardian, ſuch a *recovery* ſhould not be reverſed for *error* after full age; becauſe a guardian is made by the court, who will not admit of any one, but ſuch who ſhall be anſwerable for the loſs that the infant may ſuſtain; but an attorney is made by the party, and an infant may not have diſcretion enough to chuſe an Attorney who will be faithful to him.

Therefore ſhe appearing by attorney, and ſuffering a recovery, it ſhall be reverſed for the ſame after the party comes of age, becauſe it ſhall be tried by the country, whether the warrant of attorney was made when under age or not.

Neither can the huſband, though of full age, make an attorney for himſelf and wife under age, to bind the inheritance of the wife; but ſhe being the principal muſt be barred by her own act, and therefore ſhe muſt appear in court in ſuch manner as the law has directed by reaſon of her infancy.

It may be a queſtion, whether ſhe can be barred by any act of her own, beſides a *fine*, for ſhe is not examined on a *common recovery*.

But this is not like the caſe of a *fine* levied by an infant, for that cannot be reverſed but by the infant himſelf during his nonage; for it being the act of the court to ſuffer ſuch a one to levy a *fine*, the court muſt therefore reform the ſame by inſpection, which cannot be after full age.

For this reaſon, the recovery was reverſed, *niſi*. *Vide Mod. Rep. vol.* 5. *p.* 209.

Eaſter, 10 *W.* 3. *Anonymous*. Error.

A *writ of error* was brought in this court to reverſe a *common recovery*, and there was a *ſci. fac.* iſſued out againſt all the *ter tenants*, and they made *default*. The *recovery* was reverſed, and it appearing afterwards, that the plaintiff in the *writ of error* had no title, there being a remainder-man before him, the court reverſed their former reverſal. *Vide Mod. Rep. vol.* 5. *p.* 396.

Trinity, 11 *W.* 3. *Lacy* v. *Williams*. Error.

On *error* brought on a judgment in *C. B.* in *Ejectment*, wherein a *ſpecial verdict* was found, *viz.* that a *writ of entry* was brought againſt *Miles Corbet*, *returnable in fifteen days of Martin*. That on the return *Miles Corbet* appeared, and the demandant declared againſt him, that he vouched *Lacy* the *tenant in tail* and a ſummons to warrant iſſued, returnable *in eight days of the purification*. After the *teſte*, and before the return of the writ of ſummons, *viz.* on the *firſt* day of *January*, *Lacy* the *tenant in tail* conveyed to *Miles Corbet* by leaſe and releaſe for life. At the return of the ſummons, *Lacy* the *tenant in tail* appeared and entered into the warranty, and vouched over the *common vouchee*, and ſo a *common recovery* was had. This *recovery* being held good in *C. B.* for the plaintiff in *error* it was inſiſted, that *Miles Corbet* was not tenant to the *præcipe* at the return of the *writ of entry*. It was agreed that if he had purchaſed before the return of the *writ of entry*, the *recovery* had been good, (otherwiſe if after, as in this caſe,) to bind ſtrangers or the iſſue *in tail*, though it might be good between the parties by way of *eſtoppel*. *Vide* 1 *Ro.* 868. 21 *E.* 3. 5. 5 *H.* 6. 1. 18 *E.* 4. 26. 9 *Ed.* 4. 12. 3 *H.* 6. 34. The reaſon is, becauſe the tenant could not render the lands at the return of the *writ of entry*, and a voucher ſuppoſes a *ſeiſin*; for it is a good counterplea that the voucher had nothing in the lands at the time of the voucher, and the words *nor ever after* are not material; and if the tenant pleads *non-tenure* as he ought and might, that only binds himſelf and thoſe that are parties and claim under him by *eſtoppel*.

It was replied, that the iſſue ſhall be bound where he may have execution for the value. 3 *Co.* 5, 6. 12 *E.* 5, 19. And it is not a ſufficient counterplea of a voucher to ſay, the voucher had nothing *at the time*, &c. without adding *nor ever after*. *Raſt.* 367, 126. So it is of *non-tenure*, *Raſt.* 273. Where the tenant appears on the return of the *writ of entry*, and the *recovery* is then had, in ſuch caſe the tenant muſt have the *freehold* at the return of the writ, becauſe it is a *recovery* then ſuffered; but otherwiſe where there is a voucher over, or interpleader, as in this caſe; for it is ſufficient if he become tenant before judgment. 41 *E.* 3, 5. 8 *E.* 3. 32. 10 *E.* 3. 21.

Holt, Chief Juſtice. It is not enough in a counterplea of a voucher to ſay, the voucher had nothing in the lands at the time of the voucher, without adding, *nor ever after*; ſo it is of *non-tenure*: if the tenant to the *præcipe* gains a freehold before judgment, it is ſufficient, for it cannot be ſaid to be a *recovery* againſt him that had nothing; therefore a writ may be made good by a ſubſequent purchaſe, and ſo may a voucher; and it is the more reaſonable, becauſe the demandant may have a good cauſe of action, though the tenant have not the land; for it is not his being tenant to the *præcipe*, but the demandant's having a right to the land, that is the foundation and cauſe of action; and therefore it is in law ſufficient, if the tenant have the land to render at any time before judgment. And the judgment was affirmed, *niſi*.

Afterwards the plaintiff in *error* came to ſhew cauſe why the judgment ſhould not be affirmed, and cited 18 *E.* 4. 36. 2 *Ro.* 746. But not allowed: and *Holt C. J.* ſaid, the recompence in the caſe of *common recoveries* was one reaſon but not the only one; for a reverſion expectant is barred by a *common recovery*, and yet the recompence cannot extend to that; which he ſaid was a bold advance in favour of *common recoveries*. So the rule was made abſolute. *Vide Salk. vol.* 2. *p.* 569, *Raym. vol.* 1. *p.* 475.

Hilary, 12 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. At *common law fines* were levied on any original writ; as on a *writ of entry*, *writ of right*, &c. as well as on a *writ of covenant*, and they might be levied for any thing for which a *præcipe quod reddat* or *permittat* lies; and they are leviable in *counties palatine* by *ſtat.* 38 *H.* 8. *c.* 19. *&* 2 *&* 3 *Ed.* 6. *c.* 28. *Vide Salk. vol.* 3. *p.* 168.

Hilary, 1 *Ann.* *Hunt* v. *Bourne.* Error.

On a ſuit brought in *ejectment* in *C. B.* the jury found a ſpecial verdict: that the lands in queſtion were holden of the manor of *Wormelow*, which is an ancient manor, held of the crown, *&c.* and it was impleadable there by plaint before the ſteward, *&c.* and that on *writs of right-cloſe Fines* have been time out of mind levied and leviable in the ſame court: that *T. G.* was ſeiſed in *tail* of the ſaid lands, and being ſo ſeized, 25 *May*, 22 *Car.* 1. a *fine* was levied in the ſaid court, *according to the cuſtom aforeſaid*, before *A. B. deputy ſteward*, *&c.* by which *fine* the ſaid *T. G. granted the aforeſaid tenements* to one *N.* for life, rendering rent, *&c.* then the *fine* was ſet forth in *theſe words*, and it appeared to be levied before the attornies or the ſuitors, *in a plea of covenant*, *according to the cuſtom of the manor*, *come ceo que il ad de ſon done*, with warranty. Then they found that the ſaid lands were not accuſtomably letten, and that this was not the ancient rent: that *N.* entered, and afterwards on the 24 *Car.* 1. the ſaid *T. G.* and his wife levied a *fine* with warranty, to the uſe of the huſband and his heirs; that afterwards, the ſame year, the ſaid *T. G.* bargained and ſold the ſaid lands to one *P.* and his heirs, under whom the defendant claimed: that afterwards he releaſed to *P.* and that *P.* died in 1661. That *G.* died in 1663, that *thirty* years afterwards, *viz.* in 1693, *N.* died; and whether the entry of *R. G.* grandſon and heir in tail of *T.* the conuſor of both *fines*, be lawful on the purchaſer, was the queſtion; which in *C. B.* was determined in the affirmative, and *R.* had judgment; and now on a *writ of error* brought in this court, that judgment was affirmed, after many arguments at *bar*. And theſe points were reſolved.

1ſt, That the tenant in *tail* of ancient *demeſne* lands may levy a *fine* of thoſe lands in the court of *ancient demeſne*, although it be no court of record, becauſe it is but agreeable to the power of that court, in like inſtances; for they may proceed to try the *Miſe* joined in a *writ of right cloſe*, which is of a higher nature than a *fine*. *Dy.* 111. *pl.* 47. *Whereas* in all other inferior courts on the *miſe* joined, the cauſe muſt be removed into the *C. B.* by *recordari*. *F. N. B.* 12. And *ſtat.* 18 *E.* 1. is but declarative of the *common law*, and was made to rectify a miſtake, *viz.* that *fines* were leviable in *inferior courts* on bills or plaints, which now cannot be either by grant or cuſtom, by reaſon of the negative words of that ſtatute; but this does not extend to *ancient demeſne courts*, for then this ſtatute would make *fines* of thoſe lands leviable in the court of *C. B.* whereas they are not, but reverſable by *writ of diſceit*; ſo that they would be under a double diſadvantage, that a *fine* would not be leviable of the land any where, if not in this *court of ancient demeſne*; whereas that which is their privilege, could never be intended to be to their diſadvantage.

2dly, That a *fine* may be levied on a *writ of right-cloſe*, or in any *real action*, but not on an *original* in a *perſonal action*; and the common *writ of covenant*, on which a *fine* is levied, is not a *perſonal* but a *real action*; for though it is to have damages for a breach of covenant, as in perſonal actions, yet it is to have an execution and performance of the covenants. 5 *Co.* 59. *F. N. B.* 146. *f.* 2 *Inſt.* 514. 1 *And.* 71. *Kel.* 90. *b.* 4 *Inſt.* 207.

3dly, That a *fine* levied in the *court of ancient demeſne* may work a diſcontinuance, though the court is not a court of record; for the diſcontinuance is, becauſe the freehold is *recovered* in the action; for every *recoveror recovers* a *fee ſimple*, and a *recovery* of the *fee-ſimple* muſt work a *diſcontinuance*; and if this be allowed to be a *fine*, in conſequence it ought to have the effect of *fines*. But *note*, though ſuch *fine* be a diſcontinuance, it is not a *bar* to the *intail*; for *ſtat.* 4 *Hen.* 7. ſays, that a *fine* with proclamations ſhall *bar* an eſtate tail, and no *fine* but a *fine* with proclamations is within that ſtatute, nor can *bar* an *eſtate-tail*. And the court denied a *fine* to be a *feoffment* to ſome purpoſes, if he that levied the *fine* was ſeized of the freehold at the time of the *fine* levied.

4thly, That a *fine ſur conuſance de droit come ceo que il ad de ſon done* generally implies a *fee-ſimple*; but it is only by implication, and therefore there is no repugnancy to limit an eſtate for life to the conuſee; for the precedent donation or a *feoffment* which is ſuppoſed might be for life only, or in *tail*, and the general intendment of the *conuſance*, may be qualified by an expreſs limitation. 41 *E.* 3. 14. *Co. Lit.* 9. *b.*

5thly, That the ſuitors, who are judges, might act by attorney, becauſe it is a part of their ſervice by reaſon of their eſtate, and they are judges as tenants. 2 *Inſt.* 225. *F. N. B.* 25. 156. *Vide Salk. vol.* 1. *p.* 341.

Lent Aſſizes, 1 *Ann.* *Jennings* v. *Rogers.*

In an *Ejectment* at *niſi prius*, the caſe appeared to be thus. *A.* was tenant of the lands for life, remainder to *B.* in *tail*, remainder to *C.* for life, *&c.* *B.* leaſed and releaſed all his eſtate to *A.* then a *præcipe* was brought againſt *A.* *A.* vouched to *B.* and *C.* and they vouched the common vouchee, and the *recovery* was perfected. The queſtion was if this *recovery* was good, to *bar* the *intail?*

Holt, Chief Juſtice, held, that it was, though *A.* had but an eſtate for life, but he reſerved it as a point for his further conſideration. See *Plowd. com. Manxel's caſe* 504. *Eare* v. *Snow*; and 3 *Co. Cuppledike's* caſe, and afterwards he gave his opinion accordingly. *Vide Raym. vol.* 2. *p.* 753.

Trinity, 1 *Ann.* *Smith* v. *Angel.*

See this caſe fully ſtated in page 123 of this work, under the head *Aſſets.*

Trinity, 1 *Ann.* *Machel* v. *Clerk.*

See this caſe fully ſtated in page 435 of this work, under the head *Eſtates.*

Michaelmas, 1 *Ann.* *Odes* v. *Woodward.*

Per curiam. If a *fine* be acknowledged before commiſſioners in the county in the long *vacation*, and before the next term the conuſor dies, though no *writ of covenant* was ſued out, nor King's ſilverentered; yet the *C. B.* will permit the conuſee to enter the *fine* as of the *Trinity* term preceding. *Vide Raym. vol.* 2. *p.* 849.

Eaſter, 2 *Ann.* *Clements* v. *Langham.* Error.

On *error* brought on a *fine* levied in the court of *C. B.* the *error* aſſigned was, that the cogniſor died after the caption, and before the return of the *writ of covenant*, and for this reaſon it was reverſed. *Vide Salk. vol.* 3. *p.* 168. *Raym. vol.* 2. *p.* 872.

Michaelmas, 2 *Ann.* *Ford* v. *Lord Grey.*

See this caſe fully ſtated in page 393 of this work, under the head *Ejectment.*

Trin, 3 *Ann.* *Page* v. *Hayward.*

Nicholas Searle by his will deviſed to his niece *Mary Bryant* and the heirs male of her body, upon condition and provided that ſhe intermarry with and have iſſue male by one ſurnamed *Searle*; and in default of both conditions he deviſed to *Eliz. Bryant* (in the ſame manner) and in default thereof he deviſed to *George Searle* for *ſixty* years, if he ſo long live, remainder to the heirs male of the body of the ſaid *George*, and their iſſue male for ever. *Mary*, and *Elizabeth* with her huſband, (for ſhe had then married one *Cliff*,) joined in a *fine* to make a tenant to the *præcipe*, who was one *Iſaac Savery*. *Iſaac Savery* vouched *Mary Bryant*, *Eliz. Cliff* and her huſband, and the wife of the deviſor with her huſband, ſhe being again married, and vouched them all jointly, and they vouched over the *common vouchee*.

See the determination of the court on this caſe fully ſtated in *page*, 271. of this work, under the head *Conditions*.

Trinity, 3 *Ann*. *Fazacharly* v. *Baldo*.

Holt, Chief Juſtice. If a *writ of error* be brought in this court, to reverſe a *fine* levied in *C. B.* the very record of the *fine* itſelf is never removed hither, but only a tranſcript of it: but if this court adjudge it erroneous, then a *certiorari* goes to the *chirographer* to certify the *very fine*, and when it comes up it is actually cancelled. *Vide Salk. vol.* 1. *p.* 341.

Michaelmas, 5 *Ann*. *Smith* v. *Tindal*.

One *Taylor* being ſeiſed in *fee*, deviſes to the poor of *Sutton* 40 *s.* to be diſtributed by his *executors*, with four coats, four hats, on every 21ſt day of *November* for ever; makes his wife *Margaret* executrix; deviſes all his lands, tenements, and *hereditaments*, and all his perſonal eſtate, to *Margaret* the *executrix*, who marries with one ——, and the huſband and wife by indenture, *&c.* covenant to levy a *fine ſur cognizance de droit comeceo* to the uſe of ——, and *Margaret*, with a warrantry, who conveys to the plaintiff. It was argued, 1ſt. What eſtate is conveyed by this will? Whether an eſtate of inheritance? 2dly. If the warranty binds?

Holt, Chief Juſtice. The words of the will give a *fee*. Here being a general charge for ever, and a ſufficient perſonal eſtate to purchaſe, *&c.* But he was not ſatisfied to fix it on the land. He went on the word *hereditament* to make a *fee*; the words *lands and tenements* carry only an eſtate for life, but *hereditament* carries the fee; for if he had not a *fee*, then it was not his *hereditament*, and when he gives his hereditament, he gives a deſcendable eſtate, otherwiſe it is no hereditament. *Co. Lit.* 6. Theſe words cannot be ſatisfied, unleſs this word carry the inheritance. *Hob.* 2. is rightly reported, and wrong in *Moor* 873. Lands of inheritance is only a deſcription of what lands ſhall paſs. Touching the warranty; if a diſſeiſor continues in poſſeſſion twenty years, and the diſſeiſee enters, or brings an *ejectment*, the diſſeiſor ſhall maintain his poſſeſſion by the *ſtatute of limitations*; for he has acquired a *right of poſſeſſion*, though not a right to the inheritance. *Vide Mod. Rep. vol.* 11. *p.* 102.

Michaelmas, 7 *Ann*. *Buſhel* v. *Burland*.

In *Ejectment* on a *ſpecial verdict*, the caſe was, *A.* and *B.* his wife levied a *fine*; and *four years* after they make a deed to declare the uſes, in which there are theſe words, *all and every fine or fines levied, or to be levied, ſhall be to the uſes of the deed.*

The caſe having been argued in *Eaſter* term, the court now obſerved, that the *firſt fine* would be to no uſe, if this deed does not relate to it; and *Beckwith*'s caſe in 2 *Co.* ſays, it ſhall be good, if the wife does not declare the contrary. If a *fine* be levied by huſband and wife in *vacation*, and they make a deed of *uſes* of a *fine* levied in *Trinity* term, (as in judgment of law it is) it is good, though ſince the *ſtatute* of *frauds and perjuries*: and there is the ſame objection as to the freehold being in *abeyance*, and the time does not make any alteration.

Or if a man levy a *fine*, and the deed is loſt, and four *years* after he makes another deed, the *fine* is good.

The *ſtatute of frauds* and *perjuries* is out of the caſe; for it is thereby declared, that all ſubſequent deeds ſhall be as they were before. But the matter was adjourned. *Vide Mod. Rep. vol.* 11. *p.* 196.

Eaſter, 8 *Ann*. *Lord Altham* v. *Lord Angleſey*.

See this caſe fully ſtated in page 453 of this work, under the head *Evidence*.

Michaelmas, 10 *Ann*. *Lord Say, and Seal's Caſe*.

On a queſtion, whether a *common recovery*, that was ſuffered in order to dock the *intail*, was good or not?

The objection to the *recovery* was, that there was no tenant to the *præcipe*.

Per curiam. A *Common recovery*, tho' there is no tenant to the *præcipe*, is good by way of *eſtoppel* againſt the party that ſuffered it, though not againſt remainder men, ſtrangers, *&c.* *Vide Mod. Rep. vol.* 10. *p.* 40.

Michaelmas, 10 *Ann*. *Lloyd* v. *Viſcount Say and Seal*.

A *fine* ran thus: This is the final agreement made in the court of our Lord the King at *Weſtminſter*, in the 10th year of *W.* 3. before *Thomas Trevor*, *&c.* and afterwards on the *Morrow of the Holy Trinity*, 1 *Ann.* agreed and recorded before the ſame juſtices; ſo that the concord of the *fine* was of one term, and the *recording it* of another term following; and therefore the queſtion was, of which term this ſhould be ſaid to be a complete *fine*?

Per curiam. It is a *fine* of that term when the concord was made, and of which the writ of *covenant* was returnable, for the *agreement made in court* is the complete *fine*; the *agreed and recorded*, is the leave of the court to inrol it. 6 *Co.* 68. *Hob.* 330. 2 *Ven.* 47. *Vide Salk. vol.* 1. *p.* 341.

Trinity, 13 *Ann*. *Miles.* v. *Williams*.

Parker, Chief Juſtice. The ſtatute *de donis*, which ſays, that a *fine* levied of intailed lands ſhall be *ipſo jure* null, has been interpreted not to make a nullity, but a *diſcontinuance*, becauſe at the *common law*, if a Biſhop ſeiſed in right of the church, or a huſband of his wife, had aliened by *fine*, &c. it was but a *diſcontinuance*. 3 *Co.* 85. *&c.* *Vide Mod. Rep. vol.* 10. *p.* 243.

Michaelmas, 3 *Geo*. *Thruſtout* v. *Peak and others*.

On *not guilty* pleaded in *ejectment* for the manor of *Welhall*, and other lands in *Norfolk*, on the demiſe of *Edmund Miller*, ſerjeant at law, the jury find this ſpecial verdict.

That *Roger Weſt* being ſeiſed in *fee*, *among others*, of the premiſes in queſtion, on the 23d day of *March* 1697, made his will in writing, wherein was the following clauſe; " and my further will is, and I declare, that if
" it ſhall appear, that at the time of my death I ſhall
" leave no child or children begotten by me on the
" body of my ſaid dear wife; or if ſhe be not with
" child or breeding at the time of my death, then I
" give, deviſe, and bequeath, all and ſingular my ma-
" nors, lands, tenements, *&c.* which are freehold, in
" the counties of *Bucks*, *Hertford*, and *Norfolk*, or elſe-
" where in the kingdom of *England*, unto my afore-
" ſaid dear wife, for and during her natural life, or ſo
" long thereof as ſhe ſhall remain my widow. And
" *as for my eſtate* in the county of *Norfolk*, not as yet
" any ways diſpoſed of, but to my ſaid wife for life or
" widowhood as aforeſaid, I hereby give, deviſe, and
" bequeath the ſame after the deceaſe or marriage of my
" ſaid wife as aforeſaid, unto my nephews *Edmund*
" *Miller* and *Robert Sharrock* during their natural
" lives, *equally to be divided between them*; *and after*
" *their deceaſes, then to the next heirs male of their bodies*
" *lawfully to be begotten, equally to be divided between*
" *them*; but in caſe either of the ſaid *Edmund Miller*
" and *Robert Sharrock* depart this life without ſuch
" iſſue, then I give, deviſe and bequeath the ſame
" eſtate in *Norfolk* to the other of them for life, and
" after his deceaſe to the heirs male of his body law-
" fully to be begotten. And, for want of ſuch iſſue of
" both of them, he deviſed it over to others, with a
" remainder to his own right heirs, and then goes on;
" *Provided always*, that if any of the *deviſees* ſhould
" fell timber, other than for repairs or firewood, or
" becauſe likely to decay, it ſhould be a forfeiture of
" their particular and reſpective eſtates."

They find further, that *Elizabeth*, wife of the teſtator, died in his life-time, and afterwards the deviſor died without iſſue. That the two deviſees, *Edmund Miller* and *Robert Sharrock*, entered and were *ſeiſed as the law requires*; and by their indenture dated the 5th day of *May* 1700, reciting the deviſe, and to the end that each party may know and enjoy his own ſhare and moiety in *ſeveralty*, they the ſaid *Edmund Miller* and *Robert Sharrock* do by theſe preſents, for themſelves and their heirs males, make and deliver, an equal, perfect and abſolute partition of all the ſaid manors, lands, *&c.* to and between the ſaid *Edmund Miller* and *Robert Sharrock* in two parts, in manner and form following, *viz.* that he the ſaid *Edmund Miller* and the next heirs male of his body, ſhall have, hold, and enjoy to his and their own ſeveral uſe, according to the limitations in the ſaid recited will expreſſed, *but for no greater or other eſtate, or quantity of eſtate*, than he or they can or may have by virtue of the ſaid *Roger Weſt's will*, all that the manor, *&c.* in full ſatisfaction of all his the ſaid *Edmund Miller*'s and his next heirs male mentioned in the ſaid will, part, portion, ſhare and moiety, *but for no greater or other eſtate than he can or ought to take by virtue of the ſaid will.* So in like manner, *Robert Sharrock* ſhall hold and enjoy *all that the manor* of *Wellhall* in *Gayton*, &c. and each covenanted to reſt contented therewith. That *Edmund Miller* and *Robert Sharrock* entered and enjoyed their parts in *ſeveralty*. That *John Lyng* proſecuted a *writ of covenant* of the *manor of Gayton, Wellhall*, againſt *Robert Sharrock*, teſted 2 *October* 13 *W.* 3. *returnable in eight days of St. Martin*, on which a *fine* was levied. And that by deed dated 2 *Oct.* 13 *W.* 3. it was covenanted between *Robert Sharrock*, *John Lyng*, and *John Carter*, that *Robert Sharrock* ſhould levy a *fine* to *John Lyng of the manor of Wellhall* in *Gayton*, to the intent to ſuffer a *common recovery*, and that *John Carter* before the end of *Michaelmas* term then next enſuing, ſhould ſue a *writ of entry ſur diſſeiſin en le poſt* againſt *John Lyng*, who ſhould vouch *Robert Sharrock*; which *fine* and *recovery* then to be levied and ſuffered, ſhould be to the uſe of the ſaid *Robert Sharrock* in *fee*. That though this deed was dated 2d *October* 13 *W.* 3 yet it was not executed till the 26th day of *November* following, but nevertheleſs that it was executed before the *recovery* at bar. And that there is no other declaration of the uſes than as aforeſaid. That *John Carter* ſued a *writ of entry* of the *manor of Gayton Wellhall*, teſted 16 *October* 13 *W.* 3. returnable on the *Morrow of All Souls* on which a *recovery* was ſuffered, (which is found *in theſe words*) and a *writ of ſeiſin* thereon proſecuted by the ſaid *John Carter*, teſted 6th *November*, returnable immediately, on which the ſheriff returned, that he delivered *ſeiſin* on the 24th of *November*, which is *two days* before the execution of the deed. That the lands in the *fine* and *recovery* are the part allotted by the deed of partition to *Robert Sharrock*, and mentioned in the deed of the 2d *October* 13 *W.* 3. That on the 16th *February* 1707, *Robert Sharrock* ſo ſeiſed, died without iſſue, and that *Elizabeth Sharrock* his ſiſter and heir *apparent* entered, and married *Patrick Seagrave*, Eſq; who became ſeiſed in right of his wife, on whom the leſſor of the plaintiff entered, and made the leaſe, and was poſſeſſed till ejected by the defendants; but whether, *&c.*

Parker, Chief Juſtice. The partition will not alter the eſtate, it only alters the right of ſurvivorſhip. The difference in the names of the manor is not material. It appears there is no tenant made by deed, till after judgment. But the *fine* being levied, and no uſe declared, the *recovery* being immediately ſuffered of the ſame lands, and the *writ of entry* brought againſt the conuſee in the *fine*, ſhews that the intent of levying the *fine* was to make a tenant to the *precipe*. This deviſe intends an eſtate tail. *After their deceaſes* are but words of form; for if one deviſes to *A.* for life, and after his deceaſe to *B.* for life, yet *B.* ſhall take the eſtate if *A.* forfeits, enters into any religious order of the church of *Rome*, or becomes incapable to enjoy it; and he ſhall not wait till the deceaſe of *A.* for the words were not meant as conditions. *Salk.* 230. 1 *Vent.* 199. What the jury mean, that the deed was executed before the *recovery* had at bar, I know not; for the law takes no notice when a *recovery* is had at bar.

Eyre, Juſtice. *Equally to be divided*, is no more, than if one moiety had been deviſed to one, and the other to the other; unleſs ſomething appears contrary in the will. Here can be no croſs-remainders ſpringing after the death of one of the deviſees, becauſe it is limited *if either die*, &c. When a *writ of entry* is brought againſt the conuſee in a *fine*, there is no reſulting uſe.

Accordingly the defendant had judgment *niſi*, and no cauſe being ſhewn, the rule was afterwards made abſolute. *Vide Stra. vol.* 1. *p.* 12.

Eaſter, 13 *Geo.* *Warren on the Demiſe of Webb*, v. *Greenville*.

See this caſe fully ſtated in page 466 of this work, under the head *Evidence*.

Trinity, 10 *Geo.* *Waddy* v. *Newton*.

See this caſe fully ſtated in page 396 of this work, under the head *Ejectment*.

Hilary, 11 *Geo.* 2. *Berrington* v. *Parkhurſt*. Error.

On a trial at *bar* in *Ejectment* on the demiſe of *John Dormer*, Eſq; for a *manor* and *lands* in *Bucks*, a ſpecial verdict on the family ſettlement was found.

The point on which the judgment was given was ſhortly this: the defendants (as diſſeinſor for argument ſake) levied a *fine* in 1730; to avoid this, the leſſor of the plaintiff made an actual entry on the 6th of *January* 1731, and in *Hilary* term after brought his *Ejectment*, and laid the demiſe on the 1ſt of *October* 1731, which was *three months* before the actual entry.

And it was inſiſted on for the defendants, 1ſt. That an actual entry was neceſſary to avoid the *fine*. And, 2dly. That the demiſe could not be laid before the leſſor had regained the poſſeſſion by the actual entry.

The court on the *ſecond* point gave judgment for the defendants; and on *error* brought in parliament, after two day's argument at the bar, two queſtions were put to the houſe by the judges; 1ſt. Whether an actual entry was neceſſary to avoid the *fine*. To which they all anſwered, that it was. 2dly. Whether the demiſe being laid before the time of the firſt entry, this *ejectment* could be maintained. To which they anſwered, it could not be ſo, without putting any queſtion on the merits. And the judgment was affirmed with coſts. *Vide Stra. vol.* 2. *p.* 1086.

Hilary, 16 *Geo.* 2. *Martin, on the demiſe of John Tregonwell, Eſq.* v. *Strachan and others.*

In *Ejectment* for lands in the county of *Dorſet*, a ſpecial verdict was found, the ſhort ſtate of the caſe was as follows: The tenant in tail *on the mother's ſide* with the reverſion in *fee* in himſelf on the part of the mother alſo, ſuffers a *common recovery* to the uſe of himſelf in *fee*. And whether this *fee* on his death veſted in his heir on the father's ſide or on the mother's, was the queſtion.

And after two arguments at bar, *Lee*, C. J. delivered the reſolution of the court; that by the *common recovery* to the uſe of himſelf in *fee*, the title under the ſettlement was deſtroyed, and a new *fee* acquired, deſcendable to the right heir of him that ſuffered the *recovery*. He ſaid, it was true, that if *A.* ſo ſeiſed, had made a *feoffment* to the uſe of his own right heirs, it would work no alteration, but be the ſame uſe, according to *Co. Lit.* 13, 3. *Lev.* 406. *Salk.* 590. But that is only in the caſe of a *deſcent*; whereas here the *eſtate-tail* he took, was as a purchaſe *per formam doni*. In the caſe of a *common recovery* the *recoveror* has a *fee* as the grantee of the tenant in tail, *Popb.* 5. and a full *fee* paſſes. The caſe of *Simmonds* v. *Cudmore*, *Salk.* 338, was on the operation of a *fine* which differs widely from that of a *recovery*. The charges of the tenant in tail affect the *fee* gained, *Popb.* 7. but no act or charge of the remainder man ſubſiſts, which ſhews nothing how his eſtate paſſes, 1 *Co. Capel*'s caſe. The leſſor of the plaintiff therefore, claiming only as heir on the mother's ſide; there was judgment for the defendants.

Afterwards this judgment was affirmed in the Houſe of Lords, by the unanimous opinion of all the other judges. *Vide Strange*, *v.* 2. *p.* 1179.

Eaſter, 16 *Geo.* 2. *Lewis on the Demiſe of the Earl of Derby* v. *Witham.*

On a ſpecial verdict in *Ejectment* the defendant claimed under a *Common Recovery*, whereby it was inſiſted the leſſor of the plaintiff was barred. But exception being taken that no writ of ſeiſin or execution was found, the court was of opinion the defendant could not take any advantage of the *recovery*. It was then moved, that a *venire facias de novo* might go, this being an old *recovery* an hundred years ago, on which execution would be preſumed; and in fact there was a writ of ſeiſin and a return, and ſo this recovery is compleatly found in a cauſe now depending on the demiſe of the duke of *Athol*: It was likewiſe inſiſted, that the minutes find this recovery *as &c.* and therefore warrant the inſerting this.

Per curiam. A venire facias de novo can only be granted on what appears to the court on this record; and unleſs the record warrants it, it will be *error* to grant it, 8 *Co. Loveday*'s caſe. It is not the verdict, but the defendant's title that is imperfect: how can we ſuggeſt, that the jury have miſbehaved themſelves; and yet that muſt be an introduction of *a venire facias de novo*.

It was then prayed, that an entry might be made of its being aſked and denied: but as to that, the court ſaid, that as it was to iſſue on the record, it would be grantable by the court where *error* was brought: as was done in the Houſe of Lords lately in the caſe of the *wine licence office*.

This judgment was afterwards affirmed in the Houſe Lords. *Vide Strange, vol.* 2. *p.* 1185.

Trinity, 19 *Geo.* 2. *Lloyd* v. *Vaughan.*

See this caſe fully ſtated in page 424 of this work, under the head *Error*.

Eaſter, 20 *Geo.* 2. *Keen, on the Demiſe of the Earl of Portſmouth, et. al.* v. *The Earl of Effingham.*

On a trial at bar, wherein the validity of two *common recoveries* ſuffered in 1714 and 1721 came in queſtion, it was ruled by the court, that though at ſuch a diſtance of time proper tenants to the *præcipe* ſhall be preſumed, where no deed appears; yet in this caſe, it appearing that there were deeds inrolled for that purpoſe, wherein proper parties did not join, and the uſes were declared to have been warranted by ſuch deeds; the court could not preſume there were any others. And ſo directed the jury to find againſt the *Recoveries*, which they did accordingly. *Vide Strange, vol.* 2. *p.* 1267.

Hilary, 30 *Geo.* 2. *Taylor on the Demiſe of Atkins, Eſq.* v. *Horde, Eſq. and Others.*

On queſtion in this cauſe whether the *common recovery* was duly ſuffered, it was objected that there was not a good *tenant to the præcipe*, for *Lady A.* the widow of *Sir R. A.* the father, had an eſtate for life in the premiſes, and did not join by ſurrender or otherways in any conveyance of the freehold to *J. E.* the tenant, againſt whom the *præcipe* was brought.

Lord Mansfield. Common Recoveries are a meer form of conveyance, all neceſſary circumſtances of form and ceremony are taken from its fictitious original; the policy of this *ſpecies* of alienation being to take a middle way as to entails between perpetuities and abſolute property.

Stat. 14 *Geo.* 2. proceeds on the parties to a *recovery*, having power to ſuffer it; and the caſes of *Lincoln* Colledge, 3 *Co.* 59. and that of *Jennings* 10 *Co.* 44. were determined on that ground.

By a *parity* of reaſoning this *recovery* ought not to be ſupported, becauſe the parties had no power; if it was, the law muſt be overturned, and every remainder-man in tail might eaſily get a naked poſſeſſion, and make a *ſecret feoffment*.

The plan of marriage, and other family ſettlements, is "to limit a remainder to the firſt and every other ſon in tail". The *negative* which the father now has on the eldeſt ſon's ſuffering a *common recovery*, is the very *means* and *conſideration* of getting the eſtate reſettled on the marriage of the eldeſt ſon; by this method, the moment he attains to the age of *twenty-one years*, he may ſet his father at defiance, ſuffer a *common recovery*, and bar all the reſt of the family: this conſequence alone in a caſe *unprecedented* is a ſufficient objection. *Vide Bur. vol.* 1. *p.* 60.

Trinity, 30 & 31 *Geo.* 2. *Far, Spinſter* v. *Dean.*

See this caſe fully ſtated in page 425 of this work, under the head *Error*.

Michaelmas, 31 *Geo.* 2. *Sheepſhanks and Wife* v. *Lucas.* Error.

On a *writ of error* brought from the *C. B.* to reverſe a *common recovery*, the plaintiff's wife claiming to be entitled (in common with others) to a remainder in *fee* (under the will of one *B.*) after the death of one *T. P. tenant in tail*, who was vouched in this *recovery*, her huſband and ſhe bring this writ, and the *error* aſſigned was, "the death of the vouchee before judgment."

The defendant in *error*'s council made the following objections.

1ſt, That none can maintain a *writ of error* on a judgment, but one who is either party or privy; the plaintiff in this writ is neither, nor injured by the judgment complained of.

2dly, That no *ſci. fac.* or *warning* has been given to the heir, who may be an *infant*; or may have many things to plead. *B. L.* the *recoveror* is the only defendant, who is only *nominal*, but has no real intereſt.

3dly, It appears on the record, that *B. L.* the defendant has judgment to recover againſt *T. C.* but *T. P.* is no party at all to the writ, therefore *T. P.* (who only came in as *vouchee*) had nothing to do with a judgment againſt another, conſequently *T. P.*'s death before judgment is no *error*, it can be only an *irregularity*.

4thly, This writ is not well aſſigned, for it is an *error in fact*, and therefore ought to conclude to the country.

Lord *Mansfield.* 1ſt, The *writ of error* need not to ſet forth a complete title, it is only required of the plaintiff to ſhew the *connection* and *privity* between the perſon againſt whom the *recovery* is had, and the perſon who brings the writ, this is not like a proceeding to try the right of the land, or to *recover* the land itſelf.

As to the *ſecond objection*, no authority or reaſon is produced for a *ſci. fac.* to the *heir*.

The *third objection* has no weight in it, and the caſe of *Wynn* v. *Wynn* is in point againſt it.

As to the *fourth objection*, the concluſion with an *averment* is right, and gives an opportunity to try the fact by the country, if the defendant in *error* chuſes it, which is all that is requiſite.

As to the *merits*, it is extremely clear, that a remainder-man ought to have this chance to the benefit of the *entail, viz.* to ſee that all the proper and requiſite forms ſhould be gone through before he is barred of it. It is plain, that judgment ought not to be given againſt any man after he is dead, and there could have been no judgment againſt the tenant to the *præcipe* in a *common recovery*, without a judgment likewiſe over, in value, againſt the vouchee; they being all entered at the ſame time, and part of the ſame proceeding.

Deniſon, Foſter, and *Wilmot,* concurred with the Chief Juſtice in opinion.

Per curiam. Let the judgment of the *C. B.* be reverſed, *Vide Bur. vol.* 1. *p.* 410.

Michaelmas, 5 *Geo.* 3. *Swann* v. *Broome.* Error.

On a *writ of error* from the *C. B.* on a *common recovery* ſuffered there, the queſtion before the court (among others) was.

"Whether the *recovery* is good or erroneous,
"the return day of the *writ of ſummons* being on
"*Sunday* the 13th day of *May*, on which day *E.*
"*S.* the younger, the tenant in *tail* died.

Adjudged, That the *rcovery* was erroneous: on which a *writ of error* was brought in the *Houſe of Lords*, where the judgment of this court was *affirmed*. *Vide Bur. vol.* 3. *p.* 1602.

Eaſter, 6 *Geo.* 3. *Oates on the demiſe of Wigfall* v. *Brydon and others.*

Adjudged, That to avoid a *fine*, there muſt be an actual entry, and the demiſe cannot be carried back beyond ſuch entry, and in all other caſes the confeſſion of *leaſe*, *entry*, and *ouſter* is ſufficient. *Vide Bur. vol.* 3. *p.* 1897.

Forcible Entry.

Michaelmas, 5 *W.* & *M.* *The King and Queen* v. *Waite.*

A motion was made to quaſh an inquiſition for a *forcible entry*, the exceptions were:

1ſt, It is ſaid, by *the oath of twelve*, &c. *ſworn and impannelled*, &c. and does not ſay *then and there ſworn*, &c. for if the time and place are not ſufficiently aſcertained, the inquiſition cannot be good, becauſe the fact may have been committed above a year paſt. And a caſe in *Dyer* was cited for this purpoſe, 5 *Ed.* 6. One *Buckler* was indicted, and outlawed, for murder in this court, *for that* on ſuch a day, and year, at ſuch a place he made an aſſault on *B. and him, with a certain knife*, &c. *feloniouſly ſtruck*, *killed*, *and murdered*; without ſaying *then and there*; for this reaſon the indictment was adjudged to be ill.

But, notwithſtanding this authority, the exception was not allowed in this caſe, becauſe it is not material here to ſhew the place, *&c.* for the party could not be amoved, ſo as to make the defendant guilty of a *forcible entry* from any other place but from the *land.*

2dly. By *ſtat.* 8. *H.* 6. *c.* 9. *reſtitution is to be granted where the tenant of the freehold only is put out of poſſeſſion, and ſtat.* 21. *Jac. c.* 15. makes no alteration of any former law, but *only grants reſtitution where a termor for years*, &c. is put out of poſſeſſion: now in this caſe it is not ſaid, that the tenant of the freehold was *ouſted*, but that the *leſſee* for years was ouſted; and it was compared to a caſe in this court. *Mich.* 28 *Eliz.* viz. There was a leſſee for years, and a reverſion, and an indictment was brought on this ſtatute, ſetting forth that the defendant *expelled*, and *diſſeiſed* him in reverſion, and *one J. S. the tenant expelled*, which laſt word was applied to both, and *two* cannot be expelled where but *one* is in poſſeſſion; and therefore it ſhould have been that the tenant of the freehold was diſſeiſed, and the leſſee for years expelled, and for this reaſon the indictment was held naught, by *Dolbin* and *Eyre*, Juſtices, the reſt being abſent. *Vide Mod. Rep. vol.* 4. *p.* 248.

Eaſter, 11 *W.* 3. *The King* v. *Harris.*

Holt, Chief Juſtice. If an inquiſition of *forcible entry* comes into this court by *certiorari*, there can be no reſtitution, if either the defendant *traverſes* the *force*, or pleads *three years* quiet poſſeſſion before the *force*; for theſe points muſt be tried firſt, as in the caſe of Sir *Robert Atkins* and Lord *Brounker* concerning St. *Catharine*'s hoſpital. *Vide Salk. vol.* 1. *p.* 260. *Raym. vol.* 1. *p.* 440. *Mod. Rep. vol.* 12. *p.* 268.

Trinity, 11 *W.* 3. *The King* v. *Bengough.*

An inquiſition for a *forcible entry* on the poſſeſſion of one *Lanton*, was taken on a *view by one* juſtice of peace, and reſtitution awarded; and now the Attorney-General moved for re-reſtitution on an *affidavit* made, that when the *force* was found, the defendant tendered a *traverſe* of *not guilty* to the inquiſition, which the juſtice of peace refuſed to accept.

Per curiam, (except *Gould*, Juſtice.) The juſtice of peace ſhould have accepted the *traverſe*, for the fact was *traverſable*, and the law was taken to be ſo in this court during all the time that Chief Juſtice *Keeling* preſided here: it is true, in *Styles* it is ſaid, that on an indictment at ſeſſions, the juſtices may accept a *traverſe*, but that a juſtice of peace, on an inquiſition of a *force* taken on his view, cannot accept a *traverſe*, becauſe it is a ſort of judgment on his view; but the law is taken to be otherwiſe. *Vide Salk. vol.* 3. *p.* 170.

Michaelmas, 12 *W.* 3. *The King* v. *Dorny.*

An inquiſition for a *forcible entry* was, that the defendant *and others into a meſſuage, being* a ſchool-houſe, *then in the occupation of* J.S. *entered and being expelled and diſſeiſed*, held him out. It was objected, that it does not appear what eſtate *J. S.* had, ſo that he might be but *tenant at will*, which is not within any of the ſtatutes. It was ruled, the word *diſſeiſed* imports, that he had a freehold. 3 *Leon.* 102. *Palm.* 277. *All.* 49.

Holt, Chief Juſtice. Here is an *entry* on *J. S.* but no expulſion expreſsly alledged; and the *diſſeiſin* ought to be poſitively charged; the words *being expelled and diſſeiſed, they held him out*, are a concluſion without premiſes. 1 *Sid.* 102.

Per curiam. The inquiſition muſt be quaſhed. *Vide Salk. vol.* 1. *p.* 6.0. *Mod. Rep. vol.* 12. *p.* 419.

Michaelmas, 12 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. Tho' an inquiſition of *forcible entry* be quaſhed, yet reſtitution is not a matter of courſe. *Vide Mod. Rep. vol. p.* 12, 423.

Eaſter, 13 *W.* 3. *The King* v. *Brown.*

Holt, Chief Juſtice. Juſtices of peace, on their view of a *force*, cannot meddle with the poſſeſſion; all they can do is to remove the *force*, and commit them that uſe it, and to make a record thereof; and here the record of the commitment was *arreſtavi* in the *preter-perfect tenſe*, and not in the preſent tenſe, as it ought to have been, and all records of commitments are; as *is committed to the Marſhal* in this court; and the record was quaſhed, *niſi.* *Vide Mod. Rep. vol.* 12. *p.* 516.

Eaſter, 13 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. On a conviction for a *forcible entry*, the juſtices ought to commit the offender. If they find *force*, they are on view to remove it, and commit the offender, but not to award reſtitution, without inquiſition; and this they may do though the *entry* be peaceable, if the detainer be with *force*, in which caſe ſo may convict the offender on the view. *Vide Mod. Rep. vol.* 12. *p.* 495.

Hilary, 1 *Ann.* *Hardeſty* v. *Goodenough.*

An inquiſition for a *forcible entry* being removed hither by *certiorari* at the ſuit of the defendant, the court was moved for a *procedendo* before filing, on ſuggeſtion that the defendant got poſſeſſion of an houſe, in which there were great ſtore of periſhable goods, and that now he would by this means keep it till the goods would be all ſpoiled.

Per curiam. We may award reſtitution immediately, though we file it, if the defendant does not plead *three* years quiet poſſeſſion immediately before the force, and that his eſtate does yet continue according to *ſtat.* 31 *Eliz. c.* 11. The party ought to be ready with their plea in ſuch a caſe as this; for a perſon may juſtify a *forcible entry*, if he were *three* years in quiet poſſeſſion immediately before, and that his eſtate does ſtill continue. *Vide Mod. Rep. vol.* 7. *p.* 138.

Hilary, 1 *Ann.* *The Queen* v. *Taylor and Griffith.*

On an indictment for a *forcible entry* on *ſtat.* 8 *H.* 6. *c.* 9. it was not ſaid in the indictment that the party had been *ſeiſed* and *diſſeiſed* by force, and it was quaſhed *niſi*, &c. and on ſhewing cauſe it was urged, that this need not be expreſsly laid. *Pop.* 205.

Holt, Chief Juſtice. The caſe in *Popham* was on *ſtat.* 21 *Jac.* 1. *c.* 15. on which it is ſufficient to ſay, that the *entry* was made on a *copyholder* or leſſee for years, and that he was expelled; but the preſent caſe is on *ſtat. H.* 6. on which you muſt always alledge a freehold and ſeiſin in ſomebody; and if it be an *entry* on a leſſee for years, you muſt ſay, the *entry* was made on the freehold of *A.* in the poſſeſſion of *B.* and that ſo he diſſeiſed *A.* and of neceſſity there muſt be a *diſſeiſin* of the freehold laid; and on reſtitution, the poſſeſſion is reſtored to the leſſee, and the freehold to the other; and on this ſtatute *diſſeiſin* is a term of art, and not to be ſupplied by any other word: wherefore the rule was made abſolute. *Vide Mod. Rep. vol.* 7. *p.* 123.

Michaelmas, 1 *Ann.* *The Queen* v. *Taylor and Griffith.*

An indictment of *forcible entry* and *detainer* concluded *againſt the peace* of the late King, and the preſent Queen, the *entry* being in K. *William*'s time, and the *detainer* in the Queen's time.

Holt, Chief Juſtice. The concluſion is very improper, but there are too many miſtakes of this ſort to reverſe them all. *Vide Mod. Rep. vol.* 7. *p.* 115.

Hilary, 2 *Ann.* *The Queen* v. *Watton.*

In the caption of an inquiſition for a *forcible entry*, it was ſaid, *the jurors ſworn and charged on their oaths*, &c. and to this it was excepted, that it did not appear what the jury were ſworn to do, whether they were an inqueſt of inquiry, or a *petit* jury: and though it might not be neceſſary to ſay, that it was to inquire, *&c.* yet at leaſt it ought to appear, that they were an inqueſt: and the court ordered precedents to be ſearched.

And on the ſearch the court were informed that moſt inquiſitions in King *Charles* the ſecond's time, that wanted theſe words, *to inquire*, were quaſhed.

To which *Holt*, Chief Juſtice, anſwered, that he had known inquiſitions quaſhed for it; but ſince it was a particular offence, and at the ſuit of the party by the ſtatute, by his conſent none ſhould ever be quaſhed for it; and he obſerved that in no indictment it is ever ſaid what the jury is to inquire of, but only to inquire for our Lady the Queen, *&c.* and as to the want of the words *to inquire*, in caſe of a *petit* jury, you only ſay, *elected, tried, and ſworn*, without ſaying, *to try the iſſue*; and here it is ſaid, *ſworn and charged, ſay on their oath*, and it does appear that they were ſworn to preſent, becauſe there is no iſſue joined; and the reaſon why on the preſentment at the general quarter ſeſſions it is neceſſary to ſay, *to inquire of*, &c. is, becauſe their commiſſion is ſuch, and the jury muſt inquire according to their commiſſion; but here their commiſſion is by a ſtatute: and if it were an indictment for a rict on *ſtat. H.* 4. it might perhaps be held well, without the words *to inquire*. Wherefore the inquiſition was confirmed by the court. *Vide Mod. Rep. vol.* 6. *p.* 95.

Eaſter, 3 *Ann.* *The Queen* v. *Goodenough.*

An inquiſition of a *forcible entry* found before a juſtice of the *peace* in the country, was removed into this court by *certiorari*. And in ſtay of reſtitution, the defendant pleaded poſſeſſion *three* years before the indictment found, according to *ſtat.* 31 *Eliz. c.* 11. And on a traverſe to the plea it was found againſt the defendant. And now the court was moved that the defendant ought not to pay coſts in this caſe; but the court on view of the ſtatute ordered the maſter to tax coſts.

Holt, Chief Juſtice, ſaid, that by *ſtat.* 8 *H.* 6. immediately on finding the inquiſition of *forcible entry*, the juſtice was to award reſtitution, and the defendant had no plea to it. And now *ſtat.* 31. *Eliz.* had given the defendant the plea of *three* years quiet poſſeſſion in bar of reſtitution; but in caſe the plea was found againſt him, it had given coſts in expreſs words. And as to *ſtat.* 5 *&* 6 *W. & M. c.* 11. he did not take it to be within the ſtatute, becauſe the inquiſition was not found at the ſeſſions; but if it had been found at the ſeſſions, and removed from thence by *certiorari*, the defendant muſt have paid coſts by the ſtatute. *Vide Raym. vol.* 2. *p.* 1035.

Eaſter, 4 *Ann.* *Cockcroft* v. *Smith.*

See this caſe fully ſtated in page 266 of this work, under the head *Commitment*.

Hilary, 8 *Ann.* *The Queen* v. *Depuke.*

The court was moved to quaſh an indictment for a *forcible entry*, which ſet forth, that the defendant *entered forcibly* into the cloſe of *J. S.* and turned him out; whereas before the time, the term of which *J. S.* had been poſſeſſed was elapſed; the exception was, that the eſtate of *J. S.* ſhould have been particularly ſet forth, for he might have been a tenant at ſufferance; and it has been often adjudged, that a tenant at ſufferance is not within the ſtatute of *forcible entries*; it was likewiſe urged, that by the words *had been* it does not appear, but the eſtate of *J. S.* was determined before the *entry*. Therefore the indictment was quaſhed. *Vide Mod. Rep. vol.* 11. *p.* 273.

Trinity, 8 *Ann.* *The Queen* v. *Baker et al.*

The court was moved to quaſh a conviction for a *forcible entry*, becauſe there wanted the words *violently entered*, on reading the conviction it was, *with force and arms entered*, which the court ſaid was bad; for it might be *with force and arms*, and not violently, which are the words of the ſtatute. Therefore the conviction was quaſhed. *Vide Mod. Rep.* 11. *p.* 235.

Trinity, 8 *Ann.* *The Queen* v. *Layton or Leighton.*

See this caſe fully ſtated in pages 177 and 256, under the heads *Bail* and *Certiorari*.

Michaelmas, 8 *Geo.* *The King* v. *Jones.*

A conviction for a *forcible entry* was quaſhed for the old exception of *meſſuage* or *tenement*; but the reſtitution was oppoſed, on an *affidavit* that the parties title (which was by leaſe) was expired ſince the conviction. The court ſaid, they had no diſcretionary power in the caſe, but were bound to award reſtitution on quaſhing the conviction. *Vide Strange, vol.* 1. *p.* 474.

Hilary, 1 *Geo.* 2. *The King* v. *Sir Edmund Elwell and others.*

See this caſe fully ſtated in page 258, of this work, under the head *Certiorari*.

Trinity, 5 *Geo.* 3. *The King* v. *Storr.*

On ſhewing cauſe againſt a rule obtained to quaſh *four indictments*, which were alledged to be only private injuries, though laid *vi et armis*; after hearing the arguments of council on both ſides, *three* of the indictments were quaſhed, and the rule diſcharged as to the *fourth*.

Lord *Mansfield*. The objection to the fourth indictment is given up; the other three ſtand all of them on the ſame ground, nothing but the *vi et armis* implies force, every force and violence is a breach of the peace; I think the preſent caſe within thoſe that juſtify the quaſhing.

Wilmot, *Yates*, and *Aſton*, Juſtices, gave their opinions at large, and concurred with the *Chief Juſtice*.

Per Curiam. Let the three indictments be quaſhed, and the rule diſcharged as to the fourth. *Vide Bur. vol.* 3. *p.* 1698.

Trinity, 5 *Geo.* 2. *The King* v. *Bake, and fifteen others.*

On ſhewing cauſe why an indictment ſhould not be quaſhed, which was brought for a *forcible entry*, the objection was, that the indictment was only for *with force and arms)* breaking and entering a *cloſe* (not a dwelling-houſe) and unlawfully and unjuſtly expelling the proſecutors, and keeping them out of poſſeſſion.

After hearing the arguments of council on both ſides, the court made the rule abſolute for quaſhing the indictment.

Wilmot, Juſtice. No doubt, an indictment will lie at *common law* for a *forcible entry*; though they are generally brought on the ſtatutes: and then it is neceſſary to ſtate the nature of the eſtate, becauſe there muſt be a reſtitution; but they may be brought at *common law*.

The words "*force* and *arms*," are not applied to the whole, yet it ought to be ſuch an actual force as implies a breach of the peace, and makes an indictable offence; and it is a rule of law, "That it ought to appear on the face of the indictment to be an indictable offence."

Yates and *Aſton*, Juſtices, concurred with Mr. Juſtice *Wilmot* in opinion.

Per Curiam. Let the rule be made abſolute to quaſh this indictment. *Vide Bur. vol.* 3. *p.* 1731.

Forgery *ſee* Indictment.

Franchiſes, &c.

Hilary, 2 *W*. 3. *Cotton* v. *Johnſon*.

On an *ejectment* brought for lands in the *Iſle of Ely*, after *not guilty* pleaded, the privilege of the *County Palatine* was ſuggeſted on the roll, that no jury ſhould be returned out of the *Iſle*, and ſo a *venire facias* was prayed to *R*. the next vill in the county of *Cambridge*. It was objected, that the defendant's confeſſion ſhould have been entered likewiſe on the roll, *viz. and becauſe the defendant does not deny this, therefore*, &c. but adjudged, though ſome precedents are ſo, yet either way is well enough; for if the fact is otherwiſe, he may bring a *writ of error*, and aſſign it for *error*: then it was objected, that the entry ought to have been, *that the free tenants, and reſidents in the ſaid Iſle ought not to go to make a jury without that liberty*; for otherwiſe it does not appear to be a privilege annexed to the inhabitants, but a mere cogniſance in the *Biſhop*; however, the trial being in the county of *Cambridge*, of which this is parcel, the court held it to be aided by *ſtat.* 16 & 17 *Car.* 2. *cap.* 8. *Vide Salk. vol.* 3. *p.* 110.

Eaſter, 5 *W*. & *M*. *Hicks* v. *Harris*.

Where a *common* or way is claimed, the title ought to be ſet forth in the declaration; but for a *fair* or *franchiſe*, which is no charge to another's ſoil, there the words *ought to have* are good without any thing further. *Vide Mod. Rep. vol.* 12. *p.* 35.

Hilary, 9 *W*. 3. *Lamb* v. *Jeniſon*. Error.

On *error* brought to reverſe a judgment in the court of *Durham*, in *ejectment* before *juſtices of aſſize*; the *error* aſſigned was, that a *tales de circumſtantibus* was awarded, which ought not to have been, for *ſtat.* 5 *El. c.* 25. which gives the *tales de circumſtantibus* in *Wales*, and *Counties Palatine*, gives it only before the juſtices of the great ſeſſions, and not before juſtices in *Eyre*, as theſe are. But the court held this to be *no error* becauſe the ſtile of the juſtices in the court of *Durham* is always juſtices of aſſize; and there is no great ſeſſions at all in the *County Palatine*; and therefore this act muſt be underſtood of ſuch courts therein as anſwer to the grand ſeſſions in *Wales*.

Then it was urged that the words *by the court* were omitted in the judgment; but it was anſwered and reſolved, that the words *therefore it is conſidered*, without ſaying *by the court* were good in the *County Palatine courts*, which are looked on in that reſpect as the courts of *Weſtminſter*; and ſo the judgment was affirmed. *Vide Mod. Rep. vol.* 12. *p.* 181.

Hilary, 9 *W*. 3. *Hinton* v. *Hern*.

The court was moved in behalf of the univerſity of *Cambridge*, that they might be allowed their privilege in relation to licenſing of taverns in *Cambridge*, on producing their charter; but it was denied.

Holt, Chief Juſtice. When a privilege is once aſcertained, and appears on record, then it ſhall afterwards be allowed on motion; but where it was never conteſted before, there it muſt be *judicially* determined; and ſo it was done in the caſe of *Caſtle* v. *Litchfield* in the *Exchequer*. *Vide Mod. Rep. vol.* 12. *p.* 165.

Michaelmas, 10 *W*. 3. *Neſſon* v. *Finch*.

See this caſe fully ſtated in page 241 of this work, under the head *Bonds*.

Trinity, 11 *W*. 3. *The City of London* v. *Vanacre*.

See this caſe fully ſtated in page 292 of this work, under the head *Corporations*.

Trinity, 12 *W*. 3. *Willbraham* v. *Poley*.

The court was moved to ſtay the return of a *writ of error* out of *Chancery*, to reverſe an *outlawry* in the *county palatine* of *Cheſter*, according to the opinion of L. *Coke* 4 *Inſt.* 214. But not allowed; for this old uſage is exploded by *ſtat.* 32 *H*. 8. *c.* 43. and 33 *H*. 8. *c.* 13. for coroners are there introduced by that *ſtat.* and there was no Chief Juſtice in *Cheſter* till Queen *Elizabeth's* time, for till then there being but one, there could be no Chief Juſtice. *Vide Salk. vol.* 2. *p.* 500.

Hilary, 13 *W*. 3. *Croſſe* v. *Smith*.

See this caſe fully ſtated in page 161 of this work, under the head *Bail*.

Hilary, 13 *W*. 3. *Taylor* v. *Reignolds*.

On a *Habeas Corpus* brought to the *Stannary Courts* it was returned, that they have conuſance of pleas by the charters of *Edward* 1. and another of *Edward* 3. and that this matter might be well returned. *Style* 255. 1 *Rol. Ab.* 547, 548. were cited.

Holt, Chief Juſtice, conuſance of pleas, or exempt juriſdiction, were never returned to a *habeas corpus*; for then they might return a falſity to ſupport their juriſdiction, which would not be traverſable, and ſo a ſubject would be *ouſted* of the privilege of ſuing, or being ſued, in the King's ſuperior courts, without an opportunity of controverting the matter, and he quoted the caſe of *Biſhop* v. *Percival* in *Hard.* and as to an exempt juriſdiction that always is for the benefit and eaſe of the reſiants within ſuch a *vill*, *borough*, &c. not to be uſed out of their *vill*, &c. then ſurely they may wave that benefit, and remove their cauſes to the ſuperior courts. And if one who is in an exempt juriſdiction, be impleaded out of it, his way is to plead it, and the Lord has nothing to do with it; but as to conuſance of pleas, that cannot be pleaded by a defendant, but muſt be demanded by the Lord of the *Franchiſe*, his *bailiff*, or *attorney*. *Vide Mod. Rep. vol.* 12. *p.* 666.

Trinity, 13 *W*. 3. *Bidolph* v. *Veal*.

See this caſe fully ſtated in page 410 of this work, under the head *Error*.

Trinity 13 *W*. 3. *Wilbraham* v. *Lownds*.

In *treſpaſs*, *wherefore he broke his cloſe* in *Cheſhire*: it was pleaded, that this court ought not to take conuſance of it, for that the defendant at the time of the ſuppoſed *treſpaſs* and *exhibiting his bill* was an inhabitant of the *county palatine* where the *treſpaſs* was made, *and prays judgment*, if this court will take conuſance; to which there was a *demurrer*. In maintenance whereof it was ſaid, that the declaration was againſt him *in cuſtody of the Marſhal*; that his being in cuſtody of the Marſhal was not traverſable, no more than being the King's creditor in a *quo minus.* Beſides, the defendant's being an inhabitant of the *county palatine* does not hinder his being an inhabitant out of it: for a man may be an inhabitant in ſeveral places atonce; and in all appeals and indictments of murder, the party is alledged to be an inhabitant in the place where the murder is committed.

Holt, Chief Juſtice. As to your caſe of a *quo minus*, it is *traverſable*, if the party comes in due time to do it; and if *one* be a priſoner here, againſt whom *one* has a cauſe of action ariſing within the *county palatine*, ſo that his being a priſoner here, hinders that perſon from proceeding againſt him below; ſurely the cauſe ariſing within the *county palatine*, ſhall not hinder us from having conuſance of it here; but that is where he is *firſt* in cuſtody of the *Marſhal* for cauſe, and another perſon, or the ſame party has another cauſe of action ariſing againſt him in the *county palatine*; and if the truth were ſo, that the defendant was in *cuſtody of the Marſhal* before for cauſe ariſing within our juriſdiction, the defendant, inſtead of *demurring*, ought to ſhew it in ſupport of our juriſdiction. But any plea of privilege is good to a declaration againſt one *in cuſtody of the Marſhal*, if he was brought wrongfully there. As if an attorney of the *C. B.* be arreſted on a *writ*, and is *in cuſtody of the Marſhal* for want of bail, or ſuppoſe he puts in bail, it ſhall not hinder him of pleading his privilege; becauſe he cannot plead till he put in bail, if he be not in actual cuſtody; and if we give judgment, it muſt be for the defendant. *Vide Mod. Rep. vol.* 12. *p.* 535.

Trinity, 1 *Ann.* *The Queen* v. *Taylor.*

The court was moved againſt the keeper of the priſon of the *Gatehouſe* for not returning a *habeas corpus* for bringing up priſoners in order to be ſent to *Newgate*, the county goal: on this occaſion, *Holt*, Chief Juſtice, laid it down, that none can claim a priſon as a *franchiſe*, unleſs they have alſo a goal-delivery of *felony*, which the Dean and Chapter of *Weſtminſter* hath not, and therefore ought to ſend a calendar of them to *Newgate*, or return the *habeas corpus* to this court, with a claim of their *franchiſe.* *Vide Salk. vol.* 1. *p.* 343.

Trinity, 1 *Ann.* *Ruſh* v. *The Chancellor and Scholars of Oxford.*

The court was moved for a *prohibition* to a ſuit in the Vice-Chancellor's court againſt certain brewers, for ſelling ill beer and falſe meaſure; and the particular exceſs of juriſdiction alledged was, the exacting juratory caution; and it was alſo inſiſted, that tho' they have the aſſiſe of bread and beer by charter, yet a power to puniſh by fine, and proceed according to the civil law cannot be by charter.

Holt, Chief Juſtice. Before *ſtat.* 14 *H.* 8. the univerſity had the juriſdiction of a *leet*, and exerciſed it in the Vice-Chancellor's court; but the charter of the 14 *H.* 8. grants them power of treſpaſſes, and that over all perſons whatſoever, if a ſcholar be a party. Adjourned. *Vide Salk. vol.* 1. *p.* 343.

Eaſter, 9 *Geo.* 2. *Ibbotſon's Caſe.*

One *Vawkes* moved for an information in nature of a *quo warranto* againſt one *Ibbotſon* for making a warren for rabbits.

Lord *Hardwicke*. We do indeed grant theſe informations for public uſurpations on the crown, but never for private uſurpations of *franchiſes*; but the way is, to apply to the Attorney-General in ſuch caſes. So I remember my Lord *Barrington*'s caſe, when I was Attorney-General, who had ſet up a fair, and the court was applied to for one of theſe informations, but refuſed it, and directed an application to the Attorney-General, and they did accordingly, and I granted it; but I would not by this be underſtood to give an opinion that a *quo warranto* lies for this, as if it were a free warren. *Vide Caſes Temp. Lord Hardw. p.* 261.

Fraud.

Hilary, 9 *W.* 3. *Meggot, Aſſignee of Wilſon a Bankrupt* v. *Mills & al.*

Adjudged, If the goods of a bankrupt had been aſſigned to any other perſon than a creditor, the keeping of the poſſeſſion of them had made the bill of ſale *fraudulent.* *Vide Raym. vol.* 1. *p.* 286.

Hilary, 9 *W.* 3. *Smith* v. *Weſtall.*

In a *ſtat.* made the laſt ſeſſions of parliament for regulation of brokers, there is a *clauſe* which makes all contracts for transferring of bank-ſtock void, which by the tenor of the agreement ought to have been performed after the 1ſt of *May*, unleſs they are performable within *three* days, *&c.* the plaintiff's caſe was as follows: an agreement was made in *February* by *A.* with *B.* that *A.* ſhould transfer bank-ſtock to *B.* on the requeſt of *B.* at any time before the 10th of *May.* It was urged, that becauſe this contract might have been performed before the 1ſt day of *May*, therefore it was not within the words of the *ſtat.* And it was compared to a caſe on the *ſtat.* of *frauds*, where the agreement was, that *A.* in conſideration of 5 *l.* paid by *B.* ſhould pay to *B.* 20 *l.* on his day of marriage, and the promiſe was not in writing; it was held by the judges at *Serjeants Inn* to be out of the intent of the *ſtatute*, and good, becauſe it might have been performed within the year.

Holt, Chief Juſtice. I granted that the caſe of the marriage was ſo adjudged; and if the marriage had taken effect within the year, they all agreed no writing was neceſſary; but in the caſe before them the marriage did not happen within the year, but *nine* years after the promiſe; and he was of opinion, that it ought to have been in writing, becauſe the deſign of the *ſtat.* was, not to truſt to the memory of witneſſes for a longer time than a *year*; but the majority of the judges were of opinion, that it was not within the intent of the *ſtat.* of *frauds*, and therefore he returned the *poſtea* accordingly, the cauſe being tried before himſelf. As to the caſe in queſtion, he was of opinion, that if the requeſt had been before the 1ſt of *May*, and the contract performed, it had been good; but if no requeſt was made before the 1ſt of *May*, the contract being performable afterwards, was within the intent of the act; and in fact no requeſt appeared to have been made before the 1ſt of *May.* And therefore judgment was for the defendant, who had pleaded the *ſtat.* *Vide Raym. vol.* 1. *p.* 316.

Eaſter, 9 *W.* 3. *Watkins* v. *Perkins, at Guildhall.*

Holt, Chief Juſtice. If *A.* promiſes *B.* being a ſurgeon, that if *B.* cures *D.* of a wound, he will ſee him paid; this is only a promiſe to pay if *D.* does not, and therefore it ought to be in writing by the *ſtatute of frauds*: but if *A.* promiſes, in ſuch a caſe, that he will be *B.*'s paymaſter, whatever he ſhall deſerve; it is immediately the debt of *A.* and he is liable thereto without writing. *Vide Raym. vol.* 1. *p.* 224.

Hilary, 10 *W.* 3. *Cole* v. *Davis, & al. Aſſignees of Maul, a Bankrupt.*

See this caſe fully ſtated in page 192 of this work, under the head *Bankrupts.*

Michaelmas, 1 *Ann.* *The Queen* v. *Starney.*

The defendant was convicted in a ſummary manner on *ſtat.* 13 & 14 *Car.* 2. for a *fraud* in payment of a cuſtom; and the conviction being removed here, was quaſhed on motion.

Per curiam. The ſtatute directs no particular way of trial, but only that the offender ſhall be fined at the ſeſſions; and whenever an act of parliament makes an offence, and is ſilent on the manner of trying it, it ſhall be intended to be a trial *by jury*, according to *Magna Charta*. *Vide Mod. Rep. vol.* 7. *p.* 99.

Eaſter, 3 *Ann.* *Popley* v. *Aſbly*.

The defendant being a Captain of a ſhip, took up ſeveral goods for the uſe of the ſhip from the plaintiff, who ſent his ſervant with a bill to him for his money. The defendant orders the ſervant to write him a receipt for the money, which he did, and thereon he gives him a note on a *third* perſon, payable in *two* months. The maſter ſent ſeveral times to the *third* perſon to preſent him the note, but could not get ſight of him within the time at which the money was payable: the party breaks, and now this action was brought for the money againſt the Captain. All this appearing on evidence, and that the Captain went to ſea next day after he gave the note, the Chief Juſtice directed a verdict for the plaintiff.

And, *alſo obſerved*, If a man give a note on a *third* perſon in payment, and the other takes it abſolutely as payment; yet if the drawer knew the *third* perſon breaking, or to be in a failing condition, and the receiver of the note uſes all reaſonable diligence to get payment, but cannot, this is a *fraud*, and therefore no payment; and here was no *laches* in the plaintiff; for the party failed before the money was payable, and the Captain was gone to ſea, therefore he could not bring him back to give him notice: but if a man takes a note, and after it is payable, makes no demand, and that he might be paid if he had been diligent enough, there, if the party, on whom the note is, fails, it is at his peril that took the note. *Vide Mod. Rep. vol.* 6. *p.* 147.

Michaelmas, 3 *Ann.* *Birkmyr or Burkmyre*, v. *Darnell.*

See this caſe fully ſtated in page 33 of this work, under the head *Actions*.

Hilary, 8 *Geo.* *Towers* v. *Sir John Oſborne*.

The defendant beſpoke a chariot, and when it was made refuſed to take it; and in an action for the value, it was objected, that they ſhould prove ſomething given in earneſt, or a note in writing, ſince there was no delivery of any part of the goods. But the Chief Juſtice ruled this not to be a caſe within the *ſtatute of frauds*, which relates only to contracts for the actual ſale of goods, where the buyer is immediately anſwerable, without time given him by ſpecial agreement, and the ſeller is to deliver the goods immediately. *Vide Stra. vol.* 1. *p.* 506.

Hilary, 4 *Geo.* 2. *Elkin* v. *Heart*.

In an action of *aſſumpſit*, the plaintiff declared, that *J. G.* the defendant's ſon-in-law was indebted to him in ſuch a ſum for diet and lodging, and that he brought an action againſt the ſaid *J. G.* for the ſaid ſum; and thereon the defendant promiſed, in conſideration that the plaintiff would forbear to ſue the ſaid *J. G.* for the ſaid debt, that the ſaid *J. G.* ſhould not leave the kingdom without paying the ſame: and the plaintiff aſſigned for *breach*, that *J. G.* left the kingdom without paying the debt: the defendant pleaded the *ſtatute of frauds*, and that there was no note in writing: on demurrer to this plea, the plaintiff's council argued, that this was not a promiſe to pay the debt in default of the principal, which is the caſe provided againſt by the *ſtatute*, but a collateral promiſe on a conſideration ariſing between the plaintiff and the defendant; for this action is not brought for the *debt* of *J. G.* but for the damages ſuſtained by the plaintiff, by the defendant's having ſuffered *J. G.* to leave the kingdom without paying the debt; and the conſideration is, that the plaintiff had waived his action againſt *J. G.* and conſequently the coſts of the ſame. The plaintiff inſiſted the plea amounted to the general iſſue, which therefore the defendant ſhould have pleaded, and have given the *ſtatute* in evidence, becauſe it differs from a plea of *infancy*, &c. which is by the *common law*. The defendant's council inſiſted there was no new conſideration, as the plaintiff was not bound to forbear for any certain time: and to the other matter, that the plea contained matter of law.

Per curiam. If there be no certain time of forbearance agreed on, the party is to forbear for ever: but the court ſeemed inclined to think that there was a new conſideration, and that therefore it was for the debt of *J. G.* and ſo not within the ſtatute: *but adjourned. Vide Fitz-Gibbons*, *p.* 202.

Trinity, 4 *Geo.* 2. *The King* v. *Wilſon*.

Per curiam. A *parol* promiſe to pay the debt of another in conſideration of a forbearance is void by the ſtat. of *frauds* and *perjuries*. *Vide Stra. vol.* 2. *p.* 873.

Hilary, 18 *Geo.* 2. *Lekeux* v. *Naſh*.

See this caſe fully ſtated in page 467 of this work, under the head *Evidence*.

Trinity, 30 & 31 *Geo.* 2. *Bright. Executor of Hannah Criſp, Widow* v. *Eynon*.

On ſhewing cauſe on a rule obtained to ſet aſide the verdict in this cauſe, with coſts. Lord *Mansfield*, obſerved, that he left *two* queſtions to the jury.

1ſt, "Whether the name of the teſtatrix was "*forged?*"

2dly, "If they took it on the evidence laid before "them to be her hand, then, whether it was not obtained by *fraud*, and without her knowing the contents and effect of the writing ſhe ſigned?"

The jury on theſe queſtions found for the defendant.

After hearing the arguments of council on both ſides, the verdict was ſet aſide on payment of coſts.

Lord *Mansfield*. (After recapitulating the evidence offered at the trial,) obſerved, that he went on the apparent manifeſt *fraud* and *impoſition* in obtaining the diſcharge from the teſtatrix, if ſhe really ſigned it.

Fraud or *covin* may in judgment of the *law* avoid every kind of act, many inſtances are put in *Fermor's* caſe. 3 *Co.* 77.

What circumſtances and facts amount to ſuch *fraud* or *covin*, is always a queſtion of *law*, courts of *equity* and courts of *law* have a *concurrent* juriſdiction to ſuppreſs and relieve againſt *fraud*. The writing on the face of it ſpeaks *impoſition*.

Deniſon and *Foſter*, Juſtices, gave their opinions at large, and concurred with the Chief Juſtice.

Per curiam. Let the rule for ſetting aſide the verdict be made abſolute, with coſts. *Vide Bur. vol.* 1. *page* 390.

Hilary, 31 *Geo.* 2. *Worſely and another*, *aſſignees of Richard Slader, a Bankrupt* v. *De Mattos and Slader*.

See this caſe fully ſtated in page 200 of this work, under the head *Bankrupts*.

Hilary, 33 *Geo.* 2. *Foxcroft and another*, *Aſſignees of Satterthwaite, a Bankrupt* v. *Devonſhire and others*.

Per curiam. We are all clearly of opinion, "that "no concluſion attempted to be drawn from the *evidence* in this caſe, allowing it to be true, amounted "in point of law to the offence of *fraud* and a forfeiture of the debt on that account." See this caſe more fully ſtated in page 202 of thiswork, under the head *Bankrupts.*

Game.

Hilary, 8 *W.* 3. *Bennet* v. *Talbot or Talboys.*

See this caſe fully ſtated in page 348 of this work, under the *Declaration.*

Hilary, 8 & 9 *W.* 3. *The King* v. *Yaites.*

The defendant was convicted of *killing rabbets* in a private warren, by inquiſition taken before a juſtice of peace, and was fined 20*s.* a rabbit; and the court was moved to quaſh the inquiſition, becauſe the juſtices of peace have no authority to ſet a fine on a man for ſuch offence. For the *ſtat.* 22 & 23 *Car.* 2. *cap.* 25. gives treble coſts and damages, but no fine. And *ſtat.* 4 & 5 *W.* & *M. cap.* 23. extends only to *game,* which cannot be extended to rabbits kept in a private warren. And of this opinion was the whole court, and therefore the inquiſition was quaſhed. *Vide Raym. vol.* 1. *p.* 151.

Michaelmas, 9 *W.* 3. *Sutton* v. *Moody.*

On an action of treſpaſs wherefore he broke his cloſe, and hunted, killed, took, and carried away an hundred conies, his property, then and there found.

On *not guilty* pleaded, a verdict was given for the plaintiff, and intire damages. It was now moved in arreſt of judgment, that conies are *wild by nature,* and therefore there is no property in them in any one; therefore ſince the plaintiff has laid property in them, by the word *his,* it is ill, and no damages ought to have been given for them. But if the action had been for having hunted *in his warren,* and killed *his conies* there found, it had been good; for then he would have had a privileged property in them. The ſame law for fiſh taken in *his fiſhpond. Fitzh. N. Br.* 17. 1 *Cro.* 553. *Greenhill* v. *Child, March* 48. *Jones* 450. But generally there is no property in things which are wild by nature, and therefore *trover* does not lie, for a hawk, without alledging that he was tamed, and in ſuch an action it was adjudged againſt the plaintiff, though it was alledged in the declaration, that he was poſſeſſed of the hawk as of his own proper goods. *Dyer* 306. *b. pl.* 66. *But not allowed.*

Holt, Chief Juſtice. A warren is a privilege, to uſe land for ſuch a purpoſe; and a man may have warren in his own land, and he may alien the land, and retain the privilege of warren. But this gives no greater property in the conies to the warrener, for the property ariſes to the party from the poſſeſſion; and therefore if a man keeps conies in his cloſe (as he may) he has a poſſeſſory property in them, ſo long as they abide there; but if they run into the land of his neighbour, he may kill them, for then he has the poſſeſſory property. *Vide Raym. vol,* 1, *p.* 250.

Michaelmas, 2 *Ann. The Queen* v. *George.*

See this caſe fully ſtated in page 255 of this work, under the head *Certiorari.*

Hilary, 8 *Geo. The King* v. *Filer.*

The defendant was convicted on *Stat.* 5 *Ann. c.* 14. for keeping a lurcher to deſtroy *game*; not being qualified.

It was excepted, that it was not ſhewn he had made uſe of the dog to deſtroy the *game*; and it may be he kept it only for a gentleman who was qualified, it being common to put out dogs in that manner.

Per curiam. Stat. 5 *Ann. c.* 14. is in the diſjunctive *keep or uſe,* ſo that the bare keeping a lurcher is an offence, and ſo it was determined in the caſe of *The King* v. *King, Eaſt.* 3 *Geo.* in this court which was a conviction for keeping a gun, and it was not doubted by the court, whether the keeping was not enough to be ſhewn, but the only queſtion they made was, whether a gun was ſuch an engine as is within that ſtatute, and in that caſe a difference was taken as to keeping a dog which could only be to deſtroy the *game,* and the keeping a gun, which a man might do for the defence of his houſe. The conviction was confirmed. *Vide Strange, vol.* 1. *p.* 496.

Hilary, 9 *Geo. The King* v. *Gage.*

See this caſe fully ſtated in page 284, of this work, under the head *Conviction.*

Eaſter, 10 *Geo. Shipton* v. *Hopton.*

See this caſe fully ſtated in page 346 of this work, under the head *Debt.*

Michaelmas 10 *Geo. The King* v. *Burchet, his Attorney, and the Town Clerk of Guilford.*

See this caſe fully ſtated in page 137 of this work, under the head *Attachment.*

Hilary, 12 *Geo. The King* v. *John Hill.*

The defendant was convicted by Sir *Henry Bateman* a juſtice of the peace of *Middleſex,* for unlawfully keeping a lurcher and a gun, to kill and deſtroy the *game, not being qnalified by law, and againſt the form of the ſtatute in that caſe made and provided.* And this conviction being removed into this court by *certiorari,* was quaſhed, becauſe it was only averred generally, that he was not qualified, and did not aver that the defendant had not the particular qualifications mentioned in the ſtatute as to *degree, eſtate,* &c. *Vide Raym. vol.* 2. *p.* 1415.

Hilary 12. *Geo. The King* v. *Buck.*

The court was moved to quaſh an indictment for killing an hare, this being a matter indictable, by *ſtat.* 5 *Ann. c.* 14. appointing a ſummary proceeding before juſtices of the peace; and thecaſe of *The King* v. *James, Trinity,* 1 *Geo.* was cited, where an indictment for keeping an alehouſe was quaſhed, becauſe *ſtat.* 3. *Car.* 1. *c.* 3. had directed a particular remedy.

Per curiam. The indictment muſt be quaſhed, *Vide Strange, vol.* 1. *p.* 679.

Trinity, 12 *Geo. The King* v. *Chipp.*

The defendant was convicted on *ſtat.* 4 & 5 *W.* & *M. c.* 23. for deſtroying *game,* not being a perſon duly qualified.

The defendant's council took the following *exceptions* to the conviction:

1ſt. That the information, which was ſet forth in the indictment was inſufficient to warrant the conviction; for the information only recited that he was an *inferior tradeſman,* but did not ſhew that he had *waſted his ſubſtance,* or that he was a *diſſolute perſon,* which are the words of the ſtatute; and therefore it did not appear by this conviction that the defendant was ſuch a perſon as was intended by the ſtatute, for he might be an *inferior tradeſman,* and yet have a ſufficient eſtate to qualify him to *hunt,* &c.

2dly. That it was not any where ſet forth in the conviction that the defendant did *unlawfully hunt*; and for any thing which appears in this conviction, the defendant might have bought the hare; and have *hunted* and killed it in his own yard, which would have been lawful.

3dly. That the conviction ſet forth, that information was given to ſuch a one, *a juſtice of peace,* but did not ſay *then* a juſtice, and he might be a juſtice at preſent, and not at the time of the information.

But the court over-ruled all the exceptions; and to the firſt they ſaid, that the ſtatute was in the disjunctive, viz. *inferior tradeſmen* or *diſſolute perſons*; and therefore ſaying that the defendant was either, was ſufficient.

To the *ſecond*, the court ſaid, that the ſtatute forbid ſuch perſons as the defendant to *hunt at all*, and made it criminal for ſuch perſons to *hunt generally*. And in this ſtatute there is no diſtinction betwixt *lawful* and *unlawful hunting*, as there is in the ſtatute againſt *deer-ſtealers*; and they agreed, that in a conviction for *deer-ſtealing*, it muſt be ſet forth, that the defendant did *unlawfully hunt*, but in the preſent caſe it need not, becauſe there is no ſuch diſtinction.

To the *third* exception the court ſaid, that the conviction ſet forth, that information was made to ſuch a one *being one of the juſtices*, &c. which muſt be intended that he was one at that time, and was ſufficient without ſaying *then*.

And ſo all the *exceptions* were over-ruled, and the conviction confirmed. *Vide Stra. vol.* 1. *p.* 711.

Trinity, 11 *Geo.* 2. *The King* v. *Gardner*.

The defendant was convicted by a juſtice of peace for keeping a gun, contrary to *ſtat.* 5 *Ann*, *c.* 14. And it was objected, that a gun is not mentioned in that ſtatute; and though there are many things for the bare keeping of which a man may be convicted, yet they are only ſuch as can be only uſed for the deſtruction of *game*, whereas a gun is neceſſary for the defence of an houſe, or for a farmer to ſhoot crows.

Per curiam. This was made a queſtion in the caſe of *The King* v. *King Eaſter* 3 *Geo.* but never determined. And on conſideration we are of opinion, that a gun differs from nets and dogs, which can only be kept for an ill purpoſe; and therefore this conviction muſt be quaſhed. *Vide Stra. vol.* 2. *p.* 1098.

Hilary, 13 *Geo.* 2. *Hooker* v. *Wilks*.

In an action of *debt* on *ſtat.* 8 *Geo. c.* 19. for the penalty of 30 *l.* incurred by uſing an hound to deſtroy *game*. After a verdict for the plaintiff, the judgment was arreſted; for *ſtat.* 5 *Ann c.* 14. has not the word *hound*, and the words *other engines* come after *nets*, &c. and are applicable only to *inanimate* things. And this being a *penal law*, cannot be extended. *Stat.* 22 & 23 *Car.* 2. *c.* 25. has indeed general words, *or any other dogs to deſtroy game*, but this is not a conviction on that ſtatute. *Vide Stra. vol.* 2. *p.* 1126.

See **Conviction.**

Gaming.

Michaelmas, 6 *W.* & *M.* *Walker* v. *Walker*.

See this caſe fully ſtated in page 342 of this work, under the head *Debt*.

Eaſter, 7 *W.* 3. *St. Leger* v. *Pope*.

See this caſe fully ſtated in page 342 of this work, under the head *Debt*.

Michaelmas, 7 *W.* 3. *Anonymous*.

Holt, Chief Juſtice. No *indeb. aſſump.* lies for money *won at play*, but for money ſtaked on a *wager* it does, but not otherwiſe, for when the money is in the cuſtody of a *third* perſon, there the winning the *wager* determines whoſe property it ſhall be. *Vide Mod. Rep. vol.* 12. *p.* 81.

Trinity, 9 *W.* 3. *Stanhope* v. *Smith*.

An action was brought on a note for money *won at play*, the defendant pleaded the ſtatute of *gaming*, and ſet forth, that at one ſitting he loſt 85 *l.* to the plaintiff, and 40 *l.* more to one *Y.* and on *demurrer* it was argued, that the act made no ſecurities void, neither was the winner to pay treble the value of the money *won*, unleſs it was above 100 *l.* for if *three* men ſhould each of them *win* 50 *l.* neither of them ſhould forfeit; for though it is more than 100 *l.* among them all, yet it is under that ſum to each, and the ſtatute makes no forfeiture, but where the perſon *winning* has got above 100 *l.* at *one* ſitting.

Per curiam. The plaintiff muſt have judgment, for the ſtatute intends a remedy, where more than 100 *l.* is loſt to *one* perſon, and at *one* ſitting; for if it be loſt to ſeveral, it is not within that act; as for inſtance, if a man loſes 95 *l.* to *one* man, and refuſes to play any longer with him, and then voluntarily loſes 10 *l.* to another at the ſame ſitting; this ſhall not defeat the *firſt* perſon of the money which he lawfully *won*. *Vide Mod. Rep. vol.* 5. *p.* 351.

Michaelmas, 9 *W.* 3. *Huſſey* v. *Jacob*.

This was an action on the *caſe* brought on a *bill of exchange* againſt the acceptor, wherein the plaintiff ſet forth, that the bill was drawn by Lord *Chandois* on the defendant, for the payment of 120 guineas to the plaintiff. Then he ſet forth the cuſtom of merchants, and that both the drawer, the plaintiff, and the acceptor, were perſons uſing trade and merchandize, and that the defendant had not paid the money, &c.

The plaintiff by proteſtation ſaid, that neither Lord *Chandois* or the plaintiff were perſons uſing merchandize at the time when the *bill of exchange* was drawn, or at any time afterwards. Then he pleaded, that after making the ſtatute againſt *gaming*, and before the ſaid bill was given, Lord *Chandois* and the plaintiff played with dice at a *game* called hazard; and that his Lordſhip, at one time, loſt 120 guineas to the plaintiff, and that for ſecuring the payment thereof, he drew this *bill of exchange* on the defendant, who accepted the ſame; and that by virtue of the ſaid ſtatute, the acceptance was void in law.

The plaintiff's council inſiſted, that the ſtatute againſt *gaming* cannot be pleaded in this action, becauſe it is no anſwer to the cuſtom of merchants, ſo that the declaration is true notwithſtanding this plea.

2dly, It is not averred in the plea, that the plaintiff, *Huſſey*, accepted the bill for ſecuring the payment of the money loſt at *play*; and without ſuch averment, it is not within the meaning of the ſtatute.

Per curiam. Judgment muſt be given for the defendant. *Vide Mod. Rep. vol.* 5. *p.* 175.

Trinity, 13 *W.* 3. *Anonymous*.

Holt, Chief Juſtice. If at *one* ſitting a perſon loſes above 50 *l.* to *one*, and ſo to another, he muſt pay it, for they are ſeveral contracts; ſo if *one* of them plays with falſe dice, and the other with fair ones, he that plays with the fair dice ſhall recover his *winnings*. *Vide Mod. Rep. vol.* 12. *p.* 540.

Roſtington's Caſe.

One covenanted, that his horſe ſhould run four heats with the horſe of *W. R.* for 30 *l.* each heat, which in all amounts to 120 *l.*

Adjudged, that though he wins every heat, he can recover no part of the money, for though they were *diſtinct wagers*, yet the contract was intire. *Vide Salk. vol.* 3. *p.* 175. *Raym. vol.* 1. *p.* 89.

Eggleton v. *Lewin*. Error.

On an *indebitatus aſſumpſit* for 20 *l.* *won at cards*, there was judgment by *default*, and a *writ of inquiry* executed, &

&c. and on a *writ of error* brought in the *Exchequer Chamber*, the *error* aſſigned was, that a general *indeb. aſſumpſit* would not lie for money won at play, but the greater number of the judges inclined to think that it would.

Holt, C. J. and *Pollexfen*, C. J. of *C. B.* however, held that it would not, becauſe there muſt be ſome meritorious act, as a conſideration to maintain ſuch action; it will lie againſt him who holds the *wager*, becauſe the law implies a promiſe to deliver the money to the *winner*. *Vide Salk. vol.* 3. *p.* 176.

Hilary, 2 *Ann.* *Smith* v. *Ary.*

See this caſe fully ſtated in page 28 of this work, under the head *Actions.*

Trinity, 2 *Geo.* *The King* v. *Dixon and Wiſe.*

This was an indictment againſt *Dixon* and his *wife*, charging that they and *each of them* did unjuſtly and unlawfully on ſuch a *day*, *and at divers other days and times*, *as well before as afterwards*, keep a *common gaming-houſe againſt the peace*, *and form of the ſtatute*, &c. To this indictment the defendants demurred.

The *firſt objection* taken againſt the indictment was, that it ſhould not have been brought againſt the huſband and wife, but the huſband only.

Per curiam. This objection would have weight in it, if the property or ownerſhip of the houſe was the matter in queſtion; but it ſignifies nothing here, where only a criminal management of the houſe, in which the wife may probably have as great, nay, a greater ſhare than the huſband, is the fact charged.

The *ſecond objection* was, that it was charged in the indictment, that they *and each of them*, kept a *gaming houſe*, &c. which was wrong; for two perſons cannot jointly and ſeverally keep an houſe; the keeping of the houſe by the huſband and wife is not a keeping of the houſe by the huſband only, or by the wife only; and cited 2 *Rol.* 51.

Per curiam. The caſe in *Rolle*'s is not applicable to the preſent caſe. For there the uſing of the trade, not being the offence, but the uſing the trade without having ſerved an apprenticeſhip, (an act to be performed by each ſingly and ſeverally) it was an offence that was in its own nature impoſſible to be committed jointly: whereas here this may be committed by both jointly; and the addition of *either of them* is but a further ſpecifying and corroborating the former charge.

3dly. It was objected, that this indictment was on a particular ſtatute, viz. *ſtat.* 33 *Hen.* 8. *c.* 9. *ſect.* 12. which ſtatute chalking out a particular method of proceeding, for the recovery of 40*s. per day* the party could not proceed by indictment.

Per curiam. Keeping a *gaming-houſe* is an offence indictable at *common law* as a nuiſance, nor will the concluſion of the indictment *againſt the form of the ſtatute* bar the party from ſupporting the indictment by *common law*, ſuppoſing it could not be maintained on the ſtatute.

But we are clearly of opinion, that an indictment is not taken away by any words in the ſtatute. The words of the act inſiſted on are, *to be recovered by*, &c. *or otherwiſe*; now all the remedies, or different ways of proceeding, beſides by indictment, having been enumerated before in the *ſtat.* theſe words, *or otherwiſe*, muſt be underſtood of indictment, or nothing.

4thly. It was objected, that if this were to be conſidered as an indictment for a nuiſance at *common law*, it would not be good for want of concluding *to the common nuiſance* of the King's ſubjects.

Per curiam. It is not neceſſary to conclude ſo here; the offence in its own nature importing that it is ſo. Beſides, the word *common* ſupplies this defect, if it were one.

Laſtly. It was objected, that as this indictment was laid, the penalty of 40*s. per day* given by this ſtatute could not be recovered; for it is not ſaid that *for the ſpace* of one day, or ſeveral days they kept, &c. but only that ſuch a day, &c.

Per curiam. Keeping a *common gaming-houſe* any part of the day is enough. Indeed more days might have been laid; for the time is ſo uncertain as to all but one day, that only 40*s.* is recoverable. So judgment was given for the King *niſi*. *Vide Mod. Rep. vol.* 10. *p.* 335.

Michaelmas 9 *Geo.* *Coleborne* v. *Stockdale.*

See this caſe fully ſtated in page 346 of this work, under the head *Debt.*

Michaelmas 10 *Geo.* *Anonymous.*

On a motion for an information againſt the defendant on an affidavit of the proſecutor, who made oath that he had loſt 15*l.* or thereabout, to the defendant at one ſitting; the words of *ſtat.* 9 *Ann. c.* 14. being, *any perſon winning at one time above the value of* 10*l. and being convicted thereof on an information, or indictment, ſhall forfeit five times the value*, &c.

The council on the other ſide objected, that the proſecutor had already indicted the defendant for the ſame offence, and that the grand jury had found the bill; which was true; but the defendant was not tried on it, becauſe it was quaſhed for inſufficiency.

However, the court would not grant the proſecutor leave to file an information, for that the grand jury had already found a bill, and though the indictment was quaſhed, they might find another bill for the ſame offence; therefore there was no reaſon for this court to interpoſe. *Vide Mod. Rep. vol.* 8. *p.* 187.

Trinity 9 *Geo.* 2. *The King* v. *Luckup.*

The defendant was convicted on an information on the *gaming act*, which ſays he ſhall forfeit *five* times the value, to be recovered by a common informer, on conviction. The court was moved, that a fine ſhould be ſet on the defendant if he refuſed to *ſpeak* with the proſecutor.

Per curiam. All the judgment we can give is, *that he be committed*; and a new action muſt be brought on that judgment for the forfeiture, which was thought ſufficient to deter offenders. In the caſe of recuſancy there is no other judgment. *Lutw.* 159, 162. 5 *Mod.* 431. *Cro. Car.* 504. *Co. Ent.* 362. Therefore the defendant was diſcharged without any fine or coſts. *Vide Strange, vol.* 2. *p.* 1048.

Trinity, 14 *Geo.* 2. *Bowyer* v. *Bampton.*

See this caſe fully ſtated in page 238 of this work, under the head *Bills of Exchange*, &c

Michaelmas, 15 *Geo.* 2. *Goodburn* v. *Marley.*

An action was brought for 15 *l.* won as a *wager* at an horſe race. And on a cauſe made and argued, it was determined, that the action would not lie; for *ſtat.* 16 *Car.* 2. *c.* 7. has theſe words *horſe racing*, and a great many other words which are not particularly mentioned in *ſtat.* 9 *Ann. c.* 14. but are within the general words *other game or games.* And the court ſeemed to be of this opinion in the caſe of *Oates* v. *Collins. Trin.* 6 *Geo.* 2. though it was never determined. 1 *Vent.* 253. The defendant had judgment. *Vide Strange, vol.* 2. *page* 1159.

Hilary 19 *Geo.* 2. *Barjeau* v. *Walmſley.*

The plaintiff and defendant *gamed* together at toſſing up for *five guineas* a time, and the plaintiff having won all the defendant's ready money lent him *ten guineas* at a time, and won it 'till the defendant had borrowed 120 *guineas.*

It was inſiſted for the defendant, that by *ſtat.* 9 *Ann. c.* 16. the plaintiff could not maintain an action; for by that act, "all notes, bills, bonds, judgments, mortgages, or other ſecurities, or conveyances, given, granted, drawn, entered into, or executed for money knowingly lent and advanced to *game* with, are

" made void," and the borrowing on an agreement to pay is a *ſecurity*.

Lee, Chief Juſtice. This is not a caſe within the ſtatute, for there is not the word *contract*, as in the ſtatute of *uſury*; and the word *ſecurities*, as it ſtands in this act, muſt mean *laſting liens* on the eſtate. The parliament might think there could be no great harm in a *parol* contract, where the credit was not likely to run very high; and therefore confined the act to written ſecurities. Wherefore the plaintiff obtained a verdict for 126 *l.* *Vide Strange vol.* 2. *p.* 1249.

Michaelmas, 1 *Geo*. 3. *Palmes Robinſon, Eſq*; v. *Ann Bland, Spinſter, Adminiſtratrix de bonis non of Sir John Bland, Bart. deceaſed.*

On a caſe reſerved at *niſi prius* in this cauſe on a *bill of exchange*, given for a debt won at *play* in *France*, the following queſtions (among others) came before the court.

1ſt, Whether the plaintiff is entitled to recover his *bill of exchange* by force of the writing.

2dly, Whether he is entitled to recover on the original *conſideration* and *contract* by the juſtice and equity of his caſe, *excluſive* of any aſſiſtance from the *bill of exchange*.

Lord *Mansfield*. As to the *firſt queſtion*, the defendant has objected, " That the conſideration of the " *bill of exchange* is wholly money won and lent at " *play*. Therefore by force of the writing, the plain- " tiff cannot by the law of *England*, recover ſuch ſe- " curity, being utterly void," and no doubt the law of *England* is ſo.

The *bill of exchange* is as a ſecurity void (being for a *gaming* debt) both in *France* and *England*. We may therefore lay the *bill of exchange* out of the caſe; it is very clear the plaintiff cannot recover on that *count*.

As to the *ſecond queſtion*, the other *counts* for money had and received to the plaintiff's uſe, and for money lent and advanced to him, I ſhall conſider it diſtinctly as to each part, the money *won*, and the money *lent*.

1ſt, As to the money *won*, by the rule of the law of *England*, no action can be maintained for it.

2dly, As to the money *lent*, the ſenſe of the legiſlature ſeems agreeable to the authorities cited.

Stat 16 *Car*. 2. *cap*. 7. does not meddle with money *lent* at *play*; but as to money (exceeding 100 *l.*) *loſt* and not paid down at the time of loſing it: it ſays, " That the *looſer* ſhall not be compellable to make it " good; but the *contract* and *contracts* for the ſame, " and for every part thereof, and all ſecurities ſhall " be void, *&c*." The words, " *contract and contracts* " *for the ſame*." are not in *ſtat*. 9 *Ann*. and I dare ſay were deſignedly left out; it only ſays, " That all " *notes, bills, bonds, judgments, mortgages*, or other ſe- " curities, *&c*. for money *won* or *loſt* at *play*, ſhall be " utterly void, *&c*." See this caſe more fully ſtated in page 338 of this work, under the head *Damages*.

Grants, *&c.*

Michaelmas, 3 *W.* & *M.* *Germain or Germin and Wife*, v. *Orchard*.

In an action of *treſpaſs* with *force and arms*, *not guilty* was pleaded, and iſſue was joined thereon, and as to the other part of the treſpaſs to ſuch a time, the ſtatute of limitations was pleaded; on which there was a demurrer; and as to the reſidue a juſtification, and iſſue on it, and a *venire* to try that, and inquire of the damages on the demurrer: accordingly there was an inquiry of damages as to the iſſue, but not on the demurrer, and as to that the plaintiff entered a *non pros*, and took judgment for the other. The caſe as to the juſtification was found as follows, by the ſpecial verdict, *viz*. The leſſee for 1000 *years* by deed, reciting the original leaſe of the lands, *grants* the ſaid *lands*, together with the ſaid recited leaſe to the grantee, his executors, adminiſtrators, and aſſigns, and all writings relating to the premiſes, *To hold* to the *grantee* his executors, *&c*. after the death of the *grantor* and his wife for the reſidue of the term of 1000 years.

Holt, Chief Juſtice. If a termor *grants* the lands, the *grantee* is but tenant at will; for it does not appear that the *grantor* meant to paſs his whole intereſt, and this is enough to ſatisfy the grant; but if a termor deviſes the land, all his term paſſes; for the deviſee cannot be tenant at will, becauſe the deviſor muſt die before the deviſe can take effect, and one cannot be tenant at will to a dead man. Alſo he agreed the word *leaſe* would paſs the term, but here it is the recited leaſe, which can ſignify nothing but the deed, therefore he held the *habendum* was void; *otherwiſe* had it been a *grant* of the crown to *hold* after his and his wife's deceaſe, there the *habendum* ſhould be rejected as repugnant, and that being rejected, there would be enough in the premiſes to paſs the eſtate, but here was nothing in the premiſes that could paſs the term. And as to the iſſue on the *force and arms*, on which nothing was found, he held that was only form, and that not finding damages on the demurrer, was helped by the *non pros* entered as to them. Therefore judgment was given for the plaintiff. And on that judgment a *writ of error* was brought in the *Exchequer-Chamber*, where it was reverſed; and the court there held, that by the *grant* of the lands in the premiſes to the grantee, his executors, adminiſtrators, and aſſigns, the whole term of 1000 years were transferred; and ſince by the premiſes the whole term paſſed preſently, but by the *habendum* not till after the death of the grantor and his wife, of conſequence the *habendum* was repugnant to the premiſes, and void, And *Trin*. 6 *W.* & *M.* the judgment of the *Exchequer-Chamber* was affirmed in the *Houſe of Peers*.

N. B. In this caſe a diſtinction was made between the operation of a *grant* and a deviſe. If A. *grants* to B. *generally*, the term is in him only at the will of A. but ſuch a deviſe paſſes the whole term to B. elſe he would have nothing; for ſhould it be like a *grant* at will only, then the will could not commence till the death of A. and ſo inſtantly it would be determined by his death. *Vide Salk*. *vol* 1. *p*. 346. *Mod. Rep. vol*. 12. *p*. 11.

Hilary, 4 & 5 *W.* & *M.* *Harcourt* v. *Fox*.

On a ſpecial verdict, the queſtion was, whether the plaintiff being nominated *clerk of the peace* by *John* Earl of *Clare*, had a good title to hold that office *during life*, or whether it was dependant on the *cuſtos rotulorum*, and determined by his removal.

Per curiam. By *ſtat*. 1 *W.* & *M.* the *cuſtos* has power to appoint a perſon to execute this office by himſelf or deputy, *for ſo long time only as he ſhall demean himſelf well*, &c. which does plainly import an *eſtate for life*: and the clauſe would have the ſame effect if the word *only* had been left out; for if the power is given to a tenant for life to make a leaſe for *twenty-one* years *only*, this would ſignify for ſo many years abſolutely.

If this clauſe has not a conſtruction to give him an eſtate for life, it ſignifies nothing; for if the cauſe is taken to be no otherwiſe than as it ſtood in *ſtat*. 37 *H*. 8. then this clauſe is of no uſe; but it is plain that the words in that act relating to this matter are omitted in this new law, *viz*. *that he ſhall continue ſo long as the other is cuſtos*; and a better and more fixed eſtate is given, *viz*.

Stat. 1 *W.* & *M.* revives that of *H*. 8. as to the nomination of a *cuſtos*, but makes ſeveral alterations from it when it mentions the *clerk of the peace*, as has been well obſerved at the bar; ſo that the deſign of this later act was to abridge the power of the *cuſtos*, and enlarge the eſtate of the clerk, and to ſettle him therein, that he might go on cheerfully in his buſineſs; for when places depend on contingencies, it occaſions embezzling records, and neglect in offices; and for this reaſon Lord *Hobart* was of opinion that the Chief Juſtice cannot grant thoſe offices which are in his gift for leſs time than for life.

Therefore the clerk of the peace being in this office by virtue of this act, *for ſo long time as he ſhall demean him-*

ſelf well; thoſe words ſhall be conſtrued moſt favourably to anſwer the intent of the law makers, whoſe deſign was to have the office well ſupplied by a man able and well ſkilled in the laws, which will be effected when the officer has an *eſtate for life*; and for theſe reaſons judgment was given in *Trinity* term following for the plaintiff, and afterwards affirmed in parliament. *Vide Mod. Rep. vol. 4. p.* 167.

Trinity, 7 *W.* 3. *The King* v. *Kempe or Kemp.*

See this caſe fully ſtated in page 432 of this work, under the head *Eſtates.*

Trinity, 7 *W.* 3. *The King* v. *Hornby.* Error.

A petition to the treaſurer and barons of the *Exchequer*, was exhibited by *Joſeph Hornby Hil.* 1 *W. & M.* for the allowance of letters patent *granted* by *Charles* 2. for payment of an annuity out of the *exciſe*, *&c.* The Attorney-General demurred generally. The court gave judgment for the petitioner *Hornby*; whereon the Attorney-General brought a *writ of error*; and the matter was argued in the *Exchequer Chamber*, where the Lord Keeper and *Treby*, Chief Juſtice of the *C. B.* were of opinion to reverſe the judgment, contrary to the opinion of *Holt*, Chief Juſtice: The ground on which the Lord Keeper and Chief Juſtice *Treby* gave their opinion was, that the patentees had not taken a proper remedy by petition to the barons, who have no power or controul over the King's treaſury, *&c.* and that their only remedy was by petition to the King himſelf. *Vide Mod. Rep. vol.* 5. *p.* 29.

Hilary, 8 *W.* 3. *The King* v. *The Biſhop of Cheſter & al.*

See this caſe fully ſtated in page 53 of this work, under the head *Addition.*

Lent Aſſizes, 10 *W.* 3. *Anonymous.*

It was ruled by *Holt*, Chief Juſtice, at *Dorcheſter*, that if *A.* was poſſeſſed of a term for an *hundred* years, and *grants* the land, the *habendum* for *forty* years, to begin after his death; it is a good *new leaſe*: and a man poſſeſſed of a term for *twenty* years, may grant the lands for *nineteen* years, to commence after his death; and it will be good for ſo many of the *twenty* years, as ſhall be unexpired at the time of his death. *Vide Raym. vol.* 1. *p.* 737.

Hilary, 13 *W.* 3. *Smartle* v. *Penhallow.*

See this caſe fully ſtated in page 434 of this work, under the head *Eſtates.*

Eaſter, 4 *Ann.* *Anonymous.*

Per curiam. A *grant* or authority to come on a perſon's lands, and to hunt there, is but a licence and no more; but if it is to take the profits, it is a *leaſe* at will; ſo if it is to take profits for a year, it is a *leaſe* for a year, for this paſſes an intereſt, the other is only an authority to do particular acts. *Vide Salk. vol.* 3. *p.* 223.

Eaſter, 4 *Ann.* *Anonymous.*

Adjudged, That if a licence is *granted* to a man to uſe another's ground or yard, he has thereby an intereſt in it; ſo that the licence is not revocable, till it amounts to a *leaſe at will*, and he thereby has ſuch a poſſeſſion, as not to be turned out by a recovation, but muſt be diſpoſſeſſed by an *ejectment*. *Vide Mod. Rep. vol.* 11. *p.* 42.

Trinity, 10 *Ann.* *Thomlinſon* v. *Dighton.*

See this caſe fully ſtated in page 360 of this work, under the head *Deed.*

Hilary, 11 *Ann.* *Michell* v. *Reynolds.*

Parker, Chief Juſtice. The reaſon of the diſtinction taken in 1 *Inſt.* 106. 8. between a *feoffment* and a *bond*; that a *feoffment* to a man on condition he will kill *B.* ſhall be good; but a bond with ſuch a condition ſhall be void, is this: becauſe the law ſecures to him the poſſeſſion of the land, without performing the condition; and in the other, diſcharges him from the penalty of the bond; ſo that the law has the ſame end in view in making the *feoffment* good, and the bond void, *viz* the prevention of the fact. *Vide Mod. Rep. vol.* 10. *p.* 134.

Hilary, 1 *Geo.* ——— v. *Ormſton.*

See this caſe fully ſtated in page 232 of this work, under the head *Bills of Exchange*, *&c.*

Trinity, 5 *Geo.* *Dr. Bentley* v. *The Biſhop of Ely.*

In *prohibition* againſt the Biſhop of *Ely*, as viſitor of *Trinity College* in *Cambridge*; the *two* following queſtions were ſtated by the court:

1ſt, Whether by *ſtat.* 6 *Ed.* 6. ſet forth in the plea, the Biſhop of *Ely*, for the time being, is appointed *General Viſitor* of this college?

2dly, Whether the crown, having parted with the *general viſitatorial* power, might afterwards *grant* ſtatutes to the college.

On theſe queſtions, the cauſe was argued ſeveral days in the laſt term; and this term, *Raymond*, Chief Juſtice, delivered the opinion of the court, as follows:

Raymond, C. J. A *general viſitatorial power*, paſſed to the Biſhop of *Ely*, by *ſtat.* 6 *Ed.* 6. becauſe the grant was to the Biſhop of *Ely* which extends to every Biſhop of *Ely*, for the time being, and therefore differs from a *grant* to the Biſhop of *Ely*, in his natural capacity, for in that caſe it would only have enured to the then Biſhop for his life. The conſtruction made on the *grants of the crown*, is, that where the intention is plain, the words are taken moſt favourably for the ſubject. To the *ſecond* queſtion, I anſwer, that the exerciſe of ſuch a power by the crown, ever ſince the making of *ſtat.* 6 *Ed.* 6. is an argument of the legality of it. The ſingle queſtion therefore to which I ſhall confine myſelf in delivering the opinion of the court, will be this, whether the citation that iſſued to ſummon Dr. *Bently* to appear before the Biſhop of *Ely*, as *viſitor*, was well founded? For as that is the leading proceſs, and the ſole baſis of all the ſubſequent proceedings below, if it ſhall appear to have been warranted by no legal authority in its *firſt* emanation, whatever has been done purſuant to it, was without juriſdiction.

The citation, or rather the power iſſuing it, as here claimed, is expreſsly founded on the 40th chapter of the ſtatutes of Queen *Elizabeth*, by which, as it is alledged, the Biſhop of *Ely* is *ſpecially* conſtituted *viſitor* to examine the maſter, *&c.*

This might require to be conſidered under *two* general heads.

1ſt, On the words and intention of this *ſtatute.*

2dly, Suppoſing the words ſufficient, and the intention plain, to create him a *ſpecial viſitor*, yet how far the operation of either may be defeated by ſome legal impediment? Which laſt I ſhall have occaſion to ſay very little to; as my brethren and I are of opinion, that neither the letter, view, or deſign of this ſtatute ever extended to create him a *viſitor*, but ſuppoſed him ſo already; and only made new regulations to be obſerved under his direction, already in the legal poſſeſſion of the juriſdiction.

We are therefore clearly of opinion, that the citation is illegal, and that being the foundation, all ſubſequent acts muſt be ſo too, and therefore the *prohibition* muſt ſtand. *Vide Fitz-Gibbons, p.* 305.

Michaelmas, 8 *Geo.* *Smith* v. *Trigg.*

See this caſe fully ſtated in page 438 of this work, under the head *Eſtates.*

Michaelmas, 11 *Geo. Wyvil* v. *Stapleton. Shelburn* v. *Eundem.*

See this caſe fully ſtated in page 16 of this work, under the head *Accounts.*

Hilary, 30 *Geo.* 2. *Sir John Trelawny, Bart.* v. *The Biſhop Wincheſter.*

See this caſe fully ſtated in page 389 of this work, under the head *Eccleſiaſtical Matters*, &c.

Hilary, 30 *Geo.* 2. *The Earl of Bath* v. *Abney, Spinſter.*

See this caſe fully ſtated in page 439 of this work, under the head *Eſtates.*

Guardian *ſee* Infant.

Habeas Corpus.

Eaſter, 7 *W.* 3. *The King* v. *Bethell or Bythell.*

See this caſe fully ſtated in page 263 of this work, under the head *Commitment.*

Michaelmas, 7 *W.* 3. *The King* v. *Leaſon and Edwards.*

The defendants were taken by a meſſenger, and kept in cuſtody ſeveral days in *Middleſex*; and the beginning of this term they entered their prayer according to the *habeas corpus* act. After being brought before Sir *William Trumball*, ſecretary of ſtate, he committed them to the *Marſhalſea* for *high-treaſon* in conſpiring the death of the King, which fact was ſuppoſed to be committed in *Surrey*. And now being brought to the King's Bench by *habeas corpus*, the court was moved that they ſhould be bailed. But denied by the court, for the intent of the *habeas corpus* act was, that the prayer ſhould be entered where the party ought to be tried; which in this caſe muſt be at the aſſizes in *Surrey*, for the *K. B.* cannot originally hold plea of felony ariſing out of *Middleſex*, and therefore the *K B.* will remand the priſoners. *Vide Raym. vol.* 1. *p.* 61.

Hilary, 8 *W.* 3. *Montgomery's Caſe.*

Lord *Montgomery* being indicted in *London* for high-treaſon, for conſpiring the death of the King, entered his prayer in the *K. B.* but it was adjudged that it ought to be entered at the *Old Bailey*. *Vide Raym, vol.* 1. *p.* 61.

Hilary, 8 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. If the Chief Juſtice of the King's Bench commits a perſon to the cuſtody of the marſhal by his warrant, he ought not be brought to the bar by rule, but by *habeas corpus*. *Vide Salk. vol.* 1. *p.* 349.

Michaelmas, *W.* 3. *The King* v. *Row and Kendall.*

See this caſe fully ſtated in page 263 of this work, under the head *Commitment.*

Michaelmas, 8 *W.* 3. *Clark's Caſe.*

See this caſe fully ſtated in page 263 of this work, under the head *Commitment.*

Michaelmas, 9 *W.* 3. *De Caſtro's Caſe.*

The defendant being a foreigner, as the council urged, and therefore not intitled to have an *habeas corpus*, becauſe not within the *hab. corp.* act; the court was moved that he might be diſcharged; for if an *hab. corp.* had been brought, the Attorney General would have returned that he was an *alien*. This *De Caſtro* was committed by an order of the Secretary of State for being a *ſpy*, and had been impriſoned a year and an half, and then admitted to bail, and now no proſecution being brought againſt him, he was diſcharged. *Vide Forteſcue, p.* 195.

Michaelmas, 11 *W.* 3. *Anonymous.*

If one in priſon in the *Compter* be removed into the *King's Bench* by an *habeas corpus ad reſpond.* and intending going over to the *Fleet*, procures ſome friend to bring a *habeas corpus* to remove him thither; he ſhall not be removed thither till he has anſwered to the cauſe here, and he ſhall not compel the plaintiff to follow after a prowling defendant; and ſo *vice verſa* of the *Common Pleas*; each court ſhall retain the defendant, in which he is firſt attached, and after he has anſwered there, you may carry him where you will. This is fit to be the ſettled courſe, if there be any difference between the two courts *Vide Salk. vol.* 1. *p.* 350.

Hilary, 12 *W.* 3. *The King* v. *Margaſon.*

The defendant was committed to *Newgate* on *ſtat.* 8 & 9 *W.* 3. on refuſal of paying ſuch money as was in his hands, as collector of the taxes; and removed up by *hab. corp.* on the laſt day of the laſt term; and then the Chief Juſtice being abſent, a rule was made to bring him up the *firſt* day of this term, without filing the return.

Holt, Chief Juſtice. Tho' ſuch a rule might be well for bringing a perſon up on a day in the ſame term, without the filing the writ, yet it ought not to have been to bring him up on a day in another term, without filing the return; for he cannot now be brought up on a writ returnable in a *precedented* term, by ſuch a rule, without the return thereof be filed; therefore you muſt take out a new writ. And this being a cauſe concerning the King's revenues, you had beſt give notice to the Attorney General; for we ought not to file a return of any ſuch matter removed hither, without notice being given to him. *Vide Mod. Rep, vol.* 12. *page* 441.

Hilary, 12 *W.* 3. *Anonymous.*

The court was moved for a *procedendo*, becauſe the plaintiff, after he had given notice of trial, removed the cauſe himſelf by *hab. corp.*

Per curiam. Let a *procedendo* go, not but that a plaintiff may remove his cauſe himſelf, but this is a mere vexation to do it ſo late, and a *procedendo* was awarded, having been done before. *Vide Forteſcue p.* 244.

Trinity, 12 *W.* 3. *The King* v. *Fowler.*

Fowler was brought up on an *habeas corpus* directed to the ſheriff or gaoler; whereupon was returned the warrant from the ſheriff for taking him, and that was upon a writ of *excommunicato capiendo* for *ſubſtraction of tithes* and other *eccleſiaſtical duties.*

Holt, Chief Juſtice, and the court held,

1ſt, That the *habeas corpus* being directed in the diſjunctive to the *ſheriff* or *gaoler* was wrong, and that all the precedents were otherwiſe. That where a man is taken on a warrant of the ſheriff, in purſuance of a writ to the ſheriff, the *habeas corpus* ought to be directed to the ſheriff, for the party is in his cuſtody, and the writ itſelf muſt be returned. It is otherwiſe, where one is committed to the gaoler immediately, as in *criminal caſes.*

2dly, The writ of *excommunicato capiendo* itſelf ought to be returned; and it is not ſufficient to return the warrant, becauſe the warrant may be wrong when the writ is right; and though the warrant may be wrong yet if the writ is right, the party is rightfully in cuſtody of the ſheriff. And for theſe reaſons the writ was quaſhed. *Vide Salk. vol.* 1. *p.* 350. *Raymond, vol.* 1. *p.* 586.

Trinity 12 *W.* 3. *Anonymous.*

An *habeas corpus* went to the *Stannary Court* to which an inſufficient return was made, and therefore it was diſallowed.

Per curiam. The warden of the *Stannaries* muſt be *amerced*, and you may go to the coroners and get it *affeered* and *eſtreat* it, (you know my Lord *Bath's Amerciament* is 5 *l.*) and another *habeas corpus* muſt go for the inſufficiency of the return of the firſt, and upon that the body and the cauſe muſt be removed up: If another excuſe be returned, we will grant an attachment. *Vide Salk. vol.* 1. *p.* 351.

Trinity, 12 *W.* 3. *Anonymous.*

On a return to an *habeas corpus* moved for to diſcharge the defendant, it appeared, that he was committed by *five* juſtices of *Surrey* for a miſbehaviour; but it not appearing in the commitment that he was committed for want of ſureties for his good behaviour, the priſoner was diſcharged. *Vide Forteſcue, p.* 242.

Trinity, 12 *W.* 3. *The King* v. *Daviſon.*

See this caſe fully ſtated in page 177 of this work, under the head *Bail.*

Hilary, 13 *W.* 3. *Taylor* v. *Reynolds.*

See this caſe fully ſtated in page 496 of this work, under the head *Franchiſes, &c.*

Hilary, 13 *W.* 3. *Anonymous.*

Per curiam. A perſon committed to the Marſhal by the court, may be brought up by rule of court, but one committed by a judge in his chambers, cannot be brought up without an *hab. corp.* to which a return may be made. *Vide Mod. Rep. vol.* 12. *p.* 641.

Eaſter, 13 *W.* 3. *Mr. Archer's Caſe.*

The court was moved for an *habeas corpus* returnable immediately, to be directed to *John Archer*, the father, to bring up the body of *Eleanor Archer*, his daughter. The motion was founded on two *affidavits*, made by ſervant maids; they made oath, that the father ſwore he hated her more than any thing living, and ſhould be glad of an opportunity of killing her, and if he had, he would ſhoot her thro' the head, and that ſhe often ſaid ſhe was afraid of being murdered in her bed by him.

On the council's urging that an *hab. corp.* had been granted on the ground of a letter, and in the caſe of a wife, *Holt*, Chief Juſtice, ſaid, it had been granted on leſs than that. It was argued, that ſhe was *eighteen* years of age, ſo might have choſe her guardian, though her father was living.

Holt, Chief Juſtice. Theſe writs are never returnable *immediately* in term time, but on a day certain.

It was argued by the council on the other ſide, that her father was afraid ſhe would be ſtolen away, and that it had been attempted to ſteal her away, ſhe having a great fortune, and therefore he was obliged to keep her with ſome ſtrictneſs.

Per curiam. Let an *habeas corpus* iſſue to bring her up to be examined; it being *ſixty* miles off, take till this day ſevennight.

Then it was moved, that ſhe might be conducted by the *poſſe*, for this might be a contrivance to ſteal her away.

Holt, Chief Juſtice, ſaid, perhaps that might be granted on *affidavit*, but he never knew it done; therefore it was denied.

According to this writ the daughter came into court, on the day appointed, with her father, and the writ not being returned, the court ſaid, they could not proceed till the writ was returned and filed, and the writ was immediately returned in court, and the return was, that he had her ready to be delivered to the court.

Holt, Chief Juſtice, ſaid, he would conſider of this return, for thereby you confeſs ſhe has been detained, and returning no cauſe at all, we may conſider whether ſhe is not at liberty. But on examination of the daughter by the court ſecretly, ſhe diſowned her father was unkind to her, that he had never beat her, only once gave her a ſlight blow with his glove, and ſaid ſhe was willing to go home and live with her father again; and the court ordered ſo accordingly, ſo ſhe went away with her father. *Vide Forteſcue, page* 196.

Michaelmas, 13 *W.* 3. *Anonymous.*

A priſoner was brought up by a *habeas corpus*, returnable at a day certain, and the goaler did not bring him into court; but carried him back, and brought him the next day.

Holt, C. J. This being a writ returnable at a day certain, you cannot bring him in at another day by virtue of it; *otherwiſe*, if the writ was returnable *immediately*; and the goaler was ruled to be at the charge of a new writ. *Vide Mod. Rep. vol.* 12. *p.* 564.

Michaelmas, 13 *W.* 3. *Paulhill* v. *Powell.*

See this caſe fully ſtated in page 26 of this work, under the head *Actions.*

Michaelmas, 13 *W.* 3. *Nailor's Caſe.*

One *Nailor*, an attorney of the court of *C. B.* was arreſted in *London*, on a plaint levied in *one* of the *Sheriff's courts* there, and was carried to the *Compter.* A writ of *ne exeat regno* iſſued out of *Chancery* againſt him, which was delivered to the ſheriff while he was there. On which *Nailor* made application to Mr. Juſtice *Turton*, at his chambers, and afterwards to Chief Juſtice *Holt*, to have an *habeas corpus* to remove him into the *Marſhalſea*, actions being entered againſt him in this court; and an order was made that he ſhould be moved into this court; on which it was moved, that the *hab. corp.* ought not to be granted in this caſe, 1ſt, Becauſe the writ of *ne exeat regno* commands the ſheriff to take ſecurity, and to tranſmit it into *Chancery*, which he cannot do, if this *hab. corp.* ſhould iſſue out of this court. 2dly, They in *Chancery* only know what ſecurity is ſufficient, being only conuſant on what ground this writ was granted. 3dly, They in *Chancery* can only grant a *ſuperſedeas.*

Per curiam. We are of opinion, that the *hab. corp.* ought to be granted, that this court may receive and judge of the ſecurity taken, and that he ought to remain there, and then they may grant a *ſuperſedeas.* Adjourned. *Vide Raym. vol.* 1. *p.* 696.

Hilary, 1 *Ann.* *Anonymous.*

After an interlocutory, and before final judgment in an *inferior court*, an *habeas corpus cum cauſa* was brought: before the return of the writ, the defendant died, and a *procedendo* was awarded; becauſe by *ſtat.* 8 & 9 *W.* 3. *c.* 11. the plaintiff may have a *ſcire facias* againſt the executors, and proceed to judgment, which he cannot have in another court, otherwiſe he would be deprived of the effect of his judgment, which would be unreaſonable. *Vide Salk. vol.* 1. *p.* 352.

Hilary, 1 *Ann.* *Geery* v. *Hopkins.*

See this caſe fully ſtated in page 449 of this work, under the head *Evidence.*

Hilary, 1 *Ann.* *Hollingſhead's Caſe.*

See this caſe fully ſtated in page 265 of this work, under the head *Commitment.*

Eaſter, 1 *Ann.* *Yoxley's Caſe.*

One *Yoxley* was committed by the Earl of *Nottingham*, till he ſhould be delivered by due courſe of law, for refuſing to be examined, and anſwer whether he was a *Jeſuit or not*, according to *ſtat.* 35 *Eliz. c.* 2. which impowers the juſtices to examine and commit him if he refuſes to anſwer ſuch queſtions; and the court held the commitment naught, becauſe the ſtatute was not purſued; and that this was a kind of conviction or judgment to be founded upon the ſtatute. The court held further that they had a power to examine, and he being examined, made anſwer, *No Jeſuit*; and was accordingly diſcharged. *Vide Salk. vol.* 1. *p.* 351.

Trinity, 1 *Ann.* *Dowler* v. *Keite.*

The defendant was taken into cuſtody by the officers of the court of *Admiralty*, by way of execution, being condemned by a ſentence there. And intending to procure his liberty, he perſuades the plaintiff to ſue a *hab. corp. ad reſpondendum* out of this court, to the intent that he ſhould be turned over to the *Marſhalſea*, he being in fact indebted to the plaintiff. And being brought into court, the plaintiff's council moved, that the defendant might be committed to the *Marſhalſea*: and urged, 1ſt, That if it were denied, there would be a failure of juſtice, becauſe the ſheriff could not arreſt and take the defendant out of the *Admiralty* priſon; that this court would not permit a failure of juſtice. And he cited 2 *Inſt.* 23. 4 *Inſt.* 71. *W. Jones* 380. 2dly, That a perſon may be charged in cuſtody of the *Marſhal* with the ſentence of another court, which this court cannot execute; as a man committed by *Chancery* on a decree there, may be turned over to the *Marſhal* of the *King's Bench*, on a *habeas corpus*. 2 *Roll. Abr.* 69. 4 *Inſt.* 29. *Hard.* 476. but not allowed. For tho' on a *hab. corp. ad ſubjiciendum*, this court on a charge of treaſon or ſelony, would have turned the defendant over to the *Marſhal*; or if a bill had been filed againſt him, ſo that he had been in cuſtody of the *Marſhal* before; but yet in this caſe the court cannot do it, becauſe there is no plea in this court at this time depending againſt him; and it cannot be, becauſe he is not *in the cuſtody of the Marſhal*, and he was remanded by the whole court. *Vide Raym. vol.* 2. *p.* 789.

Trin. 1 *Ann.* *Dounci* v. *Keach.*

An *habeas corpus* iſſued to remove *K.* from the priſon of the *Admiralty* where he lay in execution upon a ſentence, to anſwer to an action to be brought againſt him here. Upon the return it was moved that the defendant might be committed here, for that there was no other way to ſue him; for he was not chargeable in the priſon of the *Admiralty*, and there ought not to be a failure of juſtice.

Holt, C. J. ſaid, this was new: that tho' the proceedings of the *Admiralty* were by the *civil law*, yet they were ſupported by the cuſtom of the realm, and this court muſt not elude their proceſs. He inquired as to the action, and thinking it only a pretence, ſaid, there being no action pending here, conſequently they ought not to commit him, and the plaintiff could not declare againſt him till in cuſtody, otherwiſe, if an action had been depending: ſo the defendant was remanded. *Vide Salk. vol.* 1. *p.* 351. *Forteſcue*, *p.* 245.

Michaelmas, 1 *Ann.* *Anonymous.*

Holt, Chief Juſtice. An *habeas corpus* cannot be granted after judgment. *Vide Mod. Rep. vol.* 7. *p.* 118.

Michaelmas, 1 *Ann.* *Anonymous.*

An *hab. corp. cum cauſa*, iſſued to remove a cauſe out of *Windſor* court, it was *teſted* the 15th of *October*, and returnable the laſt day of *Michaelmas* term. To this writ they returned according to the ſtatute, that iſſue was joined before: but the plaintiff moved for a *procedendo*, becauſe the return was ſo long, and for that ſole cauſe only a *procedendo* was granted. *Vide Forteſcue*, *p.* 268.

Michaelmas, 1 *Ann.* *The Queen* v. *Dr. Watſon.*

This term Dr. *Thomas Watſon*, formerly Biſhop of *St. David*'s, being arreſted on an *excommunicato capiendo*, after an excommunication in the ſpiritual court for non-payment of coſts of the ſuit in which he was condemned, was brought into this court on a *hab. corp. ad reſpondendum* J. S. *of a plea of debt*, &c. and on motion by the council for *J. S.* that he might be committed to the *Marſhalſea*, he was remanded, becauſe no ſuit was depending here againſt him, the bill of *Middleſex* not being returnable till next term. *Vide Raym. vol.* 2. *p.* 789.

Trinity, 3 *Ann.* *Fazacharly* v. *Baldo.*

On a *habeas corpus* to the ſheriffs of *London*, they returned an action on a *bye-law* with a penalty for not weighing at the city-beam. The court was moved that the return might be filed, for otherwiſe the party could have no remedy if the return was falſe, and that there was no inconvenience on the other ſide; for the record might be taken off the file at any time the ſame term. 1 *Roll. Rep.* 85. At leaſt a *procedendo* might be awarded. 1 *Lev.* 93. 1 *Keb.* 133, 170.

Holt, Chief Juſtice. 1ſt. If a record be filed here, it can never be ſent down or remanded, either in the term it is filed, or any other, and that is plain by the act of 6 *H.* 8. *c.* 6. which enables this court to do it in caſe of *felony*, which otherwiſe they could not have done.

2dly. The record itſelf is never removed by a *habeas corpus*, as it is on a *certiorari*, but remains below, and the return is only an account or hiſtory of their proceedings ſtated and ſent up to the ſuperior court to judge and determine the matter there; therefore if a cauſe be removed hither by *habeas corpus*, the plaintiff here muſt begin *de novo*, and declare againſt the defendant as *in cuſtody of the Marſhal.*

3dly. The *habeas corpus* ſuſpends the power of the court below, ſo that if they proceed, the proceedings would be void, *and before no judge.*

4thly. The return in this caſe may be filed, becauſe the very record below is not returned, and therefore will not be thereby filed; of conſequence a *procedendo* may be granted, becauſe it will not ſend out any record filed in this court, but takes off the ſuſpicion they were under by the *habeas corpus*. Accordingly the writ was filed, and afterwards a *procedendo* was awarded. *Vide Salk. vol.* 1. *p.* 352. *Mod. Rep. vol.* 6. *p.* 177.

Michaelmas, 3 *Ann.* *French's Caſe.*

The defendant being out on bail in an action in this court, was taken on an *extent* at the Queen's ſuit; the bail brought him up by a *habeas corpus*, and prayed he might be committed to the Marſhal in diſcharge of his bail; and notwithſtanding great oppoſition was made by the Attorney-General, he was turned over, becauſe the action here was precedent to the Queen's *extent*. *Vide Salk. vol.* 1. *p.* 353.

Hilary, 4 *Ann.* *Hetherington* v. *Reynolds.*

An action was brought in an *inferior court* againſt a a *feme ſole*, who afterwards married, and the *Baron* brought a *habeas corpus* declaring in the ſame manner as in the inferior court, againſt the *feme* only. The defendant pleaded in *abatement*, that ſhe was a *feme covert*, and the plaintiff replied the proceedings in the *inferior* court, and that the cauſe was originally againſt the *feme ſole*; to which the defendant *demurred*.

Holt, Chief Juſtice. An *habeas corpus* does not remove the record, though it does the cauſe, but a *certiorari* removes the record and cauſe too, on which the party has a day here, and is entered on record, and ſo is the plaint; and we take notice when the proceedings begin; beſides a *certiorari* goes to the judge, but an *habeas corpus* to the officer, and on an *habeas corpus* the record is not here, but the cauſe begins *de novo*; and the declaration is againſt the defendant *in cuſtody of the Marſhal of the Marſhalſea*, &c.

Suppoſe before *ſix* years are elapſed, a man ſues in an *inferior court*, and the defendant brings an *hab. corp.* and *ſix* years are elapſed before the declaration in this court on the *hab. corp.* he cannot take the advantage of the ſtatute without pleading this ſpecial matter, and that he had a right to his action when the ſame was begun below, and it ſhall not be in the power of the defendant to deprive him of that right, by his removing the cauſe; for if a ſuit be abated, and *ſix* years elapſe, he ſhall bring another action by *journey's accounts*, for he ſhall not loſe the benefit he had at firſt. So if a man bring an action and dies, his executor ſhall. *Vide Forteſcue*, *p.* 269.

Eaſter, 4 *Ann.* *The Queen* v. *Layton.*

See this caſe fully ſtated in page 265 of this work, under the head *Commitment.*

Michaelmas, 4 *Ann.* *Crackall* v. *Thompſon.*

The defendant, pending an action againſt him in this court, was taken on a warrant on a criminal matter, and committed to the *Compter*, and afterwards was there charged with an *extent* for the Queen. And he was brought up by *habeas corpus* at the ſuit of the plaintiff in this action, in order to be declared againſt in cuſtody of the Marſhal, and Mr. Attorney-General oppoſed it, becauſe the cuſtody of the Marſhal was precarious, and he would let him eſcape as he did *French*; and this caſe differed from that, becauſe by the late act of parliament the plaintiff might declare againſt him in cuſtody of the ſheriff, whereas the bail had been without remedy, if *French* had not been committed; and as to the defendant's being arreſted on criminal proceſs, that was nothing; for though one ſo arreſted cannot be charged at the ſuit of a ſubject in any action, without leave of the court, yet the Queen may charge him: and the defendant was remanded. *Vide Salk. vol.* 1. *p.* 534.

Michaelmas, 4 *Ann.* *Anonymous.*

An *Habeas corpus ad reſpond.* was granted to the County Palatine of *Cheſter*, and afterwards *ſuperſeded* on motion; precedents being cited. *Vide Salk. vol.* 1. *p.* 354.

Michaelmas, 8 *Ann.* *The Queen* v. *Mickae.*

A motion was made for an *habeas corpus* to bring up the body of the defendant, who was charged with picking pockets, and offered to bring unqueſtionable bail, and to ſend down a tipſtaff to enquire of his reputation.

Holt, Chief Juſtice, though we have a diſcretionary power, yet it being ſworn, that he was charged with the fact, I think we ought to refuſe to bail him, which (on conſultation with his companions,) he accordingly did. *Vide Mod. Rep. vol.* 11. *p.* 261.

Michaelmas, 10 *Ann.* *Leach* v. *Page.*

The court was moved for a *ſuperſedeas* to an *habeas corpus cum cauſa ad faciend & recipiend*, 'and alſo *ad reſpond*' directed to the *Mayor's Court* in the city of *Cheſter*, in that county palatine; and a day was given to ſhew cauſe.

At that day ſeveral precedents were quoted, where ſome writs of *habeas corpus* were quaſhed before any return made, and others where a return was made; but this the court would not receive.

Of the firſt ſort there was *Michaelmas*, 4 *Ann.* *Michaelmas* 10. *Ann.* an *hab. corp.* to the *Mayor's Court of Durham*; an *hab. corp.* to the *Court of Namptwich*. In 1704, *Eachard* v. *Bradſhaw.* *Michaelmas*, 1705. *Bovey* v. *Hall.* in this court; in 1706 an *hab. corp.* to *Cheſter.*

In 2 *Keb.* 134 there was a return made to an *hab. corp.* but the court would not receive it.

Parker, Chief Juſtice, If this court cannot do juſtice why ſhould we ſend for the cauſe; if it be a county Palatine, judgment will be void; it is not material in what court in the County Palatine the ſuit is; it had been material, if here had been an affidavit that the defendant was not reſident in the county. But here is an *hab. corp.* without any ſuggeſtion, that the party is not an inhabitant of the County Palatine, which in reaſon ought to be, and ſuch writs ought not to iſſue of courſe, but there is as yet no ſuch rule; it does not appear to us that we can do juſtice; there is no doubt but they have liberty to ſhe he lived out of the County Palatine, but here though it ſhould appear he was reſident in the County Palatine of *Lancaſter* it will be of no avail; though you ſhew by *affidavit* he did not reſide in *Cheſter*, for we cannot do juſtice in either County Palatine, we cannot take away their juriſdiction; but ſhould it be made out that the defendant did not reſide in the County Palatine, we could do juſtice, and ſend an *habeas corpus.*

Per curiam. Let the rule be made abſolute, and the writ ſuperſeded. *Vide Forteſcue, p.* 270.

Hilary 11 *Ann.* *The King* v. *Mary Hill Morton.*

The defendant was indicted for *perjury* in ſwearing the peace againſt the Duke of *Leeds*, and was in the *King's Bench* priſon, and her cauſe was to be tried in the ſittings after the term; and on the laſt day of the term the court was moved for an *hab. corp.* to bring her up to attend the trial of her cauſe, and it was granted. *Vide Forteſcue, p.* 271.

Eaſter, 11 *Ann.* *The Queen* v. *Nichols.*

The court was moved for an *hab. corp. ad teſtificand*, before juſtices of peace on a conviction for *deer ſtealing*, directed to the keeper of *Newgate*, which was granted; but the court ſaid, juſtices could not compel the witneſs to appear *nolens volens*, but if he was willing, it might be done. *Vide Forteſcue, p.* 271.

Eaſter, 11 *Ann.* *Anonymous.*

A return was made to an *habeas corpus* directed to the *Mayor's court* of *Canterbury*, of a cuſtom in *Canterbury*, which *ouſted* this court of juriſdiction, but the return was defective, and the court being moved to amend it, at firſt the rule was granted *niſi*, &c.

On ſhewing cauſe, it was inſiſted that it ought not to be amended, and the court ſet aſide the rule for the amendment, becauſe this was to *ouſt* the court of their juriſdiction, and by conſent they were not to proceed below.

The caſe of *Preſton* v. *Goodwin*, *Trinity*, 12 *W.* 3. in this court, was quoted, where the return of an *habeas corpus* was, that the demurrer was not joined in *ſix weeks*, and exception taken to ſuch return, which was defective, and allowed; but the court refuſed to admit the return.

Parker, Chief Juſtice. This is no new caſe; if this return was filed now, we muſt grant an attachment, they having not returned the cauſe, nor any excuſe for it, it is for their ſakes that we do not file it; now, the queſtion is, whether we may give them leave to amend, that we may not know what the merits of the cauſe are; that is, to *ouſt* the court of juriſdiction, therefore we muſt be ſtrict: amendments in *habeas corpus*'s of the crown ſide are allowed and practiſed, becauſe otherwiſe the officer might on purpoſe make a defective return, and then the priſoner muſt be diſcharged, and therefore we take care of that before the writ is filed; you do not make the return you are required, but you return an excuſe only; I do not doubt but if the cauſes were returned, if there was a ſlip, the court would grant leave to amend, and you ſhall ſtill have the liberty, at your requeſt, to annex the return of the cauſes. If this goes down to *Canterbury*, they may judge of it according to their law; but how can the Mayor determine this cauſe? It is a franchiſe of the corporation; if this matter concerns themſelves, they cannot hold plea of it. *Vide Forteſcue, p.* 273.

Eaſter, 12 *Ann.* *Hide* v. *Browning.*

The court was moved for an *habeas corpus ad teſtificand.* to the *Marſhalſea*, to be a witneſs at the ſeſſions at *Guildhall*; and a caſe was quoted where *Holt*, Chief Juſtice, granted one for a priſoner to go down to the aſſizes. *Vide Forteſcue, p.* 271.

Hilary, 13 *Ann.* *The Queen* v. *Green.*

See this caſe fully ſtated in page 266 of this work, under the head *Commitment.*

Eaſter, 1 *Geo.* *The King* v. *Gibſon.*

A return made on an *habeas corpus* was, that the defendant was committed by *two* juſtices of peace, for that he being overſeer of the poor, did not account as by the ſtatute is directed, and ſet forth that he had not accounted before them.

Two exceptions were made to this return.

1ſt. That it appears to be a commitment within the year, and the act does not direct any commitment till after the year.

2dly. It only ſays, he had not accounted before them, whereas he might have accounted before two other juſtices, and that would have been good. And both theſe *exceptions* were allowed by the court; but yet the defendant was not diſcharged, but on giving his recognizance to appear at the next ſeſſions in order to account; becauſe this was an offence, and they had power to call him to an account. *Vide Forteſcue, page* 272.

Hilary or Eaſter, 2 *Geo. The King* v. *Hawkins.*

The return to an *habeas corpus* was, that the defendant was committed for *backbearing*, and carrying away a deer out of the foreſt; but it appeared to be after conviction.

It was objected to this return, that it does not ſay it was unlawfully taken away, becauſe it might be with the conſent of the owner..

Parker, Chief Juſtice. There is a difference in the return of an *habeas corpus*, when it is before a conviction, and when after; for where it is after conviction, you need not be ſo particular; it ought to be alledged unlawfully if before conviction, but in this caſe it may be in the conviction, ſo that will be enough; now, taking away a *deer*, though not killed, is within the act, and it cannot receive that conſtruction of being taken in toils, for it is taking away quite; if it had ſaid *taken away*, of which he was convicted, that might have done.

Till proceſs iſſues in order to diſtrain, he cannot have corporal puniſhment, *i. e.* without the return of the officer that he was not ſufficient; as to the truth of facts, the return of the officer is the ſame as a ſpecial verdict; but if the juſtice of peace will not believe it, on information to the contrary, perhaps he may iſſue another warrant. And in order to come at theſe facts, the court ordered the defendant to be brought up on another day, and to return the conviction. *Vide Forteſcue, p.* 272.

Hilary, 5 *Geo. The King* v. *Leonard.*

The defendant in the long vacation, was committed by a warrant from the Secretary of State for *high treaſon.* He lay all *Michaelmas* term till the laſt day, and being then brought up, was charged with an indictment, and recommitted by rule of court. In the *firſt* week of this term he applied to enter his prayer on the *hab. corp.* act, which the Chief Juſtice thought he might well do; for though he has lapſed the time on the *firſt* commitment, yet that is now out of the caſe, and he ſtands on the ſame terms with one originally committed ſince the laſt term. And though the ſtatute has only the word *warrant*, yet he took commitments by rule of court, to be within the meaning of it, this being an act for the liberty of the ſubject, and never intended to leave an indefinite power any where. But *Eyre* and *Forteſcue*, Juſtices, (*Powys*, Juſtice, abſent) were of a contrary opinion, and ſaid it had been otherwiſe reſolved at the *Old Bailey.* Then the Chief Juſtice propoſed to enter the prayer *de bene eſſe*, and conſider of the validity of it afterwards; as was done in *Bernardi*'s caſe, who at the end of the term was refuſed to be bailed, notwithſtanding his prayer was regularly entered; that entry being no *eſtoppel* to the court. But the other judges would not agree to this, ſo nothing was done. The council then prayed, that ſome *memorandum* might be made, but did not prevail. *Vide Strange, vol.* 1. *p.* 142.

Eaſter, 5 *Geo. Hudſon and Wife* v. *Aſh.*

See this caſe fully ſtated in page 279 of this work, under the head *Conſtable.*

Eaſter, 6 *Geo. The King* v. *Mackintoſh.*

The defendant was committed for treaſon done in *Scotland*, and in the *firſt* week of this term applied to enter his prayer on the *hab. corp.* act.

Per curiam. We cannot do it, for that prayer is only in order to be tried, and we cannot try a treaſon committed in *Scotland.* It was then offered by the defendant's council, whether within the equity of that ſtatute (ſince there could be no application elſewhere) the court would not enter his prayer and bail him at the end of the term, in caſe he was not ſent to *Scotland*, before that time, *but not allowed.* In *Hilary* term following, there being nothing done, he moved to be bailed, but was denied, and in *Eaſter* term following, the Attorney General conſented to his diſcharge. *Vide Strange, vol.* 1. *p.* 308.

Trinity, 7 *Geo. The King* v. *Clarkſon, et al.*

One *Dibley* pretending to have married Mrs. *Tuberville*, a Lady of fortune, ſued out an *hab. corp.* directed to her guardians, commanding them to bring her into court. The return to which was, that by her mother's will ſhe was committed to the care of Mrs *Clarkſon*, who had put her to ſchool to the other defendant, where ſhe had continued ever ſince with her own liking, and with the approbarion of her guardian; and that ſhe now remains there of her own accord, under no reſtraint: *and for no other cauſe.* &c.

When ſhe was brought into court, and the return had been read, the chief juſtice aſked her, if ſhe deſired to be taken out of the hands of the perſons ſhe lived with, and to go with *Dibley?* She denied him to be her huſband, and deſired ſhe might continue with her guardians.

Per curiam. We have nothing to do to order her to go with *Dibley*, but only to ſee that ſhe is under no illegal reſtraint: all we can do is, to declare ſhe is at her liberty to go where ſhe pleaſes; but leſt this writ ſhould be made uſe of by *Dibley* as a means to get her abroad, and ſeize her, (as the court was informed there was reaſon to apprehend) we will order our tipſtaff to wait on her home to her guardian's; and ſo it was done in Lady *Harriot Berkley's* cauſe, 3 *vol. State Trials, p.* 7, 8. *Vide Strange, vol.* 1. *p.* 444.

Michaelmas, 8 *Geo. Mr. Liſter's Caſe.*

See this caſe fully ſtated in page 214 of this work, under the head *Baron and feme.*

Michaelmas, 8 *Geo. The King* v. *Walter.*

The defendant was committed by a warrant, under the hand and ſeal of a juſtice of the peace, for being a *notorious owler and ſmuggler*; and being in cuſtody, he was brought up by an *hab. corp.* and moved by his council to be diſcharged.

1ſt, Becauſe he had been in gaol *two terms* ſince the indictment was found, and not yet brought to his trial.

2dly, The charge in the warrant of commitment is very looſe, viz. for the defendant was *a notorious owler and ſmuggler*, which is not a ſufficient charge to deprive a ſubject of his liberty, eſpecially in a criminal cauſe, where the utmoſt certainty is required.

3dly, It does not appear that the defendant was charged *on oath.*

4thly, No time is alledged when the fact was committed.

The court allowed the firſt objection, viz. that the defendant ought to be tried within *two* terms after his commitment, according to the *habeas corpus* act.

But as to the other objection they held, that a juſtice of peace muſt take care that he has ſuch an information of the fact as may be ſufficient to ſupport his warrant of commitment; but he could not ſet it forth in the warrant itſelf, becauſe ſo much certainty is not required in warrants, as in writs and pleadings which are always on record.

The court were of opinion to *bail him*; but he having no bail was remanded. *Vide Mod. Rep. vol.* 8. *p.* 5.

8 *Geo. The King* v. *the Biſhop of Rocheſter, Mr. Shelly, and Mr. Cockran.*

The priſoners were committed to the *Tower* for *high treaſon*, plainly expreſſed in the warrant of commitment,

ment, but not ſpecifying where the treaſon was committed, and were brought to the *Old Bailey* on the 7th of *September* 1722, and that being the firſt day of the ſeſſions, they made their prayer, thinking to be bailed, according to the *habeas corpus* act.

The court told them they thought there was no inſtance of ſuch a prayer being allowed or entered, but it had often been denied.

In this caſe, *Pratt*, Chief Juſtice, was clearly of the ſame opinion, as was *Forteſcue*, Juſtice, and ſo was the Lord Chancellor *Macclesfield*, when the caſe was ſtated to him, who thought that the *habeas corpus* act was not to put trials or bails out of their ordinary courſe; but to quicken the proſecutor in the common and ordinary way; and therefore could not make that triable at the ſeſſions of the *Old Bailey*, which was uſually tried in this court. If *treaſon* be committed in the country, it cannot be tried there till the next aſſizes after, and yet the King may grant a commiſſion of *Oyer* and *Terminer*, to try it before if he pleaſes; as here he might by *hab. corp.* ſend the Biſhop of *Rocheſter* to *Newgate* to be tried; and before the act it was uſual to try in this court ſuch as were committed to the *Tower*, for which reaſon he thought if there had been a commiſſion of *Oyer* and *Terminer* for *Middleſex* at the *Old Bailey*, (as there really never is) yet a prayer ought not to be entered at the *Old Baily*, becauſe it is putting it out of the common way of trial; and ſo if they had made their prayer at *Hicks's Hall* the firſt day of the term, that it ought not to be granted; but it is very clear, that at the *Old Bailey*, where no commiſſion of *Oyer* and *Terminer* for *Middleſex* ever is, it ought not to be granted.

The judges willing to receive all the ſatisfaction they could, aſked the clerks, Mr. *Tanner* and Mr. *Harcourt*. Mr. *Tanner* had been a clerk of the *Arraigns* ever ſince the revolution, and his father had been in that place ever ſince the reſtoration; and he produced his book of notes; and quoted the caſe of Sir *John Muſgrave*, who was committed for *high-treaſon*, for adhering to the King's enemies beyond the ſeas, and was committed to the *Gatehouſe*, and he moved to enter his prayer at the *Old Bailey*; and by *Holt*, Chief Juſtice, and the whole court, it was refuſed, and they ſaid, they had no juriſdiction, nor was there any other note or memorandum about ſuch a prayer in the whole book; and Mr. *Harcourt*, clerk of the indictments, was of the ſame opinion, that no ſuch prayer was ever granted. *Vide Forteſcue, p.* 101. *Mod. Rep. vol.* 8. *p.* 97.

Michaelmas, 9 *Geo.* *The King* v. *Layer.*

The defendant being indicted for *high-treaſon*, moved by his council for an *habeas corpus ad teſtificand.* to bring up Lord *Orrery* and Lord *North* and *Grey*, then in the *Tower* for *high-treaſon*, but the court refuſed to grant it without an *affidavit* of the priſoner, who was to be tried, that they were *material witneſſes*.

Eyre, Juſtice, ſaid, he never granted one in a civil caſe at his chambers, without an *affidavit*; and agreed that a judge might grant one at his chambers on an *affidavit*, and in a civil caſe; and ſaid, that ſometimes they give ſecurity. *Courtney*'s caſe was quoted in Sir *John Friend*'s trial, where an *habeas corpus ad teſtificand.* was granted at the *Old Bailey*; but then the court was ſatisfied he was a *material witneſs*, and here a commiſſioner was ſent to *Layer*, and he made an *affidavit* to that purpoſe.

The court declared their opinion, that there ought to be an *affidavit* that the perſon was a material witneſs before an *habeas corpus* could be granted, elſe they might deliver all the goals in *England* on a bare ſurmiſe; and a general rule was made by the court, that no *habeas corpus* of either ſide, either *civil* or *crown*, ſhould be granted without an *affidavit*, that they are *material witneſſes*, and directed the officers to take it down. *Vide Forteſcue, p.* 396.

Hilary, 10 *Geo.* *The King* v. *Colvin.*

See this caſe fully ſtated in page 136 of this work, under the head *Attachment*.

Hilary, 10 *Geo.* *The King* v. *Johnſon.*

An *habeas corpus* was granted, directed to the defendant, to bring up the body of a child about *ten years* of age, which ſhe had in her cuſtody. To which ſhe returned, that ſhe was appointed *guardian* to the child by the *ſpiritual court*, and therefore kept her in her cuſtody. But the perſon who ſued out the *habeas corpus* inſiſted, that he was appointed *guardian* to the girl by her father's will. The child was very unwilling to be taken from the care of Mrs. *Johnſon*, who was her near relation, and had taken great care of her, and was to have no benefit by keeping her. And the court doubted whether they ſhould deliver the child to the *guardian* appointed by the father's will, or only ſet her at liberty out of Mrs. *Johnſon*'s cuſtody, and leave her to go to whom ſhe pleaſed. Whereon the court ordered Mrs. *Johnſon* to bring up the child again on the laſt day of the term, at which time alſo the *guardian*, who was then in the country, was directed to attend; at which day the child was delivered by the court to the *guardian* appointed by the father's will. *Vide Raym. vol.* 2. *p.* 1334. *Stra. vol.* 1. *p.* 579. *Mod. Rep. vol.* 8. *p.* 214. *Stra. vol* 1. *p.* 579.

Michaelmas, 2 *Geo.* 2. *Hopman* v. *Barber.*

On a motion againſt *Bambridge*, the warden of the *Fleet*, it was held, that if a *habeas corpus* is brought he muſt obey it, though the party refuſes to pay his fees; for he has a remedy for them. *Raymond, vol.* 2. *p.* 814.

Michaelmas 3 *Geo.* 2. *The King* v. *Kimberley.*

See this caſe fully ſtated in page 179 of this work, under the head *Bail*.

Eaſter, 4 *Geo.* 2. *The King* v. *Catterall.*

On a return of a *habeas corpus*, the commitment was by juſtices of the peace, (authorized for that purpoſe by act of parliament) *for refuſing to account for a toll by him received, and until he do account, and pay what ſhall be due to the proprietors of the ſaid toll.*

Per curiam. The commitment is illegal, for no certain ſum is thereby appointed to be paid, and then the defendant may remain in priſon for life; it was then moved to amend the commitment.

Per curiam. That cannot be after the return is filed; and the defendant was diſcharged. *Vide Fitz Gibbons, p.* 266.

Michaelmas, 5 *Geo.* 2. *The King* v. *Wright.*

On a *habeas corpus* to *Wright* to bring up a *lunatic* under his care, he made no return, and the court, on an *affidavit* that the writ was delivered to him, was moved for an attachment. The clerks of the *Crown Office* certified, there ought firſt to be a rule to return the writ.

Per curiam. In caſes where the liberty of the ſubject is concerned, there ought to be no ſuch indulgence, but all the expedition poſſible; and they granted an attachment *niſi*, &c. whereon the Doctor came in and returned, that before the delivery of the writ he had delivered the woman to her huſband, and that he does not know where ſhe is, nor can produce her. And the court held it a ſufficient anſwer. *Vide Raymond, vol.* 2. *p.* 915.

Trinity, 7 *Geo.* 2. *The King* v. *Smith.*

A boy between *thirteen* and *fourteen* years of age was brought up by an *habeas corpus* ſued out by his father, in order to have him delivered over to him by an aunt, who kept him, according to *Johnſon's* caſe. And on great debate the caſe was over-ruled; and *Lee*, J. ſaid Lord *Raymond* repented of what was done in that caſe. And all the court declared, that on this writ they could only deliver the boy out of the cuſtody of the aunt, and inform him he was at liberty to go where he pleaſed. And the boy choſe to ſtay with the aunt;

and they ſaid that was all that was done in Lady *Catharine Anneſley's* caſe: that the right of *guardianſhip* could not be determined by them in this ſummary way, and the father was not without other remedy, he might have *treſpaſs*, to ſhew why he was taken from him, or other actions that would properly bring the right of *guardianſhip* in queſtion. *Vide Strange, vol.* 2. *p.* 982.

Eaſter, 30 *Geo.* 2. *Bond* v. *Iſaac.*

See this caſe fully ſtated in page 174, of this work, under the head *Bail.*

Hilary, 31 *Geo.* 2. *The King* v. *Dr. Shebbeare.*

The defendant being brought up by virtue of a *habeas corpus*, iſſued by the Chief Juſtice in *vacation*, returnable *immediately* before himſelf at his chambers.

The defendant mentioning to the court, that he had been informed that as the term was begun it was neceſſary to take out a new writ of *habeas corpus*, he craved their advice.

Lord *Mansfield*, declared the court to be unanimous, that a perſon might be brought into court on a writ of *hab. corp.* iſſued in *vacation*, and that to require a new writ would be attended with delay and expence, but in this caſe, if the defendant was not bailed, the court could not commit him to the ſame cuſtody he came up under; but muſt commit him to the *Marſhal*, and then he would not be obliged to ſue out a new *habeas corpus*, but might be brought up by rule of court when prepared to give bail, which in this caſe was done accordingly. *Vide Bur. vol.* 1. *p.* 460.

Eaſter, 31 *Geo.* 2. *The King* v. *Mead.*

See this caſe fully ſtated in page 218 of this work, under the head *Baron and Feme.*

Trinity, 31 *Geo.* 2. *The King* v. *Davis.*

In this caſe the defendant having been apprehended on an *outlawry* for *high treaſon*, in diminiſhing the coin of the kingdom, was brought up by *habeas corpus* from the place where he was taken, and committed to *Newgate* from whence he was brought up by rule. *Vide Bur. vol.* 1. *p.* 638.

Trinity, 31 *Geo.* 2. *The King* v. *Earl Ferrers.*

On a motion either for an attachment againſt the defendant for not returning a *habeas corpus*, already iſſued and returnable *immediately*, to bring up the body of his wife, or for a new *habeas corpus*, accompanied with an attachment.

The council for the Counteſs not being able to produce any precedent in ſupport of his motion, waived the ſame, and on a new motion a new writ was granted, returnable *immediately*. *Vide Bur. vol.* 1. *p.* 631.

Hilary, 32 *Geo.* 2. *Cox* v. *Hart.*

On ſhewing cauſe why a *procedendo* ſhould not go on a cauſe removed hither from the ſheriff's court of *London*, by *habeas corpus cum cauſa.*

After hearing the council on both ſides, and on reading *affidavits* from the officers of the ſheriff's court, (confirmed by the opinion of the maſter of this court) that the practice is "to allow the *habeas corpus*, provided it be delivered at any time before the jury is "ſworn," the court diſcharged the rule.

Lord *Mansfield*. The preſent caſe is not within the words of *ſtat.* 21 *Jac.* 1. *cap.* 23. that is plain, and it appears, that the practice has gone much further than the words of the act, for that has been to allow it at any time before the jury be ſworn.

Per curiam. Let the rule be diſcharged. *Vide Bur. vol.* 2. *p.* 758.

Eaſter, 32 *Geo.* 2. *The King* v. *Barnard Schiever, a Swede.*

On a motion for a *habeas corpus*, directed to the keeper of the town goal of *Liverpool*, to bring up the body of the defendant, a ſubject of a neutral power, taken on board an enemy's ſhip, but *forced* (which force was ſupported by *affidavit)* into the enemy's ſervice.

The court thought this man on his own ſhewing clearly a priſoner of war, and lawfully detained, and therefore denied the motion. *Vide Bur. vol.* 2. *p.* 765.

Trinity, 3 *Geo.* 3. *The King* v. *Burbage.*

On a motion for a *habeas corpus ad teſtificandum*, to carry a priſoner in execution in the *K. B* priſon for a *miſdemeanor*, to the aſſizes for the county of *Worceſter*, againſt the defendant, on an *affidavit* of his being a *material witneſs.*

Lord *Mansfield*, though he agreed, that (in general) a *habeas corpus ad teſtificandum* will lie to remove a perſon in execution to be a *witneſs*, yet he thought the preſent application to be mere contrivance.

Per curiam. Take nothing by this motion. *Vide Bur. vol.* 3. *p.* 1440.

Michaelmas, 3 *Geo.* 3. *The King* v. *Clarke.*

An *habeas corpus* having iſſued to Mr. *Clarke*, who kept a *mad-houſe* at *Clapton*, commanding him to bring up the body of Mrs. *Ann Hunt*, who was kept confined in his houſe.

It was now moved to return the writ, and an *affidavit* being offered, made by Dr. *Monro*, that ſhe was not fit to be brought into court, and by advice of Lord *Mansfield*, the Doctor's *affidavit* was given as a reaſon for enlarging the time to return the writ, inſtead of actually filing the return at preſent, to which the council for the motion conſented, and the court enlarged the return till the firſt day of next term.

The council who had obtained the *habeas corpus*, came afterwards into court, and deſired a rule for liberty to have acceſs to, and inſpection of the *lunatic*; but he not being able to ſhew, that the ſame was made on behalf of any perſon who had the leaſt pretenſions to demand it, the court denied the requeſt. *Vide Bur. vol.* 3. *p.* 1362.

Eaſter, 6 *Geo.* 3. *Dr. Betteſworth* v. *Hugh Parker Bell, Eſq.*

On ſhewing cauſe to a rule made to ſet aſide a *habeas corpus cum cauſa ad faciendum & recipiendum*, &c. directed to the goaler of *Ayleſbury*, returnable before the Chief Juſtice *immediately.*

The objections offered for ſetting aſide the *habeas corpus, &c.* were.

1ſt, That the writ could not be made returnable *immediately*, or before the Chief Juſtice, for by rule of this court, made in 1654, no *habeas corpus, &c.* can be returnable, but in court, and at a day in *term*, except in *London* and *Middleſex.*

2dly, That it was contrary to *ſtat.* 4 & 5 *W. & M. cap.* 21. "for delivering declarations to priſoners," and that they had already declared againſt the defendant in the body of the ſheriff of *Bucks.*

The council on ſhewing cauſe in ſupport of the *habeas corpus, &c. obſerved,*

1ſt, That the writ iſſued in term, that it was *teſted* the 11th of *February*, and it is and ought to be returnable *immediately*, which means only within due and convenient time.

2dly, That by *ſtat.* 4 & 5 *W.* 3. *cap.* 21. the plaintiff may declare againſt a perſon in cuſtody of the *ſheriff*, and we have done ſo; but it does not follow that we cannot afterwards remove him.

Wilmot, Juſtice. There is no foundation for ſetting aſide this writ; it is *teſted* in *term*, which it ought to be.

Yates and *Aſton*, Juſtices, gave their opinions at large, and concurred with Mr. Juſtice *Wilmot*.

Per curiam. The motion was denied, and the defendant was committed to the cuſtody of the *Marſhal. Vide Bur. vol.* 3. *p.* 1875.

Heir.

Hilary, 2 *W.* 3. *Killow v. Rowden.*

In *debt* brought againſt the defendant as *heir* to his father, without ſhewing *how he was heir*; on *nothing by deſcent* pleaded, the jury find, that *John Rowden*, the father, being ſeiſed in fee, entered into this bond for which the ſuit was now brought, and afterwards ſettled his lands to the uſe of himſelf for life, remainder to his *eldeſt ſon in tail*, remainder to his own right heirs, and died; after whoſe death the eldeſt ſon entered and died, leaving iſſue a ſon, who alſo died without iſſue, ſo that the reverſion (after the eſtate-tail being ſpent) came to the ſecond ſon of the obligor, who was now defendant; and the queſtion was, whether he had the eſtate by *immediate deſcent* from him, or from his nephew, who was the only ſon of his elder brother.

Per curiam. Neither the elder brother or his ſon, were ever ſeiſed of the reverſion, for they were ſeiſed of an eſtate-tail, and not of the reverſion expectant on the determination of that eſtate, and if a writ of *formedon* had been brought againſt the defendant, he ſhould not in making his title have mentioned either his elder brother or nephew; and yet they were ſeiſed of the reverſion to ſome purpoſes, viz. *to give*, *to forfeit*, *to be in ward*, and to join the *miſe* on the mere right. *Vide Salk. vol.* 3. *p.* 179.

Oſbaſton v. Stanhope.

In an action of *debt* brought againſt an *heir* on a bond of his anceſtor; the defendant pleaded, that he had nothing by deſcent *except* the reverſion expectant after the determination of a leaſe for years; the plaintiff replied, that he (the defendant) had ſufficient *aſſets* by deſcent; and on a demurrer it was objected, that this general replication was ill, for that the plaintiff ought to have anſwered the word *except*.

Per cur. The word *except* is immaterial, becauſe the reverſion which follows is not chargeable, for the anceſtor had ſettled the lands on truſtees to the uſe of himſelf for life, remainder to the *heirs male of his body*, remainder to his own *right heirs*, with power for the truſtees to make leaſes, ſo that this was a leaſe made by them, and if the reverſion ſhould happen before the eſtate tail had been ſpent, he had ſtill but a reverſion after an eſtate-tail. *Vide Salk. vol.* 3. *p.* 180.

Hilary, 6 *W. & M. The Leſſee of Carter v. Taſh.*
At Niſi Prius.

In *ejectment* theſe points were held as law by *Holt*, C. Juſtice. 1ſt. If a leſſee for years be made tenant to the *præcipe* by leaſe of a freehold to ſuffer a common recovery, that by this the term is not merged, but preſerved and revived by the ſaving of former rights by *ſtat.* 27 *H.* 8. of *uſes*.

2dly. If a termor levy a fine *come ceo*, &c. this ſhall not bar him in the reverſion, for he may avoid it by plea of *partes finis nihil habuerunt*.

3dly. A deſcent which the tolls the entry ought to be an immediate deſcent; and therefore if a *feme diſſeiſoreſs* marries, and has iſſue and dies, and after the huſband dies, the deſcent to the iſſue does not take away the entry becauſe the interpoſition of a tenant by the *curteſy* does impede it.

4thly. Coverture to avoid a deſcent, ought to be continual from the time of the diſſeiſin to the deſcent: for if a feme be ſole at the time of the diſſeiſin, or of the deſcent, or any time intermediate, her entry is not preſerved, becauſe ſhe had an opportunity to enter and prevent the deſcent. As if a *feme covert* is a *diſſeiſee*, and after her huſband dies ſhe takes a ſecond huſband, and then the deſcent happens, this deſcent ſhall take away the entry of the *feme*; and on this laſt point the plaintiff was nonſuited. 1 *Inſt.* 338, 246, 353. *Vide Salk. vol.* 1. *p.* 241.

Michaelmas, 7 *W.* 3. *Redſhaw v. Heſther.*

In *debt* brought againſt the defendant as *heir* on a bond of his anceſtor; on *nothing by deſcent* pleaded, the plaintiff replied, that he had lands by deſcent *before the exhibiting of the bill, out of which the aforeſaid debt might be ſatisfied, and prays judgment of the court*; and on a demurrer to this replication it was objected, that the plaintiff ought to have concluded to the country; beſides, the replication is ill at *common law*, becauſe it is, that the defendant had lands by deſcent *before the exhibiting of the bill*, which may be true, and yet he might have none at the time of the bill exhibited; it is likewiſe ill by the *ſtatute*, for that directs, that *where the heir ſells any lands which were liable to the debts of his anceſtor, before any action brought againſt the heir, he ſhall be anſwerable for the value of the lands ſo ſold*, which *value* ſhould be tried by a jury, who, on finding that ſuch lands deſcended, are *officially* to inquire of the *value*; therefore the replication ſhould be, that the defendant had lands by deſcent, before, or at the time of the original writ, &c. without alledging *out of which the debt might be ſatisfied*, and then concluding *wherefore he prays judgment*, &c. becauſe it is making the *value* part of his replication, and putting it on the judgment of the court, when it ought to have been tried by a jury.

Per curiam. The replication is good; for though a jury may find, that what deſcended to the *heir* is not ſufficient to ſatisfy the debt, and ſo may falſify the value alledged in the replication, yet the plaintiff ſhall recover to the value of the land ſold, be it what it will. *Vide Salk. vol.* 3. *p.* 179. *Mod. Rep. vol.* 5. *p.* 122.

Michaelmas, 11 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. One may be ſued as executor and as *heir* both; for why may not a man make uſe of both his ſecurities? *Vide Mod. Rep. vol.* 12. *p.* 328.

Trinity, 12 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. If a perſon binds himſelf and his *heirs*, the *heir*'s lands are chargeable, as he is tertenant, and not as heir. *Vide Mod. Rep. vol.* 12. *p.* 404.

Eaſter, 13 *W.* 3. *Anonymous.*

Per curiam. An *heir*, ſued as ſuch, ſhall no more be held to ſpecial bail than an executor. *Vide Mod. Rep. vol.* 12. *p.* 511.

Eaſter, 13 *W.* 3. *Lord Petre v. Heneage.*

In an action of *trover* brought by the plaintiff as adminiſtrator, *with the will annexed*, of the late Lord *Petre*, againſt the wife of the *firſt* executor, for a pearl necklace, ſaid to have been in the family for many generations, and worn as a perſonal ornament by the Lady *Petre* for the time being, or in default of ſuch, by the Lady Dowager *for that time*. And to prove the property, an ancient inventory made by the defendant's huſband, being executor of Lord *Petre*, now inteſtate, being found among the ancient evidences of the family, was allowed; for the mentioning of this necklace in it ſhews he did not claim this necklace in his own right; for no man will inſert in an inventory more *aſſets* than he has; and though if the queſtion were, whether Lord *Petre* was proprietor or not, he himſelf could not be a witneſs; yet the executor by inſerting it in the inventory, has charged himſelf with it as *aſſets*, and there it ſhall be taken as ſuch.

Holt, Chief Juſtice. The wearing of a pearl is a converſion; and goods in groſs cannot be an *heir loom*, but they muſt be things fixed to the *freehold*, as old benches, tables, &c. And a chattel in groſs cannot be deviſed for life, but a perſon may deviſe the uſe of a chattel in groſs for life. If a perſon, before adminiſtration taken out, gives away the goods of the inteſtate, and afterwards takes out adminiſtration, he may avoid the gift. And the jury cannot carry any evidence from the *bar* without conſent of both ſides, except writings under hand and ſeal. *Vide Mod. Rep. vol.* 12. *p.* 519.

Trinity, 13 *W.* 3. *Emerſon* v. *Inchbird.*

See this caſe fully ſtated in page 123 of this work, under the head *Aſſets.*

Hilary, 1 *Ann.* *Reading* v. *Royſton.*

H. had *two* daughters, one of them had iſſue a ſon and died, *H.* deviſed the land to the ſon and *heirs* for ever. And the queſtion was, whether the ſon ſhould take all by the deviſe, or the one moiety by deſcent, and one moiety by deviſe? For then as to that moiety he takes by deſcent, his aunt will be co-parcener with him. It was argued, that where two titles concur, the elder ſhall be preferred; and that as to one moiety, which the grandſon has by the deviſe, he has the ſame eſtate in it, and no other by the deviſe, than he would have had without it; and therefore ſince the deviſe works no alteration in point of eſtate as to that, the grandſon ſhall take it by the preferable right, which is by deſcent: as if the father having ſome lands *borough-Engliſh*, and ſome *frank-fee*, ſhould deviſe all his lands to his eldeſt ſon and *his heirs*. But it was reſolved by the court, that the eldeſt ſon ſhould take all by the deviſe, and could not take a moiety by the deſcent as *heir*, and a moiety by the deviſe; for there can be no ſuch deſcent as the deſcent of a moiety to one co-parcener as *heir*; but it is a deſcent to all: and the court agreed to the rule, *viz.* where a deviſe to an *heir* gives the ſame eſtate which would deſcend, the deviſe is unneceſſary, *and has no operation*; it has no effect, and therefore it is void: but here is not a deviſe to an *heir*; both coparceners make the *heir*, and the one is not an *heir* without the other; and ſuppoſing the deviſe void as to one moiety, the other moiety muſt deſcend to both: but the grandſon muſt take by the deviſe in this caſe, becauſe nothing can deſcend to him *as to one co-heir*. *Vide Salk. vol.* 1. *p.* 242.

Michaelmas, 1 *Ann.* *Wortley Montague* v. *Lord Sandwich.*

On a motion for a new trial, the caſe appeared to be this: An executor, ſeveral years before, had left ſome houſehold ſtuff in the houſe by conſent of the *heir*, who uſed them after; and within *ſix* years before the action was brought, the executor demands the goods, and the heir refuſed to let him have them; whereon *trover* was brought, and the *ſtatute of limitation* pleaded.

Per curiam. The *uſer* before the demand was no converſion nor evidence of it; for it was with the conſent of the executor till then. And the demand being within *ſix* years, the refuſal which enſued it, and is the only evidence of a converſion in the caſe, was within the *ſix* years; and if a *trover* be brought before *ſix* years, and a conviction after, the *ſtatute of Canterbury* may be pleaded. *Vide Mod. Rep. vol.* 7. *p.* 99.

Hilary, 2 *Ann.* *Clements* v. *Scudamore.*

In *ejectment* a ſpecial verdict was found, *viz.* *A.* had *five* ſons, and the youngeſt ſon died in the life of the father, leaving iſſue a daughter, after which the father purchaſed copyhold lands of the nature of *borough-Engliſh*, which by cuſtom were deſcendible to the youngeſt ſon and his *heirs*. The father died *ſeiſed*, and the *fourth* ſon entered; and now the queſtion was, whether the *fourth* ſon, or the daughter of the *fifth* ſon ſhould inherit theſe lands?

Holt, C. Juſtice, delivered the reſolution of the court, *viz.* the daughter ſhall inherit *by right of repreſentation*; for by this cuſtom the youngeſt ſon is put in the place of the eldeſt at *common law*, and as at common law the iſſue of the eldeſt is preferred *by right of repreſentation*, ſo by this cuſtom ſhall the iſſue of the youngeſt. If a man ſeiſed of lands of the cuſtom of *gavel-kind* have iſſue *three* ſons, and one of the three dies, leaving iſſue a daughter, in the life of his father, this daughter ſhall *inherit* the part of her father, and yet ſhe is not within the words of the cuſtom; for ſhe is no male, but the daughter of a male, and *heir* by repreſentation. In the year 1560, there was a cauſe *Fane* v. *Barr*; it is entered *Hilary*, 1659, *Rot.* 779. The cuſtom was, that the copyhold land of every tenant dying ſeiſed deſcended to the youngeſt ſon. A ſurrender was made to the uſe of *A.* and his *heirs*; *A.* died before admittance, and it was agreed his youngeſt ſon ſhould *inherit* if *A.* had been admitted; but in this caſe *A.* being not admitted, it was adjudged the eldeſt ſon ſhould *inherit*; and that is by reaſon of the ſtrictneſs of the cuſtom, which required a ſeiſin and a dying ſeiſed; but by the report I have of that caſe, the court ſaid it had been otherwiſe, if this land had been found to be of the cuſtom of *borough-Engliſh* or *gavel-kind*; for the law takes notice of theſe cuſtoms, but not of ſuch ſpecial cuſtoms which muſt be pleaded by him that would take advantage of them, and muſt be taken by the court to be as they are ſet forth by the pleading, and no otherwiſe. In the caſe at *bar*, the cuſtom is expreſsly found to be deſcendible to the youngeſt ſon and his *heirs*, though the words *his heirs* are needleſs, for the law would imply all neceſſary incidents and conſequences in the courſe of deſcents. If the father be diſſeiſed and die, the right of entry ſhall deſcend to the youngeſt ſon; if the youngeſt ſon die, the ſame right of entry ſhall deſcend to his daughter; and the youngeſt ſon being *heir* by cuſtom, ſhall have his age as if he were *heir* at *common law*. And the court denied the caſe of 1 *Leon.* 109, 208. and inclined againſt the opinion of *Croke* in 1 *Cro.* 410. *Reeves* v. *Malſter*, and ſaid, if a leaſe be made to *H.* and his *heirs*, for *three* lives, of lands of the nature of *borough-Engliſh*, this deſcendible freehold ſhall go to the youngeſt ſon, though it is a new created eſtate, for the cuſtom is inherent in the land; and ſo it is of a rent, for it iſſues out of the land; and the introducing the ſame rules of deſcent in all caſes relating to the ſame lands, tends to quietneſs and certainty. *Vide Salk. vol.* 1. *p.* 243. *Raym. vol.* 2. *p.* 1024.

Hilary, 4 *Ann.* *Brown* v. *Dyer.*

See this caſe fully ſtated in page 436 of this work, under the head *Eſtates.*

Eaſter, 4 *Ann.* *Anonymous.*

Holt, Chief Juſtice. If a farm is out of repair in the life of the *anceſtor*, and after the *heir* brings an action, he ſhall recover damages for the whole time: but the *heir* ought not to alledge a breach in the *anceſtor*'s time, becauſe that belongs to the executor. *Vide Mod. Rep. vol.* 11. *p.* 45.

Trinity, 6 *Ann.* *Hardwicke* v. *Gamball.*

See this caſe fully ſtated in page 272 of this work, under the head *Condition.*

Eaſter, 10 *Ann.* *Jeffry* v. *Barrow.*

In an action of *debt* on a bond, brought againſt the *heir*, on *nothing by deſcent* pleaded, the plaintiff replied that he had lands, *&c.* ſufficient to diſcharge, *&c.* the jury found for the plaintiff, viz. that ſufficient lands to diſcharge, *&c.* did deſcend.

It was moved in arreſt of judgment, that this plea being grounded on ſtat. 3 & 4. *W.* & *M.* that act ought to have been exactly purſued; and then the iſſue would have been only, whether any lands deſcended, and not the value of the lands; and if the jury found for the plaintiff, then the jury were to inquire of the value.

Parker, Chief Juſtice, ſeemed to incline for the defendant meerly on this point, that it did not appear by this verdict, whether, when the jury found the deſcent of ſufficient lands, they meant ſufficient with reſpect to the debt in *equity*, or at *common law*, *viz.* the penalty; probably the jury intended the equitable debt only; whereas judgment muſt be given on the penalty.

The plaintiff has put himſelf to great hazard, in this way of pleading, for though it had been found that lands were deſcended, yet if theſe lands were found inſufficient, judgment muſt have been given for the defendant.

Powel, Juſtice, doubted, whether this not being an immaterial iſſue, but a material one and more, it was helped by *ſtat.* 32 *H.* 8.

He doubted likewiſe, whether if it were not, yet this being an iſſue appointed by this act and more, it might not be ſupplied by another inquiſition by another jury.

Powys and *Eyre*, Juſtices, were of another opinion as to this point, for the ſtatute ſays *the jury viz.* the jury that tried the cauſe.

As to the principal matter *Powys*, Juſtice, concurred with *Parker*, Chief Juſtice.

Eyre, Juſtice, was of opinion that this verdict was equivalent to an inquiſition.

The end of the ſtatute was by the court thought to be, helping the creditor in caſe of alienation, and alſo the *heir*, that he might not run ſuch a riſque in pleading *nothing by deſcent*, as to ſubject himſelf to the payment of the whole, if but a *penny* was found to be deſcended. *Vide Mod. Rep. vol.* 10. *p.* 18.

Trinity 2 *Geo.* *Carrington* v. *Warren.*

See this caſe fully ſtated in page 479 of this work, under the head *Executors and Adminiſtrators.*

Hilary, 3 *Geo.* *Woodright* v. *Wright.*

On a ſpecial verdict found by the jury, the caſe was ſhortly this: The teſtator divided the lands in queſtion to *Edward Baſil* in *tail*, remainder to *Suſannah Wright*, and the iſſue of her body lawfully begotten; remainder to the right heirs of *Edward Baſil* for ever: *Edward Baſil* died without iſſue in the life time of the teſtator.

Suſannah Wright ſome years after making the will, had iſſue *Margaret Wright* the defendant, who was found likewiſe to be *heir at law* to *Edward Baſil*; and then *Suſannah Wright* died in the life time of the teſtator.

The plaintiff's title was as *heir at law* to the teſtator.

The queſtion therefore was, whether *Margaret Wright* could claim any eſtate under this will, either as *heir at law* to *Edward Baſil*, or as daughter to *Suſannah Wright?*

After argument, *Parker*, Chief Juſtice, delivered the opinion of the court as follows:

Parker, Chief Juſtice. The 1ſt point to be conſidered is, whether *Margaret Wright* is entitled to take by the will, as *heir at law* to *Edward Baſil*, by virtue of theſe words, *the remainder to right heirs of Edward Baſil for ever.?*

And here the queſtion is ſingly this, whether theſe words do make the *heirs* of *Edward Baſil* deviſees, and import any deviſe to them? ſo that the deviſe is not a lapſed legacy, by the death of *Edward Baſil* in the life time of the teſtator. Or whether *Edward Baſil* is not ſole deviſee? and thoſe words only uſed to denote and deſcribe the nature and quality of that eſtate, which was hereby deſigned to be ſolely given to *Edward Baſil*, *viz.* to ſpeak in the language and idiom of law, whether theſe words are words of *purchaſe* or *limitation?*

If *Edward Baſil* had ſurvived, no body can ſay, but the *fee* had veſted in him, and in him alone; he would then have had the entire power over the eſtate, and the deſcent to his *heir* would have appeared plainly to have been but in conſequence of the *fee* veſted in him, and which at his pleaſure he might permit or prevent.

It is not his living to take the freehold, that does, as it were, accidentally turn theſe into words of *limitation*; becauſe theſe are in their own nature, and in all events, words of *limitation*, therefore it becomes neceſſary that the anceſtor muſt take, or no body.

So that on the whole, theſe words, though they may, perhaps, carry ſomething in their ſound, that looks like a deſign and an intention in the teſtator of favour towards the *heirs*, in reality are not ſo; but ſerve only to deſcribe the eſtate which paſſes to the deviſee, and for his benefit only.

It being clear then, that the defendant can take nothing by this deviſe as *heir at law* to *Edward Baſil*; the next point to be conſidered is, whether ſhe can take any thing as daughter to *Suſannah Wright*, by virtue of that clauſe in the will, *viz. remainder to Suſannah Wright, and the iſſue of her body lawfully begotten?*

In anſwer to this point it will be neceſſary to ſee,

1ſt, Whether ſhe can have any right, ſuppoſing the words *iſſue of her body*, are looked upon as a ſynonimous expreſſion to the *heirs* of her body.

And 2dly, Whether, ſuppoſing ſhe has no right this way, ſhe can derive any right by any other interpretation, which the word *iſſue* is capable of?

As to the *firſt*, the caſe differs not from that of *Brett* v. *Ridgen in Plowd. Com.* that *there* a *fee* is deviſed, and here an *eſtate tail*, which will make no difference in the interpretation before us; for if here the words *heirs of her body* are not words of purchaſe but of limitation, the point comes out juſt the ſame. For ſuppoſing *Suſannah Wright* had lived, ſhe and ſhe only would have taken this deviſe, and ſhe would have the power of barring the iſſue by *fine*. And here again by the ſame reaſon that the daughter of *Suſannah* ſhould take, the huſband muſt be tenant by *curteſy*. In ſhort the only difference that there is between a deviſe in *fee*, and *in tail*, is this, that in the former caſe, the deviſee has a greater *choice*, and variety of ways, whereby he may defeat the iſſue, than in the latter. But the words *heirs of the body*, are as much words of *limitation*, and as proper to expreſs an *eſtate tail*, as the word *heirs* is to expreſs a *fee*.

And now I come to conſider 2dly, Whether the defendant can put any other conſtruction on the word *iſſue*, by virtue of which ſhe may claim under this deviſe.

In the caſe of the *King* v. *Meling*, 1 *Vent.* 229. the word *iſſue* is by Lord *Hale*, affirmed to be a *collective name*, and takes in the whole generation; and is therefore a great deal ſtronger than the word *children*. It is therefore obſerved, that in all acts of parliament, the word *iſſue*, is as comprehenſive, as the words *heirs of the body*; as in the ſtatute *de donis*, and *ſtat.* 34 *H.* 8. of *entails* ſettled by the crown.

On the whole it appears, that theſe words are words of limitation, and do, moſt certainly in a will, give an *eſtate tail*. Therefore judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 10. *p.* 370.

Michaelmas, 8 *Geo.* *Smith* v. *Trigg.*

See this caſe fully ſtated in page 438 of this work, under the head *Eſtates.*

Eaſter, 9 *Geo.* *Goodright* v. *Opie.*

In *ejectment*, on *not guilty* pleaded, the jury found the defendant not guilty as to part, and as to the other part there was a ſpecial verdict, the ſubſtance whereof was thus:

The teſtator being ſeized in fee of ſeveral lands, did in the year 1705, deviſe all his ſaid lands to *five perſons*, (naming them) and *to their heirs*, *as tenants in common*; that one of the ſaid deviſees died *two years* before the teſtator, who by another clauſe in the ſaid will, deviſed all his other meſſuages, lands, *&c.* not therein before given, deviſed or bequeathed, and all his money, houſhold goods, plate, rings, *&c.* and all other his eſtate real and perſonal whatſoever, or of what kind or kinds ſoever, to his two nieces *Mary Bruce* and *Mary Opie*, their heirs, executors, and adminiſtrators; that the teſtator died without making diſpoſition of the ſaid *fifth part* of his lands, other than by his laſt will as aforeſaid.

The queſtion was, whether the ſame ſhould deſcend to the *heir at law* of the teſtator, as not being diſpoſed of by him in his life, becauſe the deviſee died before him; or whether it ſhould paſs to *B.* and *C.* as *reſiduary legatees* by the latter clauſe of the will, as an eſtate before diſpoſed of by the teſtator.

Per curiam. An executor has not the ſame right to the perſonal eſtate as the *heir at law* has to the lands, becauſe an executor is no more than a truſtee made by the teſtator, but an *heir* is to ſtand in the place of his anceſtor.

But as to the principal matter, if a particular eſtate for life had been deviſed to *John Payne* (who died), with a remainder over, ſuch a remainder had been good, and ſo is *Perkins* 108. *b.* 109. *a.* and ſo ſhould this, and there is no objection againſt it but that it does not appear in the will, that the teſtator had any thing to diſpoſe of, he having deviſed all his lands before by the firſt clauſe in his will, to *five* perſons and their heirs: No judgment was given. *Vide Mod. Rep. v.* 8. *p.* 124.

Eaſter, 11 *Geo.* *Shaw* v. *Weight*, *et al.*

See this caſe fully ſtated in page 438 of this work, under the head *Eſtates.*

Michaelmas, 14 *George* 2. *Harvey* v. *Harvey.*

In an action of *trover* brought by the executor againſt the *heir*, *Lee*, Chief Juſtice, held, that *hangings*, *tapeſtry*, and *iron backs to chimnies* belonged to the executor; who recovered the ſame accordingly againſt the *heir.* *Vide Strange, vol.* 2. *p.* 1141.

Hilary, 16 *Geo.* 2. *Martin on the Demiſe of John Tregonwell, Eſq.* v. *Strachan and others.*

See this caſe fully ſtated in page 492 of this work, under the head *Fines and Recoveries.*

Herriots. See Manors.

Highways, &c.

Michaelmas, 3 *W.* & *M.* *The King* v. *The Inhabitants of Hornſey.*

See this caſe fully ſtated in page 440 of this work, under the head *Evidence.*

Michaelmas, 3 *W.* & *M.* *The King and Queen* v. *Buckeridge*, & *al.*

An *information* was brought againſt the defendant for not repairing of a *highway* by reaſon of his tenure between *Stratford* and *Bow*: it was tried at *bar* by an *Eſſex* jury.

The evidence for the King was, that Queen *Maud*, gave certain lands to the Abbeſs of *Barking*, to repair this *way*, that the Abbeſs, &*c.* ſold thoſe lands to the Abbot of *Stratford*, who by the conſent of his convent, charged all his lands for the repair of the *way*; and thus it ſtood till the diſſolution, &*c.*

Then all the lands of the Abbot of *Stratford*, being veſted in the crown, were granted to Sir *Peter Mewtis* who held them charged for repairing the *way*, and from him, by ſeveral *meſne* conveyances, they came to the defendants: this was proved by ſeveral witneſſes living in other pariſhes, none being admitted to give evidence, who lived in either of the ſaid pariſhes of *Stratford* or *Bow.*

The court were of opinion, that on this evidence al the lands of the Abbot were liable to repair this *way*, and directed the jury accordingly, who found for the plaintiffs. *Vide Mod. Rep. vol.* 4. *p.* 48.

Trinity, 8 *W.* 3. *The King* v. *The Inhabitants of Newington.*

By *ſtat.* 2 *W.* & *M. cap.* 6. *ſect.* 8. The pavements of *ſtreets* are to be repaired by the inhabitants of the ſaid *ſtreets*, and by *ſect.* 9. the ſcavengers are to be paid by the pariſhioners; and the queſtion was, whether houſholders, who are bound to repair the pavements before their own doors at their own coſts by the *eighth* clauſe, are bound to contribute to the payment of the ſcavengers rates? And the court held they were, for that an indefinite propoſition is univerſal, and they are pariſhioners: and as for paving before their own doors, they have the principal benefit of it; ſo that is no reaſon to excuſe them from other *parochial* duties. *Vide Salk. vol.* 1. *p.* 356.

Trinity, 10 *W.* 3. *The King* v. *Dixon and Hollis.*

The defendants who were overſeers of the *highway*, were indicted for not repairing or cauſing to be repaired the *highways*; and quaſhed, becauſe an indictment for not repairing muſt always be againſt the the pariſh; the overſeers not being bound to repair the *ways*, but only to give notice to the pariſh. *Vide Mod. Rep. vol.* 12. *p.* 198.

Michaelmas, 10 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. The inhabitants of every pariſh, of common right, ought to repair the *highways.* And therefore if particular perſons are made chargeable to repair the ſaid *ways* by a ſtatute lately made, and they become inſolvent, the juſtices of the peace, may put that charge on the reſt of the inhabitants. *Vide Raym. vol.* 1. *p.* 725.

Michaelmas, 10 *W.* 3. *Young* v. ———

Holt, Chief Juſtice. Every man, of common right, may juſtify the going of his ſervants or his horſes on the banks of navigable rivers, for towing barges, &*c.* to whomſoever the right of ſoil belongs. And if the water of the river impairs and decreaſes the banks, &*c.* then they ſhall have a *reaſonable way* for that purpoſe in the neareſt part of the field next adjoining to the river. And he compared it to the caſe, where there is a *way* through a great open field, which becomes bad and dangerous, the travellers may juſtify going over the outlets of the land not incloſed next adjoining to ſuch old *highways.* *Vide Raym. vol.* 1. *p.* 725.

Trinity, 12 *W.* 3. *The King* v. *The Pariſh of Ragley.* Error.

On a *writ of error* brought on a judgment, given on an indictment at the quarter ſeſſions for not repairing a *highway*, between *A.* and *B.* in the pariſh of *R.* and the judgment was, that ſuch a ſum be drawn and levied to repair the ſaid *way*, unleſs it was repaired by ſuch a time.

Holt, Chief Juſtice. There are ſtatutes that direct the certainty of proceedings in theſe caſes; as *ſtat.* 2 & 3 *P.* & *M. c.* 8. and 13 *El.* &c. and they are impowered by law to charge or fine, and that alone to be controlled by traverſe: by *ſtat.* 2 & 3 *Ph.* & *M.* a juſtice of peace may preſent at the quarter-ſeſſions on his own knowledge; and the juſtices there are to give as much credit to it as if it were by jury; and that is a public law. A pariſh, of common right, ought to repair their *highway*; but by *preſcription* one pariſh may be bound to repair the *way* in another pariſh. And here it was excepted, that it did not appear in what pariſh the *way* was; for it was laid to be between *A.* and *B.* in the pariſh of *R.* ſo that *B.* only may be in *R.* Another *exception* was, that the judgment was prepoſterous, *be drawn and levied*, inſtead of the natural way *be levied and drawn*; and for this exception the judgment was reverſed. *Vide Mod. Rep. vol.* 12. *p.* 409.

Michaelmas, 1 *Ann.* *The Queen* v. *Sir John Bucknal or Bucknell.*

The defendant was Lord of the manor of *Le More* in *Herefordſhire*, which manor was held by the ſervice of repairing a *public bridge*; and though all the demeſnes of the manor, except the copyholds, were aliened, yet it was held.

Per curiam. All the alienees were chargeable in proportion, yet the Queen might charge any of them with the whole, and let him have contribution againſt the others; and though the Lord had nothing but the copyhold, yet foraſmuch as the freehold thereof was in him, he was chargeable, and the court would direct the information to be againſt all the parties liable; but let him that is charged have his remedy againſt the reſt.

Holt, Chief Juſtice, declared, if complaint were made to him, that ſome juſtice of the peace had iſſued a warrant to take away goods out of a man's poſſeſſion, to which he pretended a right; he would ſend for the juſtice and bind him over; for people muſt take the legal remedy, that is by action of *detinue*, *trover*, or *replevin*. *Vide Mod. Rep. vol.* 7. 98. *Raym. vol.* 2. *p.* 792.

Hilary, 2 *Ann.* *Warren* v. *Matthews.*

A perſon claimed *the ſole right* of fiſhing in the river *Exon*, by a grant from the crown.

Holt, Chief Juſtice. The ſubject has a right to fiſh in all *navigable rivers*, as he has to fiſh in the ſea; and a *quo warranto* ought to be brought to try the title of this grantee, and the validity of his grant. *Vide Salk. vol.* 1. *p.* 357.

Eaſter, 2 *Ann.* *The Queen* v. *Watſon.*

The defendant was indicted, for that he was on the — day of — poſſeſſed of an houſe in *Lynn Regis*, adjoining to the *common bridge*; that he ought to repair the ſaid houſe, *by reaſon of his tenure*; but that he permitted it to be ſo much out of repair, that it was ready to fall on the Queen's ſubjects paſſing over the ſaid *bridge*, *&c.* On *not guilty* pleaded, the jury found a ſpecial verdict, *viz.* that *Watſon* was but tenant at will of the ſaid houſe, and concluded with a ſpecial concluſion, praying judgment of the court, whether he was obliged *by reaſon of his tenure*, to repair the houſe: and after argument, it was adjudged, that the defendant as tenant at will only, ought to repair the houſe, ſo that the public be not prejudiced by want of repairs; but that he is not compellable to repairs as to his landlord; and that is ſhewn well enough in this indictment. The only objection is, that he is not chargeable to repair *by reaſon of his tenure*, but though that is improper, yet it ſhall be intended of the poſſeſſion, and not of the ſervice. And judgment was given againſt the the defendant. *Vide Raym. vol.* 2. *p.* 856.

Eaſter, 2 *Ann.* *The Queen* v. *Kime.*

The defendant was indicted for not working towards the repair of the *highways* in *London*, on *ſtat.* 22 & 23 *Car.* 2. 17. The indictment ſet forth, that *ſix* days *between* ſuch a time and ſuch a time were appointed by the juſtices, and that the defendant did not come on any of the *ſix* days; this indictment was held naught, for the particular days ought to be ſet forth. The juſtices muſt not appoint *ſix* days generally between ſuch a time and ſuch a time, but muſt be particular; and ſince the appointment was naught in this caſe, the party was not bound to come at all. *Vide Salk. vol.* 1. *p.* 357. *Raym. vol.* 2. *p.* 858.

Trinity, 2 *Ann.* *The Queen* v. *Watts.*

The defendant was indicted for not repairing a houſe ſtanding on the *highway*, ruinous, and like to fall down, which the defendant occupied, and ought to repair *by reaſon of his tenure*. The defendant pleaded *not guilty*, and the jury found a ſpecial verdict, *viz.* that the defendant occupied, but was only tenant at will, and whether he was liable was the queſtion.

Per curiam. The *reaſon of his tenure* is only an idle allegation; for it is not only charged, but found, that the defendant was occupier, and in that reſpect he is anſwerable to the public; for the houſe was a *nuiſance* as it ſtood, and the continuing the houſe in that condition is continuing the *nuiſance*. And as the danger is the matter that concerns the public, the public are to look to the occupier, and not to the eſtate, which is not material in ſuch caſe as to the public.

Powell, Juſtice, held, that there might be a tenure, and that tenures being chargeable on the land by the ſtatute of *avowries*, it is not material, even in an avowry, what eſtate the occupier has in the premiſes liable. *Vide Salk. vol.* 1. *p.* 357. *Raym. vol.* 2. *p.* 856.

Trinity, 2 *Ann.* *Staples* v. *Heydon.*

See this caſe fully ſtated in page 4 of this work, under the head *Abatement*.

Eaſter, 3 *Ann.* *Anonymous.*

Per curiam. If a man either by *grant* or *preſcription* has a right to a wreck thrown on another's land, of neceſſary conſequence, he has a right to a *way* over the ſame land to take it; and the very poſſeſſion of the wreck is in him that has ſuch right before any ſeizure: *Originally all wrecks* were in the crown, and the King has a right to a *way* over any man's ground for his wreck; and the ſame privilege goes to the grantee thereof. *Vide Mod. Rep. vol.* 6. *p.* 149.

Eaſter, 3 *Ann.* *The Queen* v. *The Ducheſs of Buckleugh & al.*

At a trial at *bar* on an information for ſuffering a *common bridge* to run to decay, which the defendants by tenure were obliged to repair, it was reſolved, 1. That if a manor be held by the ſervice or tenure of repairing a *common bridge* or *high way*, and that manor afterwards comes to be divided into ſeveral hands; every one of theſe *alienees* being tenants of any parcel, either of the *demeſnes* or ſervices, ſhall be liable to the whole charge, and are contributary among themſelves. And though the lord of the manor might on the ſeveral alienations, agree to diſcharge thoſe that purchaſed of him, from ſuch repairs; yet that ſhall not alter the remedy for the public, but only bind the lord and thoſe that claim under him. As the whole manor, and every part of it in the poſſeſſion of one tenant, was once chargeable with the reparation, ſo it ſhall remain, notwithſtanding any act of the proprietor: it ſhall not be in his power to apportion the charge whereby the remedy for public benefit ſhould be made more difficult, or by alienations to perſons unable, to render it, in reſpect of the parts which ſhould come into ſuch hands, quite void. 2dly. That though a manor ſubject to ſuch charge, comes into the hands of the crown, yet the duty on it continues, and any perſon claiming afterwards, under the crown, the whole manor, or any part of it, ſhall be liable to an *indictment* or *information* for want of due repairs. *Vide Salk. vol.* 1. *p.* 358. *Mod. Rep. vol.* 6. *p.* 150.

Eaſter, 3 *Ann.* *The Queen* v. *The Inhabitants of Cluworth.*

The defendants were indicted for not repairing a *common footway*, and confeſſed it, and ſubmitted to a fine.

Per curiam. The matter is not at an end by the defendant's being fined, but writs of *diſtringas* ſhall be awarded *in infinitum*, till we are certified that the *way* is repaired; but the defendants are not bound to put it in better condition than it has been in time out of mind, but as it has been uſually at the beſt. *Vide Salk. vol.* 1. *p.* 359. *Mod. Rep. vol.* 6. *p.* 163.

Michaelmas, 3 *Ann.* *The Queen* v. *The Inhabitants of the County of Wilts.*

On an *information* againſt the county for not repairing *Laycock Bridge*; they pleaded, that the village of *Laycock* ought to repair it; and it was proved on evidence, that the juſtices of the ſeſſions had made an order on the village to repair it; but the court held that was no evidence, for the juſtices might indict for the neglect, but could not make an order; and the county is liable, unleſs they can find a particular perſon to charge. The *Attorney-General* cited a caſe, wherein it was adjudged, that if a private perſon builds a *bridge*, which afterwards becomes a public convenience, the county is bound to repair it. *Vide Salk. vol.* 1. *p.* 359. *Mod. Rep. vol.* 6. *p.* 191.

Michaelmas, 3 *Ann.* *Denham* v. *Stevenſon.*

See this caſe fully ſtated in page 476 of this work, under the head *Executors and Adminiſtrators.*

Eaſter, 4 *Ann.* *The Queen* v. *The Inhabitants of Stratford.* Error.

On a *writ of error* brought to reverſe a judgment given on an indictment, for not repairing the *highways*, the council excepted, that it was not ſaid the *highways* were out of repair; but that it was not then ſo narrow, filthy, and dirty, as to hinder the Queen's ſubjects from paſſing: now it did not appear but that it was antiently ſo and it was not now narrower than before; it was not ſhewn that the *way* was ſtreightned, and delayed, for which the court thought it was inſufficient; but put off the judgment till next term, on the prayer of the party indicted, that he might inſpect the record; therefore judgment was granted to reverſe it, *unleſs cauſe ſhewn* by the firſt day of *Trinity* term. *Vide Mod. Rep. vol.* 11. *p.* 56. *Raym. vol.* 2. *p.* 1169.

Trinity, 4 *Ann.* *The Queen* v. *Sainthill or Saintiff.* Error.

On an indictment found before juſtices of the peace at the ſeſſions for not repairing *the weſtern part of the foot bridge,* (*pons pedalis*) *meaning the common foot bridge, containing half of the bridge in the common path.* On judgment given for the Queen, *error* was brought; and it was objected, that *ſtat.* 22 *H.* 8. by which juſtices of peace have their juriſdiction of nuiſances in *bridges*, extends only to *bridges* in the *common highway.* 2 *Inſt.* 701.

2dly, It ought to ſhew the quantity, *viz.* ſo many feet in length, and ſo many in breadth. It was anſwered, that there may be *a common highway* which is not the King's *highway*, and yet the juſtices have power over nuiſances in that caſe, not by virtue of *ſtat.* 22 *H.* 8. but by *ſtat.* 1 *E.* 3. which gives them power over all nuiſances. The court doubted as to the *firſt exception*, and over-ruled the *ſecond*; it being held that *pons pedalis* did not ſignify a *foot-bridge*, but a *bridge* a foot long; and ſo reverſed the judgment; the word *pedalis* having been uſed for *pedeſtris.* *Vide Salk, vol.* 1. *p.* 359. *Mod. Rep. vol.* 6. *p.* 255.

Hilary, 8 *Ann.* *The Queen* v. *Brown.*

The defendant was indicted for not repairing a *highway*; he pleaded, that the inhabitants of *D.* ought *abſque hoc*, that he ought, whereon iſſue being joined, the defendant offered to give in evidence, that it was not a *highway*; but a verdict being given againſt him, and that point ſaved at the aſſizes of *York*, for the opinion of this court; this term it was reſolved by *Powel*, *Powys*, and *Gould*, Juſtices, on motion, that this ought not to have been given in evidence; becauſe the defendant had confeſſed it to be a *highway* by his plea; for if he would have conteſted that point, he ſhould have pleaded *not guilty.* *Vide Mod. Rep. vol.* 11. *p.* 273.

Michaelmas, 8 *Ann.* *Tenant* v. *Golding.*

See this caſe fully ſtated in page 34 of this work, under the head *Actions.*

Michaelmas, 10 *Ann.* *The Queen* v. *Brandling.*

An order was made at the *quarter ſeſſions* againſt the ſurveyors of the *highways*, to account for money received; and it was quaſhed, becauſe it ſhould be made at the *ſpecial ſeſſions*, and not at the general *quarter ſeſſions*; and in this caſe it ſeems they refuſed to account before *three* juſtices of the *ſpecial ſeſſions*, and therefore this order was made at the *quarter ſeſſions.*

It was objected, that by the act no *certiorari* ought to go.

Per curiam. That is only where the queſtion is, about not repairing the *highway*, but not in this caſe, where it concerns the accounts only of the ſurveyors for money received, beſides, this objection ought to have been made before the filing of the *certiorari.* *Vide Forteſcue, p.* 254.

Hilary, 11 *Ann.* *The Queen* v. *The Inhabitants of Hornſey.*

See this caſe fully ſtated in page 454 of this work, under the head *Evidence.*

Hilary, 3 *Geo.* *The King* v. *Hamond.*

The defendant was indicted, for that he, *on ſuch a day, year, and place, in the common* (ſtrata, or alta regia, via, i. e.) *highway, laid and placed, and there ſuffered to remain for ten days, ten loads of ſtraw, dung, &c.* On *demurrer* it was objected, that the place where the nuiſance was committed, ſhould be certainly alledged whereas here the indictment runs, that it was laid in *one* place or another, and being disjoined by the word *or*, the court cannot take *communis ſtrata*, and *alta regia via*, to be the ſame.

To which was anſwered, and reſolved by the court, that *ſtrata* ſignifies the *highway*, and that theſe *two* expreſſions denote the ſame place. *Spelman, verbo ſtrata, Cowel's Interpreter, Streetgavel* and *Streetward.*

Then an exception was taken, that *the place from which to where* the *way* led was not mentioned. To which the court anſwered, that in indictments for nuiſances in the *highway*, it is not neceſſary; for the *highway* is infinite; and leads from ſea to ſea. *Latch.* 183. 3 *Keb.* 89. The *King* v. *Thompſon,* 10 *W.* 3. Therefore judgment was given for the King. *Vide Strange, vol.* 1. *p.* 44.

Eaſter, 4 *Geo.* *The King* v. *The Inhabitants of Hamworth, in the County of Stafford.*

See this caſe fully ſtated in page 258 of this work, under the head *Certiorari.*

Trinity, 5 *Geo.* *The King* v. *Corrock.*

The defendant was indicted for not repairing an *highway*, which he was obliged to do *by reaſon of the tenure* of a certain houſe, which in another place was mentioned to be the manſion-houſe of the defendant.

It was objected, that by *ſtat.* 5 *H.* 7. *c.* 3. it appears, that the occupier and not the owner is chargeable to repairs of the *highway*, and therefore the indictment ſhould have been *by reaſon of his tenure*, for it may be this houſe is let to another, and *Noy* 93. *Lat.* 206. were cited.

Per curiam. There is no neceſſity to lay it ſo, for *by reaſon of the tenure*, implies it to be ſuch a tenure, as makes him chargeable, and ſo it was held, 1 *Vent.* 331. *The King* v. *Fanſhaw.* There he was charged *on account of the tenure of certain lands and tenements*; and the exception was for want of the word *his*, and the indictment was held well enough. But if it were neceſſary to ſay *his*, we think it is implicitly averred, by calling it afterwards his manſion-houſe; ſo take it which way you will, the indictment is well enough. *Vide Strange, vol.* 1. *p.* 187.

Trinity, 6 *Geo.* *The King* v. *The Inhabitants of Stroud.*

An order for impoſing a new rate towards the repairs of the *highway*, was quaſhed for *two* exceptions. 1ſt, Becauſe it did not appear, but that the ſtatute labour was ſufficient. And 2dly, Becauſe only *the occupiers of land* are charged, whereas others are equally liable. *Vide Strange, vol.* 1. *p.* 315.

Michaelmas, 6 *Geo.* *Haſſel's Caſe.*

The court was moved for a *mandamus* to be directed to the juſtices of peace of the county of *Cheſter*, commanding them to make a rate, to reimburſe one *Haſſel* the money he had expended as ſurveyor of the *highways*; and it was granted. *Vide Strange, vol.* 1. *p.* 211.

Hilary, 9 *Geo.* *The King* v. *the Inhabitants of the County of Surry.*

On a motion made to diſcharge a rule for an information againſt the inhabitants of the county for not repairing a *bridge*, it was alledged, that the pariſhioners of *Mitcham*, in that county, ought to repair it, which they had done time out of mind; it is true, that pariſh had obtained a verdict againſt the county, but it was by ſurpriſe; for by certificates, and other records, of the ſeſſions, it will appear that this pariſh ought to repair this *bridge*, and that they had been fined for not repairing; and that they had acquieſced under that charge many years.

It was inſiſted for the pariſh, that admitting they had repaired the *bridge*, yet if they were not obliged ſo to do, either by *preſcription or tenure*, they ſhall not always be liable; they cannot be obliged by *preſcription* becauſe the inhabitants of this pariſh are not a body politick, and it is not pretended, that they are obliged by *tenure*.

To which it was anſwered, that an information againſt the county in general was the only way to try the right; for tho' this pariſh might not be obliged to repair the *bridge*, yet ſome other pariſh might, and ſince the county is at *firſt view* to repair it, it is probable that when the information is exhibited againſt them, the inhabitants of *Mitcham* to excuſe themſelves may ſhew who is obliged to repair it; and the court being of that opinion, the rule was made abſolute. *Vide Mod. Rep. vol.* 8. *p.* 120.

Hilary, 5 *Geo.* 2. *The King* v. *Hindſon.*

On an information for ſtopping a *common foot-way*, the proſecutor moved, that it had been a *common paſſage* as far back as any witneſs could remember. But the defendant producing a leaſe made for *fifty ſix years* of this *way* to the intent that it might be a paſſage during the term, and the term expiring in 1728.

Raymond, Chief Juſtice, held the defendant *not guilty* and as to the leaving of it open ſince, he ſaid, that would not be long enough to amount to a gift of it to the public. *Vide Strange, vol.* 2. *p.* 909.

Michaelmas, 6 *Geo.* 2. *The King* v. *The Inhabitants of Eckerſhall.*

See this caſe fully ſtated in page 259 of this work, under the head *Certiorari.*

Hilary, 8 *Geo.* 2. *Sir John Lade* v. *Shepherd.*

On a trial of an action of *treſpaſs*, a caſe was made, that the place where the ſuppoſed treſpaſs was committed was formerly the property of the plaintiff, who ſome years ſince built a ſtreet on it, which has ever ſince been uſed as an *highway*. That the defendant had land contiguous, parted only by a ditch, that he had laid a bridge over the ditch, the end whereof reſted on the *highway*. And it was inſiſted for the defendant, that by the plaintiff's making a *ſtreet*, it was a dedication to the public; and therefore however he might be liable to an indictment for a nuiſance, yet the plaintiff could not ſue him as for a treſpaſs on his private property.

Per curiam. It is certainly a dedication to the public, as far as the public has occaſion for it, which is only for a right of paſſage. But it was never underſtood to be a transfer of the abſolute property in the ſoil. Therefore the plaintiff had judgment. *Vide Strange, vol.* 2. *p.* 1004.

Eaſter, 17 *Geo.* 2. *The King* v. *Farewell.*

See this caſe fully ſtated in page 260 of this work, under the head *Certiorari.*

Eaſter, 30 *Geo.* 2. *Goodtitle, on the Demiſe of Cheſter* v. *Alker and Elmes.*

See this caſe fully ſtated in page 400 of this work, under the head *Ejectment.*

Hilary, 31 *Geo.* 2. *The King* v. *The Inhabitants of Flecknow.*

On an *indictment* againſt the inhabitants of the hamlet of *Flecknow*, for not repairing a *highway*,

The inhabitants pleaded that one "*G. W.* ought "to repair it by reaſon of his tenure, ſo long as the "ſame ſhould remain incloſed, *&c.*" On iſſue being joined, a verdict by conſent was found by the jury, whereby the defendants were found *guilty*; but the verdict was left *ſubject* to the opinion of the court.

The queſtion ſubmitted to the court was, whether the inhabitants of the ſaid hamlet of *Flecknow* continued bound to repair the *highway* in the *indictment* mentioned, notwithſtanding the ſaid incloſure by the ſaid *G. W.* or whether by reaſon of ſuch incloſure they were diſcharged therefrom, during the time ſpecified in the *indictment.*

After hearing the arguments of the council on both ſides, the court ordered the *poſtea* to be delivered to the proſecutor.

Lord *Mansfield.* An owner of land, over which there is an open road, may incloſe it by his own authority, or alter it under a proper authority, and by a legal courſe. 1ſt, He may incloſe it by his own authority, but then it muſt be on *two* conditions, *one* "That he is obliged to repair it till he throws up the "incloſure." The *other*, "That he leave ſufficient "ſpace and room for the road." Therefore *G. W.* is not on the facts ſtated to us, obliged to repair, by reaſon of his having incloſed an open road, nor indeed can it be deemed an open road under the circumſtances of this caſe.

Deniſon, *Foſter*, and *Wilmot*, Juſtices, gave their opinions at large, and concurred with the Chief Juſtice.

Per curiam. Let the *poſtea* be delivered to the proſecutor. *Vide Bur. vol.* 1. *p.* 461.

Trinity, 32 & 33 *Geo.* 2. *The King* v. *Boyall.*

See this caſe fully ſtated in page 157 of this work, under the head *Averment.*

Trinity, 4 *Geo.* 3. *The King* v. *the Juſtices of Peace for Wiltſhire.*

On ſhewing cauſe why a *writ of mandamus* ſhould not iſſue directed to the juſtices of peace for the county of *Wilts*, commanding them to receive, and proceed on a traverſe to a certain preſentment made by a juſtice of peace on view againſt the inhabitants of the tything of *Connock* in the ſame county, for not repairing a *highway* within the ſaid tything.

The council on ſhewing cauſe *argued*, that as this was a preſentment in the ſeſſions, made by a juſtice of peace on his own knowledge, "that the *highway* was out of repair," a general traverſe could not be admitted; for though ſuch a preſentment by a juſtice of peace on view be traverſable as to all other points, yet it is concluſive ſo far as the view and knowledge of the juſtice goes, and the fact of its being out of repair cannot be diſputed; conſequently though a *ſpecial* traverſe ought to be received, a *general* one ought not.

The power of preſentment by any one juſtice on his own proper knowlege "of any *highway* not being well, and ſufficiently repaired and amended," is given by *ſtat.* 5 *Eliz. cap.* 13. which refers to *ſtat.* 2. *P. & M. cap.* 8. and 3 *W. & M. cap.* 12. has alſo a relation to the ſame ſubject, and it has been held, "that the "party againſt whom ſuch a preſentment is made "cannot take a traverſe to the want of repair of ſuch "*highway.*"

The council in ſupport of the rule *urged*, that the juſtices *were obliged* to receive the traverſe *generally*, and that the defendant had a *right* to traverſe the way being out of repair, notwithſtanding that the preſentment was made by the juſtice on his own view.

After hearing the arguments of the council for and againſt the rule, the court enlarged the ſame, and ſome time after the court gave their opinion as follows:

Lord *Mansfield.* We are all of opinion, “that a
“*mandamus* ſhould go, commanding the juſtices to re-
“ceive and admit a general traverſe.”

Per curiam. Let the rule be made abſolute. *Vide Bur. vol.* 3. *page* 1530.

Hundred.

Michaelmas, 6 *W. & M.* *Hicks* v. *Woodeſon.*

See this caſe fully ſtated in page 326 of this work, under the head *Cuſtom.*

Michaelmas, 8 *W.* 3. *Hallet* v. *Byrt.*

Adjudged, that a *hundred court* is derived out of the *county court.* *Vide Mod. Rep. vol.* 5. *p.* 254.

Eaſter, 1 *Ann.* *Anonymous.*

Adjudged, That generally a *levari fac.* is not the proceſs of a *hundred court,* but it may be ſo by cuſtom, and generally all the *hundred courts* in *England* have ſuch a cuſtom. The true *common law* proceſs is a *diſtringas,* *Vide Mod. Rep. vol.* 7. *p.* 1.

Hilary, 1 *Ann.* *Cooper* v. *The Hundred of Baſingſtoke.*

In an action againſt the *hundred,* on the *ſtat.* of *Winton* of *hue and cry,* a ſpecial verdict was found at the aſſizes to this effect, *viz.* That the plaintiff was travelling on the highway, within the *hundred* of *Michael, Devon,* that thereon he was *aſſaulted,* and ſet on by ſeveral malefactors to him unknown, who took poſſeſſion of him, and carried him into a coppice wood, hard by the ſaid highway, in the *hundred* of *Baſingſtoke,* and there did rob him.

The queſtion before the court was, whether the *hundred* of *Baſingſtoke* be chargeable with this robbery.

After ſeveral arguments, the court this term gave judgment.

Per curiam. We are unanimouſly of opinion, that the *hundred* of *Baſingſtoke,* is chargeable for this robbery; therefore judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 7. *p.* 157. *Raymond, vol.* 2. *p.* 826.

Michaelmas, 7 *Geo.* *Taſhmaker* v. *The Hundred of Edmonton, in the County of Middleſex.*

The plaintiff lived a mile from the church, and going thither with his Lady in his coach on a *Sunday,* was robbed, and brought the preſent action againſt the *hundred,* and recovered, for the *ſtat.* extends only to the caſe of travelling; but *Pratt,* Chief Juſtice, ſaid, if the plaintiff and his wife had been going to make viſits, it might been otherwiſe. *Vide Strange, vol.* 1. *p.* 406.

Michaelmas, 16 *Geo.* 2. *Ball* v. *The Hundred of Wymerſley, in the County of Northampton.*

On a caſe made at the *aſſizes* on the *ſtatute* of *hue* and *cry, It was ſtated,* that ſoon after *ſix* o'clock in the morning, the plaintiff was robbed *two* miles and a half diſtance from *Northampton,* and the highwayman cut his bridle and ſtirrups, and threw them into a ditch, and then turned his horſe looſe; that the plaintiff recovered them, remounted, and rode through a village called *Cotton,* where he gave no notice. He met *three* men afterwards on the road, whom he informed of the robbery, and arrived at *Northampton* by *ſeven* o'clock, and gave notice to an inn keeper there, from whence he went to *Rotherthorpe, three* miles off, where the High Conſtable lived, and between *eight* and *nine* o'clock gave notice; and the point for the opinion of the court was:

> Whether this was ſufficient to maintain the action within *ſtat.* 8 *Geo.* 2. *c.* 16. which requires, that the party robbed ſhall, “with as much conve-
> “nient ſpeed as may be after the robbery, give
> “notice to *one* of the conſtables of the *hundred,*
> “or to ſome conſtable of ſome town, pariſh,
> “village, hamlet, or tything, near to the place,
> “where ſuch robbery ſhall happen.”

The court on argument held this to be good notice, for the High Conſtable is the propereſt perſon to go to, and it is not required to go to the next conſtable. It appeared the plaintiff loſt no time conſidering the circumſtances he was in, and *Rotherthorpe* is not at ſuch a diſtance, but that it may come within the meaning of the ſaid word *near.* So the plaintiff had judgment. *Vide Strange, vol.* 2. *p.* 1170.

Hilary, 19 *Geo.* 2. *William King* v. *The Inhabitants of the Hundred of Biſhops Sutton in Hants.*

By *ſtat.* 9 *Geo. cap.* 22. the *hundred* is made liable for damages ſuſtained by the wilful burning of barns, *&c.* and it requires the party injured to give notice within *two* days, and within *four* days after to give in on an *examination on oath, whether he knows the perſon or perſons that committed ſuch fact, or any of them,* and if he confeſſes he knows them, then he is to be bound in a recognizance to proſecute.

In an action brought on this ſtatute, the oath proved was, that he had good reaſons to ſuſpect the fact was done by *R. G.* and *W. L.* both of ſuch a pariſh, and a doubt ariſing at the aſſizes, whether this was ſufficient or not, a caſe was made thereon, and *twice* argued at the *bar.*

Per curiam. The examination does not maintain the action, the oath required, is a condition *precedent,* for the ſake of the *hundred,* and to prevent ſcreening the offenders. There is a great difference between *ſuſpecting* and *knowing,* a man who *knows* the offender may purpoſely ſtop at the word *ſuſpect,* to avoid being bound to proſecute, and though it would be equivocating, yet it would hardly be a perjury aſſignable, it being only a ſuppreſſion of part of the truth; he ſhould have ſaid, *I ſuſpect them to be the men, but do not know it.* It will be dangerous to let them go out of the words of the act, and therefore the defendants muſt have the *poſtea* delivered to them, and the plaintiff muſt pay the coſts of a *nonſuit.* *Vide Strange, vol.* 2. *p.* 247.

Trinity, 5 *Geo.* 3. *Greetham, Widow* v. *The Inhabitants of Theale.*

On an action brought by the *party aggrieved* againſt the inhabitants, *&c.* on *ſtat.* 9 *Geo. cap.* 22. for ſatisfaction and amends for the damages ſuſtained by maliciouſly ſetting on fire a barn and out-houſe belonging to the plaintiff, in which action the plaintiff was *nonſuited;* and on an application to the maſter, “to
“tax the coſts of the *nonſuit,*” he doubted, “Whe-
“ther the defendants were entitled to them;” on which the defendants council moved for the court to give directions to the maſter, as to the taxing ſuch coſts.

The court held, that wherever the plaintiff would be entitled to coſts, the defendant is ſo *reciprocally.* Here the plaintiff, the party aggrieved, would have been entitled, therefore as it is mutual and reciprocal, he is liable, and accordingly they gave directions to the maſter to tax the coſts. *Vide Bur. vol.* 3. *p.* 1723.

Jeofails.

Hilary, 3 & 4 *W.* & *M.* *Walwin* v. *Smith.* Error

A queſtion was ſtated whether a *diſcontinuance* in an inferior court is helped after judgment by the *ſtatute of jeofails*; the court was of opinion, that diſcontinuance of proceſs, or in pleading, was helped by the ſtatute; but where the cauſe is diſcontinued, and out of court, as in the beginning of this reign, for not holding *Hilary* term, all cauſes were then diſcontinued, which could not be aided by any ſtatute of *jeofails*, without a particular act of parliament for reviving thoſe cauſes and proceſs.

In *Becher's* caſe after a verdict for the plaintiff, there being ſome doubt whether the *venue* was good or not, and the plaintiff intending to bring a new action, got leave to *diſcontinue*, in which caſe the judgment ſhould have been entered, *That the plaintiff take nothing by his writ, but be in mercy for his falſe claim, and that the aforeſaid defendant may go hence without a day.*

But inſtead of ſuch an entry, it was that the plaintiff by his Attorney *comes here into court, and confeſſes that he will not further proſecute*, &c. So judgment was given that the defendant *go hence without a day, &c.* which amounts to a *retraxit*, and is a bar to the ſame action for ever, ſo long as that judgment ſtands in force.

Whereon a writ of *error* was brought, and it was ſhewed, that there was a *diſcontinuance*, for the verdict was, 2 *Jac.* and the judgment was 4 *Jac.* and no continuance from one term to the other, which might have been aided by the ſtatute of *jeofails*, if the judgment had been given on the verdict; but it was on the *retraxit* which is not within the ſtatute; and for this reaſon that judgment was reverſed *Vide Mod. Rep. vol.* 4. *p.* 86.

Trinity, 3 *W.* & *M.* *Chew* v. *Briggs.*

See this caſe fully ſtated in page 368 of this work, under the head *Diſcontinuance*.

Michaelmas, 4 *W.* & *M.* *Williams* v. *Saliſbury.*

The want of the words *brought into court*, helped after verdict, by the ſtat. of *Oxford*: *he brings here into court the letters of Adminiſtration*, are form after verdict, but ſubſtance on demurrer. *Vide Mod. Rep. vol.* 12. *p.* 30.

Eaſter, 5 *W.* & *M.* *Morley* v. *Vivian.*

And this he is ready to verify, held to be only form; and though it has been held ſubſtance, yet ſubſequent opinions have been contrary. *Vide Mod. Rep. vol.* 12. *p.* 38.

Eaſter, 5 *W.* & *M.* *Brook* v. *Ellis.* Error.

On a *devaſtavit* ſuggeſted againſt both executors. *viz. A.* and *B.* the writ was to the ſheriff to inquire of the waſting by both; the ſheriff returned a *devaſtavit* as to *A.* but ſaid nothing as to *B.* This being aſſigned for error, after judgment on a verdict, was held to be aided by the verdict, being but an inſufficient return, or a miſ-return by reaſon of the omiſſion; otherwiſe, if no return at all. *See* 3 *Cro* 587. 3 *Co.* 81. *Noy* 72. *Cro. Car.* 295, 512. *Vide Salk. vol.* 1. *p.* 363.

Eaſter, 9 *W.* 3. *Dorne* v. *Caſhford.*

The plaintiff declared, that he was poſſeſſed of the *Greyhound Inn*, &c. by leaſe thereof for a term of years, and that he and all thoſe whoſe eſtate he had, *had and ought to have, and were accuſtomed to have a way to the church*, &c. and the defendant obſtructed it. After a verdict for the plaintiff, the judgment was arreſted for this reaſon, that a leſſee for years, has no body's eſtate but his own, and therefore he cannot lay a *que eſtate*, and the title is impoſſible; but the words *ought to have* without a *que eſtate* had been well enough: adjudged 3 *Keb.* 528. 1 *Vent.* 13. 1 *Sid.* 297. *Vide Salk. vol.* 1. *p.* 363. *Raym. vol.* 1. *p.* 266.

Eaſter, 1 *Ann.* *Anonymous.*

When the ſuit is by *original writ* the ſtatute of *jeofails* will not help a bad (original); *otherwiſe* when the ſuit is by *meſne* proceſs, as *bill Midx. latitat.* &c. for the difference therein between *treſpaſs*, and *treſpaſs on the caſe. See Hob.* 180. 2 *Cro.* 542. *Vide Mod. Rep. vol.* 11. *p.* 2.

Eaſter, 1 *Ann.* *Clerk* v. *Martin.*

Per curiam. After a verdict it may be intended that no damages were given for matter inſenſible; but it cannot be ſo intended for matter ſenſible, but inſufficient in law. See this caſe fully ſtated in page 229 of this work, under the head *Bills of Exchange*.

Hilary, 4 *Ann.* *Crowther* v. *Oldfeild.* Error.

The plaintiff declared, *for that whereas he was ſeiſed of one meſſuage and ten acres of land in, &c. parcel of the manor of W. held by copy of court-roll of that manor as a cuſtomary tenant in fee-ſimple, according to the cuſtom of the ſaid manor; and for that whereas he the aforeſaid plaintiff has, and ought to have, and he and all the cuſtomary tenants of the manor aforeſaid, by the cuſtom of that manor from time whereof,* &c. *had, and ought to have, and uſed common of paſture in a certain place called* Waimleſs Moor, *parcel of the ſaid manor, for all his cattle, levant and couchant, as appertaining and belonging to his tenement aforeſaid, nevertheleſs the defendant,* to deprive him of his ſaid common, had incloſed, *whereby*, &c. On *not guilty* pleaded, the plaintiff had a verdict; but on motion in the *Common Pleas*, judgment was arreſted. On this the plaintiff brought a *writ of error* in this court and that judgment was reverſed: 1ſt. It was agreed in this caſe, that a man cannot be a copyholder, nor an eſtate be a copyhold eſtate though it be held *by copy of court-roll, according to the cuſtom of the manor*, unleſs it be alſo *at the will of the lord*; and the Chief Juſtice ſaid, the great difference between copyholds and cuſtomary freeholds which paſs by ſurrender is, that the copyholder is in by demiſe from the lord, but in the caſe of cuſtomary freeholds the lord is only an inſtrument: and that in pleading a title to a copyhold eſtate, it is ſufficient to ſhew a grant from the lord; but in the other caſe it is not enough to ſhew, that the lord granted it, or that *A.* ſurrendered to the lord, and he granted; but it muſt be ſhewn that the ſurrenderor was ſeiſed in *fee* and ſurrendered to the lord, and he granted, *&c.* 2dly. It was agreed, that if this eſtate muſt be taken to be *freehold*, the judgment of the *Common Pleas* was rightly given: for then the plaintiff being ſeiſed of a freehold eſtate, to make a title to the common, ſhould have preſcribed, that he and all thoſe whoſe eſtate he had, have time out of mind had, *&c.* and cannot make a title by cuſtom, according to 1 *Cro.* 418. And here the court admitted the caſe of *Dorne* v. *Caſhford* and ſaid that though a plaintiff in poſſeſſory actions may declare on his poſſeſſion without ſetting out a title; yet if he undertakes to ſet out a title, and ſhews a bad one, the verdict cannot cure that. 1 *Cro.* 418. 2 *Cro.* 315. 2 *Saund.* 136, 186. 1 *Mod.* 294. But the court held, that now after a verdict this eſtate of the plaintiff's muſt be taken to be a copyhold eſtate, and not a freehold eſtate, becauſe it is both laid and found, that the tenements were parcel of the manor, and that by cuſtom the plaintiff, *as a cuſtomary tenant* has *common*; all which is utterly impoſſible, unleſs the tenement was copyhold, and therefore muſt be ſuppoſed ſuch, though the words *at the will of the lord* were omitted, comparing it to the caſe of debt for rent by an aſſignee of a reverſion, who ſhews no attornment, and has a verdict, and to the caſe in 1 *Sid.* 218. On this ground the whole court held, that though a title, which could not be good, could never be aided by a verdict; yet a title in a declaration which was only imperfectly ſet forth, and where the want of ſomewhat was omitted might be ſupplied by intendment, was cured by a verdict: and hereupon, ſuppoſing this to be a copyhold eſtate, there aroſe theſe objections: 1ſt. That the cuſtom was not alledged expreſsly, *as belonging and appertaining to his tenements.* 2dly. That they ought not to claim *common*, for it is annexed to the eſtate, and not to the land; the reaſon is, becauſe the eſtate grew by cuſtom, and ſo did the common as part thereof, or rather a privilege annexed thereto. 2 *Cro.* 253. 2 *Brownl. Entr.* 96. If a copyholder purchaſe the freehold of his copyhold, his common is gone. As to the firſt objection the court held, that it was but a defective title, and there was room enough to induce a proof of the cuſtom; and it was only an informality of laying the cuſtom, which is cured by the verdict. As to the ſecond objection, the Chief Juſtice made this diſtinction, *viz.* where a copyholder claims common in the waſtes of a manor, it properly and ſtrictly belongs to the eſtate, and if he enfranchiſes his copyhold, in that caſe his common is loſt; but where he claims it out of the manor, it belongs to the land, and not to the eſtate; and if he enfranchiſe the eſtate, the common continues; but all the precedents of *common* are, *as belonging to his tenements.* 9 *Co.* 113. *Co. Ent.* 9. *Dy.* 363. *b.* 1 *Saund.* 349. 2 *Saund.* 231. *Co. Ent.* 574. *Winch. Ent.* 931. 1026, 1027. 1111. *Hern.* 81. *Brownl. Red.* 428, 430. And the Chief Juſtice thought, that ſince the pleadings were ſo, the common might be ſaid to belong to the copyhold tenement, ſince it belonged to the copyhold eſtate; for that which belongs to the eſtate belongs to the tenement: and the judgment was reverſed after great deliberation. *Vide Salk. vol.* 1. *p.* 365. *Raym. vol.* 2. *p.* 1225.

Michaelmas, 4 *Ann. Courtney* v. *Strong.*

On an *aſſumpſit*, the plaintiff *James Courtney* declared, that in conſideration that he had agreed with the defendant at his requeſt, that the defendant *ſhould quietly occupy a certain meſſuage, and twenty acres of land, charged with the payment of* 20 *l. per annum, lately granted to one John Courtney, free from all moleſtation from the aforeſaid James Courtney, by reaſon of the rent aforeſaid*, the defendant promiſed. *Non aſſumpſit* was pleaded, and a verdict for the plaintiff. But judgment was arreſted on motion, for that the rent-charge was granted to *John Courtney*, and not to the plaintiff; and there was no room to imagine an aſſignment, or that the rent did not continue in *John*. So then the defendant was to pay the plaintiff for not doing that which he had no right to do, which is *nudum pactum*, and no conſideration: it was urged for the plaintiff, that being after verdict, the court muſt intend a conſideration, and that there was an aſſignment.

Per curiam. Here was a promiſe, though not a legal promiſe, and ſuch as could bind; and if that promiſe, which is laid was fully proved, the jury might well find the verdict. *Vide Salk. vol.* 1. *p.* 364. *Raym. vol.* 2. *p.* 1217.

Eaſter, 10 *Ann. Jeffrey* v. *Barrow.*

See this caſe fully ſtated in page 512 of this work, under the head *Heir.*

Hilary, 2 *Geo. Hannah Lee* v. *John Pilmy.* Error.

The plaintiff brought an action of debt on a bond, as executrix to her huſband, againſt the defendant. *Pilmy* confeſſed the action, whereon judgment was given for *Lee*, on which judgment *Pilmy* brought a writ of *error* in this court and aſſigned for *error* by his council that this action was brought by the plaintiff as executrix in the *debet* and *detinet*, whereas it ought to be in the *detinet* only. But to this it was anſwered that this would be aided after verdict by the *Oxford* act. 1 *Lev.* 250. 1 *Lid.* 379. *Frewin and Wife* v. *Painton.* And *ſtat.* 4 *Ann. cap.* 16. *par.* 2. extends all the ſtatutes of *jeofails* to judgments to be entered on confeſſion, &c. And the court was of this opinion, ſo the judgment was affirmed. *Vide Raym. vol.* 2. *p.* 1513.

Eaſter, 2 *Geo. Burland* v. *Tyler.*

See this caſe fully ſtated in page 125 of this work, under the head *Aſſets.*

Michaelmas, 2 *Geo. Dorſet* v. *Ghaplin.*

See this caſe fully ſtated in page 415 of this work, under the head *Error.*

Trinity, 3 *Geo. The King* v. *the Biſhop of Meath in Ireland.* Error.

On a *quare impedit* brought by the crown, the original writ was returnable at a general return, and the *venire* at a day certain; and it was inſiſted to be error, becauſe throughout the cauſe the proceſs ſhould be uniform.

Per curiam. This is not a diſcontinuance, but a miſcontinuance, which is helped by *ſtat.* 32 *H.* 8. *cap.* 30. and though the King is a party, yet in theſe civil ſuits the ſtatutes of *jeofails* extend to the crown. So the judgment was affirmed. *Vide Strange, vol.* 1. *p.* 62.

Hilary, 4 *Geo. Vandeput* v. *Lord.*

See this caſe fully ſtated in page 147 of this work, under the head *Attornment.*

Eaſter, 6 *Geo. Hackett* v. *Marſhall.*

See this caſe fully ſtated in page 438 of this work, under the head *Error.*

Eaſter, 9 *Geo. Rawbone* v. *Hickman.*

It was moved in arreſt of judgment, that the record ran, *and the aforeſaid plaintiff* inſtead *of the defendant likewiſe*, ſo no iſſue joined; but the court held it was aided. *Cro. El.* 435, 904. In *Mich.* 5 *Geo.* 2. on the authority of this caſe the court would hear no argument on the like objection. *Vide Strange vol.* 1. *p.* 550.

Eaſter, 11 *Geo Shaw* v. *Weigh.*

See this caſe fully ſtated in page 438 of this work, under the head *Eſtates.*

Trinity, 11 *Geo. Cooper* v. *Spencer.*

See this caſe fully ſtated in page 68 of this work, under the head *Amendment.*

Trinity, 11 *Geo. Cambridge* v. *Lea.* Error.

A *writ of error* was brought on a judgment in an action on a *policy* of *inſurance* and the error aſſigned was, for that after the plaintiff had ſet forth that the *ſhip* was laden with goods, and bound from ſuch a place to ſuch a place, and inſured, *that the aforeſaid ſhip and goods aforeſaid was ſunk*, whereas the goods only, and not the ſhip were inſured.

Per curiam. This being only an inſurance on the goods, nothing could be given in evidence at the trial but the loſs thereof, without which evidence the plaintiff could never have a verdict, and as to the word *fuit*, it is only *falſe latin*, and cured by the verdict; ſo the judgment was affirmed. *Vide Mod. Rep. vol.* 8. *p.* 383.

Michaelmas, 11. *Geo. Weldon* v. *Buckler or Buckland.*

See this caſe fully ſtated in page 68 of this work, under the head *Amendment.*

Michaelmas, 13 *Geo. Gradell* v. *Tyſon.* Error.

In *debt* on a bond brought by the executor of the ſurviving executor of the obligee; on *error* brought after a verdict, it was objected, that it was not ſhewn that the firſt executor proved the will; and if not, this executor could maintain no action, but it muſt be brought by the adminiſtrator *with the will annexed.* But being after a verdict, the court held it well enough, and affirmed the judgment. *Vide Stra. vol.* 2. *p.* 716.

Michaelmas, 3 *Geo.* 2. *Anonymous.* Error.

On a *writ of error* brought on a judgment in *C. B.* where the plaintiff declared in *treſpaſs quare clauſum fregit*, of a *treſpaſs* committed in the *eleventh* year of the late King, with a *continuance* to the firſt year of his preſent Majeſty, and had judgment by default, *&c.* of which *error* being brought, and the want of an original being aſſigned for *error*, the defendant alledged *diminution*, and had a *certiorari* to the *cuſtos brevium* of the *C. B.* who certified an original as of the precedent term to the *plea*, which original was without any continuances to the term of the *plea*, and which being brought in the *firſt* year of the preſent King, concluded *againſt our peace*. The council for the plaintiff in *error* argued, that the original returned is as no original in this ſuit, there being no continuances on it to the term in which the plaintiff in the action declared, and ſo the ſuit diſcontinued; which caſe would not have been aided after a verdict by the old ſtatutes of *jeofails*; then the variance between this original and the declaration was an incurable fault after verdict by *ſtat.* 18 *Eliz.* and the variance is plain in this, that the original concludes *againſt our peace*, and the declaration does not ſet forth a *treſpaſs* in the late King's time, *Hob.* 251. *Yelv.* 1089. 1 *Sid.* 84. The late ſtatute for the amendment of the law helps only in thoſe caſes of judgments by default, which the old ſtatutes would have aided in judgment, after verdict; and therefore the late ſtatute aids not the preſent caſe.

The council on the other ſide ſaid; the caſe of *Rowning* v. *Lord Carteret*, which was adjudged *Hilary* 3 *Geo. R. R. Rot.* 193. is a direct anſwer to the firſt objection: for there the diſcontinuance was held to be aided by *ſtat.* 32 *H.* 8. after verdict, and conſequently in a judgment by default, ſince the late act: and as to the *ſecond* exception, the declaration lays the *treſpaſs* with a continuance to the preſent King's time, and ſo the variance is only in not concluding *againſt the peace* of his late as well as of his preſent Majeſty, and ſo rather an inſufficiency: it might be naught on demurrer, but not after verdict. 6 *Mod.* 80. *Day* v. *Muſkett.*

Raymond, Chief Juſtice. *Holt* in the above caſe ſays, that *againſt the peace* is a deſcription of the *treſpaſs*, and that therefore a *treſpaſs* concluded *againſt the peace* of the preſent King, could not be maintained by evidence of a *treſpaſs* committed in the King's time; and therefore how it comes to be dropped in the caſe, that this would be cured after a verdict, is hard to conceive: but in the preſent caſe, the variance is not contradictory, but omiſſive and inſufficient; ſo that the queſtion will be, whether this be ſuch a variance as will make it as no original in this ſuit: as to the other exception, how does this, not being continued over to the *plea*, appear to be an original in this ſuit? Are we concluded by the return of the officer? But we will not ſhake the authority of *Rowning* v. *Carteret*, which is in point. *Adjourned* on the other exception; but judgment was afterwards affirmed. *Vide Fitz-Gibbons*, *p.* 96.

Michaelmas, 4 *Geo.* 2. *Mallory* v. *Jennings.*

On debate it was held, that the want of a *writ of inquiry* is aided by the ſtatute of *jeofails*; though it was inſiſted to be ſuch a fault as could not happen in caſe of a verdict. *Vide Stra. vol.* 2. *p.* 878. *Fitz-Gibbons*, *p.* 162.

Eaſter, 5 *Geo.* 2. *Hays* v. *Warren.*

See this caſe fully ſtated in page 276 of this work, under the head *Conſideration.*

Hilary, 8 *Geo.* 2. *The King* v. *the Biſhop of Landaff.* Error.

On *error* brought on a judgment in the court of grand ſeſſions in *Wales* on a *quare impedit*, brought by the King againſt the Biſhop of *Landaff*, *Francis* Lord *Brook*, and *Thomas Humfreys* clerk for the church of St. *Andrew* in the county of *Glamorgan*, it was adjudged, that is neceſſary to alledge a preſentation on a *quare impedit*, but the want thereof may be cured by a verdict, the words of *ſtat.* 16 & 17. *Car.* 2. *c.* 8. being very ſtrong, and on that act an actual amendment is never made; but the benefit of the act is attained, by our overlooking the exception. *Vide Strange, vol.* 2. *p.* 1006.

Eaſter, 10 *Geo.* 2. *Caſwall* v. *Martin.*

The court was moved to ſtay proceedings in this cauſe, becauſe the copy of the *latitat* which was ſerved was only to anſwer *J. C.* Eſq; without ſaying in a plea of treſpaſs, or ſhewing any cauſe of action.

The Solicitor General, on behalf of the plaintiff urged, that there had been *common bail* filed for the defendant by the plaintiff, and the defendant's attorney had taken the declaration out of the office, and paid for it, which was a waiver of the defect in the proceſs.

Per curiam. The taking out a declaration, and paying for it, was error in the proceſs.

Page, Juſtice. The proceſs was only to bring him in, and he cannot have a declaration filed againſt him, without coming into court. *Vide Caſes Temp. Lord Hardw. p.* 369.

Imparlance.

Hilary, 9 *W.* 3. *Ellis* v. *Thomas.*

Imparlances are allowed in general actions of *treſpaſs*, but not in a ſpecial *clauſum fregit.*

Holt, Chief Juſtice. If it appears on the record, that an *imparlance* was due, and denied it is *error*; but then ſuch error muſt appear on the record. *Vide Salk. vol.* 3. *p.* 186.

Anonymous.

No *imparlance* is allowed on a writ of *homine replegiando*, or in *aſſize*, unleſs on good cauſe ſhewn. *Vide Salk. vol.* 3. *p.* 186.

Michaelmas, 10 *W.* 3. *Anonymous.*

In an action brought againſt *H.* he pleaded to the juriſdiction of the court; and the declaration being not delivered *four* days before the end of the term, pleaded it as he might by the courſe of the court within the firſt *four* days in the ſubſequent term; and the clerk, to avoid the trouble of making up a poſt-roll, entered it with a ſpecial *imparlance* as of the ſubſequent term, which ſpoiled the plea; and the clerks were ordered to make up poſt-rolls, and not uſe the ſpecial *imparlances*, which *Holt*, Chief Juſtices ſaid, were crept in of late, and were not known formerly. *Vide Salk. vol.* 1. *p.* 367.

Hilary, 11 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. On an information if the defendant comes in on the *firſt* proceſs, he has an *imparlance* of courſe; but if on the attachment, he muſt plead *inſtantly*. *Vide Salk. vol.* 1. *p.* 367.

Michaelmas, 11 *W.* 3. *Lenox* v. *Boddington.*

One pleaded a foreign plea after the *imparlance*, which could not be; but it was objected, not to be after *imparlance*, becauſe there was no entry of *defends the force and injury.*

Per curiam. That is not neceſſary to an *imparlance.* *Vide Mod. Rep. vol.* 12. *p.* 367.

Michaelmas, 13 *W.* 3. *The King* v. *Fitzgerald.*

The defendant was bound by recognizance to appear the *firſt* day of term, and was called on, but did not appear; but came after and entered his appearance with Mr. *Harcourt,* his clerk in court, and would *imparle to the Morrow of All Souls.* And heretofore when *one* came in on a recognizance, he muſt have pleaded *immediately,* ſo it was if he came in on a *habeas corpus reddidit ſe* or exigent; but this was thought hard, and is remedied ſince the revolution. *Vide Mod. Rep. vol.* 12. *p.* 562. *Raym. vol.* 1. *p.* 706.

Eaſter, 1 *Ann.* *Anonymous.*

An *imparlance* ought not to be granted, unleſs it is prayed, or aſked by the party; and on a *nil dicit,* judgment is to be given inſtantly. *Vide Mod. Rep. vol.* 11. *p.* 2.

Trinity, 2 *Ann.* *Sir Edward Longueville* v. *The Inhabitants of Thiſtleworth.*

Holt, Chief Juſtice. In this court the party may demand *oyer* of a deed after *imparlance,* though it is not allowed in the *C. B.* *Vide Raym. vol.* 2. *p.* 971.

Michaelmas, 4 *Ann.* *Hackett* v. *Tilly.*

Note, The plea in this cauſe was pleaded after *imparlance.* See 3 *Lev.* 330. 2 *Lutw.* 963. *Hunloek* v. *Petre,* general non-tenure pleaded after ſpecial *imparlance*; otherwiſe after general *imparlance.* 3 *Lev.* 55. But ſee that record 53. that it is a ſpecial *imparlance.* Privilege is not pleadable after ſpecial *imparlance.* 1 *Sid.* 318. *Truſſel* v. *Maddin.* 22 *H.* 6. 7. *Vide Raym. vol.* 2. *p.* 1208.

Michaelmas, 4 *Ann.* *The Queen* v. *Rawlins.*

An *information* was filed againſt him on the *firſt* day of *Michaelmas* term, on which day he was bound by recognizance to appear, and accordingly did appear and prayed an *imparlance.* *Northey,* Attorney-General, obſerved, that formerly when the defendant came in by *habeas corpus,* or on his recognizance, he was to plead *inſtantly,* that if a declaration in a civil action is delivered the *firſt* day of *Michaelmas* term, or at any time before *the Morrow of All Souls,* though the defendant is not bound to plead ſo as to try the cauſe that term, yet he ſhall plead ſo as to enter, and that the defendants ought not to have greater indulgence on the *crown-ſide*; therefore in this caſe he inſiſted, that the defendant ſhould *imparle* only to *the Morrow of All Souls* of that term.

Holt, Chief Juſtice. *Imparlances* may be to a day certain, or to a return day of the ſame term, or from *one* term to another; and it is reaſonable in this caſe to give the defendant leave to *imparle* not to a day in the ſame term, but to a day of another term, becauſe, if a ſummons had iſſued, and a proceſs had been continued, he might have ſtood out to another term, but might have been brought in before the end of that term, and then he muſt have pleaded *inſtantly,* and ſo he ſhall do now in another term. *Vide Salk. vol.* 3. *p.* 185. *Ibid. vol.* 1. *p.* 367. *Mod. Rep. vol.* 6. *p.* 243.

Hilary, 11 *Ann.* *The Caſe of the Univerſity of Cambridge.*

See this caſe fully ſtated in page 294 of this work, under the head *Corporations.*

Indictment.

Hilary, 2 *W.* & *M.* *The King and Queen* v. *Fezas.*

See this caſe fully ſtated in page 440 of this work, under the head *Evidence.*

Michaelmas, 3 *W.* & *M.* *The King and Queen* v. *Alſop.*

The defendant was convicted before the juſtices of peace in ſeſſions, on an *indictment* brought againſt him on *ſtat. Edw.* 6. and on that conviction he was committed, and afterwards brought an *hab. corp.* when ſeveral exceptions were taken to the *indictment.*

Firſt, It was agreed on all ſides, that this ſtatute was in force, by which it was enacted, that no perſon ſhall ſhoot in any place, any *hail ſhot,* or more pellets than *one* at *one* time, on pain to forfeit for every time that he or they ſhall ſo offend 10*l.* and *three* months impriſonment.

The *firſt* exception was, that the *indictment* ſets forth, that the defendant did ſhoot conies in *Codden Wood,* but it does not appear where he ſtood when he ſhot, which may be in ſeveral vills, and the ſhooting being the offence, it muſt be laid with certainty.

2dly, There is no judgment given on this *indictment,* for it is ſaid *quod foris faceat,* &c. when it ſhould have been *faciat.*

But the court would not quaſh the conviction on theſe exceptions.

At another day the matter of law was ſpoke to, *viz.* that the juſtices of peace have no general juriſdiction to hear and determine this offence; for though their commiſſion is to *keep the peace,* yet that power is reſtrained to caſes only of open violence: ſo likewiſe by virtue of their commiſſion, they may enquire *of all and ſingular the crimes and offences,* which words have alſo a qualification of ſuch offences only, into which they may lawfully enquire.

If therefore they have no power by the general words of their commiſſion, which are reſtrained as aforeſaid, then they muſt have an authority by the ſtatute, but that gives them none. Therefore the judgment ought to be quaſhed.

Holt, Chief Juſtice. The juſtices of peace by the general words of their commiſſion have a power to puniſh offences againſt any ſtatute made concerning the peace of the nation; but by this act on which this *indictment* is brought, the peace is no ways concerned, becauſe the offence thereby created is for want of due qualification of the perſon to ſhoot, which is not an offence againſt the peace.

This cannot be an *indictment* on *ſtat. H.* 8. becauſe they do not ſet forth the length of the gun, which by that law ought to be a yard long; and therefore the general concluſion *againſt the form of the ſtatute* will not help it. And for theſe reaſons the *indictment* was quaſhed.

But it was agreed, that the party might be *indicted* for this offence before the juſtices of *oyer* and *terminer,* but not before juſtices of peace for want of juriſdiction. *Vide Mod. Rep. vol.* 4. *p.* 49.

Trinity, 4 *W.* & *M.* *White* v. *England.*

See this caſe fully ſtated in page 68 of this work, under the head *Apprentice.*

Trinity, 4 *W.* & *M.* *The King and Queen* v. *Marriot.*

The defendant was *indicted* on *ſtat.* 5 & 6. *E.* 6. for keeping an alehouſe without a licence, and it was objected, that it would not lie, becauſe it was not an offence at *common law,* but made ſo by this ſtatute, which gives power to the juſtices of peace in their ſeſſions to make inquiry into theſe offences by *preſentment, information,* or otherwiſe.

Holt, Chief Juſtice. An *indictment* being a ſummary way of proceeding, is more beneficial to the ſubject, and therefore it ſeems reaſonable that ſuch a method ſhould be purſued.

Dolben and *Eyre,* Juſtices, were of a different opinion: they ſaid they had never heard of an *indictment* before for keeping an unlicenſed alehouſe; and this ſeems to be the judgment of the parliament in 30 *Car.* 2. that an *indictment* would not lie, becauſe the conviction is to be on view by the chief officer within his limits, or by the confeſſion of the party, or by the oath of *two* witneſſes, and then the penalty is to be levied by *diſtreſs,* &c. *Vide Mod. Rep. vol.* 4. *p.* 144.

Michaelmas, 4 W. & M. *Bennet* v. *Preſton.*

See this caſe fully ſtated in page 74 of this work, under the head *Appeal.*

Hilary, 4 & 5 W. & M. *The King and Queen* v. *Tucker.* Error.

On a *writ of error* brought to reverſe an attainder of *high-treaſon* committed in the *weſt of England*, many exceptions were taken both to the *indictment* and judgment.

Per curiam. The want of concluding the *indictment* with theſe words, *againſt his allegiance*, is erroneous, and ſuch an omiſſion will make it ſo, though there are words in the body of the *indictment*, which are *tantamount*, becauſe a man may levy war, and not be guilty of the offence laid here; for he may be an *alien enemy*; and that was the reaſon in *Calvin*'s caſe, why that *indictment* was not concluded *againſt his allegiance.*

But there are no words in this *indictment* to ſupply this omiſſion.

For *not minding his oath of allegiance* will not do it, becauſe a man may not conſider the duty of his allegiance, and yet do nothing that is contrary to it.

Then *againſt the Lord the King*, *his ſupreme true and natural Lord*, &c. will not help it, becauſe theſe words are not always eſſential in an *indictment*, they ſignify no more than to ſhew that the defendant was born in *England*, they are words ſuperabundant, and were added to *indictments* in latter times, for the old way was, to ſet forth the offence to be *againſt our Lord the King* only; ſo that words which are not neceſſary in an *indictment* ſhall never be conſtrued to ſupply the omiſſion of thoſe which are abſolutely neceſſary.

The very offence of *treaſon* is, becauſe it is committed *againſt his allegiance*, the other words are but an aggravation of the offence, and the omiſſion of that clauſe can no more be ſupplied by the adverb *traiterouſly* than the word *feloniouſly* could ſupply *againſt the peace.*

It would be very ſtrange if the omiſſion of *againſt the peace* in an *indictment* at *common law*, and *againſt the form of the ſtatute*, for an offence committed againſt a particular ſtatute, ſhould be *error*, and yet an omiſſion of theſe words ſhould be none.

It is probable this might be a reaſon for making *ſtat.* 29 *Eliz.* by which it is enacted, that no record of attainder of *treaſon* ſhall be reverſed where the party attainted is executed for the ſame offence.

For before that ſtatute there are few precedents which have theſe words, and ſince the ſtatute there are few or none beſides this, wherein they are omitted.

It is true, there are ſeveral *indictments* in the reign of *H.* 8. againſt offences for *high-treaſon*, which were made ſo by ſome new ſtatutes in thoſe days; as denying his *ſupremacy*, &c. in which *indictments* theſe words were omitted, but the reaſon was, becauſe they were new treaſons, created by particular acts of parliament, and it is probable that the proceedings in thoſe caſes begat this *error.*

And for theſe reaſons, in *Eaſter* term 6 *W. & M.* the judgment was reverſed, which reverſal was afterwards in *Hilary* term, 7 *W.* 3. affirmed in parliament. *Mod. Rep. vol.* 4. *p.* 162.

Trinity, 5 W. & M. *The King and Queen* v. *Clerk.*

An *indictment*, that *twenty* perſons being aſſembled, the defendant, not being licenſed, preached to them, not concluding *againſt the form of the ſtatute*, was quaſhed, for they might be the defendant's own family, to which the ſtatute does not extend, and it is not an offence at *common-law.* But *Dolben*, Juſtice, differed in this. *Vide Salk. vol.* 1. *p.* 370.

Trinity, 5 W. & M. *The King and Queen* v. *Ball.*

On the removal of an *indictment*, the defendant enters into a recogizance to try it; yet this is not forfeited unleſs the proſecutor gives rules; and ſo if *one* gives a recognizance to proſecute a *writ of error* with effect, the defendant muſt gives rules, and nonſuit the plaintiff, or there is no forfeiture. *Vide Salk. vol.* 1. *page* 370.

Trinity, 5 W. & M. *The King and Queen* v. *Harwood.*

An *indictment* was, for words ſpoke, to the intent to prejudice the market of *Barnſtaple*, and hinder the town of *Toll, viz. I have got a judgment againſt the town, that we ſhall not pay for ſtanding; and they are fools that pay:* the court quaſhed it, and ſaid, the Recorder of the town ought to be fined for it. *Vide Salk. vol.* 1. *p.* 370.

Trinity, 5 W. & M. *The King and Queen* v. *Whitehead.*

The court was moved to quaſh *two indictments*, which were, *that whereas* an order was made, that the pariſhioners ſhould receive a baſtard-child; they in contempt refuſed to receive it. And becauſe it was not poſitively ſaid, that it was ordered they ſhould receive it, but only by recital with a *that whereas*, the *indictments* were quaſhed. *Vide Salk. vol.* 1. *p.* 371.

Hilary, 6 W. & M. *The King and Queen* v. *Buggs.*

The defendant was *indicted* before the juſtices of peace in their ſeſſions, on *ſtat.* 2 & 3 *P. & M. c.* 11. he being a cloth-worker, and not living in a city, borough, or town corporate, and yet keeping in his houſe more than *one* woollen loom, by reaſon whereof he had forfeited 40 *s. per* week.

An exception was taken to this *indictment*, for that the juſtices had not power to take it before them; for they cannot by law hold cognizance of pleas on penal ſtatutes, without an expreſs power power given them by theſe acts, and here being no ſuch authority allowed by this act, the *indictment* was for that reaſon quaſhed. *Vide Mod. Rep. vol.* 4. *p.* 379.

Hilary, 6 W. & M. *The King* v. *Wood.*

The court was moved to quaſh an *indictment*, which ſet forth, that *J. J.* having fourteen yards of ſilk, *W.* deceptively told him, that a young woman had occaſion for it, to make her a wedding ſuit; on which he ſold it to her under colour of that pretence.

Per curiam. No *indictment* lies for this matter, for there was no truſt, and if there was any, an action lies for it: then it was not averred, that the young woman did not marry, or that ſhe had not occaſion for it: let it be quaſhed. *Vide Mod. Rep. vol.* 5. *p.* 18.

Michaelmas, 6 W. & M. *The King and Queen* v. *Trobridge.* Error.

An *indictment* was, *by the jurors it is preſented*, that the defendant erected a cottage; *and further they preſent that it continued againſt the form of the ſtatute*; and there was judgment for the King, but reverſed on a *writ of error*; for there is nothing to agree with the words *they preſent*, and it is a *new indictment* diſtinct from the *firſt*, the matter whereof is no offence at common law, and *againſt the form* neceſſarily refers to the words *they further preſent*, and no more. *Vide Salk. vol.* 1. *p.* 371. *Mod. Rep. vol.* 4. *p.* 345.

Michaelmas, 6 W. & M. *The King and Queen* v. *Wadſworth.*

The court was moved to quaſh a judgment on an *indictment* againſt a miller for taking too great toll, becauſe it was not ſaid *ſworn* nor *charged* nor the jurors named.

Per curiam. It is againſt the courſe of the court to *quaſh* an *indictment* againſt *extortion* or *oppreſſion*; we cannot do it, but you may demur to it. *Vide Mod. Rep. vol.* 5. *p.* 13.

Hilary, 7 W. 3. *The King* v. *Hall.*

The defendant was a *conſtable*, and was *indicted*, for *that whereas* he the ſaid *Humphrey Hall*, being a *conſtable*, had ſeiſed *eighty half-crowns*, which were ſuſpected to be clipped, and refuſed to deliver them to a juſtice of peace; this was held to be an offence, but not *indictable*; beſides, the fact is laid by way of recital *that whereas*, &c. and not poſitively. *Vide Salk. vol.* 3. *p.* 188.

Trinity, 7 *W.* 3. *Anonymous.*

An *indictment* for ſcolding was quaſhed, becauſe it was not ſaid to be *to the great diſturbance of the peace of our Lady the Queen*, nor *of her ſubjects*, or *liege-men. Vide Salk. vol.* 3. *p.* 187.

The King v. *Holliday.*

An *indictment* was quaſhed, becauſe it did not ſet forth, that the jury were charged, *&c. to inquire for the King and the body of the county. Vide Salk. vol.* 3. *p.* 187.

Trinity, 7 *W.* 3. *The King* v. *Harpur.*

A motion was made to quaſh an *indictment*, which ſet forth, that the defendant being qualified to be a conſtable, was *duly elected* to ſerve that office at *Iſlington*, and that he had notice of it, but did not take the oath to execute that office.

The objection was, that the *indictment* ſhould ſet forth, that he was choſe by one who had ſufficient authority, and that he was ſummoned before a juſtice of peace to take the oath; but it not appearing how he was choſen, and that he had notice, therefore the *indictment* ought to be quaſhed. *Vide Mod. Rep. vol.* 5. *p.* 96.

The King v. *Hemmings or Commings and Ghent.*

The defendants being *overſeers of the poor*, were *indicted* for refuſing to *accompt* for the money by them received; and on a demurrer to this *indictment* it was objected, that it ſet forth they had collected divers ſums of money, but did not ſay *how much*, and this made the *indictment* uncertain.

Holt, Chief Juſtice, held, that it was neceſſary to ſet forth *how much money* they had received, it being impoſſible to charge them with every particular ſum, and the *indictment* is for refuſing to come to an *accompt*: but a more material objection was, that the *indictment* ſet forth, that they *and each of them*, converted the money to their own uſe; but as to that it was held, that the cheat of one is the cheat of the other; but laſtly, it was objected, that this *indictment* would not lie, becauſe another remedy was provided by the ſtatute, and of this the court doubted. *Vide Salk. vol.* 3. *p.* 187. *Mod. Rep. vol.* 5. *p.* 179.

Michaelmas, 7 *W.* 3. *The King* v. *Stocker.*

An *indictment* was for making, or cauſing to be made, a falſe bill of loading, in the *disjunctive*: and though forging, *or* cauſing to be forged, is *forgery*; yet the court thought the *indictment* not good in the *disjunctive. Vide Salk. vol.* 1. *p.* 371. *Mod. Rep. vol.* 5. *p.* 117.

Michaelmas, 7 *W.* 3. *The King* v. *Walcot.*

Per Holt, Chief Juſtice. If a man is *indicted* and tried in this court, the *indictment* is entered on the *plea-roll*; but if he be tried at the ſeſſions of the *Old Bailey*, the *indictment* when brought here is put into a bag and laid by. *Vide Salk. vol.* 1. *p.* 371.

Michaelmas, 7 *W.* 3. *The King* v. *Hill.*

Though the ſtatute of *recuſancy* ſays, that an *Outlawry* for *recuſancy* ſhall not be reverſed for want of form; yet in Serjeant *Trinders*'s wife's caſe, 1 *W. & M.* it was adjudged in this court that it ſhould, that the ſtatute may be made ſenſe. But an *indictment* or *information* for *recuſcancy* ſhall not be quaſhed for form; but yet on *traverſe* of the fact, and bail given, the *outlawry* ſhall be reverſed for form: *which the court allowed.*

The Chief Juſtice held, that on the reverſal of an *out-lawry*, on an *information* for ſending children beyond ſea to be bred papiſts, the defendant muſt plead inſtantly. *Vide Mod. Rep. vol.* 5. *p.* 141.

Hilary, 8 *W.* 3. *The King* v. *The Inhabitants of Belton.*

The defendant being *indicted* on *ſtat. Weſtm.* 2. *c.* 4. for pulling down hedges, moved to quaſh it, which *Holt*, Chief Juſtice, refuſed, ſaying, he might as well move to quaſh a declaration without pleading to it. Afterwards, *Trin.* 11. on a like motion the Chief Juſtice ſaid, we never quaſh *indictments* for *forgery, perjury, ſubordination*, or any crime concerning the *highways*. In *Trin.* 10 *W.* 3. on a like motion the court ſaid, they would not quaſh an *indictment* for enticing away another's ſervant on motion, but the party muſt plead, demur, or move in *arreſt of judgment*. So of all crimes that are heinous. So it was held, *Eaſt.* 4 *Ann. The Queen* v. *Wigg*, in an *indictment* for a nuiſance. *Vide Salk. vol.* 1. *p.* 372.

Hilary, 8 *W.* 3. *The King* v. *Tumock.*

An *indictment* for an offence at the *general ſeſſions*, without ſaying *general quarterly ſeſſions*, in a caſe where the *ſtat.* appoints it to be at the general quarterly ſeſſions, was quaſhed. *Vide Mod. Rep. vol.* 12. *p.* 117.

Hilary, 8 *W.* 3. *The King* v. *Keate.*

The defendant was *indicted* on the *ſtatute of ſtabbing*, for that he drew his ſword and ſtabbed *James Wells*, he *having not firſt ſtruck*, but did not ſay, *having not a weapon firſt drawn*, and concluded *againſt the form of the ſtatute.* The better opinion was, that the *indictment* ſhould ſet forth, that the deceaſed *had not a weapon firſt drawn. Vide Salk. vol.* 3. *p.* 191. *Mod. Rep. vol.* 12. *p.* 118. *Raym. vol.* 1. *p.* 138.

Eaſter, 8 *W.* 3. *The King* v. *Bakeſtraw.* Error.

The defendant was *indicted* at the *Old Bailey* for *uſury*, and being convicted, he brought a *writ of error*, and the judgment was reverſed, becauſe the *Court of Seſſions* had no juriſdiction in this matter. *Vide Salk. vol.* 3. *p.* 188.

Eaſter, 8 *W.* 3. *The King* v. *Cooper.*

An *indictment* againſt the defendant, ſet forth, that there was a war with *Lewis*, the *French* King; that during the continuance of that war, the defendant hired a boat for 20 guineas, *falſely, maliciouſly, and traiterouſly*, to aſſiſt the King's enemies, that the boat ſo hired, was brought to the ſhore, in order to embark him and others, where he was taken. This was all found by verdict.

It was moved in *arreſt of judgment*, that this was not an offence at *common law*; for then any act that ſhews an intention to do an unlawful thing will be a fault; as if a man hire an houſe, with an intention to ſet up an unlawful trade; if the fact itſelf does not import any malicious deſign, then the finding of the jury will not alter the nature of it.

If there is nothing in this *indictment* which ſavours of an offence at *common law*, there is nothing prohibited by any ſtatute, for an intention to do an unlawful act is no crime by either law.

In this caſe it is not ſo much as ſaid, that the defendant endeavoured to go beyond ſea, without the King's licence.

Per curiam. The very intention to commit treaſon is regarded in law, and any preparation to aſſiſt the King's enemies is a prejudice to the public, and therefore an offence at *common law.*

Our actions are governed by intentions, as well as qualified by them; ſo that in divers caſes the intention makes the act more or leſs criminal; whereon the judgment was affirmed, and the defendant fined 100 *merks*, and committed till paid. *Vide Mod. Rep. vol.* 5. *p.* 206.

Eaſter, 8 *W.* 3. *The King* v. *Cranfeild.*

The defendant was *indicted* at the ſeſſions held for the borough of *Hatfield*, for ſpeaking theſe words, *the Mayor and Aldermen of* Hatfield *are a pack of as great villains as any who rob on the highway, and we will take away their charter.* He was found *guilty* of ſpeaking theſe words.

The court was moved in arreſt of judgment, and ſeveral exceptions taken,

1ſt. This being tried at a ſeſſions of a particular borough, they ſhould have ſhewed what authority they had to hold the ſeſſions being in a private place, either by preſcription or charter, which was omitted.

2dly. The words are *not indictable*, being words of heat and paſſion, for which the defendant ought to be bound to his good behaviour, but not *indicted.*

In *Eaſter* term 21 *Car.* 2. one *Burford* was *indicted* in this court for theſe words ſpoken by him of the juſtices of the peace, viz. *that none of the juſtices did underſtand the ſtatutes of exciſe, except ſuch a one, and truly he did neither well underſtand them, nor moſt of the parliament-men who made them.* And this *indictment was quaſhed.*

3dly. It is ſaid, *the jurors for our lord the King preſent*, when it ſhould have been *for the Lord the King and the borough aforeſaid. Vide Mod. Rep. vol.* 5. *p.* 203.

Eaſter, 8 *W.* 3. *The King* v. *Stonehouſe*

An *indictment* againſt *Elizabeth Stonehouſe*, for that ſhe intending to deprive *Henry Bradſhaw* of ſeveral ſums of money, did falſely and maliciouſly accuſe him of *felony*, and of robbing her, was adjudged ill, becauſe it was for a fact *not indictable*, it not being laid by way of *conſpiracy*, ſo as to make it a public crime; and it being only a private wrong, the party has his remedy by an action on the *caſe*. *Vide Salk. vol.* 3. *p.* 188.

The King v. *Savill.*

An *indictment* was quaſhed, becauſe there was no caption to it. *Vide Salk. vol.* 3. *p.* 188.

The King v. *Atkinſon.*

The Mayor of *Newcaſtle*, being a juſtice of peace, made an order, that the company of *tanners* there ſhould admit one *Young* to be a freeman of that company: the defendant *Atkinſon*, who was maſter of that company, being ſerved with this order, refuſed to obey it, and for this he was *indicted.*

Per curiam. It is not *indictable*, for it is only a *nonfeaſance* and particular wrong done to another. *Vide Salk. vol.* 3. *p.* 188.

The King v. *Gorge.*

The defendant was *indicted* at the ſeſſions held in the city of *Worceſter*, for keeping an open ſhop in the ſaid city, not being free thereof, contrary to an immemorial cuſtom there; quaſhed, for it is not a matter *indictable. Vide Salk. vol.* 3. *p.* 189.

The King v. *Brown.*

The juſtices made an order, that the defendant ſhould pay *Stephen Paine*, a taylor, 7 *l.* for work done, which he (the defendant) refuſing to do, was *indicted*, but it was quaſhed, for it is a matter not *indictable. Vide Salk. vol.* 3. *p.* 189.

The King v. *Bradford.*

The defendant was *indicted* for not curing the proſecutor of an ulcerated throat, as he had agreed and undertaken to do; quaſhed, for it is no public offence, and no more in fact than an action on the *caſe. Vide Salk. vol.* 3. *p.* 189.

Trinity, 8 *W.* 3. *The King* v. *Bracy.*

On an *indictment* for a *riot* an exception was taken, that the concluſion ought not to have been *againſt the form of the ſtat.* it being an offence at common law; yet it is good to conclude *againſt the form of divers ſtatutes.* Stabbing was an offence at *common law*; and therefore a man may be *indicted* generally, or the jury find it *manſlaughter* generally; therefore the court refuſed to quaſh the *indictment*; but bid the council demur, if they thought fit. *Vide Mod. Rep. vol.* 12. *p.* 99.

Michaelmas, 8 *W.* 3. *The King* v. *Gluff*, *or Clough.*

An *indictment* before the commiſſioners of *Oyer* and *Terminer* at the *Old Bailey* was removed by *certiorari* on *ſtat.* 1 & 2 *P.* & *M. c.* 7. for ſelling haberdaſhery wares contrary to the *ſtat.* on pain of forfeiture, one moiety to the King, the other to him that will ſue for the ſame in any of the King's Courts of Record, by bill, plaint, information, or otherwiſe; the court was moved to quaſh it on the authority of *Gregory*'s caſe. 6 *Co.* 19. 6. and *Farrington* v. *Keymer*, 1 *Co.* 112. becauſe the general words *of the King's Courts of Record*, extend only to thoſe of *Weſtminſter.*

Per curiam. It is true, the juſtices of peace cannot hereby have juriſdiction, but it has been ruled ſince *Gregory*'s caſe, that juſtices of *Oyer* and *Terminer* may by way of *indictment*, but not by way of *information*, and therefore in that reſpect it is well enough; but here the ſtatute has preſcribed a particular way for the recovery of the forfeiture, *viz.* by action of *debt*, *information*, &*c.* without ſaying any thing of *indictment*; and therefore it is a queſtion, whether this be *indictable* or not; for which reaſon let it be quaſhed *Niſi. Vide Mod. Rep. vol.* 12. *p.* 104. *Ibid. vol.* 5. *p.* 149.

Hilary, 8 & 9 *W.* 3. *The King* v. *Penny.*

The defendant was *indicted* for having ſpoken theſe words of Mr. *Martin* a juſtice of peace; *I did not care if all the* Martins *had been hanged five years ago.* And the *juſtice is now turned out of commiſſion.* But on motion this indictment was quaſhed, for an *indictment* does not lie for theſe words, and Mr. *Martin* ſhould have had recourſe to his action. *Vide Raymond, vol.* 1. *p.* 153.

Trinity, 9 *W.* 3. *The King* v. *Holroy.* Error.

The defendant was *indicted* for concealing traitors unknown, and buying clippings. He was found *guilty*; brought a writ of *error*, and aſſigned for cauſe, that there was a *miſerecordia* inſtead of a *capiatur* entered: and for this reaſon the judgment was reverſed. *Vide Mod. Rep. vol.* 5. *p.* 341.

Michaelmas, 9 *W.* & *M.* *The King* v. *Cook, Snatt, and Collier.*

They were found *guilty* on an *indictment* for the following crime, *viz. Sir John Friend* and *Sir William Perkins* were convicted for *high treaſon* in conſpiring the death of the King; and the defendants being preſent with them at the place of execution, did all of them lay their hands on Sir *John Friend*, who ſhewed no repentance for the crime for which he was about to die, and *Cook* pronounced the abſolution, to which *Snatt* and *Collier* ſaid *Amen.*

That they all three likewiſe laid their hands on Sir *William Perkins*, who was likewiſe unpenitent of his crime, and *Collier* pronounced the abſolution, and *Cook* and *Snatt* ſaid *Amen*, and that they all aſſiſted in, and aſſented to the ſaid abſolution.

The jury made a ſpecial concluſion in their verdict, whether the laying on the hands of *three*, and but one at a time pronouncing the abſolution, makes them all guilty of the whole matter? *Adjourned. Vide Mod. Rep. vol.* 5. *p.* 363.

Hilary, 10 *W.* 3. *The King* v. *Fell.*

See this caſe fully ſtated in page 264 of this work, under the head *Commitment.*

Eaſter, 10 *W.* 3. *The King* v. *Kitchner.*

The defendant was *indicted* for cauſing an apprentice to abſent himſelf from his maſter, and keeping and detaining him in that abſence. It was moved to quaſh it; becauſe not a thing of a public nature, being no other than an action on the *caſe*; the court ſaid it was a great offence, and would not quaſh it; but left the party to demur. *Vide Mod. Rep. vol.* 12. *p.* 195.

Eaſter, 10 *W.* 3. *The King* v. *Stainford.*

The defendant was *indicted*, for that he on the 19th of *June*, &c. and before, being an inhabitant of a town in *Derbyſhire*, was ſummoned to watch with one *B.* a conſtable, and for that he obſtinately, contemptuouſly, and maliciouſly made default.

The following exceptions were taken to the *indictment*;

1ſt, It ſays that he was an inhabitant on the 19th of *June*, and before, and does not ſay that he continued to be ſo.

2dly, It does not ſay, that notice was given to him to watch within the pariſh.

3dly, It ſays, that he did not watch with one *B.* a conſtable; it ought to have been ſaid he did not watch at all; for poſſibly he might watch that night with another conſtable.

The council on the other ſide argued, that this *indictment* was founded on *common law*, and not on the ſtatute of *Winton*. And as to the ſecond exception, it is ſaid he was ſummoned to watch with the conſtable, but does not ſay within the pariſh. Now there may be a place *extra-parochial*, where the conſtable is to watch. But as to the other exceptions was ſilent.

Per curiam. You muſt demur to the *indictment*; we will not quaſh it. *Vide Mod. Rep. vol.* 5. *p.* 393.

Trinity, 10 *W.* 3. *The King* v. *Savage, et al.*

The defendant and *two* others were *indicted* on *ſtat.* 8 & 9 *W.* 3. *c.* 25. for licenſing hawkers and pedlars, ſelling glaſſes without licence; and the court was moved, that the *indictment* ſhould be quaſhed, becauſe it does not lie for this offence; for it is an offence created by the ſaid *ſtatute*, which *ſtatute* directs a forfeiture for this offence, and the remedy how it ſhall be recovered, and beſtowed; and therefore the offence is not puniſhable any other way not directed by the *ſtatute.* And the court ſeemed to be of that opinion.

Rokeby, Juſtice, obſerved, that this act was deſigned to raiſe money by the licences of hawkers and pedlars, *&c.* not to prohibit *hawking* as unlawful, for it is not prohibited, but only enacted that there ſhall be licences taken out. But the court refuſed to quaſh it. *Vide Raym. vol.* 1. *p.* 348.

Trinity, 10 *W.* 3. *The King* v. *Sir Henry Bond, Bart.*

See this caſe fully ſtated in page 53 of this work, under the head *Addition.*

Trinity, 10 *W.* 3. *The King* v. *Robert Fielding.*

See this caſe fully ſtated in page 53 of this work, under the head *Addition.*

Trinity, 10 *W.* 3. *The King* v. *Dixon, and Hollis.*

See this caſe fully ſtated in page 514 of this work, under the head *Highways.*

Michaelmas, 10 *W.* 3. *The King* v. *Beechcroft.*

An *indictment* for extortion was brought againſt an officer for taking money for not carrying his priſoner to a ſpunging houſe; the court looked on it to be ſo ill a practice that they would not hear a motion to quaſh it. *Vide Mod. Rep. vol.* 12. *p.* 225.

Hilary, 11 *W.* 3. *The King* v. *Pheaſant.* Error.

On a *writ of error* brought to reverſe a judgment of attainder, on an *indictment* for a *rape*, ſeveral errors were aſſigned, and overuled. Among others was the following, *viz.* that it was not ſaid in the caption, *then and there ſworn*, and it may be, that they were ſworn at an alehouſe, and not for the ſaid purpoſe, *&c.* And for this 1 *Vent.* 16. 2 *Keb.* 610. 1. *Mod.* 26. 2 *Keb.* 583. were cited. But the court inclined to diſallow the exception, becauſe it would reverſe an infinite number of attainders, and judgments on *indictments*.

Holt, Chief Juſtice, ſaid, that in *Coventry, Lincoln, &c.* the grand jury were ſworn at the ſeſſions from whence they came to the aſſizes, and they inſiſted that they were not accuſtomed to be ſworn there again; but he held it to be an ill practice, and always for his part cauſed them to be ſworn again at the aſſizes. And this exception being moved, the court refuſed to allow it. *Vide Raym. vol.* 1. *p.* 548.

Eaſter, 11 *W.* 3. *The King* v. *Fox.*

See this caſe fully ſtated in page 87 of this work, under the head *Apprentice.*

Michaelmas, 11 *W* 3. *The King* v. *Hoſkins.*

Exception was taken to an *indictment* for a *reſcous*,

1ſt, Becauſe it was ſaid, that it was without the conſent of the ſheriff, but it might be by the conſent of the bailiff or plaintiff; *but not allowed.*

2dly, Exception was taken, becauſe the arreſt was not laid to be before the return of the writ; which was allowed good.

Holt, Chief Juſtice, on this occaſion ſaid, that a common fine for a reſcous was *four nobles*; *Gould*, Juſtice, ſaid, that in the common pleas they would have the original action tried on a feigned iſſue, before they would let the action for a reſcous go on. *Vide Mod. Rep. vol.* 12. *p.* 323.

Michaelmas, 11 *W.* 3. *The King* v. *Slaughter.*

See this caſe fully ſtated in page 87 of this work, under the head *Apprentice.*

Hilary, 12 *W.* 3. *The King* v. *Lluellin.*

The defendant was *indicted* for not receiving one taken ill with the *ſmall pox*, and it was quaſhed. *Vide Mod. Rep. vol.* 12. *p.* 445.

Hilary, 12 *W.* 3. *The King* v. *Everard.*

A preſentment at a *court-leet* for erecting of a cottage, *&c.* contrary to *ſtat.* 31 *Eliz. c.* 7. being removed into this court by *certiorari*, the following *exceptions* were taken to it:

1ſt. That they did not lay *four* acres of land to it, according to the ſtatute *for meaſuring lands*, and not ſaid or ordinance, whereas it was not a ſtatute, but an ordinance only. And forth is was cited, *Cro. Jac.* 603. but the court over-ruled this *exception*, and held that it was a ſtatute.

2dly. That the caption was *at a court of view of frank-pledge with a court baron*, and ſo it did not appear at which of them it was made, and one of them not having authority to take ſuch preſentment, therefore it is ill. And for this it was compared to the caſe *of Valconbridge, Stile* 228. where the caption of an *indictment* was before juſtices of aſſize, goal-delivery, and *Oyer* and *Terminer*; and becauſe it was not ſhewn by virtue of which commiſſion in particular it was taken, it was quaſhed. And a caſe was cited, *The King* v. *Ayers*, 2 *Hob.* 139. where a preſentment in ſuch form was quaſhed.

Holt, Chief Juſtice. Where there are ſeveral commiſſions, each of which has authority to proceed in a matter, and their manner of proceeding is different; the *indictment* ought to ſhew before which of them it was taken. But here one of the courts only has juriſdiction in the matter, and therefore though they were both held together, it muſt be taken before thoſe who had authority to proceed in it. The words here are, *with a court baron*, which do not imply that the preſentment was made at the *court baron*, but only that both courts were held together. If it had been *at the court baron*, the objection had been ſtronger.

Gould, Juſtice, ſaid, that the caſe of *Ayers* was ſo ruled for this reaſon, *viz.* becauſe it was not preſentable at the *leet*, it not being a public nuiſance, nor at the *court baron*, becauſe it was a private right.

3dly. That the *Anno Domini* was in *Engliſh* figures. But becauſe the year of the King was in words at length, it was held certain enough, and that the year of our Lord was only ſurpluſage. And therefore the motion was denied. *Vide Raym. vol.* 1. *p.* 638.

Eaſter, 12 *W.* 3. *The King* v. *Newman.*

The defendant was *indicted* by the name of *Elizabeth Newman, alias Judith Hancock*, for keeping a bawdy houſe. The court was moved to quaſh it; becauſe a woman cannot have *two Chriſtian* names; for which fault in a caſe in *Noy* the return of a *reſcous* was quaſhed; and for this reaſon the *indictment* here was quaſhed. *Vide Raymond, vol.* 1. *p.* 562.

Eaſter, 12 *W.* 3. *The King* v. *Bell.*

The defendant was bound by recognizance to appear here, for printing a ſeditious libel concerning the *Scots* colony at *Darien*, and it appearing that an *indictment* had been found againſt him at the *Old Bailey*, which he had traverſed, and was to anſwer there, his attendance was diſcharged. *Vide Mod. Rep. vol.* 12. *p.* 348.

Trinity, 12 *W.* 3. *The King* v. *Harris.*

An order of ſeſſions for ſuppreſſing a cottage on *ſtat.* 31 *El. c.* 7. was quaſhed; for that cottages are not to be ſuppreſſed by *indictment*. *Vide Mod. Rep. vol.* 12. *p.* 406.

Trinity, 12 *W.* 3. *The King* v. *Sellinger.*

The defendant was *indicted* for lying with another man's wife, and the court was moved to quaſh it as a matter *not indictable*.

Per curiam. We will not quaſh an *indictment* for a matter of this nature on motion; but demur if you will. *Vide Mod. Rep. vol.* 12. *p.* 413.

Trinity, 12 *W.* 3. *The King* v. *Walden.*

The defendant was *indicted*, for that being before a juſtice of peace, for a matter, as it did appear conuſable by him, he contemptuouſly, *&c.* ſpoke theſe words; *your worſhip ſpeaks to me here, but you dare not do it in another place*; and it was quaſhed on motion. *Vide Mod. Rep. vol.* 12. *p.* 414.

Trinity, 12 *W.* 3. *The King* v. *Brown or Browne.*

The caption of an *indictment* was, *it is preſented that the ſeveral indictments to this ſchedule annexed are true bills*; it was objected, 1ſt. That if there be *twenty indictments*, one-half true, the other falſe, it is within this finding: but the court held otherwiſe: the words *ſeveral indictments* import all the ſeveral *indictments*.

Second objection. That they were not *indictments* till they were found; till then they were only bills; and they were quaſhed for this cauſe. *Vide Salk. vol.* 1. *p.* 376. *Raym. vol.* 1. *p.* 592.

Summer Aſſizes, 12 *W.* 3. *The King* v. *Goat.*

An *indictment* for *forgery* at *common law*, though it is not ſhewn, that the party is prejudiced is good; otherwiſe, in an action of *forger des faits*: therefore where the *indictment* was for *forgery* of a ſurrender of the lands of *J. S.* and it was not *ſhewn in the indictment* that *J. S. had any lands*,

Holt, Chief Juſtice, on a motion in arreſt of judgment, held it good, and judgment was given againſt the defendant, being an attorney, that he ſhould ſtand in the pillory. *Vide Raym. vol.* 1. *p.* 737.

Michaelmas, 12 *W.* 3. *The King* v. *Purſey.*

An *indictment* was filed in *Eaſter* term, 10 *W.* 3. for that *A.* uſing the trade of buying and ſelling cattle at *B.* in the county of *M.* and did buy and expoſe to ſale bad cattle, *&c.* and it was quaſhed for *uncertainty*.

Per curiam. If it be underſtood that the uſing of buying and ſelling was at *B.* in the county of *M.* there is no *venue* where the expoſing to ſale was; and if (*B.* in the county of *M.*) be applied to the place of ſale, there is no place laid where the uſing the trade was; ſo either way it will be impoſſible to make it good. *Vide Mod. Rep. vol.* 12. *p.* 435.

Hilary, 13 *W.* 3. *The King* v. *Morgan & al.*

An *indictment* found againſt the defendants for a riot was removed into this court, and on *not guilty* pleaded, was tried at the aſſizes, and a verdict given for the King. And now a motion was made in *arreſt of judgment*, and many exceptions were taken and over-ruled: but the *one* on which the defendant principally relied was, that there was an omiſſion of *ſworn and charged* in the caption. To which it was anſwered by the council on the other ſide, that there is a great difference between a record made up for *niſi prius*, which is always made briefly, and an *indictment* removed with an intent to be quaſhed; that the words *on their oath* ſupply the omiſſion of *ſworn and charged*. *T. Jones* 180. 2 *Keb.* 59. *The King* v. *Ambler*. And this term *Holt*, Chief Juſtice, ſaid, that the whole court were of opinion, that it was good without the words *ſworn and charged*. *Vide Raym. vol.* 1. *p.* 710.

Hilary, 13 *W.* 3. *The King* v. *Cranmer.*

On an *indictment* for perjury: the defendant entered into a recogniſance to try it, and was deſirous to carry it down to trial, but the proſecutor entered a *non proſ.*

Per curiam. It was an ancient but illegal practice, that if an *indictment* had lain ſtill for a long time, to enter a *non proſ.* on it; but that ought not to be without leave of the Attorney General, not even at the requeſt of the proſecutor; for it would be of intolerable miſchief, that it ſhould be at the diſcretion of the proſecutor to make an end of the King's ſuit, and alſo to get a bill for an infamous crime found of record againſt a perſon, and by ſuch entry of a *non proſ.* deprive him of the means of clearing himſelf by trial. For theſe reaſons, the court ſet it aſide; and if the *indictment* be vicious, an acquittal in it will be no bar to a new *one*. *Vide Mod. Rep. vol.* 12. *p.* 647.

Hilary, 13 *W.* 3. *The King* v. *Croſs.*

The defendant was *indicted* for buying *ſtolen goods*, *knowing* them to be ſtolen; and on *not guilty* pleaded, he was convicted; and it was moved in arreſt of judgment, that by the ſtatute the buyer is made an acceſſary to the *felony*, for which he ought to be *indicted*, and not for a *miſdemeanor* or *treſpaſs*, as he was in this caſe, and ſo it was adjudged.

Holt, Chief Juſtice. At *common law* this offence was more than a *treſpaſs*, it was evidence of his being an acceſſary after the fact was done. *Vide Salk. vol.* 3. *p.* 193.

Eaſter, 13 *W.* 3. *Anonymous.*

The court was moved to quaſh an *indictment* for entering into a warren, and hunting and killing rabbits at night. The exception was, that by *ſtat.* 3. *Jac.* 1. *c.* 13. the offender forfeits treble damages and coſts, half a year's impriſonment, and is to find ſecurity for his good behaviour for ſeven years, ; and the *indictment* not concluding *againſt the form of the ſtatute*, the puniſhment of the *ſtat.* cannot be inflicted ; and if the defendant be fined on this *indictment*, he may be notwithſtanding again puniſhed according to the *ſtat. and ſo* twice *for the ſame offence : but not allowed* ; for if a man has *two* remedies, the *one* by act of parliament, and the other by common law, and takes *one* of them, he thereby determines his election. *Vide Mod. Rep. vol.* 12. *p.* 446.

Eaſter, 13 *W.* 3. *The King* v. *Pigot.*

The defendant was convicted on an *indictment* for a miſdemeanor, in attempting forcibly to carry away one Mrs. *Heſcot*, a woman of great fortune.

Holt, Chief Juſtice. Sure this concerns all the people in *England* that would diſpoſe of their children well ; and he was fined 200 *merks*, and the Lady's maid who was privy to the contrivance, was fined 20 *merks*, and to go to all the courts with a paper on her back, with her offence wrote thereon in large characters. *Vide Mod. Rep. vol.* 12. *p.* 516.

Eaſter, 13 *W.* 3. *The King* v. *Orbevill.*

The defendant was *indicted* for fraudulently, unlawfully, and for wicked gain to himſelf, procuring another to lay money on ſuch a match, and though the *indictment* had many apparent faults in it, yet being a cheat, the court would not quaſh it on motion. *Vide Mod. Rep. vol.* 12. *p.* 499.

Eaſter, 13 *W.* 3. *The King* v. ———

An *indictment* for a riot, concluded *contrary to the form of the ſtatute* ; and the *exception* made to it was, that a *riot* was a *common law* offence, independant, of any ſtatute, therefore the concluſion was ill.

Holt, Chief Juſtice. Though it be not made an offence by any ſtatute, yet divers ſtatutes are directive of the manner of puniſhing it, and that is reaſon enough to make the concluſion good. As on the *ſtatute of ſtabbing*, the thing was *felony* before ; but *clergy* is *ouſted* by the ſtatute, and yet an *indictment* for that ſort of felony does conclude *contrary to the form of the ſtatute*, though the ſtatute does not make the offence, for it was felony before ; on the other hand, an *indictment* would be well without concluding on the ſtatute in that caſe ; ſo both ways are good. So in caſe of *barratry*, you may conclude an *indictment contrary to the form of the ſtatute, or divers ſtatutes*, or take no notice of any ſtatute at all ; for wherever there was any offence at *common law*, and a ſtatute makes a further proviſion of penalty, an *indictment* for that offence may conclude *contrary to the form of the ſtatute*, or leave it out at election. Another *exception* was, that it was not ſaid in the caption that the jury were ſworn and charged then and there, but no heed was taken to it. And he further obſerved, that it was not uſual to quaſh *indictments* for a *nuiſance*, riot, or any other public offence on motion; but in caſe of *petit riots*, on a conteſt of *right of common*, it had been often done. *Vide Mod. Rep. vol.* 12. *p.* 502.

Eaſter, 13 *W.* 3. *The King* v. *Sir Polycarp Wharton et al.*

An *indictment* was for a *riot* ; but the cauſe of the *riot* was the right of a private river.

Holt, Chief Juſtice. If a river runs contiguouſly between the land of two perſons, each of them is owner of that part of the river which is next his land, of *common right* ; and may let it to the other, or to a ſtranger. 2dly. If one ſees his neighbour erecting a thing which will be a nuiſance, he cannot abate it till it becomes an actual nuiſance, ſo the maxim that prevention is better than a cure, holds not in this caſe. 3dly. If one has a river, and for want of ſecuring it the neighbouring land is over-flowed, he is *indictable* for it. 4thly. Unlawful aſſemblies, riots, and routs, are three different offences. *Vide Mod. Rep. vol.* 12. *p.* 510.

Eaſter, 13 *W.* 3. *The King* v. *Eller.*

If an innocent perſon receive money on a *forged note*, not knowing any thing of the *forgery*, it is not criminal in him ; but he ſhall anſwer for the money ſolely ; but receiving money on a *forged note*, knowing the *forgery*, is a publication of the *forgery*. *Vide Mod. Rep. vol.* 12. *p.* 494.

Trinity, 13 *W.* 3. *The King* v. *Fuller.*

The defendant being convicted on an *indictment* for procuring an attorney of the court, who married his ſiſter, to be preſſed to ſea, he was fined 100 *merks*. *Vide Mod. Rep. vol.* 12. *p.* 542.

Michaelmas, 13 *W.* 3. *The King* v. *Marks.*

The court was moved to quaſh an *indictment* for the unlawful taking *with force and arms*, *ten* pounds *in money* of *J. S.* 1ſt, Becauſe an action lies. 2dly, Becauſe it ought to have been ſhewn, how many ounces theſe *ten* pounds contained, and therefore it was uncertain ; *but not allowed*, becauſe the court knows well enough how much money makes a pound, and it is certain enough. *Vide Raym. vol.* 1. *p.* 702.

Michaelmas, 13 *W.* 3. *Anonymous.*

In an action on the *caſe* for money received to the plaintiff's uſe, it appeared on evidence, that the defendant had *indicted* the plaintiff for regrating wool ; and after compounded the matter with him for a ſum of money, for which money the action was now brought by the plaintiff.

Holt, Chief Juſtice, was ſo angry with the parties for compounding an *indictment* of a public nature, that he had the plaintiff non-ſuited, and fined the defendant ; but he ſaid if it was an *indictment* for a private wrong they might do it. *Vide Mod. Rep. vol.* 12. *p.* 60.

The King v. *Summers.* Error.

The defendant was *indicted* at the ſeſſions, for writing a ſcandalous letter to one *Mellith* concerning a young woman, whom he intended to marry : Upon *not guilty* pleaded, he was found *guilty*, and afterwards he brought a writ of error, and the error aſſigned was, that this was a private letter, for which he was not puniſhable by way of *indictment* ; or if an *indictment* would lie, yet not before the juſtices of peace in their ſeſſions.

Per curiam. This is an offence, and *indictable* before the juſtices in ſeſſions, becauſe it tends to the breach of the peace. *Vide Salk. vol.* 3. *p.* 194.

Anonymous.

Adjudged, That where a perſon came to a ſemſtreſs's ſhop, and aſked her to ſhew him ſome linen ; which ſhe did, and delivered it into his hands, and then he run away with it, that this is *felony* ; for though the goods were delivered by the owner, yet they were never out of her poſſeſſion, becauſe though the contract might be begun, by aſking and telling the price, yet it was not perfected, and the ſubſequent act of his running away doth plainly ſhew his intention to take the goods feloniouſly before the property was altered ; for which he was *indicted*, convicted, and executed.

So where a man, who had no manner of title to a houſe, brought an *ejectment*, and procured an *affidavit* to be filed of the delivery of the declaration to the tenant in poſſeſſion, and for want of appearing and pleading, got judgment at his own ſuit, and then ſued out an *habere facias poſſeſſionem*, and got a warrant from the *High Bailiff of Weſtminſter*, directed to one of his bailiffs, who, with the plaintiff himſelf turned the defendant out of poſſeſſion, and ſeiſed all the goods, and converted them to his own uſe ; this was adjudged *felony*, for which he was *indicted*, convicted and executed, for he made uſe of the proceſs of the law, with a felonious purpoſe. *Vide Salk. vol.* 3. *p.* 194.

Hilary, 1 *Ann.* *The Queen* v. *King*.

To an *indictment* for *forgery* brought from *London*, and demurred to here, the following *exceptions* were taken:

1ſt. To the *caption*, there being no verb to the nominative *qui triat. jurat. & onerat. exiſtentes*; and ſo it was ſaid to be nonſenſe.

2dly. It was excepted, that the crime charged was the *forging falſely*, whereas it could be no crime if it was not truly forged.

3dly. If it were a *forgery* it could not be a *writing obligatory*, for a forged deed is not obligatory; therefore it ſhould be for forging a certain writing, purporting to be a writing obligatory.

4thly. That a *forgery* to the prejudice of nobody cannot be a crime, and the pretended bond could not be any body's prejudice; for it was a bond to the ſheriff of *London* for the appearance of a perſon under an arreſt *on the day of the purification in eight days*, and there is no ſuch day, and therefore the bond is not according to the ſtatute, *therefore* void; and by conſequence the *forgery* no crime, becauſe no prejudice to any.

But it was reſolved by the court, 1ſt. That this *indictment* is to be conſidered as if it were an *indictment* for *high-treaſon*; and if it were ſuch, it would be good notwithſtanding the *caption*, for that was no uncertainty in the charge.

Holt, Chief Juſtice. Worſe *Latin* than this may be ſeen in many writs, as in the writ of *adjournment*, which runs thus: *Rex juſticiar. ſuis ad placitas coram nobis*, &c.

And as to the *ſecond*, the words *falſely made* are as much as to ſay, that he being a falſe and malicious man, did forge; and not that the *forgery* was a true *forgery*, but the thing forged was not true, but falſe.

And to the *third*, that it could not be *obligatory* if it was forged it is not in truth and reality binding, but in ſhew and appearance it is; and that is enough; ſo it is an obligation, though a falſe one.

To the *fourth* it was held, that the *eight days* may be well underſtood for the *eighth* of the, *&c.* Beſides, theſe bonds are not merely void by the ſtat. but only voidable; and therefore you muſt plead the ſpecial matter, and not *non eſt factum*; and you may ſay, that a forged bond binds nobody, (as in truth it does not) and infer from thence it is no crime to forge. And the Queen had judgment, and the defendant ſtood in the pillory. *Vide Mod. Rep. vol. 7. p.* 150.

Hilary, 1 *Ann.* *The Queen* v. *Whiſtler*.

On a conviction before a juſtice of peace, on *ſtat.* 3 & 4 *W. & M. c.* 10. ſetting forth, that the defendant was unlawfully and unjuſtly aſſiſtant to one *Rolf*, in killing *five* deer, by perſuading him the ſaid *Rolf* to hunt and kill the ſame, by lending him a dog to hunt and kill them, and a horſe to bring them away *againſt the form of the ſtatute*.

The queſtion for the opinion of the court was,

Whether the defendant was an aider and abettor therein, within the intent and meaning of the *ſtatute*, and if the words *aiding and abetting* were not in the ſtatute, whether the defendant would not be a principal.

The judges gave their opinions at large on this point, and after the matter had been ſolemnly argued, it was *adjudged* by *Powell*, *Powys*, and *Gould*, Juſtices, againſt the opinion of *Holt*, Chief Juſtice, that the defendant was guilty within the meaning of the ſtatute; and judgment was entered againſt the defendant agreeable to their opinion. *Vide Mod. Rep. vol.* 11. *p.* 25.

Eaſter, 1 *Ann.* *The Queen* v. *Clerk*.

See this caſe fully ſtated in page 289 of this work, under the head *Coroner*.

Eaſter, 1 *Ann.* *Anonymous*.

Holt, Chief Juſtice. It is a matter *indictable* to bury a man who dies of a violent death before the coroner's inqueſt have ſat on him. *Vide Mod. Rep. vol.* 7. *page* 10.

Eaſter, 1 *Ann.* *The Queen* v. *Summers*.

See this caſe fully ſtated in page 305 of this work, under the head *Coſts*.

Trinity, 1 *Ann.* *The Queen* v. *Langley*.

An *indictment* being found againſt the defendant for having entertained idle and vagrant perſons in his houſe, knowing them to be ſuch, was removed into this court by *certiorari*. And on demurrer, judgment was given for the defendant, and his recognizance diſcharged. 1ſt, Becauſe it was not ſaid they were vagrants at the time of their being entertained by the defendant. 2dly, Becauſe the entertainment of them, *viz.* the giving them meat, drink, and lodging, is not any offence within *ſtat.* 39 *Eliz. cap.* 4. *Vide Raym. vol.* 2. *p.* 790.

Trinity, 1 *Ann.* *The Queen* v. *Templeman*.

See this caſe fully ſtated in page 449 of this work, under the head *Evidence*.

Trinity, 1 *Ann.* *Anonymous*.

Holt, Chief Juſtice, held, it ſhould be a rule for the future, that on removing of *indictments* into this court by *certiorari*, that they would not hear a motion in arreſt of judgment till the defendant had appeared. *Vide Mod. Rep. vol.* 7. *p.* 39.

Michaelmas, 1 *Ann.* *The Queen* v. *Darby*.

See this caſe fully ſtated in page 115 of this work, under the head *Arreſt of Judgment*.

Michaelmas, 1 *Ann.* *Taylor* v. *Griffith*.

An *indictment* for a forcible entry and detainer, concluded *againſt the peace* of the late King and preſent Queen, the entry being in King *William*'s time, and the detainer in the Queen's time.

Holt, Chief Juſtice. The concluſion is very improper, but there are too many that way to reverſe them all. But this was quaſhed on the objection, that it did not appear what eſtate the party had, whether freehold, for years, or at will, and ſo the court could not tell what execution to award; but if the eſtate were ſet out, perhaps the poſſeſſion ſhould be reſtored to *one*, and the freehold to another; and here beſides it was not ſaid, that there was a diſſeiſin of him that had the freehold, and ſo it was quaſhed. *Vide Mod. Rep. vol.* 7. *p.* 116.

Michaelmas, 1 *Ann.* *The Queen* v. *Swanſon*, *Baynton*, *Hartley*, *and Spur*.

The defendants were *indicted* on *ſtat.* 3 *H.* 7. againſt ſtealing of women, *&c.* And on evidence the caſe appeared to be thus: *Baynton* perſonating a country lady, though in truth a woman of the town, took a lodging in the houſe where Mrs. *Plaiſant Rawlins* lodged, and after ſometime introduced the ſaid *Swanſon* into the houſe as her brother, where he frequently had the converſation of the ſaid *Rawlins*, in the mean time Mrs. *Baynton* uſed to magnify her pretended brother's merit and goodneſs, inſomuch that the ſaid *Rawlins* had likewiſe declared her liking of him, and wiſhed he would marry her. But to get her abroad without any of her friends, *Baynton* deluded her aunt and her, to go with her to church, and againſt the time got bailiffs to take out a writ againſt *Rawlins* and her aunt, and ſo way-layed, and arreſted them, and conveyed them from *Weſtminſter*, where they lived, to the *Garter Tavern* in *Drury Lane*; and there ſeparated the aunt and her, and carried her to *Holborn*, to the *Vine Tavern*, where *Swanſon* came as her bail, and there married her, ſhe continuing under the arreſt, *Baynton* telling her, that if ſhe did not marry him ſhe muſt go to *Newgate*; and *Swanſon* and *Baynton* were found *guilty*; for the court delivered it to the jury for law; that though the ſaid *Rawlins* had a fancy for the man, yet becauſe ſhe was not privy to the contrivance of coming out to him, and knew not before hand, or conſented ſo to come to him, and being married while ſhe continued under that reſtraint and violence, though perhaps ſhe conſented to the marriage, yet the ſaid fact was a crime within the ſtatute, for here was a forceable taking, and her ſubſequent conſent while under the reſtraint could not be looked on but an effect of the continuing force; and that though *Swanſon* had known nothing of the firſt force, yet he knowing her to be under it, made him approve of the firſt force, and ſo partake of it, as to be *guilty*. On this ſtatute aiders and aſſiſters are principals. *Vide Mod. Rep. vol.* 7. *p.* 101.

Michaelmas, 1 *Ann.* *The Queen* v. *Lilly*.

On an *indictment* for an *aſſault* and *battery*, and taking out of the cuſtody of *A.* and *B.* ſeveral goods mentioned in the *indictment*, which goods one *J. G.* ſerjeant at Mace to *A.* and *B.* then ſheriffs of *London*, by virtue of a warrant to them duly made in that behalf, then had and taken in due form of law, by reaſon whereof they had the goods in cuſtody.

The following *exceptions* were taken to the *indictment*:

1ſt, It is not laid that the property of the goods was in any body.

2dly, It is not ſaid that there was any judgment or execution thereon: and for theſe *exceptions* the *indictment* was quaſhed. *Vide Mod. Rep. vol* 7. *p.* 63.

Michaelmas, 1 *Ann.* *The Queen* v. *Sir John Bucknell.*

See this caſe fully ſtated in page 514 of this work, under the head *Highways*.

Michaelmas, 1 *Ann.* *The Queen* v. *Buckridge*.

The defendant was *indicted*, for that he was a *common drunkard, and a common profane ſwearer, and a diſturber of the peace, and a frequenter of tipling houſes*; and the *indictment* was quaſhed, becauſe the charge was too general and looſe. *Vide Mod. Rep. vol.* 7. *p.* 52.

Michaelmas, 1 *Ann.* *The King* v. *Speed*.

On a conviction affirmed in this court, a *levari fac.* was awarded to the ſheriff, to levy the penalty: the ſheriff ſeiſed the goods and ſold them. And this coming before the court, they held,

1ſt. That this court muſt award execution; for the record here cannot be removed or ſent back to the juſtices; and as the court have a power to affirm the conviction, the court in neceſſary conſequence have power to award execution.

2dly. This execution cannot be awarded to the conſtable, as it would, if the record had been before the juſtices; but it muſt be awarded to the ſheriff, for he is the officer of the court, and the court can take notice of no other.

3dly. It may be that the *levari facias* might impower the ſheriff to ſell the goods. The words of the act are, that the offender ſhall forfeit 40 *l.* to be levied by way of *diſtreſs*; and in ſuch caſe the diſtreſs ſhall not be deemed to be a diſtreſs taken as a pledge, but a diſtreſs to ſell; for the public being concerned, it ſhall be conſtrued the moſt effectual levy by diſtreſs. Thus on a *diſtringas* in a *court-leet* for a fine, as in caſe of a nuiſance, where the public is concerned, the officer may ſell of common right: but on a *diſtringas* in a *court-leet for a certain leet*, the officer cannot ſell the diſtreſs of common right, without a cuſtom: ſo for a diſtreſs in a *court-baron*, he cannot ſell without cuſtom; but in caſe of the ſewers, the officer has a power to ſell the goods. *Vide Salk. vol.* 1. *p.* 379. *Mod. Rep. vol.* 12. *p.* 328.

Michaelmas, 1 *Ann.* *The Queen* v. *Parker*.

An *indictment* was brought, to which the defendant demurred; and on motion, the Queen had *ſix days* to plead peremptorily, or join in demurrer; and within the ſix days their clerk in court died: and now, after three terms they applied to the court, which told them, if they had come in any reaſonable time they would relieve them.

Per curiam. A *non proſ.* ought not to be entered on an *indictment*, but on motion in court, and leave thereby obtained. *Vide Mod. Rep. vol.* 7. *p.* 86.

Michaelmas, 1 *Ann.* *The Queen* v. *Smith*.

The defendant's council took exception to a conviction of *deer-ſtealing*, where the fact was laid to be done in a foreſt *uſed* for keeping deer, and that the defendant killed a deer without the conſent of the keeper; and inſiſted, that the word *uſed* might be meant of a long time before, and there might be the conſent of the ranger. *But not allowed*; for the leave of the ranger is the leave of the keeper, and the word *uſed*, ſpeaks the preſent time as well as time paſt. *Vide Salk. vol.* 1. *p.* 378.

Hilary, 2 *Ann.* *The Queen* v. *Langley*.

The defendant was *indicted* for ſaying to the Mayor of *Saliſbury*: *You Mr. Mayor, I care not a fart for you*; and on another day, for ſaying to him, *You are a rogue and a raſcal*; and on a demurrer to this *indictment* it was inſiſted for the defendant, that theſe words do not appear to be ſpoken of the *Mayor* in the execution of his office, and therefore this *indictment* would not lie; he cannot be impriſoned for ſuch words, neither can he be *indicted*.

Holt, Chief Juſtice. Theſe words are *not indictable*, becauſe it does not appear that the *Mayor* was in the execution of his office, nor that he was a patent officer, for it would have altered the caſe, if it had appeared that he was a *juſtice of peace* by commiſſion from the Queen, for then he would have been *indictable*, becauſe the words would have been an aſperſion on the Queen, and on the government in general by whom he was employed; but here it does not appear he was a juſtice of peace, or if he was, it does not appear that he was ſo by commiſſion or appointment of the Queen, but of the corporation; it is true, if theſe words had been *written*, as they were ſpoken of the *Mayor*, an *indictment* would have laid, for there are many caſes which prove, that the ſame words, when written, are actionable, which are not ſo when ſpoken.

Per curiam. Words which directly tend to the breach of the peace are *indictable*, as where one man challenges another to fight, and the commiſſion of *Oyer* and *Terminer*, *for retailing of words*, is to be underſtood of words againſt the government, or which amount to *ſcandalum magnatum*, &c. But for theſe little offences *againſt good manners*, the law has made a proviſion, and that is by requiring *ſurety of the peace*, or for *good behaviour*, and by committing the offender, if he refuſe to find ſuch ſureties; or if he ſpeak ſuch words in court, they may proceed in a ſummary way againſt him, by fining him for a contempt of the court, and by committing him till he has paid the fine. The caſes cited to the contrary were. 1 *Cro* 503. 2 *Bulſt.* 139. 3 *Mod.* 139. *Vide Salk. vol.* 3. *p.* 190. *Raym. vol.* 2. *p.* 1029. *Mod. Rep. vol.* 6. *p.* 124.

Hilary, 2 *Ann.* *Anonymous*.

A. was *indicted* for *deceptively* coming to *B.* as ſent from *C.* to whom *B.* owed money, to call for and receive the ſaid money; and receiving the money *when in truth C.* never ſent him.

Per curiam. If he had come with a falſe token, it had been criminal, and therefore *indictable*; but the queſtion is, whether this be ſuch a cheat as is *indictable*? As playing with falſe dice, for that is ſuch a cheat as a perſon of an ordinary capacity cannot diſcover; but this is an *indictment* to puniſh one man becauſe another is a fool: let it be ſtayed. *Vide Mod. Rep. vol.* 6. *p.* 105.

Hilary, 2 *Ann. The Queen* v. *Daniel.*

An *Indictment* ran, for that at ſuch a day and place the defendant unlawfully enticed, procured, and cauſed one *Charles Scot*, a ſervant, or apprentice of one *Joſeph Biſhop* to abſent himſelf from, and depart out of the houſe and ſhop of the aforeſaid *Joſeph* his maſter, and that then and on other days before, he unlawfully ſeduced the ſaid *Charles* to take and carry away out of the houſe and ſhop of the ſaid *Joſeph* 200 *Carolina* hats, value, &c. of the goods and chattels of the ſaid *Joſeph*, and then and there received the ſame, knowing the goods, &c. and the ſaid *Charles* to be ſervant of the ſaid *Joſeph*. The defendant being found guilty, it was moved on arreſt of judgment, that this was but a private injury, for which an action on the *caſe* lies, and not in its nature public to maintain an *indictment*. *Treſpaſs* will lie for taking away his ſervant out of his actual ſervice; but for inticing, *caſe* lies only, and not treſpaſs. 21 *H.* 6. 31. Alſo no fact is laid to be done in purſuance of this inticing; and as to the latter part about the inticing to carry away the goods, there is no *venue* laid where the goods were taken away; ſo judgment was arreſted. And in the caſe of *The Queen* v. *Collingwood*, *Mich.* 3 *Ann.* in this court, which was an *indictment* of the the ſame nature; the judgment was alſo arreſted for the ſame reaſons. *Vide Salk. vol.* 1. *p.* 380.

Hilary, 2. *Ann. The Queen* v. *Wyatt.*

See this caſe fully ſtated in page 278 of this work, under the head *Conſtable*.

Hilary, 2 *Ann The Queen* v. *Dyer.*

An exception taken to an *indictment* for an entry into land was, that it was not ſaid to have been *manu forti*, as the words of the ſtatute are.

Per curiam. At *common-law* a perſon was *indictable* for entering into land, into which his entry was not lawful, though there was no force; but the ſtatute forbids force in entering or detaining, even where the entry is lawful; and here they would not quaſh the *indictment*. *Vide Mod. Rep. vol.* 6. *p.* 96.

Eaſter, 2 *Ann. The Queen* v. *Cave.*

An *indictment* was brought againſt the defendant for ſpeaking theſe words of the proſecutor *John Bradſhaw*, in the hearing of many perſons, *viz.* that he had made an *aſſault* on *Priſcilla Tinſdale*, and had carnally known her, without the conſent of the ſaid *Priſcilla Tinſdale*, with intent to procure money from the proſecutor; a motion was made that the *indictment* ſhould be quaſhed, becauſe it was not a matter for which an *indictment* lies. And it was quaſhed accordingly. *Vide Raym. vol.* 2. *p.* 857.

Eaſter, 2 *Ann. The Queen* v. *Watſon.*

See this caſe fully ſtated in page 515 of this work, under the head *Highways*.

Eaſter, 2 *Ann. The Queen* v. *Parry, Snelling* & *al.*

A motion was made for quaſhing an *indictment* againſt the defendants for having pretended to be officers in the land bank, and for having cheated *T. S.* of 14 *l.* and for having pretended to aſſiſt him in procuring the place of a meſſenger, whereas there was not any ſuch office, &c. But it was denied, becauſe it is a cheat; and the defendant, if he imagines that the law is with him, may demur. *Vide Raym. vol.* 2. *p.* 865.

Trinity, 2 *Ann. Anonymous.*

The defendant was *indicted for that with force and arms he took one hundred ſheep*, &c. and a motion was made to quaſh the *indictment*, for that it was no more than an action of *treſpaſs*.

Per curiam. An indictment will lie for taking goods forceably, but then ſuch taking muſt be proved to be a breach of the peace; and though the goods are the perſon's own property, yet if he takes them in that manner, he will be guilty. *Vide Salk. vol.* 3. *p.* 187.

Trinity, 2 *Ann. Anonymous.*

The defendant was *indicted* for aſſaulting and beating a cuſtom-houſe officer, in the execution of his office. The court moved to quaſh it, becauſe *ſtat.* 13 & 14 *Car.* 2. *c.* 11. *ſect.* 6. inflicts a penalty, and preſcribes the particular method of puniſhing that offence, *viz.* by the juſtices of peace, by fine and impriſonment; and therefore no *indictment* lies for this offence, as was *adjudged* about *two* years ago, in the caſe of *The King* v. *Watſon*, in this court, and reſolved accordingly; ſo the *indictment* was quaſhed. *Vide Raym. vol.* 2. *p.* 991.

Trinity, 2 *Ann. The Queen* v. *Carter.*

An *indictment* was found againſt the defendant, for having taken and carried away ſo many malt tickets. A motion was made that it ſhould be quaſhed, becauſe it does not ſay, from whom they were taken, nor to whom they belonged, and it was granted. And the *indictment* was quaſhed. *Vide Raym. vol.* 2. *p.* 890.

Trinity, 2 *Ann. The Queen* v. *Scott.*

The defendant was *indicted* for not repairing the pavement before his houſe in *Old Street*, *to the common nuiſance*, &c. and on motion, it was quaſhed, becauſe it was not ſaid, how he was obliged to repair it, and this was not within the late act of parliament for paving the ſtreets. *Vide Raym. vol.* 2. *p.* 922.

Trinity, 2 *Ann. The Queen* v. *Goddard and Carlton.*

On an *indictment* found for forging an aſſignment of a leaſe, the aſſignment was ſet forth in the *indictment*, in the words and figures thereof, and at the end was the mark of ſuch a one, but no mark appeared on the *poſtea*.

The defendant's council took the following exceptions to the *indictment*, *viz.*

1ſt, That the *indictment* was laid with a *that whereas*, which was ill; but the court held that was well enough, being but inducement: and *Holt*, Chief Juſtice, ſaid, this differed from a declaration in *treſpaſs*, becauſe in that caſe, there is nothing of recital in the declaration, as there is here; and when the *indictment* comes to charge the *forgery*, it charges it poſitively.

The ſecond *exception* was, that it was not ſaid there was a demiſe, and if there was no demiſe, there could be no aſſignment, but only that by a certain indenture, *it is witneſſed*, that *J. S.* demiſed. And as to this exception the court were divided.

Holt, Chief Juſtice, and *Powys*, Juſtice, held, that the words, *and by this indenture it is agreed and demiſed*, were a poſitive diſtinct averment of a leaſe, and had no relation to the words *it is witneſſed*.

Powell and *Gould*, Juſtices, on the contrary held, that thoſe words, as well as the word *demiſed*, muſt refer to the words *it is witneſſed*. And *Powell*, Juſtice, ſaid, they could not take this to be a diſtinct averment, becauſe they muſt take it to be the recital of the leaſe, the conſtant form of deeds being to put both in, *viz. hath demiſed, and doth demiſe*.

The third *exception* was, that there was no mark on the *poſtea*, and now ſince the *ſtatute* of *frauds*, a leaſe is not aſſignable, without a writing ſigned by the party. And this was agreed to be a good objection by the whole court.

Holt, Chief Juſtice. If the *indictment* had been, that the defendant forged a deed of aſſignment, and then they had ſet it out thus, without any mark, that had been well enough, becauſe ſigning is not neceſſary to a deed, and deeds anciently were not ſigned. But now ſince the *ſtatute of frauds*, an aſſignment by writing, if not a deed, muſt be ſigned, and therefore this not appearing to be any more, this ought to have been ſhewn to have been ſigned, or elſe it is no aſſignment.

Powell, Juſtice. In the caſe of *The King* v. *Newton*, in King *Charles* the ſecond's time, becauſe an *indictment* of forgery ſaid only *written*, and did not ſay *ſealed*, the judgment was reverſed on a *writ of error* out of *Cheſter*.

This matter came on again in *Eaſter* term, and now the *firſt* day of this term the court was informed that the *indictment* on the file was right.

Holt, Chief Juſtice, ſaid, he doubted there had been no trial at all, this being a material variance. But there having been a new *indictment* found, pending this matter, the court would not determine theſe exceptions, but made him plead to that, where theſe things were amended; but they all ſeemed to retain their former opinions. *Vide Raym. vol.* 2. *p.* 920.

Trinity, 2 *Ann*. *Anonymous*.

The caption of the *indictment* was *by the oath* of a jury *of good and lawful men*, &c. *ſworn and charged*, without ſaying *impannelled*, and for that reaſon the court was moved to quaſh it, but the motion was denied. *Vide Salk. vol.* 3. 191.

Michaelmas, 2 *Ann*. *Anonymous*.

An *indictment* was removed by *certiorari*, and upon the awarding the *certiorari*, a recognizance taken; and now the court was moved to quaſh the *indictment*; but it appearing that the recognizance was forfeited, the court would not hear the motion.

Holt, Chief Juſtice ſaid, the practice was, or ought to be now altered by the late act; before that the defendant came ſoon enough at any time to quaſh, but ſhould not be allowed to do it now after his recognizance was forfeited, by not carrying the record down to the next aſſizes to be tried; and for the ſame reaſon the court refuſed to let any exceptions be taken, either to the *certiorari* or return. *Vide Salk. vol.* 1. *p.* 380.

Michaelmas, 2 *Ann*. *Holderſtaffe* v. *Saunders*.

Holt, Chief Juſtice. A clerk in court may confeſs an *indictment* for his client. *Vide Mod. Rep. vol.* 6. *p.* 16.

Michaelmas, 2 *Ann*. *The Queen* v. *Dixon*.

See this caſe fully ſtated in page 255 of this work, under the head *Certiorari*.

Michaelmas, 2 *Ann*. *The Queen* v. *Browne*.

The defendant was *indicted* at *Hull* for forging a cocket for *quinque ſarcinas lini*, i. e. *five packs of linen cloth*; and this being removed by *certiorari*, after trial, a motion was made in arreſt of judgment, for that it was too uncertain. On the other ſide it was urged, that much ſtronger caſes than this had been adjudged good, as 2 *Lev.* 125. *duas ſarcinas canapis*, i. e. *two bundles of hemp*, 1 *Lev.* 203. for a parcel of thread: *trover* for a ſtudy of books; for it is enough to ſufficiently deſcribe the thing in which they were contained.

Holt, Chief Juſtice. *Detinue* lies for a box of writings, and if any of them concern lands, it will be prudent to name it, for that ſhall *ouſt* the defendant of his *wager of law*; but it ſuffices that the things it contains be certain enough; and if any new action be brought, the defendant ſhall ſay, that a former action was brought for the ſame by the name of ſo many bundles, &c. therefore judgment was given for the Queen. *Vide Mod. Rep. vol.* 6. *p.* 87.

Michaelmas, 2 *Ann*. *The Queen* v. *Orbell*.

The defendant was *indicted* for that fraudulently conſpiring to cheat *J. S.* of his money, he got him to lay a certain ſum of money on a foot-race, and prevailed with the party to run booty; and on motion, the court would not quaſh the *indictment*, for they ſaid, that being a cheat, though it was private in this particular, yet it was public in its conſequences.

Note. After this the defendant would not plead till he was ſerved with a peremptory rule; and for that by the courſe of the court, his plea ought not to be received without bail to try it the ſame term, whereas if he had pleaded freely, he need not try it till the next term.

Per curiam. He muſt give bail to try it this term, or the ſitting after. *Vide Mod. Rep. vol.* 6. *p.* 42.

Michaelmas, 2 *Ann*. *The Queen* v. *George*.

A conviction on *ſtat.* 4 & 5 *W.* & *M.* was, that the party *being a diſſolute perſon*, did hunt and kill ſo many hares; and it not being ſaid, that he was not qualified the *indictment* was quaſhed; for there are many diſſolute perſons worth 2000 *l. per annum*, and by conſequence are qualified to hunt, &c. *Vide Mod. Rep. vol.* 6. *p.* 40.

Michaelmas, 2 *Ann*. *The Queen* v. *Bothell or Porter*.

See this caſe fully ſtated in page 255 of this work, under the head *Certiorari*.

Michaelmas, 2 *Ann*. *Anonymous*.

A *feme covert* was *indicted* by her huſband for poiſoning his cows with bruiſed glaſs put into their grains; and ſhe was admitted *in forma pauperis*, though the court ſaid, the huſband could not convict her. *Vide Mod. Rep. vol.* 6. *p.* 88.

Michaelmas, 2 *Ann*. *The Queen* v. *Tracy*.

The defendant was *indicted*, for that he procured one *Muriell* the proſecutor to be arreſted by a warrant from a juſtice of peace, &c. and perſuaded the juſtice to refuſe bail, but the *indictment* did not alledge that *any bail was offered*; and that *when Muriell was committed*, he (the defendant) *extorted divers ſums of money* from him, but did not *expreſsly alledge, that Muriell was committed*, nor *what was extorted* from him; and for theſe reaſons this *indictment* was quaſhed after verdict; for it being a complicated offence, the defendant muſt be guilty of all or none, but they would not diſcharge him without he firſt entered into a recognizance to appear to a new *indictment*, which he did; and afterwards he was *indicted anew*, for that he, together with *A.* and *B.* intending to oppreſs *Muriell*, did in the pariſh of *St. Giles's in the Fields*, in the county of *Middleſex*, procure him to be arreſted under pretence of a warrant, and brought him before one *Chamberlaine*, a juſtice of peace *in the pariſh of St. Margaret*'s in the ſaid county, and intending farther to oppreſs him, perſuaded the juſtice to refuſe bail, *though good bail was offered*, and to commit him; and *avers, that he was committed*, and that *Tracy* perſuaded the goaler to lay him (the proſecutor) in irons, who by that means *extorted* 5 *l. from him*, &c. On *not guilty* pleaded, the defendant was found guilty; and now it was objected in arreſt of judgment, that here was a *miſ-trial*, for the *venire* was only from the *pariſh of St. Giles*'s, whereas the fact did ariſe from the *pariſh of St. Margaret*'s, as well as from the *pariſh of St. Giles*'s.

Per curiam. This is a plain *miſ-trial*, but yet the defendant has forfeited his recognizance, becauſe he was to try the cauſe *with effect*, that is ſo as the court may proceed to judgment; and if defendants will make ſuch faults on purpoſe, their recognizances ſhall be *eſtreated*, or a *ſcire facias* ſhall be brought thereon in this court;

for this court may take either courſe, unleſs the defendant will enter into a recognizance, to try it again *de novo*, which was accordingly done, and the defendant was tried and found guilty again; and it was inſiſted for him in arreſt of judgment, that his perſuading Mr. *Chamberlaine* the Juſtice, to refuſe bail, was only matter of opinion, and that the extortion was not by the defendant, but by the *goaler*; ſo that there was no offence charged in this *indictment* againſt the defendant, for the reſt is only taking a man on a lawful warrant, which is no crime.

Holt, Chief Juſtice. He is guilty even of the oppreſſion and extortion committed by the goaler, becauſe he procured him to be wrongfully put into the goal; for if *W. R.* wrongfully impriſons *W. W.* and the goaler detains him till ſo much is paid, in ſuch caſe, he who was the priſoner ſhall have an action of *falſe impriſonment* againſt *W. R.* for impriſoning and detaining him till he paid ſo much money; and this is a taking by *W. R.* and it muſt be illegal to uſe any unlawful means to oppreſs another. It was held in this caſe, that wherever a juſtice of peace may by warrant arreſt a perſon, he has authority to take bail, and that before any *indictment* found, the juſtice may grant a warrant for apprehending a man for a miſdemeanor, and bind him to the peace, or over to the ſeſſions.

In the caſe above mentioned it was held, that where the defendant is *indicted*, he cannot put in a plea without giving ſecurity to try it at his own charge; but if he comes into court, he may put in his plea, and the court is bound to receive it, but then he muſt be committed, unleſs he gives ſecurity to try it; and if he chuſes to be committed, then the trial muſt go on at the charge of the proſecutor, but if he gives ſecurity, the trial muſt be at his own charge. *Vide Salk. vol.* 3. *p.* 192. *Mod. Rep. vol.* 6. *p.* 39.

Michaelmas 2 *Ann. The Queen* v. *Macartney, or Macarty, et al.*

See this caſe fully ſtated in page 451 of this work, under the head *Evidence*.

Hilary, 3 *Ann. The Queen* v. *Harman.*

The defendant was *indicted* on *ſtat.* 9 & 10 *W.* 3. *c.* 41. for preventing the embezzlement of government ſtores.

Two *exceptions* were taken to this *indictment* in *arreſt of judgment*: *firſt*, that no *indictment* lay, becauſe it was a new offence, and a particular penalty inflicted, *viz.* forfeiture of the goods, and 200 *l.* as directed by the act.

But this *exception* was over-ruled by *Holt*, Chief Juſtice, who ſaid it was contrary to the words of the act, becauſe the forfeiture accrues by the conviction on an *indictment* for the offence.

The ſecond *exception* was, that the *indictment* did not conclude againſt the form of the ſtatute.

Powell, Juſtice. In all caſes of *indictments* for offences againſt a ſtatute, the *indictment* muſt conclude *againſt the form of the ſtatute*, to which all the court agreed, and ordered the *poſtea* to be ſtayed till it ſhould be further moved. *Vide Raym. vol.* 2. *p.* 1104.

Eaſter, 3 *Ann. The Queen* v. *Gould.*

See this caſe fully ſtated in page 88 of this work, under the head *Apprentice*.

Eaſter, 3 *Ann. The Queen* v. *Lane.*

The defendant was *indicted* on *ſtat.* 5 *Eliz.* for uſing the the trade of a barber, not having ſerved an apprenticeſhip to it for *ſeven years*; and a motion was made to quaſh the *indictment*, becauſe it did not conclude *againſt the peace*, &c.

Holt, Chief Juſtice. There can be no reaſon for this objection, for it would be very hard to make a *barber's* ſhaving a man by conſent, to be *againſt the peace*; beſides, it is laid to be *againſt the form of the ſtatute*, and therefore this *indictment* is good.

Powell, Juſtice, and the other Judges, ſaid, every act which is contrary to the law is contrary to the peace, and a breach of the peace: therefore by the other three judges, againſt *Holt*, Chief Juſtice, this *indictment* was quaſhed. *Vide Salk. vol.* 3. *p.* 191. *Raym. vol.* 2. *p.* 1034. *Mod. Rep. vol.* 6. *p.* 128.

Eaſter, 3 *Ann. The Queen* v. *Carter.*

See this caſe fully ſtated in page 62 of this work, under the head *Amendment*.

Trinity, 3 *Ann. The Queen* v. *Middlemore.*

A great number of people were *indicted* for a *riot*; and the court was moved, that the proſecutor ſhould pitch on *three* or *four* of them, and try it only againſt them, the reſt entering into a rule, if they were found *guilty* to plead *guilty* too; and this was ſaid to be done frequently to prevent the charge of putting them all to plead; and the rule was ſo. *Vide Mod. Rep. vol.* 6. *p.* 212.

Trinity, 3 *Ann. The Queen* v. *Wyatt.*

See this caſe fully ſtated in page 278 of this work, under the head *Conſtable*.

Trinity, 3 *Ann. The Queen* v. *Criſp.*

The defendant was *indicted*, for that there being an account between him and *A.* whereby he was indebted in ſuch a ſum to *A.* which account he ſigned, and afterwards he got it into his hands by *falſe and ſiniſter inſinuations*, and with *force and arms* tore it *againſt the peace*, &c.

The court was moved to quaſh the *indictment*:

1ſt, Becauſe it was a private offence, and not *indictable*.

2dly, Becauſe it did not ſhew whoſe property the paper was.

But the court denied the motion, for it was conſidered as a treſpaſs now *from the beginning*.

3dly, The property is his, who was entitled to the debt on the account; but the court bid him try it, or demur at his peril. *Vide Mod. Rep. vol.* 6. *p.* 175.

Trinity, 3 *Ann.* Anonymous.

Per curiam. A perſon is *indictable* for ſetting up a market, fair, or leet. *Vide Mod. Rep. vol.* 6. *p.* 183.

Trinity, 3 *Ann. The Queen* v. *Beſt, et al.*

See this caſe fully ſtated in page 154 of this work, under the head *Averment*.

Trinity, 3 *Ann.* Anonymous.

Several houſekeepers, being Quakers, were *indicted* for keeping their ſhops open on a day ordained by proclamation for a public humiliation and prayer, and becauſe they were ſeveral and diſtinct crimes in every diſtinct offender, and therefore not to be joined in one *indictment*, it was quaſhed. *Vide Mod. Rep. vol.* 6. *p.* 210.

Trinity, 3 *Ann. The Queen* v. *Steer and others.*

The defendants were indicted, for that they fiſhed *&c. and twenty carps, being the goods and chattels* of the proſecutor, did take and carry away.

Per curiam. The *fiſh* could not be *goods and chattels* of the proſecutor, unleſs they were in a *ſtew-pond* or trunk; but they might be *his fiſh* in a cloſe pond, and this is *by reaſon of the place*, becauſe they could not ſwim away: but they would not quaſh the *indictment* on a motion. *Vide Salk. vol.* 3. *p.* 189.

Trinity, 3 *Ann. The Queen* v. *Coteſworth.*

The defendant was *indicted* for abuſing Dr. *Ratcliff*; and it was objected againſt the caption, that it was *jurors for our Lady the Queen and the body of the county, ſworn and charged*, &c. now it ſhould not be *for our Lady the Queen and the body of the county*, but *for the body of the county only*; but it was diſallowed. *Vide Salk. vol.* 3. *p.* 191.

Michaelmas, 3 *Ann.* *The Queen* v. *Branworth.*

An *indictment* was found by the grand jury of the town of *Portſmouth* againſt the defendant, for that he being an idle perſon, did wander in the ſaid town ſelling of ſmall wares as a *petit chapman:* to maintain this *indictment*, it was urged, that a *petit chapman* is a vagabond by *ſtat.* 39 *El. c.* 4. And tho' ſome *petit chapmen*, that is ſuch as are legally qualified by *ſtat.* 8 *&* 9 *W.* 3. *c.* 25. may now lawfully uſe that occupation, yet that act excepts *boroughs* and *corporations*, ſo that as to them they remain in *ſtatu quo.*

Holt, Chief Juſtice. Is a vagabond, as ſuch, *indictable?* It ſeems not; for at *common law* a man might go where he would; but if he be an idle looſe perſon, you may take him up as a vagabond, and bind him to his good behaviour at *common law*; and by the ſtatute of *labourers* he may be compelled to ſerve: there is indeed a way by law for puniſhing incorrigible rogues by burning them in the ſhoulder, and ſending them to the gallies; from whence it may be urged, that there muſt be a way before of convicting them of being rogues, for they cannot be puniſhed otherwiſe as incorrigible rogues; and the queſtion is, whether that firſt conviction muſt be by *indictment?* In my opinion no; but by being convicted by a juſtice of peace to be a vagrant, and uſed by him as ſuch; and if he offends again, he may be *indicted* as a common vagrant; ſo the rule for quaſhing it was enlarged. *Vide Mod. Rep. vol.* 6. *p.* 240.

Michaelmas, 3 *Ann.* *Goddard* v. *Smith.*

See this caſe fully ſtated in page 34 of this work, under the head *Actions.*

Michaelmas, 3 *Ann.* *The Queen* v. *Buck and Hale.*

The defendants were found guilty on an *indictment*, for a *miſdemeanor*; for that being collectors and aſſeſſors of a public tax in ſuch a pariſh, they aſſeſſed and rated ſome at too high a rate, and omitted to tax others in their books, and levied on them, and put the money in their own pockets.

On theſe defendant's coming to receive judgment, it was urged, that it being no offence of an infamous nature, as *perjury* or *forgery*, nor againſt the public, there ought not to be any ſuch corporal puniſhment as *pillory, &c.*

Per curiam. It is an offence of dangerous conſequence, and very pernicious to the government, and of very ill example, too much practiſed of late, for what greater diſcouragement can there be to the people to pay their taxes freely, than to have injuſtice and inequality of rates, for the private advantage of ſome: and therefore this offence deſerves an exemplary puniſhment, and they were adjudged to ſtand on the pillory in the county where the fact was committed, and the marſhal was ordered to carry them down, and that a writ ſhould iſſue to the ſheriff of the county to aſſiſt him in the execution. *Vide Mod. Rep. vol.* 6. *p.* 306.

Michaelmas 3 *Ann.* *The Queen* v. *Culliford.*

See this caſe fully ſtated in page 80 of this work, under the head *Apprentice.*

Michaelmas, 3 *Ann.* *The Queen* v. *Hannon.*

See this caſe fully ſtated in page 34 of this work, under the head *Actions.*

Michaelmas, 3 *Ann.* *The Queen* v. *Sir James Banks.*

A bill of *indictment* was found againſt the defendant at the *quarter ſeſſions* for *Berkſhire*, for an aſſault made on one Mr. *C.* in *Windſor Caſtle*, and the ſame was removed by *certiorari*, at the inſtance of the proſecutor, into this court. Both the plaintiff and defendant made up the record in order to try the *indictment* at the next *aſſizes* for the county. After the removal, the proſecutor not thinking proper to carry down his record, the defendant tried the *indictment*, and was acquitted.

On a motion made by the proſecutor's council for a new trial, grounded on this ſtep taken by the defendant in trying the cauſe on his record after the ſuit had been removed by *certiorari*; the court directed a new trial, and ordered that it might be a rule hereafter, that a defendant ſhould never carry down an *indictment* removed hither by the proſecutor to trial without leave of the court. *Vide Mod. Rep. vol.* 6. *p.* 245. *Mod. Rep. vol.* 11. *p.* 33.

Michaelmas, 3 *Ann.* *The Queen* v. *Saxfield.* Error.

On a *writ of error* brought on a judgment on an *indictment* againſt the defendant for being a *common ſcold*, the word in the *indictment* was *rixa*, which was objected by the council for the defendant, not to ſignify a ſcold, but *rixatrix.* And for this exception the judgment was reverſed. *Vide Raym. vol.* 2. *p.* 1094.

Michaelmas, 3 *Ann.* *The Queen* v. *Collingwood or Callingwood.*

See this caſe fully ſtated in page 89 of this work, under the head *Apprentice.*

Eaſter, 4 *Ann.* *The Queen* v. *Smith.* Error.

On a *writ of error* brought on a judgment at the *ſeſſions* for *Middleſex*, at *Hick's Hall*, on an *indictment* on the *ſtatute* of *uſury*; the error aſſigned was, that the juſtices at the ſeſſions had no juriſdiction of uſury on the ſtatute. And on looking into the ſtatute, the court were of the ſame opinion, and reverſed the judgment. *Vide Raym. vol.* 2. *p.* 1144.

Eaſter, 4 *Ann.* *The Queen* v. *Wigg.*

The defendant was *indicted* for keeping of hogs here in town in ſome of the back ſtreets, *againſt the form of the ſtatute.* And the court was moved to quaſh the *indictment*, becauſe by *ſtat.* 2 *W. & M. c.* 8. *ſeſ.* 2. *ſect.* 20. there was a particular penalty appointed for this offence, *viz.* forfeiture of the ſwine to the uſe of the poor of the pariſh where they are kept, and therefore an *indictment* will not lie, at leaſt not on the ſtatute as this was, by concluding *againſt the form of the ſtatute.* And the caſe of *The King* v. *Watſon* was cited, where it was adjudged, that an *indictment* would not lie for keeping an ale-houſe without a licence, becauſe there is a particular penalty appointed by act of parliament.

Holt, Chief Juſtice, and the court, agreed to the caſe of *The King* v. *Watſon*, becauſe the keeping an ale-houſe without licence, was no offence at *common law*; and they made this diſtinction, where a new penalty is appointed by act of parliament, for a matter that was an offence at *common law*, there you may either take that remedy which is given by the act of parliament, or proceed by way of *indictment*, as you might have done before; and therefore keeping of ſwine in the city, *&c.* being a nuiſance at *common law*, the proſecutor is at liberty either to proceed by way of *indictment* for the nuiſance, or to take the more expeditious remedy which is given him by the ſtatute, *viz.* by ſale of the ſwine: but where the ſtatute makes the offence, there you muſt purſue that. As to the words *againſt the form of the ſtatute*, the offence being an offence at *common law*, that was ſurpluſage, and would do no harm. If the defendant had any hopes in his exception, he ſhould have demurred; for it is a rule never to quaſh an *indictment* for nuiſances. *Vide Raym. vol.* 2. *p.* 1163.

Trinity, 4 *Ann.* *The Queen* v. *Peirſon.* Error.

A *writ of error* was brought on a judgment given at the ſeſſions for the county of *Middleſex* at *Hicks's Hall*, by the juſtices of peace there, on an *indictment*, which ſet forth, that the defendant on ſuch a day and year, and at *divers* other days, at ſuch a place, *was and ſtill is a* *common bawd, and for her own proper advantage and gain, then and there certain evil diſpoſed perſons, as well men as women, unlawfully procured to meet in different bawdy-houſes, and commit whoredom and fornication, in contempt*, &c. To this *indictment* the defendant pleaded *not guilty*, and was convicted and fined 100 *l.* but the judgment was reverſed, becauſe the *indictment* ought to have been, *for keeping a common bawdy-houſe.* But what is charged in this *indictment* is but ſolicitation of chaſtity, which is a ſpiritual offence, and not *indictable* or puniſhable at *common law.* And the council relied on the diſtinction made in 1 *Roll.* 44. *n.* 8, 9. where it is reſolved, that for ſaying a *woman is a bawd*, no action will lie at *common law*, otherwiſe if you ſay, *ſhe is a bawd, and keeps a bawdy-houſe*, becauſe that is an offence inquirable and puniſhable in a *leet*.

It was agreed by the court and council in this caſe, that if a perſon was only a lodger in a houſe, yet if ſhe made uſe of her room for the entertaining and accommodating people in the way of a *bawdy-houſe*, it would be keeping of a *bawdy-houſe* as much as if ſhe had the whole houſe. *Vide Raym. vol.* 2. *p.* 1197.

Trinity, 4 *Ann*. *The Queen* v. *Johnſon.*

On a motion to quaſh an *indictment*, which ſet forth, that a juſtice had committed a woman to priſon, there to remain till further examination; and that becauſe the officer did not carry her to priſon, but kept her in his own houſe, (though he brought her forth on demand) he was *indicted*, as diſobeying the juſtice's order, and behaving himſelf negligently, *&c.* the commitment was on *Saturday*, and he brought her up before the juſtices on *Monday* following.

Per curiam. He ought to have carried her to priſon forthwith; whereon the court refuſed to quaſh it. It appeared alſo, that during the time, he took a note from her for 10 *s.* which the court held a great miſdemeanor. *Vide Raym. vol.* 2. *p.* 61.

Trinity, 4 *Ann*. *Anonymous.*

The court was moved to quaſh an *indictment* againſt a woman for uſing the trade of a *millener*, not having ſerved an apprenticeſhip, but it was refuſed.

Holt, Chief Juſtice, ſaid, it ought to be tried if it was within the ſtatute or not; for it did not appear to the court but that it might be a trade at the time of making the ſtatute; and all trades are not enumerated in the ſtatute; but yet they may be within the meaning thereof. *Vide Mod. Rep. vol.* 11. *p.* 63.

Eaſter, 5 *Ann*. *The Queen* v. *Paſchal, et al.*

An *indictment* was found againſt *A.* and others, for that they being receivers of the Queen's tax, did *under colour of office* extort money from ſeveral perſons. On a motion in arreſt of judgment it was held, that *two* men may be *indicted* jointly for a battery or extortion; becauſe it is a crime at *common law*, of which they might be jointly or ſeverally guilty. But as to the caſe in *Ro.* 81. 1 *Vent.* 302. they admitted *that, viz.* That *two* men could not be *indicted* jointly for exerciſing a trade, not having been apprentices; for not being apprentices, is that which occaſions the crime and forfeiture, and that muſt of neceſſity be ſeveral. In this caſe judgment was given for the Queen. *Vide Salk. vol.* 1. *p.* 382.

Hilary, 6 *Ann*. *Anonymous.*

On motion two *indictments* were quaſhed, becauſe in the caption it was ſaid, *by the oath of twelve true and lawful men for the borough aforeſaid*, inſtead *of the aforeſaid borough, ſo that it did not appear that they were of the borough.* *Vide Mod. Rep. vol.* 11. *p.* 165.

Eaſter, 6 *Ann*. *The Queen* v. *Pawlett.*

An *indictment* was brought againſt *Pawlett* for not executing a warrant of a juſtice of peace on a common baker, for exerciſing his trade on a *Sunday*, contrary to the act. The exception taken to the *indictment* was, that it does not appear the conviction was within *ten* days of the fact, which is the time limited by the act; and the *indictment* ſaid only *lawfully convicted.*

Holt, Chief Juſtice, was of opinion, that ſince it was ſaid that he was convicted, it ſhall be taken for a good conviction in all reſpects; and the defendant ſhould have taken advantage of the contrary, by ſhewing it in evidence on the trial.

Per curiam. It was agreed by the court, that for things neceſſary, as puddings and pies, for baking them an *indictment* will not lie on the ſtatute; but for baking bread it will. *Vide Mod. Rep. vol.* 11. *p.* 114.

Eaſter, 6 *Ann*. *The Queen* v. *Hickeringill.*

The defendant was *indicted*, and found *guilty* of a miſdemeanor, in altering an aſſeſſment, which he, with the other commiſſioners, ſigned in purſuance of the land-tax act, which was enacted at a ſeſſions of parliament held in *November* 4 *Ann*. *Exception* was taken, that in the *indictment* the act was not well ſet forth, for though the writs of parliament were returnable the 14th day of *June*, the time mentioned in the *indictment*, and right according to the printed book, yet being prorogued till *October*, the ſeſſions did not commence till then; whereon the *indictment* was quaſhed. *Vide Mod. Rep. vol.* 11. *p.* 113.

Eaſter, 6 *Ann*. *The Queen* v. *Harris.*

The defendant was *indicted* for riotouſly entering the cloſe of *J. S.* and cutting down and carrying off *twenty* aſhen-trees, and thirty oaks there growing being of the goods and chattels of *J. S.* and his wife.

The council for the defendant ſaid, they could not call them *goods and chattels* of the huſband and wife, and being faulty in that reſpect, the whole is void, and muſt be quaſhed, being different from the caſe in *Latch.* 173. where the offences were diſtinct and ſeveral.

Parker, Chief Juſtice, ſaid, they are ſeveral treſpaſſes, and though void for one, yet may be good for the reſt.

Per cur. Let judgment be for the Queen, as to entering the cloſe, and the *indictment* void as to the reſt, for trees growing cannot be called *goods and chattels.* *Vide Mod. Rep. vol.* 11. *p.* 113.

Trinity, 6 *Ann*. *The Queen* v. *Templeman.*

See this caſe fully ſtated in page 449 of this work, under the Head *Evidence*

Trinity, 6 *Ann*. *The Queen* v. *Lady Oglethorpe.*

The defendant was *indicted* for high treaſon on *ſtat.* 1 *Jac.* for converting her ſervant maid to popery, and *not guilty* was pleaded. On the *firſt* day of term, the Attorney General came in court, and confeſſed the plea to be true, by a ſpecial mandate from the Queen; whereon ſhe was diſcharged. *Vide Mod. Rep. vol.* 11. *p.* 115.

Michaelmas, 6 *Ann*. *The Queen* v. *Hurſt.*

The defendant was *indicted* for keeping an ale-houſe without a licence. The council for the defendant moved to quaſh it, becauſe *ſtat. Ed.* 6. and 3 *Car.* 2. have carved out particular penalties.

Per curiam. Let it be quaſhed. *Vide Mod. Rep. vol.* 11. *p.* 140.

Michaelmas, 6 *Ann*. *The Queen* v. *Rudd.*

Per curiam. A crime that ſhakes religion, as profaneneſs on the ſtage, *&c.* is *indictable*; but writing an obſcene book, (as that intitled, *The fifteen Plagues of a Maidenhead*) is not *indictable*, but puniſhable only in the *ſpiritual court.* *Vide Mod. Rep. vol.* 11. *p.* 142.

Hilary, 7 *Ann.* *The Queen* v. *Griffiths.*

The court was moved to quaſh an *indictment* againſt the defendant, for taking goods *feloniouſly*, which the proſecutor had as executrix to *J. S.*

Per curiam. It is not ſaid where he took them, nor in what manner, ſo that it does not appear he ſtole them. Wherefore the *indictment* was quaſhed *niſi*. *Vide Mod. Rep. vol.* 11. *p.* 207.

Eaſter, 7 *Ann.* *The Queen* v. *Wrightſon.*

The defendant was *indicted* for ſaying of Sir *Rowland Wynn*, who was a juſtice of peace, the words following: *Sir* R. W. *is a fool, an aſs, and a coxcomb, for making ſuch a warrant, and underſtands no more how to make a warrant than a ſtick-head*; and on the trial of this *indictment*, the defendant was found guilty of ſpeaking theſe words. On a motion in arreſt of judgment, *Holt*, Chief Juſtice, ſaid, he knew no caſe like this, but that of *The Queen* v. *Darby*. That words ſpoken in diſparagement of a juſtice's parts, is a breach of good behaviour, but not *indictable*; the preſent *indictment* does not ſet forth, that this was a legal warrant, it ought to appear to the court what ſort of warrant it was, if it was a fooliſh warrant, or of a matter whereof he had no conuſance, it was lawful to ſay ſo. The words perhaps might be true, and juſtices of the peace are not beyond cenſure.

Powell, *Powys*, and *Gould*, Juſtices, gave their opinions, and concurred with the Chief Juſtice. *Vide Mod. Rep. vol.* 11. *p.* 166.

Eaſter, 7 *Ann.* *The Queen* v. *Buſheir.*

An *indictment* was brought on *ſtat.* 1 *R* 3. *c.* 3. whereby it was enacted, that, *if any one out of the King's obeiſance, exerciſe any trade here, they ſhall forfeit their goods and chattles*, and in the *indictment* the words were *not born within the kingdom*, which may be, and yet be within the Queen's obeiſance; and therefore it was quaſhed. *Vide Mod. Rep. vol.* 11. *p.* 167.

Eaſter, 7 *Ann.* *The Queen* v. *Dy.*

No *indictment* will lie on the *ſtatute of uſury*: for the method the act preſcribes muſt be followed; therefore the *indictment* was quaſhed. *Vide Mod. Rep. vol.* 11. *p.* 174.

Eaſter, 7 *Ann.* *The Queen* v. *Grantham.*

On a motion in *arreſt of judgment*, on an *indictment* againſt the defendant, for aſſuming the name of one *Jones*, and borrowing money, and promiſing that ſhe the ſaid *Jones* would repay it, when in fact, *Jones* never ſent her, of which he was found guilty; the council obſerved, that an *indictment* would not lie in this caſe, for ſhe brought no tokens with her.

And further cited a caſe of *The Queen* v. *Jones*, *Hilary*, 2 *Ann*, which was exactly ſimilar, and there the *indictment* was quaſhed, though there was a token brought.

The council for the Queen ſeeming ſatisfied, that the *indictment* did not lie, therefore the matter went off. *Vide Mod. Rep. vol.* 11. *p.* 222.

Trinity, 7 *Ann.* *The Queen* v. *Jennings.*

The court was moved to quaſh a conviction of deer-ſtealing on *ſtat.* 3 & 4 *W.* & *M.* taken by a juſtice who entered into a glover's houſe, and finding a deer-ſkin, aſked him how he came by it; the glover ſaid he bought it of *J. S.* who not giving a good account of himſelf, was convicted. And the court held, that the juſtice might enter and convict the perſon that ſold it; for the ſtatute might be eaſily evaded, if the deer-ſtealer could diſcharge himſelf by a ſale. *Vide Salk. vol.* 1. *p.* 383.

Michaelmas, 7 *Ann.* *The Queen* v. *Leighton.*

Adjudged, That a forceable detainer is puniſhable by *indictment*. *Vide Forteſcue*, *p.* 173.

Eaſter, 8 *Ann.* *The Queen* v. *Jennings.*

See this caſe fully ſtated in page 278 of this work, under the head *Conſtable*.

Michaelmas, 8 *Ann.* *The Queen* v. *Tooley* & *al.*

See this caſe fully ſtated in page 278 of this work, under the head *Conſtable*.

Hilary, 10 *Ann.* *The Queen* v. *Ingram* & *Ux.*

An *indictment* againſt the huſband and wife for an *aſſault* and *battery*, ſet forth, that they *vi* & *armis*, *aſſaulted*, beat, wounded, &c. on *not guilty* pleaded, the jury found both *guilty*; and now an exception was taken that the words *aſſaulted* being in the ſingular number, could refer only to *one* of the defendants, therefore it was uncertain, which was charged, and both could not be found guilty.

Parker, Chief Juſtice. This *indictment* would have been very good, though the word *aſſaulted* had been left out, for there cannot be a battery and wounding without an aſſault; though there may be the latter without the former. In a civil action, where *one* part of the declaration is ill, and the jury find entire damages, the judgment muſt be arreſted, becauſe the court cannot apportion them; but in *indictments* the court aſſeſs the fine, and they will ſet it only according to thoſe facts which are well laid. If an offence ſufficient to maintain the *indictment* be well laid, it is enough. Afterwards, in *Trinity* term following, judgment was given againſt the defendants. *Vide Salk. vol.* 1. *p.* 384.

Michaelmas, 10 *Ann.* *The Queen* v. *Williams.*

See this caſe fully ſtated in page 213 of this work, under the head *Baron and Feme*.

Michaelmas, 11 *Ann.* *The Queen* v. *Cranage.*

On an *indictment*, that the defendant, with others, at the pariſh of *St. Giles in the Fields*, riotouſly aſſembled, *and a certain bed-chamber of one* S. S. *in the manſion houſe of one* James *broke open and entered*, and *thirty* yards of ſtuff took and carried away; on evidence, it appeared to be the manſion-houſe of one *Jamſon*, and not *James*; and the Chief Juſtice held, that this did not maintain the *indictment* like the caſe in 2 *Ro.* 677. In *treſpaſs* for breaking his cloſe in *Calvering* in a certain place called *Calverfield*, abutting ſouth on a mill in the tenure of *J. S.* the plaintiff muſt prove the whole abutement, even its being in the tenure of *J. S.* He cited the caſe of the Queen againſt *Sudbury*, where on an *indictment* for an aſſault and battery laid as a riot; two were acquitted, and *two* found guilty; and all were acquitted, for the crime was the riot, and the whole charge alledged under that ſpecification and deſcription. So of the play-houſe; an *indictment* for acting a play and ſpeaking obſcene words, in ſuch a pariſh, in a play-houſe in *Lincolns-Inn-Fields*; if there be no play-houſe in *Lincolns-Inn-Fields*, the defendant muſt be acquitted; for though the words are not local, yet theſe are made ſo. One may make a treſpaſs local, that is not ſo. If the ſpeaking had been alledged in *Lincoln's-Inn-Fields*, then it had been laid as a *venue*; but here it is otherwiſe, for here it is alledged as a deſcription where the play-houſe ſtood. In the principal caſe, part is local, part not local; the *chamber* is local, the taking and carrying away is not local; but then all is put together as *one* entire fact under one deſcription, and you cannot divide them. *Vide Salk. vol.* 1. *p.* 385.

Hilary, 12 *Ann.* *Jones* v. *Gwynn.*

See this caſe fully ſtated in page 39 of this work, under the head *Actions*.

Eaſter, 12 *Ann.* *The Queen* v. *Bradley.*

See this caſe fully ſtated in page 283 of this work, under the head *Conviction*.

Michaelmas, 12 *Ann.* *The Queen* v. *Muſcot or Muſket.*

See this caſe fully ſtated in page 455 of this work, under the head *Evidence.*

Trinity, 2 *Geo.* *The King* v. *Winteringham.*

The defendant was *indicted, for that he unduly and negligently behaved himſelf in the execution of the office of a conſtable*, which was quaſhed for being too general. *Vide Stra. vol.* 1. *p.* 2.

Trinity, 2 *Geo.* *The King* v. *Dixon and Wife.*

See this caſe fully ſtated in page 501 of this work, under the head *Gaming.*

Michaelmas, 3 *Geo.* *The King* v. *Powell et al.*

The court was moved to quaſh an *indictment* againſt the defendant, for deceiving one *Davila* of ſeveral lottery orders, the words were, *deceived and defrauded, being the writings, goods, and chattels, of the ſaid* Davila, this is *trover* in effect, and too generally laid. 2 *Roll. Abr.* 79. *Mod. Caſ.* 311.

Per curiam. This is too general, and the *indictment* was accordingly quaſhed without putting the defendant to demur to it. *Vide Stra. vol.* 1. *p.* 8.

Michaelmas, 3 *Geo.* *The King* v. *Dawſon.*

On an *indictment*, for that the defendant on ſuch a *day, year, and place, made and counterfeited* a bank note of 520 *l.* On *not guilty* pleaded, the jury found a ſpecial verdict, *viz.*

That *Conrade de Gols* being a perſon entruſted and employed by the governor and company of the bank of *England*, made and ſigned a bank note for 220 *l.* which note was delivered to the defendant unaltered, who *croſſed* and *altered* the ſaid note, by turning the word *two* into the word *five*, whereby the ſaid note, which was made only for 220 *l.* purported to be a note for 520 *l.* by colour whereof the defendant had and received of the bank 520 *l.*

The council for the defendant inſiſted, that the facts found in the verdict were not included in the general words of the *indictment, made and counterfeited*; that this was not counterfeiting or making a note, but only altering a note made; that this muſt be admitted to be a crime within the words of *ſtat.* 8 & 9 *W.* 3. *c.* 20. concerning the bank. But as the *indictment* is not for altering or eraſing, judgment was prayed for the defendant.

The opinion of the judges was, that the *indictment* was well enough, for this was a plain forgery, if not a counterfeit, and the word *made* would denote as much: and accordingly the defendant was convicted. *Vide Stra. vol.* 1. *p.* 19.

Hilary, 4 *Geo.* *The King* v. *Loggen and Froome.*

On an *indictment* found againſt the defendants for *extortion*, ſetting forth, that the defendant Dr. *Loggen*, being chancellor, and the other defendant, regiſter to the biſhop of *Sarum*, did force one *Thomas Hollier*, executor of the will of *Mary Alſton*, to prove the ſaid will in the ſaid biſhop's court, they well knowing that the ſaid will had before been proved in the prerogative court of *Canterbury*, and by reaſon thereof they extorted from the ſaid *Thomas Hollier* 40 *s.* and on *not guilty* pleaded, there was a verdict for the King.

The defendants now moved in arreſt of judgment, and offered ſeveral *exceptions, viz.*

1ſt. That it only alledged that the defendants *well knew* that the will had been proved before in the prerogative court: whereas they ſhould have ſhewn, that it appeared *judicially* before them. For otherwiſe this is no more than *indicting* a judge for giving ſentence on one ſide, when a matter not appearing to him would have inclined him to the other.

To this it was anſwered, that he could not well know it, unleſs it appeared under ſeal, and this being after a verdict.

Parker, Chief Juſtice, ſaid, he would intend it ſo, and in fact the ſecond probate was affixed to the ſame copy as the firſt.

2dly. It was excepted, that this was an *indictment* at *ſeſſions*, and the juſtices have no juriſdiction as to *extortion.* But this was likewiſe over-ruled, for their commiſſion has in it the word *extortion*, 3 *Inſt.* 149.

3dly. It was excepted, that the *indictment* had not alledged what was the juſt fee; ſo *it does not appear* that the defendants were *guilty* of *extortion.*

Parker, Chief Juſtice. It matters not whether 40 *s.* was the uſual fee for the probate, ſince in this caſe the defendants had no title to any fee at all.

4thly. It was excepted, that the defendants offices are diſtinct; and what might be *extortion* in one, might not be in the other; and therefore the *indictment* ought not to be joint; as two cannot be jointly *indicted* for exerciſing a trade without ſerving an apprenticeſhip.

Parker, Chief Juſtice. This would be an exception, if they were *indicted* for taking more than they ought, but it is only againſt them for contriving to get money where none is due. And this is an entire charge. For there are no acceſſaries in *extortion*, but he that is aſſiſting is as *guilty* as the *extortioner*; as he that is party to a riot is anſwerable for the act of the other.

Eyre, Juſtice, doubted whether the *well knew* was ſufficient, and quoted a caſe where *having knowledge*, that he was elected conſtable, was held ill. But as to the merits and all the other objections, the court were unanimous; *but adjourned* as to this laſt, and to conſider what puniſhment to inflict on the defendants. *Vide Stra. vol.* 1. *p.* 73.

Michaelmas, 5 *Geo.* *The King* v. *Turner* & *al.*

The defendants having been *indicted* for a riot in entering into a room: they came in and confeſſed the *indictment*, and moved to ſubmit to a ſmall *fine.* The proſecutor, to aggravate the *fine*, produced *affidavits*, that a young gentleman, who was then in the room, and ill of the ſmall pox, was ſo frightened that he died; though he was in a very good way before, and whether theſe *affidavits*, could be read on this *indictment*, was the queſtion.

Eyre, Juſtice, was againſt the reading them, becauſe it was an injury to a *third* perſon, and no mention of it in the *indictment.* If in *treſpaſs*, the plaintiff would give the beating his ſervants in aggravation of damages, it muſt be laid in the declaration. And he mentioned the caſe of *The King* v. *North* & *al.* 9 *W.* 3. *in this court*, where in an *indictment* againſt ſeveral journeymen weavers for a *riot*, the circumſtance of their meeting, in order to oblige their maſters to raiſe their wages, was not allowed to be given in evidence, not being laid in the *indictment.*

Pratt, Chief Juſtice, *Powys* and *Forteſcue*, Juſtices, were for reading the *affidavits*, becauſe this was the immediate conſequence of the riot, and could not ſubſiſt as a crime of itſelf. And if it was otherwiſe, every man might make his *indictment* as long as his *evidence.* Beſides, why are *affidavits* ever read, unleſs it be to inform the court of circumſtances, that cannot appear on the general allegation of the crime? They ſaid, the true diſtinction was, where the matter can or cannot ſubſiſt as a diſtinct crime by itſelf: the combination of the weavers was a conſpiracy, which is a crime *indictable*; and it would have been hard to *fine* them on that account, and yet leave them open to be *indicted* for a conſpiracy. In an *indictment* for a riot in breaking windows, *Holt*, Chief Juſtice, let them in to ſhew, that it was becauſe the proſecutor had put out illuminations for the peace of *Ryſwick.* If circumſtances are not to be conſidered, the puniſhment for a riot muſt be the ſame in all caſes, which would be highly unreaſonable. The *affidavits* were therefore allowed to be read. *Vide Stra. vol.* 1. *p.* 139.

Trinity, 7 *Geo.* *The King* v. *Carter.*

The defendant was *indicted* for a *treſpaſs* before juſtices of peace, and it was excepted that it did not appear they had any juriſdiction for want of the words, *and* *alſo aſſigned to hear and determine different felonies, tranſgreſſions, and other offences perpetrated in the county aforeſaid.*

For theſe words are in all the commiſſions ever ſince *ſtat.* 18 *Ed.* 3. and the opinions have been, that without this clauſe the juſtices, as juſtices, cannot hear and determine thoſe matters.

Per curiam. The *indictment* muſt be quaſhed. At *firſt* the juſtices were only *Conſervators of the peace*, and the ſubſequent power to hear and determine, given by *ſtat* 18 & 34 *Ed.* 3. is only, that by commiſſion they may have ſuch a power. The commiſſion of the peace appears to have been altered into the preſent *form*, immediately after making theſe ſtatutes, which ſhews the opinion of the King's council at that time. *Lambert* ſays, *they ſhall have power*, which muſt be underſtood by *commiſſion.* As therefore this is not a proceeding on their *common law* juriſdiction, but a juriſdiction given by ſtatute; when ever they hold ſuch pleas, they muſt ſhew an appointment to hear and determine, and we cannot intend that they have ſuch power. *Vide Strange, vol.* 1. *p.* 442.

Eaſter, 8 *Geo.* *The King* v. *Selfe.*

See this caſe fully ſtated in page 118 of this work, under the head *Arreſt of Judgment.*

Michaelmas, 8 *Geo.* *The King* v *The Journeymen Taylors of Cambridge.*

One *W.* together with ſeveral other *journeymen taylors*, of or in the town of *Cambridge*, were *indicted* for a *conſpiracy* among themſelves to raiſe their wages, and being found guilty, they now by their council moved in *arreſt of judgment* on ſeveral errors in the record.

1ſt, It was *objected*, that the defendants having the addition of *yeomen*, are notwithſtanding charged with a conſpiracy not to work as journeymen taylors, which is a repugnancy.

2dly, The caption is not good, being *to the general quarter ſeſſions of the peace, &c.* omitting our *Lord the King* after *peace*, *Hilary*, 11 *Ann*, *two indictments* were quaſhed on this *exception.*

3dly, No crime appears on the face of this *indictment*, for it only charges them with a conſpiracy and refuſal to work at ſo much *per day*, whereas they are not obliged to work at all by the day, but by the year, by *ſtat.* 5 *Eliz. c.* 4.

4thly, That this fact being laid in the town of *Cambridge*, it did not appear by the record what county *Cambridge* was in, which it ought to do, becauſe there are many other towns of that name in *England*: in *Glouceſterſhire.* So a miſ-trial; for there is no more reaſon to award the *venire* to the ſheriff of *C.* than to to the ſheriff of any other county. The *venire facias* is awarded *to the ſheriff of Cambridge*, commanding him to ſummon a jury of the county. In the margin of the *indictment*, *the vill of* C. in the *indictment*, the *venue* is alledged only at the *vill* of *C.* the *certiorari* to remove it, is directed to *the juſtices of our Lord the King of the vill* of *C.* in our county of *C.*

This error is not helped by naming the county in the *certiorari* to remove the *indictment*, becauſe that writ is only an order of this court.

Neither ſhall it be intended that *Cambridge* is in the county of *Cambridge*, becauſe this is a *criminal* caſe, and intendments are never allowed in proſecutions of this nature.

5thly, This *indictment* ought to conclude *againſt the form of the ſtatute*, for by a late ſtatute, *viz.* 7 *Geo.* journeymen taylors are *prohibited* to enter into any contract or agreement for advancing their wages. And *ſtat.* 2 & 3 *E.* 6. *c.* 15. makes ſuch perſons *criminal. Saund.* 250. *W. Jones* 379.

Per curiam As to the *firſt*, there is no inconſiſtency between the addition of *yeomen* and *taylors.*

As to the *ſecond*, this *exception* has been often overruled, eſpecially of late years.

As to the *third*, it is true this *indictment* ſets forth, that the defendants denied to work under ſuch wages as they demanded; but though this might be more than directed by the ſtatute, yet it is not for the denial, *&c.* but for the conſpiracy that they were *indicted*; and a conſpiracy of any kind is illegal, though the matter about which they conſpired might have been lawful for them, or any of them to do, if they had not conſpired to do it; and this appeared in the caſe of the *Tub-women* v. *The Brewers of London.*

As to the *fourth*, a *venire facias*, directed to the ſheriff of *Cambridge* to return a jury, if he returns one of the county of *Cambridge*, this is good; for *Cambridge* being mentioned in ſeveral acts of parliament, the court muſt-take notice of ſuch acts, and on ſuch a return will intend, that *Cambridge* is the county of *Cambridge.* “In the caſe of *Withers* v. *Warner*, *Hilary*, 6 *Geo.* we took judicial notice, that *London* and the city of *London* were all one. The *certiorari* directed *to the juſtices of our Lord the King of the vill of C.* in our county of *C.* and returned by the juſtices of the *vill* in the county of *C.*” that it will be a very foreign intendment, to ſuppoſe the *vill* to be out of the county.

As to the *fifth*, this *indictment* need not conclude *againſt the form of the ſtatute*, becauſe it was for a *conſpiracy*, which is an offence at *common law.* Therefore the judgment was affirmed by the whole court, *&c. Vide Mod. Rep. vol.* 8. *p.* 10.

Michaelmas, 8 *Geo.* *The King* v. *Gray.*

One of the ſervants in the houſe opened his Lady's chamber door (which was faſtened with a braſs bolt) with a deſign to commit a rape: and *King* Chief Juſtice, ruled it to be a *burglary*, and the defendant was convicted and tranſported. *Vide Strange, vol.* 1. *p.* 481.

Hilary, 9 *Geo.* *The King* v. *Sprigg and Oakley.*

The defendants were tried at the *Old Bailey* on an *indictment* for *piracy* in ſinking a ſhip near the *Iſle of Man*; the evidence was as follows:

Sprigg bought this ſhip, and made *Oakley* maſter thereof, and having freighted her, he inſured 500 *l.* on the ſhip, and 400 *l.* on the cargo to the *Weſt Indies.*

Afterwards they put to ſea, and run the goods on the coaſt of *England*, and then put to ſea again, and about *two days* afterwards the ſhip was ſunk, and then he proteſted at the next port that both the ſhip and cargo were loſt.

The proof againſt the maſter was, that the day before the ſhip was loſt he took notice that the ſhip's boat was out of repair, and deſired ſome of the men to ſtop the chinks therein, for that he did not know how ſoon they might have occaſion to make uſe thereof.

The next day he deſired one of the ſailors to ſee how deep the water in the pump was, who in a quarter of an hour before had pumped till it was no more than *two* inches deep; but now to his great ſurpriſe found it more than *ſeven* inches deep; thereon he and the reſt of the ſhip's crew began and continued to pump, but ſtill the water became higher in the ſhip, and *within half an hour* was fifteen inches high.

Thereon the ſailors who pumped, and ſome of the reſt of the ſhip's crew, offered to go down to the hold, but the maſter would not ſuffer any of them to go down, nor any body to be there beſide himſelf and *Sprigg*, who was all the time below, which was proved by the ſailors; and that the water could not flow in ſo faſt, unleſs the ſhip was bored or broken in the bottom.

The proof againſt *Sprigg*, the owner, was, that the day before the ſhip put to ſea he bought an *auger*, which was an inch and a half wide in the bore; that the ſhip had *augers* enough before, and there was no manner of occaſion for ſo wide an *auger* and that he was under deck all the time the ſailors were pumping, and, as they believed, boring the ſhip.

But the evidence being only preſumptive againſt both the defendants, they were acquitted.

Note. This differs from *Maſon's* caſe, *Eaſter* 9 *Geo.* for there the goods of another were delivered on a ſpecial truſt to be carried to *Malaga*; but here the goods were the property of *Sprigg* himſelf, and he could not be *indicted* for ſtealing his own goods, with an intent to charge another, becauſe there muſt be a *felonious taking* as well as a *converſion*; now there could be no *felonious taking*, becauſe he himſelf was owner, and in poſſeſſion of the goods. *Vide Mod. Rep. vol.* 8. *p.* 66.

Eaſter, 9 *Geo.* *The King* v. *Maſon.*

The defendant who was maſter of a ſhip, was *indicted* and tried on three ſeveral *indictments* at the *Old Bailey*, before the judge of the *Admiralty Court.*

The firſt *indictment* was for maliciouſly and piratically burning his ſhip.

The ſecond *indictment* was for *piracy* in ſtealing the goods which he received on board the ſaid ſhip at *Rotterdam.*

The third *indictment* was for a cheat in committing the acts aforeſaid.

The court and jury acquitted the defendant of the *two firſt indictments*, and found him guilty of the *third*, for which he was fined and committed till he paid the ſame. *Vide Mod. Rep. vol.* 8. *p.* 74.

Trinity, 9 *Geo.* *The King* v. *Atho, Father and Son.*

See this caſe fully ſtated in page 257 of this work, under the head *Certiorari.*

Trinity, 9 *Geo.* *The King* v. *Hotch.*

The court was moved to quaſh an *indictment* on *ſtat.* 5 *Eliz. c.* 4. where it was averred to be a trade unuſed at that time in *Great Britain*, inſtead of *England*; and after a rule to ſhew cauſe, it was made abſolute without oppoſition. *Vide Stra. vol.* 1. *p.* 552.

Michaelmas, 9 *Geo.* *The King* v. *Gibbs.*

See this caſe fully ſtated in page 285 of this work, under the head *Conviction.*

Michaelmas, 9 *Geo.* *The King* v. *Layer.*

The defendant was committed to the *Tower* for *high-treaſon*, in compaſſing the death of the King, and an *indictment* having been found againſt him at *Rumford* in *Eſſex*, he was removed hither by *certiorari*, when the following *exceptions* were taken, *viz.*

Miſ-ſpelling, *falſe Latin*, *nonſenſe*, and *ſurpluſage*, and that there were inſignificant and inſenſible words in the very commiſſion, by virtue whereof this *indictment* was found, as *plenius veritat.* which words cannot be conſtrued to any manner of ſenſe.

As to the *miſ-ſpelling*, he (the priſoner) is called in the *indictment Chriſtopherus*, with an *e*, when it ſhould have been with an *o*, as *Chriſtophorus.*

To which the court anſwered, that they did not know what his name was, and probably he might be baptized by that name; but if he was not, then it might be pleaded in *abatement*; and though the *Lexicons* and *Dictionaries* might warrant *Chriſtophorus*, yet the other might likewiſe be a name of baptiſm.

Then it was objected againſt the words of the *indictment*, *viz.* that he (the priſoner) *compaſſavit imaginatus fuit & intendebat ad ſacram perſonam Domini Regis capiend. ſeiſiend. & impriſonand.* Now here the conjunction copulative *et* ſhould have joined the word *intendebat* to the ſame mood and tenſe, *&c.* therefore it is incongruous *Latin*, and improper in an *indictment*, and makes it vitious; beſides, the word *ad ſeiſiend.* the *King* is an inſignificant word, not known in law, or in any *Latin* author; and for theſe reaſons, this *indictment* ought to be quaſhed, and the rather, becauſe all forms of *indictments*, eſpecially in *high-treaſon*, ought to be very certain.

To which it was anſwered and reſolved, that as to the fault objected to the commiſſion by virtue whereof this *indictment* was taken, this court has no power over it ſo as to quaſh the *indictment*; but though the objection is, that *plenius veritat.* cannot be conſtrued to any manner of ſenſe, yet by tranſpoſing the words it may be made good ſenſe.

They are in the recital of the commiſſion in the caption of the *indictment*, and muſt refer to the former words *ad inquirend.* They are inſerted in the form of a commiſſion, publiſhed in a treatiſe allowed by all the judges, called, *A Collection of all Statutes relating to high-treaſon, compoſed for the aſſiſtance of the judges in Scotland.*

1ſt. Then, as to the *miſ-ſpelling* the priſoner's name, he may plead that matter in *abatement*, for he may be as well known by the name of *Chriſtopherus* as by the name of *Chriſtophorus.*

2dly. It is true the verbs are not all in the ſame tenſe; but though they are not, and that the *præter* tenſe is coupled with the *præter-perfect* tenſe, yet that is not material, and ſhall not make this *indictment* naught; either word is ſufficient to charge the defendant with the intent of compaſſing: either *overt* act is ſufficient.

3dly. And as to the words *ad ſeiſiend*, it being an *overt* proof of the deſign; it is well enough if any proof is made of an *overt* act of the things laid in the *indictment*; beſides, it is not a word unknown in law, for it is uſed every day in the court of *Exchequer*, where *ſeiſire facias* are words in a writ ſent to the ſheriff, and he returns *ſeiſiri feci. ſeiſiend.* is a proper word; but without it there is ſufficient to charge Mr. *Layer.*

Theſe objections being over-ruled, the priſoner pleaded a *miſnomer* in *abatement*, and his plea was received, read, and filed, and afterwards he was ſent back to the *Tower.* *Vide Mod. Rep. vol.* 8. *p.* 82.

Eaſter, 10 *Geo.* *The King* v. *Crowhurſh.*

The defendant was *indicted* at the *quarter ſeſſions* for the county of *Kent*, as Overſeer of the pariſh of *Swanſcombe* in that county, for diſobeying an order made by *two* juſtices, whereby they ordered the churchwardens and overſeers of that pariſh to pay 4 *s. per* week to the keeper of the houſe of correction there, for the maintenance of one *B.* a lunatic, committed to that houſe, as long as *B.* ſhould continue there in cuſtody: and the *indictment* ſet out, that the defendant was one of the overſeers, *&c.* and had notice of the order, and was requeſted to pay the 4 *s. per* week by the keeper of the houſe of correction, and had not paid it, *&c.* And on demurrer to this *indictment*, it being removed into this court by *certiorari*, an *exception* was taken that there was no poſitive averment in the *indictment* that the *two* juſtices had made ſuch an order; for it was only ſet forth by way of recital, that *whereas* the *two* juſtices had made an order, *&c.* and for this reaſon *two indictments* were quaſhed for not obeying an order for receiving a baſtard child, *Salk.* 371. *The King* v. *Whitehead.* And unleſs there was ſuch an order, which ought to be poſitively alledged, there could be no diſobedience to it.

The council for the King cited the caſe of *The Queen* v. *Goddard* and *Carleton*, *Trinity*, 2 *Ann*, and argued, that the order here was only ſet out by way of recital, but the non-payment of the 4 *s. per* week, *&c.* is poſitively alledged. *But not allowed.*

Per curiam. If there was no order there could be no breach of that order, and therefore that ought to be poſitively alledged. And as to the caſe of *The Queen* v. *Goddard and Carleton*, the forgery was the offence, and that was poſitively averred; however, though the court ſeemed then to be of that opinion in that caſe, yet it was never *adjudged*, for the cauſe was not determined, nor judgment ever given on that *indictment.* And the caſe cited from *Salk.* is in point. So here judgment was given for the defendant. *Vide Raym. vol.* 2. *p.* 1363.

Trinity, 10 *Geo.* *The King* v. *Reeves.*

On a motion to quaſh an *indictment*, wherein was theſe words, *it is preſented, which bill is true*, inſtead of, *that the bill is true*, a rule was made to quaſh it *niſi*, &c. but no cauſe was ſhewn, ſo the indictment was quaſhed for that fault, *Vide Mod. Rep. vol.* 8. *p.* 296.

Eaſter, 11 *Geo.* *The King* v. *Weſton & al.*

An *indictment* was found againſt *ſix* perſons jointly and ſeverally, for exerciſing a trade; it was quaſhed, becauſe the court held that there ought to be diſtinct *indictments.* *Vide Stra. vol.* 1. *p.* 622.

Eaſter, 11 *Geo.* *The King* v. *Weſtbury*.

The defendant was *indicted*, for that *T. S.* and other bailiffs, &c. did *by virtue of a writ of our Lord the King of fieri facias*, and a warrant thereon, levy the goods of *M. G.* and that the defendant, *Weſtbury*, with others did aſſemble, *and riotouſly and routouſly* did reſcue the the ſaid goods, and aſſault and beat the bailiffs, and ſo diſturbed them *in the execution of the writ and warrant aforeſaid*.

On *not guilty* pleaded, judgment was given againſt the defendant, and the court was now moved in arreſt of judgment, for that the *fi. fac.* was not well ſet forth; for it was *by virtue of a writ of our Lord the King of fieri facias*, without ſetting forth the writ itſelf, and without mentioning the party's name; then it ſets forth, that there was a warrant *according to the exigence of the writ aforeſaid*, and that the defendant diſturbed the bailiffs *in the execution of the writ and warrant aforeſaid*, which is ill; for if there was no writ, there could be no warrant; it is true this *indictment* mentions a writ, but it is not well ſet forth, and if ſo, the warrant muſt fail; for the court can never judge whether it is according to the exigence of the writ, when no good writ appears to have iſſued.

Per curiam. It is true, the bailiff may defend himſelf by the warrant, but a writ muſt be ſhewn to charge a ſtranger; and this is the conſtant diſtinction in ſuch caſes; and as this caſe is, an *indictment* would have lain for a ſingle battery; but the warrant itſelf, and the diſturbing another in the execution of that warrant both refer to the writ, and that not being well ſet forth, thoſe things which refer to it muſt neceſſarily fail; for which reaſon the judgment was arreſted. *Vide Mod. Rep. vol.* 8. *p.* 357.

Michaelmas, 11 *Geo.* *The King* v. *Chandler*.

See this caſe fully ſtated in page 222 of this work, under the head *Baſtards*.

Michaelmas, 11 *Geo.* *The King* v. *Roberts*.

The defendant was *indicted* and acquitted in this court, and afterwards brought an action in the *Marſhalſea* againſt the proſecutor for a malicious proſecution; on which the defendant in the action was held to ſpecial bail; and now the court was moved to ſtop the proceedings there, becauſe this court being poſſeſſed of the principal cauſe, may better judge whether the proſecution was malicious or not.

Per curiam. It is highly inconſiſtent to have the reaſonableneſs of ſuing here determined below; where there are any particular circumſtances of aggravation, a judge may require ſpecial bail, though the writ does not require it. However, if we ſtop proceedings below, we will order the defendant to find ſpecial bail; which the defendant below agreeing to, the proceedings were ſtayed. The court agreed the caſes on this point in *Salkeld* and *Siderſin* to be law. *Vide Mod. Rep. vol.* 8 *p.* 308.

Michaelmas, 11 *Geo.* *The King* v. *Edwards et al.*

The defendants were *indicted*, for that they, *by a conſpiracy between them*, gave the huſband money to marry a poor helpleſs woman, who was an *inhabitant in the pariſh of* B. and incapable of marriage, on purpoſe to gain a ſettlement for her in the pariſh of *A.* where the man was ſettled; and now the court was moved to quaſh this *indictment*, becauſe it is no crime to marry a woman and give her a portion; and the juſtices are not judges what woman is capable of an huſband, neither have they any juriſdiction in *conſpiracies*.

Per curiam. The quaſhing of *indictments* is a diſcretionary power of the court, but in this caſe the defendant has not ſhewed any thing to induce the court to quaſh the *indictment*; and if the matter is doubtful, the defendant muſt plead or demur; but *indictments* for *conſpiracies* are never quaſhed.

A bare conſpiracy to do a lawful act to an unlawful end, is a crime, though no act was done in conſequence thereof; but if the fault in the *indictment* is plain and apparent, it is quaſhed for that reaſon, and the party ſhall not be put to the trouble to plead or demur; ſuppoſe there is a conſpiracy to let lands at 10*l.* *per annum* value to a *poor man*, in order to get him a ſettlement, or to make a *certificate-man* a pariſh-officer, or a conſpiracy to ſend a woman big of a baſtard-child into another pariſh to be delivered there, and ſo to charge that pariſh with the child; certainly theſe are crimes *indictable*, but in this *indictment* it is not ſet forth that the woman was likely to be chargeable to the pariſh.

As to the objection, "that the ſeſſions have no juriſdiction in *conſpiracies*," the contrary is true; they have no juriſdiction in *perjury at common law*, but by the *ſtatute* they have; and they have no juriſdiction to *indict* for *forgery*, but certainly they have juriſdiction of *conſpiracies*, and ſuch a perſon as this defendant is, was puniſhable by *indictment* at *common law*.

In *Trinity* term following judgment was given for the defendant, becauſe it was not averred in the *indictment* that the woman was laſt legally ſettled in the pariſh of *B.* but only that ſhe was an *inhabitant* there. *Vide Mod. Rep. vol.* 8. *p.* 321.

Michaelmas, 11 *Geo.* *The King* v. *Polland and Taylor*.

The defendants were ſeverally *indicted* for receiving goods ſtole by one *Foſter*, knowing them to be ſtolen, as for a miſdemeanor *againſt the form of the ſtatute*; on *not guilty* pleaded, they were found *guilty* at *niſi prius* before *Pratt*, Chief Juſtice.

The council for the defendants moved in arreſt of judgment, that by *ſtat.* 3 & 4 *W.* & *M.* *c.* 9. *ſect.* 5. this offence was made *felony*, but by a ſubſequent, *ſtatute* viz. 5 *Ann.* *c.* 31. the receiver may be tried as for a miſdemeanor, if the principal felon cannot be taken and convicted; but if the principal can be took, then the council for the defendants inſiſted the receiver could not be proſecuted as for a miſdemeanor; and therefore it is neceſſary in ſuch an *indictment* as this to aver, that the principal felon could not be taken; but in fact they ſaid *Foſter* was afterwards taken, and tried for the felony, and acquitted; and there is no ſuch averment in the *indictment*. But the Judges held, on conderation of the ſtatutes, that the proſecutor had his election to proſecute either for *felony* or a *miſdemeanor*; and though there have been ſeveral *indictments* for ſuch offences, yet none have had any ſuch averment, as is inſiſted on to be neceſſary by the council for the defendant. Whereon judgment was given for the proſecutor. *Vide Raym. vol.* 2. *p.* 1370.

Hilary, 12 *Geo.* *The King* v. *Buck*.

See this caſe fully ſtated in page 499 of this work, under the head *Game*.

Eaſter, 12 *Geo.* *The King* v. *How*.

An *indictment* was brought againſt the defendant, for that he abuſed one Sir *Nicholas Carew*, being a juſtice of peace, in the execution of his office, *by divers ſcandalous, threatening, and contemptuous words, and with force and arms unlawfully retarded him in the execution of his aforeſaid office*.

On demurrer to this *indictment* it was objected, that it was too general, and that the words ought to be ſet out, that the court may judge whether they are *indictable* or not, according to the late caſes of convictions for *curſing* and *ſwearing* where the court has required the oaths to be ſet out.

The council for the proſecutor admitted the *indictment* to be bad as to the words, but inſiſted that it was good as to the obſtructing the juſtice in the execution of his office: and if any part of it be well laid, there ſhall be judgment for the King. Juſtices are *indictable* for neglecting their duty, and it is but reaſonable to give them the ſame remedy againſt obſtructions.

Per curiam. If any part of the *indictment* was good, we ſhould not give judgment for the defendant. But this is bad *in the whole*, the word *retarded* will hardly warrant calling this an obſtruction; but if it would, ſurely ſome act or other ſhould be ſet out. So judgment was given for the defendant. *Vide Stra. vol.* 1. *p.* 699.

Eaſter, 12 *Geo.* *The King* v. *Warre et al.*

On demurrer to an *indictment*, the caption appeared to be at a ſeſſions held *ad feſtum Epiphanii*, inſtead of *Epiphaniae*; and it was inſiſted for the defendant, that this was a different time from that preſcribed in the ſtatute, for *Epiphanicus* is in the *Roman* calendar, and was a Biſhop of *Solamis* in the time of the Emperor *Theodoſius*: and the court held it ill, and gave judgment for the defendant. *Vide Stra. vol.* 1. *p.* 698.

Trinity, 12 *Geo.* *The King* v. *Edwards.*

The defendant was *indicted* for conſpiring to marry a poor perſon ſettled in *A.* to a perſon ſettled in *B.* in order to bring a charge on the pariſh of *B.* and on demurrer judgment was given for the defendant, becauſe it was not an offence *indictable*. *Vide Stra. vol.* 1. *page* 707.

Michaelmas, 13 *Geo.* *The King* v. *Rhodes.*

See this caſe fully ſtated in page 461 of this work, under the head *Evidence*.

Hilary, 1 *Geo.* 2. *The King* v. *Channell.*

The defendant was *indicted*, for that he keeping a common *griſt mill*, and being employed by *William Bare* to grind *three* buſhels of wheat, did *with force and arms unlawfully* take and detain *forty-two* pounds weight of the ſaid wheat. On demurrer judgment was given for the defendant, there being no actual force laid, and this being a matter of a private nature, no action would lie. *Vide Stra. vol.* 2. *p.* 793.

Hilary, 2 *Geo.* 2. *The King* v. *Malland.*

The defendant was *indicted* on *ſtat.* 12 *Geo. c.* 35. for burning *place bricks* and *ſtock bricks* together. And on demurrer, it was objected, that in this particular inſtance, though a penalty of 20 *s. per* thouſand is given, yet there is no appropriation of it, or any method preſcribed in which it ſhall be recovered, though there is to all the reſt. And on looking into the act, it appeared this offence was omitted out of the clauſe, which gave the bricklayers company power to ſue for the penalties; therefore the court held, that the 20 *s. per* thouſand, was in the nature of a debt to the crown, where the unappropriated penalty would go, and might be ſued for in a court of revenue, and not by *indictment*; and therefore the defendant had judgment. *Vide Strange, vol.* 2. *p.* 828.

Eaſter, 2 *Geo.* 2. *The King* v. *Myne and others.*

The defendants were *indicted*, for that they *unlawfully, riotouſly, and routouſly, and alſo illicitly, riotouſly, and routouſly broke, and threw down pales*, and took away, *&c.* *two* water engines belonging to *J. G.* The defendants having been found *guilty*, the court was moved in *arreſt of judgment*, for that the *indictment* is not laid *with force and arms*, and that judgment was arreſted on the like occaſion, in 2 *Keb.* 133.

Raymond, Chief Juſtice. When the fact implies *a force*, the addition of, *with force and arms* is not material; here it is laid *riotouſly, &c. broke, and threw down pales, &c.* which neceſſarily implies a *force* and *treſpaſs*, and therefore it is not neceſſary to determine, whether the omiſſion of *with force and arms* is generally remedied by *ſtat.* 37 *H.* 8. the preſent caſe being clear on the other reaſon.

Per curiam. The *indictment* is well enough. *Vide Fitz-Gibbons, p.* 63.

Eaſter, 2 *Geo.* 2. *The King* v. *Wynd & al.*

The defendants were *indicted* for a *riot*, whereby they riotouſly took away *two* water engines; after a verdict for the King, it was moved in *arreſt of judgment*, that it was not laid *with force and arms*.

Per curiam. The words *riotouſly took, broke, and threw down*, imply a force, and the *indictment* is well enough. *Vide Stra. vol.* 2. *p.* 834.

Michaelmas, 2 *Geo.* 2. *The King* v. *Upton.*

After a verdict *for the King* on an *indictment* for *uſury:* the court was moved in *arreſt of judgment*, that they had only laid a corrupt agreement, without any loan or taking exceſſive intereſt in purſuance of it. And the judgment was arreſted. *Vide Stra. vol.* 2. *p.* 816.

Eaſter, 3 *Geo.* 2. *The King* v. *Martham Bryan.*

On an *indictment* ſetting forth, that the defendant came to the ſhop of one *Langley*, a mercer, and affirmed ſhe was a ſervant to the Counteſs of *Pomfret*, and was ſent by her from St. *James's* to fetch ſome ſilks for the Queen, and endeavouring thereby to defraud the ſaid *Langley:* whereas in fact ſhe was not a ſervant of the Counteſs of *Pomfret's*, nor was ſent on the Queen's account. After a verdict for the King, it was moved in arreſt of judgment, that there being no falſe tokens or any actual fraud committed, it was not an offence *indictable*.

The court would have maintained it as being a fraud concerning public traffic; and though no harm was done, yet an *indictment* would lie as in the caſe in 1 *Vent.* 304. of an *indictment* for a conſpiracy to charge a man with a baſtard child, when there really was no child, ſo that the party could not ſuffer.

Per curiam. There the *conſpiracy* was the crime: and an *indictment* will lie for that, though it be to do a lawful act; this is no more than telling a lie, and no evidence being given to maintain it, the judgment muſt be arreſted. *Vide Stra. vol.* 2. *p.* 866.

Eaſter, 3 *Geo.* 2. *The King* v. *Fiſher and Saunders.*

In the caſe of *Fiſher*, judgment was arreſted after a verdict; and in the caſe of *Saunders* the *indictment* was quaſhed; being taken at an adjourned ſeſſions, and it not appearing what day the original ſeſſions began, to bring it within the time preſcribed by the ſtatute. *Vide Strange, vol.* 2. *p.* 865.

Michaelmas, 3 *Geo.* 2. *The King* v. *Taylor.*

An *indictment* was quaſhed for being *too general*, it being ſtated therein, that the defendant was a *ſlanderer, and a common and turbulent diſturber of the peace, having moved and incited divers ſtrifes, controverſies*, &c. *and for having abuſed one* J. A. *with ill language*, &c. *in the houſe of the ſaid* J. A. *Vide Strange, vol.* 2. *p.* 849.

Trinity, 3 & 4 *Geo.* 2. *The King* v. *Clendon.*

The defendant was *indicted* for an *aſſault* and *battery* committed by the defendant on *J. S.* and *J. N.* and on *not guilty* pleaded, a verdict was found for the King, that the defendant was guilty, *&c.* and a motion was made in arreſt of judgment by the council for the defendant, that theſe were two diſtinct *batteries*, and two diſtinct *offences*, for which the defendant ought to have been *indicted* by ſeveral *indictments*, and that they could not be joined in the ſame *indictment*; for as the offences were *ſeveral*, ſo the judgments ought to be *ſeveral*, and diſtinct fines ſet on the defendant in reſpect of them, on which a rule was made to ſtay judgment till, *&c.* And the council for the proſecutor moved to diſcharge the rule, for although he agreed *J. S.* and *J. N.* could not have joined in an action for theſe batteries, yet they might be well enough put in the ſame *indictment*, becauſe the court would conſider them as different *indictments*, and might very well give different judgments, and ſet different fines, but the court held, that as no caſe was cited, nor precedent to warrant ſuch an *indictment*, it was ill, for the reaſons given by the council for the defendant: ſo judgment was arreſted abſolutely. *Vide Raym. vol.* 2. *p.* 1572.

Eaſter, 4 *Geo.* 2. *The King* v. *Lady Lawley.*

See this caſe fully ſtated in page 157 of this work, under the head *Averment*.

Eaſter, 4 *Geo.* 2. *The King* v. *Stoughton.*

The defendant was *indicted* for a *nuiſance*, charging that he *deſtroyed or cauſed to be deſtroyed a hedge*. And on demurrer, judgment was given for the defendant, on account of the *uncertainty* of the charge. *Vide Strange, vol.* 2. *p.* 900.

Eaſter, 4 *Geo.* 2. *The King* v. *Japhet Crooke.*

The defendant was convicted on *ſtat.* 5 *El. c.* 14. for *forging* a leaſe and releaſe: and the *indictment* ſets forth, that one *Garbut* and *Wife* were ſeiſed in fee of certain meſſuages, lands, and tenements, called *Jawick*, in the pariſh of *Clackton* in *Eſſex*; and that the defendant intending to moleſt them and their intereſt in the premiſes, forged a leaſe and releaſe as from *Garbut* and *Wife*, whereby they are ſuppoſed for a valuable conſideration to convey to him all that part called *Jawick Park* in the pariſh of *Clackton* in *Eſſex*, containing *eight* miles in circumference, with all the deer, woods, *&c.* thereto belonging.

After a verdict *for the King*, it was moved in arreſt of judgment, that the premiſes ſuppoſed to be conveyed were ſo materially different from thoſe which were really the eſtate of *Garbut* and *Wife*, which was houſes, lands, and tenements, that it was impoſſible this conveyance ever could moleſt or diſturb them; or if it was a true deed, it could not paſs their lands at law for want of a proper deſcription: and though where lands are improperly deſcribed, a court of *equity* will oblige the vendor to convey them by proper words; yet that is only where there is a previous contract for a ſale, and they do it as carrying that contract into execution; whereas here is no contract, and the caſe is no more than if *A.* had been ſeiſed of *Blackaw*, and *B.* had *forged* a conveyance of *Whitacre*, which certainly would not be within the ſtatute.

Raymond, Chief Juſtice, declared that they were all of opinion that this *indictment* ought to be quaſhed: the words of the act are, "to the intent that "the ſtate of freehold or inheritance of any per-"ſon to any lands, *&c.* or the right or title of, in, "and to the ſame, ſhall or may be moleſted, trou-"bled, defeated, recovered or charged.' By this it appears, that it is not neceſſary there ſhould be a charge, or a poſſibility of a charge; it is ſufficient that it be done with that intent, and the jury found that it was done with intent to moleſt *Garbut* and his wife in the poſſeſſion of their lands. Accordingly judgment was given for the King, and the defendant was ſentenced to undergo the puniſhment appointed by the act for *forging* a deed, which ſentence was executed on him at *Charing Croſs*. *Vide Stra. vol.* 2. *p.* 901.

Michaelmas, 4 *Geo.* 2. *Joſhua Cornwall's Caſe.*

The defendant was *indicted* with another perſon for *burglary*, and on evidence it appeared that he was a ſervant in the houſe where the robbery was committed, and in the night-time opened the ſtreet door, and let in the other priſoner, and ſhewed him the ſide-board, from whence the other priſoner took the plate; then *Cornwall* opened the door and let him out, but did not go out with him, but went to bed.

On the trial before *Raymond*, Chief Juſtice, *Denton*, Juſtice, and Baron *Comyns*, it was doubted, whether this was *burglary* in the ſervant, he not going out with the other; and it being laid down in *H. P. C.* 81. *Dalt.* 317. that it was not *burglary* in the ſervant; the judges ordered it to be found *ſpecially*. And afterwards at a meeting of all the judges at *Serjeant's Inn*, they were all of opinion, that it was *burglary* in both, and not to be diſtinguiſhed from the caſe that had been often ruled and allowed in the ſame page in *Hale*, that if one watches at the ſtreet end, while the others go in, it is *burglary* in all: and on report of this opinion the next ſeſſions, the defendant was executed. *Vide Strange, vol.* 2. *p.* 881.

Michaelmas, 5 *Geo.* 2. *The King* v. *Lowe.*

See this caſe fully ſtated in page 280 of this work, under the head *Conſtable*.

Michaelmas, 5 *Geo.* 2. *The King* v. *Philips & al.*

The defendants were *indicted* in *one indictment* for *perjury*, and *four* of them pleading, were convicted. It was then moved in *arreſt of judgment*, that crimes (eſpecially perjury) were in their nature ſeveral, and *two* cannot be *indicted* together. And *Palm.* 535. 6 *Mod.* 210. 2 *Roll. Abr.* 81. *pl.* 6. 7. *Salk.* 382. *Eaſter*, 7 *Geo. King* v. *Weſton & al. Salk.* 623. *Trin.* 4 *Geo.* 2. *King* v. *Clendon. Ante* 870. 1 *Keb.* 585, 612. 635. were cited.

It was cited *Salk.* 382. in *extortion*, *Trin.* 10 *Ann. Queen* v. *Marſhal*, againſt *two* for receiving ſtolen goods. 1 *Vent.* 302. 3 *Keb.* 700. for maintenance. 2 *Roll. Rep.* 345. *Palm.* 367. *Salk.* 384. againſt the huſband and wife, for keeping a diſorderly houſe, and *The Queen* v. *Dixon & ux. Stra.* 312 *Cro. El.* 230. 3 *Leon.* 230. where the execution was not taken in perjury. *Cro. Car.* 380.

Per curiam. There may be great inconveniences if this is allowed; one may be deſirous to have a *certiorari*, and the other not; the jury on the trial of all, may apply evidence to all, that is but evidence againſt *one*. The caſes cited are all of them applied to that which may be joint, as extortion, maintenance, *&c.* but perjury is a ſeparate act in each: and *Trin.* 6 *Ann. The Queen* v. *Hodſon & al.* two were *indicted* for being ſcolds, and compared to barretry, and held not to lie; ſo the judgment here was arreſted. *Vide Strange, vol.* 2. *p.* 921.

Hilary, 6 *Geo.* 2. *The King* v. *Moore.*

An *indictment* for *perjury* was moved here by *certiorari*, and the defendant paid coſts for not going on to trial: the proſecutor afterwards moved to quaſh it, which the court refuſed, unleſs he would ſubmit to pay coſts. *Vide Strange, vol.* 2. *p.* 946.

Eaſter, 8 *Geo.* 2. *The King* v. *Francis et al.*

The defendants were *indicted* at the ſeſſions in *Somerſetſhire*, for that they *feloniouſly* made an *aſſault* on *Samuel Cox* in the King's highway, and put him in fear, *&c.* and 9 *l.* in money from the ſaid *Cox* did take, ſteal, and carry away. On *not guilty* pleaded by all the defendants, the jury found this ſpecial verdict,

That *Samuel Cox* travelling on horſeback on the King's highway to *Somerton fair*, on a place called *Kingſdown Hill*, in the county of *Somerſet*, ſaw all the priſoners in company together, one of whom was then lying on the ground: that *Cox* paſſed by them, and one of them (which, the jury did not know) called to *Cox*, and deſired him to change half a crown, that they might give ſomething to a poor *Scotchman* then lying on the ground, who was one of the priſoners. *Cox* came back, and putting his hand in his pocket to pull out his money, in order to give them change, as they deſired, he pulled out *four moidores*, and a *Portugal* piece, value 3*l.* 12*s.* and having the pieces of gold in his hand, *John Francis*, one of the priſoners, gently ſtruck *Cox*'s hand, in which he held the gold, by means whereof the gold fell to the ground; that thereon *Cox* got off his horſe, and ſaid to the priſoners, that he would not loſe his money ſo; and the ſaid *Cox* then and there offering to take up the pieces of gold, which were then on the ground, and in *Cox*'s preſence; the priſoners then ſwore, that if he touched the pieces of gold, they would knock his brains out; whereby he was then and there put in bodily fear of his life, and then and there deſiſted from taking up the pieces of gold. That the priſoners then and there immediately took up the gold, and got on their horſes and rode off with the gold; that *Cox* thereon purſued them, and rode after them about half a mile; and then the priſoners ſtruck him and his horſe, and ſwore that if he purſued them any further, they would kill him, by reaſon of which menace he was afraid to continue his purſuit any further; but whether on the whole matter the priſoners are *guilty* of the felony and robbery charged on them; the jury doubt, and pray the advice of the court. And if, *&c.*

On this ſpecial verdict the priſoners were removed to the *K. B* where it was twice argued at the bar. And on the *firſt* argument, the only queſtion was, whether a taking in the preſence be in point of law a taking from the perſon, and it was unanimouſly determined that it was.

But then a doubt aroſe whether it was ſufficiently found to have been a taking in the preſence of *Cox*, it not being ſaid ſo in expreſs words; and after it had been argued in this court on this point, it was ordered to be argued at *Serjeant's Inn Hall* before all the judges of *England.* And this term the Chief Juſtice declared, that all the Judges, except *Carter*, *Comyns*, and *Thompſon*, (who only doubted), were of opinion, that the fact of *Cox*'s preſence at the taking was not ſufficiently found though there ſeems to have been evidence enough to warrant ſuch finding. The whole reſted on the word *immediately*, *then and there*, ſerving only for a *venue*, and *immediately* was a word too looſe and uncertain. In all legal proceedings, it does not exclude all *meſne* times and *meſne* acts. In *Oneby*'s verdict it is uſed *five* times to different purpoſes. In *Mawgridge's twice.* On *ſtat.* 27 *Eliz. c.* 13. *ſect.* 11. the notice for *hue and cry* muſt be in convenient time; and yet on declaring, you aver it was *immediately*, which is ſupported by proof of a convenient time. The caſes cited ſhew how nice the judges have always been; and therefore as here wants one neceſſary ingredient to make it a robbery, the priſoners muſt be diſcharged from this *indictment.*

However, we all think this a *grand larceny*, and therefore cannot diſcharge their perſons, and as we cannot give judgment for a *larceny*, there muſt be a *new indictment*; for we are confined to the doubt of the jury, whether this be a taking from the perſon of *Cox*.

They muſt be remanded to *Somerſetſhire.* We diſcharged *Burridge* the other day, becauſe no ſpecies of felony was found. *Vide Stra. vol.* 2. *p.* 1015.

Eaſter, 8 *Geo.* 2. *The King* v. *The Inhabitants of all Saints and St. Mary's.*

Theſe pariſhes were *indicted* for not repairing an highway, and on demurrer, ſeveral exceptions were taken to the *indictment.*

1ſt, That there are no names of the grand jurors ſet 2 *Roll. Abr.* 82. and 2 *Keb.* 470. But the *indictment* being read, it appeared that their names were ſet out.

2dly, The *indictment* is not ſufficiently certain in ſetting out the length and breadth of the road, for it ſays only containing by eſtimation abour *ſixteen* acres, *&c.* 2 *Roll. Abr.* 81.

3dly, There are there *three* pariſhes jointly *indicted*, though it is a ſeparate offence. *Stiles* 157.

4thly. It does not appear that theſe pariſhes were bound to theſe repairs, for it does not appear that the road is in any of the pariſhes, nor is there a ſufficient *preſcription* laid to charge them otherwiſe, it being only ſaid that they have been uſed and accuſtomed to repair.

Lord *Hardwicke.* I do not ſee on this laſt *exception* how this *indictment* can be maintained, the pariſhes are an *eccleſiaſtical* diviſion, yet they are of common right bound to repair the roads, and therefore it is ſufficient to ſhew that a way lies within ſuch a pariſh, and is out of repair, and to pray proceſs againſt the inhabitants. Now, here it appears, that this highway is within the liberty of *Derby*, but it does not that *three* pariſhes are within the liberty of *Derby*, it is only ſaid, that they are within *Derby*; and even if theſe words did ſufficiently ſhew that, yet it would not then appear that they are all within the liberty, ſo as to make them a *vill*; and if that appeared too, it ſhould be ſhewn likewiſe by what means they are chargeable, but it does not appear on this *indictment*, that any part of this road is within the pariſh; ſo that it is bad on this *exception.*

Lee, Juſtice. I am of the ſame opinion, and I ſhould think too, that the *indictment* is bad on the *ſecond* exception, for if the breadth does not appear, how can the court ſet a proper fine?

The court agreed, that it was bad on the *laſt* exception, therefore judgment was given for the defendants. *Vide Caſes Temp. Lord Hardwicke, p.* 105.

Hilary, 9 *Geo.* 2. *The King* v. *Pewteras.*

The court was moved, that ſeveral unneceſſary *counts* might be ſtruck out of an *indictment.*

Lord *Hardwicke.* How can we ſtrike out any thing that the grand jury have found? We might do it in an *information*, the officer that attends the grand jury ſhould not let ſuch *indictments* come before them; it is fit a rule ſhould be made, that no *indictments* ſhould be preferred to the grand jury, but by the clerks of the *Crown-office*; and then we ſhould know who to call on in ſuch caſes; but however, as it is found, we can do nothing. *Vide Caſes Temp. Lord Hardwicke, p.* 203. *Strange, vol.* 2. *p.* 1026.

Michaelmas, 9 *Geo.* 2. *The King* v: *Layer.*

Per curiam. The *indictment* is the thing on which the merits of the cauſe depends, and therefore the court admitted it to be read to the priſoner, but not the *venire facias.* *Vide Mod. Rep. vol.* 8. *p.* 92.

Eaſter, 10 *Geo.* 2. *The King* v. *Sutton.*

The defendant was *indicted* at *Northampton* aſſizes, for unlawfully having in his cuſtody and poſſeſſion *two* iron ſtamps, with intent to impreſs the ſcepters on *ſixpences*, and to colour and paſs them for *half guineas.* And Lord *Hardwicke*, who tried him, having ſome doubt, whether the bare having them in his cuſtody, without ſhewing that he had uſed them, was *indictable*; directed a *certiorari* to be brought. And after it had been *twice* argued, the court was of opinion, that it was well enough; for coining was the prerogative of the crown at *common law*: that this could not be a caſual having them innocently, or coming to him as executor; becauſe it is laid, and found that he had them with intent to impreſs. 3 *Inſt.* 18. ſays, the perſon may be impriſoned, in whoſe cuſtody ſuch inſtruments are found; and ſhall be impriſoned for what is not *indictable*, lading wool is lawful, but if it be with an intent to tranſport that makes it an offence; here the intent is the offence; and the having in his cuſtody, an act that is the evidence of that intent. We muſt not be too nice in theſe *indictments*, which Lord *Hale*, in his *Hiſt. p.* 193. complains of in the courts. The defendant was fined 6 *s.* 8 *d.* to ſtand in the pillory at *Charing Croſs*, and to ſuffer *ſix* months impriſonment, and to remain till the fine was paid. *Vide Strange, vol.* 2. *p.* 1074. *Caſes Temp. Lord Hardwicke, p.* 370.

Trinity, 13 *Geo.* 2. *The King* v. *Weſtbeer.*

An *indictment* for *larceny*, and a ſpecial verdict thereon, was brought into this court on a *certiorari.* The *indictment* ſet forth, that the priſoner feloniouſly ſtole a parchment-writing, purporting to be a commiſſion out of the Court of *Chancery*, to ſettle the boundaries between *two* manors, and aſcertain the height which the defendant in the cauſe had a right to keep water up to, in a pond in his ground; *And alſo* another parchment-writing, purporting to be a return of the commiſſioners thereto: which commiſſion and return were reſpectively ſaid to be of the value of 2 *s.* and were of the goods and chattels of the King. On *not guilty* pleaded, the jury found that two parchment-writings, anſwering the deſcription in the *indictment* in the year 1712, were brought into the Six Clerk's Office in *Middleſex*, belonging to the Court of *Chancery*, the proper office wherein to record and keep them, as records of that court, where they were accordingly kept till the 20th day of *October* 1738, when the priſoner privately carried the ſame out of the office, with an intent to ſteal the ſame: that they were the King's goods, and each of the value of *one penny*; and that in 1717, the cauſe was at an end.

This cauſe was argued at the bar, that on the whole record, the priſoner was *guilty* of *petit larceny*; in order to prove this, *two* things were inſiſted on, 1ſt. That this was *petit larceny*, according to the general nature of it. 2dly. That no objection lies from the nature of the parchment-writing, or its being a record, to bring this taking away to be under the degree of *felony*.

On the other hand it was argued for the priſoner, that this is one of the *exempted* caſes. It was admitted, that this was neither *chattel real* nor a *cloſe* in action. But it was contended to be a thing that concerned the reality, as it related to the boundaries of manors, and the right of water, which are points in which the very inheritance is affected. That theſe were of that nature which are called *the goods of no one*, things whereto every man has a right to reſort, and to uſe them. And admitting they are in the cuſtody of the *crown*, (for they can be but in one cuſtody) it will not follow that they are the property of the *crown*.

The court did not meddle with the queſtion, whether this was properly ſaid to be the goods of the King, nor with the queſtion on *ſtat.* 8 *Hen.* 6. *c.* 12. or as to ſtealing records at *common law*; but ſaid, the point of theſe writings concerning the reality, was ſufficient to found their judgment on. They ſaid there was a ſtrong inclination in the judges to make lodgers guilty of *felony*; but it was not done by the act of parliament. And if there is any inconvenience in the preſent judgment, it may be rectified that way.

They all therefore declared their opinions, that the priſoner was not guilty.

Lee, Chief Juſtice, then ſtated a queſtion, whether as this was undoubtedly a great *miſdemeanor*, they could not give judgment as for a *treſpaſs*.

Per curiam. The priſoner muſt be diſcharged. *Vide Stra. vol.* 2. *p.* 1133.

Michaelmas, 14 *Geo.* 2. *The King* v. *Jones.*

The defendant was *indicted* for not taking on him the office of overſeer of the poor, on a regular appointment; and on demurrer it was objected, that he was to take no oath, *ſtat.* 43 *Eliz. c.* 2. had inflicted pecuniary penalties for neglect of duty to be recovered in a ſummary way, therefore he could not be *indicted*.

Per curiam Thoſe penalties are for neglect of duty when he is the officer, whereas this *indictment* ſays, he has obſtinately refuſed to take the office on him; the diſobeying an act of parliament is *indictable* on the principles of the *common law*. Judgment was given for the King. *Vide Strange, vol.* 2. *p.* 1146.

Michaelmas, 14 *Geo.* 2. *The King* v. *Obrian.*

On an *indictment* brought againſt the defendant, for that he intending to defraud the King, and unjuſtly to procure a payment to be made to the widow of an officer, did accordingly publiſh a certain falſe and counterfeit *affidavit*, purporting to have been ſworn by one *Elizabeth Roe*, before a Juſtice of the peace, by which means he received 5 *l.* 6 *s.* 8 *d.* of the paymaſter of the King's bounty, and this was laid as an offence at *common law*.

After a verdict for the King, it was moved in arreſt of judgment, that this not being laid to be forged by the defendant, was not an offence at *common law*, but he ought to have been *indicted* on *ſtat.* 23 *H.* 8. *cap.* 1. for a *falſe token*.

Per curiam. Since *Ward*'s caſe, this can never be doubted. And it has always been held, that the ſtatute did not create a new offence, but only added a further puniſhment when the *indictment* is *againſt the form of the ſtatute*, *ſtat.* 5. *Eliz. c.* 14. reciting the *forgeries* at *common law*, has the word *writings* in contradiſtinction to deeds; and it is in the election of the party, in the caſe of *forging* deeds, to lay the *indictment* either at *common law*, or on the ſtatute. So judgment was given for the King. *Vide Stra. vol.* 2. *p.* 1144.

Trinity, 17 *Geo.* *The King* v. *Bailey.*

The court refuſed to quaſh an *indictment* for not attending the Mayor of *Sarum* to execute his warrant; and ſaid, the defendant might demur to it. *Vide Stra. vol.* 2. *p.* 1211.

Eaſter, 18 *Geo.* 2. *The King* v. *Freeman.*

The defendant was convicted, for that the keeper of the houſe of correction having *A.* in his cuſtody, who was committed by virtue of a juſtice of peace's warrant, he the defendant unlawfully reſcued him: and the court arreſted the judgment, it not being ſhewn for what he was committed, ſo as to make the houſe of correction a proper priſon, (which it is not for all offences) and alſo becauſe the court cannot judge of a proper puniſhment on ſo general a charge. *Vide Stra. vol.* 2. *p.* 1226.

Hilary, 19 *Geo.* 2. *The King* v. *Margaret Cooper.*

The defendant was convicted on an *indictment* for *being a common and turbulent brawler, and ſower of diſcord amongſt her quiet and honeſt neighbours. ſo that ſhe had ſtirred, moved, and incited, divers ſtrifes, controverſies, quarrels, and diſputes, amongſt his majeſty's liege people, againſt the peace*, &c.

It was moved in arreſt of judgment, that the charge was too general, and did not amount to either a barrator or common ſcold, which are the only inſtances in which a general charge will be ſufficient.

It was likewiſe objected, that if the words did amount to a deſcription of a ſcold, yet it ſhould be *to the common damage* of her neighbours, for every degree of ſcolding is *indictable*.

The court was of opinion, that the judgment ought to be arreſted on both *exceptions*, for none of the words here uſed are the *technical* words, and it muſt be laid to the common nuiſance, *&c.* *Vide Strange, vol.* 2. *p.* 1246.

Eaſter, 20 *Geo.* 2. *The King* v. *George Trivilian, Eſq.*

The defendant was *indicted* for not receiving an apprentice, it was quaſhed becauſe it did not appear to be binding within *ſtat.* 4. *Eliz. c.* 2. and the court ſaid that was barely matter of evidence, but the circumſtances muſt be averred. They would not meddle with the general queſtion, whether an *indictment* would lie or not. *Vide Strange, vol.* 2. *p.* 1268.

Eaſter, 20 *Geo.* 2. *The King* v. *King, et al.*

The court would not quaſh an *indictment* againſt overſeers for not paying over money to their ſucceſſors, as quaſhing was not a *matter of right*. and this is a growing evil. *Vide Strange, vol.* 2. *p.* 1268.

Hilary, 30 *Geo.* 2 *The King* v. *Strong.*

On ſhewing cauſe againſt quaſhing an *indictment* on *ſtat.* 5. *Eliz. cap.* 4. found at the ſeſſions for the city of *Carliſle*, for exerciſing a trade not having ſerved an apprenticeſhip thereto.

The objection taken to the *indictment* was, that *Burrough ſeſſions* had no juriſdiction to take ſuch *indictments*

After hearing the arguments of council on both ſides the court diſcharged the rule.

Lord *Mansfield*, at the time of the original motion, looked into *ſtat.* 5. *Eliz. c.* 4. and ſaid that the ſtat. expreſly gives the power to mayors, or other head officers of *cities* or *towns corporate* at their ſeſſions.

Per curiam. Unanimouſly let the rule be diſcharged *Vide Bur. p.* 252.

Eaſter, 30 *Geo.* 2. *The King* v. *Ward and White.*

On a motion for a new trial on a conviction of the defendants for a *nuiſance*, in erecting and uſing a building at *Twickenham*, in the county of *Middleſex*, for making acid ſpirit of ſulphur, *&c.* The court granted a rule to ſhew cauſe, with this addition:

"That the defendants ſhould have *three* days "time to move in arreſt of judgment after the "court ſhould have given their opinion on the "preſent motion for a new trial as on a verdict "againſt evidence."

Deniſon, Juſtice, who tried the cauſe, reported the evidence given at the trial, and declared himſelf ſatisfied with the verdict of conviction, on which the rule was diſcharged as to ſetting aſide the verdict.

On a motion made by the defendants council in arreſt of judgment, they took the following *exceptions* to the *indictment*, *viz.*

1ſt, That it is laid *generally* at the pariſh of *Twickenham*, and only ſaid "near the common highway," but not ſaid to be in the *town* or *village*, it may therefore be on a heath or common, for ought that appears to the contrary.

2dly, That in the *indictment* no offence is preciſely laid, it charges, "that by reaſon of the noiſome of- "fenſive and ſtinking ſmoke, the air was impregnated "with noiſome offenſive ſtinks and ſmells," which are vague uncertain terms.

After hearing the arguments of the council on both ſides on this motion, the ſame was denied.

Lord *Mansfield*, ſaid, there was nothing in the objections, and reduced them to *three* heads, *viz.*

1ſt That there is no ſufficient charge of *hurtfulneſs.*

2dly, That it is not preciſely charged "to whom," the *hurt* is done.

3dly, That it is only laid *generally*, "in the pariſh of *Twickenham*."

1ſt, The jury have found, "that it is to the *com-* "*mon nuiſance* of the King's ſubjects dwelling, &c. "and travelling, &c."

2dly, The perſons incommoded are *ſufficiently* deſcribed, and the offence is charged to be to the common *nuiſance* of perſons inhabiting and travelling, &c. and unleſs they had been *ſo near* as to be hurt by it, the *indictment* could not have been proved.

3dly, It is *ſufficiently laid*, and in the uſual and cuſtomary manner, the very *exiſtence* of the *nuiſance* depends on the number of houſes and concourſe of people, and this is a *matter of fact* to be judged of by the jury. Therefore there is no foundation for the *objections.*

Deniſon and *Foſter*, Juſtices, gave their opinions at large, and concurred with the Chief Juſtice.

The court unanimouſly denied the motion, and on a motion for judgment, the defendants were fined 6 *s.* 8 *d.* each, and entered into a rule never to make any more acid ſpirit of ſulphur, &c. at their works at *Twickenham.* *Vide Bur. vol.* 1. *p.* 334.

Trinity, 30 & 31 *Geo.* 2. *The King* v. *Goddard Williams.*

On ſhewing cauſe againſt quaſhing a *certiorari* to remove from the *quarter ſeſſions* of the city of *London* an *information* on *ſtat.* 1 *Jac.* 1. *cap.* 22. intitled, "the "duty of tanners, curriers, ſhoemakers, and of others "cutting of leather."

The council for the motion ſaid, *three objections* had been taken on the original motion to the *certiorari*, viz.

1ſt. That the *certiorari* does not lie at all.

2dly. That it is not well directed.

3dly. That it does not lie before conviction.

Which objections he anſwered, and after hearing the council on the other ſide, the court were of opinion, that the proper method of bringing this queſtion before them would be, to move to quaſh the *information.*

Lord *Mansfield.* The *certiorari* has manifeſtly iſſued as ſuppoſing it to be a proceeding before the Juſtices at the *ſeſſions*, and they have returned it as ſuch.

The court, thought the previous queſtion to that of the regularity or direction of the *certiorari* depended on the propriety and validity of the *information*, viz.

"Whether the Mayor alone had the juriſdiction "under this act, or the Mayor in *ſeſſions*."

The council for the rule (and to quaſh the *certiorari) argued*, that the juriſdiction is in the Mayor *alone*, for that his power extended even for the ſpace of *three miles* out of the city, where the *ſeſſions* has *no* juriſdiction *at all.*

On theſe doubts in the court and council, as to the mode of ſettling this motion, the preſent rule was enlarged, and a rule was made "to ſhew cauſe why the "*information* ſhould not be quaſhed."

On ſhewing cauſe, the defendant's council took the following *objections* to the *information*, viz.

1ſt. That the juriſdiction is not in the Lord Mayor, but in the *ſeſſions.*

2dly. That the remedy is not by way of *information*, but ought to be by *indictment.*

3dly. That it is uncertain before whom the *information* was taken.

Theſe objections were anſwered by the council for the proſecution, and they further *urged*, that the court could not quaſh ſuch an *information* on motion, eſpecially where a private perſon is intitled to the penalty, and no part belongs to the King.

Lord *Mansfield.* As to the court's not quaſhing on motion, but putting the party to *demur*; that reaſoning will not hold where the objection is to the juriſdiction of the court that has undertaken to proceed. The queſtion is here on the juriſdiction of the court, and it is agreed by the council for the proſecutor to be a proceeding before the Lord Mayor *perſonally*, though in *ſeſſions.*

The *fiftieth ſection of the ſtatute* (which gives him the juriſdiction) does not give it to him *perſonally*, but in the *terms* of the common commiſſion of *Oyer* and *Terminer*, and the ſame power is given to *him* as to *other* Mayors, bailiff's, head officers of boroughs, ſtewards of leets, &c. now this muſt be exerciſed according to the courſe of the *common law*, i. e. by *indictment.*

As to the objection, "that the *ſeſſions* cannot have "juriſdiction *beyond the limits of the city*;" whereas this is given to the Mayors in any place within *three miles* of it.

The anſwer is, that this juriſdiction of the *ſeſſions* is therefore by this act extended to *three miles* beyond the city.

There appears no colour for the notion of a *ſummary juriſdiction* in the Mayor under the authority of this ſtatute; therefore the *information* ought to be quaſhed for want of *juriſdiction* in the Mayor to receive and proceed on it.

Deniſon and *Foſter* Juſtices, gave their opinions at large, and concurred with the Chief Juſtice.

Per curiam, unanimouſly, let the rule for quaſhing the *information* be made abſolute, and the former rule be diſcharged. *Vide Bur. vol.* 1. *p.* 385.

Hilary, 31 *Geo.* 2. *The King* v. *Elizabeth Sarmon.*

On motion the court quaſhed this *indictment*, which was found for delivering out in the public ſtreets printed bills of the defendant's occupation, being of opinion that the matter was not *indictable.* *Vide Bur. vol.* 1. *p.* 516.

Eaſter, 31 *Geo.* 2. *The King* v. *Wright, Clerk.*

On ſhewing cauſe againſt quaſhing an *indictment* found againſt the defendant, being a *ſpiritual* perſon, for taking to *farm* ſeveral lands, &c. againſt *ſtat.* 21 *H.* 8. *c.* 13. for that no *indictment* will lie where a ſtatute creates a new offence, and gives a particular remedy.

The defendant's council propoſed *three objections* to the *indictment*, viz.

1ſt. An *indictment* will not lie; it ought to be a proceeding by *action* or *information*, which are the two particular methods of proceeding, preſcribed by this ſtatute.

2dly. No offence is here charged, for occupation is the offence for which the act gives the forfeiture, and here *no occupation* is charged; it is only "that he did "take to farm."

3dly. It cannot be proſecuted at the *ſeſſions*, for the words of the ſtatute are, "in any of the King's courts."

After hearing the arguments of council on both ſides, the rule to quaſh the *indictment* was made *abſolute.*

Lord *Manſfield.* I always took it, that where new created offences are only prohibited by the *general prohibitory* clauſe of a ſtatute, an *indictment* will lie, but where there is a *prohibitory particular clauſe*, ſpecifying only *particular remedies*, there ſuch *particular remedy* muſt be *purſued*, otherwiſe the defendant would be liable to a double proſecution, viz. *one* on the *general prohibition*, and the *other* on the particular *ſpecified remedy.*

Deniſon and *Wilmot*, Juſtices, gave their opinions at large, and concurred with the Chief Juſtice.

Per curiam. Let the rule be made abſolute to quaſh the *indictment.* *Vide Bur. vol.* 1. *p.* 543.

Trinity, 32 & 33 *Geo.* 2. *The King* v. *Robert Robertſon Clerk.*

On a motion in arreſt of judgment, on an *indictment* found againſt the defendant for refuſing to obey an order of the *general quarter ſeſſions* for the county of *Stafford*, made on him for his keeping and maintaining *James* and *Peter* Robinſon, his *two* infant grand-children; in which *indictment* the breach was laid to be according to *ſtat.* 43 *Eliz. cap.* 2.

The defendant's council in arreſt of judgment *urged*, that this was a new offence, with a *particular* penalty; and *ſect.* 11. of that ſtatute preſcribes a *ſummary* method of recovering the penalty. That *ſect.* 7. gives a particular penalty, *viz.* "on pain that every one of them "ſhall forfeit 20 *s.* for every month which they ſhall "fail therein;" and *ſect.* 11. directs how that forfeiture ſhall be levied and employed.

After hearing the arguments of the council on both ſides, on ſhewing cauſe why the *indictment* ſhould not be arreſted, the rule to arreſt the judgment was diſcharged.

Lord *Manſfield* now delivered the opinion of the court. The objection to this *indictment* is, "that the "offence is not *indictable*, becauſe the ſtatute points "out a *particular puniſhment*, and a *ſpecific method* of re-"covering the penalty which it inflicts."

The true rule of diſtinction ſeems to be, that where the offence intended to be guarded againſt by the ſtatute was *puniſhable* before the making of ſuch ſtatute, preſcribing a particular method of puniſhing it, there ſuch particular remedy is *cumulative*, and does *not* take away the former remedy: but where the ſtatute only *enacts*, "that the doing any act *not puniſhable before* ſhall "*for the future* be puniſhable in ſuch a *particular* man-"ner; *there* it is neceſſary that ſuch *particular* method "by ſuch act preſcribed *muſt be ſpecifically purſued*, and "*not* the *common law* method of an *indictment*."

Per curiam. We are all of opinion, that the judgment on the *indictment* ought not to be arreſted, and that therefore the rule to ſhew cauſe muſt be diſcharged. *Vide Bur. vol.* 2. *p.* 800.

Trinity, 32 & 33 *Geo.* 2. *The King* v. *Bootie.*

See this caſe fully ſtated in page 280 of this work, under the head *Conſtable.*

Trinity, 32 & 33 *Geo.* 2. *The King* v. *Boyall.*

On ſhewing cauſe againſt quaſhing this *indictment*, the defendant's council took *three exceptions* thereto, the laſt whereof was—

That a particular remedy is appointed by *ſtat.* 22 *Car.* 2. *cap.* 12. namely, in *ſect.* 9 & 12. and therefore this being a *new offence* created by this ſtatute, and the ſtatute preſcribing a *particular* remedy, that *particular remedy* muſt be *purſued*, and an *indictment* will not lie.

Lord *Manſfield.* As to this *objection*, it was an offence *indictable* before the appointment of the ſummary remedy preſcribed by *ſtat.* 22 *Car.* 2. therefore the *ſummary* juriſdiction is *cumulative* (although there is another remedy given) and does not *exclude* the *common law* remedy.

Deniſon Juſtice, concurred with the Chief Juſtice, and the rule was diſcharged. See this caſe fully ſtated in page 157 of this work, under the head *Averment.*

Hilary, 33 *Geo.* 2. *The King* v. *Spragg, and another.*

On a motion in arreſt of judgment, where the defendants had been *convicted* of a *conſpiracy*, in charging a perſon with a *capital felony*, and the record of ſuch conviction was removed hither, but not the perſons of the defendants:

The council for the *crown* objected to this motion, for that the defendants ought to be perſonally preſent, and cited the caſe of *The King* v. *Elizabeth Nichols*, 2 *Stra.* 1227. which was in point.

The court held this to be a fixed and invariable rule of practice in this court, "that the defendants muſt "after *conviction* of ſuch an offence as this, be preſent "in court, if they would move in arreſt of judgment."

On this the council for the defendants prayed a *habeas corpus* to bring up their bodies, which was granted.

In *Eaſter* term following, the defendant's council renewed his motion in arreſt of judgment, on the following objections to the *indictment*:

1ſt. It is not alledged *in the charge itſelf*, "that the "defendants conſpired *falſely* to *indict Gilmore*."

2dly. Nor does it appear in the ſaid charge of what particular *crime or offence* they conſpired to *indict* him. It is only charged *in general*, "that they did wickedly "and maliciouſly (without adding *falſely)* conſpire to "*indict* and proſecute him for a crime or offence li-"able to be capitally puniſhed by the laws of this "kingdom."

Both thoſe matters are *eſſentially neceſſary*, and *cannot be ſupplied* by any thing that goes before, or comes after.

After hearing the arguments of the council on both ſides, the court gave their opinion, that there was no colour for the objections in the preſent caſe, and that the rule ought to be diſcharged.

Per curiam. Let the rule to ſhew cauſe why the judgment ſhould not be arreſted be diſcharged.

In *Trinity* term following the defendants were brought up to receive judgment.

John Spragg the father was ſentenced to be remanded to the *K. B.* for *one* month, to be ſet *twice* in the *pillory*, to be impriſoned *two years* from the end of the ſaid month; to pay a *fine* of 50 *l.* to the *King*, and find ſecurity for his good behaviour for *three years.*

Mary Spragg, the daughter, in conſideration of her youth, and being under the influence of her father, was only committed for *ſix months.* *Vide Bur. vol.* 2. *p.* 930, 993, *and* 1027.

Trinity, 33 & 34 *Geo.* 2. *The King* v. *Pemberton.*

See this caſe fully ſtated in page 158 of this work, under the head *Averment.*

Hilary, 1 *Geo.* 3. *The King* v. *Wheatly.*

On a motion in arreſt of judgment, on an *indictment* found againſt the defendant for knowingly ſelling *amber beer* ſhort of due and juſt meaſure, of which he was convicted.

Lord *Manſfield.* The queſtion is, whether the fact here alledged be an *indictable* crime or not. Here the fact is allowed; but the conſequence is denied: the objection is, that the fact is not an offence *indictable*, though acknowledged to be true as charged. And that the fact here charged ſhould not be conſidered as an *indictable* offence, but left to a *civil* remedy by action, is reaſonable and right in the nature of the thing, becauſe it is only an inconvenience, and injury to a private perſon, ariſing from negligence in not meaſuring the liquor on receiving it, to ſee whether it hold out the juſt quantity or not; the offence that is *indictable* muſt be ſuch a one as affects the *public:* therefore the preſent judgment muſt be arreſted.

Deniſon and *Wilmot*, Juſtices, gave their opinions at large, and concurred with the Chief Juſtice.

Per curiam, unanimouſly, let the judgment be arreſted. *Vide Bur. vol.* 2. *p.* 1125.

Hilary, 1 *Geo.* 3. *The King* v. *Dunnage.*

This caſe was exactly the ſame as that of *The King* v. *Wheatley.*

Per curiam. Let the *indictment* be quaſhed, and the rule to ſhew cauſe be made abſolute. *Vide Bur. vol.* 2. *p.* 1130.

Trinity, 1 *Geo.* 3. *The King* v. *Higginſon.*

On a motion in arreſt of judgment, on an *indictment* found againſt the defendant, the objection to the *indictment* was, that it was *too general.*

The *indictment* ran in theſe words, " *Middleſex,* " *viz.* the jurors for our Lord the King on their oath " preſent, that the defendant *with his addition* on the " 6th day of *November,* &c. and on divers other days " and times, between that day and the day of taking " this inquiſition, with force and arms, *&c.* did keep and maintain, and yet does keep, *&c.* a certain common ill governed and diſorderly houſe, and therein, for his own lucre and profit, certain evil and ill diſpoſed perſons of ill name, *&c.* to frequent and come together, then, *&c.* there unlawfully, *&c.* and the ſaid perſons in the ſaid houſe, then, *&c.* there to be and remain, fighting of *cocks, boxing,* playing at *cudgels,* and miſbehaving themſelves unlawfully, *&c.* to the great damage, *&c.* and againſt the peace, *&c.*

On ſhewing cauſe, the court ſaid it appeared to them to be a good *indictment*; and therefore diſcharged the rule. *Vide Bur. vol.* 2. *p.* 1232.

Trinity, 2 *Geo.* 3. *The King* v. *Riſpal.*

On a motion in arreſt of judgment on an *indictment* found at the *Weſtminſter* ſeſſions of the peace, againſt the defendant and *two* others, for a *conſpiracy,* where the *certiorari* was brought by *Riſpal* only.

The defendant's council took the following *exceptions, viz.*

1ſt, An *indictment* for ſuch a *conſpiracy* as this, does not lie before the *general ſeſſions* of the peace.

2dly, The fact which the defendant conſpired to charge the proſecutor with, is no offence; it is only an *indictment* for " wickedly and unlawfully conſpiring, *&c.* " falſely to accuſe *John Chilton* of taking hair out of a bag," without alledging it to be an unlawful or felonious taking, *whereas* the offence whereof the party was accuſed ought to be particularly charged, no *implication* will make it good.

After hearing the arguments of the council on both ſides on the rule to ſhew cauſe:

The court were of opinion, that the juſtices of peace had juriſdiction in the preſent caſe; a *conſpiracy* being a *treſpaſs,* and tending to a breach of the peace, and they held that the *indictment* was well laid, and that the *giſt* of the offence is the *unlawful* conſpiracy to injure the man by this falſe charge.

Per curiam. Let the rule be diſcharged. *Vide Bur. vol.* 3. *p.* 1320.

Eaſter, 4 *Geo.* 3. *The King* v. *Philip Carteret Webb, Eſq; The ſame* v. *The ſame.*

On a motion made by the proſecutor's council to quaſh their own *indictment* found againſt the defendant at *Hicks's Hall* for *perjury,* and removed hither by *certiorari,* as being *inſufficient* and *defective.*

This motion was oppoſed by the defendant's council, but it at laſt ended in a rule by conſent, that the *new indictment* ſhould in all reſpects ſtand in the place of the *old* one, and all things whatſoever remain in *ſtatu quo,* as if it had been the caſe of an *amendment.*

The court declared their opinion, that a motion on behalf of a proſecutor, " for leave to quaſh his own *indictment,*" was by no means a motion of courſe; the proſecutor afterwards moved to quaſh the *indictment,* which the court refuſed, unleſs he would ſubmit to pay *coſts. Vide Bur. vol.* 3. *p.* 1468.

Hilary, 5 *Geo.* 3. *The King* v. *Felix M‘Donald.*

On a motion to to quaſh an *indictment* found againſt defendant for converting his houſe into an hoſpital for taking in and delivering lewd, idle, and diſorderly unmarried women, who after their delivery ran away and deſerted their children, whereby they became chargeable to the pariſh.

On ſhewing cauſe, the proſecutor's council obſerved, that all that was deſired in this proſecution was, *that the pariſh might be indemnified.*

Per curiam. To be ſure, this is not *indictable,* therefore let the rule be made abſolute to quaſh the *indictment. Vide Bur. vol.* 3. *p.* 1645.

Trinity, 5 *Geo.* 3. *The King* v. *Gillet.*

This *indictment* being on the ſame ground as the *fourth indictment* in *The King* v. *Storr,* the ſame rule was made in this caſe, as in that, *viz.* that the rule for ſhewing cauſe be diſcharged. *Vide Bur. vol.* 3. *p.* 1707.

Trinity, 5 *Geo.* 3. *The King* v. *Atkins.*

This *indictment* was for pulling the thatch off a man's dwelling houſe, he being in the peaceable poſſeſſion thereof, and was quaſhed on the ſame ground as *The King* v. *Storr. Vide Bur. vol.* 3. *p.* 1706.

Trinity, 5 *Geo.* 3. *The King* v. *Storr.*

See this caſe fully ſtated in page 405 of this work, under the head *Forcible Entry.*

Trinity, 5 *Geo.* 3. *The King* v. *Oſborn.*

On ſhewing cauſe againſt quaſhing an *indictment* for ſelling as *two* chaldron of coals, a quantity *defective* by ſo many buſhels (in the *indictment* ſpecified) of that quantity, which a chaldron ought by law to contain.

Lord *Manſfield,* obſerved, that a man may be *indicted* for *ſelling by falſe meaſure,* but this *indictment* is not ſo charged.

Wilmot and *Yates,* Juſtices, gave their opinions at large on this point, and concurred with the Chief Juſtice.

Per curiam. Unanimouſly, let the *indictment* be quaſhed, and the rule to arreſt the judgment be made abſolute. *Vide Bur. vol.* 3. *p.* 1697.

Note, There was another *indictment* againſt the defendant on the ſame ground, which was determined by this.

Trinity, 5 *Geo.* 3. *The King* v. *Bake and fifteen others.*

See this caſe fully ſtated in page 495 of this work, under the head *Forcible Entry.*

Hilary, 6 *Geo.* 3. *The King* v. *Crookes.*

This *indictment* was found at the *quarter ſeſſions* for *ſelling by falſe weights,* and which on motion to quaſh the ſame was denied.

The court ſaid they were not obliged to quaſh an *indictment* on motion, and in this caſe, if the defendant had a mind he might demur to it. *Vide Bur. vol.* 3. *p.* 1841.

Eaſter, 6 *Geo.* 3. *King* v. *Lookup.* Error.

On an *indictment* againſt the defendant for *wilful and corrupt perjury,* in ſwearing in his anſwers to a bill filed by Sir *Thomas Frederick,* relative to money charged to be unfairly won by the defendant at play, he was convicted.

The defendant's council moved to ſtay the entry of the judgment, in order to give him an opportunity of moving in arreſt of judgment, a fatal miſtake having been diſcovered in the *indictment,* viz. that the fact was charged to have been committed in the time of the *late* King, whereas the *indictment* concludes, " againſt the " peace of the preſent King."

The court denied this motion; they thought that in ſuch a caſe, and on ſuch an objection, they were not bound or warranted to let in a motion in arreſt of judgment, after ſentence pronounced.

On this his council moved for *adjourning* his ſtanding in the *pillory*, on an *affidavit* of his phyſician of his ill ſtate of health; on which the court enlarged the rule for the execution of that part of the ſentence.

In *Michaelmas* term 1765, the defendant's council moved the court that they might re-conſider their judgment, but the court denied the motion, on which the defendant brought a *writ of error* in *parliament*, and aſſigned the foregoing miſtake, among others, for error. On arguing this *writ of error* before the Lords, all the *errors* except this were conſidered as frivolous; and on the 5th day of *May* 1766, the following queſtion was put by the Lords to the judges:

> " Whether the perjury being alledged in the *in-*
> " *dictment* to have been committed in the time of
> " the *late* King, and charged to be againſt the peace
> " of the *now* King, is *fatal*, and renders the *indict-*
> " *ment inſufficient*."

The Lord Chief Baron delivered the unanimous opinion of the judges in the *affirmative*, and the judgment of this court was reverſed.

On the 7th day of *May* 1766, the defendant's council moved this court that he might be diſcharged, and the order of reverſal being produced and read,

Per curiam. Let the defendant be diſcharged. *Vide Bur. vol.* 3. *p.* 1901.

Infants.

Hilary, 1 *W.* & *M.* *The King* v. *Dilliſton*. Error.

In *ejectment* it was found by a ſpecial verdict, that the cuſtom of a manor was, that if on a ſurrender preſented, and three proclamations made, the ſurrenderee comes not to be admitted, the lord ſhall ſeize the premiſes as forfeited: the ſurrenderee died; three proclamations were made; his heir, an *infant*, did not come in; and the lord ſeized.

Holt, Chief Juſtice held, the *infant* was bound; becauſe otherwiſe the lord would loſe his fine; and it is not the forfeiture of the *infant*, but of the ſurrenderor in whom the eſtate continues till admittance; and that, if it be a forfeiture, 'tis only *until*, &c.

Dolben, *Eyre*, and *Gregory*, Juſtices, obſerved, that a cuſtom ſhall not be intended to reach *infants*; and *Eyre*, that if it had been found expreſly, that all perſons, *infants* as well as others, &c. he had been bound; for as cuſtom makes his inheritance, it may abridge it. And the lord cannot be ſaid to loſe a fine, for he has a tenement and no fine due, nor occaſion of admittance: And here is no room to ſuppoſe a temporary forfeiture; for the jury have found the cuſtom to be of an abſolute forfeiture: nor is the *infant* within the cuſtom; for as it is found, that if the perſon to whom the ſurrender is made comes not, the bailiff of the manor may, by command of the lord, ſeize ſuch tenements as forfeited. *Vide* 1 *Leon* 100. 3 *Leon* 221. 8 *Co.* 99. 2 *Cro.* 226. 8 *Co.* 44. is of ſuch a cuſtom, but the forfeiture is *until* only, as appears by the pleadings. In error on a judgment of *C. B.* which was affirmed. *Vide Salk. vol.* 1. *p.* 386.

Michaelmas, 2 *W.* 3. *Score, or Cone,* v. *Bowles.* Error.

In *replevin* againſt *three*, they all made cognizance by attorney, and judgment being given for the plaintiff, a *writ of error* was brought in this court, and the error aſſigned was, that one of the *three* defendants was an *infant*, but it was diſallowed; this matter being pleadable in abatement, and therefore not aſſignable for error. *Vide Salk. vol.* 3. *p.* 197.

Trinity, 3 *W.* 3. *Williams* v. *Harriſon*.

Adjudged, that if an *infant* accepts a bill of exchange, he may plead *infancy* upon an action brought againſt him, becauſe the cuſtom of merchants is part of the law of the land; and it is not a *local* cuſtom, as in *London*, for an *infant* to bind himſelf apprentice, &c. *Vide Salk. vol.* 3. *p.* 197.

Hilary, 6 & 7 *W.* & *M.* *Tipping* v. *Cozens*.

See this caſe fully ſtated in page 488 of this work, under the head *Fines and Recoveries*.

Hilary, 7 *W.* & *M.* *Borough's Caſe*.

Adjudged that an action of *debt* will not lie againſt an *infant* for a copyhold fine on his admiſſion; and therefore an *infant* arreſted on ſuch an action, being *five* years of age, was diſcharged. *Vide Raymond vol.* 1. *p.* 36.

Eaſter, 8 *W.* & *M.* *Stokes* v. *Oliver*.

See this caſe fully ſtated in page 489 of this work, under the head *Fines and Recoveries*.

Michaelmas, 9 *W.* 3. *Ellis* v. *Ellis*.

On an *aſſumpſit* brought againſt an executor for *money* lent to his teſtator: the defendant pleaded, that his teſtator was an *infant*; the plaintiff replied, that the *money lent was for neceſſaries*: and held good; for an *infant* is chargeable for *money lent, if it is laid for neceſſaries*, according to his degree, but all that is at the peril of the lender. *Vide Salk. vol.* 3. *p.* 197. *Mod. Rep. vol.* 5. *p.* 368. *Ibid. vol.* 12. *p.* 197. *Raym. vol.* 1. *p.* 343.

Michaelmas, 10 *W.* 3. *The King* v. *Cole*.

See this caſe fully ſtated in page 192 of this work, under the head *Bankrupts*.

Michaelmas, 10 *W.* 3. *Hyleing* v. *Haſtings*.

Holt, C. Juſtice. If an *infant* buys goods, and an action of *indebitatus aſſumpſit* is brought againſt him, he may plead *non aſſumpſit*, and give *infancy* in evidence, becauſe the contract is void; yet if he promiſes to pay it after he comes to the age of *twenty-one* years, a general *indebitatus aſſumpſit* will lie againſt him. *Vide Raym. vol.* 1. *p.* 389.

Eaſter, 13 *W.* 3. *Mr. Archer's Caſe*.

See this caſe fully ſtated in page 505 of this work, under the head *Habeas Corpus*.

Bridget Hide's Caſe.

Bridget Hide, being the daughter and heir of Sir *Thomas Hide*, and about *thirteen* years old, and her mother having married Sir *Robert Viner*, and ſhe being dead, the court was moved for a *habeas corpus* to be directed to Sir *Robert Viner*, in whoſe cuſtody ſhe was left, and who had no right to her, as her aunt was her *guardian at law*; and ſhe being brought into court, it was ſuggeſted, that he intended to marry her to a great perſon, but of ſmall fortune, though ſhe was already married to one Mr. *Emmerton*, by the conſent of her mother whilſt living, which marriage being queſtioned, and the young lady being aſked by the court, whether ſhe was willing to ſtay with her father-in-law? ſhe anſwered, that ſhe was; whereon he was ordered to enter into a recognizance of 40,000*l.* not to let her marry whilſt ſhe was in his cuſtody, and to permit her aunt to viſit her. *Vide Salk. vol.* 3. *p.* 178.

Eaſter, 1 *Ann.* *Lilly's Caſe*.

Adjudged, that an action of *covenant* does not lie againſt an apprentice, being an *infant*. *Vide Mod. Rep. vol.* 7. *p.* 15.

Michaelmas, 3 *Ann. Anonymous.*

Holt, Chief Juſtice. It has been adjudged that if one be born the *firſt* of *February* at eleven o'clock at night, and on the laſt of *January*, in the *twenty-firſt* year of his age, at *one* of the clock in the morning, he makes his will of lands, and dies, it is a good will, for he was then of age. *Vide Salk. vol.* 1. *p.* 44.

Eaſter, 6 *Ann. Wilkinſon* v. *Tireman.*

See this caſe fully ſtated in page 414 of this work, under the head *Error.*

Hilary, 10 *Ann. Earle* v. *Peale.* Error.

In an action of *debt* on a promiſory note, the defendant pleaded that he was *under age*; and the plaintiff replied, that it was for neceſſaries, *viz.* 10 *l.* for cloaths, and 15 *l.* money lent *for and towards* his neceſſary ſupport at the *Univerſity*. The defendant rejoined, that the money was lent him to ſpend at pleaſure, *abſque hoc*, that it was lent him for neceſſaries; and on iſſue it was found for the plaintiff, who had judgment in the *C. B.* and on a *writ of error* being brought, *Parker*, Chief Juſtice, delivered the opinion of the court as follows:

Parker, Chief Juſtice. That which is put in iſſue is only, whether this money was lent the *infant* for neceſſaries, not whether it was laid out in neceſſaries: it may be borrowed for neceſſaries, but laid out and ſpent at a tavern: a *feme covert* may buy neceſſaries, and her act ſhall make the huſband chargeable; but ſhe cannot borrow money to lay out for neceſſaries. So it is of an *infant*; he may buy neceſſaries, but cannot borrow money to buy; for he may miſapply the money, and therefore the law will not hurt him, but it is at the peril of the lender, who muſt lay it out for him, or ſee it laid out, and then it is his providing, and his laying out ſo much money for neceſſaries for him. Therefore the judgment was reverſed *niſi*, &c. *Vide Salk. vol.* 1. *page* 387. *Mod. Rep. vol.* 10. *p.* 66.

Hilary, 11 *Ann. Mitchell* v. *Reynolds.*

This caſe (which ſee fully ſtated in page 90 of this work) having been compared to that of an *infant*, whom a contract for neceſſaries will bind, but not a bond.

It was *adjudged*, that this compariſon will not hold: for it ſtands clearly on the incapacity of the *infant* to make any contract at all, but ſuch as ſhall be for his advantage; and it can never be for his advantage to enter into a penalty. That this is ſo, is plain from hence, that if an *infant* and a ſurety enter into a bond for neceſſaries for the *infant*, the bond is good as to the ſurety, but not as to the *infant*: ſo that it is not the nature of the bond, but the incapacity of the *infant* that makes the bond void. *Vide Mod. Rep. vol.* 10. *p.* 139.

Eaſter, 5 *Geo. Turner* v. *Triſby.*

Pratt, Chief Juſtice. Neceſſaries for an *infant*'s wife are neceſſaries for him: but if provided in order for the marriage, he is not chargeable, though ſhe uſes them. *Vide Stra. vol.* 1. *p.* 168.

Eaſter, 6 *Geo. Archer* v. *Frowde.* Error.

On a *writ of error* brought on a judgment in *C. B.* in *treſpaſs* and *aſſault* by one *infant* againſt another; and a verdict *for the plaintiff*: the defendant aſſigned for *error*, that whereas the plaintiff had appeared to proſecute the ſuit by one *Iſaac Knight* her next friend, as one ſpecially aſſigned by the court, yet the ſaid *Iſaac Knight* was never ſo aſſigned, nor does any ſuch admiſſion appear on record.

Per curiam. The practice of this court warrants a general admiſſion, and there is no inconvenience in it: it amounts to the ſame thing, whether the admiſſion be *general* or *particular*, and no reaſon can be given why it ſhould not be one way as well as the other. Therefore the judgment of the *C. B.* was affirmed. *Vide Stra. vol.* 1. *p.* 307.

Trinity, 7 *Geo. The King* v. *Clackſton.*

See this caſe fully ſtated in page 508 of this work, under the head *Habeas Corpus.*

Hilary, 8 *Geo. Spiller and Wiſe* v. *Adams or Andrews.*

See this caſe fully ſtated in page 235 of this work, under the head *Damages.*

Hilary, 10 *Geo. The King* v. *Johnſon.*

See this caſe fully ſtated in page 509 of this work, under the head *Habeas Corpus.*

Hilary, 12 *Geo. Southerton* v. *Whitlock.*

It was held, that if goods which are not neceſſaries in this caſe are delivered to an *infant*, who after full age ratifies the contract by a promiſe to pay, he is bound: and it was left to the jury, whether in this caſe there was any confirmation of the contract at full age. *Vide Strange, vol.* 1. *p.* 690.

Eaſter, 12 *Geo. The King* v. *Travers.*

See this caſe fully ſtated in page 460 of this work, under the head *Evidence.*

Michaelmas, 1 *Geo.* 2. *Keniſton or Kynaſton*, v. *Freſcobaldi*, Error.

On a *writ of error* brought on a judgment in *aſſumſipt* in the *C. B.* againſt *three* executors, who appeared and pleaded by attorney; the error aſſigned was, that one of them being an *infant*, they all appeared and pleaded by attorney, and it was argued for the plaintiff, that the diſability of an *infant* is adherent to his perſon, and therefore his being ſued in *auter droit* can make no difference, and conſequently even in that capacity he ſhould not have appeared by attorney, 2 *Cro.* 441. *Stile*, 388. 1 *Lev.* 299. Now in the preſent caſe, though ſome of the executors were of full age, that makes no alteration, and his appearing along with them by their attorney cannot mend the matter; for it is like the caſe of *Baron* and *Feme*, ſhe being under age and ſued along with her huſband; he cannot make an attorney for her, but ſhe ought to appear by guardian.

Per curiam. The diſability of an *infant* is adherent to his perſon; and the reaſon why the law will not allow of his proſecuting or defending his right by attorney, is, that tho' the attorney ſhould act contrary to his warrant, he is not anſwerable to him for it; whereas in ſuch caſe he has his remedy againſt his guardian; and likewiſe, becauſe he has not power by law to make an attorney: the law regards the acts of an *infant* as an executor, becauſe he is liable to a *devaſtavit*; and they held that an *infant* can neither ſue, nor be ſued, as executor, by attorney; that the caſe of *Foxwith* v. *Tremayne*, 1 *Lev.* 229. 2 *Saund.* 212. was not law; and that *Holt*'s opinion was always known to be the reverſe of what is reported by *Shower* in the caſe of *Cone* v. *Bowles*. So the judgment was reverſed. *Vide Fitz-Gibbons, p.* 1. *Stra. vol.* 2. *p.* 783.

Hilary, 3 *Geo.* 2. *Sir John Forteſcue Aland*, v. *Maſon.* Error.

On a *writ of error* brought on a judgment in the *B. R.* in *Ireland*, on a *writ of error* brought there to reverſe a *common recovery*, wherein the judgment was, that the parol ſhall demur. It was adjudged, that the *nonage* cannot be pleaded again.

The plea of *nonage* in *England* having been ſo excluded, it came now to be debated on the validity of the judgment of the *B. R.* in *Ireland*, by which the parol was to demur till the *infant* came of age. And the court being of opinion, that it was proper to conſider that, as a previous queſtion to the *errors* in the *common recovery*, if there were any, it was argued; that the plea was ill, both as to the matter, and as to the manner of it. As to the matter of it; he is not intitled to his age, becauſe by his own ſhewing he is in by deſcent, and therefore ſome books ſay, he ſhall not have his age. 47 *Aſſ. pl.* 4. 1 *Roll. Abr.* 139. *pl.* 33.

Beſides, he is not intitled to have his age in this caſe, becauſe the *error* aſſigned is *error* in law, and not in fact; and that is the diſtinction taken by Juſtice *Doddridge* in 3 *Bulſt.* 139.

But ſuppoſing this was a caſe wherein the defendant is intitled to his age, yet the manner of the plea is ill.

Per curiam. His being in by deſcent, is the ſtrongeſt reaſon for having his age, and though the book cited is to the contrary, yet in the ſame page is a caſe directly againſt it, and the authorities in general are ſo. And as to Juſtice *Doddridge*'s diſtinction, there is nothing in it, for a releaſe of *errors* if he knew how to plead it, would defend him againſt *errors* in law as well as in fact. As to the form of the plea, we think it well enough, and therefore the judgment for the parol to demur muſt be affirmed. *Vide Stra. vol.* 2. *p.* 861. *Raym. vol.* 2. *p.* 1433. *Fitz-Gibbons, p.* 114.

Hilary, 4 *Geo.* 2. *Wigmore* v. *Alvarez.*

In this cauſe Mr. *Solicitor General* obſerved, that *infants* are neither amenable to, or entitled to the benefit of the ſtatutes of bankrupts, as it was determined in one *Whitlock*'s caſe: but the court gave no opinion on this point. *Vide Fitz-Gibbons, p.* 200.

Michaelmas, 4 *Geo.* 2. *The King* v. *Dr. Betteſworth.*

On a motion for a *mandamus* to the defendant, in order to compel him to grant adminiſtration to the grandfather, during the minority of ſeveral *infants*, his grandchildren, whoſe father died inteſtate; it was *adjudged*, that the courſe of the *Spiritual Court* is, if the *infant* be under *ſeven years* of age, they chuſe a curator, if he be *ſeven*, he chuſes one himſelf. *Vide Fitz-Gibbons, p.* 163.

Trinity, 5 *Geo.* 2. *Holt* v. *Ward.*

In an action of *aſſumpſit* brought for a promiſe of marriage, the plaintiff joined iſſue on the *non aſſumpſit*, and a verdict was found for her, with 200 *l.* damages. And as to the plea of *infancy*, it was demurred to.

After this cauſe had been ſeveral times argued at the bar, this term the Chief Juſtice delivered the reſolution of the court as follows:

The objection in this caſe is, that the plaintiff not being equally bound with the defendant, this is a *void agreement*, and the defendant cannot be charged in this action. Formerly it was made a doubt by L. *Vaughan*, whether any action could be maintained on mutual promiſes to marry; but that is now a point not to be diſputed. And as to the preſent caſe, we ſhould have had no difficulty in giving judgment for the plaintiff, if we could have been ſatisfied by the arguments of the Civilians, that as the plaintiff was of the age of conſent, any remedy, though not by way of action for damages, could be had againſt her: but ſince they ſeem to have no precedent in the caſe, we muſt conſider it on the foot of the *common law*, and on that the ſingle queſtion is, whether this contract, as againſt the plaintiff, is abſolutely void? And we are of opinion, that this contract is not void, but only voidable at the election of the *infant*; and as to the perſon of full age, it abſolutely binds.

The contract of an *infant* is conſidered at law as different from the contracts of other perſons. In ſome caſes his contract ſhall bind him: ſuch is the contract of an *infant* for neceſſaries, and the law allows him to make this contract as neceſſary for his preſervation; and therefore in ſuch caſes a ſingle bill ſhall bind him, though a bond with a penalty ſhall not.

Where the contract may be for the benefit of the *infant*, or to his prejudice, the law ſo far protects him as to give him an opportunity to re-conſider it when he comes of age: and it is good or voidable at his election. But though the *infant* has this priviledge, yet the party with whom he contracts has not: he is bound in all events. And as marriage is now looked on to be an advantageous contract, no diſtinction holds whether the party ſuing be man or woman, the true diſtinction is, whether it may be for the benefit of the *infant*; we think, that though no expreſs caſe on a marriage contract can be cited, yet it falls within the general reaſon of the law with regard to *infants* contracts. And no dangerous conſequence can follow from this determination, becauſe our opinion protects the *infant*, even more than if we rule the contract to be abſolutely void. And as to perſons of full age, it leaves them where the law leaves them, which grants them no ſuch protection againſt being drawn into the inconvenient contracts.

For theſe reaſons, we are all of opinion, that the plaintiff ought to have her judgment on the demurrer. *Vide Stra. vol.* 2. *p.* 937. *Fitz-Gibbons, p.* 175. 275.

Trinity, 7 *Geo.* 2. *The King* v. *Smith.*

See this caſe fully ſtated in page 509 of this work, under the head *Habeas Corpus.*

Michaelmas, 7 *Geo.* 2. *The King* v. *White.*

See this caſe fully ſtated in page 299 of this work, under the head *Corporations.*

Eaſter, 8 *Geo.* 2. *Stern* v. *Bern.* Error.

On a motion to ſhew cauſe why a *writ of error* brought on a judgment by *confeſſion*, contrary to the defendant's undertaking, ſhould not be *nonproſſed* at the defendant's expence. The cauſe ſhewn was made during the defendant's *infancy*, and the judgment given, and the agreement not to bring a *writ of error* was during his *infancy* likewiſe, and that he intends to aſſign *infancy* for *error*.

The court accordingly diſcharged the rule, for tho' the judgment binds him, yet it binds but as a judgment reverſable. *Vide Caſes Temp. Lord Hardw. p.* 104.

Trinity, 10 *Geo.* 2. *Stone* v. *Atwoll.*

If the defendant does not file common bail in time, according to *ſtat.* 12 *Geo.* 2. *c.* 29. the plaintiff may do it for him; in this caſe the defendant was an *infant*, and had appointed no guardian by whom to appear: and the court made a rule, that the plaintiff ſhould name a guardian for him, if he refuſed to do it himſelf. *Vide Stra. vol.* 2. *p.* 1076.

Michaelmas, 11 *Geo.* 2. *Whywall* v. *Champion.*

It was *adjudged*, that tobacco ſent to the defendant, who ſet up a ſhop in the country, could not be recovered as neceſſaries, he appearing to be an *infant*. For the law will not ſuffer him to trade, which may be his undoing. *Vide Stra. vol.* 2. *p.* 1083.

Michaelmas, 12 *Geo.* 2. *Clowes* v. *Brook.*

On an *aſſumpſit* brought for a farrier's bill, the defendant pleaded, that the teſtator was an *infant*: the plaintiff replied, that the demand was for looking after his horſes, and that the work was neceſſary for the horſes. And on demurrer, the court held, that the replication was ill; for it ſhould only have been a general replication, that it was neceſſaries for the *infant*, and left it to evidence, where the circumſtances of his health and fortune would be conſidered: and though the work might be neceſſary for the horſes, yet it does not appear that the horſes were neceſſary for the *infant*: therefore judgment was given for the defendant. *Vide Stra. vol.* 2. *p.* 1101.

Michaelmas, 18 *Geo.* 2. *Gardiner* v. *Holt.*

An *infant* was ſued by *prochein amy*, and there was a verdict againſt him, and judgment for coſts. And now being taken in execution, he moved to be diſcharged; and cited *Cro. Eliz.* 33. *Cro. Jac.* 640.

Per curiam. If coſts cannot be given, it will be matter of error to be inſiſted on; but we will not diſcharge him on motion. Where he is a defendant he certainly muſt pay coſts. *Vide Stra. vol.* 2. *p.* 1217.

Trinity, 5 *Geo.* 3. *Evelyn*, *Baronet*, *Executor of Sir John Evelyn*, *Baronet*, v. *Chicheſter*, *Eſq*;

See this caſe fully ſtated in page 487 of this work, under the head *Fines* and *Amerciaments*.

Michaelmas, 6 *Geo.* 3. *Zouch on the Demiſe of Abbott and Hallet*, v. *Parſons*.

See this caſe fully ſtated in page 361 of this work, under the head *Deed*.

Information.

Michaelmas, 3 *W.* & *M.* *Sir James Smith's Caſe.*

See this caſe fully ſtated in page 290 of this work, under the head *Corporations*.

Trinity, 4 *W.* & *M.* *Culliford* v. *Blandford*.

On an action of *debt* on *ſtat.* 23 *H.* 6. brought againſt the Mayor of *Doncaſter* for a falſe return of a burgeſs to parliament; by which ſtatute a penalty of 40 *l.* is given to the King, and 40 *l.* *to the burgeſs choſen, and not returned, ſo as he ſue for the ſame within three months after the beginning of the ſaid parliament, or to any perſon who, in default of him ſo choſen, ſhall ſue for the ſame.*

The plaintiff was a ſtranger, who after three months, *and before the end of one whole year, ſued out a latitat againſt the defendant; but this was within a year after the offence committed.*

1ſt. The queſtion was, whether the plaintiff was a *common informer*, and ſo ought by *ſtat.* 31 *Eliz.* to bring his action within a year after the offence: in the preamble of that *ſtatute*, it is ſaid, that no perſon, other than the party aggrieved, ſhall be received to inform on a penal *ſtat.* and then it is enacted, that where a forfeiture is given to the King only, the action ſhall be brought within *two* years after the offence; but if it be to the King and proſecutor, then it muſt be within a year.

2dly. If the plaintiff ſhall be taken to be a *common informer*, then whether the ſuing out this *latitat* is a commencement of the action.

Eyre and *Gregory*, Juſtices, held the affirmative in both points; but they inſiſted chiefly on the firſt point, that the plaintiff is *no common informer*, becauſe the penalty was given to the proſecutor, and no time limited by this ſtatute when he ſhould commence his action. He ſtands now in the place of the party aggrieved, who did not ſue within the *three* months limited by the act, and nobody will ſay that he is a *common informer*.

Dolben, Juſtice, was of opinion, that the ſuing out of the *latitat* within the year, was a good commencement of the ſuit, and ſufficient to avoid the ſtatute.

But the Chief Juſtice held, that a penalty being given to the King as well as to the proſecutor, if he had brought his action for the whole 80 *l.* *as well for our Lord the King as for himſelf*, he had been within *ſtat.* 31 *Eliz.* and a *common informer*; but here the action was brought only for 40 *l.* which makes ſome alteration.

And as to the ſecond point, a *latitat* was never yet conſtrued to extend to a *ſtatute*, where a penalty is given to the proſecutor, and therefore it cannot be a commencement for a ſuit on a penal law.

It is otherwiſe where the party is limited, and barred from his right by any ſtatute, for not proſecuting in time; therefore if the firſt point is not for him, the laſt is againſt him: yet the plaintiff had judgment. *Vide Mod. Rep. vol.* 4. *p.* 129.

Michaelmas, 4 *W.* & *M.* *The King* v. *Hicks*.

See this caſe fully ſtated in page 342 of this work, under the head *Debt*.

Eaſter, 4 *W.* 3. *The King* v. *Roberts*.

On an *information* againſt a *common ferryman*, ſetting forth the accuſtomed rates to be, *viz.* for the paſſage of a man and horſe 1 *d.* for 20 oxen 7 *d.* for twenty ſheep 2 *d.* &*c.* and that the defendant being ferryman, from ſuch a day to ſuch a day, did take of ſeveral of the King's ſubjects, unknown, divers ſums of money exceeding thoſe ancient rates, *viz.* for the paſſage of one man and horſe, 2 *d.* for every 20 oxen 12 *d.* &c. On *not guilty* pleaded, the defendant was found *guilty*; but the judgment was arreſted for the uncertainty as to what the defendant did take, and of whom, and of how many perſons, for every taking was a ſeparate offence. *Vide Salk. vol.* 3. *p.* 198.

Michaelmas, 7 *W.* 3. *The King* v. *Hill*.

If a man be *outlawed* by proceſs on an *information*, and comes in and traverſes the *outlawry*, he muſt plead *inſtantly* to the *information*. *Vide Salk. vol.* 1. *p.* 371.

Hilary, 8 *W.* 3. *Anonymous*.

The court was moved to quaſh an *inquiſition* taken before a coroner, where the jury found, that a poſt in the highway was *the only cauſe of the perſon's death*, and it was excepted to, becauſe the words were, *we certainly believe it the cauſe of death*, whereas it ought to be certain; and therefore it was quaſhed. *Vide Mod. Rep. vol.* 12. *p.* 112.

Hilary, 8 *W.* 3. *The King* v. *Gregory*.

A motion was made to quaſh an *information* by the Attorney General, and the court denied the motion. *Vide Salk. vol.* 1. *p.* 372.

Eaſter, 8 *W.* 3. *Roberts* v. *Witherhead*.

See this caſe fully ſtated in page 343 of this work, under the head *Debt*.

Trinity, 8 *W.* 3. *The King* v. *Thorp and others*.

An *information* was brought againſt *Thorp* and others for conſpiring to take one *Edward Mitchel*, being under the age of *eighteen* years, and the only ſon and heir of *Robert Mitchel*, Eſq; and carrying him out of the cuſtody, &*c.* of his ſaid father, without notice, and againſt his will, and compelling him to get drunk, and then marrying him to one *C. H.* a perſon of ill fame, and of no fortune.

On *not guilty* pleaded, this *information* was tried at the aſſizes at *Wincheſter*, and all the defendants were found *not guilty*, except *Thorp*: and he was acquitted of compelling the ſaid *Mitchel* to be drunk, and found *guilty* of all the reſt in the *information*.

On a motion in arreſt of judgment; the *exceptions* taken were:

1ſt, This *information* does not contain any matter of miſdemeanor.

2dly, It is laid by way of *conſpiracy*, and the defendant *Thorp*, only being found *guilty*, there can be no judgment againſt him, becauſe *one* cannot *conſpire*.

3dly, Here is a miſ-trial: for the conſpiracy being laid in *Hampſhire*, and the marriage being in *Oxfordſhire*, it ought not to be tried by a jury of *Hampſhire* alone, but by a jury of both counties.

Per curiam. It is a misfortune that the marriage is good; it is true, it is lawful to marry, but if it is obtained by unlawful means, it is an offence.

The queſtion is, whether a father has not the guardianſhip of his ſon and heir apparent till the age of *twenty-one* years, as he had when there was tenures in Knight's ſervice: for the father had ſuch an original right inveſted in him by nature, that he might have an action of *treſpaſs* againſt the Lord, wherefore he took away his ſon and heir: the matter was adjourned. *Vide Mod. Rep. vol.* 5. *p.* 221.

Trinity, 9 *W.* 3. *The King* v. *Greep*.

The defendant was convicted of *perjury*: and the court was moved in arreſt of judgment.

1ſt, Becauſe it is not ſet forth, that the oath was material to the matter in iſſue.

2dly, The fact is laid, that on a former trial, Mr. *Strode* gave evidence, that the indentures of leaſe and releaſe were executed by the Duke of *Albermarle*, at *Albermarle houſe*, about the time of the date thereof, which was the *ſixteenth* day of *July*, in the year 1681, and that he was then and there preſent with the Duke, and was a witneſs that the Duke did ſeal and deliver the ſame; and the perjury now aſſigned is, that the defendant then depoſed, *That about the ſame time*, Mr. *Strode*, was at *Newnham*, (*a certain houſe called* Newnham, *in the pariſh of St.* Mary, Plimpton, *in the county of* Devon:) now the words *about which time*, are very uncertain; for if he had depoſed, Mr. *Strode* was then at *Newnham*, without ſaying any more, it muſt be agreed that had been uncertain; for it does not appear where *Newnham* was, or that it was Mr. *Strode*'s houſe, or in what county, or in what place.

Per curiam. An *information* for perjury at *common law* as this is, does not require ſo much certainty as an *indictment* on the ſtatute; for if perjury be aſſigned in ſwearing to ſeveral interrogatories in *Chancery*, without ſhewing in which; this is good at *common law*, but not on the ſtatute.

Neither will an *indictment* lie for a *perjury* on the ſtatute, which may be maintained at *common law*, as for making a falſe *affidavit* in *Chancery*, or in this court.

The ſtatute has made the offender ſubject to a certain penalty, and to a corporal puniſhment, and therefore the perjury muſt be by ſwearing falſely in a court of record, and in a thing material to the iſſue, or a man may be perjured in an anſwer in *Chancery* to a thing not charged in the bill. So the matter was adjourned. *Vide Mod. Rep. vol.* 5. *p.* 343.

Michaelmas, 9 *W.* 3. *The King* v. *Lambert.*

A motion was made laſt term for filing an *information* againſt *Lambert* for ſubornation of perjury, on an affidavit of his ſuborning two perſons; but the rule was drawn up generally, and an *information* was filed for ſuborning thoſe *two*, and *ten* others; and it was moved that this *information* was not duly filed, becauſe the addition of *ten* more, were *ten* more *informations*; and the court declared, that no *information* ſhould have been filed, but as to thoſe perſons mentioned in the *affidavits*; every ſubornation is a diſtinct offence; and the act for an *information* does not direct an *affidavit*, yet the court being truſted with it, and the parliament repoſing in them, they ought to do it on good grounds. It was then moved that the *information* was ill to thoſe perſons, becauſe the ſtatute requires a recognizance to be entered into to the party, which they had not done; to which alſo the court agreed. But a doubt aroſe what ſhould be done with this *information*, which is now filed.

Holt, Chief Juſtice, ſaid, it could not be quaſhed or taken off of the file; for when once a thing is on the file, it cannot be taken off without an act of parliament, no, not by conſent of the parties; as in the caſe of Dr. *Widdrington* on a *mandamus*; the college made a very ſcandalous return, to which he and the college agreed; and then they moved to take the return off the file; but the court refuſed it, ſaying, it could not be done without an act of parliament, only they ordered a *vacatur* to be entered thereon. In this caſe the method may be, to enter the irregularity on the roll, with *let the proceſs ceaſe thereon.*.

The matter was adjourned for further conſideration. *Vide Mod. Rep. vol.* 12. *p.* 153.

Hilary, 10 *W.* 3. *The King* v. *Gaul or Gall.*

An *information* on *ſtat.* 5 & 6. *E.* 6. *c.* 14. for buying and ſelling live cattle, not having kept them the time the ſtatute appoints, was exhibited in this court. The buying and ſelling was alleged to be in *Norfolk*; and it was inſiſted, that the *information* ought to have been brought in *Norfolk*, where the fact was done, and not in *Middleſex*; and that *ſtat.* 21 *Jac.* 1. was made for the eaſe of the ſubject. On the other ſide it was objected, that this court is not reſtrained, and that the Attorney General may exhibit *informations* in this court for the King, notwithſtanding the ſtatute; and *Latch.* 192. 1 *Sid.* 360. 2 *Keb.* 340. 1 *Vent.* 8. *Jones* 193. 3 *Keb.* 247. 2 *Cro.* 178. 3 *Inſt.* 176, 191. 1 *Cro.* 112. were cited.

Holt, Chief Juſtice, obſerved, that *ten* of the Judges had come to the following reſolutions:

1ſt. That *ſtat.* 21 *Jac. c.* 4. does not extend to any offence created ſince that ſtatute; ſo that proſecutions on ſubſequent penal ſtatutes are not reſtrained thereby; but that the ſtatute as to them, is as it were repealed *pro tanto* i. e. *for ſo much.*

2dly. That all *informations* and popular actions on *penal* ſtatutes made before that act, muſt by force of *ſtat.* 21 *Jac.* 1. *c.* 4. be laid, brought, and proſecuted in the proper county where the fact was done. *Vide Salk. vol.* 1. *p.* 372. *Raym. vol.* 1. *p.* 370. *Mod. Rep. vol.* 12. *p.* 223.

Hilary, 10 *W.* 3. *Hicks's Caſe.*

Holt, Chief Juſtice, reported the opinion of all the Judges in this caſe. An action of *debt* was brought in this court on *ſtat.* 5. *Eliz. c.* 4. by a *common informer*, for exerciſing a trade, not having ſerved as an apprentice; and the queſtion was, if the juriſdiction of this court was taken away by *ſtat.* 21 *Jac.* 1.? for it was thought fit to ſettle it, becauſe of the caſe of *Barnes* v. *Hughes*, 1 *Vent.* 8.

And it was reſolved by the opinion of *eleven* of the judges, 1ſt. That *ſtat.* 21 *Jac.* 1. reſtrains the juriſdiction of this court in actions of *debt* brought by *common informers*, and that they cannot bring *debt* on the ſtatute in this court, unleſs the cauſe of action ariſe in the county where the *King's Bench* ſits, but muſt in other caſes proſecute by *information*, &c. before juſtices of aſſize, *&c.* as the ſtatute directs.

2dly. It was reſolved, that where a remedy is given by action of *debt*, &c. in any court of record, *&c.* by any later ſtatute ſubſequent to 21 *Jac.* 1. ſuch action is not reſtrained; for the ſaid ſtatute 21 *Jac.* 1. does not extend to ſuch actions, but ſtands repealed as to them.

But *Holt*, C. J. declared, that his own private opinion was, that where any ſubſequent act gives any *popular action*, it muſt be laid in the proper county, and within the equity of *ſtat.* 21 *Jac.* 1.

Hale, Chief Juſtice, was always againſt the opinion of *Barnes* v. *Hughes*; and the principal objection in that caſe was, that the party offending might get out of the county, and ſo eſcape the puniſhment of the law, as being out of their juriſdiction.

Now, this objection does not hold, for there may be proceſs of *outlawry* ſued out againſt him; *ſtat.* 21 *Jac.* 1. giving the ſame proceſs that lay in actions of *treſpaſs vi et armis* at *common law*; and therefore neither *debt* nor *information*, though exhibited by the Attorney General, lies here, but in *Yorkſhire*, which is the proper county in this caſe. *Vide Salk. vol.* 1. *p.* 373.

Michaelmas, 10 *W.* 3. *Anonymous.*

An *information* was filed againſt one *Jourdan*, an Enſign of the Guards, for reſcuing *one* arreſted by the Chief Juſtice's warrant in the Park. *Vide Mod. Rep. vol.* 12. *p.* 256.

Michaelmas, 10 *W.* 3. *Anonymous.*

Leave was granted to file an *information* againſt ſeveral plate button-makers, for combining by covenants not to ſell under a ſet rate.

Holt, Chief Juſtice. It is fit that all conſederacies by tradeſmen to raiſe their rates, ſhould be ſuppreſſed. *Vide Mod. Rep. vol.* 12. *p.* 248.

Hilary, 11 *W.* 3. *The King* v. *Knight and Burton.*

In an *information* it was ſtated, that on the 5th day of *June* 9 *W.* 3. three or more commiſſioners of the *Exchequer* cauſed *Exchequer* bills to be iſſued on the receipt of the *Exchequer*, according to the form of the ſtatute in ſuch caſe made and provided, the aforeſaid *Knight* then being Receiver General, *&c.* to the intent to get great gains to himſelf, did fraudulently and falſely indorſe *twenty* bills at the cuſtom-houſe, as if on account of the cuſtoms, and on the ſame day, *&c.* paid them into the *Exchequer*, as if being truly indorſed, to defraud our Lord the King. On *not guilty* pleaded, the defendant was convicted; and now a motion was made in arreſt of judgment: this caſe depended on *ſtat.* 8 *&* 9 *W.* 3. *c.* 19. and was twice ſpoke to and determined on good conſideration. At laſt judgment was arreſted, and the Chief Juſtice delivered the opinion of the court on theſe points:

1ſt. That the words *nuper receptor*, i. e. *late receiver*, do not import that he was the King's officer at the time of indorſing and paying theſe bills, but rather the contrary; and he muſt be taken to be a private perſon, and as ſuch to make this indorſement; which in a private perſon could be no crime, becauſe the falſity might hurt himſelf, but could not prejudice the King. And it is like the caſe in *Noy* 99. where the obligee leſſened the ſum in the obligation; it would have been *forgery* in a ſtranger or in the obligee to make it more; but in regard the obligee had hurt no body but himſelf, it was *no forgery*: ſo it is of this falſe indorſement, it is not criminal, becauſe it hurts nobody but himſelf. But it is objected, it may be a damage to contractors: I anſwer, we are to take notice there might be contractors, but not that there are any, becauſe it is not ſet out.

2dly. The word *indorſe* is not ſufficient; the words of the act are, *that the perſon who pays the ſame into*, &c. *ſhall put his name to the ſaid bill, and write the day of the month*, &c. And the *information* ſhould have been, that the defendant ſet ſuch a perſon's name on the back of the bill, when indeed, there was no ſuch perſon, or when indeed, no ſuch perſon ordered him to put his name to the bill; for the words *it was indorſed* import a writing on the back of a thing, but not putting his name on it. But it was urged by the King's counſel, that this might be plainly underſtood by the words as if received on a note for cuſtoms: I anſwer, this is by argument only; and argumentative *informations* are naught for that very cauſe; for all charges ought certainly to be ſet out in pleading. But further it was urged, that it is ſaid to be a falſe indorſement in defrauding of our Lord the King, and ſo found by the jury; and though a fact that appears innocent cannot be made a crime by adverbs of aggravation, as falſely, fraudulently, *&c.* yet where a fact ſtands indifferent, as writing, which may be *true or falſe*, and charged to be *falſe*, and the jury find it ſo, all are then *eſtopped* to ſay the contrary. That on the other ſide it was ſaid, the words *in defraud* are only matter of concluſion. But here is no charge; it is not enough to ſay the King is cheated; he muſt appear to be ſo, as well as ſtated to be ſo.

3dly. The ſaying it was indorſed as if received on account of cuſtoms, *&c.* is not well. In an indictment of *forgery* it is not well to ſay, the defendant forged a falſe deed, purporting as if a conveyance, *&c.* but it muſt be *containing*, &c. So here it ſhould have been, that the defendant made a falſe indorſement, *containing*, &c. Here is a falſity, but nothing is charged that is criminal; for that falſity could not hurt, nor tend to hurt any body but himſelf: and therefore the judgment was arreſted.

N. B. The iſſue was tried at bar, and the evidence proved that the bills were ſigned at the Treaſury by three acting commiſſioners of the Treaſury; the defendant called on them to produce their commiſſion, but *Holt*, C. J. held it not neceſſary, comparing it to the caſe on the ſtatute of *hue and cry*, where ſhewing an affidavit is enough, without going into the proof of the juſtices power to adminiſter an oath. *Vide Salk. vol.* 1. *p.* 375.

Trinity, 11 *W.* 3. *The Caſe of the Surgeons Company.*

A *mandamus* was granted to the company of ſurgeons to chuſe officers; they made a return under their *common ſeal*: and now a rule was moved for, and granted, to file an *information* againſt ſome particular perſons of the company for that return.

Holt, Chief Juſtice, ſaid, the court muſt proceed by way of *information*; for it being a matter concerning public government, no particular perſon is ſo concerned in intereſt as to maintain an action; and the *information* muſt be granted againſt particular perſons, tho' the return be under their common ſeal, for there is no other way to try the right; and if it be found for the King, there muſt be a *peremptory mandamus*; perhaps we ſhall ſet but a ſmall fine. *Vide Salk. vol.* 1. *p.* 374.

Michaelmas, 11 *W.* 3. *The King* v. *The Borough of Abington.*

See this caſe fully ſtated in page 292 of this work, under the head *Corporations.*

Michaelmas, 11 *W.* 3. *The King* v. *Dummer.*

A motion was made for an *information* againſt one *Dummer*, for *perjury* committed in a trial between *The King* and *Fitch*, in anſwering to this queſtion, whether he had received 800 *l.* for paſſing his accounts?

Holt, Chief Juſtice, ſaid, if the queſtion had been fair, we would have granted an *information*; but this queſtion was in effect, whether he was guilty of *bribery*, which it could not be expected he would own. You may *indict* him, but we will not grant an *information*. *Vide Salk. vol.* 1. *p.* 374.

Michaelmas, 11 *W.* 3. *Anonymous.*

The Solicitor General moved for leave to enter a *non proſ.* on an *information*, in order to file another; and the maſter of the *Crown Office*, ſaid, the courſe was to come to him, and pay coſts on the *information*, and then to enter a *non proſ.*

Per curiam. You ſhall not file a *ſecond* before the *firſt* be diſcharged. *Vide Mod. Rep. vol.* 12. *p.* 325.

Michaelmas, 11 *W.* 3. *The King* v. *Lawrence.*

An *information* was filed againſt *Lawrence* for writing a letter to Sir *John Piggot*, deſiring him to moderate his zeal, for that the King, meaning King *James* the *ſecond*, would be ſoon reſtored; and that for further ſatisfaction herein, he would ſoon hear that many Lords would repair to him to *France*; what to do he might gueſs: and being found *guilty*, he was fined 20 *merks*, and committed till payment. *Vide Mod. Rep. vol.* 12. *p.* 311.

Michaelmas, 11 *W.* 3. *The King* v. *Taylor.*

Leave was granted to file an *information* againſt a perſon for offering to buy votes, in order to ſecure an election to parliament. *Vide Mod. Rep. vol.* 12. *p.* 314.

Michaelmas, 11 *W.* 3. *The King* v. *Warburton.*

If there be a rule for filing an *information*, and *non proſ.* thereon for non-appearance of the defendant, a new *one* cannot be without a new rule, for the firſt was executed; and here the court granted a new rule, on payment of coſts. *Vide Mod. Rep. vol.* 12. *p.* 319.

Hilary, 12 *W.* 3. *The King* v. *Clerk.*

On an *information* for a public nuiſance, the jury found the defendant *guilty*; and becauſe it appeared to the court to be doubtful on the evidence, and that the jury had not had a view, though very proper in this caſe, they wiſhed the parties to conſent to let this jury have the view, and to come to trial again; and it was ſo done by conſent. And this the court did, becauſe it was a queſtion of right, and this trial would be peremptory to the defendant. *Vide Mod. Rep. vol.* 12. *p.* 626.

Eaſter, 12 *W*. 3. *Anonymous*.

An act of parliament was made for rendering a river in *Derbyſhire* navigable, and that none ſhould build any wharfs on it from henceforth; and a perſon having after built a wharf, another, who had a former wharf, and prejudice in the advantage thereof by the *ſecond* wharf, moved for leave to file an *information* againſt him on the *ſtatute*; and though the court ſaid it was not an act of ſo public a nature, as that the court ought, *officially*, to take notice of it; yet becauſe it was for the public good, and the matter directly againſt it, they gave leave to file an *information*; but held an *information* would not lie for the violation of a private *ſtatute*. At common law *informations* might be filed without motion, in the name of the maſter of the crown office; but ſince *ſtat*. 4 & 5 *W*. & *M*. *c*. 18. it cannot be without leave of the court; and that to avoid frivolous and vexatious matters; and that the party in caſe of acquittal, or nonſuit, ſhall have coſts. *Vide Mod. Rep. vol.* 12. *p*. 398.

Eaſter, 12 *W*. 3. *Anonymous*.

A clerk in *Chancery*, was committed by the *Lord Keeper*, for ſending writs into the country with ſoft yellow wax on them, without being ſealed by the great ſeal, as if they had been actually ſealed; and this was ſaid to be a very high miſdemeanor, and next to counterfeiting the ſeal; and he was bound himſelf in 1000 *l*. and *two* more in 500 *l*. each, for his appearance, in order to an *information*. *Vide Mod. Rep. vol.* 12. *p*. 355.

Eaſter, 12 *W*. 3. *The King* v. *The Mayor and Aldermen of Hertford*.

In the *information* againſt the Mayor and Aldermen of *Hertford*, a motion was made to ſet aſide the proceſs, becauſe no recognizance was given according to the late act; and this being to try a right, the queſtion was, whether it was within the ſtatute, viz. *treſpaſſes, batteries, and other miſdemeanors*, which are frivolous wrangling matters of an infinite nature? But the court ſaid, that this uſurpation here pretended was a miſdemeanor, and the *information* might be as vexatious in this caſe, as in *treſpaſs* or *battery*: that this laſt is a remedial law to prevent vexation, and muſt be conſtrued accordingly; therefore the proceſs was ordered to be ſet aſide, but the *information* ſtood. *Vide Salk. vol.* 1. *p*. 376. *Mod. Rep. vol.* 12. *p*. 312.

Michaelmas, 12 *W*. 3. *Anonymous*.

An *information* was filed againſt a gaoler for ſuffering *one* taken up on an *excommunicato capiendo*, to go at *large*. *Vide Mod. Rep. vol.* 12. *p*. 434.

Eaſter, 13 *W*. 3. *Anonymous*.

An *information* was filed againſt a man who ſet up a lottery, and after ran away without drawing it. *Vide Mod. Rep. vol.* 12. *p*. 495.

Eaſter, 13 *W*. 3. *Anonymous*.

An *information* concluding to the nuiſance of the inhabitants of a certain *vill* was quaſhed for the ſpecial concluſion. *Vide Mod. Rep. vol.* 12. *p*. 504.

Eaſter, 13 *W*. 3. *Pocock* v. *Thornicroft*.

Leave was granted to file an *information* againſt the defendant, for inveigling away the plaintiff's wife, and procuring merchants and tradeſmen to ſell her goods, in order to ſaddle the huſband with the debt, agreeing with the ſeller to deliver him the goods again.

Note. A wife ſhall be admitted to ſwear the peace againſt her huſband, becauſe a matter concerning her perſon. *Vide Mod. Rep. vol.* 12. *p*. 454.

Michaelmas, 13 *W*. 3. *The King* v. *Hathaway*.

One *Hathaway* a notorious rogue, pretending to be bewitched, the ſuppoſed witch was *indicted* for witchcraft, and tried and acquitted at *Surry* aſſizes. But the fellow perſiſting in his contrivances, pretended ſtill to be ill, and the poor woman, notwithſtanding her acquittal, was forced by the mob to ſuffer herſelf to be ſcratched by him. The whole being diſcovered to be an *impoſition*, an *information* was filed againſt him. *Vide Mod. Rep. vol.* 12. *p*. 556.

Eaſter, 1 *Ann*. *The Queen* v. *Clerk*.

See this caſe fully ſtated in page 289 of this work, under the head *Coroner*.

Trinity, 1 *Ann*. *Anonymous*.

An *information* was filed againſt the defendant for drawing in ſeveral to play with him for money, and uſing falſe dice. *Vide Mod. Rep. vol.* 7. *p*. 40.

Trinity, 1 *Ann*. *The Queen* v. *Blacket and Robinſon*.

Leave was given to file an *information* againſt the defendants for procuring a gentleman's ſon to marry a woman of infamous repute. *Vide Mod. Rep. vol.* 7. *p*. 39.

Trinity, 1 *Ann*. *The Queen* v. *Clerk*.

See this caſe fully ſtated in page 305 of this work, under the head *Coſts*.

Michaelmas, 1 *Ann*. *The Queen* v. *Smith*.

The council took exceptions to a conviction for *deer-ſtealing*, where the fact was laid to be done in a foreſt *uſed* for keeping deer, and that the defendant killed a deer without conſent of the keeper; and inſiſted, that *uſed* might be meant of a long time before, and there might be the conſent of the ranger; *but not allowed*; for the leave of the ranger is the leave of the keeper, and the word *uſed*, ſpeaks the preſent time as well as the paſt. *Vide Salk. vol.* 1. *p*. 378.

Michaelmas, 1 *Ann*. *The Queen* v. *Chandler*.

A *conviction* of *deer-ſtealing* on *ſtat*. 3 & 4 *W*. *M*. *cap*. 10. was returned on a *certiorari*, and exceptions taken to it. It was ſaid by *Holt*, Chief Juſtice, that in theſe ſummary proceedings, the right of an *Engliſhman* of being tried *by his peers*, was taken away; therefore the court was to conſtrue them ſtrictly, ſo far as to ſee that the fact was an offence within the act, and that the juſtices proceeded accordingly: and theſe points were agreed; 1ſt. That the fact in the *conviction* need not be laid *againſt the peace*, for mere form or formality is not required in theſe nor any other ſummary proceedings.

Mr. Attorney General ſaid. This is not the King's proſecution; he can have no fine; but the proſecution of the party, and this is the *memorandum* of what the juſtice had done in that matter.

2dly. That between ſuch a day and ſuch a day he killed *three deer*, is good; for if a day certain were alledged, the *informer* is not tied up to that: now in theſe caſes he is confined to give evidence of a killing within theſe days, ſo that it is more certain and better for the defendant; and *Raſt*. 410. *Hern*. 549. *Winch* 54, 547. *Tho*. 91, 92. *Vide* 186. *Co. Ent*. 158, &c. were cited. It is otherwiſe in *informations* at *common law*, becauſe every diſtinct offence creates a new penalty, but in *treſpaſs* a fact may be laid to be done at different times between ſuch a day and ſuch a day; becauſe it is not a new action, but an increaſe of damages.

3dly. That an unlawful killing is ſufficient, and it need not ſet forth a hunting, nor how the deer was killed.

4thly. That *ideo conſideratum eſt*, &c. without *foris faciat*, is ſufficient; for the ſtatute gives that in conſequence,

quence, and the judicial part ends at the *conviction*; the reſt is only conſequence and execution.

5thly. That if the owner of the park die before execution, and the *convictien* is affirmed here; his executors ſhall have a *levari facias* (*but it ſeems, it muſt be on affidavit, and then the matter ſuggeſted on the roll.*) So may the churchwardens without ſuggeſtion or *ſcire facias*, and ſo may the King. *Vide Salk. vol.* 1. 378.

The Queen v. *Norton.*

This was an *information qui tam*, brought by an *informer* on the ſtatute of *uſury*, and the court was moved to amend it, by altering the pledge the money was lent on; for it was laid in the declaration, that a quantity of grogram yarn was delivered to the defendant, as a pledge on which to lend 200 *l.* and that the defendant was to receive *one guinea per month* for intereſt; and by this amendment they would have ſtruck out all that related to the pledge of grogram yarn; but the court refuſed it; becauſe it makes another *information*, and another perſon might be intitled to it, being a *popular* action; they agreed that it was a general rule to amend *informations* at any time, even juſt before trial; but then it muſt not make the *information* different; but ſent it to the maſter, to examine if the *informer* ſet up was not a *pauper*, that he might anſwer coſts to the defendant. *Vide Forteſcue, p.* 232.

Eaſter, 2 *Ann. The Queen* v. *Holford or Rhodes and Cole.*

On an *information* againſt the defendant for ſubordination of *perjury*, ſetting forth, that whereas *in the court of our Lord the King, before the King himſelf, at* Weſtminſter, *in the county of* Middleſex, *one* Rhodes, *late of* D. *in the county of* Surry, oat-meal maker, had impleaded the defendant, *Holford*, for that whereas he was indebted to the plaintiff in the pariſh of *St.* Clement Danes, *in the county aforeſaid*, and promiſed to pay, *&c.* And that whereas on an account ſtated between them, the defendant was found in arrear, *&c.* and promiſed to pay, *&c.* and the defendant pleaded *not guilty*; and at the trial procured one *W. R.* to ſwear that he was preſent at the ſtating of the ſaid account, *&c.* whereas in truth he was not preſent, *&c.* to this *information* the defendant pleaded *not guilty*, and the cauſe being tried at *niſi prius* in *Middleſex* he was found *guilty*; and it was moved in arreſt of judgment, that the fine would be intire, and therefore if either of the aſſignments was naught, no judgment could be given; but this objection was diſallowed, and thereon another objection was made, *viz.* that the cauſe of action being laid in *Surry*, it could not be tried in *Middleſex*; it is true, it is ſaid that the defendant was indebted to the plaintiff in the pariſh of St. *Clement Danes, in the county aforeſaid*, which muſt be in the county of *Surry*, becauſe that county was laſt named, and therefore it muſt relate to that county, for the antecedent has relation to the neareſt word; but that rule has an exception, *viz.* unleſs the ſenſe prevents it, as it plainly does in this caſe. *Vide Salk. vol.* 3. *p.* 199. *Raym. vol.* 2. *p.* 886.

Eaſter, 2 *Ann. The Queen* v. *Taylor.*

On an *information* againſt the defendant, ſetting forth, that he on the 30th of *January*, *traiterouſly* ſpoke theſe words, *viz.* "King *Charles* the *firſt* was rightly "ſerved in having his head cut off, and it was a pity "that his two ſons, *Charles* and *James* were not ſer-"ved ſo too; in contempt of *William* the *third*, the "late King, and of his laws, and to the bad example "of all others in the like caſe offending, and againſt "the peace of the ſaid late King, *&c.*" On *not guilty* pleaded, the defendant was found *guilty*; and it was moved in arreſt of judgment, that theſe words were ſpoken of the dead, and they are not averred to be ſpoken with an intention to prejudice the government, and they are not aggravated by the word *traiterouſly*, becauſe that is applicable only to treaſon, which this is not.

Per curiam. Theſe words affect the living, though they were ſpoken of the dead, and they advance a common-wealth principle contrary to law, and therefore there needs no averment, that they were ſpoken with an intention to injure the government, for the words import a crime of themſelves, and endanger the Queen and monarchy; and though the crime is only a miſdemeanor, yet the word *traiterouſly* is proper in this *information*, becauſe this miſdemeanor has a tendency to treaſon, and ſhews a treaſonable intent in the ſpeaker. He was fined *forty merks*, being but a poor tanner, and ſentenced to ſtand *twice* in the pillory. *Vide Salk. vol.* 3. *p.* 198.

Trinity, 6 *Ann. The Queen* v. *Soley & al.*

The defendants were convicted on two *informations* for riots; the *firſt* was for hindering the bailiffs and burgeſſes of *Bewdly* in their choice of a bailiff for that corporation; and the *information* ſets forth; that the bailiffs and burgeſſes being aſſembled to chuſe a bailiff for the borough of *Bewdly*, the defendants *rioutouſly, routouſly, with great clamour and vociferation, &c.* hindered them in the ſaid election.

The ſecond *information* was for breaking open the door of the *Guildhall* of the borough of *Bewdly*; which ſets forth, that the defendants on the 23d of *October*, did aſſemble themſelves to diſturb the peace, *and ſo aſſembled*, did break open the door of a certain houſe, called the *Guildhall* of the borough of *Bewdly* aforeſaid.

The court being moved in arreſt of judgment on theſe two *informations*.

Holt, Chief Juſtice, held the *firſt* not good, becauſe it did not appear what authority they had to chuſe a bailiff.

And he held the *ſecond* ill, becauſe it did not ſhew whoſe houſe it was. And thereon judgment was arreſted on both *informations. Vide Mod. Rep. vol.* 11. *p.* 115.

Michaelmas, 6 *Ann. The Queen* v. *The Mayor of Thetford.*

It was reſolved on this caſe, that on a motion for an *information* againſt *A.* an *affidavit* on a motion againſt *B.* cannot be read: becauſe the ſwearer cannot be proſecuted for it if falſe. *Vide Mod. Rep. vol.* 11. *p.* 141.

Michaelmas, 6 *Ann. The Queen* v. *Hungerford.*

A motion was made for an *information* in nature of a *quo warranto*, againſt a common-council man of *Briſtol*, for refuſing to take on himſelf the office, after he was choſen; but the court denied the motion, and ſaid their remedy was to proceed by their *bye-laws*, in order to compel him; he not being ſuch a public officer as a ſheriff, *&c.* But if they had applied to the court for a *mandamus*, they ſhould have had it. *Vide Mod. Rep. vol.* 11. *p.* 142.

Trinity, 8 *Ann. The Queen* v. *Tyrril and Barber.*

An *information* in nature of a *quo warranto*, judgment by default, and a *capiatur pro fine*, the queſtion was, whether this was pardoned by the late act?

Holt, Chief Juſtice, delivered his opinion, that an interlocutory judgment is not within the exception of the act; for by a judgment is meant a final judgment, it being coupled with ſentence and decree; and a *capiatur pro fine* is only to bring them in to receive the judgment of the court. But this being a matter of right, *viz.* in a *quo waranto*, though the fine be pardoned, yet the continuance of the crime is not.

Powell, *Powys* and *Gould*, Juſtices, were of the ſame opinion; wherefore judgment was given, that the defendant ſhould be *ouſted* of his office, for committing the offence, but that the fine is pardoned. *Vide Mod. Rep. vol.* 11. *p.* 235.

Trinity, 10 *Ann. The Queen* v. *Matthews*

See this caſe fully ſtated in page 283 of this work, under the head *Conviction.*

Michaelmas,

Michaelmas, 10 *Ann.* ——— v. *Whitehorn, Mayor of Portſmouth.*

See this caſe fully ſtated in page 294 of this work, under the head *Corporations.*

Michaelmas, 11 *Ann.* *The Queen* v. *The Borough of Aldborough.*

See this caſe fully ſtated in page 295 of this work, under the head *Corporations.*

Hilary, 12 *Ann.* *The Queen* v. *Blagdon.*

On an *information in nature of a quo warranto* againſt the defendant to know by what authority he exerciſed the office of *portreeve* in the borough of *Honiton.*

The defendant in his *bar* ſet forth his right to that office, and concluded with a traverſe, *abſque hoc*, that the defendant uſurped the office. The crown in its replication taking no notice of the ſpecial title ſet forth by the defendant, joined iſſue on the traverſe *that he uſurped, &c.* and thereon demurrer was joined.

Parker, Chief Juſtice. The queſtion turns on this point, whether the traverſe be only matter of form? If ſo, the crown cannot take iſſue on it; but if it be a material part of the plea, moſt certainly the crown may do it.

The defendant's council argued, that if the crown had a right to join iſſue on the traverſe, yet the iſſue was here ill joined; becauſe not joined in the words of the traverſe, but more narrow and reſtrictive.

The *information* charges the defendant with uſing the office, liberties and privileges, franchiſes, *&c.* of *portreeve* of the town of *Honiton*, and the traverſe is taken in words as general and comprehenſive as the charge; but the iſſue taken on the traverſe is *abſque hoc*, that he uſurped the office generally. Now a man may uſurp the office, and not uſurp all the privileges, *&c.* belonging to that office.

As to the main queſtion, which was, whether the crown was at liberty to take iſſue on the traverſe, or not; the only precedent alledged in behalf of the power of the crown, was that of *The Queen* v. *Walcourt*, *Hil.* 23 *Eliz.* and there the queſtion never received any judicial determination, becauſe the defendant died.

To the objection, that in an *information* of *intruſion*, the King may take iſſue on the uſurpation, though a title be ſet forth; he anſwered, that an *information* of *intruſion* was of a different nature from this, becauſe it does not follow from his having a title, that he is no intruder; but it does that he is no uſurper.

The courſe of precedents is ſo in an *intruſion*; but otherwiſe in this kind of *information*; which is a preſumptive agreement that there is a difference.

Then he argued, that the allowing the crown to join iſſue on this traverſe, in their replication, would be inconvenient to the crown, inconvenient to the party, and inconvenient to the court.

As to the objection made by the Attorney General, that no prerogative of the crown is here inſiſted on, but only a right common to every ſubject, it is enough to anſwer, that the Attorney General would not be content in this caſe, to be bound down by the ſame rules of pleading that the ſubject is; the ſubject could not have avoided taking the iſſue, but no one will ſay the crown was bound to do this.

In the laſt place he inſiſted, that the defendant by ſetting forth his title, had anſwered the whole charge of the *information*, which was for him to ſhew *quo warranto, &c.*

Per curiam. We are unanimouſly of opinion, that the defendant muſt have judgment. *Vide Mod. Rep. vol.* 10. *p.* 211, 296.

Michaelmas, 4 *Geo.* *The King* v. *Lewis.*

An *information* was moved for againſt a clergyman, for perjury at his admiſſion to a living, on an *affidavit* that the preſentation was *ſimoniacal*; but the court refuſed to grant it, till he had been convicted of the *Simony.* *Vide Strange, vol.* 1. *p.* 70.

Eaſter, 5 *Geo.* *The King* v. *The Inhabitants of the City of Norwich.*

An *information*, for not repairing *three public bridges* lying within the county of the city of *Norwich*, leading from the *Market Croſs* to *Ipſwich*, ſet out that they are out of repair, and that it cannot be found that any perſon or body politic is bound by *tenure* or otherwiſe to repair them, and therefore the inhabitants of the county of the city are bound by the ſtatute; notwithſtanding which they have not repaired them, but ſuffer them to continue in decay.

Not guilty was pleaded by two of the inhabitants of the city and county of the city, in the name of all the reſt; and the record then takes notice by way of ſuggeſtion, that the queſtion, *&c.* is between the citizens of *Norwich* and the inhabitants of the county of *Norfolk*, and they being intereſted, there can be no indifferent trial had there, and *Suffolk* being the next county, the *venire* is awarded thither: and on the trial, the jury gave a ſpecial verdict, *viz.*

That the city of *Norwich* is an ancient city, and has been time out of mind a county of itſelf, diſtinct from the county of *Norfolk*: that the *three bridges* were at the time of making *ſtat.* 22 *H.* 8. *c.* 5 within the county of *Norfolk*, and not within the county of the city of *Norwich*: that *Philip & Mary*, *April* 1, 1555, reciting the many inconveniences which had happened by not knowing the true bounds and limits of the county of the city, ſevered ſuch an extent of ground from the county of *Norfolk*, and annexed it to the city. That the *three bridges* are within the annexed boundaries, which are made to extend *as far as Harford Bridge*, which is the fartheſt of the three: that they are *public bridges*, and no particular perſon is bound to repair them: that they are out of repair; but whether the inhabitants of the county in the city are bound to repair them, is the doubt of the jury, on which they pray the advice of the court, *&c.*

Pratt, C. J. They who are not chargeable of common right, may diſcharge themſelves on *not guilty*; and if ſo, the trial was well in *Suffolk*. If they could only give repairs in evidence, then it ought to have been in *Norfolk*. There is no doubt but the *information* lies in this caſe; and as to the appearance, we may take them to be the ſame perſons. It ſeems to be true, that the fartheſt *bridge* is included, for it extends *to the exterior part of the river*. There is nothing in that notion about diſtinguiſhing between juriſdiction and charge, for certainly both muſt go together.

Eyre, Juſtice, inclined that the trial was right in *Suffolk* on the diſtinction taken by the council; but the matter was adjourned for further argument.

At another day, the following *exceptions* to the *information* and trial were ſpoke to, and fully argued: 1ſt. That no *information* lies in *B. R.* becauſe *ſtat.* 22 *H.* 8. gives the juriſdiction to four juſtices.

2dly. This cannot be taken to be an *information* at *common law*, becauſe it ſays, that the defendants *ought to repair by virtue*, &c. and concludes *againſt the form of the ſtatute.*

3dly. The *information* is againſt the inhabitants of the county of the city only, and the appearance for thoſe of the city only. With reſpect to the ſpecial verdict, two doubts were raiſed.

1ſt. Whether theſe *bridges* are within the annexed, boundaries, for the defendants ſay, that *as far as* being *the bound to which*, and the word *from* being *the bound from which, all the bridges are excluded.*

2dly. Here is a miſ-trial, for on *not guilty* pleaded, the defendants could give nothing in evidence but that the *bridges* are in repair, and therefore the trial ſhould have been in *Norfolk.*

The whole court were unanimous for the King on all the points, but the miſ-trial. To which *Powys* and *Eyre*, Juſtices, were of opinion it was well in *Suffolk*, for the queſtion naturally ariſes, whether the *bridges* are in *Norfolk* or *Norwich*; and the reſult of that is, that either the one or the other is bound to repair; and on *not guilty*, puts all in iſſue: there was no other way to make this appear on record but by ſuggeſtion, which not being denied, it is as well as if it had appeared by ſpecial pleading. And it ſhall not be in the power of the defendants to diſappoint the King of a proper trial by their refuſing to plead ſpecially.

Forteſcue, Juſtice, thought the right ought not to be tried on this iſſue. *But the matter was adjourned.*

Afterwards, the cauſe being ſpoke to on the ſingle queſtion of the miſ-trial. The Chief Juſtice delivered his opinion as follows:

Since it is admitted, the ſituation may come in queſtion; that will by way of conſequence determine the other point, who ought to repair? And therefore the trial could not be in *Norfolk*. The matter of law in the ſuggeſtion ariſes neceſſarily out of the matter of fact, and without it, would not be compleat. To which *Powys*, Juſtice, agreed.

Eyre, Juſtice. On *not guilty* pleaded, the defendant may controvert every thing the proſecutor is bound to prove. He is bound to prove where the *bridges* lie, and therefore *Norfolk* was an improper county. If a man would diſcharge himſelf on a particular account, he muſt plead it ſpecially; but not where the common right is his defence. If a man is charged to repair *by reaſon of the tenure*, he may throw it on the pariſh by the general iſſue. The ſame ſuggeſtion was made in Sir *Richard Onſlow*'s caſe, and no exception taken. There is judgment entered in that caſe of *Hornſey*, *Eaſter* 2 *W.* & *M. Rol.* 31. and in the debate, as I find in my notes,

Holt, Chief Juſtice, ſaid, the defendants might ſhew it not to be a *highway*.

Forteſcue, Juſtice, thought, parcel or not parcel could not be given in evidence on *not guilty*. *Mod.* 1. 112.

Hale, Chief Juſtice, ſaid, *not guilty* goes only to the repair or not; ſo that as to all other queſtions, the defendant muſt plead ſpecially.

And *Parker*, Chief Juſtice held ſo, *Michaelmas* 10 *Ann.* There being *three* judges to one, Judgment was given for the King. *Vide Stra. vol.* 1. *p.* 177.

Trinity, 5 *Geo.* *The King* v. *Nixon.*

The court refuſed to quaſh an *information* on motion, which had been exhibited by rule of court: *Eyre*, Juſtice, obſerving, that ſuch *informations* are amendable. 1 *Sid.* 152. 54. *Vide Strange, vol.* 1. *p.* 185.

Michaelmas, 5 *Geo.* *The King* v. *The Mayor of Taunton, in the County of Somerſet.*

See this caſe fully ſtated in page 295 of this work, under the head *Corporations*.

Michaelmas, 7 *Geo.* *The King* v. *Drew.*

The defendant was brought up on an *hab. corp.* from the *Savoy*, to which it was returned, that for ſeveral years laſt paſt, the *African* company have been a body corporate, and retained the defendant in their ſervice, and ſent him to the *Savoy*, to be provided for with neceſſaries, till he ſhould embark for *Africa*, *and this is the cauſe*, &c. The court diſcharged the defendant for the inſufficiency of the return, and ordered an *information* againſt the colonel, who inliſted the men, and the keepers of the *Savoy*. *Vide Strange, vol.* 1. *p.* 404.

Hilary, 8 *Geo.* *The King* v. *Bickerton.*

On a motion for an *information* for a *libel* in advertiſing that one *Madox*, an apothecary, had perſonated one Dr. *Crow*, a phyſician, and wrote and took his *fee*, (which the apothecary did not pretend to deny,) the Chief Juſtice declared, that though truth be no juſtification for a *libel*, as it is for defamatory words, yet it will be ſufficient cauſe to prevent the interpoſition of the court in this extraordinary manner, and induce them to leave it to the ordinary courſe of juſtice before a grand jury. Whereon the rule for an *information* was diſcharged. *Vide Strange, vol.* 1. *p.* 498.

Eaſter, 8 *Geo.* *The King* v. *Okey.*

On a motion to file an *information* againſt the defendant (who was a juſtice of peace) for ſending the proſecutor to the houſe of correction without ſufficient cauſe; the rule was, that he ſhould ſhew cauſe on ſuch a day, why the *information* ſhould not be filed; and now he ſhewed for cauſe, that the proſecutor was ſervant to *L. R.* who complained to the defendant, that his ſaid ſervant was ſaucy, and gave his (the maſter's) horſes too much corn.

The court held this not ſufficient cauſe to ſend a man to the houſe of correction; ſo leave was given by the court to file an *information* againſt the juſtice of peace. *Vide Mod. Rep. vol.* 8. *p.* 46.

Trinity, 8 *Geo.* *The King* v. *The Mayor and Burgeſſes of Malmſbury.*

On a motion for leave to file an *information* againſt the defendants, on an *affidavit* of the town clerk of *Malmſbury*, for that one *Gawen Hart* of the ſaid borough of *Malmſbury*, was admitted to be a capital burgeſs thereof in 1714, and had not taken the oaths of *abjuration* and *ſupremacy*, when he was admitted: a rule was made for the defendants to ſhew cauſe why an *information* in return of a *quo warranto* ſhould not be filed, and the defendants produced ſeveral *affidavits*, by which it appeared, that the ſaid *Hart* did take all the oaths that were tendered to him at that time, when he was admitted to be a capital burgeſs; and alſo, that he had taken the oaths of *abjuration* and *ſupremacy* in ſome ſhort time afterwards, at a quarter ſeſſions held in *Wiltſhire*, and he himſelf made *affidavit*, that he believed he had taken all the oaths requiſite for him to take at the time of the election.

Pratt, Chief Juſtice. If he did not take the oaths at the time of his admiſſion to be a capital burgeſs, he is not qualified to be a burgeſs, and the length of time, wherein he continued to be ſo, will not obſtruct the filing an *information* againſt him, but then after ſo long a time, there ought to be a clear proof of his *wilful refuſal, or voluntary neglect to take the oaths*; but certainly an *information* ought not to be granted on the oath of the town clerk himſelf, becauſe it was his fault that *Hart* did not take the oaths; and it was likewiſe his duty to diſcover the not taking them, which he had not done for ſo many years together, therefore that length of time ſhall gain a preſumption in his favour, eſpecially when by other *affidavits* it is proved, that he took all the oaths, which he believed to be requiſite for him to take at the time of his election.

If the *Crown* pleaſes, an *information* may be filed in the name of the Attorney General, but we cannot file any, but on probable cauſe; and none appearing here, the rule muſt be diſcharged.

Powys and *Eyre*, Juſtices, were of the ſame opinion.

Forteſcue, Juſtice. The probability of the evidence is ſo much of the defendant's ſide, that if I was to be a juror in this cauſe, I ſhould acquit him.

In the caſe of the *The Queen* v. *Jefferies* concerning the borough of *Bridgwater*, he took the oath of allegiance *three* days after his admiſſion, for which an *information* was prayed, but denied; and he was reelected. After *eight* years we ought not to put the defendant to a trial to prove that he took the oath of allegiance at a proper time. It has been held, that no tender of oath is neceſſary, contrary to 2 *Leo.* 242, 243. So the *information* was not granted, but the rule was diſcharged. *Vide Mod. Rep. vol.* 8. *p.* 55.

Hilary, 9 *Geo.* *The King* v. *The Inhabitants of Surry.*

See this caſe fully ſtated in page 517 of this work, under the head *Highways*, &c.

Eaſter, 10 *Geo.* *The King* v. *Green.* *Idem* v. *Rooper.*

Informations were granted for *perjury* on the trial of an *information* for a *conſpiracy*; and all the parties proſecuted agreeing, the court on conſent arreſted the judgment on the *conſpiracy*, and quaſhed the *two other informations*. *Which note*, for it has not been uſual ſo to do, whereby ſuch proſecutions are ſtifled, and the Attorney General never grants a *nolle proſequi* in ſuch caſes, though by conſent. *Vide Strange, vol.* 2. *page* 1072.

Trinity, 10 *Geo.* *The King* v. *Sir Charles Holloway.*

The court was moved for leave to file an *information* againſt the defendant, who was about *fifteen* years old, and a ſcholar at *Wincheſter* ſchool, for aſſaulting, beating, and challenging one *Eyes* a clergyman, who was then *ſecond* maſter of that ſchool, for no other cauſe, but that the ſaid ſchool-maſter reproved the defendant for ſomething he had done at ſchool.

A rule was made for the defendant to ſhew cauſe. *Vide Mod. Rep. vol.* 8. *p.* 283.

Michaelmas, 10 *Geo. The King* v. *The Mayor of Tiverton.*

See this caſe fully ſtated in page 297 of this work, under the head *Corporations.*

Michaelmas, 10 *Geo. Anonymous.*

See this caſe fully ſtated in page 501 of this work, under the head *Gaming.*

Eaſter, 11 *Geo. The King* v. *Butler.*

The caſe was, one *Hunt* was bailiff of the corporation of *Whitchurch* in *Hampſhire* in the year 1722, at which time *Batchelor* was choſen Mayor by the jurors ſummoned by the ſaid *Hunt*; and then the Mayor continued *Hunt* bailiff for the next year, *viz.* for the year 1723, being the year of his Mayoralty.

Thereon *an information in nature of a quo warranto* was granted againſt the Mayor and *Hunt*, ſuggeſting that no man could be Mayor or bailiff there who was *non-reſident*, and choſen by *non reſidents*, and therefore had uſurped a franchiſe.

And at the trial a verdict was found for the Mayor, that he was an inhabitant reſident; and againſt *Hunt*, that he was *non-reſident*; thereon the Mayor named one *Page* to be bailiff.

And now the queſtion was, whether the Mayor could name a new bailiff, or whether one *Neeve*, who was bailiff before this Mayor was elected, ſhould continue bailiff, becauſe by the conſtitution of this corporation, a bailiff duly choſen is to continue in his office for *one year*, and *till another is duly choſen*; and *Hunt* was never duly choſen, becauſe he was *non reſident?* And this being a controverted point, another *information*, &c. was granted to try it.

Per curiam. *Informations in nature of a quo warranto* may be brought *(with leave of the court)* at the relation of any perſon deſiring to proſecute; and this is by virtue of *ſtat.* 9 *Ann*, the intent of which ſtatute was, to prevent frivolous and vexatious controverſies, and therefore *informations* were not to be filed without leave of the court; but the queſtion in this caſe ſeemed doubtful, and ſince it is controverted it ought to be tried. *Vide Mod. Rep. vol.* 8. *p.* 351.

Eaſter, 11 *Geo. The King* v. *Tuck or Tucke.*

See this caſe fully ſtated in page 285 of this work, under the head *Conviction.*

Michaelmas, 11 *Geo. The King* v. *Nicholls.*

A motion was made for leave to file an *information* againſt the defendant, who was Mayor of *Stafford*, and a juſtice of peace, for his neglect of public juſtice, in denying a warrant to the proſecutor, who was beaten by one *T. S.* A rule was made to ſhew cauſe, *&c.*

It was now moved to diſcharge that rule, becauſe the Mayor had ſeveral people then before him to be examined concerning a riot which happened on that day; and it being late at night, he deſired them to come the next day, which is the denial of which the proſecutor now complained. So the rule was thereon diſcharged, becauſe the Mayor had done what juſtice he could; and the intent of the procuring this rule was to bring him into diſgrace, and to influence the corporation againſt him; wherefore the proſecutor was ordered to pay the coſts of the motion. *Vide Mod. Rep. vol.* 8. *p.* 337.

Michaelmas, 11 *Geo. The King* v. *Edwards.*

On a motion for an *information* againſt the *Overſeers of the poor* of the pariſh of *Wadhurſt*, for removing a poor woman who had the *ſmall-pox* into another pariſh, and againſt her will, from the pariſh of *Wadhurſt*, where ſhe was an inhabitant; the ſeſſions refuſing to give any relief.

Per curiam. Where a perſon is viſited with ſickneſs, by the act of God, he ought not to be removed from the place where he is ſick, farther to endanger his health, without an order of *two* juſtices; and if ſuch order is made by the juſtices, knowing him to be ſick, an *information* ſhall go againſt them; thereon a rule was made againſt the Overſeers to ſhew cauſe, *&c.*

And on another day they came to ſhew cauſe, *&c.* and denied the fact alledged againſt them; and moved that the rule might be diſcharged, for otherwiſe this woman, who was really ſettled in that pariſh to which ſhe was removed, would on the trial of this *information* be evidence againſt the pariſh of *Wadhurſt*, and gain a ſettlement there.

But the court were of opinion that the fact being controverted, and carrying ſuch a barbarity with it, it is requiſite that it ſhould be tried on an *information*; and then the judges would be judges of the truth. *Vide Mod. Rep. vol.* 8. *p.* 326.

Michaelmas, 11 *Geo. The King* v. *The Mayor of Monmouth.*

A motion was made for leave to file an *information* againſt the defendant for beating the *informer*, who gave no other provocation than ſaying to him, who kept an ale houſe, *Mr. Mayor, draw me a pot of drink*; but it being the laſt day of the term but one, the court would make no rule to hang over a magiſtrate's head a whole vacation, ſo ordered it to be moved the next term, if they thought fit. *Vide Mod. Rep. vol.* 8. *page* 337.

Michaelmas, 11 *Geo. The King* v. *Brereton.*

On a motion in arreſt of judgment on an *information* brought for a *libel* laid in the city of *Cheſter*, which being a *local offence*, and iſſue joined in this court, could not be tried there, but in the *county of the city.*

The council for the plaintiff took the following exceptions:

1ſt. That it appears by the record that the day is appointed by the Mayor; which is therefore void, becauſe it was done without authority; for the writ from the Chamberlain to the Mayor (after iſſue tried) commands the Mayor to ſend the record back to the Chamberlain for him to appoint a day for the appearance of the parties, in order for their receiving judgment.

2dly. That it does not appear that the Chamberlain of the County Palatine of *Cheſter* is Chamberlain of the city of *Cheſter*.

Then as to the *information*, the fact is laid very uncertain, for it is, that the defendant *wrote, made, and publiſhed*, or cauſed *to be wrote and publiſhed*, which is very uncertain, and no proper defence can be made, becauſe it is in the *disjunctive*; ſo where a judgment was for *making, or cauſing to be made*, a bill of lading, this was held ill, becauſe in the *disjunctive*.

Then it ſets forth, that the defendant wrote *a certain libel, in which theſe ſcandalous words were contained*, ſetting forth ſome words, but not the whole pamphlet, which he ſhould have done, or averred, that there were no words in it to qualify thoſe which were uncertain.

Per curiam. As to the *firſt* and *ſecond exceptions*, if the precedents are ſo, we cannot vary now: the city is part of the County Palatine.

As to the *third exception*; *writing*, and *cauſing to be wrote*, are two different acts: and no *information* is like this. On *ſtat. H.* 6. an indictment for erecting a *cottage* or *tenement*, is ill; as to the indictment on *ſtat.* 5. *Eliz. cap.* 4. it is good, becauſe that is not the charge. If the crimes were the ſame, yet the indictment ought to be certain.

4thly. The *information* is good, notwithſtanding this exception. However, the matter was adjourned. *Vide Mod. Rep. vol.* 8. *p.* 328.

Eaſter, 4 *Geo.* 2. *The King* v. *Lady Lawley.*

See this caſe fully ſtated in page 157 of this work, under the head *Averment.*

Trinity, 5 *Geo.* 2. *The King* v. *Clendon.*

An *information* was laid for an *aſſault* in *Middleſex*, and the court refuſed to amend it by laying it in *London. Vide Stra. vol.* 2. *p.* 911.

Michaelmas, 5 *Geo.* 2. *The King* v. *Baxter.*

On a motion for an *information*, the court refuſed to grant it, becauſe it appeared that the facts were committed on the high-ſeas, and an *information* is *local.* 3 *Keb.* 603. 799. *Salk.* 174. *Keyling* 79. *Hilary*, 7 *Geo.* 2. *The King* v. *Hooper*, where an *information* was denied for a *Battery* in *Newfoundland. Vide Stra. vol.* 2. *p.* 918.

Michaelmas, 7 *Geo.* 2: *The King* v. *Jocamb.*

The court held, that a *qui tam information* is not to be quaſhed on motion. *Vide Stra. vol.* 2. *p.* 953.

Eaſter, 8 *Geo.* 2. *The King* v. *Neal.*

An *information* in nature of a *quo warranto* againſt the defendant for exerciſing the office of maſter of the *coopers company*, ſet forth, that there is a company of Coopers, and that the maſter thereof is an officer of public truſt, and that the defendant took on him to execute that office, *&c.*

The defendant demurred to the *information*, and there was a joinder in demurrer.

On which the defendant's council took the following exception, *viz.* that this is not a public office for which a *quo warranto* lies.

Lord *Hardwicke.* But how can we allow of that exception now, ſince the *information* lays it to be a public office of truſt, which you have confeſſed by your demurrer. So judgment was given for the King. *Vide Caſes Temp. Lord Hardw. p.* 106.

Trinity, 8 *Geo.* 2. *Moravia's Caſe.*

See this caſe fully ſtated in page 319 of this work, under the head *Courts.*

Trinity, 8 *Geo.* 2. *The King* v. *Angell.*

The juſtices of *Berks* had a *petty ſeſſions* to ſearch after vagrants, and a poor man reſiding in the pariſh of *Bingfield* being examined, confeſſed himſelf to be ſettled in the pariſh of *Sunning*, whereon the juſtices ordered him to be removed to *Sunning*; but the *pauper* threatened to return, and he returned the ſame day to *Bingfield*, pretending to be an hired ſervant to a pariſhioner of *Bingfield*, (but the court were ſtrongly inclined now, on the circumſtances of the hiring being diſcloſed on the *affidavits*, to think it a colourable hiring) whereon the defendant, who was a juſtice of peace for *Berks*, and was preſent at the *petty ſeſſions*, without any ſummons, or oath made of his return, committed the *pauper* to the houſe of correction, where he was kept *three days*; and on this the court was moved to grant an *information* againſt the defendant. The court allowed the proceedings of the *petty ſeſſions* in this caſe to be irregular, becauſe there was no complaint made of his being chargeable, or likely to become chargeable to the pariſh of *Bingfield*; but yet as that was only a miſtake of judgment, the court would not have thought it worthy of puniſhment, but the ſending him to the houſe of correction was puniſhing him, after having convicted him unheard, and that is contrary to natural juſtice, and therefore, on the authority of the caſe of the juſtices of *Hertford*, they were for granting the *information*, but as no malice appeared in the juſtice, the court allowed the proſecutor to accept of ſome propoſals made by the juſtice, to make him amends, and ſo it went off. *Vide Caſes Temp. Lord Hardw. p.* 124.

Michaelmas, 8 *Geo.* 2. *The King* v. *Robe.*

An *information* was filed againſt the defendant for ſeveral illegal exactions in his office of *clerk of the market*, and there were ſeveral counts ſpecifying ſums taken of particular perſons; on all which diſtinct charges the defendant was acquitted: but at the cloſe of the *information*, there was a general charge, of which he was found *guilty*, *viz.* that under colour of his ſaid office, he did illegally cauſe his agents to demand and receive of *ſeveral other perſons*, *ſeveral other ſums of money*, on pretence of weighing and examining their ſeveral weights and meaſures. Exception was taken, that this was ſo general a charge, that it is impoſſible that any man can prepare to defend himſelf on this proſecution, or have the benefit of pleading it in *bar* to any other: and for this fault judgment was arreſted. *Vide Stra. vol.* 2. *p.* 999.

Hilary, 9 *Geo.* 2. *The King* v. *Green.*

An *information* was filed againſt the defendant by the Attorney General for a *riot*, which contained *two hundred* ſheets of paper.

The defendant's council moved, that the unneceſſary counts might be ſtruck out, or that it might be referred to the maſter, for it being an *information* filed by the Attorney General, by the rules of the court it cannot be quaſhed, but the party is put to demur.

Lord *Hardwicke.* Your way ſhould be, to apply to the Attorney General, and he will do it to be ſure.

To which the defendant's council anſwered, we have applied, and he refuſes, and ſays he has a right to put in what counts he pleaſes.

Lord *Hardwicke.* Well, we will read it over, ſo mention it again in a day or two.

And afterwards, at another day, he ſaid, we find no inſtance of ſuch a motion, but we think there ſhould be an application to the Attorney General for a ſummons to the proſecutor's attorney, to ſhew cauſe why they ſhould not be ſtruck out, and then I dare ſay Mr. Attorney will do what is proper. *Vide Caſes Temp. Lord Hardw. p.* 209.

Eaſter, 9 *Geo.* 2. *The King* v. *Morgan.*

On an *information in nature of a quo warranto*, for uſurping the office of a burgeſs of *Cardiffe*, a recognizance was taken as on *ſtat.* 4 *&* 5 *W. & M. c.* 18. and not being tried within the year, the court was moved for coſts againſt the proſecutor; which was oppoſed, on pretence that theſe *informations* were not within the act, which ſpeaks only of *treſpaſſes*, *batteries*, and other miſdemeanors.

Per curiam. An *uſurpation* is a miſdemeanor, and the practice of taking recognizances is the beſt expoſitor. Beſides, this has been determined in *Salk.* 376. But as here has been no verdict or judgment, it muſt not be coſts generally as on *ſtat.* 9 *Ann c.* 20. but reſtrained to 20*l.* as on *ſtat.* 4 *&* 5 *W. & M. Vide Stra. vol.* 2. *p.* 1042.

Eaſter, 9 *Geo.* 2. *Ibbotſon's Caſe.*

The court was moved for an *information in nature of a quo warranto* againſt one *Ibbotſon*, for making a warren for rabbits.

Lord *Hardwicke.* We do indeed grant theſe *informations* for public uſurpations on the crown, but never for public uſurpations of franchiſes; but the way is, to apply to the Attorney General in ſuch caſes. I remember in Lord *Barrington's* caſe, when I was Attorney General, who had ſet up a fair, the court refuſed it, and directed an application to the Attorney General, which they did accordingly, and I granted it: but I would not by this be underſtood to give an opinion that a *quo warranto* lies for this, as if it was a free warren. *Vide Caſes Temp. Lord Hardw. p.* 261.

Eaſter, 9 *Geo.* 2. *The King* v. *Howell.*

See this caſe fully ſtated in page 311 of this work, under the head *Coſts*.

Eaſter, 9 *Geo.* 2. *The King* v. *Con. Phillips, and others.*

See the caſe of *Cox* v. *Phillips* in page 282 of this work, under the head *Contempt*.

The court was moved on ſeveral *affidavits* for an *information* againſt the defendant for ſubordination of *perjury*, in a cauſe in the *Eccleſiaſtical Court*; but on ſhewing cauſe, the council for the proſecutor did not inſiſt on charging that offence, becauſe it did not appear that any perjury had been committed; but urged, that there was a ſufficient ground for an *information* for an attempt to ſuborn the witneſſes, or for an attempt to *extort* money from the proſecutor.

Lord *Hardwicke*. As to the ſubornation of perjury, it has been rightly given up, no perjury appearing; as to the attempt to ſuborn, to be ſure there may be an *information* for that; and here, though there are contradictory *affidavits*; but in this caſe I am of opinion not to do it, becauſe of the civil ſuit which is now depending. But yet I do not lay it down as a rule, that the court will not grant an *information* for *perjury* pending a civil ſuit, for if the perjury appears very plain to the court, they may, but only where there is ſuch a contradiction of the charge as to make it doubtful, as in this caſe. As to the conſpiracy, that may be an offence, though the cauſe before the *delegates* ſhould be a juſt cauſe, it being made uſe of in order to extort money; but in this caſe the conſpiracy, if not plainly denied, is at laſt doubtful, and was not the point of the application, but only reſorted to now, but even this part of the caſe is very uncertain; though I think this rule ought to be diſcharged, yet I do it on this ſingle reaſon, becauſe there is a civil ſuit now depending, and not becauſe I think the parties innocent, and do therefore think that the proſecutor, on a final end of the ſuit before the *delegates*, or a deſertion of the cauſe, may be at liberty to make another application.

The whole court concurred with the Chief Juſtice, and on that ſingle ground the rule was diſcharged. *Vide Caſes Temp. Lord Hardw. p.* 241.

Michaelmas, 9 *Geo.* 2. *The King* v. *The Overſeers of the Poor of the Town of Spotland.*

A *mandamus* was iſſued to the defendants to make a rate for the poor, who returned, that there were *two* townſhips, *Further Spotland* and *Nearer Spotland*; and that overſeers are appointed for the townſhip of *Further Spotland*; and that the inhabitants have made a rate, and provided for their poor; and on this return, on behalf of the townſhip of *Nearer Spotland*, an *information* was moved for againſt the defendants as for a falſe return; for the queſtion is, between the *two* places, whether they ſhall join in the maintenance of the poor as one pariſh or townſhip, or not; there being many in *Nearer Spotland*, and very few in the other; and therefore *Nearer Spotland* alledged that they were not diſtinct, but one and the ſame townſhip, which now on ſhewing cauſe was denied by *Further Spotland*; and they offered to try it in a feigned iſſue.

Lord *Hardwicke*. If this had been a *mandamus* on *ſtat.* 9 *Ann, c.* 20. the return might have been traverſed; or had it been a *mandamus* concerning ſome private right, the party might have had an action for a falſe return; and ſo a peremptory *mandamus*, if the return had been wrong: but here there cannot be an action for a falſe return, becauſe no one is particularly intereſted, ſo there is no remedy but an *information*, and there being a direct contrariety in the *affidavits*, it is the courſe of the court to grant an *information* to try the fact.

Per curiam. Let the *information* go. *Vide Caſes Temp. Lord Hard. p.* 184.

Michaelmas, 9 *Geo.* 2. *The King* v. *James.*

See this caſe fully ſtated in page 311 of this work, under the head *Coſts*.

Hilary, 12 *Geo.* 2. *The King* v. *Lord Oſſulſton, et al.*

On a motion for an *information*, it appeared that the defendants contrived to get a young lady out of the cuſtody of her guardian, aſſigned in *Chancery*, and marry her, and that a coach, *&c.* was prepared, into which ſhe voluntarily went, and was carried into *Suſſex*, and there married.

And the court granted an *information*; though in 4 *Mod.* 144. it is ſaid not to be an offence at *common law*, for they ſaid it was certainly a *conſpiracy*; and 1 *Sid.* 387. 1 *Lev.* 257. and 2 *Mod.* 130. are in point. Beſides, they inclined, that though ſhe went voluntarily, yet it was a taking and conveying of her within the meaning of *ſect.* 3. *ſtat.* 4 *P. & M. c.* 8. which in caſe of her conſenting, lays a penalty on her.

In this caſe it appeared, the court of *Chancery* had committed the defendants for a contempt; but the court granted the *information* notwithſtanding, and the Attorney General refuſed a *nolle proſequi*. *Vide Stra. vol.* 2. *p.* 1107.

Michaelmas, 12 *Geo.* 2. *Garland, qui tam* v. *Burton.*

An *information* was brought at the aſſizes on *ſtat.* 21 *H.* 8. *c.* 13. againſt the defendant for non-reſidence: and the action is thereby given to him that will ſue in any of the King's courts by bill, plaint, or *information*, in which no *eſſoign* is to be allowed. And on demurrer, the court held, that it would not lie at the aſſizes, but muſt be brought in this court, according to *Cro. Car.* 112. 146. *Het.* 101. Sir *W. Jones* 198. *Hutt.* 98. For *ſtat.* 21 *Jac.* 1. *c.* 17. never intended to give a new juriſdiction to the aſſizes in caſes where they had it not before. *Salk.* 373. And it was ſaid that the cauſe of *Farthing, qui tam*, v. *Markham, Michaelmas*, 13 *Geo.* was never argued, but the rule was only to ſhew cauſe, and the matter never ſtirred again.

N. B. Before any demurrer, there was a rule to ſhew cauſe why the *information* ſhould not be quaſhed, but the court refuſed to enter into the conſideration of it on ſuch a motion.

In *Michaelmas* term, 13 *Geo.* 2. the court made a rule on *ſtat.* 18 *Eliz. c.* 5. for the proſecutor to pay coſts, though this was not a judgment on the merits. *Vide Strange, vol.* 2. *p.* 1103.

Eaſter, 13 *Geo.* 2. *The King* v. *Woodfall.*

See this caſe fully ſtated in page 312 of this work, under the head *Coſts*.

Eaſter, 13 *Geo.* 2. *The King* v. *Ford.*

The court was moved for an *information* againſt a churchwarden, for refuſing to collect money on a brief for fire, according to *ſtat.* 4 *Ann. c.* 14. and the caſe of an *information* granted for not burying in woollen was cited.

Per curiam. That is of a public nature, and wherein the revenue is concerned; and beſides in this caſe, there is a penalty given, and a method for obtaining it. So no rule was made. *Vide Strange, vol.* 2. *p.* 1130.

Hilary, 16 *Geo.* 2. *The King* v. *Thomas Sergiſon, Eſq.*

An *information* was moved for againſt the defendant, being *coroner* of the county, for not condemning an horſe taken out of a team, on *ſtat.* 5 *Geo. c.* 12. which requires proof to be made before a juſtice, of the cauſe of forfeiture; and the party who ſeized tendering his own oath, the defendant ſcrupled to take it, or determine the affair, in the abſence of the owner or driver.

Per curiam. They are both reaſonable objections, why is not the perſon who ſeized, and is to have the benefit of the forfeiture, within the reaſon of excluding *informers* where there is a penalty? *Making proof* muſt mean *legal proof*. The other alſo is but natural juſtice. There are exceptions in the act as to *one* ſtone, or *one* piece of timber, though drawn by ever ſo many horſes; and ought not the owner to have an opportunity of ſhewing it? The rule was therefore diſcharged with coſts. *Vide Strange, vol.* 2. *p.* 1181.

Trinity, 16 *Geo.* 2. *The King* v. *Groſvenor.*

The defendant who was a diſſenter, was choſen ſheriff of *London* and *Middleſex*, but refuſed to take that office on him; on which an *information* was moved for againſt him, for which it was urged, that it was an office in which the public are intereſted, and therefore not to be compenſated by a pecuniary ſatisfaction to the city. But on ſhewing cauſe the court diſcharged the rule, it appearing, that there were acts of *common council* that had provided penalties on refuſers, which is the proper remedy; eſpecially where it is in *doubt*, whether the refuſal is a crime or not, which has never yet been ſettled. In this caſe the facts are agreed, and the only doubt is in point of law; and therefore more proper for a civil ſuit, and ſo was the opinion of the court in the caſe of *Shakleton* of *York*, in Lord *Hardwicke*'s time. However, they declared, that if after the point was determined againſt the diſſenters, others ſhould refuſe, it might be a foundation to aſk for an *information*. *Vide Strange*, *vol.* 2. *p.* 1193.

Trinity, 18 *Geo.* 2. *The King* v. *Hendricks.*

By *ſtat.* 12 *Ann. c.* 16. the *treble value* is recoverable on an *uſurious contract*, *viz.* one moiety to the crown, and the other to him that will ſue for the ſame. By *ſtat.* 31 *Eliz. c.* 5. *ſect.* 5. the *common informer* is limited to a year after the offence is committed, and if no ſuch ſuit is brought within the year, then the crown may ſue at any time within *two* years, after the end of the firſt year.

In this caſe the year was expired; but within the other *two* years, the court was moved on proper *affidavits* for an *information*, and a rule was obtained to ſhew cauſe; but the court afterwards diſcharged it, being of opinion, that it was a matter left to the diſcretion of the crown, which the court had not power to exerciſe: and there never was an inſtance where, for a penalty veſted in the crown only, this court ever granted an *information*; but they are always filed by the Attorney General, who is the proper officer in thoſe caſes. *Vide Strange*, *vol.* 2. *p.* 1234.

Eaſter, 30 *Geo.* 2. *The King* v. *Joſeph Chaplin Hankey*, *Eſq.*

On a motion to ſhew cauſe why an *information* ſhould not go againſt the defendant, at the inſtance of one *Ralph Carr*, an attorney, for ſending him a challenge;

After hearing the *affidavits* made by the parties, and the letters that paſſed between them,

The court held, that though the defendant had *behaved very improperly*, and though it would have been right for the court to have granted even *croſs informations* in caſe each party had applied for an *information* againſt the other; yet they thought that when the *aggreſſor* who gave the *firſt* challenge, came and applied for an *information* againſt the other, who *only accepted it*, (however improperly and unlawfully) it was a very different caſe; and that the court had no reaſon to give him this *extraordinary remedy* by way of *information*, but ought rather to leave him to his *ordinary remedy* by action or by indictment.

Per curiam. Let the rule to ſhew cauſe why an *information* ſhould not be granted, be diſcharged. *Vide Bur.* *vol.* 1. *p.* 316.

Trinity 30 & 31 *Geo.* 2. *The King* v. *Goddard Williams.*

See this caſe fully ſtated in page 545 of this work, under the head *Indictment.*

Trinity, 30 & 31 *Geo.* 2. *Ball*, *qui tam*, v. *Cobus.*

On ſhewing cauſe againſt quaſhing an *information*, *qui tam*, for exerciſing the trade of a baker in the pariſh of *Speldhurſt* in *Kent*, not having ſerved an apprenticeſhip thereto, contrary to *ſtat.* 5 *Eliz. cap.* 4.

The following objections were taken to the *information*.

1ſt, “ It does not appear whether *Speldhurſt* is a “ *city*, *market-town*, or *corporation*. It may be a *vil-* “ *lage*.”

2dly, It was not averred, “ That he did not *then* “ exerciſe the trade,” *viz.* at the time of making the *ſtat.* Both objections were over-ruled.

Per curiam. Let the rule, “ to ſhew cauſe why the “ *information* ſhould not be quaſhed,” be diſcharged. *Vide Bur. vol.* 1. *p.* 367.

Eaſter, 31 *Geo.* 2. *The King* v. *Collingwood Foſter*, *Edward Gallon*, *Geo. Selby*, *and Thomas Mills.*

Four rules having been made *abſolute*, for *four informations* in nature of a *quo warranto* againſt the defendants reſpectively, “ to ſhew by what authority they “ claimed to be *Chamberlains* of *Alnwick*, in the coun- “ ty of *Northumberland*;”

The council for the defendants moved, that theſe *four informations* might be conſolidated into *one*.

The court thought this requeſt *reaſonable*, and granted the motion on the ground of the 4*th ſect.* of *ſtat.* 9 *Ann. cap.* 20. which ſays, “ And if it ſhall appear to “ the reſpective courts, that the ſeveral rights of di- “ vers perſons, to the ſaid *offices* or *franchiſes*, may “ properly be determined on *one information*, it ſhall “ and may be lawful for the ſaid reſpective courts, to “ give *leave* to exhibit *one* ſuch *information* againſt ſe- “ veral perſons, in order to try their reſpective rights “ to ſuch *offices* or *franchiſes*.” *Vide Bur. vol.* 1. *p.* 573.

Eaſter, 31 *Geo.* 2. *The King* v. *Peach and others.*

On ſhewing cauſe againſt an *information* which had been moved for by perſons who appeared to be gamblers, againſt others of the ſame profeſſion, for a *conſpiracy* to cheat them out of 900 *l.* at a foot race.

The court *unanimouſly* refuſed to grant the *information*, but referred the complainants to the *ordinary remedy* of an action or indictment, as the facts alledged ſeemed to be within the act of parliament made to prevent exceſſive gaming, and the rule to ſhew cauſe, was accordingly ordered to be diſcharged. *Vide Bur. vol.* 1. *p.* 548.

Eaſter, 31 *Geo.* 2. *The King* v. *Young and Pitts*, *Eſq.*

On a motion for an *information* againſt two juſtices of the peace for *refuſing to grant a licence to one* Henry Day *to keep an inn at* Everſley, it was ſworn, that he was a fit perſon, and that it was proper, and even neceſſary there ſhould be an *additional* inn-holder (there being *one* there already) and for which occupation of keeping an inn this man was (as the juſtices had allowed on a former occaſion) a *proper* perſon, they having before licenced him ſo to do at another place.

On this motion the court granted a rule on the defendants to ſhew cauſe “ why they did not grant this “ licence to the ſaid *Henry Day*.”

On *Monday* the 27th of *June*, 1757, the council for the defendants ſhewed cauſe, and the defendants by their *affidavits* made no *perſonal* objections to the ſaid *Day*, but thought the certificate *inſufficient*, becauſe not ſigned by the *parſon*, *vicar*, or *curate*.

The court was of opinion, “ that the certificate be- “ ing ſigned by *three* or *four* reputable houſe-keepers, “ *&c.* was ſufficient,” but though the juſtices had miſtaken the act, the court cleared them from any wrong motive.

It being ſuggeſted to the court, “ that the preſent “ parſon and church-wardens were ready to ſign a “ certificate in his favour,” the court enlarged the rule to ſhew cauſe in theſe terms, *viz.* “ That the “ firſt day of the next term be farther given them to “ ſhew cauſe *why they have not granted*, *&c.*”

On *Friday* the 18th of *November*, 1757, the proſecutor's council again moved (as a new motion) for an *information* againſt the defendants for not granting the ſaid *Henry Day* a licence, notwithſtanding what had paſſed in court, and at the general meeting, which he ſupported on *affidavits* of the fact; *and alſo*, on the merits; but the court gave no opinion, and only kept their former rule on foot, *in order to obtain the material* *end of it*, and made the like rule on theſe *affidavits* as they had made on the former rule, and ordered both rules to come on together.

On *Thurſday* the 13th of *April* 1758, this affair coming on again for the laſt time, after hearing the arguments of the council for and againſt the rule, the court diſcharged both rules with coſts.

Lord *Mansfield*. The preſent queſtion only is, "Whether the juſtices have been guilty of any *par-* "*tiality* or *malice* in the refuſal of this licence."

On the *firſt* and *original* motion, the juſtices appeared to have been miſtaken in the grounds of their refuſal; in that they fixed it on the want of the miniſter's and church-wardens ſigning; which they judged to be *requiſite* by *ſtat.* 26 *Geo.* 2. *cap.* 31. (when it was not.) In this they were *not criminal*, though they were *miſtaken*. At that time they had no *perſonal* objection to the ſaid *Day*. It was therefore (from all that then appeared) reaſonable to expect that, on enlarging the rule, they would at their next meeting *grant* the licence.

Since this, and *antecedent* to ſuch next meeting, there are come out ſeveral ſtrong *perſonal objections* to the ſaid *Day*, (which the juſtices were the proper judges of,) *viz.* his keeping, and having for a long time kept a houſe for publickly retailing *ale*, *wine*, and *ſpirituous liquors without licence*; his ſuffering a day-labourer to drink a whole day in his houſe, in harveſt time, and afterwards vindicating ſuch conduct; his having been charged with a fraud on oath; beſides an allegation in one of the *affidavits*, "That two notorious highway- "men and robbers appeared at leaſt to have uſed his "houſe, as a public houſe, if they enjoyed no other "and more particular kind of harbour and protection "in it."

In reſpect to the houſe, the juſtices now ſwear that they are clearly of opinion, "That *one* houſe is ſuf- "ficient," and they likewiſe clear themſelves, by the moſt ſolemn aſſertions in their *affidavits*, of all *criminal* imputation. He therefore declared his opinion, that there was no *ſufficient ground* for a *criminal charge* againſt the defendants.

Deniſon, *Foſter*, and *Wilmot*, Juſtices, gave their opinions at large, and concurred with the Chief Juſtice.

Per curiam. Let both the rules be diſcharged with coſts. *Vide Bur. vol.* 1. *p.* 557.

Michaelmas, 31 *Geo.* 2. *Bennet, qui tam,* v. *Smith.*

In this action the court refuſed to ſet aſide a *non proſ.* regularly obtained by the defendant againſt the plaintiff, who was only a *common informer* (who ſued for a penalty of 10000 *l.* on the *ſtat. of uſury*) though the plaintiff offered to pay the coſts of ſetting it aſide.

The court were clear and unanimous, that where a *mere common informer*, who ſued for *puniſhment only*, had been guilty of a ſlip or miſtake, which put him out of court, and entitled the defendant to enter a *non proſ.* againſt him, they would not exerciſe their *diſcretionary power* in ſetting aſide this *non proſ.* thus regularly obtained, and reſtoring this *mere common informer* to an opportunity of proceeding for the ſake of *puniſhment only*. *Vide Bur. vol.* 1. *p.* 402.

Michaelmas, 31 *Geo.* 2. *The King* v. *Stephens.*

On a motion for an *information* in nature of a *quo warranto* againſt teh defendant, to ſhew by what authority he acted as one of the Aldermen of the corporation of St. *Ives* in *Cornwall*.

The ground of this motion was a defect of the defendant's title to the office of Alderman, being elected thereto, *without being then a burgeſs or aſſiſtant of the corporation*.

The court were clear and unanimous in refuſing to grant this *information*; by reaſon of the *ſtaleneſs* of the defect of a title, aſſigned as the foundation of it; which was of no leſs than *twenty-nine* years ſtanding. They obſerved, that though there was indeed no ſtatute, nor even fixed rule of limitation, as to the length of the time which ſhould ſuffice to quiet the poſſeſſors of theſe offices, yet the court, in their diſcretion, ought to refuſe granting theſe motions, after a great length of time. So the motion was denied. *Vide Bur. vol.* 1. *p.* 433.

Michaelmas, 31 *Geo.* 2. *The King* v. *Williams.* Error.

On a writ of *error* directed to the juſtices of the *great ſeſſions* in the county of *Denbigh*, on a judgment given there for the King againſt the defendant, after a verdict on an *information* brought againſt him in that court by the *Prothonotary* and *Clerk of the Crown* there, at the relation of *John Moſtyn*, Eſq. according to the form of the ſtatute, in that caſe made and provided.

The plaintiff in *error*'s council aſſigned the follow-*errors* to the judgment on the *information*.

1ſt, *General*, *viz.* That judgment is given for the King againſt the defendant, *whereas* by the law of this kingdom, it ought to have been given for the defendant.

2dly, *Special*, *viz.* *And alſo* in this; that it appears by the ſaid record, that judgment in the plea aforeſaid was given, "that the ſaid *John Moſtyn* in the ſaid "plea named, *or the relator therein*, *recover againſt the* "*ſaid* Thomas Williams 121 *l.* 12 *s.* 11 *d.* *for his coſts* "*laid* out in that ſuit;" whereas, by the law of this realm, *no judgment ought to have been given in the plea aforeſaid for thoſe, or for any other coſts* in that ſuit.

After hearing the council on both ſides on arguing theſe errors, the court *affirmed* the *common law* judgment, and *reverſed* the judgment for coſts.

Lord *Mansfield*. 1ſt, As a ſtatute judgment within *ſtat.* 9 *Ann. c.* 20. it is wrong.

2dly, As to the *common law* part of the judgment, the *objection* taken by the plaintiff in *error*'s council, that this was not a caſe within *ſtat.* 9 *Ann. c.* 20. and therefore there ought not to be any judgment for coſts, will not hold; for he may certainly be puniſhed for *one ſingle offence*, though he goes no further. So that *this part* of the judgment *is right*.

Deniſon, *Foſter*, and *Wilmot*, Juſtices, gave their opinions at large, and concurred with the Chief Juſtice.

Per curiam. Unanimouſly, the *common law* judgment, *viz.* as to the *ouſter* muſt be *affirmed*, but the judgment for *coſts* (which was founded on the *ſtatute*) muſt be *reverſed*. *Vide Bur. vol.* 1. *p.* 403.

Michaelmas, 31 *Geo.* 2. *The King* v. *Robert Chappel.*

On a motion for an *information* for *ſending a challenge* by letter, to one Mr. *H.* of *Wells*,

The councilf or the motion only produced *copies*, and not the original letters, wherein the challenge was contained.

The court made a rule to *ſhew cauſe* on reading the copies of ſuch letters *only*, (the ſame being ſufficiently verified). *Vide Bur. vol.* 1. *p.* 402.

Hilary, 32 *Geo.* 2. *The King* v. *Fielding, Eſq.*

On ſhewing cauſe againſt an *information* moved for by one Mr. *Barnard* againſt the defendant for a *miſdemeanor* committed by him in his office of a *juſtice of peace*, in committing and detaining *W. B.* the ſon of the ſaid Mr. *B.* in priſon, *&c.* on a *verbal* charge made by the Duke of *Marlborough*, "that this young man "had ſent him threatening letters, *&c.*"

The defendant's council objected to the proſecutor's proceeding any further in this *criminal* application till he had previouſly made his election, "whe- "ther to proceed in this *criminal* method, or in a "*civil action* which he had actually commenced."

The council for the proſecution oppoſed making their election, but the court thought they ought to make it *directly*, and before they entered into the *criminal* complaint, for that this was the *conſtant* rule; and the particular circumſtance of the *civil action* being confined to be brought within *ſix* months, made no ſort of difference.

After hearing the arguments of the council on both ſides, the matter was adjourned till the *firſt* day of the *next term*, when it came on again, and the court took time to deliver their opinion.

The court now delivered their opinion, and were unanimous, that the main and principal charge which was the ground and foundation of the reſt, and indeed the *key* to the whole nature and complexion of the defendants behaviour, appeared to be *falſe in fact*, and quite *miſrepreſented* to the court by Mr. *B.* the father, and Mr. *B.* the *ſon*, and that the juſtice of peace appeared to have acted in this affair without any *bad*, *oppreſſive*, or *injurious intention*, though (in ſome reſpects) *irregularly*; therefore, though the preſent complaint appeared to be ſo ill grounded, that the complainants ought to be *puniſhed in coſts*; yet as the juſtice had made the commitment without previouſly taking the Duke of *Marlborough*'s oath, and had alſo neglected to take his Grace's *recognizance* to proſecute, (both which parts of his conduct were *irregular*) he had no right to receive his coſts: they therefore ordered that the rule be diſcharged; but in regard to the warrants of commitment and detainer of the ſaid *W. B.* the *ſon*, made by the ſaid defendant, they did not think fit to diſcharge the ſaid rule, with *coſts* to be paid to the ſaid defendant. *Vide Bur. vol.* 2. *p.* 720.

Eaſter, 32 *Geo.* 2. *The King* v. *William Lewis, Capital Burgeſs and Alderman of New Radnor.*

On ſhewing cauſe againſt an *information*, in nature of a *quo warranto* to ſhew by what authority the defendant acted in the characters above mentioned; it appeared to the court, that the charge was groundleſs and frivolous, and could not but be known to the proſecutor to be ſo.

Per curiam. Let the rule be diſcharged with coſts. *Vide Bur. vol.* 2. *p.* 780.

Michaelmas, 32 *Geo.* 2. *The King* v. *Athay, Eſq.*

On ſhewing cauſe why a rule ſhould not be made abſolute for an *information* againſt a juſtice of peace for a *miſdemeanor*, in refuſing to grant a licence to one *Francis Simes* (who had been licenced for ſeveral years before) to ſell *ale* as uſual, and afterwards convicting him *without* any previous *ſummons*, for having ſold it without a licence.

The ground on which this rule had been obtained, was as follows:

1ſt, That the only reaſon why the licence was refuſed him, was his declining to pay a ſum of money, *viz.* 5 *l.* which was claimed of him on a diſtinct and collateral account, and which he denied to be due from him. The payment of which ſum of money was (as he alledged) inſiſted on by the juſtice as a condition *precedent* to his granting the man a licence.

2dly, “ That the juſtice had convicted him of the “ offence without any previous ſummons.”

As to the *firſt*, the court were unanimous, that the allegation appeared to be falſe in fact, but at the ſame declared explicitly, “ That juſtices of peace have *no* “ *ſort of authority* to annex any *ſuch conditions* to the “ grant of theſe licences.”

As to the *ſecond*, they conſidered it to be fallacious, as the fact came out on ſhewing cauſe, for the man was actually preſent before the juſtice (who had ſent for him) and was ſo far from offering any defence, that he rather ſeemed to apply for mercy, declaring, however, “ that if the juſtice did convict him, he “ ſhould not pay the penalty.”

Thirdly, The court took notice, that the man had not any where alledged, “ That he was *innocent* of “ the offence,” which they thought it incumbent on him to have done, to entitle himſelf to make this application againſt the juſtice; and ſo diſcharged the rule. *Vide Bur. vol.* 2. *p.* 653.

Michaelmas, 32 *Geo.* 2. *The King* v. *Fielding, Eſq.*

See this caſe fully ſtated in page 146 of this work, under the head *Attorney*.

Eaſter, 33 *Geo.* 2. *The King* v. *Benfield and Saunders.*

On a motion in arreſt of judgment, on an *information* filed againſt the defendants, together with *three* others for a *miſdemeanor*.

The *information* conſiſted of *four counts*, *viz.* one for a riot, another for publiſhing a libel; a third for a riot and libel; and the *fourth* and *laſt* for a libel in making, ſinging, and publiſhing certain ſlanderous ſongs of one *John Cooke* and *Jane* his wife.

The *three* other defendants were acquitted of the whole *information*. The defendants *Benfield* and *Saunders* were acquitted of all the reſt of the *information*, except the *fourth count*.

The council in arreſt of judgment made *three objections* thereto, *viz.*

1ſt, That an *information* or *indictment* will not lie for publiſhing *two diſtinct* libels on *two diſtinct* perſons, any more than an indictment will lie for an *aſſault* on *two*.

2dly, That *ſeveral diſtinct defendants* charged with *ſeveral* and *diſtinct* offences cannot be *joined together* in the ſame *indictment* or *information*, becauſe the offence of *one* is not the offence of the *other*; and the preſent charge is made up of *ſeparate* and *diſtinct offences*, for which the ſeveral defendants can no more be joined, than ſeveral defendants can be charged with *perjury*, *&c.*

3dly, That this is an entire *general* verdict on the *whole* fourth *count*, and yet the latter ſong contained in it (namely the ſong made on *John Cooke*) contains no *libellous matter* at all; conſequently, no judgment can be entered up for the King.

After hearing the arguments of the council on both ſides, the court anſwered the *three objections* ſeparately.

As to the *firſt objection*, the court looked on this to be *one offence*, the *giſt* of the charge is ſinging thoſe ſongs in the manner, and with the intent charged in the *information*, and ſinging them at the ſaid *John Cooke*'s door, with intent to diſcredit him and his children, and to diſturb his domeſtic peace and comfort, and therefore over-ruled this *objection*.

As to the *ſecond objection*, they held this to be an *entire offence*, one *joint act* done by both; they both joined in the act of ſinging this *libellous* and *ſcandalous* matter in the public ſtreet, at the ſaid *John Cooke*'s door, with intent to diſcredit him and his children; and whether it be *two ſongs* or *one*, or a *firſt* and *ſecond* part of the ſame *ſong*, or ſeparate *ſtanzas*; *one* on *John*, *another* on *Jane*, yet it is one *entire offence*: and the more there are that join in it, the greater is the offence.

As to the *third objection*, they over-ruled it, holding the latter ſong to be *libellous* and *defamatory*; and likewiſe, that if this part of the charge had not been ſo, it would in an *information* or *indictment* only go towards leſſening the puniſhment, but would not be a ſufficient reaſon for arreſting the judgment.

Per curiam, unanimouſly, let the rule to ſhew cauſe why the judgment ſhould not be arreſted, be diſcharged. *Vide Bur. vol.* 2. *p.* 980.

Michaelmas, 33 *Geo.* 2. *The King* v. *The Corporation of Caermarthen.*

On a motion for an *information* in nature of a *quo warranto* againſt the whole corporation, (as a body) to ſhew by what authority they claimed to act as a *Corporation*.

The council for the motion intimated a doubt, “ whether ſuch a ſpecies of *information*, (*viz.* filed by “ the clerk of the crown, under leave of the court at “ the relation of a *private* proſecutor) could be within “ *ſtat.* 9 *Ann. c.* 20.”

The court gave no direct opinion: however, Lord *Mansfield* and Mr. Juſtice *Deniſon* ſeemed pretty clear, that this act was calculated only againſt individuals uſurping *offices* or *franchiſes* in *corporations*; and not againſt any *corporation itſelf* as a body; and the words of the ſtatute manifeſtly carry this meaning.

The council then moved againſt the ſeveral *individuals*, “ to ſhew by what authority they *reſpectively*

" claimed to exerciſe their particular *franchiſes*," and obtained the *ordinary* rules againſt them, in the uſual form. *Vide Bur. vol.* 2. *p.* 869.

Eaſter, 1 *Geo.* 3. *The King* v. *Palmer and Baine, Eſqrs. and others.*

See this caſe fully ſtated in page 313 of this work, under the head *Coſts.*

Hilary, 2 *Geo.* 3. *The King* v. *Heydon and four others.*

On ſhewing cauſe on behalf of the proſecutor, why the proceedings on this *joint information* ſhould not be ſtayed, with coſts to be paid by the proſecutor; for that *five* ſeparate rules, " for one or more *informations* " againſt each defendant," are *conſolidated* into this *one joint information*, without any rule for ſuch a joint *information* againſt *all* of them.

The council againſt the rule inſiſted, that by the practice, this cannot be done, nor does the preſent rule juſtify it.

Lord *Mansfield*, obſerved, that he was clear, that this *joint information* againſt *all*, was wrong, on theſe *ſeparate* and *diſtinct* rules, for one or more againſt each; and that the *preſent* rule muſt be made abſolute.

Per curiam. Let the rule be made abſolute for ſtaying the proceedings on this *joint information. Vide Bur. vol.* 3. *p.* 1270.

Hilary, 2 *Geo.* 3. *The King* v. *Heydon, Head and Roper.*

See this caſe fully ſtated in page 314 of this work, under the head *Coſts.*

Eaſter, 2 *Geo.* 3. *The King* v. *Williams. Idem* v. *Davis.*

An *information* was granted againſt the defendants as juſtices of the peace for the borough of *Penryn* in *Cornwall*, for refuſing to grant licences to thoſe publicans who voted againſt their recommendation of candidates for members for the ſaid borough.

It appeared on *affidavits*, that they had acted *very groſsly* in this matter; having *previouſly threatened* to ruin theſe people by not granting them licences, in caſe they ſhould vote againſt thoſe candidates whoſe intereſt theſe juſtices themſelves eſpouſed, and afterwards *actually refuſing* them licences *on this account only.*

Lord *Mansfield*, declared, that the court granted this *information* againſt the juſtices, not for the *mere refuſing to grant* the licences (which they had a diſcretionary power to grant or refuſe as they ſhould ſee to be right and proper) but for the *corrupt nature* of ſuch refuſal; for their *oppreſſive* and *unjuſt* refuſing to grant them, becauſe the perſons applying for them, would not give their votes for members of parliament, as the juſtices would have had them. *Vide Bur. vol.* 3. *p.* 13 7.

Eaſter, 2 *Geo.* 3. *The King* v. *Baylis, and others, Juſtices of Peace for the City of Glouceſter.*

The ſame *principle* was laid down in this caſe as in *The King* v. *Williams*, &c. though the preſent rule " for ſhewing cauſe why there ſhould not be an *in-* " *formation*," was diſcharged on the *merits*; the juſtices *not* appearing to the court to have acted from *corrupt motives* which the proſecutor of the rule had charged them with. *Vide Bur. vol.* 3. *p.* 1318.

Trinity, 2 *Geo.* 3. *The King* v. *Pitt. Idem* v. *Mead.*

See this caſe fully ſtated in page 406 of this work, under the head *Elections.*

Eaſter, 4 *Geo.* 3. *The King* v. *Latham and others, Six of the Burgeſſes of Wigan.*

On ſhewing cauſe why *informations* in nature of a *quo warranto* ſhould not be granted againſt theſe *ſix* whoſe right depended on that of *thirteen* other perſons, (who had voted in the election of them into their offices) to ſhew by what right they claimed the franchiſes of in-burgeſſes of this corporation, it appeared to be incumbent on the proſecutors to invalidate the right of *three* out of the *thirteen*, in order to turn the ſcale of the election. They had voted as being reſident in-burgeſſes, but *two* out of the *thirteen* were objected to by the proſecutor's affidavits, as being aldermen, and thereby diſqualified to vote as in-burgeſſes, *three* as having been legally disfranchiſed, and never legally reſtored, and *ſix* as not being actually and *bona fide* reſident in *Wigan* at the time of the election: ſo that it was pretended that even *all* the *thirteen* were illegal votes: however, it was agreed, " that the election would not " hold good, if only *three* of theſe *thirteen* votes could " be proved bad ones." It was therefore inſiſted on the part of the proſecution, that the election was bad.

Beſides this, another general *objection* was taken to the validity of the election; namely, that the court, at which the election was made, was *improperly holden*, and therefore all that was done at it was *totally void*, and an abſolute *nullity*; for it was ſworn that it was eſſentially neceſſary to the competency of the corporate court, that at leaſt *one* of the *bailiffs* ſhould be preſent at it; *whereas* there was no *bailiffs* at the *original court*, which was *adjourned* to the ſubſequent day; on which ſubſequent day of adjournment the defendants were elected at the adjourned court, conſequently the *adjourned* court was an incompetent one, and juſt the ſame as *no court at all*; and every thing tranſacted at it muſt be *nugatory*, *ineffectual*, and *void*.

It was alſo inſiſted, that it was neceſſary for the in-burgeſſes who voted to be reſidents in *Wigan* at the time of their voting; and the only diſpute was, " whether *ſix* of thoſe who voted for theſe *ſix* defen- " dants were *actually* and *fairly* ſo in fact, or only " *colourably* and *fallaciouſly* ſo."

After this matter had been much litigated, the court took time to conſider this matter.

Lord *Mansfield* now declared the opinion of the court on this ſubject, in which he recapitulated the ſeveral objections taken, and ſaid, We are all of opinion, " that thoſe rules muſt be made abſolute on the *firſt* " point," which is a general, and if true, a fatal objection to the validity of that election; the *information* will be " for *uſurping the office on the Crown*;" and the *Crown may take what iſſue they think proper* to *ſhew* ſuch uſurpation. There is no inſtance of *precluding the Crown* from inſiſting on any objections that they ſhall be adviſed to take iſſue on, in order to ſhew the defendant to have uſurped the franchiſe.

Therefore we neither need to give, nor ſhould give any opinion on the other points: nor does the line ſeem to be fully and clearly drawn and fixed, " whe- " ther the rights of the electors can be gone into at all, " or *how* far they can be gone into on the trial of the " right of the elected:" therefore the rules were made abſolute for *informations. Vide Bur. vol.* 3. *p.* 1585.

Trinity, 4 *Geo.* 3. *The King* v. *Phillips, Lucas, and others.*

The court was moved by the Attorney General for leave (in the *ordinary* form of theſe motions) to exhibit an *information* againſt ſeveral perſons for a moſt groſs *miſdemeanor* in attempting to influence the jury returned to try Mr. *W.*'s cauſe, by ſending them ſeveral pamphlets and inflammatory papers, and actually preventing *two* of thoſe ſpecial *jurors*, who had been before ſummoned from appearing, by ſending an expreſs to them in the middle of the night preceding the day of the trial, with a *fictitious* letter, (ſigned " ſummon- " ing bailiff") acquainting them, " that the trial was " put off," (when in truth it was not put off, but did then come on.)

Lord *Mansfield* declared, that the court would never grant an *information* on the application of the Attorney General in caſes where the *Crown* proſecuted, becauſe he has a right himſelf *officially* to execute one: and he may, if he thinks proper, ſummon the parties, to ſhew cauſe "why it ſhould not be exhibited" before he ſigns it. He ſaid this was not a caſe within *ſtat.* 4 & 5 *W. & M. cap.* 18. "to prevent *malicious informations* "in this court;" and therefore told the Attorney General, "that he muſt uſe his own diſcretion."

On this, the Attorney General changed his motion, and prayed a rule for an *attachment*, which was granted, but the defendants exculpating themſelves, the rule was diſcharged. *Vide Bur. vol.* 3. *p.* 1564.

Hilary, 5 *Geo.* 3. *The King* v. *Sir William Trelawney, Steward and Capital Burgeſs of Weſt Loe.*

On a motion for an *information* in nature of a *quo warranto* againſt the defendant, for acting as a *capital burgeſs*, having been *ſteward*, (a *high office*, as was alledged) *when elected capital burgeſs*, which higher office of *ſteward* was ſaid to be *incompatible with*, and therefore rendered him *incapable* of being elected into the *lower* office of *capital burgeſs*.

On ſhewing cauſe it was alledged, that theſe offices were *not incompatible*, but if they were, it would be the *former office* that was *vacated* by the acceptance of the *latter*, and *not* the office which was *laſt* accepted.

Lord *Mansfield*. Here is no fact doubted; no oppoſition; no objection ever made All the evidence that can be traced ſhews a conſiſtent uſage for *one hundred years* back, "that the *ſteward*, if a *capital burgeſs* be-"fore, has *remained* a *capital burgeſs*."

In point of *law* there is no *incompatibility* in the *ſteward* being a *capital burgeſs*. If he ſhould be choſen Mayor, it may then be a queſtion, "whether his ac-"ceptance of *that* office does not *vacate* his office of "*ſteward*." It ſeems to me very ſtrong, that *if* theſe *two* offices of *ſteward* and *capital burgeſs* were *incompatible*, the acceptance of the *latter* would imply a *ſurrender* of the *former*.

Wilmot, Juſtice, gave his opinion at large, and concurred with the Chief Juſtice.

Per curiam, unanimouſly, let the rule be diſcharged. *Vide Bur. vol.* 3. *p.* 1615.

Eaſter, 5 *Geo.* 3. *The King* v. *Wroughton, Eſq*; *and others.*

On ſhewing cauſe againſt an *information* for a *miſdemeanor*, in obſtructing *divine ſervice* in the church, and groſsly inſulting the rector, who had admitted a methodiſt into his pulpit.

After hearing the *affidavits*, and arguments of the council on both ſides,

Lord *Mansfield* declared, that he always underſtood "that a preacher muſt have a licence from the biſhop "of the dioceſe wherein he ſo preached," and "that "a licence from the biſhop of a *particular dioceſe* "would not give the perſon authority to preach in "every dioceſe, nor in any other dioceſe." He ſaid, this was ſeldom diſputed; if it was, he took it to be in *ſtrictneſs* ſo, by the *canons*.

In the preſent caſe, he thought the court ſhould not interpoſe on the application of the rector, becauſe he had ſuppreſſed the truth, and thereby miſrepreſented the matter; and alſo, becauſe he was going out of the way of the general and uſual courſe of celebrating divine ſervice in the eſtabliſhed church; and further, he behaved himſelf improperly, by particularly marking Mr. *Wroughton*, and preaching perſonally againſt him in his ſermon; and it ſeemed to him that the blow complained of was not a blow ſtruck the rector by Mr. *W.* (as is charged on him) but an accidental bruſhing him with his finger: therefore there is no reaſon for the court to interpoſe in an *extraordinary* way in this caſe, as it is circumſtanced.

In general, *methodiſts* have a right to the *protection of the court*, if interrupted in their decent and quiet devotion, and ſo have *diſſenters* from the eſtabliſhed church, if diſturbed.

Wilmot, *Yates*, and *Aſton*, concurred with the Chief Juſtice in opinion.

Per curiam. Let the rule be diſcharged, with coſts. *Vide Bur. vol.* 3. *p.* 1683.

Trinity, 5 *Geo.* 3. *The King* v. *Robert Hann and John Price. Juſtices of the Peace for the Borough of Corfe Caſtle.*

The defendants, on ſhewing cauſe againſt an *information* which had been prayed againſt them for a *miſdemeanor* in the execution of their office as juſtices for the ſaid borough, in refuſing to grant a *licence* to *ſell ale* to one *Ingram* an inn-keeper in the ſaid borough, *merely* from a motive of reſentment, in having joined in an *affidavit* made in ſuppport of the intereſt which was adverſe and oppoſite to that which the juſtices and their friends eſpouſed.

The defence was, that they did not act from any reſentment, or other corrupt motive, but ſolely becauſe *Ingram* was an improper perſon, and had *kept* a *diſorderly houſe*, and continued to keep it after due notice to the contrary, and particularly that he had encouraged *gaming*, and *cock-fighting* at his houſe.

Lord *Mansfield*. The court ſhould never interpoſe againſt magiſtrates, unleſs they have acted from bad motives, and with an evil mind, eſpecially in ſuch a caſe as this, where they are intruſted with an *abſolute diſcretion*; but for that very reaſon the preſent is the ſtrongeſt caſe for the interpoſition of the court, if it appears that they acted on corrupt motives.

If it appeared clearly that this man did keep a *diſorderly houſe*, it would be a reaſon againſt the court's interpoſing againſt the juſtices, but this does not appear on the contrary, the juſtices have not fully proved the charge.

The court therefore thought it a proper caſe for an *information*, and made the rule to ſhew cauſe abſolute. *Vide Bur. vol.* 3. *p.* 1716.

Michaelmas, 6 *Geo.* 3. *The King* v. *Marſden, and others.*

On a motion for an *information* in nature of a *quo warranto*, againſt the defendants, for holding a public *fair* or *market* at *Wakefield Common*, *Yorkſhire*, on every other *Wedneſday*.

The court doubted whether an *information* in the nature of a *quo warranto* in the name of the *Clerk of the Crown*, at the application of a private perſon, would lie

The court on this motion granted a rule, drawn up in the following form, *viz.*

"To ſhew cauſe why an *information* in the nature "of a *quo warranto* ſhould not be exhibited againſt "thoſe perſons, to ſhew by what authority they "hold or *promote* and *encourage* the holding of a "public *ſhew*, *fair*, *market*, or *ſale*, at a place called "*Wakefield Inge*, within the town of *Wakefield* in "the county of *York*, on every other *Wedneſday* "throughout the year, or on any particular *Wedneſday*, for the expoſing to ſale, and buying and "ſelling of cattle, goods, wares, and merchan-"dizes."

On ſhewing cauſe, the defendant's council made the following *objections*:

1ſt. That the uſurpation of a *fair* or *market* is not in general a ground for the interpoſition of this court, by way of *information* in the nature of a *quo warranto*.

2dly. That the preſent caſe, in *particular*, does not afford a foundation for ſuch an *information*.

After hearing the arguments of the council for and againſt the rule, the court diſcharged the ſame.

Lord *Mansfield*. If it were neceſſary to determine "whether the court could grant an *information* for "holding a *fair* or *market*," I ſhould deſire time to conſider: for it does not ſufficiently appear, whether before *ſtat.* 4 & 5 *W.* 3. *c.* 18. the *King's coroner* and *attorney* could file ſuch an *information*. If he could, the power is *not taken away* from him to do it now by leave of the court: if he could not, it is not given to him.

On the circumſtances of this caſe, I am clear that there *ought not* to be an *information* in the nature of a *quo warranto*.

This rule is drawn up, "that the defendants ſhall "ſhew cauſe why they hold, or encourage and pro-"mote the holding a *fair* or *market*."

Though it were admitted, that an *information* in the nature of a *quo warranto* might go, to put the defendants to ſhew by what *title they hold it*, and that therefore the former part of the rule might be right; yet a *quo waranto* will not lie for encouraging and promoting the holding one. Therefore the rule ought not to have been drawn up in this form. Here, all the defendants are *only encouragers* or *promoters*; no one is charged with actually holding a *market* or *fair*, or with claiming ſo to do. There are no marks of a *fair* or *market*; no toll claimed or taken by the lord of the ſoil: there is no uſurpation of a franchiſe, therefore this rule ought to be diſcharged.

Deniſon, *Yates*, and *Aſton*, Juſtices, gave their opinions at large, and concurred with the Chief Juſtice.

Per curiam. Let the rule be diſcharged. *Vide Bur. vol.* 3. *p.* 1812.

Inn-keepers.

The King v. *Edwards*.

The queſtion in this caſe was, whether an indictment would lie for ſelling ale without licence; and *two* judges were of opinion it would not lie.

Holt, Chief Juſtice. An indictment is a more beneficial way for the ſubject, becauſe it is a ſummary way of proceeding, and therefore it ſeems reaſonable that it ſhould lie in this caſe, notwithſtanding it is an offence created by the ſtatute, and a particular puniſhment thereby directed; and ſo it has been adjudged in a parallel caſe. *Vide Salk. vol.* 3. *p.* 27.

Anonymous.

The defendant was indicted for keeping a *tippling houſe* without licence *againſt the form of the ſtatute*. On *not guilty* pleaded, he was found *guilty*; and it was inſiſted on in arreſt of judgment, that at *common law* any perſon might keep an ale-houſe in a fit and convenient place for that purpoſe, that this was a ſtatutable offence, and the penalty by the ſtatute is, *that the offender ſhall be committed by two juſtices, and a recognizance taken of him with two ſureties not to ſell ale*, &c. and that this being the puniſhment by the ſtatute, for that reaſon an indictment will not lie; and the court being of this opinion, judgment was ſtaid. though an expreſs caſe was cited to the contrary. *Vide Salk. vol.* 3. *p.* 25.

The King v. *Randall*.

Two orders made at the ſeſſions in *Middleſex* were removed by *certiorari* into this court; the *firſt* of which recited, that whereas *R. Randall* had lately taken an houſe at *Hoxton*, deſigning to *ſell ale and beer* there; and whereas the houſe had never been inhabited by other perſons than merchants, *&c.* and there were ale-houſes enough in *Hoxton* already, therefore it is ordered, that no licence be granted to any houſe there wherein ale was not formerly ſold; and that no licence ſhould be given to *Randall*; the other recites, that whereas a licence was *ſurreptitiouſly* obtained by *Randall* from *two juſtices* to ſell ale there, *&c.* that yet he ſhould be ſuppreſſed, *&c.* from drawing ale there, *&c.* And now the court was moved to quaſh theſe orders, becauſe by *ſtat.* 5 *&* 6 *Ed.* 6. the *quarter ſeſſions* cannot controul the authority of *two* juſtices in this manner.

Holt, Chief Juſtice. This diſtinction has been made, *viz.* where an authority has been given to *two juſtices* to do a thing, and from which there lies no appeal, there it may be commenced and done in the ſeſſions; but if an appeal is given, then the ſeſſions has not an original juriſdiction, it muſt not be begun there; as for inſtance, by the *ſtatutes* 18 *Eliz.* *&* 42 *Eliz.* and till *ſtat.* 3. *Car.* 1. But here the queſtion is, whether the ſeſſions can ſuppreſs an ale-houſe licenced by *two juſtices* of the peace? It was adjudged they could not, except for diſorders committed, and thereon theſe orders were quaſhed. *Vide Salk. vol.* 2. *p.* 470. *Ibid. vol.* 3. *p.* 27.

Hilary, 10 *W.* 3. *Parkhouſe* v. *Forſter*.

See this caſe fully ſtated in page 227 of this work, under the head *Conſtable*.

Michaelmas, 10 *W.* 3. *Parker* v. *Flint*.

By *ſtat.* 4 *&* 5 *W.* *&* *M.* intitled, *An Act for carrying on a war with France*, it was enacted, that conſtables ſhould quarter ſoldiers on *inn-keepers*, and ſuch as kept *ale-houſes* and *victualling-houſes*, *livery ſtables*, or ſold brandy, metheglin, or cyder, by retail; and in an action brought by the plaintiff againſt a conſtable for quartering an horſe and dragoon on him, he pleaded *not guilty*, being an officer, and gave the ſtatute in evidence: and the jury found that there are wholeſome wells at *Epſom*, and that the plaintiff during the ſeaſon for drinking the waters indefinitely let lodgings, to ſuch as went thither to drink the waters, for the air, or for their pleaſure, and dreſſed victuals for them, and ſold them ale and beer, and entertained their horſes at 8 *d. per diem*, but ſold no victuals, drink, *&c.* to any but to his lodgers; and thus the plaintiff had no licence from any juſtices of peace to ſell ale, and that the defendant billetted a ſoldier and an horſe on the plaintiff, who compelled him to find victuals for himſelf, and proviſion for his horſe, for the ſpace of *two months, and if*, &c.

Per curiam. The plaintiff's houſe is not within the deſcription of that ſtatute; 1ſt. It is no *inn*, for the verdict finds he let lodgings only, which ſhews him not compellable to entertain any body, and none could come there without a previous contract; that he was not bound to ſell at reaſonable rates, or protect his gueſts; but it is the contrary in all the ſaid points in the caſe of an *inn-keeper*, and an action will lie againſt him for default, not by the name of an *inn-keeper*, but of a *common Inn-keeper*, *Reg.* 105. *Mod.* 877. *Hetly*, 49. *Fitz. tit. Hoſtler*, *Bro. action on the caſe*, 76. 5 *Ed.* 4. *fol.* 2.

2dly. It is not an *ale-houſe* or a *victualling-houſe*, for thoſe extend only to ſuch *ale-houſes* or *victualling-houſes* as are known and deſcribed by ſeveral acts of parliament, which it is a crime to keep without licence; and it muſt be a *common tavern*, wherein drink, *&c.* is *commonly* ſold to all the King's ſubjects *Weſt's Precedents*, 71 *Lamb.* 341. 1 *Jac. c.* 9. and the verdict finds they only ſold to their lodgers.

3dly. It was reſolved to be a ſtatute againſt the liberty of the ſubject; for before it no man was obliged to entertain ſoldiers againſt his will, which appears by the petition of *right*, 2 *Car.* 2. and by *ſtat.* 21 *Car.* 2. and therefore not to be conſtrued favourably without great neceſſity.

4thly. That in this caſe the conſtable having wrongfully quartered the dragoon on him was anſwerable for all the dragoon had committed.

Note. In this caſe *Holt* Chief Juſtice held, that if a perſon comes to an *Inn*, and makes a previous contract for lodging for a ſet time, and does not eat and drink there, he is no gueſt, but a lodger; and as ſuch is not under the *Inn-keeper*'s protection; but if he eats and drinks there, it is otherwiſe; or if he pays for his diet there, though he does not eat it there. And a ſign is not eſſential to an *inn*, but is an evidence of it: therefore the plaintiff had judgment. *Vide Mod. Rep. vol.* 12. *p.* 254.

Michaelmas, 13 *W.* 3. *Stephen Watſon's Caſe*.

Stephen Watſon was indicted at the *quarter ſeſſions*, for that he on the firſt day of *October* 10 *W.* 3. and at divers other days and times, at *B.* *&c.* without any *licence* from *two* juſtices of the peace, did keep an *ale-houſe*, and ſold ale and beer there *againſt the peace, and againſt the form of the ſtatute*. On demurrer to this indictment, it was inſiſted,

1ſt. That an indictment would not lie in this caſe.

2dly. That admitting it would lie, yet not at the *ſeſſions*.

3dly. But admitting that it would lie, and at the *ſeſſions*, yet this indictment is ill in form.

1ſt. This indictment muſt either be on *ſtat.* 5 *&* 6 *Ed.* 6. or on *ſtat.* 3 *Car.* 1. and both theſe ſtatutes preſcribe another method of puniſhing this offence, which was made ſo by one or other of them, and that method and no other muſt be followed, and if ſo, then an indictment will not lie.

2dly. But admitting it will lie, yet not at the *ſeſſions*, for this is not an indictment on *ſtat.* 4 *Jac.* 1. *c.* 1. for ſelling ale by the barrel without licence; for in that caſe, by the very words of the ſtatute, an indictment will lie at the *ſeſſions*; but this is an indictment on one of the ſtatutes before mentioned, and neither of them give the ſeſſions any power in this caſe, and they have no power but what is expreſsly given them by ſtatute.

3dly. This indictment is naught in form, for the caption is, that it was preſented by the oath of *twelve* men, ſworn and charged, without ſaying *then and there ſworn and charged*, and thereon it was adjourned.

But afterwards in *Michaelmas*, 3 *W.* it was adjudged that this indictment would not lie, becauſe it was an offence created by the ſtatute, and a particular method of puniſhing the offender was appointed by the ſtatute, which ſhould be followed, and no other. *Vide Salk. vol.* 3. *p.* 26.

Eaſter, 2 *Ann.* *York* v. *Grindſtone or Greenough.*

In *Replevin* for a horſe; the defendant avowed the taking and detaining, for that he kept an *inn*, and the plaintiff being a traveller, came and left his horſe there, where he had been kept ſo long; that the keeping came to ſuch a ſum, till payment whereof he detained him: on demurrer, the whole court held, that *inn-keepers* were bound to receive and entertain gueſts, and therefore might detain the goods of the gueſts till payment; but the *Chief Juſtice* doubted whether the plaintiff was a gueſt in this caſe, becauſe he never went into the *inn* himſelf, but only left his horſe there, which the *inn-keeper* was not obliged to receive, and without an owner did not receive as an *inn keeper*.

Powell, *Powys*, and *Gould*, *contra*, that the plaintiff is a gueſt by leaving his horſe, as much as if he had ſtaid himſelf, becauſe the horſe muſt be fed, by which the *inn-keeper* has gain; otherwiſe, if he had left a trunk, or a dead thing. *Cro Jac.* 188, 189. *Noy* 79. *Latch* 126. *Pop.* 178. *Mo.* 471. *Vide Salk. vol.* 1. *p.* 388. *Raym. vol.* 2. *p.* 866.

Michaelmas, 8 *Ann.* *The Queen* v. *Harris.*

At the *quarter ſeſſions* on the 12th day of *July*, 8 *Ann*, the juſtices granted a licence to the defendant for keeping a *common ale-houſe*, and at the next ſeſſions, viz. on the 4th day of *October* following they made this order: "Whereas it appears to this court, that *George Harris* of *Walton upon Thames*, &c. doth keep a *lewd* "and *diſorderly houſe*, it is therefore ordered by this "court, that the ſaid *George Harris* be, and is hereby "ſuppreſſed from keeping an *ale-houſe*, &c. after *ſix* "*weeks* time, from the *firſt day* of the preſent ſeſſions, "*&c.*" And this order being removed into this court by *certiorari*, the defendant's council moved to quaſh it, becauſe by *ſtat.* 5 *&* 6 *Ed.* 6. *c.* 25. there muſt be a previous conviction, and that by the oath of *two* men, before the juſtices can hinder his ſelling ale, *&c.* For, by that ſtatute, every man who has a licence to ſell ale is to be bound in a recognizance, with ſecurity, to keep good order, *&c.* and this is to be certified at the next *quarter ſeſſions*, and they are to inquire whether any ſuch perſon bound in ſuch recognizances, have done any act whereby they have forfeited the ſame; and if they have, to award proceſs, to ſhew cauſe why they ſhould not forfeit.

But this order was confirmed by the court; *Holt*, Chief Juſtice, being abſent.

Powell, Juſtice. The Juſtices in ſeſſions have a power by this act to ſuppreſs *ale-houſes*, and need not proceed by information or conviction; but they have thereby a diſcretionary power given them to ſuppreſs them, without ſhewing any cauſe or miſdemeanor: and where the ſtatute ſpeaks of a conviction, that is only where the juſtices proceed for the penalty which ought to be by *ſcire facias*. *Vide Raym. vol.* 2. *p.* 1303.

Trinity, 9 *Geo.* *The King* v. *Ford.*

See this caſe fully ſtated in page 284 of this work, under the head *Conviction.*

Trinity, 9 *Geo.* *Jones* v. *Pearle.*

On an action of *trover* for *three* horſes, the defendant pleaded, that he kept a *public inn* at *Glaſtonbury*, and that the defendant was a carrier, and uſed to ſet up his horſes there, and 36 *l.* being due to him for keeping the horſes, which was more than they were worth, he detained and ſold them, *as he lawfully might*, and on demurrer judgment was given for the plaintiff, an *inn-keeper*, having no power to ſell horſes, except within the city of *London*. 2 *Roll. Abr.* 85. 1 *Vent.* 71. *Mo.* 876. *Yelv.* 67. And beſides, when horſes had been once out, the power of detaining them for what was due before, did not ſubſiſt at their coming again. *Vide Stra. vol.* 1. *p.* 556.

Trinity, 9 *Geo.* *Jones* v. *Thurloe.*

On an action of *trover* brought by a *common carrier* againſt an *inn-keeper* for keeping the plaintiff's horſe, and converting him to his own uſe,

The defendant pleaded, that he was an *inn-keeper*, and that the plaintiff owed him ſo much money for horſe-meat at ſeveral times, (all which he ſet forth in his plea) and that by cuſtom of the realm, an *inn-keeper* may detain horſes for their keeping, and that he, this defendant, on ſuch a night, detained the plaintiff's horſe for what was due to him, *&c.* which is the ſame *trover* and *converſion* of which the plaintiff complained, *&c.*

And on demurrer to this plea, the court were of opinion, that by the cuſtom of the realm, if a man lies at an *inn one night*, the *inn-keeper* may detain his horſe till he is paid for the expences; but if he gives him credit for that time, and lets him depart without payment, then he has waived the benefit of that cuſtom by his own conſent to the departure, and ſhall never afterwards detain the horſe for *that* expence.

For this cuſtom is founded on the hardſhip of the *inn-keeper*'s caſe to ſue for every little debt, or on a greater hardſhip, that he may not know where to find him who was his gueſt, after he was gone; therefore when he has waived that privilege which the law gives him, he muſt rely on his other agreement.

Now, in the principal caſe, the *inn-keeper* having ſeiſed this horſe for the expences of *ſeveral nights*, and not for *one night*, and no more, (which he might lawfully do) ſuch ſeizure is not lawful, and by conſequence it is good evidence of the converſion.

In the argument of this caſe, the Chief Juſtice held, that though the *inn-keeper* might detain an horſe for his meat for *one night*, yet he could not ſell the horſe and pay himſelf; if he did, it was a converſion, for he is not to be his own carver. *Vide Mod. Rep. vol.* 8. *page* 172.

Michaelmas, 9 *Geo.* *The King* v. *Gibbs.*

See this caſe fully ſtated in page 539 of this work, under the head *Indictment.*

Trinity, 11 *Geo.* *The King* v. *Venables.*

An objection being made in this caſe, that on an order for ſuppreſſing an *ale-houſe*, there ought to be a ſummons: the court held, on ſolemn argument, that there was no need to ſet out the ſummons in the order, (though a ſummons is neceſſary by natural juſtice) notwithſtanding the caſes of *The King* v. *Dyer*, and *The King* v. *Green*. *Vide Forteſcue*, *p.* 325. *Mod. Rep. vol.* 8. *p.* 377. *Raym. vol.* 2. *p.* 1405. *Stra. vol.* 1. *p.* 360.

Michaelmas, 11 *Geo.* *The King* v. *Auſtin.*

An order of *ſeſſions* was made to hinder the defendant from *ſelling ale*; and the following *exceptions* were taken to this order:

1ſt. It did not appear by this order, that it was a *common ale-houſe*: every *ale-houſe* may not be a *common ale-houſe*.

2dly. It does not appear that the defendant was *ſummoned*, or preſent when this order was made.

3dly. The county is only in the margin, and not in the body of the order; ſo that it does not appear in what county the *ale-houſe* is; which is neceſſary to the juriſdiction of the juſtices.

Pratt, Chief Juſtice. There is no difference between an *ale-houſe* and a *common ale-houſe*. 2dly. If an *ale-houſe* is ſuppreſſed for any diſorder or offence committed by the party, he ought to be ſummoned: otherwiſe, when it is ſuppreſſed by the diſcretionary power of the juſtices. An *ale-houſe* may be ſuppreſſed, as Lord *Hale* ſays, *Pl. Cr.* if kept in an inconvenient place, the order does expreſs it to be a *diſorderly houſe*, and a *common bawdy-houſe*.

Forteſcue, Juſtice. It was a queſtion in Lord *Holt*'s time, whether juſtices are bound to give a reaſon why they ſuppreſſed an *ale houſe?* He was of opinion they ought, becauſe the party had a right or intereſt veſted in him by the licence. Here the reaſon given is, *it being a diſorderly houſe*. 2dly. I do not remember it has ever been held neceſſary to ſhew a ſummons on theſe convictions: the diſtinction has been between *mandamuſſes* and *convictions*, by reaſon of the greatneſs of the puniſhment.

Pratt, Chief Juſtice. Be the puniſhment greater or leſs, it makes no difference; the party in each caſe ought to be ſummoned, and the ſummons ought to be ſet out.

Raymond, Juſtice. I remember, on a motion of my own, an objection to an order for ſuppreſſing an *ale-houſe* was taken for want of a ſummons, but the order was confirmed. The diſtinction taken by *Forteſcue*, J. ſeems very reaſonable.

The court demanding of the *Secondary* how the precedents were in ſuch caſes, he anſwered that the court was divided as to this point in the caſe of *The King* v. *Clegg*, which was a caſe of *baſtardy*; and that the name of the county in the margin has been held good in ſome orders of removal.

Per curiam. The *third* objection is fatal. In all *criminal* proſecutions it will not be ſufficient to put the county in the margin; for that can only prove the order made by the juſtices of that county, but it is no argument that the fact was committed in that county. There is no difference between indictments and orders. *The King* v. *Marſhall*, *Trin.* 10 *Geo.* This is a criminal proſecution, for it is adjudged a *bawdy houſe*, and ſuppreſſed as ſuch. *Adjourned*.

But on further conſultation, and ſearching of precedents, the order was afterwards quaſhed for the *third exception*. *Vide Mod. Rep. vol.* 8. *p.* 309. *Forteſcue*, *p.* 325.

Trinity, 4 *Geo.* 3. *Francis* v. *Wyatt*.

See this caſe fully ſtated in page 377 of this work, under the head *Diſtreſs*.

Inquiry, Inquiſition.

Michaelmas, 7 *W.* 3. *Herbert* v. *Waters*.

See this caſe fully ſtated in page 59 of this work, under the head *Damages*.

Eaſter, 9 *W.* 3. *The King* v. *Ingram et al'*.

Ingram and an hundred others, being found *guilty* of a riot on two *inquiſitions* taken before the juſtices of peace, according to *ſtat.* 13 *Hen.* 4. *cap.* 7. now moved in arreſt of judgment, on which the following points were reſolved by the court:

1ſt. When a riot is ſuppreſſed by the juſtices, together with the ſheriff, having the *poſſe comitatus* with them for that purpoſe, and they convict the rioters by a record of the force on their proper view, the ſheriff ought to be a party to ſuch *inquiſition*, and ſo he might by *ſtat.* 19 *Hen.* 7. *cap.* 13. But if the rioters diſperſe of themſelves, and after they are parted, an *inquiſition* is made of it by *two* juſtices of the peace; there is no need that it appear by the *inquiſition*, that the ſheriff was party to the *inquiry*; becauſe the juſtices may make the *inquiſition* without him.

2dly. When the conviction of a riot is by *inquiſition* taken before *two* juſtices of the peace, the *inquiſition* has no need to be, as taken *for our Lord the King, and the body of the county*, but *for our Lord the King*, is ſufficient, or rather better; for their *inquiry* is not for the county, but for the King, and ſo is the conſtant form of ſuch *inqueſts*. But when an *inquiſition* is made by the grand jury, then it ought to be *for our Lord the King and the body of the county*. It was objected, that *the body of the county* was ill, becauſe their authority was not divided, or derived partly from the King, and partly from the county, but from the King only, and executed for him; and therefore (in his opinion) it ought not to be *for the body of the county*. But this nicety was not regarded, and the court ſeemed to be of opinion that they were the ſame.

3dly. That though the words of the ſtatute are, that the juſtices, &c. ſhall make *inquiry* within one month after the riot, &c. yet an *inquiry* by them after the month is good. For the ſtatute intended only to forward their proceedings, by ſubjecting them to a penalty in caſe they did not make *inquiry* within the month, and not to reſtrain their authority to the month, ſo as it could not be executed afterwards: for the lapſe of the month makes them incur the penalty, but does not determine their power. *Vide Raym. vol.* 1. *p.* 215.

Eaſter, 13 *W.* 3. *The King* v. *Atkinſon*.

See this caſe fully ſtated in page 289 of this work, under the head *Coroner*.

Pagett v. *Preſton*.

On an action on the *caſe*, the plaintiff declared on an *indebitatus aſſumpſit*, and alſo on a *bill of Exchange*; the defendant, *as to the bill of Exchange*, demurred, and ſaid nothing as to the *indebitatus aſſumpſit*, thinking thereby to make a *diſcontinuance*, if the plaintiff did not take judgment by *default*, which he omitted, and only joined in demurrer; afterwards, when the paper-book was made up in the office, the clerk of the papers left out theſe words, *as to the bill of Exchange*, and the cauſe being put in the paper, judgment was given for the plaintiff, and a writ of *inquiry* was executed; and on a motion to ſet aſide this judgment for irregularity, by omitting theſe words, *as to the bill of Exchange*,

Holt, Chief Juſtice, held, they came too late, for they ſhould have taken notice of it when it came into the paper office, and not ſtay till a writ of *inquiry* was executed; it is a trick, for the defendant concluded, that the plaintiff would not take notice of it on a demurrer, being a thing of courſe; therefore the judgment was confirmed. *Vide Salk. vol.* 3. *p.* 400.

Michaelmas, 1 *Ann.* *Eaſt* v. *Eſtington*.

In this caſe it was held, that in all ſuperior courts the judge ſends his precept to the ſheriff to *inquire* of damages; but in *London*, and in all *inferior courts*, an *inqueſt* is ſummoned in court, and the court takes the *inquiſition* of damages. *Vide Salk. vol.* 3. *p.* 400.

Anonymous.

In *Replevin*, the defendant avowed for rent in arrear; the plaintiff replied *non conceſſit*, on which they were at iſſue, and the jury found the value of the cattle taken, but did not find what rent was in arrear, ſo as the cattle might be ſold to ſatisfy the rent, according to *ſtat.* 17 *Car.* 2. it being moved, that this might be ſupplied by the writ of *inquiry*, as it was in *Specott*'s caſe.

Per curiam. It was done in that caſe, becauſe the party might have his judgment at *common law*; but by this ſtatute it is enacted, *that the value of the rent ſhall be inquired by the ſame jury which tries the iſſue*, and therefore it cannot be ſupplied by a writ of *inquiry*. *Vide Salk. vol.* 3. *p.* 400.

Michaelmas, 1 *Ann.* *Shortridge* v. *Lamplugh.* Error.

See this caſe fully ſtated in page 333 of this work, under the head *Damages*.

Michaelmas, 1 *Ann.* *Poſt Denning* v. *Cloſe.*

Per curiam. Writs of *inquiry* are ſet aſide daily, for exceſſive damages. *Vide Mod. Rep. vol.* 7. *p.* 55.

Hilary, 2 *Ann.* *The Queen* v. *Watton.*

See this caſe fully ſtated in page 495 of this work, under the head *Forcible Entry*.

Trinity, 2 *Ann.* *The Queen* v. *Crofts.*

An *inquiſition* of forcible detainer of a *copyhold* meſſuage in *Streatham*, of which *Henry Hampſon* was ſeized in *fee* according to the cuſtom, *&c.* was found againſt the defendant, on the 11th day of *Dec.* 1702, before two juſtices of the peace in *Surry*; and being removed into this court by *certiorari*, after ſeveral motions it was quaſhed, becauſe it did not appear that the jury before whom the *inquiſition* was taken, were of the neighbourhood, nor of the county; it being only ſaid, *inquiſition, &c. taken by the oath of* George Franklyn, *&c. before* the two juſtices, and did not ſay of what place the jury were, nor contain the words *good and liege-men of the county aforeſaid*. *Vide Raym. vol.* 2. *p.* 926.

Michaelmas, 2 *Ann.* *Anonymous.*

Holt, Chief Juſtice. You cannot except againſt a juror on a *writ of inquiry*. *Vide Mod. Rep. vol.* 6. *p.* 43.

Michaelmas, 2 *Ann.* *Anonymous.*

Holt, Chief Juſtice. A *writ of inquiry* cannot be quaſhed, till it is returned and filed; but before the return, it may be *ſuperſeded*, *if improvidently iſſued*. *Vide Mod. Rep. vol.* 6. *p.* 40.

Eaſter, 3 *Ann.* *Harvey* v. *Broad.*

See this caſe fully ſtated in page 340 of this work, under the head *Date, Day, and Delivery*.

Hilary, 8 *Ann.* *The Queen* v. *Shepherd.*

The court was moved to amend a faulty *inquiſition* of a *felo de ſe* (it not ſaying *on view of the body*,) this is like the caſe of a caption of an indictment, which may be amended. 1 *Sid.* 225. 229.

Per curiam. Let the *inquiſition* be quaſhed. *Vide Mod. Rep. vol.* 11. *p.* 271.

Michaelmas, 8 *Ann.* *Anonymous.*

A writ iſſued to remove an *inquiſition* of *felo de ſe*, and they returned an *inquiſition lately taken*, and on the return it appeared to be taken after the *teſte* of the writ of *certiorari*; and it was urged, that it was well removed, though taken after the *teſte* of the writ, as a writ of *error*, *&c.*

Powell, Juſtice, held, that a writ of *certiorari* removes any order or conviction, though they may be made or taken after the *teſte* of the writ, ſo they be taken before the return.

Then two *exceptions* were taken to the *inquiſition*.

1ſt, Becauſe it is ſaid to be taken *before the coroner of our Lady the Queen*, and does not ſay for what place.

2dly, It is ſaid *by the oath of twelve, &c.* and the words *good liege-men* are omitted; nor does it mention for what place: and on theſe exceptions the *inquiſition* was quaſhed. *Vide Raym. vol.* 2. *p.* 1305.

Michaelmas, 8 *Ann.* *Taylor* v. ——

Holt, Chief Juſtice. Though a defence be made on a writ of *inquiry*, yet it will not aid a judgment, *if irregularly obtained*. *Vide Mod. Rep. vol.* 11. *p.* 262.

Hilary, 10 *Ann.* *Silk* v. *Hill.*

See this caſe fully ſtated in page 414 of this work, under the head *Error*.

Michaelmas, 10 *Ann.* *Dummer* v. ——

The court was moved to amend an *elegit*, which ſet forth, that the judgment was given on the 9th of *January*.

The following caſes were cited in behalf of the motion; *Cro. Jac.* 372. *Cro. Eliz.* 677. where *writs of inquiry*, which are *judicial writs*, are held amendable, becauſe it might occaſion an alteration in a verdict on a *writ of inquiry*; for between the 23d of *October* and the 9th of *January*, he might have lands which he had not the 9th of *January*. Adjourned. *Vide Mod. Rep. vol.* 10. *p.* 68.

Hilary, 1 *Geo.* *Holroi* v. *Ebizon.* Error.

See this caſe fully ſtated in page 334 of this work, under the head *Damages*.

Hilary, 1 *Geo.* —— v. *Ormſton.*

See this caſe fully ſtated in page 232 of this work, under the head *Bills of Exchange*.

Michaelmas, 1 *Geo.* *Shuttleworth* v. *Paterſon.*

A motion was made to ſet aſide a *writ of inquiry*, for want of theſe words, *and have there this writ*, &c.

Per curiam. It is well enough; it is a known difference between *original* and *judicial writs*, that defect in form will abate the former, but defect in ſubſtance only can alter the latter; and it was ſo reſolved in *Blackmore*'s caſe.

The ſubſtance of the writ, is only to command the ſheriff to take an *inquiſition*; and the words which are omitted are purely directory to the ſheriff; becauſe without returning the writ, it cannot appear to the court, that he had an authority to take the *inquiſition*; and if the writ be returned, as here it is, the end of the words now omitted, is effectually anſwered.

Beſides, a command to return the *inquiſition*, is virtually and conſequentially a command to return the writ; becauſe the *inquiſition* cannot be returned to any purpoſe, unleſs the writ be ſo too; for it cannot otherwiſe appear, that it is a return to the writ, or that the ſheriff had any authority for taking the *inquiſition*. The words, *if to him it ſeems expedient*, were left out in a *ſcire facias*, yet it was held good for the very ſame reaſon, *viz.* its being a *judicial writ*, which ſhall not be abated for want of form. *Vide Mod. Rep. vol.* 10. *p.* 270.

Michaelmas, 6 *Geo.* *Biron* v. *Phillips.*

Per curiam. There muſt be the ſame notice of executing a *writ of ſcire fieri inquiry*, as of executing a *common writ of inquiry*. *Vide Strange, vol.* 1. *p.* 235.

Eaſter, 7 *Geo.* *Woodford* v. *Eades & al.*

See this caſe fully ſtated in page 334 of this work, under the head *Damages*.

Eaſter, 8 *Geo.* *Hall* v. *Stone.*

On executing a *writ of inquiry*, the plaintiff was ſurpriſed with a defence, and was not prepared to prove his whole demand, and the court ſet it aſide on payment of coſts, the damages being too ſmall. *Vide Strange, vol.* 1. *p.* 515.

Michaelmas, 9 *Geo.* *Flemming* v. *Parker.*

The plaintiff declared on *four counts*, and the defendant demurred to *one*, and pleaded to iſſue as to the other *three*; the plaintiff joined in demurrer, and had judgment, and a *writ of inquiry*, reciting a judgment *of the premiſes*, and that *he recover the debt and damages occaſioned by the premiſes*; and now it was moved in arreſt of judgment, that a *writ of inquiry* would not lie on this judgment till a *nolle proſequi* was entered as to the other *three* iſſues, or a *venire* to try them; for then, and not before, a *writ of inquiry* might be had to *inquire* of the damages on the judgment on *demurrer*; but in this caſe the plaintiff having remitted the damages as to the other *three* iſſues, before the judgment was entered on the demurrer, it was held good; and the maſter of the office affirmed, that was the proper method of proceeding. *Vide Mod. Rep. vol.* 8. *p.* 108.

Hilary, 10 *Geo.* *Parr* v. *Niblett.*

See this caſe fully ſtated in page 335 of this work, under the head *Damages*.

Eaſter, 10 *Geo.* *The Eaſt India Company* v. *Ellis.*

After judgment by default for the plaintiff, and a writ of *inquiry* brought, it was moved, that it might be executed before the Chief Juſtice, at the ſittings at *Guildhall* in *London*, the action being brought for 20,000 *l.* and a rule was made accordingly. *Vide Mod. Rep. vol.* 8. *p.* 240.

Eaſter, 10 *Geo.* *Knight* v. *Cambridge.*

See this caſe fully ſtated in page 249 of this work, under the head *Breach*.

Michaelmas, 10 *Geo.* *Parr* v. *Purbeck.*

In an action of *covenant*, brought for non-payment of rent reſerved on a leaſe for years, there was judgment againſt the defendant by default; and a writ of *inquiry* executed; the jury gave the plaintiff but *one ſhilling* damages, and no more, though he proved that the defendant owed him 150 *l.* for rent.

The reaſon why the jury gave a *ſhilling* and no more was, that the defendant took this leaſe of the plaintiff of a certain piece of ground, in which he the (leſſee) covenanted to pay ſo much rent; and the leſſor covenanted, that *he ſhould have ſuch a ſewer or dam to keep water*, he (the leſſee) intending to ſet up a paper-mill, but the *commiſſioners of ſewers* had made the water-courſe ſo narrow, that he could not have water ſufficient for his purpoſe; and being unwilling to ſue the leſſor on this covenant, he left the land to the leſſor; and thereon another perſon entered, and was poſſeſſed thereof, and ſet up a corn-mill, and the miller paid the rent; and all this being known to the jury, who were of the neighbourhood, they gave the plaintiff a *ſhilling*, and no more.

And now it was moved to ſet aſide this writ of *inquiry* for the ſmallneſs of the damages; for ſince an action of *covenant* was brought, and the breach aſſigned was for non-payment of ſo much rent in certain, the jury was obliged to find the whole; it is true, if it had been in an action for damages, they might have found part only; and it is uſual to ſet aſide a writ of *inquiry* for ſmallneſs of damages, where no manner of evidence is given why they ſhould be mitigated; which is the preſent caſe.

The court were of opinion to ſet aſide this writ of *inquiry*, for though the ſuppoſed breach of covenant (on the plaintiff's ſide) was true, *viz.* that the defendant had not ſufficient water to ſet up his paper-mill, and if that had been given in evidence to the jury on the writ of *inquiry*; yet they could not have mitigated the damages on that account, much leſs when it was not given in evidence. *Vide Mod. Rep. vol.* 8. *p.* 196.

Michaelmas, 10 *Geo.* *Conden* v. *Coulter and others.*

In an action of *treſpaſs*, the declaration was againſt *three* defendants, and the *writ of inquiry* recited it to be againſt *two* only; and the court being moved to ſet it aſide for irregularity, it was ſhewn for cauſe, that if the writ was wrong in this caſe, it was matter of *error*, and no advantage can be taken of it by motion.

Per curiam. As to its being *error*, poſſibly it is ſo; but to be ſure it is a matter of irregularity, for it is now a *writ of inquiry* taken out in a cauſe which is not depending; but however, if the plaintiff aſks, to be ſure it is amendable by the record.

Then the court was moved, that it might be amended, but the council objected to paying coſts on the amendment.

Per curiam. This is a matter of irregularity, and therefore carries coſts; indeed, where amendments are made on a *writ of error* after verdict, &c. by virtue of the ſtatutes of *jeofails*, no coſts are given, for the conſtruction of thoſe ſtatutes is to give judgment for the party on the *writ of error*, as if the amendment had been made; but this is not on a *writ of error*, but within the common rule; therefore let the plaintiff amend on payment of coſts. *Vide Caſes Temp. Lord Hardw. p.* 314.

Eaſter, 11 *Geo.* *Stead* v. *Lateward.*

On conſideration, the court held, that there muſt be the ſame notice given of executing a *ſcire fieri inquiry*, as in the caſe of a *common writ of inquiry*; and ſaid it had been ſo ruled formerly, *Michaelmas* 12 *Ann*, in the caſe of *Crawley* v. *Hayward*. *Vide Stra. vol.* 1. *p.* 623.

Eaſter, 11 *Geo.* *Anonymous.*

The plaintiff, who was tutor to two young *Cambridge* ſcholars, brought an action on the *caſe* againſt their father; and declared on an *indebitatus aſſumpſit*, to pay ſo much for his ſalary for *five years and nine months*, and on a *quantum meruit*, &c. and had judgment by default, and a *writ of inquiry* for the damages, which was executed, and general damages given; and it was moved in arreſt of judgment, for that this *writ of inquiry* was executed on the 4th day of *February*, whereas the *five years and nine months* did not incur till the 20th day of *March* following; ſo that the jury having given damages generally, the plaintiff cannot have judgment for the damages, for the time not incurred, which he muſt have, if he has judgment on this record, and the court inclined to that opinion. *Vide Mod. Rep. vol.* 8. *p.* 350.

Hilary, 3 *Geo.* 2. *Coleman* v. *Mawby, et al.*

On executing a *writ of inquiry* before *Raymond*, C. J. the plaintiff could not prove the quantity of goods for which the action was brought, for want of a ſervant, who was abſent, through an apprehenſion that they ſhould not want his teſtimony. And on conſideration, the Chief Juſtice held, that he might adjourn it to the next ſittings, and accordingly the jury were adjourned over, the plaintiff ſubmitting to pay coſts: he compared it to the caſe of a *coroner's inqueſt*, or a *commiſſion of lunacy*, where the jury are adjourned over ſeveral times, it being but an *inqueſt of office*. *Vide Stra. vol.* 2. *p.* 853.

Trinity, 8 *Geo.* 2. *Valentine* v. *Fawcett.*

See this caſe fully ſtated in page 337 of this work, under the head *Damages*.

Trinity, 9 *Geo.* 2. *Kinaſton* v. *The Mayor, Aldermen, and Aſſiſtants of the Town of Shrewſbury.*

A *mandamus* iſſued to reſtore *C. Kinaſton* to the office of an alderman of this corporation; to which the defendants made a ſpecial return, ſetting forth, that he had been removed from his office, and alſo ſetting forth the cauſe of his amotion; whereon *Kinaſton* came according to *ſtat.* 9 *Ann. c.* 20. and took five traverſes to the return: and iſſue being joined on each of the traverſes, the jury found a general verdict for *Kinaſton* on *two* of the iſſues, and on the *three* others a ſpecial verdict; but they found no damages or coſts; and on the ſpecial verdict the court were of opinion for *Kinaſton*, and therefore a motion was made in behalf of the plaintiff for a *writ of inquiry* to be awarded, to inquire of the damages ſuſtained by reaſon of the falſe return, becauſe the jury have in their verdict omitted to inquire thereof. And becauſe this caſe was ſaid to be within the reaſon of the caſe of *Herbert* v. *Waters*, 1 *Salk.* 205. where in *avowry* by overſeers of the poor on *ſtat.* 43 *Eliz. c.* 2. ſuch an omiſſion was ſupplied by *writ of inquiry*.

Per curiam. We are all of opinion that this is exactly like the caſes on *ſtat. C.* 2. and that *ſtat.* 9 *Ann* is the rule we muſt go by, and by that *ſtatute* we have not authority to award a *writ of inquiry*. *Vide Caſes Temp. Lord Hardw. p.* 295.

Eaſter, 17 *Geo.* 2. *The King* v. *Roberts*.

The defendant having traverſed an *inquiſition* whereby he was found to be a *lunatic*: the Attorney General filed the common replication; and it was ſent from the petty-bag office to this court. The proſecutor of this commiſſion made up the record, and carried it down to trial: Mr. *Roberts* being ill, he did not appear; no defence was made, and the jury gave it in favour of the *inqueſt*.

On this a new trial was moved for on *two* points; 1ſt. That the ſuppoſed lunatic was in the nature of a plaintiff, and therefore had a right to carry down the record; and his traverſe is in the nature of a *monſtrans de droit*.

To this it was anſwered, and reſolved by the court, that he was properly to be conſidered as a defendant, oppoſing the title found for the Crown, without ſetting up any title in himſelf, as he muſt do in a petition of right. *Vaugh.* 62. and Lord *Somers*'s argument in the *Banker*'s caſe, *ſtat.* 4 *Hen.* 6. *c.* 13. *a.* were cited, and the form of the entries in *Tremain* 628. 652. *Coke's Ent.* 404. &c. ſhew it to be ſo. And indeed it would be abſurd to conſtrue the liberty of traverſing to give a power of delaying the Crown; which muſt be, if the party is conſidered as having the common right of a plaintiff. It was therefore held, that the record was well made up, and carried down by the proſecutor of the commiſſion.

The *ſecond* point was on the illneſs of *Roberts*, who could not attend, and which was made out by affidavits. The court thought it reaſonable to grant a new trial for this, on the footing of accident, and becauſe the Lord Chancellor and the former jury had both an inſpection, which might be of great uſe to a ſecond jury, who otherwiſe would be left to judge on leſs evidence than the others had.

A new trial was therefore granted, on payment of coſts. And the court ordered it, on the application of Mr. *Roberts*, to be tried at bar by a jury of *Devon*, where the former *inquiſition* was taken. *Vide Stra. vol.* 2. *p.* 1208.

Trinity, 19 *Geo.* 2 *Markham* v. *Middleton*.

The defendant owed the plaintiff 323 *l.* for an apothecary's bill, and ſuffered judgment to go by *default*, and the plaintiff's attorney, on executing the *writ of inquiry*, produced the foreman, who told him he would prove the bill; but when the jury was ſworn, he declined giving any evidence. On which the ſheriff was deſired to adjourn, which he thought he could not do, and the jury thereon found *one penny* damages.

This was moved to be ſet aſide, on the head of ſurpriſe, and miſtake of the ſheriff, and on the authority of *Woodford* v. *Eades*, *Parr* v. *Niblett*, *Eaſter* 19 *Geo.* and *Coleman* v. *Mawby*.

The court thought it hard that the plaintiff ſhould be paid ſo large a debt with *one penny*, as he would be, if this verdict ſtood; or that his caſe ſhould be the worſe, for the defendant's letting judgment go by *default*; for had he pleaded, the plaintiff would have ſuffered a nonſuit: and therefore they ſet this aſide, and ordered a *new writ of inquiry*, on payment of coſts. *Vide Stra. vol.* 2. *p.* 1259.

Michaelmas, 30 *Geo.* 2. *The King* v. *Killinghall*.

See this caſe fully ſtated in page 289 of this work, under the head *Coroner*.

Inſurance.

Michaelmas, 3 *W.* & *M.* *Jefferies* v. *John Legendra*.

See this caſe fully ſtated in page 19 of this work, under the head *Actions*.

Eaſter, 10 *W.* 3. *Anonymous*.

On an action brought on a policy of *inſurance* of a ſhip; it was held by *Holt*, Chief Juſtice, that if it appears on evidence that the ſhip was condemned by proceſs of law, and ſeiſed; by this ſentence the property and ownerſhip are deſtroyed, and there is no remedy on the policy of *inſurance*. *Vide Raym. vol.* 1. *p.* 724.

Michaelmas, 10 *W.* 3. *Fanſhaw* v. *Harris*.

See this caſe fully ſtated in page 338 of this work, under the head *Date, Day, and Delivery*.

Michaelmas, 11 *W.* 3. *Anonymous*.

Holt, Chief Juſtice, at *niſi prius*. If a ſhip be *inſured* under Captain *J. S.* the part-owners may change the captain, without notice to the *inſurers*. *Vide Mod. Rep. vol.* 12. *p.* 325.

Michaelmas, 1 *Ann.* *Green* v. *Young*.

By evidence on the trial in an action on a policy of *inſurance*, the caſe appeared to be, that the *inſurers* agreed to *inſure* the ſhip from her arrival at ——— in *Jamaica* during her voyage to *London*; and an embargo was laid on the ſhip by the government; and afterwards they ſeiſed the ſhip, and converted her into a fire-ſhip, and offered to ſatisfy the owners. Now the queſtion was, if this would excuſe the *inſurers*.

Holt, Chief Juſtice, held, that it would not, and that this was within the words, *detention of Princes*, &c. but he gave no abſolute opinion, becauſe the cauſe was referred to the *three* foremen of the jury. In the ſame caſe he ſaid, that if a policy of *inſurance* be made to begin from the departure of the ſhip from *England* till &c. and after the departure damage happens, &c. and then the ſhip deviates; though the ſhip is diſcharged from the time of the deviation, yet, for the damages ſuſtained before the deviation, the *inſurers* ſhall make ſatisfaction to the *inſured*. *Vide Raym. vol.* 2. *p.* 840.

Hilary, 10 *Ann.* *Aſſievedo* v. *Cambridge*.

On a ſpecial verdict, the caſe in ſubſtance appeared to be this: *Aſſievedo* had *inſured* a certain ſum of money on a ſhip called the *Ruth*, for ſuch a voyage, in which ſhip *Aſſievedo* is found by the verdict not to be at all concerned, in point of intereſt. It happened that this ſhip was taken by the enemy, and kept in their poſſeſſion for *nine* days, and then, before it was carried into a place of ſafety, it was re-taken by an *Engliſh* man of war: and whether or not this was ſuch a taking as ſhould enable the plaintiff to recover the ſum *inſured* againſt *Cambridge*, was the queſtion.

After argument by the Civilians, the court ſeemed to be of opinion for the defendant. They thought that the plaintiff's being found by the verdict to have no intereſt in the ſhip which he *inſured* ſhould make no difference.

1ſt. Becauſe they never would be more favourable to an *inſurer non bona fide*, or wagerer, than to one that *inſured bona fide*.

2dly. Becauſe to make a different interpretation of this deed from what is commonly put on *policies of inſurance*, would be to run counter to the deſigns of the parties, who have made uſe of the very ſame words that are uſed in ſuch policies; nay, who have expreſsly provided for this very caſe, by theſe words, *intereſt or no intereſt*; which words ſignify nothing at all, unleſs the ſame loſs intitles to a recovery where the *inſurer* has no intereſt, and where he has; and that the property is not altered by the *taking*, they held to be very plain. But referred the matter for further conſideration. *Vide Mod. Rep. vol.* 10. *p.* 77.

Michaelmas, 10 *Geo.* 2. *Boyfield* v. *Brown*.

On the execution of a *writ of inquiry* before the Chief Juſtice, it appeared, that the defendant was an *inſurer* to 200 *l.* on corn, the value of which was 217 *l.* that the corn was ſo damaged in the voyage, that it ſold only for 67 *l.* and the freight came to 80 *l.* And on this the queſtion was, whether, as the freight, which the plaintiff was obliged to pay, exceeded the ſalvage, this was not to be conſidered as a total loſs?

For the plaintiff it was inſiſted, that he ought not to be in a worſe condition than if his corn had gone to the bottom of the ſea: for then he would have had no freight to pay, and now that the voyage has been performed, whereby the freight has become due, he has a right to apply the ſalvage to diſcharge that. It was proved to be the uſage, where the ſalvage exceeds the freight, to deduct the freight out of the ſalvage, and make up the loſs on the difference.

For the defendant it was inſiſted, that as his *inſurance* was on the corn, and the whole did not periſh; he ought in making up the loſs to deduct the ſalvage: but no inſtance could be ſhewn on either ſide, of an adjuſtment, where the freight exceeded the ſalvage.

Lord *Hardwicke* was of opinion, that within the reaſon of deducting the freight when the ſalvage exceeds it, the plaintiff was in this caſe, wherein it fell ſhort, intitled to have it conſidered a total loſs. And the jury found for the plaintiff accordingly. *Vide Stra. vol.* 2. *p.* 1065.

Hilary, 16 *Geo.* 2. *Seaman* v. *Fonnereau*.

On the 25th of *Auguſt* 1740, the defendant *underwrote* a *policy* from *Carolina* to *Holland*. It appeared the agent for the plaintiff had on the 23d of *Auguſt* received a letter from *Cowes*, dated the 21ſt of *Auguſt*, wherein it is ſaid, "The 12th of this month, I was "in company with the ſhip *Davey*, (the ſhip in queſ-"tion) at *twelve* in the night loſt ſight of her all at "once; the captain ſpoke to me the day before, that "he was leaky, and the next day we had a hard gale." The ſhip, however, continued her voyage till the 19th of *Auguſt*, when ſhe was taken by the *Spaniards*: and there was no pretence of any knowledge of the actual loſs at the time of the *inſurance*, but it was made in conſequence of a letter, received that day from the plaintiff abroad, dated the 27th *June* before.

Several brokers were examined, and proved that the agent ought to have diſcloſed the letter; for either the defendant would not have *underwrote*, or have inſiſted on an higher premium.

Lee, Chief Juſtice, was of that opinion, and declared, that as theſe are contracts on chance, each party ought to know all the circumſtances. And he thought it not material, that the loſs was not ſuch an one as the letter imported; for thoſe things are to be conſidered in the ſituation of them at the time of the contract, and not to be judged of by ſubſequent events; he therefore thought it a ſtrong caſe for the defendant, and the jury found accordingly. *Vide Strange, vol.* 2. *p.* 1183.

Michaelmas, 16 *Geo.* 2. *Stamma* v. *Brown*.

The ſhip *The Gothick Lyon* being advertiſed to be going to *Marſeilles*, goods were ſhipped on board of her on behalf of the plaintiff, and a bill of lading ſigned by the maſter, whereby he undertook to go by a ſtrait rout to *Marſeilles*, and the defendant underwrote a *policy* from *Falmouth* (where the goods were taken in) to *Marſeilles*; before the ſhip departed from the port of *London*, another advertiſement was publiſhed for goods to *Genoa*, *Leghorn*, and *Naples*; and the plaintiff's agent was told, it was intended to go to thoſe ports *firſt*, and then come back to *Marſeilles*; but he inſiſted that his bargain was to go *firſt* or directly to *Marſeilles*, and he would not conſent to let her paſs by *Marſeilles*, or alter his *inſurance*.

The ſhip, however, did paſs by *Marſeilles*, and after delivering her cargo at the other ports, ſet out on her return for *Marſeilles* with the plaintiff's goods; but in her voyage thither was blown up in an engagement with a *Spaniſh* ſhip. And in an action on the *policy*, the breach was aſſigned of a loſs by the *barratry* of the maſter. And the plaintiff inſiſted that any fraud or moleſtation of the maſter was within the meaning of the word *barratry*. *Du Freſne* terms it a *deceit in the contract*, and ſo do all the dictionaries, as *Florio's Italian Dictionary*, *Minſhew*, *Furetier*, &c. And that in the caſes of *Knight* v. *Cambridge*, and *Knight* v. *Dodd*, *Eaſt.* 10 *Geo.* where the loſs was laid to be by the *fraud* of the maſter, the court held it to be a good aſſignment of a breach, there being the word *barratry* in the *policy*.

The defendant's council inſiſted, that this was no more than a deviation, in which caſe the *inſurer* is diſcharged, and the plaintiff's remedy is againſt the owner or maſter. That this cannot be called a crime in the maſter, when he is acting all the while for the benefit of his owners.

Lee, C. Juſtice, in his direction to the jury, told them, that this being againſt the expreſs agreement to go *firſt* to *Marſeilles*, ſeemed to be more than a common deviation; being a formed deſign to deceive the contractor. And compared it to the caſe of ſailing out of port without paying duties, whereby the ſhip was ſubjected to forfeiture, which has been held to be *barratry*.

The jury ſtaid out ſome time, and on their return aſked the Chief Juſtice, whether, if the maſter was to have no benefit to himſelf by paſſing by *Marſeilles*, and went only to the other places *firſt*, for the benefit of his owners, that would be *barratry*? And the Chief Juſtice anſwering, No; they found for the defendant.

And now a new trial being moved for, the caſe was argued; and the whole court were of opinion, that the verdict was right. For the maſter has acted conſiſtent with his duty to his owners, and the plaintiff's agent knew of the intended alteration before the goods were put on board, and might have refuſed to ſhip them, or have altered the *inſurance*; that to make it *barratry*, there muſt be ſomething of a criminal nature, as well as a breach of contract; and therefore the breach being aſſigned only on the *barratry*, was not ſupported by the evidence: ſo the defendant had judgment. *Vide Stra. vol.* 2. *p.* 1173.

Michaelmas, 17 *Geo.* 2. *Green* v. *Brown*.

See this caſe fully ſtated in page 467 of this work, under the head *Evidence*.

Trinity, 18 *Geo.* 2. *Sparrow* v. *Caruthers*.

The defendant *inſured* goods *to* London, *and till the ſame* ſhould be ſafely landed there. The ſhip arrived in the port of *London*, and the owner of the goods ſent his lighter, and received the goods out of the ſhip; before they reached land, an accident happened, whereby the goods were damaged, for which this action was brought againſt the *inſurer*.

For the defendant, it was inſiſted, that the accident happened after the owner had taken the goods into his poſſeſſion, and therefore was a loſs after the *inſurance* was ended.

Lee, C. J. held, that the *inſurer* was diſcharged, he ſaid it would have been otherwiſe, had the goods been ſent by the ſhip's boat, which is conſidered as part of the ſhip and voyage. And the jury (which conſiſted of merchants) being of the ſame opinion, brought in a verdict as to this point for the defendant. *Vide Stra. vol.* 2. *p.* 1236.

Hilary, 19 *Geo.* 2. *Dean* v. *Dicker*.

This was an *inſurance* on goods by the *Durſley Galley*, intereſt or no intereſt, at and from *Jamaica* to *Briſtol*. In her paſſage ſhe was taken by a *Spaniſh* privateer, and carried into *Mores*, a port in *Spain*, kept *eight days*, and then cut out by an *Engliſh* ſhip. And the plaintiff inſiſting, that this, though on goods, was to be conſidered as a wager on the bottom of the ſhip, brought his action as on a total loſs. The defendant inſiſted, that by *ſtat.* 13 *Geo.* 2. *c.* 4. and 17 *Geo.* 2. *c.* 34. this ſhip is to be reſtored to the owners on paying ſalvage, and conſequently this is only an average loſs; and the plaintiff can only recover on a total one.

Lee, Chief Juſtice, held, that in this caſe the plaintiff ought to recover, for his is a wager on the total loſs in the voyage, and here has happened one; for the being carried into port and detained *eight* days makes one. And where the *policy* is intereſt or no intereſt, the proviſions of the acts in the caſe of valued *policies* cannot take place. The act does not declare the property is not gone by ſuch a capture, but only provides for reſtoring the ſhip to whom it *did*, and ſhall be proved *to have belonged to*; he ſaid that it might be otherwiſe, where the re-capture was before the ſhip was carried *into a place of ſafety*, or in the caſe of goods actually on board, and on a valued *policy*. *Vide Stra. vol.* 2. *p.* 1250.

Hilary, 19 *Geo.* 2. *Tonge* v. *Watts*.

The plaintiff *inſured* on ſhip and freight at and from *Jamaica* to *Briſtol*, a cargo was ready to put on board; but the ſhip being careening, in order for the voyage, a ſudden tempeſt aroſe, and ſhe and many others were loſt. The rigging and parts of her were recovered and ſold; and the defendant paid into court as much as on an average he was liable to for the loſs of the ſhip; but the plaintiff inſiſted to be allowed 600 *l.* for the freight the ſhip would have earned in the voyage, if the accident had not happened. But as the goods were not actually on board, ſo as to make the plaintiff's freight to commence,

Lee, Chief Juſtice, held, he could not be allowed it, and he was called. *Vide Stra. vol.* 2. *p.* 1251.

Hilary, 19 *Geo.* 2. *Victorin* v. *Cleeve*.

The plaintiff *inſured* on goods in the *John* and *Jane* from *Gottenburgh* to *London*; with a warranty to depart with convoy from *Fleckery*. In *July*, 1744, the ſhip ſailed from *Gottenburgh* to *Fleckery*, and there ſhe waited for convoy *two months*: on the 21ſt of *September*, at *nine* in the morning, *three* men of war, who had *one hundred* merchant ſhips in convoy, ſtood off *Fleckery*, and made a ſignal for the ſhips there to come out, and likewiſe ſent in a yaul to order them out. There were *fourteen* ſhips waiting, and the *John* and *Jane* got out by 12 o'clock, and one of the firſt; the convoy having ſailed gently on, and being *two* leagues a-head. It was a hard gale, and by 6 o'clock in the afternoon, the ſhip came up with the fleet, but could not get to either of the men of war for ſailing orders, on account of the gale of wind. It was ſtormy all night, and at day break the ſhip in queſtion was in the middle of the fleet, but the weather was ſo bad, that no boat could be ſent for ſailing orders: a *French* privateer had ſailed among them all night, and on the 22d it being foggy, attacked the *John* and *Jane* about *two*, who kept a running fight till dark, which was renewed the next morning, when ſhe was taken.

It was inſiſted for the defendant, that this ſhip was never under convoy, nor are ſhips ever conſidered ſo till they have received ſailing orders; and if the weather would not permit the captain to get them, he ſhould have gone back.

Lee, Chief Juſtice, and the jury were of opinion, that as the captain had done every thing in his power, it was a departing with convoy; and theſe agreements are never confined to the preciſe words; as in the caſe of departing with convoy from *London*, when the place of rendezvous is *Spithead*; a loſs in going thither is within the *policy*; ſo the plaintiff recovered. *Vide Stra. vol.* 2. *p.* 1251.

Hilary, 19 *Geo.* 2. *Foſter* v. *Wilmer*.

The *inſurance* was from *Carolina* to *Liſbon*, and at and from thence to *Briſtol*; it appeared that the captain had taken in ſalt, which he was to deliver at *Falmouth*, before he went to *Briſtol*; but the ſhip was taken in the direct road to both, and before ſhe came to the point where ſhe would turn off to *Falmouth*. And it was held, the *inſurer* was liable; for it was but an intention to deviate, and that was held not ſufficient to diſcharge the *underwriter*. In the caſe of *Carter* v. *The Royal Exchange Aſſurance Company*, where the *inſurance* was from *Honduras* to *London*, and a conſignment to *Amſterdam*; a loſs happened before ſhe came to the dividing point between the *two* voyages, which the *inſurer* was held to pay for. *Vide Strange, vol.* 2. *p.* 1249.

Hilary, 19 *Geo.* 2. *Dick* v. *Barrell*.

The plaintiff *inſured* intereſt or no intereſt on any ſhip he ſhould come in from *Virginia* to *London*, beginning the adventure on his embarking on board ſuch ſhip; the money to be paid though his perſon ſhould eſcape, or the ſhip be retaken.

He embarked on board the *Speedwell*, but ſhe ſpringing a leak at ſea, he went on board the *Friendſhip*, and arrived ſafe at *London*; but the *Speedwell* was taken after he left her. And now in an action againſt the *underwriter*, he was held liable, for the *inſurance* is on the ſhip the plaintiff ſet out in; and had that got ſafe home, and the other been loſt, the plaintiff could not have recovered on the foot of having removed his perſon into that ſhip in the middle of the voyage. *Vide Strange, vol.* 2. *p.* 1248.

Hilary, 19 *Geo.* 2. *Pariſh* v. *Crawford*.

The defendant was ſole owner of a ſhip, which he let to one *Fletcher* for a voyage, at a certain ſum, and *Fletcher* was to have the benefit of carrying goods. The plaintiff ſent a quantity of *moidores*, and had bills of lading ſigned by the captain: and many of the moidores not being delivered according to the conſignment, an action was brought againſt the defendant, the owner of the ſhip, to make him liable as far as the ſhip and freight was worth, according to *ſtat.* 7 *Geo.* 2. *c.* 15. It was inſiſted for the defendant, that tho' the ſhip was his property, yet he was not owner as to be liable to the plaintiff; and that *Fletcher* is for this purpoſe the owner: but it appearing the defendant had covenanted for the condition of the ſhip, and the behaviour of the maſter,

Lee, Chief Juſtice, held, he was liable to the plaintiff, and the freight he had in general from *Fletcher*, was ſufficient, though the identical freight for the gold belonged to the other, and *Fletcher* had only the uſe of the ſhip, but no ownerſhip. *Vide Stra. vol.* 2. *p.* 1251.

Michaelmas, 19 *Geo.* 2. *Waples* v. *Eames*.

The ſhip *Succeſs* was *inſured* at and from *Leghorn* to the port of *London*, and till there *moored twenty-four hours in good ſafety*. She arrived on the 8th day of *July* at *Freſh-Wharf*, and moored, but was ſerved the ſame day with an order to go back to the *Hope* to perform a *fourteen day's quarantine*. The men on this deſerted her, and on the 12th the captain applied to be excuſed going back, which petition was adjourned to the 28th, when the regency ordered her to go back; and on the 30th ſhe went back, performed the quarantine, and then ſent up for orders to air the goods. But before they came the ſhip was burnt on the 23d day of *Auguſt*; and now the queſtion was, whether the *inſurer* was liable?

For the defendant it was inſiſted, that the ſhip arriving, and being moored on the 8th day of *July*, and remaining ſo till the 30th, was a performance of what he had undertaken, and his riſque ought not to be extended to ſo long a time as between the 8th of *July*, and the burning on the 23d of *Auguſt*.

But it was ruled, that though the ſhip was ſo long at her moorings, yet ſhe could not be ſaid to be there *in good ſafety*, which muſt mean the opportunity of unloading and diſcharging, whereas here ſhe was arreſted within the *twenty-four hours*, and the hands having deſerted, and the regency taken time to conſider the petition, there was no default in the maſter or owners. And it was proved, that till the *fourteen days* were expired, there could be no application to air the goods. Wherefore the jury found for the plaintiff. *Vide Stra. vol.* 2. *p.* 1243.

Hilary, 20 *Geo.* 2. *Gordon* v. *Morley*. *Campbell* v. *Bordieu*.

On an *inſurance* from *London* to *Gibraltar*, warranted to depart with convoy, it appeared there was a convoy appointed for that trade at *Spithead*, and the ſhip *Ranger* having tried for convoy in the *Downs*, proceeded for *Spithead*, and was taken in her way thither.

The *inſurers* inſiſted, that this being the time of a *French* war, the ſhip ſhould not have ventured through the Channel, but have waited in the *Downs* for an occaſional convoy. And many merchants and office-keepers were examined to that purpoſe.

Lee, Chief Juſtice, held, that the ſhip was to be conſidered as under the defendant's *inſurance* to a place of general *rendezvous*, according to the interpretation of the words, *warranted to depart with convoy*, *Salk*. 443, 445. And if the parties meant to vary the *inſurance* from what is commonly underſtood, they ſhould have particularized her departure with convoy from the *Downs*.

The juries, which were compoſed of merchants in both caſes, found for the plaintiffs on the ſtrength of this direction. *Vide Stra. vol.* 2. *page* 1265.

Hilary, 20 *Geo.* 2. *Elton* v. *Brogden*.

The ſhip *Mediterranean* went out in the merchants ſervice, with a letter of marque, and bound from *Briſtol* to *Newfoundland*, *inſured* by the defendant. In her voyage ſhe took a prize, and returned with it to *Briſtol*, and received back a proportionable part of the *premium*. Then another policy was made, and the ſhip ſet out, with expreſs orders from the owners, that if they took another prize, they ſhould put ſome hands on board ſuch prize, and ſend her to *Briſtol*, but the ſhip in queſtion ſhould proceed with the merchants goods. Another prize was taken in the due courſe of the voyage, and the captain gave orders to ſome of the crew to carry the prize to *Briſtol*, and deſigned to go on to *Newfoundland*, but the crew oppoſed him, and inſiſted he ſhould go back, though he acquainted them with the orders: on which he was forced to ſubmit, and in his return his own ſhip was taken, but his prize got in ſafe.

It was inſiſted in an action againſt the *inſurers*, that this was ſuch a deviation as diſcharged them. But the court and jury held, that this was excuſed by the force on the maſter, which he could not reſiſt; and therefore fell within the excuſe of neceſſity, which had always been allowed. The plaintiff's council would have made *barratry* of it.

Lee, Chief Juſtice, held, that it did not amount to that, as the ſhip was not run away with in order to defraud the owners: ſo the plaintiff had a verdict for the ſum *inſured*. *Vide Stra. vol.* 2. *p.* 1264.

Eaſter, 30 *Geo.* 2. *Pelly the younger* v. *The Governor and Company of the Royal Exchange Aſſurance*.

On an action of *covenant* brought on a *policy of inſurance*, a verdict was given for the plaintiff, *ſubject* to the opinion of the court on the following queſtion.

> Whether the *inſurers* are liable to anſwer for the loſs of the goods of the ſhip *Onſlow*, which were burnt in a *Bank-ſaul*, and not in the ſhip in the river *Canton* in *China*, and whether ſuch accident was within the intent and meaning of the *policy*?

After hearing the arguments of the council on both ſides on this matter, the court took time to conſider thereof.

Lord *Mansfield* now delivered the opinion of the court, in which he minutely ſtated the caſe, and then the queſtion, "Whether this was a loſs for which the "*inſurers* are *reſponſible* within the *intent* and *meaning* "of the above mentioned *policy of inſurance*."

By the expreſs words of the *policy*, the defendants have *inſured* the *tackle*, *apparel*, and *other furniture* of the ſhip *Onſlow* from *fire* during the *whole* time of her voyage, *till* her return in ſafety to *London*, without any *reſtriction*, and the ſame were inevitably burnt in *China* during her voyage before her return to *London*.

The *event* which has happened is a loſs within the *general words* of the *policy*, and it is incumbent on the defendants to ſhew from the manner in which this misfortune happened, or from other circumſtances, "That it ought to be conſtrued a peril which they did "*not undertake* to bear;" therefore we are clearly of opinion, that in every light and view of this caſe, in reaſon and juſtice, and within the words, intent, and meaning of the *policy*, and within the view and contemplation of the parties to the contract, the *inſurers* are *liable* to anſwer for this loſs.

Per curiam. Let the *poſtea* be delivered to the plaintiff. *Vide Bur. vol.* 1. *p.* 341.

Hilary, 31 *Geo.* 2. *Godin and others*, v. *The London Aſſurance Company*.

On a point reſerved in this cauſe at *niſi prius*, before Lord *Mansfield*, a verdict was found for the whole loſs, ſubject to the opinion of the court: and if the court ſhould think on his Lordſhip's report, "that the "plaintiff by law ought to recover for *half* his loſs *only*, "then the verdict was to be entered up as for half."

The queſtion for the opinion of the court was,

"Whether the plaintiff is intitled on the circum-"ſtances of this caſe, and on the facts as ſtated, to re-"cover the *whole* loſs from the preſent defendant, or on-"ly the *half* of his loſs from them, and the remainder "from the under-writers of Mr. *Amyand*'s policy."

Lord *Mansfield* To conſider this matter as between the *inſurer* and *inſured*. As between *them*, and on the foot of *commutative* juſtice merely, there is no colour why the *inſurers* ſhould not pay the *inſured* the *whole*; for they have received a *premium* for the *whole* riſque.

If the *inſured* is to receive but *one* ſatisfaction, natural juſtice ſays, that the *ſeveral inſurers* ſhall all of them contribute in proportion to ſatisfy that loſs againſt which they have *all inſured*.

Where a man makes a *double inſurance* of the ſame thing in ſuch a manner, that he can clearly recover againſt ſeveral *inſurers* in diſtinct policies a *double* ſatisfaction, the law certainly ſays, "that he *ought not* "to recover doubly for the ſame loſs, but be content "with one *ſingle ſatisfaction* for it."

Stat. 19 *Geo.* 2. *c.* 37. (for regulating *inſurances*, &c.) expreſsly prohibits the *re-aſſuring*, (after having already *inſured* the ſame thing) unleſs the former *aſſurer* ſhall be *inſolvent*, or become a *bankrupt*, or die; and even in that caſe it provides, that it ſhall be *expreſſed* in the policy "*to be a re-aſſurance*."

If the under-writers are liable to contribute at all, the contribution ought to be amongſt the *ſeveral inſurers* themſelves, but *Tameſz*, the *inſured*, has a right to recover his whole loſs from the defendants on the policy now in queſtion, by which they are bound to pay the *whole*; for though here be *two inſurances*, yet it is not a *double inſurance*. If *Tameſz* could recover againſt both ſets of *inſurers*, yet he certainly could not recover againſt the under-writers of *Amyand*'s policy, without ſome expence, nor without alſo firſt paying and reimburſing to Mr. *Amyand* the *premium* he paid, and alſo his *charges*.

Therefore, in every point of view this caſe can be put, we are all of us clearly of opinion, "that the verdict is right as it now ſtands, for the whole ſum *inſured*." Therefore let the *poſtea* be delivered to the plaintiff. *Vide Bur. vol.* 1. *p.* 490.

Michaelmas, 32 *Geo*. 2. *Goſs and another* v. *Withers*.
Idem v. *Eundem*.

On a ſpecial caſe from the ſittings in *London*, on *two* actions brought on *two* diſtinct *policies of inſurance*, *one* on the ſhip, and the *other* on the loading, ſeveral queſtions ariſing on the trial of the *firſt* of the ſaid cauſes, it was agreed, that the jury ſhould bring in their verdict in both cauſes for the plaintiff as for a *total* loſs, *ſubject* to the opinion of the court on the following queſtions, *viz*.

1ſt, Whether this *capture* of the ſhip by the enemy, was, or was not, *ſuch* a loſs as that the *inſurers* became *liable* thereby.

2dly, Whether under the ſeveral circumſtances of this caſe, the *aſſured* had, or had not, a right to *abandon* the ſhip to the *inſurers*, after ſhe was carried into *Milford-Haven*.

After hearing the arguments of the council on both ſides, the court took time to conſider the matter.

On the 23d of *November*, 1758, Lord *Mansfield*, delivered the opinion of the court as follows:

It is not neceſſary to confine what ſhall be ſaid, to the *two diſtinct* queſtions as ſtated. The *general* queſtion is, whether the plaintiffs were on the 18th of *January*, 1757, entitled to recover againſt the *inſurers*, as on a *total* loſs; under an offer "to *abandon* the ſhip and cargo "to the *inſurers*, for them to make what advantage of *ſalvage* they could," (for an offer "to *abandon*," was *then* made, and nothing has happened ſince that time, to alter the caſe.)

There is one point which, we are all of opinion is immaterial, as between the *inſurers* and the *inſured*, *viz*. "Whether by this *capture* the *property* was, or "was not, *transferred* to the *enemy* by the law of "nations." That queſtion can happen but in *two* caſes, namely, 1ſt, between the owner and a *neutral* perſon, who has bought the capture from the enemy. 2dly, Between the owner and *re-captor*.

If the ſhip taken by an enemy, *eſcapes* from the enemy, or is *re-taken*, or if the owner *redeems* or *ranſoms* the capture; his property is thereby *reveſted*: which property in the ſhip taken, was by the law of nations obtained by the captor.

Whatever rule ought to be followed in favour of the owner againſt a *re-captor* or *vendee*, it can no way affect the caſe of an *inſurance* between the *inſurer* and *inſured*. The *inſurer* runs the riſk of the *inſured*, and undertakes to indemnify; he muſt therefore bear the loſs *actually* ſuſtained, and can be liable to no more; ſo that if after *condemnation*, the owner recovers the ſhip in her complete condition; but has paid *ſalvage*, or been at expence in getting her back; the *inſurer* muſt bear the loſs ſo *actually ſuſtained*.

This is a *policy* on a *real intereſt*, and the ſingle queſtion is, whether the *inſured* had under all the circumſtances, on the 18th of "*January*, 1757, an election to *abandon*."

The loſs and diſability was in its nature *total* at the time it happened. During *eight* days the plaintiff was certainly entitled to be paid by the *inſurer*, as for a *total loſs*, and in caſe of a *re-capture*, the *inſurer* would have ſtood in his place. The ſubſequent *re-capture* is at beſt a ſaving only of a ſmall part: *half* the value muſt be paid for *ſalvage*. The diſability to purſue the voyage ſtill continued, the maſter and mariners were priſoners. The charter-party was *diſſolved*. The freight (except in proportion to the goods ſaved) was loſt. The ſhip was neceſſarily brought into an *Engliſh* port; what could be ſaved, might not be worth the expence attending it; which is proved by the plaintiff's offer to *abandon*.

Every argument that has been offered, holds *ſtronger* in the caſe of the other *policy* with regard to the *goods*. The *cargo* was in its nature *periſhable*; deſtined from *Newfoundland* to *Spain* or *Portugal*; and the voyage as *abſolutely defeated* as if the ſhip had been wrecked, and a *third* or *fourth* of the goods ſaved.

We are therefore of opinion, that the loſs was *total*, by the capture; and the right which the owner had, after the voyage was defeated, "to obtain reſtitution "of the ſhip and cargo, paying *great ſalvage* to the "re-captor," might be *abandoned* to the *inſurers*, after ſhe was brought into *Milford-Haven*.

Per curiam. Let the *poſtea* be delivered to the plaintiff in both caſes. *Vide Bur. vol.* 2. *p.* 683.

Hilary, 33 *Geo*. 2. *Gardiner* v. *Croaſdale*.

See this caſe fully ſtated in page 337 of this work, under the head *Damages*.

Eaſter, 1 *Geo*. 3. *Lewis and another*, v. *Rucker*.

On a rule to ſhew cauſe why a verdict given for the defendant ſhould not be ſet aſide, and a new trial had, the caſe ſtated to the court was as follows:

An action was brought on a *policy* of *inſurance*, by the plaintiffs for one Mr. *J. B.* on the goods aboard a ſhip called the *Vrow Martha*, at and from *St. Thomas Iſland* to *Hamburgh*, from the loading at *St. Thomas Iſland* till the ſhip ſhould arrive and land the goods at *Hamburgh*.

The goods were, ſugars, coffee, and indigo; the ſugars were valued at 30 *l. per* hogſhead; the clayed and *Muſcovado* ſugars at 20 *l. per* hogſhead; and the coffee and indigo were likewiſe reſpectively valued. The ſugars were warranted free from average, under 5 *l. per cent.* and all the other goods free from average under 3 *l. per cent.* unleſs *general*, or the ſhip be ſtranded.

In the courſe of the voyage, the ſea-water got in; and when the ſhip arrived at *Hamburgh*, it appeared that every hogſhead of ſugar was damaged. The damage the ſugars had ſuſtained made it neceſſary to ſell them immediately; and they were accordingly ſold: and the difference between the price which they brought, by reaſon of the *damage*, and that which they might then have been ſold for at *Hamburgh*, if they had been *ſound*, was as 20 *l.* 0 *s.* 8 *d. per* hogſhead is to 23 *l.* 7 *s.* 8 *d. per* hogſhead, for as damaged, they were worth only 20 *l.* 0 *s.* 8 *d. per* hogſhead.

On the foregoing rule of eſtimating the damage, the defendant paid the money into court.

After hearing the matter fully argued by the council on both ſides, the court took time to give their opinion.

Lord *Mansfield* now delivered the opinion of the court as follows.

The only queſtion is, "whether (all the facts being "agreed) the jurv have eſtimated the damages by a "*proper meaſure?*"

The moment the jury brought in their verdict I was ſatisfied that they did right, in totally diſregarding the particular circumſtances of this caſe: as I expected the other cauſe would be tried, I thought a good deal of the point, and endeavoured to get what aſſiſtance I could, by converſing with ſome gentlemen of experience in *adjuſtments*. The point has now been very fully argued at the bar; and the more I have thought, and the more I have heard on the ſubject, the more I am convinced that the jury did right to pay no regard to the circumſtances.

The nature of the contract is, "that the goods ſhall "come ſafe to the *port* of *delivery*; or if they do not, "to indemnify the plaintiff to the amount of the "prime coſt, or value in the *policy*." If they arrive, but leſſened in value, through damages received at ſea, the nature of an indemnity ſpeaks demonſtrably, that it muſt be by putting the merchant in the ſame condition, (relation being had to the prime coſt or value in the policy) which he would have been in, if the goods had arrived free from damage; that is, by paying ſuch proportion, or *aliquot part* of the prime *coſt* or *value* in the *policy*, as *agrees* with the proportion or *aliquot part* of the diminution in value occaſioned by the damage.

The duty accrues on the ſhip's *arrival*, and *landing* her cargo at the *port of delivery:* the *inſured* has then a right to demand ſatisfaction. The *adjuſtment* never can depend on *future* events or ſpeculations.

We are therefore of opinion, that the plaintiffs are *not* entitled to have the price for which the damaged ſugars were *ſold*, made up 30 *l. per* hogſhead, and alſo, that the rule, by which the jury have gone is the *right* meaſure, and the rule to ſhew cauſe muſt therefore be diſcharged. *Vide Bur. vol.* 2. *p.* 1167.

Trinity, 1 *Geo.* 3. *Hamilton* v. *Mendes.*

On a ſpecial caſe reſerved at *Guildhall* at the ſittings before Lord *Mansfield* after *Michaelmas* term 1760, in an action brought againſt the defendant as *one* of the *inſurers* on a *policy of inſurance* from *Virginia* or *Maryland* to *London*, of a ſhip called the *Selby*, and of goods and merchandize therein, till ſhe ſhall have moored at anchor *twenty-four hours* in good ſafety, the following queſtion was ſubmitted for the opinion of the court, *viz.*

"Whether the plaintiff on the 26th day of *June* " 1760, had a *right* to *abandon*, and has a right to reco- " ver as for a *total* loſs. If he is entitled to recover " for a *total* loſs?" then the jury find a verdict for the plaintiff, *damages* 98 *l. coſts* 40 *s.* But if the court ſhall be of opinion, that he had *no* right to *abandon* on the ſaid *twenty-ſixth* day of *June*, or he ought only to recover an *average* loſs; then the jury find a verdict for the plaintiff, damages 10 *l. coſts* 40 *s.*

After this caſe had been ſeveral times argued by the council for the defendant, the court took time to adviſe thereon.

Lord *Mansfield* now declared the reſolution of the court as follows:

The plaintiff has averred in his declaration, as the baſis of his demand for a *total* loſs, " that by the cap- " ture the ſhip became wholly loſt to him."

Without dwelling on principles or authorities, the *conſequences* of the preſent queſtion are deciſive. It is impoſſible that any man ſhould *deſire* to *abandon* in a caſe circumſtanced like the preſent, but for one of two reaſons, *viz.* either becauſe he has *over-valued*; or becauſe the *market* has *fallen* below the original price. The only reaſons which can make it the intereſt of the party to *deſire*, are concluſive againſt *allowing it.*

It is unjuſt to turn the *fall* of the market on the *inſurer*, who has no concern in it, and who could never gain by the riſe. And an *over-valuation* is contrary to the general policy of the *marine law*; contrary to the ſpirit of *ſtat.* 19 *Geo.* 2. a temptation to fraud; and a ſource of great abuſe: therefore no man ſhould be allowed to avail himſelf of having *over valued.*

If the valuation be true, the plaintiff is indemnified by being paid the charge he has been put to by the capture. If he has *over-valued*, he will be a *gainer*, if he is permitted to *abandon*; and he can only deſire it, becauſe he has *over-valued.* This was avowed on the firſt argument, and that very reaſon is concluſive againſt its being allowed.

The *inſurer*, by the *marine law*, ought never to pay *leſs* on a contract of indemnity, than the value of the loſs: and the *inſured* ought never to *gain more*. Therefore if it was neceſſary to reſort to that argument, the *conſequence* of the determination would alone be ſufficient on the preſent occaſion.

But on principles, this action could not be maintained as for a *total* loſs, if the queſtion was to be judged by the ſtricteſt rules of *common law*; much leſs can it be ſupported for a *total* loſs, as the queſtion ought to be decided by the large principles of the *marine law*, according to the ſubſtantial intent of the contract, and the real truth of the caſe.

Here, the event had fixed the loſs to be an *average* only, before the action brought; before the offer to *abandon*; and before the plaintiff had notice of any accident; conſequently before he could make an election. Therefore, under theſe circumſtances, " we " are of opinion that he cannot recover for a *total*, but " for an *average* loſs *only*," the quantity of which is eſtimated by the jury.

Per curiam. Let judgment be entered up as for the *average* loſs ſtated in the caſe. *Vide Bur. vol.* 2. *p.* 1198.

Michaelmas, 2 *Geo.* 3. *Stevenſon* v. *Snow.*

On a caſe reſerved at *niſi prius* before Lord *Mansfield* in *London*, on an action for money had and received to the plaintiff's uſe, brought by the plaintiff, the *inſured*, againſt the defendant, the *inſurer*, for a reſtitution of part of the *premium*,

The caſe ſtated to the court was; that this was a *policy of inſurance* on a ſhip, at *five guineas per cent.* loſt or not loſt, at and from *London* to *Hallifax* in *Nova Scotia*, warranted to depart *with convoy* from *Portſmouth*, for the voyage; that is to ſay, with the *Hallifax* or *Louiſburgh* convoy.

Before the ſhip arrived at *Portſmouth*, the convoy was gone. Notice of this was immediately given by the *inſured* to the *underwriter*; and at the ſame time, he was alſo deſired either to make the *long inſurance*, or to return part of the *premium.*

The jury *find*, that the uſual ſettled *premium* from *London* to *Portſmouth*, is *one*, and *one and an half per cent.*

They *find alſo*, that it is *uſual* for the *underwriter* in ſuch caſes to return *part* of the *premium*; but the *quantum* is uncertain; (and the *quantum* muſt, in its nature, be uncertain; becauſe it depends on uncertain circumſtances.)

It is ſtated, that the plaintiff made the defendant an offer of allowing him to retain *one*, or *one and an half per cent.* for the riſque he had run on ſuch part of the voyage as was performed under the policy, *viz.* from *London* to *Portſmouth.*

After hearing the arguments of the council on both ſides, the court ordered the *poſtea* to be delivered to the plaintiff.

Lord *Mansfield.* Theſe contracts are to be taken with great latitude. The ſtrict letter of the contract is not to be ſo much regarded as the object and intention of it.

Equity implies a condition, " that the *inſurer* ſhall " not receive the price of running a riſque, if he runs " none."

This is a contract without any *conſideration*, as to the voyage from *Portſmouth* to *Hallifax*; for he *intended* to inſure that part of the voyage as well as the former part of it; and *has not.* Conſequently, the *inſured* received no conſideration for this proportion of his *premium.* And then the preſent caſe is within the general principle of actions for monies had and received to the plaintiff's uſe.

I ſhall not enter on the *uſage*; for it is found only, " that in ſimilar caſes it is *uſual* to return a *part* of the " *premium*, without aſcertaining *what* part."

If the riſque is not *run*, though it is by the *neglect* or even *fault* of the party *inſuring*, yet the *inſurer* ſhall *not retain* the *premium.*

It has been objected, " that the voyage being *begun*, " and *part of the riſque* being already run, the *premium* " cannot be apportioned." But I can ſee no force in this objection. This is *not* a contract ſo entire, that there can be no apportionment. For there are two parts in this contract, and the *premium* may be *divided* into *two* diſtinct parts, *relative*, as it were, to *two* voyages.

The practice ſhews, " that it has been *uſual*, in " ſuch like caſes, to return a part of the *premium*," though the *quantum* be not aſcertained: and indeed the *quantum* muſt vary, as circumſtances vary: ſo that it never can have been fixed with any preciſe exactneſs; but tho' the *quantum* has not been aſcertained, yet the *principle* is agreeable to the general ſenſe of mankind.

Deniſon, *Foſter*, and *Wilmot*, Juſtices, gave their opinions, and concurred with the Chief Juſtice.

The court unanimouſly, ordered the *poſtea* to be delivered to the plaintiff. *Vide Bur. vol.* 3. *p.* 1237.

Trinity, 3 *Geo.* 3. *Glover* v. *Black.*

On a caſe reſerved at the fittings at *Guildhall* after *Michaelmas* term 1762, in an action on the *caſe* on a *policy of inſurance* of goods and merchandizes, *laden or to be loaden* on board the *Denham* Captain *Tryon*, " at and

“ from *Bengal* to any ports or places whatſoever in the *Eaſt Indies*, till her ſafe arrival at *London*;” which policy was underwritten by the defendant for 300 *l.* for a *premium* of 10 *l. per cent.*

The plaintiff declared for a *total* loſs. The defendant pleaded the *general iſſue*. The cauſe came on to be tried on the 1ſt day of *December* 1762, and it appeared on evidence,

That on the 31ſt day of *March* 1760, the ſaid ſhip, with her lading on board her, was *burnt* at *Fort Marlborough*, and thereby all the goods and merchandizes belonging to *W. T.* were *totally* conſumed and loſt. This proof being given of the plaintiff's intereſt, the jury found a verdict for the plaintiff, *ſubject* to the opinion of the court, “ whether on this evidence the plaintiff was entitled to recover on this *policy*.”

After hearing the arguments of the council on both ſides, the court took time to conſider the matter.

Lord *Mansfield* now delivered the opinion of the court as follows:

The ground of ſupporting this *inſurance*, if it could have been ſupported, was a clauſe of *ſtat.* 19 *Geo.* 2. *c.* 37. *viz.* the 5th *ſection*, which runs in theſe words, “ that all and every ſum and ſums of money to be lent on *bottomree*, or at *reſpondentia*, on any ſhip or ſhips belonging to any of his Majeſty's ſubjects, bound to or from the *Eaſt Indies*, ſhall be lent *only on the ſhip*, or *on the merchandize or effects* laden or to be laden on board of ſuch ſhip; and ſhall be ſo expreſſed in the condition of the bond; and the *benefit of ſalvage* ſhall be allowed to the lender, his agents or aſſigns, *who alone* ſhall have a right to make aſſurance on the money ſo lent. And *no borrower* of money on *bottomree*, or at *reſpondentia* as aforeſaid, ſhall *recover more* on any aſſurance than the value of his intereſt on the ſhip or in the merchandizes or effects laden on board of ſuch ſhip, *excluſive* of the money ſo borrowed: and in caſe it ſhall appear that the value of his ſhare in the ſhip, or in the merchandize or effects laden on board doth not amount to the full ſum or ſums he has borrowed as aforeſaid, ſuch borrower ſhall be reſponſible to the lender for ſo much of the money borrowed, as he has not laid out on the ſhip or merchandizes laden thereon, with lawful *intereſt* for the ſame, together with the *aſſurances*, and all other charges thereon, in the proportion the money not laid out ſhall bear to the whole money lent, notwithſtanding the ſhip and merchandizes be totally loſt.”

This ſtatute to the purpoſe of *inſurance* conſiders the borrower as having a right to *inſure only for the ſurplus value*, over and above the money he has borrowed on *bottomree*, or at *reſpondentia*. And the *lenders* at *reſpondentia* or on *bottomree*, may, to many purpoſes, be ſaid to have a *lien*.

We are all very well ſatisfied, “ that this ſtatute *never meant* or *intended* to make any *alteration* in the *manner* of *inſurances*.”

It is eſtabliſhed now, as the *law* and *practice* of merchants, “ that *reſpondentia* and *bottomree* muſt be *mentioned* and *ſpecified* in the *policy of inſurance*” But he declared at the ſame time, that the court did *not* mean to determine *generally*, “ that no *ſpecial intereſt in goods* may be given in evidence in other caſes than thoſe of *reſpondentia* and *bottomree*, if the circumſtances of the caſe ſhall admit of it.” Therefore the plaintiff was *nonſuited*. *Vide Bur. vol.* 3. *p.* 1394.

Trinity, 3 *Geo.* 3. *Woolmer and another* v. *Muilman.*

On a ſpecial caſe reſerved at *niſi prius* before Lord *Mansfield* for the opinion of the court, on an action on a *policy of inſurance*, brought for a *total loſs* of goods, and merchandizes on board the ſhip *Bona Fortuna*, at, and from *North Bergen* to any port or place whatſoever, till her ſafe arrival at the port of *London*.

The *policy* was under-written thus, “ *warranted* a neutral ſhip and property.”

The defendant under-wrote the *policy* for 150 *l.*

The defendant having pleaded the *general iſſue*, and paid into court the *premium* received by him for the ſaid *inſurance*, iſſue was joined, and the cauſe was tried, when it was admitted, that the plaintiffs had intereſt on the ſhip to a large value, *viz.* to the amount of the ſum *inſured*.

The ſhip, with the goods and merchandizes ſo laden, and being on board her, after her departure from *North Bergen*, and before her arrival at *London*, proceeding on her voyage, was by the force of the winds and ſtormy weather wrecked; and the ſaid goods and merchandizes *wholly* loſt.

It was expreſsly ſtated, “ that the ſhip and merchandize, at or before the time ſhe was loſt, *were not neutral property, as warranted by the ſaid policy*.”

The queſtion therefore was, “ Whether the plaintiffs can, under the circumſtances of this caſe recover, in this action.”

Lord *Mansfield*. This is no *contract*; for the man *inſured* a neutral property, and this is not a neutral property; therefore judgment muſt go for the defendant. *Vide Bur. vol.* 3. *p.* 1419.

Michaelmas, 3 *Geo.* 3. *Wilſon* v. *Ducket.*

On an action on a *policy of inſurance* of a ſhip, the plaintiff in his declaration had a count for a general *indebitatus aſſumpſit* for money had and received to the plaintiff's uſe; and laid his damages at 98 *l.*

The trial of this cauſe was had under a decree of the *Court of Chancery*, where the now defendant, the *inſurer*, being there complainant, had offered to pay back the *premium*, which was 10 *l.*

In this cauſe no money was brought into court, tho' the uſual courſe in theſe caſes is for the defendant, the *inſurer*, to bring the *premium* into court.

The jury found a verdict for the *plaintiff* for the 10 *l. premium*, on the count for money had and received to his uſe; although they were of opinion againſt the *policy*, on the foot of *fraud*; and found againſt it, as being *fraudulent*: in fact, the *firſt underwriter* was only a decoy duck, to induce other perſons to underwrite the *policy*; and it had been previouſly agreed between the *inſured* and him, “ that *he ſhould not be bound* by his ſigning the *policy*,” which this court conſidered as a fraud; and therefore, that the jury had given a right verdict in finding the *policy fraudulent*.

By the conſent of the court, and the council for the plaintiff and defendant, the following queſtion was ſtated for their opinion:

“ Whether on a *policy of inſurance* being found *fraudulent*, the *premium* ſhould be *returned* to the plaintiff the *inſured*, or *retained* by the defendant, the *inſurer*.”

After hearing the arguments of the council on both ſides on this matter, which came on, on a rule to ſhew cauſe, the rule was made abſolute, that the verdict found for the plaintiff be *vacated*, and that a verdict be entered for the defendant.

Lord *Mansfield* ſaid, he looked on the offer made by the complainant's bill in *equity* to be the ſame thing as if the money had been *actually brought into court* in this cauſe, and therefore the rule was made abſolute. *Vide Bur. vol.* 3. *p.* 1361.

Eaſter, 4 *Geo.* 3. *Hodſon* v. *Richardſon.*

There being ſeveral *inſurance*-cauſes in the paper on the ſame ground, the council for the plaintiffs and defendants agreed, “ that all ſhould be *bound* by the *verdict* given in *one*,” and accordingly a verdict was given in one of the actions for the plaintiff. The council for the defendant gave notice of motion for a new trial, and at the ſame time the plaintiff's council moved, that the reſpective defendants ſhould pay their money to the plaintiff, *purſuant to their agreement*, he having obtained a *verdict* in the cauſe already tried.

The court were clearly of opinion, that a conſent “ to be bound by a *verdict* in one of many cauſes on the ſame queſtion,” means *ſuch* a verdict as the court thinks *ought* to *ſtand* as a *final* determination of the matter.

In the preſent caſe a *material* circumſtance was concealed from the *inſurer*, by the *inſured*; and therefore the whole contract was *void*: and there ought to be a new trial, and the court made a rule for that purpoſe; but ordered, that nothing ſhould be taken by the motion. *Vide Bur. vol.* 3. *p.* 1477.

Trinity, 4 *Geo*. 3. *Wilſon and another* v. *Smith.*

On an action on the *caſe* brought on a *policy of inſurance*, for the recovery of 56 *l.* 19 *s.* 8 *d. per cent.* being the damage received by a cargo of wheat on board the *Boſcawen*, *inſured* at and from *Lancaſter* to *Rotterdam*: which wheat was valued by agreement at 30 *s. per quarter*. The *policy* was in the ordinary form. The *premium* was *five guineas per cent.* and in caſe of loſs, the *aſſured* to abate 20 *per cent.* and the *aſſurers* to be free from average under 3 *l. per cent. unleſs general, or the ſhip ſhall be ſtranded.*

The policy was thus underwritten:

> “*N. B.* Corn and fiſh are warranted *free from average*, *unleſs general*, or *the ſhip be ſtranded.* Sugar, tobacco, hemp, flax, hides and ſkins are warranted *free from average*, under 5 *l. per cent.* and all *other* goods, *free from average* under 3 *l. per cent. unleſs general, or the ſhip be ſtranded.*”

Warranted well in port the 16th of *February*, 1760.

The defendant underwrote this *policy* for 100 *l.* on the 20th of *February*, 1760.

The ſhip after her departure from *Lancaſter*, and before her arrival at *Rotterdam*, *viz.* on the 22d of *February*, 1760, met with a *violent ſtorm*, and was obliged to *cut away* and *leave* her *cable* and *anchor*, for the ſafety of the ſaid *ſhip* and *cargo*, and run into *Liverpool* to refit; and the expence thereof amounted to 38 *l.* 15 *s. per cent.*

The defendant pleaded the *general iſſue* to this action, and the cauſe was tried at *Guildhall*, on the 15th of *February*, 1764, before Lord *Mansfield*, when the plaintiff's caſe was reduced to this ſingle queſtion.

> Whether on the true conſtruction and meaning of the words, “*free from average*, *unleſs general*, *or the ſhip be ſtranded*. The plaintiffs can, under the circumſtances of this caſe, recover in this action for the damage of 56 *l.* 19 *s.* 8 *d. per cent.* (the expence of re-fitting amounting to 38 *l.* 15 *s. per cent.* not being diſputed.)

After hearing the arguments of the council on both ſides, on this matter, and taking time to conſider the ſame:

Lord *Mansfield*, now delivered the judgment of the court to the effect following:

Policies of inſurance, according to their preſent form, are very irregular and confuſed; an *ambiguity* ariſes in them from their uſing words in *different* ſenſes; particularly in the uſe of this word *average*.

It is uſed to ſignify a *contribution to a general loſs*: and it is alſo uſed to ſignify a *particular loſs*.

Whether it be conſidered in *one*, or *other* of theſe ſenſes, it will not ſerve the plaintiffs in the preſent caſe: for, if it here ſignifies *contribution*, the *inſurer* is to be free from contributing, unleſs where the contribution is *general*. If it ſignifies loſs, then plainly it is warranted free from all *particular* loſſes. The *inſurer* is *liable* to all loſſes ariſing from the ſhip being *ſtranded*, and in all caſes where there is a *general average*; but all other *partial* loſſes are *excluded* by the expreſs terms of the *policy*.

The words, “free from average, *unleſs general*,” can never mean to leave the *inſurers* liable to any *particular* average.

It is clear, that the plaintiff's *ought not* to recover; and that the judgment ought to be for the defendant, which the court ordered accordingly. *Vide Bur. vol.* 3. *p.* 1550.

Trinity, 4 *Geo*. 3. *Reed* v. *Cole.*

In an action on the *caſe* brought on articles of agreement, conſtituting a ſociety for the mutual *aſſurance* of each other's ſhips: *whereby* they engaged, that when and ſo often as any of the ſhips wherein any of the members property ſhould be loſt, the reſt ſhould contribute to ſuch loſs; but every member was obliged to prove a property of 500 *l.* in a ſhip: and if he would ceaſe to be a member he was obliged to give *ſix months* notice. The plaintiff ſhewed that he had the requiſite property in the ſhip, and became a member; and that the ſhip was loſt. The defendant pleaded, that the plaintiff had parted with his intereſt in the ſhip before the loſs happened. To this plea the plaintiff replied, that by articles of agreement entered into with the purchaſer of the ſhip, the plaintiff had agreed to pay 500 *l.* if a *loſs happened* within *three months*; and therefore he was *intereſted during the voyage*. To this *replication* the defendant demurred, and the plaintiff joined in demurrer.

After heating the arguments of the council on both ſides, the court gave judgment for the plaintiff.

The court were of opinion that as he remained *contributory* to the loſs of the others at the very time when this loſs happened, it was but juſt and equitable, and within the words and meaning of the agreement, that they ſhould contribute to his. He ſtill had an intereſt in the ſafety of the ſhip; he had not parted with all his intereſt in it, but continued intereſted as to this loſs.

Per curiam. Let judgment be entered up for the plaintiff. *Vide Bur. vol.* 3. *p.* 1512.

Trinity, 5 *Geo*. 3. *Salvador* v. *Hopkins*. *Heaton* v. *Rucker*.

The queſtion before the court was, “whether there ſhould be new trials in theſe two particular actions on a *policy of inſurance*,” which had been tried before Lord *Mansfield* at *Guildhall*; and a verdict found for the plaintiff, in Mr. *Salvador*'s caſe; and for the defendant, in Mr. *Rucker*'s caſe.

The council for the *under-writers* inſiſted, that the *policies* were *void*, becauſe at the time of under-writing, “they were not *expreſsly told of the new agreement to detain* the ſhip in *India* for a *year longer* than the enlarged time provided for by the *charter-party*, which expired on the 11th day of *February* 1764.”

The reaſons which governed the court on granting or refuſing new trials, were: that the *under-writers* are *bound* and *preſumed* to know the courſe of the *Eaſt India* trade, the terms of the *charter-party*, and the deſtination of the *India* ſhips, (which are under the direction of the Company, and not of their owners.) That the *charter-party* is a *printed form*, of a very long ſtanding. That, beſides the liberty thereby given, “to prolong the ſhips ſtay for one year,” it is *very common*, by a new agreement to detain her a *year longer*; (for no ſhip comes home in ballaſt;) and the longer a ſhip is kept, the more beneficial it is to the owners. That the words of the *policy* are *adapted to this uſage*; being without limitation of time or place; and without any reference to the firſt voyage particularly mentioned in the *charter-party*. The terms of the *policy* preciſely *deſcribe* the *riſque* in its utmoſt latitude; and neceſſarily extend to every prolongation of ſtay, and every country voyage. And any of the defendants might have learned at the *India Houſe* all that was to be known.

At the time of under-writing, there was no mention made, or queſtion aſked, “when the ſhip was *chartered*, when ſhe ſailed from *England*, when ſhe arrived in *India*, whether ſhe was *continued a year*, according to the *proviſo* in the printed *charter-party*;” and yet her continuance in the *Eaſt Indies* depended on all theſe facts.

If theſe matters ought neceſſarily to be diſcloſed, the *policy* was void, to the knowledge of the *under-writers*, at the time they took the *premium*.

The chance of her ſtay is one of the *riſques* inſured.

The evidence given was very ſtrong, “that her ſtaying a year longer, if known, would not have varied the *premium*.”

The ſhip was *inſured* at the ſame *premium*, after the prolongation of her in *India* was known.

None of the defendants deſired to be off, after they knew that an account of the new agreement “to prolong her ſtay for a year longer,” had been received in *England* on the 3d day of *April* 1764, which was notorious to themſelves before the intelligence of the loſs, which came the *October* following.

So that if there had been any force in the objection, it would have been waived by the acquieſcence of the under-writers, after they were fully apprized of the whole.

After the foregoing arguments had been offered by the council on both ſides for and againſt granting new trials in theſe cauſes, the court took time to conſider the matter,

Lord *Mansfield* now delivered the unanimous opinion of the court as follows:

“ That there *ought to be a new trial* in the caſe of “ *Heaton* v. *Rucker*, but not in that of *Salvador* v. *Hop*“ *kins.*”

The court thought the uſage of the *Eaſt India Company's trade*, and the *courſe of their voyages*, to be in fact ſo notorious, and ſo well known both to the *inſurers* and the *inſured*, that they muſt be ſuppoſed fully apprized and ſufficiently *conuſant* of it; and that the obligation of this policy is to be taken from the words of the *charter-party*, (which refer to the uſage) and the *uſage* of theſe voyages, in the ſame manner as if it was expreſsly *inſerted* in the policy.

They eſteemed this manner of determining the queſtion moſt convenient for all parties; becauſe whoever ſhall hereafter *inſure* on an *Eaſt India ſhip* will know that he *inſures* the *contingencies*, and may take proper precaution againſt them, if he thinks proper; and therefore, they made a rule for *no new trial* in *Salvador* v. *Hopkins*, and a rule for a *new trial* in *Heaton* v. *Rucker*. *Vide Bur. vol.* 3. *p.* 1706.

Eaſter, 6 *Geo.* 3. *Carter* v. *Boehm.*

On an action brought on a *policy of inſurance* for *one* year, *viz.* from the 16th of *October*, 1759, to the 16th of *October*, 1760, underwritten by Mr. *Charles Boehm*, of intereſt, or no intereſt, without benefit of *ſalvage*: for the benefit of Governor *George Carter*, againſt the loſs of *Fort Marlborough*, in the Iſland of *Sumatra*, in the *Eaſt Indies*, by its being taken by a foreign enemy. The event happened, the fort *was* taken by Count *D'Eſtaigne* within the year.

This cauſe was tried before Lord *Mansfield* at *Guildhall*; and a verdict was found for the plaintiff by a ſpecial jury of merchants.

On the 19th of *April* laſt, the defendant's council moved for a new trial on this *objection*:

“ That the circumſtances were not ſufficiently diſ“ cloſed.”

On this motion the defendant obtained a rule to ſhew cauſe, and copies of the letters and depoſitions were ordered to be left with Lord *Mansfield*.

After hearing the arguments of the council on both ſides, and the evidence given at the trial being ſtated to the court, they diſcharged the rule.

Lord *Mansfield* delivered the reſolution of the court accordingly as follows:

This is a motion for a new trial. The defendant *contends*, “ That ſome circumſtances in the know“ ledge of Governor *Carter*, not having been mention“ ed at the time the *policy* was underwrote, amounts “ to a *concealment*, which ought, in law, to *avoid* the “ *policy*.”

The plaintiff *inſiſts*, “ That the not mentioning “ theſe particulars, does not amount to a *concealment*, “ which ought in law to avoid the *policy*; either as “ a *fraud*; or, as *varying* the contract.”

The under-writer knew the *inſurance* was for the Governor; he knew the Governor muſt be acquainted with the ſtate of the place; he knew the Governor could not diſcloſe it, conſiſtent with his duty; he knew the Governor, by *inſuring*, apprehended at leaſt the poſſibility of an attack; *with* this knowlege, *without* aſking a queſtion, he under-wrote.

By ſo doing, he took the knowledge of the ſtate of the place *on himſelf*; it was a matter as to which he *might be informed*, various ways; it was not a matter within the private knowlege of the Governor only.

But not to rely on that, the utmoſt which can be contended is, that the under-writer truſted to the fort being in the condition in which it *ought* to be; in like manner, as it is taken for granted, that a ſhip *inſured* is *ſeu-worthy*

There is no imputation on the Governor, as to any intention of *fraud*. By the ſame conveyance, which brought his orders to *inſure*, he wrote to the company every thing which he knew or ſuſpected; he deſired nothing to be kept a ſecret, which he wrote either to them or to his brother. His ſubſequent conduct, down to the 8th of *February*, 1760, ſhewed that he thought the danger very *improbable*.

If the defendant's *objections* were to prevail in the preſent caſe, the rule would be *turned* into an *inſtrument of fraud*.

The under-writer, here, knowing the Governor to be acquainted with the ſtate of the place; knowing that he apprehended danger, and muſt have ſome ground for his apprehenſion; being told nothing of either; ſigned this policy, *without aſking a queſtion*.

If the objection, “ That he was *not told*,” is ſufficient to *vacate* it, he took the *premium*, knowing the *policy* to be *void*; in order to *gain*, if the alternative turned out *one way*; and to make *no ſatisfaction*, if it turned out the *other*: he drew the Governor into a *falſe confidence*, that if the worſt ſhould happen, he *had provided againſt* total ruin;” *knowing*, at the ſame time, “ that the indemnity to which the Governor “ truſted was *void*.” If he thought that omiſſion an objection, *at the time*, he ought not to have ſigned the *policy*, with a *ſecret reſerve* in his own mind to make it void; if he *diſpenſed* with the information, and did *not* think this ſilence an objection then, he cannot take it up *now*, after the event.

On the whole ſtate of the caſe, and on the fulleſt deliberation, we are all clear, that the verdict is well founded; and there ought not to be a new trial; conſequently, that the rule for that purpoſe ought to be diſcharged; which was diſcharged accordingly. *Vide Bur. vol.* 3. *p.* 1905.

Intendment,

Eaſter, 6 *W.* & *M.* *Reeve* v. *Long.* Error.

On a *writ of error* brought on a judgment in the *C. B.* in *ejectment* for lands in *Milkſham* in the county of *Wilts*, in which there was a ſpecial verdict found to this effect, *viz.* that *John Long*, Eſq; was ſeiſed of the lands, &c. in *fee*, who by his laſt will, dated the 20th day of *July* 1676, did deviſe the ſame to his nephew *Henry Long* (the eldeſt ſon of his brother *Richard Long*) for life, and after his deceaſe to the firſt ſon of the body of ſuch firſt ſon lawfully iſſuing, and for default of ſuch iſſue, to the ſecond, third, fourth, and fifth, &c. and every other ſon of the body of the ſaid *Henry Long*, lawfully to be begotten, ſucceſſively one after another, and to the heirs male of their reſpective bodies; and for default of ſuch iſſue, to *Richard Long* for life, and after his deceaſe to his firſt, ſecond, and third, &c. and every other ſon, *as above*; with divers remainders over.

John Long died, and *Henry* entered, who had iſſue one daughter, and about *Lady-Day* 1687, died, leaving his wife *enceinte* with a ſon, who was born about *ſix months* after the death of his father. But on the death of *Henry* without iſſue male, *Richard Long* being the next in remainder, entered, &c. and afterwards the *poſthumous* ſon by his guardian entered on him, and thereon *Richard* brought this *ejectment*, and had judgment in the *C. B.* on which judgment *error* was brought here. It was inſiſted that *Henry*, the after-born ſon, is heir at law, and if this will had not been made, he would have inherited; and therefore the *intention* of the teſtator muſt be very clear in the will itſelf to diſinherit this heir, otherwiſe he muſt not be defeated of the eſtate.

But his *intention* appears to be of another nature; for throughout every paragraph of the will it is plainly to be collected, that he *intended* his land ſhould go and be continued in the heirs male of his family *ſucceſſively*.

This muſt therefore be an *executory deviſe*, and not a *contingent* remainder; and the rather, becauſe it is in the caſe of a will, by which eſtates paſs otherwiſe than by conveyances at the *common law*; and the law will not ſuffer this to be conſtrued a *contingent remainder*; becauſe that would be to diſinherit an heir on a nicety, againſt the plain *intention* of the teſtator.

That *intentions* govern in wills many authorities, may be cited, *viz.* If the father having three ſons, deviſes his land to his eldeſt ſon in *tail*, remainder to his ſecond ſon in like manner, remainder to his third ſon in *fee*, and the eldeſt ſon happens to die in the lifetime of his father, leaving iſſue, it has been held, that ſuch iſſue ſhall inherit without a *new publication* of the will, becauſe it was not the *intention* of the father to diſinherit him.

If therefore this is a *ſpringing remainder*, then the freehold ſhall veſt in *Richard* till the ſon of *Henry* was born, then it ſhall veſt in him; and to prove it to be a *ſpringing remainder*, or *executory deviſe*, the caſe of *Pell* v. *Brown* was cited.

On the other ſide it was argued, that this is a contingent remainder, for if it ſhould be an *executory deviſe*, then a perpetuity would be introduced, becauſe if it is executory in one, it may be ſo in all the deviſes; and therefore it would be againſt the known principles of law to make it an *executory deviſe*, eſpecially in this caſe, where the teſtator was not ſure that *Henry Long* would have a ſon; ſo that it is a plain contingency, which not happening in time, nothing remains in him to make it *executory*.

There are two things to make a deviſe *executory*, viz. it muſt be limited on an eſtate in fee-ſimple, and it ought to be limited on a condition, both which are wanting in this caſe; neither can any remainder be *executory* where there is a particular eſtate to ſupport it.

Accordingly the judgment in the *C. B.* was affirmed, but in *Michaelmas* term following it was reverſed in the Houſe of Peers. *Vide Mod. Rep. vol. 4. p.* 282.

Eaſter, 6 *W. & M.* *The King and Queen* v. *Tucker.*

Per curiam. Indictments cannot be made good by *implication.* *Vide Raym. vol.* 1. *p.* 1.

Hilary, 7 *W.* 3. *Fletcher* v. *Ingram.*

Adjudged, That a cuſtom that a conſtable elected by the homage ſhall ſerve for a year, is good, and ſhall be *intended* for the year next enſuing. *Vide Raym. vol.* 1. *p.* 69.

Eaſter, 8 *W.* 3. *The King* v. *Cooper.*

See this caſe fully ſtated in page 524 of this work, under the head *Indictment.*

Hilary, 9 *W.* 3. *The King and Queen* v. *The Biſhop of Cheſter.* Error.

The queſtions before the court were, 1ſt. Whether the letters patent of King *Charles* the firſt paſſed the advowſon in diſpute to Sir *William Thexton* and his heirs?

2dly. If the grant ſhewn on the *Oyer* can be *intended* to be the ſame grant with that which was pleaded?

Holt, Chief Juſtice, held, that though Queen *Elizabeth* might be ſeiſed in *groſs* at the time of the grant to the Earl of *Warwick*, yet that it paſſed by letters patent of *Charles* 1. to *Thexton*: and that it did not appear that it was in groſs in the Queen at the time of the firſt grant. For all things on *Oyer* ſhall be *intended* to make the grant good, if nothing to the contrary appears. *Vide Raym. vol.* 1. *p.* 292.

Hilary, 1 *Ann.* *Cooper* v. *The Hundred of Baſingſtoke.*

See this caſe fully ſtated in page 518 of this work, under the head *Hundred.*

Eaſter, 1 *Ann.* *Feltham* v. *Cudworth.*

See this caſe fully ſtated in page 103 of this work, under the head *Compoſition.*

Michaelmas, 3 *Ann.* *Arnote or Armit*, v. *Breame.*

See this caſe fully ſtated in page 103 of this work, under the head *Arbitration and Award.*

Hilary, 4 *Ann.* *Vaughan* v. *Lucking.*

In an action on the *caſe*; the plaintiff declared, that the defendant was *paymaſter* of ——— and in conſideration of, *&c.* promiſed the plaintiff, that he ſhould be his clerk, ſo long as the defendant ſhould be paymaſter; and avers, that he the plaintiff continued to ſerve him *in his ſervice aforeſaid*, till ſuch a time; and then the defendant *diſmiſſed him from his ſervice.* After a verdict for the plaintiff, it was moved in arreſt of judgment, that the plaintiff had not averred that the defendant continued paymaſter at the time he turned the plaintiff out of his ſervice, and conſequently the plaintiff had not ſet out a good cauſe of action; for the defendant was to continue the plaintiff his clerk only ſo long as he the defendant continued paymaſter.

But it was anſwered, and reſolved by the court, that it was averred in the declaration, that the defendant was once *paymaſter*; and he ſhould be *intended* to continue ſo, unleſs the contrary did appear; and that it was ſaid, that the defendant *diſmiſſed the plaintiff from his ſervice*, which could not be, if the defendant was not *paymaſter.* But to that anſwer it was objected for the defendant, that it was from *his ſervice* generally, and not *from his aforeſaid ſervice*, and ſo might be ſome other ſervice.

Holt, Chief Juſtice, obſerved, that there was no other ſervice mentioned, and it would be a *foreign intendment* to *intend* any other. Accordingly judgment was given for the plaintiff. *Vide Raym. vol.* 2. *p.* 1222.

Eaſter, 4 *Ann.* *Smith* v. *Goffe.*

In an action on the *caſe*, it was adjudged, that the conſideration of a promiſe being to deliver up a bond, wherein *J. S.* a third perſon, is bound, muſt be *took* to be to the obligor. *Vide Raym. vol.* 2. *p.* 1126.

Trinity, 4 *Ann.* *Ball* v. *The Bail of Ruſſell.*

See this caſe fully ſtated in page 165 of this work, under the head *Bail.*

Joinder in Action.

Hilary, 2 *W.* 3. *Boſon* v. *Sandford.*

On an action on the *caſe*, in which the plaintiff declared againſt *ſix* defendants, ſetting forth, that he loaded a ſhip, whereof they were owners, and that they undertook the goods ſhould be carried ſafely; but that by their negligence of the ſaid goods, they were damaged by freſh water; on *not guilty* pleaded, it appeared at the trial, that there were more part-owners of the ſhip than the *ſix* defendants; and becauſe the part-owners muſt be equally liable, the *action* being on a contract: the court held, that the defendants ſhould take advantage of it in evidence; for where the plaintiff brings an *action* on the *caſe*, he ought to declare according to the truth of his caſe; and if the jury find a contract made by more than the plaintiff had declared againſt, it is a *variance*, and if this had been pleaded in abatement with a traverſe *abſque hoc*, that he aſſumed on himſelf only it had been ill, becauſe it is more than the *general iſſue.* *Vide Salk. vol.* 3. *p.* 204.

Eaſter, 5 *W. & M.* *Sands* v. *Child.*

Adjudged, that where an *action* is brought by partners, and the ſame ariſes on a *treſpaſs* and *riot* on a *contract*, ſuch partners muſt be *joined* in the ſaid *action*, of the defendant may avail himſelf of ſuch an omiſſion, by pleading it in abatement; and aver, that they were living at the time the *action* was brought, which will be held good. *Vide Mod. Rep. vol.* 4. *p.* 176.

Michaelmas, 6 *W. & M. The King* v. *The City of Cheſter*.

On a *mandamus* brought to reſtore *nine* perſons to their places of common council men in *Cheſter*.

Holt, Chief Juſtice, held, that it was an innovation to *join nine* men in one writ of *mandamus*. We cannot grant a *joint reſtitution* to them, becauſe it is a *ſeveral* intereſt.

Tenants in common cannot *join* in one *action*, though they come in by one *feoffment*; the amotion of the one, is not the amotion of the other; and it may be for ſeveral faults, or for forfeiture, the other for ſome other reaſon. Therefore I think the writ ought to be quaſhed. *Vide Mod. Rep. vol.* 5. *p.* 10.

Trinity, 7 *W.* 3. *Dalſon* v. *Tyſon*.

In an *action* on the *caſe*, the plaintiff declared againſt the defendant as a *common carrier*, and one count was in in *aſſumpſit*, and the other was *in trover*; this was adjudged ill after a verdict, for the one ſounds in *contract*, and the other in *tort*: the ſame caſe is 1 *Sid.* 244. but ill reported.

Holt, Chief Juſtice, held, that *tenants in common* may either *join* or ſever, becauſe it goes to the *realty*, therefore if *three tenants in common* diſtrain *three* beaſts, each of them muſt *avow* for one beaſt. *Vide Salk. vol.* 3. *p.* 204. *Raym. vol.* 1. *p.* 46. *Mod. Rep. vol.* 5. *p.* 90.

Trinity, 7 *W.* 3. *Dalſton* v. *Janſon*.

See this caſe fully ſtated in page 21 of this work, under the head *Actions*.

Michaelmas, 1 *Ann. Bennet* v. *Verdun*.

An action on an *indebitatus aſſumpſit* was brought, for that the defendant being indebted to the plaintiff 28 *l.* *Spaniſh* money, promiſed to pay it, *&c.* on *non aſſumpſit* pleaded, the verdict was for the plaintiff. It was moved in arreſt of judgment, that the plaintiff ought to have ſaid *to the value of*, &c. it being *foreign* coin. For the defendant cannot be indebted in foreign coin no more than in hogs, &c. *But not allowed.* For a man may be indebted in hogs, *&c.* but in ſuch caſe the *action* muſt be brought in the *detinet* only, not in the *debet and detinet*. But afterwards judgment was arreſted, becauſe the plaintiff brought this *action* for money due to himſelf in his own right, and alſo for another ſum on another count for money due to him as executor to *J. S.* which cannot be *joined*. *Vide Raym. vol.* 2, *page* 841.

Hilary, 2 *Ann. Ruſſell* v. *Corne.*

See this caſe fully ſtated in page 210 of this work, under the head *Baron and Feme*.

Michaelmas, 4 *Ann. The Queen* v. *Bains*.

See this caſe fully ſtated in page 256 of this work, under the head *Certiorari*.

Eaſter, 7 *Geo. Bayly* v. *Raby*, *et al.*

The court was moved, that *four* ſeveral declarations in *treſpaſs* againſt *four* different perſons might be put into one, on an *affidavit* that the *treſpaſs*, if any, was committed by *all jointly*.

Per curiam. We never went ſo far as the caſe of different perſons, but only where the declarations are between the ſame parties. The plaintiff may have the benefit of the other's evidence in his action againſt either, but this will be to deprive him of that. *Vide Stra. vol.* 1. *p.* 420.

Hilary, 8 *Geo. Philips* v. *Biron*, *et al.*

In an action of *treſpaſs* and *falſe impriſonment* againſt *two*, who both plead *jointly*, there was a judgment againſt the plaintiff at the ſuit of *Biron*, which was afterwards ſet aſide by the court, but before it was ſet aſide, a *capias ad ſatisfaciendum* was proſecuted by the then plaintiff, under which he, and the other defendant, who was the officer, juſtify the impriſonment. And on demurrer it was objected, that tho' an erroneous judgment is a juſtification, yet an irregular one is not, for that is a matter in the privity of the plaintiff, or his attorney. *Raym* 73. The officer indeed, if he had juſtified ſeparately, might have made a better caſe than the plaintiff; but having *joined* with him, he muſt take the ſame fate.

Per curiam. It is a reaſonable difference in the *firſt* point, and like the caſe of avoiding acts done by an adminiſtrator, where the adminiſtration is revoked and not reverſed; in the caſe of *error* it is no fault of the party, but of the court, and therefore binds till reverſed. But as to the other point, *Eyre*, Juſtice, differed, for he thought the court might on theſe pleadings ſeparate the officer, ſince it appears he is juſtified in what he has done. *Adjourned.*

This term, it coming into the paper again, the court were of opinion, (*Eyre*, Juſtice, doubting) that the officer had forfeited his defence, by joining in the ſame plea with the defendant, who was plaintiff in the *firſt* cauſe; and cited 1 *Saund.* 28. 2 *Cro.* 27. and gave judgment for the plaintiff. *Vide Stra. vol.* 1. *p.* 509.

Hilary, 8 *Geo. Edwards* v. *Carter*, *et al.*

The defendant and another were partners in the trade of a *brewer*, and the plaintiff ſupplied them with malt, for which they neglecting to pay, the plaintiff ſued out a *bill of Middleſex*, and arreſted *Carter*, who at the return of the writ put in bail before a judge; but the other partners could never be arreſted, whereon the plaintiff, without taking any notice of the proceedings on the *bill of Middleſex*, takes out an original againſt both partners, and *outlaws* them. And now the court was moved, that the *outlawry*, as to *Carter*, might be reverſed at the plaintiff's expence, becauſe he had proceeded to an *outlawry* againſt one that was preſent in court.

On the motion, the court made a rule to ſhew cauſe, and ſaid it was ſuch a *contempt*, that they ordered an attachment *niſi*. And the plaintiff's council, on ſhewing cauſe, inſiſted, that the other defendant not appearing on the bill of *Middleſex*, it was impoſſible for the plaintiff to proceed on it with any effect: and as to taking out the original againſt both, that was neceſſary, becauſe it was a *joint contract*.

Per curiam. Though you could not proceed on the *bill of Middleſex*, and though it was neceſſary to *join* the other, who could not be arreſted with the defendant in the ſame original, yet you could not go on to an *outlawry* againſt him: you ſhould have *outlawed* one only, and then you might have come and declared on the original, that *Carter*, together with *A. B.* his late partner, *aſſumed on himſelf*; but the proceeding here is altogether irregular, becauſe the party was in court, and had done every thing in his power to put the plaintiff in a fair way of recovering his debt: he could not appear, or file bail for the other partner, becauſe an action would lie againſt him for doing it without authority. The court ordered the *outlawry* to be reverſed, and the plaintiff to pay coſts, on the defendant *Carter*'s appearing to the original, and diſcharged the attachment. *Vide Stra. vol.* 1. *p.* 473.

Hilary, 8 *Geo. Gilbert* v. *Bath*.

See this caſe fully ſtated in page 7 of this work, under the head *Abatement*.

Trinity, 9 *Geo. Lilly* v. *Hodges*.

See this caſe fully ſtated in page 324 of this work, under the head *Covenant*.

Eaſter, 11 *Geo.* *Maddox and Godfrey*, v. *Taylor*, *et al.*'

The plaintiff's brought an action of *treſpaſs* againſt the defendants, and declared, for that whereas the defendants on the 24th day of *May*, 8 *Geo.* at *Igſham* in *Kent*, *the cloſe*, *houſe*, *and barn*, *of him the ſaid* W. M. *broke and entered*, *and divers goods and chattels*, *the property of him the ſaid* W. M. *and R. G.* viz. *one cow*, and ſeveral other goods, particularly mentioned in the declaration, *then and there took and carried away*, &c. On *not guilty* pleaded, the jury found a verdict for the plaintiffs againſt all the defendants, and gave them 20 *l.* 9*s.* damages, beſides coſts. A motion was made in arreſt of judgment, that the *two* plaintiff's had *joined* in an *action* of *treſpaſs*, for breaking and entering the *cloſe*, *houſe*, and *barn*, to which one of them, *viz.* *R. G* had no title; and by conſequence, if judgment ſhould be given for the plaintiffs, *G.* would recover damages for breaking the houſe, *&c.* to which he has no right, and had ſuſtained no damage by the breaking and entering thereof. Of which opinion, *Pratt*, Chief Juſtice, and the other judges, ſeemed to be, and therefore a rule was made to ſtay judgment, till it was moved by the plaintiffs. And it being moved again, the court were of their former opinion, therefore the judgment was arreſted abſolutely. *Vide Raym. vol.* 2. *p.* 1381.

Michaelmas, 11 *Geo.* *Brigs* v. *Greinfield and Benger.*

In an action of *treſpaſs* againſt *two* defendants, *one* ſuffered judgment to go by *default*, and the other pleaded a *diſtreſs for rent*, and a *licence* from the plaintiff to ſell the goods, on which iſſue was *joined*, and a verdict for the defendant.

The court was moved to ſtay the judgment againſt the other defendants, ſince on the whole record it appears, that the plaintiff had no cauſe of action. 1 *Inſt.* 125. *b.* *Salk.* 23. *Cro. Jac.* 134. 1 *Lev.* 63.

Per curiam. Judgment muſt be arreſted as to both. *Vide Stra. vol.* 1. *p.* 610.

Trinity, 4 *Geo.* 2. *The King* v. *Clendon.*

See this caſe fully ſtated in page 541 of this work, under the head *Indictment.*

Trinity, 5 *Geo.* 2. *Lowfield* v. *Bancroft*, *et al*'.

In an action for a *malicious proſecution*, the jury would have found 800 *l.* damages againſt one defendant, and 100 *l.* againſt each of the others. But *Raymond*, Chief Juſtice, held, that it could not be done; ſo the jury gave a general verdict for 1100 *l.* *Vide Stra. vol.* 2. *p.* 910.

Michaelmas, 5 *Geo.* 2. *The King* v. *Philips*, *et al.*'

See this caſe fully ſtated in page 542 of this work, under the head *Indictment.*

Michaelmas, 14 *Geo.* 2. *Vernon*, *et al*', v. *Jefferys.*

Ten plaintiffs bring *covenant* on articles of partnerſhip; and on *Oyer* it appeared, there were two others named in the deed, which at the cloſe of it run in the uſual form, *In witneſs whereof all the parties have ſet their hands and ſeals*, &c. Thereon the defendant demurred, and on argument inſiſted, that the *Oyer* is part of the declaration; and it is as bad as if the plaintiff had ſhewn that the covenant was with *two* others; and it could not be divided into ſeveral *actions* *Carth.* 301. *Lutw.* 680. 5 *Co.* 18. *Lutw.* 1544. *Allen.* 41. 1 *Ven.* 34. 2 *Lev.* 74. 2 *Roll. Abr.* 22.

Per curiam. If the other *two* did not ſeal the deed, the plaintiffs might have helped it by averment: but here on the *Oyer* we muſt take it, that they did ſeal. Beſides, as they are named in the covenant as covenantees, they might *join* in the *action*, though they did not ſeal: this the defendant may take advantage of on *oyer* and *demurrer*; 2 *Laon.* 47. and therefore judgment muſt be for the defendant. *Vide Stra. vol.* 2. *p.* 1146.

Iſſue.

Michaelmas, 4 *W.* & *M.* *Marckar* v. *Harris.*

In an action of *debt for rent*; the defendant pleaded, that the plaintiff *had nothing in the tenements*: the plaintiff replied, that he was poſſeſſed of the tenements by virtue of a leaſe for *forty* years, made to him by Lord *Wotton* who had power to demiſe the ſame; and on a demurrer to this replication, it was adjudged good, without ſetting forth the title, for the words *had nothing in the tenements*, is the *iſſue*, and the plaintiff may reply, *that he is ſufficiently intereſted in the tenements*, *viz.* in *fee* or *tail*, *&c.* and at the trial evidence may be given of any other eſtate, becauſe the particular eſtate alledged in the pleading is only form, where the *iſſue* is, that he *had nothing in the tenements.* *Vide Salk. vol.* 3. *p.* 211.

5 *W.* & *M.* *Hall* v. *Stich.* Error.

In *ejectment* brought for lands in the *County Palatine* of *Durham*; on *not guilty* pleaded, the plaintiff had a verdict, and on a writ of *error* brought, the *error* aſſigned was, that there was no *iſſues* joined between the parties, for the words *on the country* were left out.

Per curiam. Here is an *affirmative* and a *negative*, and that makes an *iſſue*; it is true it had been better if thoſe words had been in, but the omiſſion of them only makes the *iſſue* informal, therefore judgment was affirmed. *Vide Salk. vol.* 3. *p.* 209.

Michaelmas, 10 *Ann.* *The Queen* v. *Sutton.*

Adjudged, that what is immaterial in the *iſſue* need not be proved.

See this caſe fully ſtated in page 454 of this work, under the head *Evidence.*

Hilary, 11 *Ann.* *Merril* v. *Joſſelyne.* Error.

On a writ of *error* brought from the court of *C. B.* where the action was debt on a bond conditioned for payment of money on the 25th of *March.* The defendant pleaded payment on the 20th, on this, *iſſue* was joined, and a verdict given for the plaintiff, and judgment accordingly.

If the verdict had been found for the defendant, and judgment given accordingly, all had been right; for payment on the 20th, is payment on the 21ſt, and ſo on; but now the verdict is found for plaintiff, the *iſſue* is immaterial; for non-payment on the 20th, can be no evidence of non-payment on the 25th, for it might be paid in the mean time. 2 *Cro.* 434. *Cro. El.* 828.

Parker, Chief Juſtice, held, that it was hard that the defendant ſhould take advantage of his own immaterial pleading; but we cannot help it; ſo judgment was reverſed. *Vide Mod. Rep. vol.* 10. *p.* 148.

Eaſter, 12 *Ann.* *The Queen* v. *Blagdon.*

Per curiam. The very reaſon of joining *iſſue* is, that the party may come prepared to defend *one ſingle point.* In caſe of *barratry* the law is otherwiſe; but there it muſt be told what point will be gone on.

See this caſe fully ſtated in page 556 of this work, under the head *Information.*

Michaelmas, 1 *Geo.* *Weddall* v. *The Bail of Jocar.*

Parker, Chief Juſtice. There is, no doubt a difference between pleas of performance, and pleas of excuſe, in many reſpects; but the queſtion here is, whether you can make that time which is immaterial part of the *iſſue*.

It ſeems to be a general rule of reaſon as well as law, that circumſtances ought never to be put in *iſſue*, any further than they touch the matter in queſtion; and whatever *iſſue* does otherwiſe, is immaterial.

See this caſe fully ſtated in page 182 of this work, under the head *Bail in Error*.

Hilary, 3 *Geo.* *The King* v. *Eyre.*

A *ſcire facias* was brought to repeal the grant of a market to the defendant, ſuggeſting that it was to the prejudice of the Duke of *Rutland*, who had a market within *four* miles.

On trial, it was found *for the King*, on the *iſſue* whether the grant was to the prejudice of the Duke; and on motion in arreſt of judgment, it was held to be a good *iſſue*, though the grant and not the *uſer* was found to be prejudicial. *Vide Strange, vol.* 1. *p.* 42.

Trinity, 11 *Geo.* *Cowper* v. *Spencer.*

See this caſe fully ſtated in page 68 of this work, under the head *Amendment.*

Michaelmas, 13 *Geo.* *Crockat* v. *Jones.*

See this caſe fully ſtated in page 69 of this work, under the head *Amendment.*

Michaelmas, 10 *Geo.* 2. *Street* v. *Hopkinſon.* Error.

See this caſe fully ſtated in page 423 of this work, under the head *Error.*

Michaelmas, 10 *Geo.* 2. *Hill* v. *Fleming and others.*

An action of *aſſault* was brought againſt *three* defendants, *two* of them came in and confeſſed the action, and the other pleaded in this manner: and the ſaid defendant *J. F.* comes and defends the force, *&c.* and ſays, that the ſaid *J. F.* and *H.* (*one* of the other *two* defendants) is not guilty of the *aſſault*, on which *iſſue* was joined; and the jury found, that the ſaid *J. F.* was guilty of the aſſault in manner and form, as the plaintiff had declared; and aſſeſſed damages.

It was moved in arreſt of judgment, that this was an immaterial *iſſue*, and on ſuch an *iſſue* the jury cannot aſſeſs damages. 1 *Salk.* 173.

Lord *Hardwicke.* This is not an immaterial, but an informal *iſſue*, and as this verdict has been found, it is well enough; it is good either by rejecting the words which ſhould not have been in the plea, or by not rejecting them; for according to the rules for rejecting words, theſe may be rejected, as being *repugnant* to the other part of the record which went before, and to the verdict which follows them; and therefore as not applicable to the perſon that pleads, nor to the *verb* which is in the ſingular number; but without rejecting them, the verdict here being found for the plaintiff, it will be well, if this be only bad *Engliſh*, it will be helped as bad *Latin* would have been. Where ſeveral defendants plead *not guilty*, they ſay in general, *they are not guilty*, and they do not ſay, that they nor each of them are not, nor is *guilty*; and yet that general expreſſion refers to each of them ſeverally, and is therefore of the ſame import as ſuch a particular *plea* would be; and if this *plea* had been ſo ſeveral and particular, that would be a good *plea* for the defendant; becauſe it is a denial for himſelf, tho' the reſt of the plea as to the other had been *ſurpluſage*: this *iſſue* muſt therefore be taken in the ſame manner. But however, the verdict being found for the plaintiff, makes it a good *iſſue*, though it might have been an immaterial *iſſue* if found for the defendant; as where a defendant pleads payment before the day, if the verdict is for the defendant, the *iſſue* will be good; but if the verdict is for the plaintiff, the *iſſue* is then immaterial; becauſe there then appears no breach, *whereas*, if found for the defendant, it is a diſcharge, and therefore good; and ſo was *Nicholl*'s caſe. 5 *Co.* 43. and here if the verdict had been, that all the defendants were *not guilty*, then the *iſſue* would have been immaterial; but as it is, it is well enough.

Lee, Juſtice. An immaterial *iſſue* is, when an *iſſue* is joined on a fact which does not tend to the determination of the diſpute between the parties; but though there might be a *plea* which would be bad on demurrer for that reaſon, yet if *iſſue* is taken on it, the verdict may fix the fact for one of the parties, ſo as to ſettle the diſpute. The moſt that can be ſaid in this caſe is, that the plaintiff has joined *iſſue* informerly. Therefore the rule for ſtaying the proceedings was diſcharged. *Vide Caſes Temp. Lord Hardwicke, p.* 341.

Michaelmas, 6 *Geo.* 3. *Harvey* v. *Peake.*

On a motion in *arreſt of judgment*, one of the *objections* taken by the defendant's council was, the manner of the plaintiff's joining *iſſue*, *viz.*

" And the aforeſaid *A. P.* likewiſe," which was a repetition of the ſame name, *viz.* that of the defendant, inſtead of ſaying, " And the aforeſaid (the " plaintiff) likewiſe;" ſo that in effect, the party has joined *iſſue* with *himſelf.*

Lord *Mansfield* recommended it to the defendant's council to drop this *objection* to the want of joining *iſſue*, and to rely on his other *objections* in arreſt of judgment, but at another day the defendant cauſed this matter to be moved again, obſerving, that this was the plaintiff's miſtake, and not the defendants, and cited *Comyns* 376, *Walker* v. *Leſter*, and 2 *Stra.* 1117, *Heath* v. *Walker* to prove it fatal.

Lord *Mansfield* being abſent, *three* judges overruled this motion, and ordered the rule to ſhew cauſe (why the judgment ſhould not be arreſted) to be diſcharged. *Vide Bur. vol.* 3. *p.* 1793.

See this ſubject further conſidered under the heads **Plea** and **Repleader.**

Judgment and Execution.

Eaſter, 1 *W.* & *M.* *Oviat* v. *Vyner.*

Adjudged, that on a *fieri facias* where all the money is not levied, that the writ muſt be returned before a *ſecond execution* can be taken out, for that muſt be grounded on the *firſt* writ, and recite that all the money was not levied on the *firſt*; but if on the *firſt* all the money had been levied, the writ need not have been returned, for no farther proceſs was neceſſary. *Vide Salk. vol.* 1. *p.* 316.

Trinity, 1 *W.* & *M.* *Kirle* v. *Clifton.* Error.

On a *writ of error* brought in this court to reverſe a *judgment* of the *C. B.* the defendant in *error* pleaded a *releaſe* of *errors*, and on a demurrer to this plea, it was doubted what *judgment* ſhould be given, for the *firſt judgment* being erroneous, the court could not affirm it.

Per curiam. A *judgment, that he take nothing by the writ*, muſt be entered. *Vide Salk. vol.* 3. *p.* 214.

Trinity, 3 *W.* & *M.* *Walwin* v. *Smith.*

See this caſe fully ſtated in page 368 of this work, under the head *Diſcontinuance*, &c.

Trinity, 4 & 5 *W.* & *M.* *Weſterne* v. *Creſwick.*

On a *judgment* obtained by the plaintiff againſt the defendant, on a bond, and that by virtue thereof he had levied part of his debt on ſome of his cattle, and ſold them.

This *judgment* was afterwards ſet aſide, and it was moved that ſince *reſtitution* was awarded to the defendant, that the money for which they were actually ſold, might be brought into court for the benefit of the defendant, who was then a priſoner in the *K. B.* This being diſallowed, the plaintiff offered to pay the defendant as much money as the cattle was ſold for; but that was denied, becauſe they might be ſold for leſs than they were really worth; and if the defendant brings his action of *treſpaſs*, he will recover the full value, and therefore the plaintiff muſt agree with him to prevent ſuch an action. *Vide Mod. Rep. vol.* 4. *p.* 161. *Salk. vol.* 3. *p.* 214.

Trinity, 5 *W.* & *M.* *Clerk* v. *Rowland.*

On a *writ of inquiry*, either on *demurrer* or *judgment* by *default*, executed the laſt day of term, the plaintiff may enter *judgment* the *fifth* day after, and not before; ſo where there is a verdict there muſt be *four* days between the *verdict* and the *judgment*; not that in all caſes there can be a motion in arreſt, as in the principal caſe, where the verdict or *inqueſt* is the laſt day of the term; but ſtill there may be a *writ of error*, and the time is allowed for this purpoſe; and therefore after verdict or a *writ of inquiry*, the courſe is, for the plaintiff to give a rule to enable him to enter his *judgment* unleſs cauſe ſhewn, and in the principal caſe, *execution* was ſet aſide, becauſe it was ſued out on the *fourth* day after the term, the *writ of inquiry* being executed and returned the laſt day. *Vide Salk. vol.* 3. *p.* 399.

Hilary, 6 *W.* & *M.* *Banbury's Caſe.*

Holt, Chief Juſtice. Every *judgment* muſt not only be complete, but alſo formal, therefore if a *quo warranto* is brought againſt the defendant for uſurping *royal franchiſes*, and the court ſhould give *judgment* that he has no title, yet unleſs they go on and ſay, who from hence be excluded, it is ill; ſo in *debt* on a bond, if the defendant pleads *auterfoits acquit* in an action on the ſame bond, and the *judgment* was, that he (the defendant) ſhould recover damages, and that he go hence without a day, that is naught without ſaying further, that the plaintiff take nothing by his bill, becauſe *diſmiſſion* is no *judgment* in a court of law: and if an action of *treſpaſs* is brought for a *treſpaſs* done in lands belonging to ſuch a houſe, yet the court cannot give *judgment* to turn him out, becauſe it was not judicially before them. *Vide Salk. vol.* 3. *page* 213.

Trinity, 6 *W.* & *M.* *Lampton* v. *Collinwood.* Error.

See this caſe fully ſtated in page 407 of this work, under the head *Error.*

Trinity, 6 *W.* & *M.* *The King and Queen* v. *Knollys.*

It was held by *Holt*, Chief Juſtice, 1ſt. That *judgments* ought to be given in their proper ſtile. 2dly. That they ought to be compleat and formal. And, 3dly. That a diſmiſſion is no *judgment* in a court of law. *Vide Raym. vol.* 1. *p.* 10.

Trinity, 7 *W.* 3. *Brockwell* v. *Lock.*

See this caſe fully ſtated in page 484 of this work, under the head *Fees.*

Michaelmas, 7 *W.* 3. *Churchey* v. *Roſſe.*

Holt, Chief Juſtice, held, that if the defendant is arreſted, and in *execution*, and one becomes bound for him to the plaintiff, and the defendant gives him *judgment* for his counter ſecurity, it is good, though his attorney is not preſent, and it is not within the common rule of the court, becauſe it was not given to the perſon himſelf, (in which caſe there muſt be an attorney preſent) but to a *third* perſon. *Vide Mod. Rep. vol.* 5. *p.* 144.

Eaſter, 8 *W.* 3. *Mackareth* v. *Pollard.*

In an action of *treſpaſs* for taking an horſe, the defendant juſtified under a *judgment* recovered againſt the plaintiff in the *hundred court*, by a *taliter proceſſum*, and did not ſet out the proceedings at large; and it was adjudged good, notwithſtanding the old books are to the contrary, on the authority of the caſe of *Doe* v. *Pormiter*, *Hilary* 24 & 25 *Car.* 2. adjudged in point in this court in the time of Lord *Hale*, on great debate. The ſame point was adjudged in the caſe of *Walker* v. *Freby* and *Homes*, *Trinity* 8 *W.* 3. in *C. B.* *Vide Raym. vol.* 1. *p.* 80.

Eaſter, 8 *W.* 3. *Standford or Standfaſt*, v. *Chamberlaine.*

In *ejectment* tried at the aſſizes, and a verdict for the plaintiff, it was urged, that the *judgment* ought not to be ſigned till the rules were out, which will be in *four* days after the *poſtea* is returned, which in this caſe was on the 6th of *May*. The plaintiff got his *judgment* ſigned on the very day, but it was not executed till after the *ſixth* day; ſo that the defendant had time enough to bring a *writ of error*, or move any thing in arreſt of *judgment*. But the court held, that the ſigning the *judgment* was irregular, it being before the day allowed by the rules of the court; and tho' it was taken out afterwards, that was not material; therefore the *judgment* was ſet aſide, and the party had reſtitution. *Vide Mod. Rep. vol.* 5. *p.* 205. *Salk. vol.* 3. *p.* 215.

Eaſter, 8 *W.* 3. *Wolfe* v. *Daviſon.*

See this caſe fully ſtated in page 427 of this work, under the head *Eſcape.*

Trinity, 8 *W.* 3. *Jones* v. *Bodeener.*

In an action of *treſpaſs* for breaking the plaintiff's cloſe, and taking his cattle in *Blackacre*; the defendant pleaded, that the plaintiff was *outlawed* in an action of *debt* at the ſuit of *J. S.* on which a *capias utlegatum* iſſued againſt the plaintiff, and a *levari facias*, *teſted Hilary* 6 *W.* & *M.* iſſued out of the *Exchequer*, directed to the ſheriff of *N.* commanding him to levy the iſſues and profits of the plaintiff's lands to the uſe of the King, that this writ was delivered to the ſheriff at *A.* on which the ſheriff made his warrant, directed to the defendant, his bailiff, by virtue whereof the defendant entered into *B.* being the plaintiff's land, and took there the cattle. On which the plaintiff replied, that the defendant took the plaintiff's cattle at *O.* *abſque hoc*, that he took them at *B.* and iſſue being joined on this, a verdict was found for the plaintiff. On which the court was moved that no *judgment* could be given on this verdict, for if there is no matter of *bar* in a plea, and iſſue is joined thereon, it is void, and not aided by the ſtatutes of *jeofails*. But if a plea contains matter of *bar*, and iſſue is joined on a thing not material, this is aided by *ſtat.* 32 *Hen.* 8. *c.* 30. 3 *Cro.* 227. *Lovelace* v. *Grimſtone*, 259. *Gurney* v. Sir *Edw. Clare*. Now here the matter of the plea is merely frivolous, becauſe the Queen died before *Hilary* the 6th came.

Per curiam. *Judgment* muſt be given for the plaintiff on the confeſſion, and not on the verdict; and a new *writ of inquiry* muſt be awarded for the damages; for the iſſue being perfectly immaterial (for it cannot be a taking at *O.* by virtue of an impoſſible writ) the jury could not give damages. Therefore the verdict was ſet aſide, and judgment was entered for the plaintiff on the confeſſion of the defendant, who had admitted the treſpaſs. *Vide Raym. vol.* 1. *p.* 90.

Michaelmas, 8 *W.* 3. *Lyndſay or Linſey* v. *Clerke.*

See this caſe fully ſtated in page 486 of this work, under the head *Fines, Amerciaments, &c.*

Eaſter, 9 *W.* 3. *Anonymous.*

Adjudged, That if a *feme ſole* gives a warrant to confeſs a *judgment*, and marries before it is entered, the warrant is countermanded, and *judgment* ſhall not be entered againſt the huſband and wife, for that would charge the huſband. *Vide Salk. vol.* 1. *p.* 399.

Trinity, 9 *W.* 3. *Cooke* v. *Coake.*

On a *quaré impedit* the defendant pleaded *miſnomer* in *abatement*, and the plaintiff demurred, and gave the common rule to join, *&c.* It was held, that in all real actions one cannot enter *judgment* on a peremptory rule without motion; and ſo in mixed actions; otherwiſe in perſonal actions; but this extends not to pleas in *abatement*, becauſe *final judgment* is not given on them. *Vide Salk. vol.* 1. *p.* 400.

Trinity, 9 *W.* 3. *Bennoyer* v. *Brace.* Error.

See this caſe fully ſtated in page 408 of this work, under the head *Error.*

Michaelmas, 9 *W.* 3. *The King* v. *Harris, or Hariſon and Duke.*

The defendants were found guilty of *perjury* at a trial at *bar*, on an information exhibited againſt them; and on the *capias* they were *outlawed*; and on the return of the *exigent*, the proſecutor's council moved, that *judgment* ſhould be given againſt them in their abſence.

Holt, Chief Juſtice. No *judgment* for a corporal puniſhment can be pronounced againſt a man in his abſence; and no writ can be granted to ſeize a man and ſet him in the pillory; therefore the motion was denied. *Vide Raym. vol.* 1. *p.* 267. *Mod. Rep. vol.* 12. *p.* 156. *Salk. vol.* 1. *p.* 400.

Michaelmas, 9 *W.* 3. *Anonymous.*

Adjudged, If *judgment* be for the defendant in this court, and a writ of *error* be brought thereon, and the *judgment* reverſed in the *Exchequer Chamber*, the *Exchequer Chamber* muſt give the interlocutory *judgment*, *that the plaintiff recover*, and this court award the writ of *inquiry* of damages; and ſo is *Faldo* v. *Ridge*'s caſe in *Yelv.* 74. 2 *Cro.* 206. *Vide Mod. Rep. vol.* 12. *p.* 153.

Michaelmas, 9 *W.* 3. *Moſely* v. *Warburton.*

See this caſe fully ſtated in page 383 of this work, under the head *Eccleſiaſtical Matters.*

Michaelmas, 9 *W.* 3. *Smallcomb* v. *Croſs and Buckingham.*

A. and *B.* had each a ſeveral judgment againſt *C. A.* ſues out a *fi. fa.* and delivers it to the ſheriff about *nine* in the morning to be executed. Afterwards, about *ten* o'clock, *B.* ſues out a *fi. fa.* and brings it to the ſheriff forthwith, and deſires it may be executed; accordingly the ſheriff executes the laſt *fi. fa.* and after that executes the firſt *fi. fa.* and takes the ſame goods again that were taken on *B*'s execution. And on this the firſt vendee brought *trover* againſt the ſecond vendee, and the ſheriff: and it was held by the court, that as the goods were bound from the day of the *teſte* of the writ at *common law*, ſo now by *ſtat.* 29 *Car.* 2. *c.* 3. they are bound from the day of the delivery: but at *common law*, if two writs had been of the ſame *teſte*, the ſheriff was bound to execute that firſt, which was firſt delivered. By the ſame reaſon, if two writs of *fieri facias* come to the ſheriff in one day, he ought to execute that writ firſt which came to hand firſt, for he has no election: and in this caſe there is a *prius* and *poſterius* in the ſame day. In conſequence the ſheriff makes himſelf liable for executing the writ firſt, that came laſt, and muſt anſwer for it to the party that brought the firſt writ, who may bring an action againſt him; but the execution ſhall ſtand good: judgment for the plaintiff. It would have been otherwiſe, had he delivered his writ, but bade the ſheriff ſtay execution till another day.

N. B. The caſe was here, that he who brought the firſt *fi. fa.* told the ſheriff he was not in haſte, ſo took out no warrant, nor left any fee; and this inclined the opinion of the court more ſtrongly againſt him. *Vide Salk. vol.* 1. *p.* 320. *Mod. Rep. vol.* 5. *p.* 376. *Ibid. vol.* 12. *p.* 146. *Raym. vol.* 1. *p.* 251.

Hilary, 10 *W.* 3. *Cole* v. *Davis & al. Aſſignees of Maul, a Bankrupt.*

See this caſe fully ſtated in page 192 of this work, under the head *Bankrupts.*

Trinity, 10 *W.* 3. *Anonymous.*

In *ejectment* the defendant pleaded *not guilty*, and then *relinquiſhing the verification*, confeſſed the action. and the defendant's attorney ſubſcribed the declaration accordingly: on which the court was moved to permit the plaintiff to enter *judgment* for himſelf.

Per curiam. The defendant's attorney ought to come in proper perſon before the maſter of the office, and do it there.

And though it was urged that the attorney could not poſſibly come, yet the motion was denied. *Vide Raym. vol.* 1. *p.* 345.

Trinity, 10 *W.* 3. *Pullen* v. *Purbeck or Birbeck.*

The plaintiff having recovered *judgment* againſt the defendant for ——— he ſued out an *elegit*, commanding the ſheriff to deliver all the goods and chattels of the defendant, and the moiety of his lands to the plaintiff. To which writ the ſheriff returned, that he had delivered goods to the value of 160 *l.* to the plaintiff; and that the inquiſition found, that the defendant was ſeiſed of *two* farms, the *one* of 60 *l. per ann.* and the *other* of 40 *l.* and that he had extended the *one* farm of 60 *l. per ann.* being an entire moiety. And now it was moved at *bar*, that the court would quaſh this *elegit*, and grant a new writ; becauſe it appeared, that the ſheriff had extended more than a moiety. And it was argued, that if the plaintiff comes in at the return of the *elegit*, and ſhews to the court, that there was partiality in the *execution* of the writ, the court will award a new writ, and entry ſhall be made *that the ſheriff has not returned the writ.* *Townſh. Judgment*, 259. 3 *Keb.* 313.

Holt, Chief Juſtice. If a writ of *elegit* is awarded, and it appears to the court, that the ſheriff has not *executed* it; the court will award a new writ, and ſet aſide the old writ. But an *elegit* differs from a *fieri facias* as to goods, though it has been ſaid, that an *elegit* as to goods, is but a *fi. fa.* For on an *elegit*, the ſheriff may deliver the goods to the party, but not on a *fieri facias.* If this motion had been made in the ſame term in which the return was filed, the court might have quaſhed it; but as *ſeven* years have elapſed ſince, the court will not intermeddle. *Vide Raym. vol.* 1. *p.* 346.

Michaelmas, 10 *W.* 3. *Coote* v. *Lynch.*

See this caſe fully ſtated in page 304 of this work, under the head *Coſts.*

Michaelmas, 10 *W.* 3. *Anonymous.*

Per curiam. Regularly there ought to be *four* days between the return of the *poſtea* and *judgment* entered; that is, if there be *four* days of the term unpaſt at the return; but if there be not ſo many days to come of the term, there ought to be the utmoſt time within the term; but ſtill *judgment* may be entered that term. *Vide Mod. Rep. vol.* 12. *p.* 250.

Michaelmas, 10 *W.* 3. *Johnſon* v. *Naylor.*

See this caſe fully ſtated in page 59 of this work, under the head *Amendment.*

Michaelmas, 10 *W.* 3. *Robertſon* v. *Moor.*

In *ejectment* between the *firſt* day of the aſſizes and the verdict, the defendant died; and on *affidavit* of this fact, the defendant's counſel moved to ſtay *execution*; and ſaid that this was not helped by *ſtat.* 17 *Car.* 2. and quoted 1 *Sid.* 131. *Hard.* 51. where the like motion was granted. *Gould*, Juſtice, ſaid, he had known it granted, and as often denied.

Per curiam. Let things ſtay till notice of motion to the plaintiff: but afterwards the court held the judgment well entered. *Vide Mod. Rep. vol.* 12. *p.* 241.

Michaelmas, 10 *W.* 3. *Bidolph* v. *Bruce.*

See this caſe fully ſtated in page 428 of this work, under the head *Eſcape.*

Michaelmas, 10 *W.* 3. *Anonymous.*

A *feme covert*, who lived by herſelf, and acted as a *feme ſole*, gave a warrant of attorney to confeſs a *judgment*, &c. and afterwards moved to ſet aſide the *judgment*, becauſe ſhe was *covert*; but the court would not relieve her, but put her to her writ of error. *Vide Salk. vol.* 1. *p.* 400.

Michaelmas, 10 *W.* 3. *Anonymous.*

A motion was made to ſet aſide an *execution* on a *judgment*, on ſuggeſtion of an agreement between the parties, made after the *judgment* given, *viz.* that the *judgment* ſhould be on ſuch and ſuch terms.

Holt, Chief Juſtice. Where a judgment is confeſſed on terms, it being in effect but a *conditional judgment*, the court will interfere, and ſee the terms performed: but where a *judgment* is acknowledged abſolutely, and a ſubſequent agreement made, this does no way affect the *judgment*, and the court will take no notice of it, but put the party to his action on the agreement; and in this caſe the agreement being only under their hands, it is no ground for an *audita querela*; and the court cannot hold plea of agreement on a motion. *Vide Salk. vol.* 1. *p.* 401. *Ibid. vol.* 3. *p* 214.

Hilary, 11 *W.* 3. *Anonymous.*

Holt, Chief Juſtice, held, that a *judgment* ought to be poſitive and abſolute, and cannot be on condition, the fine ſet is the *judgment* for a poſitive offence, and ſaying it ſhould be levied is the award of *execution*; and ſetting a fine conditionally, is more like a pain ſet on the breach of a bye-law, then a *judgment* which muſt be abſolute; ſo the *judgment* was held naught. *Vide Forteſcue*, *p.* 250.

Eaſter, 11 *W.* 3. *Morrice* v. *Green.*

In this caſe it was held, that a *judgment* by *nihil dicit* is, where one is in court, and required to make anſwer to what is objected againſt him, but is ſilent and ſays nothing in his defence.

There is likewiſe a *judgment* for departing in deſpite of the court, and that is where the party appears, and being to attend that day, goes out of the court without leave of the court, as in *common recoveries* where the common vouchee comes in and pleads *nul tort*, *nul diſſeiſin*, and then the demandant imparls generally, and not to a day certain; and for that reaſon the vouchee is ſtill obliged to attend the court, but does not; then the entry is, *poſtea eodem die revenit* i. e. *afterwards on the ſame day came* the demandant, and becauſe the vouchee is not there but is departed; therefore the demandant has *judgment.*

And laſtly, there is a *judgment* by *default*, and that is where the party has a day certain, and is demandable, and being demanded does not appear, whereon *judgment* is given him by *default*; and theſe are *diſtinct judgments*, which cannot be uſed the one for the other. *Vide Salk. vol.* 3. *p.* 213.

Eaſter, 11 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. If the *diſtringas* be returnable at a day within the term, *judgment* may be entered on the crown ſide, though there be not *four* days remaining; but *four* days ought to be given if there are ſo many. In the caſe of *Knox* v. *Levaree*, who were tried for a *miſdemeanor*, *three* days before the end of the term in the time of Lord Chief Juſtice *Scroggs*, Sir *Samuel Aſtrey* certified, that judgment could not be entered; but on a conference between the Attorney General and the Chief Juſtice, it was ſettled, that the ancient practice of the court was as above-ſtated, and that it was miſ-reported; and *judgment* was entered againſt them. *Vide Raym. vol.* 1. *p.* 446.

Trinity, 11 *W.* 3. *Iveſon* v. *Moore.*

See this caſe fully ſtated in page 24 of this work, under the head *Actions.*

Trinity, *W.* 3. *The King* v. *Harris.*

Adjudged, That a man in *perſonal actions* could not have *execution* of any *judgment* after a year and a day; and in *real actions* he muſt have a *ſcire facias*, as is now the practice in *perſonal actions* by *ſtat. Weſtm.* 2. *c.* 45. This doctrine was affirmed by all the judges of *England* in this cauſe. *Vide Raym. vol.* 1. *p.* 482.

Michaelmas, 11 *W.* 3. *Worley* v. ———

It was found by verdict, that a warrant of attorney was forged; and *judgment* entered according to it, which was ſet aſide on motion. *Vide Mod. Rep. vol.* 12. *p.* 318.

Michaelmas, 11 *W.* 3. *Anonymous.*

If *A.* is in *execution* at the ſuit of *B.* and charged with an action at the ſuit of *C.* who obtains judgment: he ought to charge *A.* in *execution* by a *committitur*, and not by a *ca. ſa.* but he may a have *fi. fa.*. *Vide Mod. Rep. vol.* 12. *p.* 313.

Eaſter, 12 *W.* 3. *Anonymous.*

Per curiam. Payment to a ſheriff on a *ca. ad ſatisfaciendum* is not good to diſcharge the plaintiff's debt; and ſo adjudged and ſettled in the caſe of the ſheriff of *Wilts.* *Vide Mod. Rep. vol.* 12. *p.* 385.

Eaſter, 12 *W.* 3. *Cremer* v. *Wickett.*

See this caſe fully ſtated in page 2 of this work, under the head *Abatement.*

Eaſter, 12 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. If a writ of *execution* be taken out within the year, *and the ſheriff make no return to it*, on making an entry that *the ſheriff has not ſerved the writ* once a year, you may continue it, and not be put to ſue out a *ſci. fa.* *Vide Mod. Rep. vol.* 12. *p.* 377.

Hilary, 13 *W.* 3. *Vincent* v. *Preſton.*

When once a thing is made a *concilium*, one cannot enter *judgment*, or make any other alteration, without leave of the court: and the caſe of *Croſgate* v. *Green* was quoted; where *two* breaches were aſſigned in *covenant*, and an anſwer only to one of them, and for that a demurrer; but before it was put in the paper, *judgment* was by *nihil dicit* entered on that which was not anſwered, and held well; and all the difference between that and this caſe is, that here it is made a *concilium*, and yet *judgment* by *nil dicit* entered without leave of the court. It being again moved by the *Attorney General*, who ſeemed to ſatisfy the court, that the *judgment* might be well entered for that part of the declaration which was not anſwered in the ſame term, though it was pretended to be a diſcontinuance, yet becauſe they had entered it up without coming to the ſecondary, which is irregular it being a *judgment* for want of a plea, the *judgment* was ſet aſide. *Vide Mod. Rep. vol.* 12. *p.* 667.

Eaſter, 13 *W.* 3. *Horne* v. *Hunter*.

In an action of *treſpaſs*, the defendant juſtified under a proceſs in the *hundred court* againſt the plaintiff, on a plaint there levied, and on *judgment* being given againſt him, the goods for which the action was now brought were levied in *execution* by a *levari facias*, and delivered to the plaintiff in the action there, &c. the plaintiff demurred: and the plea was adjudged ill, becauſe the goods levied in *execution*, were delivered to the plaintiff in *execution*, which could not be; therefore *judgment* was given for the plaintiff. *Vide Raym. vol.* 1. *p.* 674.

Eaſter, 13 *W.* 3. *How* v. *Acton*.

Per curiam. If there is a rule for *judgment* in one term, it muſt be entered before the *eſſoign day* of the next term; or elſe they muſt go over to the next term by continuance, and enter it as of the ſecond term. *Vide Mod. Rep. vol.* 12. *p.* 493.

Eaſter, 13 *W.* 3. *Anonymous*.

Holt, Chief Juſtice, held, that every *judgment* entered before the *eſſoign day* of a term, is of the precedent term; but if entered after the *eſſoign* is commenced, it is of the preſent term. *Vide Mod. Rep. vol.* 12. *p.* 519.

Eaſter, 13 *W.* 3. *Holm* v. *Hunter*.

See this caſe fully ſtated in page 25 of this work, under the head *Actions*.

Eaſter, 13 *W.* 3. *Spurraway* v. *Rogers*. Error.

A *capias* was returnable the 1ſt day of *Hilary* term, and in the afternoon of that day a writ of *error* was brought returnable in the *Exchequer Chamber* the next day.

Holt, Chief Juſtice. It has been a *difficult queſtion*, whether the ſuing out the writ, or the notice thereof to the plaintiff or his attorney, were what ſuperſeded the *execution*; if the writ is teſted after the return of the *capias*, it does not ſuperſede it; if a *capias* is out, and *execution* thereon, and then the writ of *error*, it ſhall not diſcharge the *execution*. The ancient opinion was, that a writ of *error* is a *ſuperſedeas* from the actual purchaſing of the writ, but that the party ſhall not be puniſhed for *executing* his *judgment* till notice, but that ſtill it avoided the *execution*. And if a *capias* be taken out and *executed* within *four* days after the return of the *poſtea*, it is well; otherwiſe, if taken out within the *four* days, and executed after; the roll muſt be made up in vacation before the *execution* is *executed*. But *Clark*, the ſecondary aſſerted that a writ of *error* was not a *ſuperſedeas* till a certificate is obtained from the clerk of the *errors*, and ſerved on the party. *Vide Mod. Rep. vol.* 12. *p.* 501.

Eaſter, 13 *W.* 3. *Walker* v. *Humphry*.

A *fieri facias* was taken out in *Hilary* term, returnable in *three weeks of Michaelmas*. The court being acquainted with it; ordered they ſhould ſhew cauſe why it ſhould not be ſuperſeded; for this would take away all renewal of proceſs.

Per curiam. A *capias* or other proceſs muſt have continuances, and for that reaſon muſt be from term to term; but writs of *execution* need none, and for that reaſon may have a longer return. *Vide Mod. vol.* 12. *p.* 506.

Trinity, 13 *W.* 3. *Redmond* v. *Joſeph*.

On *debt* brought on a *judgment*, the defendant pleads in *bar*, that a *capias ad ſatisfaciend.* was taken out againſt him at ſuch a time, by virtue whereof he was taken in *execution*; and that the ſaid *capias* was returned on record, but did not aver that the *execution* continued, or that the debt was paid; and on demurrer, *Holt*, Chief Juſtice, ſaid, if he was once in *execution*, it muſt be intended he continues ſo, if he has not paid the money; for if he has eſcaped, the plaintiff ſhould reply that of his ſide, for this is a plea in *bar*, and good to common intent; and he quoted *two* caſes, where he had known *eſcape* replied to ſuch a plea; and a taking in *execution* is a *bar* to all other remedies while it laſts, and we cannot intend an eſcape. And here if he had averred the continuance in *execution*, if they cannot traverſe it on the plaintiff's ſide, what does his averment of it avail them? And if he is not in *execution*, but eſcaped, they may reply it. And the writ iſſued out is not of record till it is returned, though the *execution* is good before any return. *Vide Mod. Rep. vol.* 12. *p.* 541.

Michaelmas, 13 *W.* 3. *Parſons* v. *Gill*.

The court was moved to refer the regularity of an *execution* to be examined by the maſter, &c. alledging it to be irregular for this reaſon, *viz.* that the *writ of execution* bore *teſte* the *firſt* day of *Hilary* term, returnable the *Eaſter* term following, and the *judgment* was of *Hilary* term, ſo that the *writ of execution* might have been ſued out before the *judgment* was given. Beſides, it was urged, that the *judgment* was ſigned after the death of the defendant, for the defendant died on the *firſt* of *April*, and the *judgment* was ſigned on the *ſecond* of *April*, which being before the *eſſoign day* of *Eaſter* term related to *Hilary* term, therefore altogether irregular.

Per curiam. The practice is always ſo, and therefore it is well enough; ſo the motion was denied.

See this caſe fully ſtated in page 61 of this work, under the head *Ammendment*. *Vide Raym. vol.* 1. *p.* 695.

Michaelmas, 13 *W.* 3. *Anonymous*.

Holt, Chief Juſtice. A render of the principal in diſcharge of his *bail*, is not an *execution* till a *committitur* be entered; for till then, the plaintiff has his election, whether he will have him in *execution* or not; but if the *reddidit ſe*, i. e. *he has rendered himſelf*, be in preſence of the plaintiff, and then he is committed, it ſhall be adjudged an *execution*. And a delivery to the tipſtaff is a commitment to the *Marſhal*, for the Marſhal is ſuppoſed to be preſent in court; and *note*, in an action on a judgment there muſt be a copy of the *judgment*, and of the commitment given in evidence. *Vide Mod. Rep. vol.* 12. *p.* 559.

Hilary, 1 *Ann.* *Odes* or *Oades*, v. *Woodward*.

See this caſe fully ſtated in page 141 of this work, under the head *Attorney*.

Hilary, 1 *Ann.* *Brook* v. *Biſhop*.

See this caſe fully ſtated in page 115 of this work, under the head *Arreſt of Judgment*.

Eaſter, 1 *Ann.* *The Queen* v. *Ford*, *et al'*.

Ford and the other defendants were convicted of *deer-ſtealing*, according to the ſtatute, and the convictions being removed into this court by *certiorari*, were there confirmed. And after the confirmation, and before *execution* was awarded, the perſon, who was as well the informer as the owner of the deer, died; and his wife, being his adminiſtratrix, ſuggeſted his death on the roll, and that ſhe was adminiſtratrix, and on that ſued a *levari facias* on the ſaid convictions as aforeſaid, to levy the penalties; which were levied accordingly by the ſheriff, and diſtributed as the ſtatute directs. And now the court was moved that this *execution* ſhould be ſet aſide as irregularly obtained. 1. Becauſe a *levari facias* does not lie. 2dly. Becauſe the *execution* ought not to have been ſued out by the adminiſtratrix without a *ſci. fac.* &c.

As to the *firſt objection*, the whole court held, that a *levari facias* will lie: but they held, that this *execution* was irregular, becauſe in no caſe where the parties to the *judgment* are changed, ought *execution* to be ſued out without a *ſci. fac.* Whereon reſtitution was granted of the money levied. *Vide Raym. vol.* 2. *p.* 768.

Eaſter, 1 *Ann.* *Anonymous.*

See this caſe fully ſtated in page 522 of this work, under the head *Imparlance.*

Eaſter, 1 *Ann.* *The Queen* v. *Fitzgerald.*

The defendant being convicted of a ſcandalous libel, *judgment* was given againſt him to pay 100 *merks* fine, and to go to all the courts in *Weſtminſter* Hall with a paper in his hat. In *Chancery* he behaved himſelf impudently, and juſtified his offence; for which reaſon the court increaſed his puniſhment by impriſonment. *Vide Salk. vol.* 1. *p.* 401.

Eaſter, 1 *Ann.* *Anonymous*

See this caſe fully ſtated in page 181 of this work, under the head *Bail in Error.*

Eaſter, 1 *Ann.* *Anonymous.*

If *judgment* is given below for the plaintiff, and error is brought, and that *judgment* reverſed; yet if the record will warrant it, the court ought to give a *new judgment* for the plaintiff: but if *judgment* be erroneous, and againſt the defendant on the merits of the cauſe, that ought to be reverſed, and no *new judgment* given for the plaintiff. If an *erroneous judgment* be given for the defendant, and it is reverſed, and the merits appear for the plaintiff, he ſhall have *judgment*: if the merits be againſt the plaintiff, the defendant ſhall have a *new judgment*. So it is in the *Exchequer Chamber*; for they are to reform as well as to affirm or reverſe it. 1 *Rol. Abr.* 774. *pl.* *Cro. Car.* 443. *Hob.* 19. *Vide Salk. vol.* 1. *p.* 401.

Eaſter, 1 *Ann.* *Anonymous.*

See this caſe fully ſtated in page 115 of this work, under the head *Arreſt of Judgment.*

Eaſter, 1 *Ann.* *Anonymous.*

A. takes a *judgment* in the name of *B.* who dies, and adminiſtration is committed to another; *A.* enters ſatisfaction on the *judgment*; the adminiſtrator of *B.* moved that the entry of ſatisfaction might be vacated, and this appearing on a report of the maſter to whom it was referred; the court ſaid the defendant had good equity, but they could not help him, and the rule was to vacate the entry of the *judgment niſi. Vide Mod. Rep. vol.* 7 *p.* 13.

Trinity, 1 *Ann.* *The Duke of Norfolk's Caſe.*

A *verdict* was given in *Eaſter* term, and before *judgment* was ſigned, the plaintiff died.

Holt, Chief Juſtice. That ſhall not hinder the *judgment* being entered, provided it be within *two* terms after; and the ſtatute of *frauds* and *perjuries* only requires the time of ſigning ſhould be entered on the roll; and that is only for the benefit of purchaſers; for if *judgment* be ſigned in the vacation, yet it is entered as of the term before; and none but a purchaſor ſhall be admitted to ſay it was ſigned as of any other term; and it is the courſe of the court to let all things be done in the vacation, as of the term before. *Vide Salk. vol.* 1. *p.* 401. *Mod. Rep. vol.* 7. *p.* 39.

Trinity, 1 *Ann.* *Anonymous.*

Per curiam. It is irregular to ſign a *judgment*, without ſerving a rule to bring in the record. And a *judgment* was ſet aſide for want of it. *Vide Mod. Rep. vol.* 7. *p.* 47.

Trinity, 1 *Ann.* *Smith* v. *Angel.*

See this caſe fully ſtated in page 223 of this work, under the head *Aſſets.*

Michaelmas, 1 *Ann.* *Finn* v. *Hutchinſon.*

On a reference to the maſter to examine the regularity of obtaining a *judgment* againſt the defendant, the maſter reported, that the defendant was in priſon in the goal of the town of *Newcaſtle* at the ſuit of *J. N.* and during his confinement there, he at the requeſt of the plaintiff, but voluntarily, gave a warrant of attorney to the plaintiff to enter up *judgment* againſt him in this court, for a debt owing by him to the plaintiff; but at the time of the delivery of the warrant of attorney, the defendant's attorney was not preſent. And whether this was cauſe to ſet aſide the *judgment* entered on the ſaid warrant, after *execution entered* on it a year before, was the queſtion.

Per curiam. The defendant not being then in priſon at the plaintiff's ſuit, might very well give ſuch warrant in the abſence of his own attorney. For the reaſon of the rule, that the attorney of the defendant being under confinement, ſhall be preſent, when he gives a warrant to confeſs *judgment*, is to avoid all practices on the part of the plaintiff, and to ſee that it is done without dureſs of impriſonment. But the ſaid cauſe fails here, where the defendant is not impriſoned at the plaintiff's ſuit, nor abuſed by any artifice uſed by him: and therefore the whole court held the *judgment* well given, and diſcharged the rule of reference. *Vide Raym. vol.* 2. *p.* 797.

Michaelmas, 1 *Ann.* *Ingledew* v. *Crips, or Grips* v. *Ingledew.*

See this caſe fully ſtated in page 152 of this work, under the head *Averment.*

Michaelmas, 1 *Ann.* *The Queen* v. *Lee.*

The court was moved, that the defendant being in the Marſhal's cuſtody, might be charged with an *excommunicato capiendo*: here was an *excom. cap.* taken out of *Chancery*, and a *non eſt inventus* returned; it was argued, that it was to no purpoſe to take out another, when the defendant is actually in cuſtody of the officer of the court; and it was compared to the caſe of one in cuſtody on *meſne proceſs*, at the ſuit of *A.* he ſhall be charged in *execution* at the ſuit of *B.* but it was anſwered on the other ſide, that there was a great difference; for the *capias* on a *judgment* is, *ſo that you have here his body at the return of the writ*, and there, in a manner, the court is poſſeſſed of him, becauſe there the proceſs is to bring him hither: but on an *excom. cap.* to the ſheriff, the ſheriff is not to bring him here, but to keep him in goal, and he is not to bring him here but on a *habeas corpus*, and how can the court lay hold on one that has no day in court, and is not before it? And the court aſked if *ſtat.* 5 *Eliz.* had not been, what remedy they had: it was agreed there was none in that caſe; but the ſtatute has made this difference, for it makes the proceſs iſſuable in this court, and returnable here, but does not order the ſheriff to bring the party in, but to take him and keep him.

Holt, C. J. held, that if he was taken by an *excom. cap.* firſt, and brought up here by an *habeas corpus* to anſwer an action in this court, then he ſhould be turned over to the Marſhal, charged with the writ *excom. cap.* But here there is a proceſs out of this court, which gives him a day here, which the *excom. cap.* does not;

and the reaſon of that is, becauſe he cannot be in two ſeveral priſons at once: but here the court took till the next term to conſider the matter. *Vide Mod. Rep. vol.* 7. *page* 114.

Michaelmas, 1 *Ann.* *Fiſh* v. *Horner*.

See this caſe fully ſtated in page 3 of this work, under the head *Abatement*.

Michaelmas, 1 *Ann.* *Le Sage* v. *Pere*.

Adjudged, That after *judgment* in *debt* on a bond, the court will not make a rule on a plaintiff to take his principal, intereſt, and coſts; and that in ſuch caſe, the plaintiff ought to have his full coſts out of the penalty. *Vide Mod. Rep. vol.* 7. *p.* 114.

Michaelmas, 1 *Ann.* *Fuller's Caſe*.

The defendant being committed to the *Queen's Bench* for a *fine* due to the Queen, and charged in *execution* at the ſuit of ſeveral others, the Marſhal had a jealouſy of him, and put him in irons: on which he wrote a letter to the Attorney General craving his help, which being communicated to the court, they ordered the Marſhal to keep him according to law, declaring, that if he died through cruel uſage, it would be murder in the jailor; but ſaid he might juſtify putting him in irons if he feared an eſcape, or if he was otherwiſe unruly. *Vide Mod. Rep. vol.* 7. *p.* 52.

Michaelmas, 1 *Ann.* *Anonymous*.

See this caſe fully ſtated in page 393 of this work, under the head *Ejectment*.

Michaelmas, 1 *Ann.* *Anonymous*.

On a motion againſt the ſheriff of *Kent*, *Holt*, Chief Juſtice, held, that if a ſheriff returns goods levied to ſuch a value, he muſt anſwer for the goods to that value, and the plaintiff may have a *venditioni exponas*; and if he will not ſell them, then the way is, to have a *diſtringas* to the coroner; and that is the right method to lay him by the heels till he has ſold; and an action of *debt* will lie againſt him after ſuch a return, and a *venditioni exponas* taken out. *Vide Mod. Rep. vol.* 7. *p.* 118.

Michaelmas, 1 *Ann.* *Wittingham* v. *Broderick*.

A *judgment* was given in the *C. B.* in *treſpaſs* by huſband and wife, for taking away their goods, reverſed, becauſe ſhe ought not to join. *Vide Mod. Rep. vol.* 7. *p.* 105.

Michaelmas, 1 *Ann.* *Anonymous*.

Holt, Chief Juſtice, held, that in *ejectment*, if the defendant has not regular notice of trial, the way is not to confeſs *leaſe*, *entry*, and *ouſter*, but to oppoſe the *judgment* againſt the caſual ejector. *Vide Mod. Rep. vol.* 7. *p.* 118.

Michaelmas, 1 *Ann.* *Withers* v. *Harris*.

See this caſe fully ſtated in page 392 of this work, under the head *Ejectment*.

Michaelmas, 1 *Ann.* *Read* v. *Tregeagle*.

The plaintiff gave a bond and *judgment* to the defendant, with a *defeaſance* on payment of the money on ſuch a day certain; and it was agreed by the ſame deed between the parties, that the defendant ſhould not ſue any *execution* againſt the plaintiff before the 16th day of *July*; on the 15th of *June*, the defendant ſues out a *fi. fac.* and delivers it to the ſheriff, before the 16th of *July*, and gets it *executed* on the 16th day of *July*, on demand and non-payment. And the court was moved to ſet it aſide, for that the defendant, by breaking his agreement, had incapacitated the plaintiff to perform; for by the delivery of the writ to the ſheriff, the property of the plaintiff was bound; ſo that he could not ſell any of them to raiſe the money.

Per curiam. Since it is for a juſt debt, and the *judgment* is *executed*, we will not undo any thing; for perhaps that would be a means to fruſtrate the *judgment*; and, beſides, there is no oath that any purchaſer was deterred, by reaſon of taking out, and delivering the writ; and here the plaintiff had a good remedy, by an action of *covenant*

Holt, Chief Juſtice, obſerved, that a writ of *audita querela* would not lie in this caſe, but that would avoid the whole *judgment*.

After a *writ of error* is ſued out, if a *ſcire facias* is brought againſt the plaintiff in *error*, to ſhew cauſe why there ſhould not be *execution* on the *judgment*; the end of it is, to compel the plaintiff to aſſign *errors*, and *execution* ought not in ſtrictneſs to be taken out till a *non-proſ.* is entered. *Vide Mod. Rep. vol.* 7. *p.* 48.

Michaelmas, 1 *Ann.* *Atwood* v. *Burr*.

In an inferior court the plaintiff demurred to the defendant's plea, and the entry of the *judgment* for the plaintiff on the demurrer was, *therefore it is conſidered, &c.* and not ſaid as uſual, *and becauſe it appears to the court that the defendant's plea aforeſaid, is inſufficient in law, &c.* And now this *judgment* was reverſed for that cauſe; for when a demurrer is joined, the court ought firſt to determine the matter of law, whether *ſufficient* or *inſufficient*, before they pronounce *judgment*; and by this *judgment* it does not appear that they determined the matter of law before them. *Vide Salk. vol.* 1. *p.* 402.

Eaſter, 2 *Ann.* *York* v. *Grenaugh*.

A motion was made that no *judgment* ſhould be entered, on ſuggeſtion that the plaintiff had been dead *three* terms. The court agreed, that they might make ſuch a rule; but becauſe the plaintiff had appeared as of this term by his attorney, they refuſed to make a rule in it, but left the executors to bring *error*. It would have been otherwiſe, if the plaintiff had not appeared by his attorney. *Vide Raym. vol.* 2. *p.* 869.

Trinity, 2 *Ann.* *Staples* v. *Heydon*.

See this caſe fully ſtated in pages 4 and 361 of this work, under the heads *Abatement and Default*.

Trinity, 2 *Ann.* *Weſtbrook et al.'* v. *Andrews*. Error.

On a *writ of error* brought on a *judgment* given againſt the defendant in the *C. B.* in an action of *treſpaſs* for breaking the plaintiff's cloſe, *&c.* the *error* aſſigned was, that there was no *capiatur* entered.

Per curiam. Since the late ſtatute, which takes away the proceſs for the *capiatur pro fine*, there need be none entered: ſo the *judgment* was affirmed. *Vide Raym. vol.* 2. *p.* 927.

Trinity, 2 *Ann.* *Anonymous*.

See this caſe fully ſtated in page 141 of this work, under the head *Attorney*.

Trinity, 2 *Ann.* *The Queen* v. *Potter*, *et al.'*

See this caſe fully ſtated in page 254 of this work, under the head *Certiorari*.

Trinity, 2 *Ann.* *Kingſdale* v. *Mann*.

The ſheriff delivered poſſeſſion by virtue of an *habere facias poſſeſſionem* in the morning: ſome hours after the ſheriff was gone, and the party in poſſeſſion, the defendant came and turned him out again.

Per curiam. If the plaintiff had been turned out immediately after he was put into poſſeſſion, or while the ſheriff and his officers were there, an *attachment* might have been granted; for this had been a diſturbance to the *execution* and a *contempt*; but being ſeveral hours after, the court doubted. But it was agreed, that the court might grant a new *habere facias poſſeſſionem*, if the firſt writ was not returned. *Vide Salk. vol.* 1. *page* 321. *Mod. Rep. vol.* 6. *p.* 27.

Michaelmas, 2 *Ann.* *Anonymous.*

If a man be arreſted on proceſs of the *C. B.* or from any inferior court, and gives a warrant to confeſs a *judgment* in this court while in cuſtody, no attorney being there preſent, we can examine and ſet aſide this *judgment*; otherwiſe where it is to confeſs a *judgment* in another court. *Vide Salk. vol.* 1. *p.* 402.

Michaelmas, 2 *Ann.* *Dillon* v. *Brown.*

The defendant gave a warrant of attorney to the plaintiff to confeſs a *judgment* to him, and after *execution* ſued out thereon, it was moved to be ſet aſide for irregularity; on ſuggeſtion, that it was agreed between the parties at the *execution* thereof, that no *execution* ſhould be taken out till a year after.

The court reflected on a gentleman at the bar, who was ſaid to be adviſed with in the tranſaction; becauſe the agreement was not by deed; but the plaintiff inſiſted on it, that he had ſtayed a year, for the warrant was given in the long vacation, and the *judgment* was entered as of *Trinity* term before, and the *execution* was not *executed* till after *Trinity* term following; ſo the plaintiff had waited a year from the *judgment* entered: but the court could not agree, whether in ſuch caſe the year was to be reckoned from the date of the *judgment* or of the warrant: and the matter of fact being referred to Mr. *Clarke*, he reported, that there was no ſuch agreement made at the time of the warrant given, ſo the *execution* ſtood. *Vide Mod. Rep. vol.* 6. *p.* 14.

Michaelmas, 2 *Ann.* *Anonymous.*

Adjudged, That if there is a rule for *judgment*, and it is not entered for many years, if the court is informed of it, they will not let them enter it till the matter is examined how it came not to be entered before. *Vide Mod. Rep. vol.* 6. *p.* 59.

Michaelmas, 2 *Ann.* *Wood* v. *Shepherd.*

See this caſe fully ſtated in page 115 of this work, under the head *Arreſt of Judgment.*

Eaſter, 3 *Ann.* *Parker* v. *Woollaſton.*

See this caſe fully ſtated in page 163 of this work, under the head *Bail.*

Eaſter, 3 *Ann.* *Smith* v. *Harman.*

See this caſe fully ſtated in page 476 of this work, under the head *Executors and Adminiſtrators.*

Trinity, 3 *Ann.* *Hodges* v. *Templer.*

A rule was made for *judgment* in *Hilary* term was twelvemonth; but coſts not being taxed, Mr. *Clarke*, out of kindneſs to the defendant, gave time for ſettling the coſts till *Eaſter* term; and before the coſts were ſettled, and the *judgment* entered, the plaintiff died; and in the laſt *Hilary* term, the attorney entered up his *judgment* as of *Hilary* term before, *viz.* the time that the rule was pronounced. And on motion it was ſet aſide for irregularity, and the court directed them, if they pleaſed, to enter it as of *Hilary* term laſt, being the term that they really had entered it, and enter their continuances till then, for the court could not take notice of the plaintiff's death.

Holt, Chief Juſtice, held, if one will enter a *judgment* as of a term, he muſt actually enter it before the *Eſſoign-day* of the ſucceeding term, otherwiſe it ſhall only relate to the term of which he enters it; and if *judgment* is ſigned in *Hilary* term, and in the ſubſequent vacation the defendant ſells lands, and before the *Eſſoign* day of *Eaſter* term the plaintiff enters his *judgment*, it ſhall affect the lands in the hands of a purchaſer; and if one enters *judgment* in vacation, when indeed the party was dead, if he was living in the precedent term, the *judgment* is good by relation. *Vide Mod. Rep. vol.* 6. *p.* 191.

Trinity, 3 *Ann.* *Anonymous.*

Adjudged, That if *judgment* on a warrant of attorney is not entered within the year, it cannot be entered without leave of the court on motion. *Vide Mod. Rep. vol.* 6. *p.* 212.

Michaelmas, 3 *Ann.* *Siſted* v. *Lee.*

On payment of coſts, the court will ſet aſide a *judgment*, though it be regularly entered, if the plaintiff has not loſt a trial; and ſo is the common courſe in *C. B.* *Vide Salk. vol.* 1. *p.* 402.

Michaelmas, 3 *Ann.* *Booth* v. *Booth.*

By an injunction out of *Chancery*, the defendant ſtayed the plaintiff's *execution* a year and upwards; the injunction being diſſolved, the plaintiff took out *execution* without a *ſci. fac.* and this was referred to the court for irregularity. The plaintiff inſiſted that he was ſtopped by the act of the defendant, and that if the defendant had ſuſpended it by *writ of error* ſo long, he had been at liberty to take out *execution* without a *ſci. fac.*

Per curiam. We cannot take notice of the *Chancery* injunction, and you might have taken out a *writ of execution*, and continued it, becauſe the *ſheriff has not returned the writ.* A *ſuperſedeas* was awarded to the *execution.* *Vide Salk. vol.* 1. *p.* 322. *Mod. Rep. vol.* 6. *p.* 288.

Michaelmas, 3 *Ann.* *Clerk* v. *Withers.*

See this caſe fully ſtated in page 5 of this work, under the head *Abatement.*

Michaelmas, 3 *Ann.* *Reignots* v. *Tipping.*

Per curiam. After a rule to ſign *judgment*, there ought to be *four* days excluſive of the day on which the rule is given, and on which the *judgment* is ſigned; and the meaning of the rule is, that the party may have reaſonable time to bring a writ of *error*, if he has occaſion: but in the *C. B.* they never give rules for *judgment*, but they ſtay till the *fourth day afterwards*, which makes but *four* days incluſive. *Vide Mod. Rep. vol.* 6. *p.* 241.

Michaelmas, 3 *Ann.* *Davenport or Davenant* v. *Rafter.* Error.

See this caſe fully ſtated in page 153 of this work, under the head *Averment.*

Hilary, 4 *Ann.* *The Queen* v. *Deman.*

See this caſe fully ſtated in page 115 of this work, under the head *Arreſt of Judgment.*

Eaſter, 4 *Ann.* *Anonymous.*

The defendant, againſt whom *judgment* was recovered, brought a *writ of error*, and afterwards got a reference to the maſter to examine the regularity of the *judgment*; and the court on the maſter's report were of opinion, that by bringing the *writ of error* the *judgment* was admitted to be regular, and that he ſhould not examine that now; and the rule was diſcharged. *Vide Salk. vol.* 1. *p.* 402.

Michaelmas, 4 *Ann.* *The Queen* v. *Gunn.*

On a motion in arreſt of *judgment* on an indictment for *perjury*, before the juſtices of the peace in *Norfolk*, for that it ſet forth, that a fine was levied in the court of *C. B.* at *Weſtminſter* in the county of *Middleſex*, that the defendant perjured himſelf at *Theed* in the county aforeſaid, the defendants council inſiſted, that it muſt relate to the laſt county named; and then the juſtices of the county of *Norfolk* could not have juriſdiction; and this he ſaid was the expreſs caſe of the *Queen* v. *Rhodes*, adjudged about *two years* ago in this court. The council for the plaintiff ſaid, if it had been in eaſe of an action, it would have been good; he made a diiſtinction between the counties being in the margin, and in the body of the indictment. The council for the defendant ſaid, if it can ever be conſtrued bad, it ſhall never be taken otherwiſe in an indictment. The opinion of the court was, that the indictment was naught; but the matter was adjourned. Afterwards the council for the defendant took another exception; that juſtices of the peace have no power, by their commiſſion to take indictments of *perjury* and *barratry*; but the court doubted, and ſeemed afterwards of opinion, that they might. *Vide Mod. Rep. vol.* 11. *p.* 67.

Trinity, 6 *Ann.* *Philips* v. *Berry.* Error.

In *ejectment*, *judgment* was given in this court for the defendant; on which a *writ of error* was brought in the *Houſe of Lords*, who reverſed the ſaid *judgment*; whereon the plaintiff applied to this court, to enter up the *judgment* given by the *Houſe of Lords*; and it was urged, that a *judgment* muſt be given either by the Lords, or by this court: that the Lords could not, becauſe they have only the tranſcript of the record before them; therefore this court muſt, leſt there ſhould be a defect of juſtice as in the caſe of *Shaldoe* v. *Ridge* in this court. *Vide Salk. vol.* 1. *p.* 403.

Michaelmas, 7 *Ann.* *Langthorn* v. *Taylor.* Error.

See this caſe fully ſtated in page 414 of this work, under the head *Error.*

Eaſter, 8 *Ann.* *Nelſon* v. *Collins.*

See this caſe fully ſtated in page 414 of this work, under the head *Error.*

Eaſter, 8 *Ann.* *Anonymous.*

See this caſe fully ſtated in page 37 of this work, under the head *Actions.*

Trinity, 8 *Ann.* *The Queen* v. *Tyrril and Barber.*

See this caſe fully ſtated in page 555 of this work, under the head *Information.*

Hilary, 10 *Ann.* *Silk* v. *Hill.*

Adjudged in this cauſe, that the words *any judgment*, ſuppoſe more than one ſort of *judgment*; but after a verdict, there are but two ſorts, *viz.* final and interlocutory *judgments*. Now after an interlocutory *judgment* there never goes any writ, but a writ of *inquiry*; therefore ſhould not, *ſtat.* 13 *Car.* 2. *cap.* 2. extend to a writ of *inquiry*, the word *any* would be improperly uſed.

And then the concluſion of the *ſtat. nor ſhall the want, &c. in any ſuch writ, &c.* are words ſo general, that they need not be tied up to the writs before mentioned in the *ſtatute*; but may very well be underſtood of writs of the ſame nature; and following ſuch *judgments*: if indeed the concluſion had been in any of the writs *before recited*, the ſtatute could not have borne ſuch an interpretation. *Vide Mod. Rep. vol.* 10. *p.* 83.

Trinity, 10 *Ann.* *Lure* v. *Reſt.*

After a writ of inquiry *executed*, and before any entry of the *judgment*, which was delayed by the act of the court, the plaintiff died: the court was moved, that this be happening by the delay of the court, *judgment* might entered as of *two* or *three* terms ago. In behalf of the motion, the caſe of *Philip* v. *Jackſon* 1 *Ventris*, was cited, where it ſaid, that if the court does delay the entry of the *judgment*, there *judgment* may be entered as of *two* or *three* terms ago, without entering of continuances. *Vide Mod. Rep. vol.* 10. *p.* 30.

Hilary, 11 *Ann.* *Merrill* v. *Joſſelyn.*

See this caſe fully ſtated in page 582 of this work, under the head *Iſſue.*

Eaſter, 13 *Ann.* *Shipley* v. *Shipley.* Error.

See this caſe fully ſtated in page 415 of this work, under the head *Error.*

Trinity, 13 *Ann.* *The Queen* v. *Simpſon.*

See this caſe fully ſtated in page 84 of this work, under the head *Appearance.*

Sir John Fenwick's Caſe.

In the caſe of Sir *John Fenwick*, who was attainted of high treaſon, by a *bill of attainder*, all the judges met to conſider of the King's pardoning the *judgment* againſt him; and they were all of opinion, that the King could pardon all or any part of the *judgment*, and in this caſe all the *judgment* in high treaſon was pardoned, except ſevering his head from his body, and he was beheaded accordingly. *Vide Forteſcue*, *p.* 385.

Michaelmas, 1 *Geo.* *Weddall* v. *The Bail of Jocar.*

See this caſe fully ſtated in page 182 of this work, under the head *Bail in Error.*

Hilary, 2 *Geo.* *Taylor* v. *Matthews.*

See this caſe fully ſtated in page 371 of this work, under the head *Diſcontinuance*, *&c.*

Hilary, 2 *Geo.* *Baldwin* v. *Church.*

See this caſe fully ſtated in page 346 of this work, under the head *Debt.*

Michaelmas, 3 *Geo.* *Elwell* v. *Quaſh et al.*

There were *three* executors, one of whom gave a warrant of attorney to confeſs *judgment* againſt himſelf and his co-executors, purſuant to which a *judgment* was entered againſt all the executors *of the goods of the teſtator* for the debt, and againſt the executor who gave the warrant of *his own proper goods* for the coſts.

On motion to ſet this aſide, it was held to be ill, for executors may plead different pleas, and that which is moſt for the teſtator's advantage ſhall be received. 1 *Roll. Abr.* 929. *A.* 1. *B.* 5. *Vide Strange*, *vol.* 1. *p.* 20.

Trinity, 4 *Geo.* *Aires* v. *Hardreſs.*

A *fieri facias* was taken out within the year, and *no goods* returned; this was continued down for ſeveral years, and then a *capias ad ſatisfaciendum* iſſued. And whether this was regular or not, was the queſtion. The court took time to conſider of it, and the laſt day of the term, *Pratt*, Chief Juſtice, ſaid, if this was a new caſe, they ſhould think it hard to take away all *ſci. fa.*'s. But now the practice had gone ſo far, that there was no over-turning it. 1 *Inſt.* 290. 4 *Inſt.* 271. *Mod. Caſes* 288. 1 *Sid.* 59. 1 *Keb.* 159. *Cliſh.* 840. *Offic. Brevium* 96. *Raſtal* 164. Wherefore the *execution* was held regular. *Vide Strange*, *vol.* 1. *p.* 100.

Eaſter, 6 *Geo.* *Winter* v. *Lightbound.*

The plaintiff obtained *judgment* as of *Michaelmas* term generally, but was ſtopped from taking out *execution* by an injunction out of *Chancery*; which being afterwards diſſolved, he took out an *execution*, teſted the laſt day of the ſubſequent *Michaelmas* term; and whether he could do it in this caſe without a *ſci. fa.* was the queſtion?

And the whole court held, that the *execution* was irregular, as taken out after the year, for the *judgment* being *general*, has relation to the firſt day of the term, and ſo there is all *Michaelmas* term over and above a year. And they ſaid *ſtat. Weſtm.* 2. which ſays *within a year* muſt be computed by calendar months, and not by terms; for it was inſiſted, that taking out one term incluſive, and the other excluſive, there were but *four* terms.

It being thus determined, that the plaintiff was beyond the year, the next queſtion was whether the injunction operated? Which was compared to a *writ of error*, and it was urged, that there it had been often reſolved, that though the party had been hung up never ſo many years by a *writ of error*, yet there may be *execution* ſued out immediately without a *ſci. fa.*

But the court ſaid, there was a great difference between the caſe of a *writ of error* and an *injunction*; the former being a judicial proceeding, appearing to them on record, whereas an injunction is not a matter of record; ſo the court can take no notice of it. *Vide Strange, vol.* 1. *p.* 301.

Michaelmas, 6 *Geo.* *Beacon* v. *Peck*.

The plaintiff took out an *elegit*, and by virtue thereof levied part of the debt on the goods, and after a *nihil* returned, as to the lands, ſued out a *capias ad ſatisfaciendum*, and arreſted the body of the defendant.

The court was moved to quaſh the *ca. ſa.* becauſe the plaintiff, by taking out an *elegit*, had waived any other *execution*. And for this all the old caſes were cited.

But the court held the *ca. ſa.* was regular, for there being a *nihil* returned as to the lands, the *elegit* was but in the nature of a common *fi. fa.* on which if part be levied, the plaintiff may afterwards have a *ca. ſa.* for the remainder. The election is not compleat, unleſs the plaintiff has ſome benefit from the land; for the taking out the writ is not an actual election, but only in order to an election; and if there are no lands, there is nothing to chuſe, and conſequently no election. *Vide Stra. vol.* 1. *p.* 226.

Eaſter, 7 *Geo.* *Edwards* v. *Blunt*.

See this caſe fully ſtated in page 118 of this work, under the head *Arreſt of Judgment*.

Eaſter, 7 *Geo.* *Cumber* v. *Wane*. Error.

On a writ of *error* brought on a *judgment* given in *C B.* in an action on an *indebitatus aſſumpſit* for 15 *l.* it was alledged, that ſince the time which the court took to adviſe, the defendant in *error* was dead, and therefore they prayed that they might enter the judgment *nunc pro tunc*, as was done in the caſe of *Baller* v. *Delander*, *Trin.* 1 *Geo.* in this court, which was ordered accordingly. *Vide Strange, vol.* 1. *p.* 426.

Trinity, 7 *Geo.* *Bellew* v. *Scot*.

See this caſe fully ſtated in page 416 of this work, under the head *Error*.

Trinity, 7 *Geo.* *Oates* v. *Robinſon*. Error.

On a trial in *ejectment*, a caſe was made for the opinion of the court, on which the ſole queſtion was, whether an *extent* on a ſtatute into *one* county, and a *liberate* returned and filed, the conuſee can have any other *extent* into another county.

Per curiam. We are all of opinion, that if the prayer of an *extent* into the *ſecond* county was entered at the time the *firſt extent* was taken out, the *ſecond extent* will be regular, otherwiſe not.

N. B. On application to the Lord Chancellor, he gave them leave to enter the prayer *nunc pro tunc* i. e. *now for then*, ſo this court made no rule, but it went off on propoſals of going to a new trial. And accordingly the cauſe went down to trial, when a verdict was found for the plaintiff, ſubject to the judges opinion; who on hearing council, ordered the *poſtea* to be delivered to the plaintiff; on which a *writ of error* was brought, but the plea of *no goods* being put in, the plaintiff had his *execution*. *Vide Strange, vol.* 1. *p.* 461.

Eaſter, 8 *Geo.* *The King* v. *Selfe*.

See this caſe fully ſtated in page 118 of this work, under the head *Arreſt of Judgment*.

Eaſter, 8 *Geo.* *Windham* v. *Wither*, *Idem* v. *Trull*.

See this caſe fully ſtated in page 234 of this work, under the head *Bills of Exchange, &c.*

Eaſter, 9 *Geo.* *Waller's Caſe.*

See this caſe fully ſtated in page 168 of this work, under the head *Bail*.

Eaſter, 9 *Geo.* *Aldridge* v. *Snowden*.

See this caſe fully ſtated in page 167 of this work, under the head *Bail*.

Michaelmas, 9 *Geo.* *Bland* v. *Pakenham*.

The court held, that the preſence of an attorney of the *C. B.* at the *execution* of a warrant to enter up a *judgment* in this court was ſuffiicient. *Vide Strange, vol.* 1. *p.* 530.

Michaelmas, 9 *Geo.* *Cooper* v. *Beale*.

See this caſe fully ſtated in page 395 of this work, under the head *Ejectment*.

Hilary, 10 *Geo.* *Anonymous*.

An *execution* was taken out againſt the teſtator in his life-time, and *executed* after his deceaſe; the writ was returnable in *eight* days of St. *Martin*, and *executed* on the 16th day of *November*, which was *two days* before the return was out.

It was objected that this *execution* was ill, being *executed* after the teſtator's death, and without any *ſcire facias* brought to ſhew cauſe wherefore *execution* ſhould not iſſue.

Per curiam. The *execution* being ſued out before the teſtator's death, may be *executed* afterwards without a *ſcire facias*, as was reſolved in Dr. *Needham*'s caſe; and it may be *executed* at any time before the return of the writ; nay, on the very day that it is returnable; and good; and if it is *executed* in the vacation, it ſhall refer to the antecedent term, and ſo it ſhall, if it is *executed* in term-time; *Cro. Eliz.* 181. *p.* 16. *Vide Mod. Rep. vol.* 8. *p.* 225.

Hilary, 10 *Geo.* *The King* v. *Colvin*.

See this caſe fully ſtated in page 136 of this work, under the head *Attachment*.

Eaſter, 10 *Geo.* *The King* v. *Burridge*.

See this caſe fully ſtated in page 136 of this work, under the head *Attachment*.

Eaſter, 10 *Geo* *Martin* v. *Henriques*.

On a *ſcire facias* on a *judgment* againſt the principal, the defendant pleaded *nul tiel record*; whereon the plaintiff produced the record, and the maſter ſigned the roll, *that the plaintiff brought the record* and the plaintiff ſigned the *judgment* the next day, and took out *execution*, which on motion was ſet aſide as irregular, becauſe he ought not to have ſigned the *judgment* till four days after the record was brought in. *Vide Mod. Rep. vol.* 8. *p.* 237.

Eaſter, 10 *Geo.* *Cloud* v. *Nicholſon*.

See this caſe fully ſtated in page 244 of this work, under the head *Bonds*.

Eaſter, 10 *Geo.* *Anonymous.*

See this caſe fully ſtated in page 118 of this work, under the head *Arreſt of Judgment.*

Trinity, 10 *Geo.* *Anonymous.*

The defendant had leave to plead *anew* within *four* days, within which time he ought to have pleaded in *chief*, but inſtead of that, he pleaded an *outlawry* of the plaintiff in diſability, &c. and thereon the plaintiff ſigned *judgment* for want of a plea in *chief* within the *four* days; and this was held regular; but on payment of coſts, and giving the plaintiff *judgment* in *debt* for his ſecurity, and bringing 20 *l.* into court, and pleading to iſſue immediately, the *judgment* was ſet aſide. *Vide Mod. Rep. vol.* 8. *p.* 289.

Trinity, 10 *Geo.* *Paterſon* v. *Dyer.*

A *declaration* was delivered in *Michaelmas* term, and rules given for pleading according to the courſe of the court, but the defendant making *default*, the plaintiff's attorney ſigned *judgment*, and gave due notice of *executing* a *writ of inquiry*; the defendant appeared at the time and place, and made defence, but ſome time afterwards would have impeached the *judgment*, but it was not allowed, becauſe he had made a defence at the *executing* the *writ of inquiry*. *Vide Mod. Rep. vol.* 8. *p.* 289.

Trinity, 10 *Geo.* *Herbert* v. *Morgan.*

See this caſe fully ſtated in page 336 of this work, under the head *Damages.*

Trinity, 10 *Geo.* *Saladine* v. *Sir Jacob Jacobſon.*

The defendant was one of the Directors of the *South-Sea* Company, and the plaintiff had obtained a *judgment* againſt him for *one thouſand pounds*. And by *ſtat.* 7 *Geo.* it is enacted, *That every Director*, &c. *ſhall deliver on oath before one of the Barons of the Exchequer, before the* 25th *day of* March 1721, *two inventories of all the real and perſonal eſtate, of which he was poſſeſſed or intitled unto in his own right, or of any other perſon in truſt for him*, &c. which ſhall diſcharge him from the demands of all other perſons; all which eſtates ſhall be forfeited and recovered by virtue of that act, and ſhall be paid into the *Exchequer*, and applied for the benefit of the *South-Sea* Company.

A motion was made for the opinion of the court, whether the defendant could avoid this *judgment* on his own *affidavit*, that he gave in a true inventory, *purſuant to the act.*

Per curiam. All that is required in this caſe by the ſtatute is to give an exact and true inventory, and he ſwears that he gave an inventory purſuant to the act, ſo need not name all the particulars; and it is abſolutely neceſſary that his evidence ſhould be taken, becauſe he beſt knows whether the inventory was true or not; ſo the *judgment* againſt him was vacated. *Vide Mod. Rep. vol.* 8. *p.* 291.

Michaelmas, 10 *Geo.* *Crofts, Executor of Curtis*, v. *Butel, the Bail of Harris.*

See this caſe fully ſtated in page 169 of this work, under the head *Bail.*

Michaelmas, 10 *Geo.* *Clark* v. *Corniſh, or Corniſh* v. *Clark, et al'.*

See this caſe fully ſtated in page 169 of this work, under the head *Bail.*

Michaelmas, 10 *Geo.* *Miller* v. *Bradley.*

See this caſe fully ſtated in page 372 of this work, under the head *Diſcontinuance.*

Hilary, 11 *Geo.* *Cotton* v. *Owen.*

In *replevin* for taking his goods, the defendant avowed, and juſtified the taking *damage feaſant*, the plaintiff replied, that the goods were there, by virtue of a demiſe, made to him by the avowant himſelf, and that he entered and was poſſeſſed, &c. The defendant re-joined, and traverſed the *poſſeſſion*; but gave no anſwer to the *demiſe* ſet forth in the replication to be made by himſelf, for which reaſon the plaintiff demurred, and the defendant joined in demurrer; and it was inſiſted for the plaintiff, that ſince the traverſe of the poſſeſſion was immaterial, and nothing ſaid as to the demiſe, the plaintiff ought to have *judgment*; and accordingly *judgment* was given for him. *Vide Mod. Rep. vol.* 8. *p.* 343.

Hilary, 11 *Geo.* *Phillips* v. *Doelittle.*

See this caſe fully ſtated in page 396 of this work, under the head *Ejectment.*

Eaſter, 11 *Geo.* *Heavyſide* v. *Davis.*

See this caſe fully ſtated in page 170 of this work, under the head *Bail.*

Eaſter, 11 *Geo.* *Wilſon* v. *Machin.*

The Marſhal having ſuffered an eſcape, there was *judgment* againſt him for 18000 *l.* and a motion was made on behalf of the creditor to ſequeſter the profits of the *King's Bench* priſon, towards the payment of the ſaid debt; which was oppoſed by the aſſignees of *Boulter*'s mortgage on the marſhalſhip of the *King's Bench* priſon; for that there was 14000 *l.* ſtill due to them for principal and intereſt; and that if the plaintiff would diſcharge that debt, he might take the profits of the priſon to ſatisfy his debt.

Thereon it was moved on *ſtat.* 8 & 9 *W.* 3. that an account might be taken of what was due on that mortgage at the time that act was made, for it extends to no farther ſum than *what was then due*, and what profits were received by the aſſignees, or might have been received *without wilful default*; *which motion was granted accordingly.* *Vide Mod. Rep. vol.* 8. *p.* 350.

Eaſter, 11 *Geo.* *Griffith's Caſe.*

See this caſe fully ſtated in page 273 of this work, under the head *Condition.*

Trinity, 11 *Geo.* *Turner* v. *Moſſe.* Error.

See this caſe fully ſtated in page 420 of this work, under the head *Error.*

Michaelmas, 11 *Geo.* *Graves* v. *King.*

The plaintiff had *judgment* in *Hilary* term 1722, which was *three* years ago, which *judgment* was ſigned on the 14th day of *February*, *two* days after that term, and the *execution* bore *teſte* on the 12th day of *February* 1723; and no *ſci. fa.* being firſt ſued out to revive the *judgment*, it was urged to be irregular, for the *judgment* relates to the *firſt day* of the term, ſo that there is above a year between the *judgment* and the *execution*. The council for the plaintiff replied, that the plaintiff was right in point of fact, though wrong by a fiction in law, and therefore prayed that he might have leave to enter *continuances* to the laſt day of this term, ſo as to make it a *judgment* of that day, or to get the *judgment* ſigned, as of the ſucceeding term.

But the court denied leave to enter *continuances*, it being now a record of *three* years ſtanding, neither would they permit the *judgment* to be entered as of the ſucceeding term; *judgments* being obtained on adverſe ſuits. The court being divided in their opinion as to quaſhing this *execution*, no rule could be made; wherefore the *execution* was let to ſtand. *Vide Mod. Rep. vol.* 8. *p.* 310.

Michaelmas, 11 *Geo.* *Biggs or Briggs*, v. *Greinfield.*

See this caſe fully ſtated in page 118 of this work, under the head *Arreſt of Judgment.*

Michaelmas, 12 *Geo.* *Flower* v. *Lord Bolingbroke*.

About *twenty* years ſince the plaintiff obtained *judgment* againſt the then Earl of *Bolingbroke*, but by the careleſſneſs of his attorney it was never entered up, though he had charged the plaintiff for ſo doing, and had been paid his bill. The attorney being dead, whereby the plaintiff had loſt his remedy againſt him, and there being a decree in *Chancery* for the payment of the debts in a courſe of adminiſtration; the plaintiff to have the preference before the other creditors, moved the court for leave to enter up the *judgment nunc pro-tunc*, i. e. *now for then*.

But on conſideration, the court refuſed to do it, (though not being docquetted, it could not affect purchaſers) it being at ſuch a diſtance of time, that the preſumption was, that the debt was ſatisfied. *Vide Stra. vol.* 1. *p.* 639.

Michaelmas, 13 *Geo.* *Wild* v. *Sands*.

The court was moved for leave to enter up a *judgment* on an old warrant of attorney, the defendant being living, and the debt unpaid; but it appearing, that the party to whom the warrant was given to confeſs the *judgment* was dead, the court would not grant the motion. *Vide Stra. vol.* 2. *p.* 718.

Michaelmas, 13 *Geo.* *Lancaſter* v. *Fielder*.

In an action brought by the plaintiff againſt the defendant, the defendant put in bail, and afterwards was ſurrendered in diſcharge of his bail, and committed to the *Marſhalſea*; the plaintiff proceeded in the action, and got *judgment*, and ſued out *execution* thereon by *elegit*, on which the ſheriff took an inquiſition, and levied ſome of the goods of the defendant in part of the debt, but returned, the defendant had no lands. The court was moved that the defendant might be diſcharged out of cuſtody, for ſince the plaintiff has choſe an *elegit*, be can have no other *execution*, becauſe he has made his election to take the *elegit* according to *ſtat. Weſtm.* 2. *c.* 18. In 2 *Inſt.* 395. *Coke* ſays, after ſuing out an *elegit*, the plaintiff on a *judgment* in *debt* cannot have a *ca. ſa.* On which the court made a rule for the plaintiff to ſhew cauſe, &c. And on another day the Judges were all of opinion, that it being returned, that the defendant had no lands, the *elegit* was to be conſidered only as a *ſi. fa.* though goods were levied; and that if the defendant had been at large, the plaintiff might have had a *capias ad ſatisfaciendum*. So is *Hobart*'s opinion, *Hob.* 58. *Foſter* v. *Jackſon*. 1 *Lev.* 92. *Glaſcock* v. *Morgan*. But if any land had been *extended* on the *elegit*, the plaintiff had been bound down to that *execution*. Therefore the former rule was diſcharged. *Vide Raym. vol.* 2. *p.* 1451.

Trinity, 3 *Geo.* 2. *The King* v. *Hayes*.

See this caſe fully ſtated in page 118 of this work, under the head *Arreſt of Judgment*.

Eaſter, 4 *Geo.* 2. *General Rule*.

The court taking notice of the great inconveniencies ariſing from holding a warrant to confeſs *judgment* by a perſon in cuſtody to be good, if any attorney (tho' for the oppoſite party) was preſent; made a rule, that for the future there ſhould be an attorney preſent on behalf of the defendant. *Vide Stra. vol.* 2. *p.* 902.

Trinity, 4 *Geo.* 2. *Cowper* v. *Oſborne*. Error.

The entry of *judgment* was *ideo conſ.* without the word *eſt*. It was objected, that it was *error*.

Per curiam. The word being abbreviated, it may paſs for the preſent tenſe of the indicative mood of the paſſive verb, *conſideratur*, *it is conſidered*, therefore the *judgment* was affirmed. *Vide Strange, vol.* 2. *page* 874.

Michaelmas, 4 *Geo.* 2. *Fuller* v. *Jocelyn*.

Lady *Twiſden*, (the defendant's teſtatrix) on the 9th day of *February* 1729, gave a warrant of attorney to confeſs a *judgment*. On the 18th day of *April* 1730, ſhe died, and the *judgment* was ſigned on the 22d day of *April* as a *general judgment* of *Eaſter* term, which began on the 15th. And on motion to ſet it aſide, it was inſiſted, that by the death of the party the warrant was countermanded 1 *Vent.* 310. *Salk.* 399. *Co. Litt.* 52. *b.* for it is conſidered as given only in caſe of the party, to excuſe her perſonal appearance in court, and the attorney cannot do more for her than ſhe could do for herſelf. And this is by relation to diveſt a right legally veſted in the executor, who in confidence of the goods may have advanced money out of his own eſtate.

But the court ſaid, the caſe of *Oates* v. *Woodward*, *Salk.* 87. 2 *Mod.* caſes 93. was not to be got over; and that it being the courſe of the court to enter the *judgments* as of the *firſt* day of the term, they could not alter it on conſideration of the circumſtances that attend a particular caſe: beſides, this ſeems to be eſtabliſhed by the *ſtatute of frauds*, which provides for purchaſers, but has given no remedy in this caſe. *Vide Stra. vol.* 2. *p.* 882.

Eaſter, 7 *Geo.* 2. *Kent* v. *Kent*.

See this caſe fully ſtated in page 336 of this work, under the head *Damages*.

Eaſter, 7 *Geo.* 2. *The King* v. *Poole*.

See this caſe fully ſtated in page 298 of this work, under the head *Corporations*.

Trinity, 7 *Geo.* 2. *Francis* v. *Naſh*.

On a motion to ſet aſide an *execution* on a *judgment* by confeſſion for irregularity. It was reſolved, that where *judgment* had been confeſſed with a *defeazance* to *ſtay execution* till a certain time, and *execution* is taken out within that time; the court may ſet it aſide; but where there are long collateral agreements, and the defendant alledges that by reaſon of them *execution* ought to ſtay, this court cannot enter into and try the equity ariſing on them, but the defendant, if aggrieved, muſt apply for relief in *Chancery*.

2dly. Nothing can be taken in *execution* that cannot be ſold, as deeds, writings, &c.

3dly. That bank notes, &c. cannot be taken in *execution*; for though they are aſſignable over, yet notwithſtanding they remain in ſome meaſure *choſes in action*, and the ſheriff or his bargainees cannot bring an action on them without aſſignment, notwithſtanding the act for aſſigning them; yet they are ſo much things in action, that it was neceſſary to have a new act, in order to make the ſtealing of them felony. *Vide Caſes Temp. Lord Hardw.* *p.* 53.

Michaelmas, 7 *Geo.* 2. *Horton* v. *Kilmore*. Error.

See this caſe fully ſtated in page 44 of this work, under the head *Actions*.

Michaelmas, 8 *Geo.* 2. *Bern* v. *Bern*.

See this caſe fully ſtated in page 72 of this work, under the head *Amendment*.

Trinity, 9 *Geo.* 2. *The King* v. *Luckup*.

See this caſe fully ſtated in page 501 of this work, under the head *Gaming*.

Michaelmas, 9 *Geo.* 2. *Fuller* v. *Johnſon*.

The court was moved in behalf of an *executor* to ſet aſide a *judgment* ſigned againſt his teſtator, on a warrant of attorney given by the teſtator, for that the teſtator died on the ſame day on which the *judgment* was ſigned, but before it was ſigned, *viz.* at *four* or *five* o'clock in the morning. But the court refuſed to do it.

Lord *Hardwicke*, ſaid, it was like *Shelly*'s caſe in the *firſt* report, where a recovery paſſed the *firſt* day of the term, though the then recoveree died that very morning at *three* or *four* o'clock, and was held good. And he mentioned *Woodward*'s caſe, which went a good way further, for there he gave a warrant of attorney to enter *judgment*, and died within a year after in time of vacation; the attorney entered up *judgment* of the preceding term to his death, for he died in vacation, and the court would not ſet it aſide. *Vide Caſes Temp. Lord Hardw. p.* 158.

Michaelmas, 9 *Geo.* 2. *Sibbet* v. *Ruſſell.*

On a motion made to ſet aſide a *judgment*, and a *ſci. fac.* to revive the ſame; it was referred to the maſter, who reported, that the declaration was delivered on the 9th day of *June* laſt, the rules to plead were out on the 13th day of *June*, a ſummons taken out before Lord *Hardwicke* at his chambers on the 18th day of *June* for time to plead, becauſe the defendant was ill at *Bath*. Attendance before —— on the 19th day, when he gave the defendant time to plead to the 25th, but in fact the defendant was at that time dead at the *Bath*, though the attornies knew nothing of it, for he died on the 18th, and therefore his attorney did not plead within the time given; and on the 26th the plaintiff ſigned his *judgment*, and has ſince ſued out a *ſcire facias* againſt the defendant's *executors*.

The council for the defendant ſaid, that by his death the ſuit was abated, for though by *ſtat.* 8 & 9 *W.* 3. *c.* 11. *ſect.* 6. If the defendant dies after the interlocutory *judgment* is ſigned, and before final *judgment*, the ſuit ſhall not abate, yet in this caſe the defendant died before any *judgment* was ſigned at all.

Lord *Hardwicke*. In all caſes of warrants of attorney, as they are not adverſe cauſes, the court have ſupported theſe *judgments* by ſuch relation, but this is an adverſe cauſe, and ſuppoſe there had been no further time given to plead, but after the rules for pleading were out, the defendant had died, and *judgment* had been ſigned after his death, ſure that would not be a good *judgment*; for the defendant, after the rules for pleading are out, may plead at any time before *judgment* is ſigned, and the order for further time to plead was never intended to bind the party as if *judgment* had been ſigned on the day on which the rules for pleading were out; *ſtat.* 8 & 9 *W.* 3. will not vary the caſe at all.

Per curiam. The *judgment* and *ſcire facias* muſt be ſet aſide. *Vide Caſes Temp. Lord Hardw. p.* 183.

Michaelmas, 9 *Geo.* 2. *Lockwood* v. *Beaumont.*

The court was moved to ſet aſide a *judgment*, for that before the action brought the defendant had paid the debt to one *A.* who gave him a releaſe, and afterwards aſſigned the debt to the preſent plaintiff; but could aſſign no irregularity or ſurpriſe in the ſigning this *judgment*, for the defendant, inſtead of appearing and pleading the releaſe, let *judgment* go againſt him by *default*.

Lord *Hardwicke*. We do, ſometimes, on payment of coſts, ſet aſide *judgments* that are ſtrictly regular, if the *judgment* had been obtained by ſurpriſe, and let the parties in to try the merits, but never as this caſe is, where the *judgment* is regular, and no ſurpriſe, therefore the motion was denied. *Vide Caſes Temp. Lord Hardw. p.* 157.

Trinity, 10 *Geo.* 2. *Wharton* v. *Richardſon.*

A *ſcire facias* was brought againſt the defendant as adminiſtratrix of her huſband, on a *judgment* for 1,500 *l.* and after two *nihils* returned, a *ſcire fieri inquiry* was taken out, and the defendant attended the *execution* of it, in order to lay the ſtate of aſſets before the jury: but the plaintiff inſiſting that the award of *execution* on the former writs was in point of law an evidence of aſſets, a *devaſtavit* was found to 1,117 *l.* 18 *s.* 1 *d.* In *Hilary* 8 *Geo.* 2. ſhe appeared to the *ſcire fieri inquiry*, and pleaded *that ſhe had fully adminiſtered*, and traverſed the *devaſtavit*. And notice of trial being given, and countermanded, and nothing further done on it; ſhe in *Michaelmas* 10 *Geo.* 2. moved to have the award of *execution* ſet aſide, and to be admitted to plead; it being to no purpoſe to expect relief on the trial of the traverſe; and cited *Salk.* 93. 264. to ſhew that where there has been no *ſcire feci*, and only two *nihils*, the court will relieve on motion, and not put the party to an *audita querela*; and the ſtate of the real aſſets was proved to be 130 *l.* which ſhe offered to deliver up, and to be examined on interrogatories, if the plaintiff was diſſatisfied with the account.

The court was inclined to relieve her: but on conſideration of her long acquieſcence, and the ſeveral ſteps taken ſubſequent to the award of *execution*; they thought ſhe came too late, and for that reaſon only, refuſed to interpoſe. *Vide Strange, vol.* 2. *p.* 1075.

Michaelmas, 10 *Geo.* 2. *Street* v. *Hopkinſon.* Error.

See this caſe fully ſtated in page 423 of this work, under the head *Error*.

Eaſter, 11 *Geo.* 2. *Otway* v. *Ramſey*. Error.

The great queſtion in this caſe (which came from *Ireland*) was, whether *debt* would lie there on a *judgment* in this court, and after *two* ſolemn arguments, in which the court ſtrongly inclined that it would not, a *third* argument was appointed; but the plaintiff in *error*, who was plaintiff, and had *judgment* againſt him below, declining any further argument, on which the *judgment* in *Ireland* was affirmed, without any opinion delivered by the court further than what was ſaid on the former arguments. *Vide Strange*, 2. *p.* 1090.

Eaſter, 11 *Geo.* 2. *The King* v. *Harwood.*

The defendant being a juſtice of the peace, was convicted on an information, for a conviction by him made of an ale-houſe-keeper, who was never ſummoned or heard. The court was moved, as a matter of courſe, to diſpenſe with his perſonal appearance on praying *judgment*. This was oppoſed, unleſs there was ſome reaſon given, or *affidavit* made: and on debate the court held it was not a matter of courſe, and the defendant afterwards appeared in perſon. *Vide Stra. vol.* 2. *p.* 1088.

Michaelmas, 11 *Geo.* 2. *Chancey* v. *Needham.*

On the *eleventh* of *November*, about *twelve* o'clock at noon, a motion was made to enter up *judgment* on an old warrant of attorney, and an *affidavit* was produced, ſworn the day before, of the party's being alive, and the debt unpaid, on which the court made the common rule.

The court was moved at another day to diſcharge it on an *affidavit*, that the defendant died the day the *firſt* motion was made at *ſeven* o'clock in the morning: and it was inſiſted, that this was a great ſurprize on the court.

And on great debate the court declared, that if it had then appeared, that the man was dead, they would not have made the rule; but they compared it to the caſes, *Salk.* 82. and *Fuller* v. *Jocelyn*, *vol.* 2. *p.* 882. And thus ſuffered the deceit which had been put on them to prevail. *Vide Strange, vol.* 2. *p.* 1081.

Michaelmas, 13 *Geo.* 2. *Gainſborough*, *Executor of Gainſborough* v. *Follyard.*

The defendant was indebted by bond to the plaintiff's teſtator, who died on the *thirteenth* of *March*, 1738. On making up all accounts, the defendant on the *third* of *April*, 1739, *executed* a warrant of attorney to confeſs *judgment* at the ſuit of the executor, as of laſt *Hilary* term, or any other ſubſequent term, and on the *ſeventh* of *April* the *judgment* was entered up, and the defendant's goods taken in *execution*. After this a commiſſion of bankruptcy iſſued againſt him. And now the aſſignees moved to ſet aſide the *judgment*, as being

being entered of *Hilary* term, when the teſtator was living.

The court held it to be irregular, for the attorney could have no authority to appear in *Hilary* term, at the ſuit of the executor: and the *judgment* muſt be conſidered as of that term, though to other purpoſes the day of ſigning is material. So the *judgment* and *execution* were ſet aſide. *Vide Strange*, *vol.* 2. *page* 1121.

Michaelmas, 18 *Geo.* 2. *Landon* v. *Pickering*.

See this caſe fully ſtated in page 424 of this work, under the head *Error*.

Hilary, 19 *Geo.* 2. *Watkins* v. *Hanbury*.

The defendant being taken on a *capias ad ſatisfaciendum*, paid part of the debt, and gave a warrant of attorney to confeſs a *new judgment* for the reſt, on time being given him to pay it. The court was moved to ſet this aſide, becauſe no attorney was preſent on the part of the defendant when the warrant was *executed*, according to *two* ſtanding rules of the court, the *firſt* of which indeed ſpeaking of perſons in cuſtody on arreſts, may extend only to *meſne proceſs*: but the *ſecond* is general, and relates to any ſort of cuſtody.

The court held the warrant of attorney to be well given, for the defendant had a benefit by it in gaining time, and the *ſecond* rule muſt be conſtrued, *being in cuſtody as aforeſaid*, the only intent of that being, to make it neceſſary to have an attorney *on the part of the defendant*, whereas under the former rule, an attorney for the plaintiff, (who was not likely to adviſe the defendant for the beſt) was ſufficient. *Vide Strange*, *vol.* 2. *p.* 1245.

Hilary, 19 *Geo.* 2. *Fitzgerald* v. *Plunket*.

The court ſet aſide a *judgment* entered on a warrant of attorney given in *Ireland* by the defendant, while in cuſtody on a *meſne proceſs* at the ſuit of the plaintiff, becauſe no attorney was preſent at the giving of it, according to rule 4 *Geo.* 2. and ſaid that was an univerſal rule, and the plaintiff if he would make uſe of this court, muſt conform to its rules; they compared it to the caſe of ſtamping foreign deeds before they can be read here. *Vide Strange*, *vol.* 2. *p.* 1247.

Michaelmas, 19 *Geo.* 2. *Forbes* v. *Lord Middleton*.

On an action of *aſſumpſit*, the defendant pleaded the *general iſſue*, and the *ſtatute of limitations*, the *iſſue* was found againſt him at the aſſizes; but as to the ſpecial plea, there was a replication, rejoinder, and ſur-rejoinder, to which the defendant demurred, and the plaintiff joined in demurrer. This term the plaintiff made it a *concilium*, and put it in the paper, and nobody appearing to ſupport the demurrer, obtained *judgment*.

The court was now moved to ſet this aſide as irregular, the rule for the *concilium* having never been ſerved, or any notice given of putting it in the paper.

But the court held it not to be irregular, and that it was the duty of the defendant to ſearch, ſince he muſt expect the plaintiff would proceed.

Then the court was moved to ſet it aſide on payment of coſts, on the ground of ſetting aſide *irregular judgments*.

But the court ſaid, that was never to be done, but where the defendant was to plead to the merits; not to give him the advantage of a nicety in pleading. And if there was any ground for the demurrer, (as the fact there was) he might bring a writ of error, but they would not relieve him, though he offered to waive his *writ of error*. *Vide Strange*, *vol.* 2. *p.* 1242.

Hilary, 30 *Geo.* 2. *Tooker* v. *The Duke of Beaufort*.

See this caſe fully ſtated in page 468 of this work, under the head *Evidence*.

Eaſter, 31 *Geo.* 2. *The King* v. *Peters and others*, *or Cavil* v. *Burnaford and others*.

On a motion for a *mandamus* to be directed to the defendant, *John Peters*, the county clerk, (who was the ſteward of the court) *and alſo* to the free ſuitors of the *county court* of the county of *Cornwall*, commanding them to *proceed to final judgment* in a certain cauſe by plaint in *replevin*, commenced in the ſaid *county court*, between *John Cavil*, plaintiff, and *John Burnaford*, *Anthony Pomery* and *Nicholas Pelyne*, defendants; in which cauſe the ſaid *John Cavil* obtained an *interlocutory judgment* in the ſaid *county court*. A rule to ſhew cauſe was obtained.

The council on ſhewing cauſe to this rule, took the following *exceptions*.

1ſt, Whether the judge or ſteward of an *inferior court* has a right to *ſet aſide interlocutory judgments* regularly obtained.

2dly, Whether in *this particular caſe*, the ſteward of *this* inferior court had a right to do as he had done, and as is the practice of *that* inferior court.

After hearing the arguments of the council on both ſides, on ſhewing cauſe for and againſt this rule, the court diſcharged the rule.

Per curiam. We are all clearly of opinion, "That "they *may* ſet aſide *regular interlocutory judgments*, in "*order* to let in the *merits*;" both on the *reaſon* of the thing, and for the *convenience* attending it; and therefore we are unanimouſly of opinion, that a rule muſt be made, "That *John Peters*, the *county clerk*, and "the free ſuitors of the *county court*, ſhould ſhew "cauſe why a *mandamus* ſhould not iſſue, directed to "to them, commanding them to proceed to *final* "*judgment* in a certain plaint in *replevin*, com"menced in the ſaid *county court*, between *John Cavil*, "plaintiff, and *John Burnaford*, *Anthony Pomery*, and "*Nicholas Pelyne*, defendants, in which ſaid cauſe the "ſaid *John Cavil* obtained an *interlocutory judgment* in "the ſaid *county court*, and the preſent rule be diſ"charged." *Vide Bur.* *vol.* 1. *p.* 568.

Hilary, 32 *Geo.* 2. *Cooke* v. *Peter Sayer*.

See this caſe fully ſtated in page 313 of this work, under the head *Coſts*.

Michaelmas, 32 *Geo.* 2. *Michell* v. *Cue and Wife*.

On ſhewing cauſe againſt ſetting aſide an *execution* for irregularity (which irregularity was, the ſuing out the *execution above a year after the judgment* obtained, without any writ of *ſcire facias* to revive it,) it appeared, that the *whole delay* had ariſen on the part of the defendants, by bills in *Chancery* for *injunctions*, and by obtaining *time for payment*, &c.

The court were *unanimous*, that the preſent rule "for reviving a *judgment* of above a year old, by writ "of *ſcire facias*, before ſuing out *execution* on it," which was *intended* to prevent *ſurprize on the defendant*, ought not to be taken advantage of by the defendant, who was ſo far from being *ſurpriſed* by the plaintiff's delay, that he *himſelf* had been trying all manner of methods, whereby he *might delay the plaintiff*; and therefore they not only diſcharged the rule, but diſcharged it with coſts. *Vide Bur.* *vol.* 2. *p.* 660.

Trinity, 32 & 33 *Geo.* 2. *The King* v. *Robinſon*, *Clerk*.

See this caſe fully ſtated in page 119 of this work, under the head *Arreſt of Judgment*.

Hilary, 33 *Geo.* 2. *The King* v. *Spragg and another*.

See this caſe fully ſtated in page 546 of this work, under the head *Indictment*.

Trinity, 1 *Geo.* 3. *The King* v. *Higginſon*.

See this caſe fully ſtated in page 547 of this work, under the head *Indictment*.

Eaſter, 4 *Geo.* 3. *Marder and Wife* v. *Lee.*

See this caſe fully ſtated in page 218 of this work, under the head *Baron and Feme.*

Trinity, 5 *Geo.* 3. *Weſton* v. *Maſon, and Weſton* v. *Chapman.*

Adjudged, That the court will not *intend* any thing to overturn a *judgment.*

See this caſe fully ſtated in page 119 of this work, under the head *Arreſt of Judgment.*

Michaelmas, 5 *Geo.* 3. *Swann* v. *Broome.* Error.

Adjudged, That a *judgment* relates to the *eſſoign day* of the term, *unleſs* any thing appears on the record to the contrary, "ſhewing that the *judgment* cannot have "that relation." *Vide Bur. vol.* 3. *p.* 1596.

Juriſdiction.

Trinity, 6 *W. & M.* *Phillips* v. *Berry.*

Adjudged in this caſe, which ſee fully ſtated in page 407 of this work, under the head *Error :*

1ſt, That to this court belongs authority not only to correct errors in judicial proceedings, but other errors and miſdemeanors tending to the oppreſſion of the ſubject.

2dly, That a college is a temporal or lay corporation of the ſame nature as an hoſpital, and the court in this caſe allowed the diſtinction in *Bagge*'s caſe 99. *b.* that if a layman be patron of an hoſpital, he may viſit it, and diſpoſe or deprive, on good cauſe, the maſter; but if he deprives him without juſt cauſe, and by colour thereof the maſter be *ouſted*, he ſhall have an aſſize, becauſe the *common-law* will not permit any perſon to be aggrieved without a remedy. And for theſe reaſons they were of opinion, that they had here a *juriſdiction* to examine and correct the erroneous proceedings of the viſitor. But they agreed, that if the Ordinary deprives a maſter, who is *eccleſiaſtical*, without juſt cauſe, he ſhall not have an aſſize, becauſe he has another remedy by appeal. *Vide Raymond, vol.* 1. *p.* 5.

Michaelmas, 6 *W. & M.* *The Biſhop of Llandaff's Caſe.*

In an action brought for ſuing out a *prohibition*, it was held, that where temporal courts have *juriſdiction* of the right to an office, and the *ſpiritual court* to the exerciſe of that office, the right ſhall be tried in the temporal courts. *Vide Mod. Rep. vol.* 4. *p.* 28.

Eaſter, 11 *W.* 3. *Dr. Groenvelt* v. *Dr. Burwell, et al'.*

Holt, Chief Juſtice. Judges of record are not liable to actions or indictments for giving falſe judgments.

And where a judicial power is given to particular perſons by ſtatute, they may examine on oath. *Vide Raym. vol.* 1. *p.* 468, 472.

Michaelmas, 1 *Ann.* *Reginald or Reginol* v. *Taylor.*

See this caſe fully ſtated in page 412 of this work, under the head *Error.*

Eaſter, 3 *Ann.* *Sparks* v. *Wood.*

An action of *debt* was brought in *London*: A prohibition was moved for; and a rule *niſi* granted, on ſuggeſtion that the defendant had tendered for plea below, that the cauſe did ariſe out of their *juriſdiction*, and offered to make oath of the truth of his plea.

It was ſhewn, that he tendered the plea after the court was up, whereas it ſhould be in *his proper perſon*, and in court; and though an *affidavit* was offered here of the plea, and one *Turner*'s caſe, 4 *Jac.* 2. was quoted out of *Lutwyche*, where a prohibition had been granted on ſuch an *affidavit* here above, without oath of it below. Yet *Powell*, *Powys*, and *Gould*, Juſtices, *Holt*, Chief Juſtice, being abſent, diſcharged the rule. For in all pleas that *ouſt* a court of their *juriſdiction*, whether inferior or ſuperior, there muſt be an oath in that very court of the truth of the plea. *Vide Mod. Rep. vol.* 6. *p.* 146.

Michaelmas, 3 *Ann.* *Stanion or Stanyon* v. *Davis or Davies.*

See this caſe fully ſtated in pages 153 and 318 of this work, under the heads *Averment and Courts.*

Eaſter, 6 *Ann.* *Kendall or Coundell* v. *John.*

See this caſe fully ſtated in page 36 of this work, under the head *Actions.*

Trinity, 8 *Ann.* *The Queen* v. *Layton or Leighton.*

See this caſe fully ſtated in page 256 of this work, under the head *Certiorari.*

Michaelmas, 10 *Ann.* *Anonymous.*

The court was moved to quaſh a writ *de excommunicato capiendo.*

The *firſt exception* taken was, that the writ ſays only *for defamation*, but does not ſay what defamation; now there are ſome defamations that are not of ſpiritual conuſance: this objection was over-ruled by the court, who ſaid they would not preſume that any court would exceed its own *juriſdiction*, unleſs it appeared plainly it had done ſo.

The *ſecond exception* was, that the ſtanding *forty days* excommunicated did not appear in the writ; *but not allowed.*

Per curiam. The *forty days* are never inſerted in the writ, but in the *ſignificavit* only: beſides, this objection is not proper here, but in *Chancery*; the *forty* days excommunication being the very foundation on which the court grants the writ. *Vide Mod. Rep. vol.* 10. *p.* 71.

Eaſter, 11 *Ann.* *Anonymous.*

A return was made to an *habeas corpus*, directed to the Mayor's court of *Canterbury*, of a cuſtom in *Canterbury*, which *ouſted* this court of its *juriſdiction*, but the return was defective, and it was moved to amend the return, and a rule *niſi* was granted.

On the day fixed to ſhew cauſe it was inſiſted, that it ought not to be amended, and the court ſet aſide the rule for the amendment, becauſe this was to *ouſt* the court of its *juriſdiction*, and by conſent they were not to proceed by law. *Vide Forteſcue, p.* 273.

Eaſter, 9 *Geo.* *Spackman* v. *Huſſey.*

The plaintiff declared in the *Marſhalſea Court* on an *inſimul computaſſet within the juriſdiction*, &c. and had judgment; and now on a motion to ſet it aſide, it was inſiſted, that the account does not alter the duty, for that may ariſe in *York*; and no other conſideration being laid to entitle the court to any *juriſdiction*, the judgment ought not to ſtand; but it was adjudged that the account was ſufficient to give the court a *juriſdiction.* *Vide Mod. Rep. vol.* 8. *p.* 77.

Trinity, 9 *Geo.* *Cooke* v. *Wingfield.*

There was a libel againſt the defendant for *defamatory words* ſpoken by him in *London*, and after ſentence, he moved for a *prohibition*, and obtained a rule that the plaintiff ſhould ſhew cauſe, &c. why a *prohibition* ſhould not go.

And now the cauſe ſhewn why it ſhould not go was, that it ought to appear on the face of the *libel* that the matter is not of ſpiritual conuſance: otherwiſe that court ſhall not be prohibited, eſpecially after ſentence; but no ſuch thing appears on this libel, for the defendant only ſuggeſts a *cuſtom in London*, that defamatory words ſpoken there are actionable, which ought not to be ſuggeſted, nor any thing offered in proof, which is out of the libel, eſpecially ſince the defendant has ſubmitted ſo far to the *juriſdiction* of the *Spiritual Court*, till ſentence was given againſt him.

If there had been any ſuch cuſtom, he ought to have pleaded it in *bar* to the *juriſdiction* of that court, for the courts at *Weſtminſter* are not officially to take judicial notice, that there is any ſuch cuſtom in *London*.

Per curiam. There is a difference between a motion of this kind before, and after ſentence in the *Spiritual Court*; for in the one caſe this cuſtom need not be proved by *affidavit*, becauſe it is ſufficiently known, but a judicial notice ſhall never be taken of it after ſentence; ſo the rule was diſcharged. *Vide Mod. Rep. vol.* 8. *p.* 176.

Trinity, 11 *Geo.* *Vaughan* v. *Evans*.

The defendant in this cauſe brought a bill of *foreclosure* in the court of Grand Seſſions for the county of *Montgomery* againſt the plaintiff, and others, to foreclose *Vaughan* of his equity of redemption, on a mortgage of lands ſituate in that county. And laſt term a motion was made for a *prohibition*, on ſuggeſtion that the plaintiff did not dwell in that county, but lived in *England*, and that the defendant had ſued out proceſs, in order to get a ſequeſtration of the plaintiff's lands that lay in *Montgomeryſhire*. And after having heard council againſt the *prohibition*, the court made a rule for the *prohibition* abſolute, becauſe the ſuit is in nature of a ſuit in *Chancery*, and the proceſs is perſonal to ſummon the party; which cannot be ſerved in this caſe, the plaintiff living in *England*, out of the *juriſdiction* of the court of Grand Seſſions; and if he could not be ſerved with the proceſs, he could not be guilty of a contempt in not appearing on it; and then, by conſequence, no ſequeſtration ought to go againſt his lands, though they lie in that county. And this is the ſame caſe in effect as that in *Comberbach* 468. *Tranter* v. *Duggen*. And though it was objected, that the court of *Chancery* of *England* had their proceſs ſerved beyond ſea, and brought parties into contempt, and this of the Grand Seſſions was an original *juriſdiction*; the court ſaid, this was not to be compared to the *Chancery*, (if they did proceed ſo) becauſe this *juriſdiction*, though it was an original one, yet it was a limited one, and confined to that county. So the rule for the *prohibition* was made abſolute. *Vide Raym. vol.* 2. *p.* 1408. *Mod. Rep. vol.* 8. *p.* 374. *Stra. vol.* 1. *p.* 630.

Trinity, 30 & 31 *Geo.* 2. *The King* v. *Goddard Williams*.

See this caſe fully ſtated in page 545 of this work, under the head *Indictment*.

Hilary, 32 *Geo.* 2. *The King* v. *Hartſhorn, and others*.

Adjudged in this cauſe, that the conſent of the parties intereſted in a ſuit, &c. cannot give *juriſdiction* to a court that has *none*. *Vide Bur. vol.* 2. *p.* 746.

Trinity, 33 & 34 *Geo.* 2. *The King* v. *Moreley, and others*.

See this caſe fully ſtated in page 260 of this work, under the head *Certiorari*.

Jurors.

Hilary, 2 *W. & M.* *Cudlip* v. *Randall*.

See this caſe fully ſtated in page 18 of this work, under the head *Actions*.

Michaelmas, 8 *W.* 3. *Dawſon* v. *Howard*.

In *ejectment*, the *jury* was charged with the evidence, and afterwards Lord Chief Baron *Ward* being judge of the aſſize in *Cumberland*, where the cauſe was tried, on the petition and conſent of both parties, made a rule, that the cauſe being a difficult one, ſhould be adjourned into this court, and that the *jurors* ſhould appear at the day in *Bank*, being in *three weeks of St. Michael* under the penalty of 50 *l.* to give their verdict between the parties *if the juſtices ſhould ſo pleaſe*. And the court was moved, that this ſhould be made a rule of court.

But the motion was denied, becauſe the judge could not adjourn the *jury*, after they were ſworn and charged with the evidence, nor could inflict a penalty on the *jurors*. *Vide Raym. vol.* 1. *p.* 129.

Michaelmas, 10 *W.* 3. *Auſten* v. *Baker*.

Per curiam. If a *jury* eat and drink before they give their verdict, if it be not at the charge of the party for whom the verdict paſſes, it ſhall be no cauſe to ſet aſide the verdict. *Vide Mod. Rep. vol.* 12. *p.* 250.

Michaelmas, 10 *W.* 3. *The King* v. *Duncomb*.

The Attorney General moved for leave to amend an information againſt *Duncomb*, wherein the name of a commiſſioner of exciſe was miſtaken; and leave was granted. Then the court was moved, that the maſter might ſtrike a *jury* by conſent, which was alſo granted, being only a miſdemeanor; but in capital caſes, this is never allowed, for then the priſoner would loſe his *challenge*; and it was never aſked to replead on amending informations: in caſes of miſdemeanor the coroner returns *forty eight*, but not in capital caſes. *Vide Mod. Rep. vol.* 12. *p.* 224.

Michaelmas, 11 *W.* 3. *The King* v. *Kirk and Cage*.

In this caſe it was granted, that ſome of the *grand jury*, who found the bill might be of the *petit jury*.

See this caſe fully ſtated in page 446 of this work, under the head *Evidence*.

Michaelmas, 13 *W.* 3. *Turner* v. *Burnaby*.

Two attornies at a tavern agreed each to name *forty-eight* men to the ſheriff, out of which he ſhould return *twenty four* to try an iſſue.

Per curiam. If the ſheriff will return a *jury* at the nomination of any perſon, it is a miſdemeanor in him, and it may be *maintenance* in him at whoſe requeſt it is done; but here it being by conſent of the attornies of each ſide, *the conſent takes away the error*. *Vide Mod. Rep. vol.* 12. *p.* 564.

Eaſter, 1 *Ann.* *Anonymous*.

Per curiam. If a *jury* in an *inferior court* will not agree on their verdict, the way is, as in other courts, to keep them without meat, drink, fire, or candle, till they agree; and the ſteward may adjourn the court from time to time till they do. *Vide Mod. Rep. vol.* 7. *p.* 1.

Trinity, 3 *Geo.* *Hewet* v. *Bainard*. Error.

On a *writ of error* brought on a judgment given in the court of *C. B.* the ſingle queſtion was, whether a *juror* that was withdrawn from the pannel by the conſent of both parties, to the intent that the trial might go off for that time *for defect of jurors*, may not be of the *jury*, when the cauſe comes to be tried at a ſubſequent time; and if he be, whether that will be *error*.

The court were clear of opinion that this man's trying the cauſe was no *error*: wherefore the judgment was affirmed. *Vide Mod. Rep. vol.* 10. *p.* 390.

Hilary, 6 *Geo.* *The King* v. *Smith*.

In this cauſe, and alſo in another againſt juſtices of the peace, the court refuſed the common rule for a *ſpecial jury*, becauſe that is often made up of gentlemen who are in the commiſſion. *Vide Stra. vol.* 1. *p.* 265.

Trinity, 9 *Geo. Moor* v. *Thompſon*.

See this caſe fully ſtated in page 335 of this work, under the head *Damages*.

Hilary, 10 *Geo. The King* v. *Burridge*, *Mayor of Tiverton*.

Pratt, Chief Juſtice. If an *affidavit* is laid before the court of a ſuſpicion that there will not be a *fair jury*, and the adverſe party will not conſent to a *ſpecial jury*, we will rule one without his conſent. It is done every day in the *C. B. Vide Mod. Rep. vol.* 8. *p.* 229.

Trinity, 10 *Geo. The King* v. *Burridge*.

See this caſe fully ſtated in page 136 of this work, under the head *Attachment*.

Michaelmas, 12 *Geo. Snell* v. *Timbrell*.

On a motion for a new trial, it was held, that deſiring a *juror* to appear in this cauſe, which was between a miller and a baker, was no ground to ſet aſide the verdict. And the court remembered the caſe of the Duke of *Leeds*, who wrote a letter to a *juror*, "deſiring "him to attend, and you will oblige your humble "ſervant, *Leeds*;" which was held no reaſon to ſet aſide the verdict. *Vide Stra. vol.* 1. *p.* 643.

Michaelmas, 12 *Geo. Parker* v. *Thoroton*.

A *juror* on the *principal pannel* was *challenged*, and afterwards ſworn on the *tales* by a wrong name, and though no fault was found with the verdict, yet the court granted a new trial. *Vide Strange*, *vol.* 1. *p.* 640.

Michaelmas, 9 *Geo.* 2. *Goodtitle* v. *Thruſtout*.

In *ejectment* on the demiſe of Lord *Gower*, it was held no cauſe of *challenge*, that a knight was not returned on the *jury*, according to the caſe of *Holbourn* v. *Kingſton* in the *Houſe of Lords*. *Vide Strange*, *vol.* 2. *p.* 1023.

Michaelmas, 9 *Geo.* 2. *The King* v. *Duffin*.

Lord *Hardw*. On ſtriking *ſpecial juries*, if one party does not attend, the maſter is to ſettle the *forty eight*, then the attorney of that ſide which attends ſtrikes off *twelve*, and the maſter ſtrikes off *twelve* on behalf of the party which does not attend. *Vide Caſes Temp. Lord Hardwicke*, *p.* 158.

Eaſter, 30 *Geo.* 2. *Denn* v. *Lord Cadogan and others*.

Saturday 30*th*, *April*, 1757, being appointed by the court for a trial at *bar* in this cauſe, only *nine* of the *jury* appeared.

The plaintiff's council prayed a *decem tales*.

By the courſe of the court, this trial could not have come on again till *Michaelmas* term; but the court conſidering the expence and delay, ordered the *decem tales* to be returned the *Monday* following (contrary to all former practice.)

On the trial of the cauſe the plaintiff was *nonſuited*. *Vide Bur. vol.* 1. *p.* 273.

Trinity, 31 *Geo.* 2. *Wilford* v. *Berkeley*.

An action was brought againſt the defendant for *criminal converſation* with the plaintiff's wife: and the *jury* (a ſpecial one) had given 500 *l.* damages. The defendant was a clerk in the *Exchequer*, during pleaſure, at a ſalary of 50 *l.* a year, only; which was his whole *ſubſiſtence*.

On a motion by the defendant's council for a new trial in this cauſe for *exceſſive damages*, the court were unanimouſly of opinion, that although there was no doubt of the power of the court to exerciſe a proper diſcretion in ſetting aſide verdicts for *exceſſive damages*, in caſes *where* the *quantum* of the damage really ſuffered by the plaintiff, could be *apparent*, or were of ſuch a nature, that the court could *properly judge of the degree* of the injury, and could *ſee manifeſtly*, that the *jury* had been outrageous in giving ſuch damages as greatly exceeded the injury; yet the caſe was very different, where it depended on *circumſtances which were properly* and *ſolely under the cognizance* of the *jury*, and were *fit* to be ſubmitted to *their* deciſion and eſtimate. And they held the caſe of *criminal converſation* with another man's wife, to be of this *latter* kind. For the injury ſuffered by the huſband, and the eſtimate of the damages to be aſſeſſed muſt, in their nature, depend entirely on *circumſtances*, which it was ſtrictly and properly the province of the *jury* to judge of: and in the preſent caſe, the court could not ſay, that 500 *l.* was too much; or that 50 *l.* would have been too litle; therefore the motion was denied. *Vide Bur. vol.* 1. *p.* 609.

Trinity, 30 & 31 *Geo.* 2. *Bright*, *Executor of Hannah Criſp*, *Widow*, v. *Eynon*.

Adjudged, That where a *jury* have drawn a *wrong concluſion* from facts admitted on both ſides, the verdict ſo given may be ſet aſide. *Vide Bur. vol.* 1. *p.* 390.

Hilary, 6 *Geo.* 3. *Heſketh* v. *Braddock*.

See this caſe fully ſtated in page 263 of this work, under the head *Challenge*.

Juſtices of Peace.

Michaelmas, 3 *W* & *M. The King and Queen* v. *Alſop*.

See this caſe fully ſtated in page 522 of this work, under the head *Indictment*.

Hilary, 6 *W.* & *M. The King and Queen* v. *Buggs*.

See this caſe fully ſtated in page 523 of this work, under the head *Indictment*.

Michaelmas, 6 *W.* & *M. Crump* v. *Halford*.

On an action of *treſpaſs* for taking and detaining a ſilver tankard, the ſpecial verdict referred to the court was, that the plaintiff was a retailer of wines, and that according to *ſtat.* 2 *W.* & *M.* the warrant of the *juſtices of peace* was directed to the defendant, who by virtue thereof, levied the ſilver tankard, for which the action was now brought.

It was held, that a *juſtice of peace* is a treſpaſſer, if he proceeds irregularly in his office, &c. as by iſſuing a warrant to take a felon without oath made of the felony committed. *Vide Mod. Rep. vol.* 4. *p.* 349.

Hilary, 7 *W.* 3. *The King* v. *The Inhabitants of Wootton-Rivers*.

Two juſtices of peace, made an order for the removal of a poor woman, from one pariſh to another. The order recited, that on complaint made to them, but did not ſay, *by the churchwardens or overſeers of the poor*, &c.

This *exception* being taken to the order, it was inſiſted at the *bar*, that if it is a fault, yet it was helped by the return of the order; for there the *juſtices* certify, that it was on complaint made to them by the churchwardens, &c. ſo that if it is defective for this omiſſion, it is helped by the return.

And as to the order itſelf, it is not neceſſary to ſet forth that the complaint was made by the churchwardens, &c. but where it is expreſsly alledged in the order, that the perſon to be removed did endeavour to ſettle himſelf in a tenement under the yearly rent of 10 *l.* which was not mentioned in this order, but only that he was likely to be chargeable, *&c.* and if ſo, then any of the pariſhioners may complain.

To which it was anſwered and reſolved by the court, that the complaint muſt be made by the public officers of the pariſh, to whom the care of the poor is intruſted by law, and without ſuch complaint the *juſtices of peace* have no power to remove the perſon for the reſt of the pariſh may be willing to keep him or may take ſecurity of another pariſh to indemnify them in particular from any charge which may ariſe from his poverty, and ſo they will have no reaſon to complain.

Then as to the return, it is not material to ſupport this defect; for the order itſelf is the record, and not the return of the *certiorari*, which cannot make a void order good, becauſe the *juſtices of peace* have executed their authority by ſigning the order, and therefore ſhall not ſupport this defect by any ſubſequent matter.

Another *exception* taken to this order was, *viz.* that it was not alledged the perſon came to ſettle in a tenement, under the yearly value of 10 *l.*

But the court held the order to be good, notwithſtanding the exception, for of late years it is ſeldom expreſſed in orders; and becauſe the practice had been ſo, they thought fit to continue it, ſo it was quaſhed on the firſt exception. *Vide Mod. Rep. vol.* 5. *p.* 149.

Hilary, 7 *W.* 3. *The King* v. *Paine.*

See this caſe fully ſtated in page 441 of this work, under the head *Evidence.*

Hilary, 7 *W.* 3. *The King* v. *Clough & al.*

An indictment at the *ſeſſions* on *ſtat.* 1 & 2 *Ph. & M.* ſet forth, that the defendants had ſold earthen ware in *London againſt the form of the ſtatute*, but it was quaſhed on motion, becauſe the ſtatute does not give *juſtices of peace* any juriſdiction to proceed in this matter at their ſeſſions, for they are not ſo much as named in the *ſtat.* *Vide Mod. Rep. vol.* 5. *p.* 149.

Hilary, 7 *W.* 3. *The King* v. *Hall.*

An order was made by *two juſtices of peace* to remove a poor man from *Redbourne* to the pariſh of *St. Michael* in *St. Alban's*; and on an appeal to the quarter ſeſſions, the order of the *two juſtices* was quaſhed.

Afterwards, on a *certiorari* brought, the ſeſſions order was quaſhed, and the firſt order was confirmed, ſo that the poor man was now ſettled at *St. Alban's*; but of his own accord he returned to *Redbourne*, and the *juſtices* conceived that they had not any power to ſend him to the houſe of correction for returning as aforeſaid, becauſe they were of opinion that the firſt order was not before them, being removed by *certiorari.*

Therefore a motion was made that the court would grant a rule to enforce the execution of the former rule made in this caſe, by which the ſeſſions order was quaſhed, and the order of the *two juſtices* confirmed.

But the court directed that the *juſtices* ſhould have the former rule of court ſhewn to them, and the order of the *two juſtices*, and if they refuſed to puniſh the perſon afterwards, then to move the court on an *affidavit* of the matter. *Vide Mod. Rep. vol.* 5. *p.* 163.

Michaelmas, 7 *W.* 3. *The King* v. *Kendall and Roe.*

See this caſe fully ſtated in page 110 of this work, under the head *Arreſt.*

Hilary, 8 *W.* 3. *The Pariſhioners of Trobridge* v. *Weſton.*

The following *exceptions* were taken to an order made by *two juſtices of the peaſe* concerning the removal of a poor woman from *Troubridge* to *Weſton.*

1ſt. That the order did not affirm that the place to which ſhe was removed was the place of her laſt legal ſettlement; it is only ſaid by the *juſtices*, *Whereas we are credibly informed*, &c. it ſhould have been *on oath*, and being a judgment, ought to be poſitive and certain.

But this order being confirmed on an appeal, the court held that to be a void *exception*, otherwiſe it had been good.

2dly. It does not appear that the firſt order was made by *two juſtices of the peace* of the diviſion, where the perſon was likely to be chargeable to the pariſh; and this was held by the court to be a good *exception.* *Vide Mod. Rep. vol.* 5. *p.* 325.

Eaſter, 8 *W.* 3. *The King* v. *The Inhabitants of Haſwell.*

By *ſtat.* 14 *Car.* 2. *cap.* 12. it is enacted, "That
" on the complaint of the churchwardens and overſeers
" of the poor to any *juſtices* of the peace within *forty*
" days after any perſon comes to ſettle himſelf in a tene-
" ment under the yearly value of 10 *l.* that *two juſtices*
" *of peace* (one to be of the *quorum*) of that diviſion,
" where ſuch perſon is likely to become chargeable to
" the pariſh, by warrant may remove him to the pariſh
" where he was laſt legally ſettled; provided he thinks
" himſelf aggrieved by the judgment of the two *juſtices*,
" then he may appeal to the next quarter ſeſſions, who
" are required to do *juſtice* according to the merits of
" the caſe."

Two juſtices, by a warrant under their hands and ſeals, removed a poor man from the pariſh of *Woaking* to *Haſwell*; whereon an appeal is brought, and the ſeſſions order was, *that the warrant of the two juſtices ſhould be ſuperſeded, and that the party ſhould be carried back to* Woaking.

Which order being removed by *certiorari*, exceptions were taken to it, that the *juſtices* in their ſeſſions had no power to ſuperſede the warrant made by the *two juſtices*, becauſe they had only power to quaſh or affirm it; and the word *ſuperſedeas* is properly applicable to proceſs before judgment, and not to the judgment itſelf: as if a man is in cuſtody on a writ, and then comes a *ſuperſedeas* to the writ, the priſoner is thereby diſcharged.

The court were of opinion, that the word *ſuperſeded* was not a proper word in this caſe, yet would not quaſh the order, but referred the matter to the judges of *aſſize.* *Vide Mod. Rep. vol.* 5. *p.* 208.

Eaſter, 8 *W.* 3. *The King* v. *The Inhabitants of Liſley.*

See this caſe fully ſtated in page 218 of this work, under the head *Baſtards.*

Michaelmas, 8 *W.* 3. *The Inhabitants of Chidingfold* v. *The Inhabitants of Penſhurſt.*

An order was made by *two juſtices of the peace* to remove a poor man from the pariſh of *Chidingfold* to *Penſhurſt*, which order was confirmed on an appeal.

A motion was made to quaſh the *firſt* order; 1ſt. Becauſe it did not ſhew that the man occupied a tenement under the yearly rent of 10 *l.*

2dly. The ſtatute enables *two juſtices of the peace* to remove the party, one of whom is to be of the *quorum*, which word was omitted in that order.

The court diſallowed the firſt *exception*, which was the ſame as was formerly over-ruled in the caſe between the inhabitants of *Marlborough* and *Wooton Rivers.*

But the order was quaſhed for the other *exception*, the court being of opinion that *two juſtices* cannot remove a poor man, out of *ſeſſions*, unleſs one of them is of the *quorum*, becauſe they have a ſpecial juriſdiction given by the ſtatute, which muſt be followed. *Vide Mod. Rep. vol.* 5. *p.* 321.

Michaelmas, 8 *W.* 3. *Breedon, qui tam* v. *Gill, &c.*

See this caſe fully ſtated in page 77 of this work, under the head *Appeal.*

Michaelmas, 8 *W.* 3. *The Pariſh of Walton* v. *The Pariſh of Cheſterfield.*

An order was made to remove a poor man from the pariſh of *Walton* to *Cheſterfield* in the county of *Derby*, which was likewiſe confirmed on an appeal, but the firſt order was quaſhed, becauſe it did not appear to be made by *two juſtices of the peace*; it was only, *whereas complaint has been made to us*, and ſo they did not recite their authority in the order. It is true, they were mentioned to be *juſtices* on the appeal, but that will not help it, for they might be ſo then, and not at the time of making the firſt order, and for this reaſon it was quaſhed. *Vide Mod. Rep. vol.* 5. *p.* 322.

Hilary, 8 *W.* 3. *The King* v. *The Inhabitants of Boughton in Kent.*

A rate was made by a conſtable, *&c.* on ſeveral pariſhes to reimburſe himſelf his charges in the conveyance of ſturdy beggars, *&c.* according to *ſtat.* 14 *Car.* 2. *c.* 12. which was confirmed at the ſeſſions; and it being removed thither by *certiorari*, the court was moved to quaſh it; 1ſt. Becauſe *two juſtices* are directed by the ſtatute to confirm it, and not the ſeſſions.

Holt, Chief Juſtice. Where authority is given to *two juſtices of peace* to do any act, the ſeſſions may do it in all caſes, except where an appeal is directed to the ſeſſions.

Second exception. Becauſe the conſtable had power only to charge his own pariſh, as conſtable of which he was put to this expence. And for this exception it was quaſhed.

Holt, Chief Juſtice, made a diſtinction; where ſeveral pariſhes are in one and the ſame town, ſuch an order may be good, (*ſee the ſtatute which ſays pariſhes*) but that not being alledged here, it cannot be intended. *Vide Raym. vol.* 1. *p.* 26.

Michaelmas, 10 *W.* 3. *Alinſon* v. *Spence.*

See this caſe fully ſtated in page 219 of this work, under the head *Baſtards.*

Trinity, 11 *W.* 3. *The King* v. *Harniſſe or Harris.*

The caſe on a writ of *vi laica removenda* was, that a perſon had forcibly ſeiſed the church, and on inquiſition the force was found: but the *juſtice of peace* did not preſently reſtore the poſſeſſion as he ought to have done, but had a record of it made up, and deferred the delivery of the poſſeſſion for two or three years.

Holt, Chief Juſtice, was of opinion, that on the authority in Dr. *Bonham*'s caſe, which ſays, that the reſtitution muſt be immediately: ſo on *ſtat. Hen.* 6. of forcible entry, when the force is found by the inquiſition, reſtitution muſt be immediately.

Rokeby. Where an inquiſition is taken, it is ſuppoſed there is a quicker remedy, and therefore we think it is not in the power of the *juſtices of the peace* to defer reſtitution ſo long, the act requires it to be done forthwith, and ſo is the authority expreſsly in the latter end of Dr. *Bonham*'s caſe; it muſt be reſtored on view.

Per curiam. Let reſtitution be awarded. *Vide Mod. Rep. vol.* 5. *p.* 443.

Trinity, 11 *W.* 3. *The Inhabitants of King's Langley* v. *The Inhabitants of the Pariſh of St. Peter's in St. Albans.*

An *exception* was taken to an order made at the *general quarter ſeſſions* of the *juſtices of peace*, on an appeal to them made from an order made by *two juſtices*, for the removal of a poor perſon to the laſt place of his ſettlement, and the *exception* was, that the appeal was lodged at the next quarter ſeſſions; and it appeared on the face of the order, that it was not then determined, but was adjourned over for further conſideration. And it was held by the whole court, that they might well adjourn an appeal on debate for further conſideration. *Vide Raym. vol.* 1. *p.* 481.

Eaſter, 13 *W.* 3. *The King* v. *Ruſſell.*

An indictment on *ſtat.* 35 *Eliz.* for making cables of old ſtuff, concluding *againſt the form of the ſtatute*, generally, by which the penalty is four times the value of the cables, to be recovered by bill, plaint, or information; was quaſhed *niſi*, on this exception, that the *juſtices of the peace* have no juriſdiction given them by the ſtatute, and the indictment was taken before them at their quarter ſeſſions. *Vide Mod. Rep. vol.* 12. *p.* 514.

Trinity, 13 *W.* 3. *The King* v. *The Inhabitants of Mile-End.*

See this caſe fully ſtated in page 133 of this work, under the head *Attachment.*

Trinity, 13 *W.* 3. *Anonymous.*

Holt, Chief Juſtice, held, that where an act of parliament ſays, *juſtices of the peace* of ſuch a diviſion ſhall do ſo and ſo, it is only directory *as to* the diviſion; and any of the *juſtices* of the county may do it. *Vide Mod. Rep. vol.* 12. *p.* 546.

Michaelmas, 13 *W.* 3. *Elizabeth Claxton's Caſe.*

Adjudged, That though a *juſtice of peace* may be a judge of who is a *lewd and diſorderly perſon*, and therefore if in this caſe the commitment had ſaid, that it had appeared to him, that this perſon was ſuch, his word would have been taken for it, yet when he aſſigns the reaſon of his judgment, and we find that reaſon will not maintain it, we are not to regard his judgment: and as perſons of ill behaviour are to be puniſhed, ſo great care is to be taken of the innocent.

The priſoner who had been committed to *New Priſon* by *Juſtice Perry* till ſhe found ſecurity for her good behaviour for being taken in a diſorderly houſe, and had been brought up by *habeas corpus* being remanded, and brought up at another day, the court quaſhed the *juſtice*'s commitment, and ordered a rule to be drawn for her commitment to the cuſtody of the *Marſhal, till ſhe find ſureties for her good behaviour.* *Vide Mod. Rep. vol.* 12. *p.* 566.

Michaelmas, 13 *W.* 3. *Anonymous.*

Adjudged, That *five juſtices of the peace* are too many to join in an order for ſettling of poor; for they may well make a majority at the ſeſſions, and ſo confirm their own order. *Vide Mod. Rep. vol.* 12. *p.* 559.

Michaelmas, 13 *W.* 3. *Anonymous.*

Juſtices of the peace are not abſolute judges of accounts of overſeers of the poor, but an appeal lies from them to the ſeſſions, in caſe of overcharge or other wrong; but *juſtices* may, *audit* the account of the overſeers before the year is *out*, in caſe they are not turned out before that time. *Vide Mod. Rep. vol.* 12. *p.* 560.

Michaelmas, 13 *W.* 3. *Anonymous.*

Holt, Chief Juſtice ſaid, actions may be brought againſt *juſtices of the peace*, who order people to be whipt in *Bridewell* without oath made before them, or power to convict. *Vide Mod. Rep. vol.* 12. *p.* 607.

Eaſter, 1 *Ann.* *The Queen* v. *The Pariſh of Milverton.*

On an appeal to the ſeſſions, they made an order, that the firſt order ſhould be quaſhed; and the party ſent to the pariſh from whence he was thereby removed. It was agreed, that the *juſtices* of the ſeſſions had only power to affirm or quaſh the order, but not to make a new one, but becauſe an order may be good in part, and void for another part; that part which ordered the poor man to be ſent back was quaſhed, and the reſt confirmed.

It is a rule of the court, that no order of *juſtices*, whereon an appeal lies, is brought here by *certiorari* till after the appeal; and if any is brought, that it is ſent back by *procedendo*; for the original order does not come up, but the tenor of it, as appears by the very words of the return. *Vide Mod. Rep. vol.* 7. *p.* 10.

Michaelmas, 1 *Ann.* *The Queen* v. *Bucknal or Bucknell.*

See this caſe fully ſtated in page 514 of this work, under the head *Highways*, &c.

Hilary, 2 Ann. The King v. *Cowper, a Juſtice of Peace.*

An inquiſition of forcible entry was removed hither by *certiorari*, commanding the *juſtices* to ſend all inquiſitions of forcible entries made on *J. S.* and the *juſtices* returned an inquiſition of an entry made by *B.* on *J. S.* and *affidavits* were offered to give the court ſatisfaction, that the only inquiſition before the *juſtices* was an inquiſition of a force by *A.* and that the precept was, to ſummon a jury to enquire of a force againſt *J. S.* by *A.* and that they did not inquire of any other force.

Per curiam. We cannot hear *affidavits* againſt the return, which is a matter of record, in order to make reſtitution, but we may do it in order to have an information filed againſt the *juſtices* for this abuſe; or, if the return is falſe, you may have your action for a falſe return. And here a day was given to ſhew cauſe why an information ſhould not be filed againſt them. *Vide Mod. Rep. vol.* 6. *p.* 90.

Hilary, 2 Ann. The Queen v. *Langley.*

See this caſe fully ſtated in page 530 of this work, under the head *Indictment.*

Hilary, 2 Ann. Queen v. *Corbett.*

The *juſtices of peace* made an order on the defendant, that he ſhould pay *B.* ſo much money for labour and work done, without ſo much as ſaying that he was his ſervant; and it was quaſhed.

Per curiam. This might be carpenter's work, *&c.* and the *juſtices* have only power in caſes of wages of ſtatutable ſervants, *viz.* ſervants in huſbandry, and we ſhould be very tender of quaſhing ſuch orders. *Mod. Rep. vol.* 6. *p.* 91.

Eaſter, 2 Ann. The Queen v. *Chaffey.*

See this caſe fully ſtated in page 134 of this work, under the head *Attachment.*

Eaſter, 2 Ann. The Queen v. *Savil.*

An order made at the general quarter ſeſſions at *Hertford*, that the defendant ſhould be proſecuted as a *common barrator*, and that the proſecution ſhould be at the charge of the county, being removed into this court by *certiorari*, was quaſhed, becauſe the *juſtices* have not power to charge the county with the coſts of ſuch a proſecution. And as to the objection made in ſupport of the order, that by *ſtat.* 43 *Eliz. c.* 2. *par.* 45. the *juſtices* may diſpoſe of the *ſurpluſage* of the money levied for the poor for charitable uſes, and that this was ſuch; it was anſwered, that this was an original order to charge the county, and not an order of payment out of the *ſurpluſage* of the ſtock raiſed. *Vide Raym. vol.* 2. *p.* 871.

Trinity, 2 Ann. The Queen v. *Burnaby.*

See this caſe fully ſtated in page 282 of this work, under the head *Conviction.*

Michaelmas, 2 Ann. The Queen v. *Glin, et al'.*

The defendants were indicted for not producing the pariſh books of rates before certain *juſtices of peace* appointed by the reſt to examine and make orders thereon; and for diſobeying ſuch orders; it was excepted, that this was a delegation of their authority, which they could not do; for though it was agreed, that they might appoint ſome of themſelves to examine and ſtate the matter to them, and then to make an order thereon, yet ſure they cannot delegate the power of making the order.

2dly. That notice of the order was not alledged.

Holt, Chief Juſtice, was of opinion, that they can never refer the examination of the matter to a certain number of themſelves, becauſe they are all judges of the fact, and therefore they tranſact it as judges in court; but allowed that they may refer the examination of the fact, and reſerve the judgment to themſelves, yet doubtleſs they cannot give a power to make rates and orders. So it was quaſhed. *Vide Mod. Rep. vol.* 6. *p.* 87.

Trinity, 3 Ann. The Queen v. *Weſt.*

See this caſe fully ſtated in page 220 of this work, under the head *Baſtards.*

Michaelmas, 3 Ann. The Pariſh of St. Clement's v. *The Pariſh of St. Andrew's.*

On an appeal brought by one pariſh from an order of the *juſtices* for the removal of a poor perſon from the other pariſh to them, at the beginning of the ſeſſions the order was confirmed; and afterwards, at the ſame ſeſſions, another order was made for the removal of the original order.

And a *certiorari* being brought, the order of confirmation, and alſo the order of reverſal, were both returned.

Per curiam. 1ſt. The judgment of the *juſtices* is in their own breaſt, and alterable by them at the ſame ſeſſions.

2dly. If they make a *ſubſequent order* directly contrary to a former order of the ſame ſeſſions in the ſame cauſe, the ſubſequent one is an abſolute repeal of the former, being inconſiſtent with it, though there is no expreſs words of repeal in the ſame order; as if at the *Old Bailey*, one indicted of *felony*, will not plead, and judgment of *peine fort & dure* is given againſt him, and he is carried away, and the next day alters his mind, he ſhall be admitted to plead; and if he is convicted, he ſhall have judgment to be hanged, which is a *ſuperſedeas*, or ſetting aſide of the firſt judgment. *Vide Mod. Rep. vol.* 6. *p.* 287.

Hilary, 4 Ann. Anonymous.

Per Holt, Chief Juſtice. The moſt regular way for *juſtices* to proceed on *ſtat.* 14 *Car.* 2. in removing a poor perſon, is to make a record of the complaint and adjudication, and on that to make a warrant under their hands and ſeals to the churchwardens, to convey the perſons to the pariſh to which they ought to be ſent, and deliver the record into court next ſeſſions, to be kept there amongſt the records, to charge the pariſh; and that record may be well removed by a general *certiorari* to the *juſtices of peace.* *Vide Salk. vol.* 1. *p.* 406.

Hilary, 4 Ann. The Queen v. *The Bailiffs, Burgeſſes and Common-Council of the Town of Ipſwich.*

Adjudged, in this caſe, by *Holt*, Chief Juſtice, that *juſtices of peace* may appoint a ſeſſion without a *precept*, but people are not compellable to appear at it. *Vide Raym. vol.* 2. *p.* 1238.

Eaſter, 4 Ann. The Queen v. *Wiatt or Wyatt.*

See this caſe fully ſtated in page 278 of this work, under the head *Conſtable.*

Eaſter, 4 Ann. Anonymous.

Holt, Chief Juſtice. A *juſtice* that has power to ſet a fine has a power to bail; for he is not obliged and bound to commit: but after a perſon is once committed in execution, it is too late to move for bail. *Vide Mod. Rep. vol.* 11. *p.* 53.

Eaſter, 4 Ann. Cockcroft v. *Smith.*

See this caſe fully ſtated in page 266 of this work, under the head *Commitment.*

Eaſter, 4 Ann. Anonymous.

Holt, Chief Juſtice. *Juſtices of peace*, in the caſe of forcible entries and detainers, ought to adjourn their courts, and give the party an opportunity to traverſe the force; or elſe the party has no remedy, but by *certiorari*,

certiorari, and every inquiſition is traverſable by the ſtatute of *Weſtminſter*. But generally the *juſtices* inquire into the poſſeſſion only, and award reſtitution, without trying the forcible detainer or entry, on a traverſe. *Vide Mod. Rep. vol.* 11. *p.* 43.

Trinity, 4 *Ann.* *The Queen* v. *Weſton*.

See this caſe fully ſtated in page 220 of this work, under the head *Baſtards*.

Michaelmas, 6 *Ann.* *The Queen* v. *Bonnet*.

The court was moved to quaſh an order made by *two juſtices of peace*, becauſe the order was ſaid to be made *before keepers of the peace, and juſtices*, &c. and all *juſtices of peace* are keepers of the peace, but all keepers of the peace are not *juſtices*: and it was further argued, that they have been called *conſervators of the peace* only ſince *ſtat.* 34 *Ed.* 3. *c.* 1.

But the court over-ruled the objections, and adjudged the order to be good. *Vide Mod. Rep. vol.* 11. *p.* 141.

Michaelmas, 8 *Ann.* *The Queen* v. *Harris*.

See this caſe fully ſtated in page 567 of this work, under the head *Inn-keepers*, &c.

Michaelmas, 8 *Ann.* *The Queen* v. *The Pariſh of St. Giles*.

The inhabitants of the pariſh of *St. Giles* appealed to the ſeſſions on an order made for levying a poors rate, in which ſome were unequally taxed; on which the ſeſſions diſmiſſed the appeal, and ſhewed for cauſe in the order of diſmiſſion, *that the court being of opinion that the appeal ſhould have been to the next quarter ſeſſions after the making the rate, and not after the taking the diſtreſs; therefore the court does diſmiſs the appeal.*

And this order being removed into this court by *certiorari*, the council againſt the order of diſmiſſion argued that it is not neceſſary the appeal ſhould be to the next quarter ſeſſions, for there is no time limited by the act; beſides, this appeal was at the next quarter ſeſſions after the grievance.

Per curiam. This appeal need not be to the next quarter ſeſſions, but the error of the *juſtices* is, that they did not proceed on it when it was before them, and give judgment whether the rate was good or not: though one of the parties may have a particular appeal, yet this being a rate which they think not according to the act, they may appeal together. But it being aſſigned for a reaſon, that the appeal was not to the next quarter ſeſſions, the order of diſmiſſion was quaſhed. *Vide Mod. Rep. vol.* 11. *p.* 259.

Michaelmas, 9 *Ann.* *The Queen* v. *Yarrington*.

An indictment was found at the ſeſſions of the peace for forging a letter in the name of *J. S.* &c. and was brought into this court by *certiorari*, and on motion in arreſt of judgment the court held, that no indictment lay before *juſtices of peace* for *forgery*; for their power is created by act of parliament within time of memory, and they have no other authority than what is thereby given them; and the general words of their commiſſion *of all other tranſgreſſions and crimes whatſoever*, muſt be underſtood of ſuch crimes as they have power over by the ſeveral ſtatutes which created or enlarged their power: ſo it is for *perjury* at *common law*; but perjury on *ſtat.* 5 *Eliz.* is indictable before the *juſtices* of ſeſſions, becauſe it is ſo appointed by the particular proviſion of this ſtatute. *Vide Salk. vol.* 1. *p.* 406.

Michaelmas, 10 *Ann.* *The Queen* v. *Wooton*.

Juſtices of peace have no juriſdiction to judge of wages except in caſe of huſbandmen; but yet the court, in favour of ſervants, will always, unleſs the contrary appears on the face of the order, preſume ſervants to be ſervants in huſbandry, and will admit of no collateral proof to the contrary. *Vide Mod. Rep. vol.* 4. *p.* 68.

Trinity, 13 *Ann.* *The Queen* v. *Simpſon*.

See this caſe fully ſtated in page 84 of this work, under the head *Appearance*.

Michaelmas, 1 *Geo.* *The King* v. *Miles*.

See this caſe fully ſtated in page 221 of this work, under the head *Baſtards*.

Trinity, 2 *Geo.* *The Pariſh of Pancras* v. *The Pariſh of Rumbald in Suſſex*.

An order of *two juſtices* iſſued for the removal of a poor perſon from the pariſh of *Pancras* to *Rumbald*. Within *three days*, the *juſtices*, reciting that they were ſurpriſed, *ſuperſeded* it, and commanded the church-wardens to return the former order, to be cancelled.

It was inſiſted that the *juſtices* could not iſſue ſuch a *ſuperſedeas*; and *Salk.* 472. was cited.

Per curiam. The *ſuperſedeas* is well iſſued by the *juſtices*, to prevent the charge of an appeal; ſo the laſt order was confirmed. *Vide Stra. vol.* 1. *p.* 6.

Hilary, 3 *Geo.* *The King* v. *Fox*.

The defendant being Mayor of *Totneſs* the laſt year, was by the charter made a *juſtice of peace* for the following year, without whom the ſeſſions could not be held, and the court granted an information againſt him for a voluntary abſence. *Vide Stra. vol.* 1. *p.* 21.

Michaelmas, 3 *Geo.* *The King* v. *Helling*.

On an indictment for not paying ſervants wages, recited an order of *two juſtices*, whereby it appeared that 9*l.* was due, which the defendant refuſed to pay, having had notice of the order.

It was urged for the defendant, that the order was void. It does not ſet out the labour of the ſervant, and is only generally for *ſalary*; the *juſtices* have only juriſdiction in caſe of huſbandry; and the order ought to ſhew, this was a matter within the juriſdiction.

Eyre, Juſtice. The practice is, if an order be for paying wages, it is ſuppoſed to be ſuch as the *juſtices* have power over.

Parker, Chief Juſtice, and *Pratt*, Juſtice, were of another opinion. And in *Hilary* term following the indictment was quaſhed. *Vide Stra. vol.* 1. *p.* 8.

Trinity, 7 *Geo.* *The King* v. *Carter*.

See this caſe fully ſtated in page 537 of this work, under the head *Indictment*.

Eaſter, 8 *Geo.* *The King* v. *Okey*.

See this caſe fully ſtated in page 557 of this work, under the head *Information*.

Trinity, 11 *Geo.* *The King* v. *Venables*.

See this caſe fully ſtated in page 567 of this work, under the head *Inn-Keepers*, *&c.*

Michaelmas, 11 *Geo.* *The King* v. *Nicholls*.

See this caſe fully ſtated in page 558 of this work, under the head *Information*.

Hilary, 12 *Geo.* *The King* v. *Allington*, *Recorder of Hertford*.

There being *affidavits* made, that no ſummons was had in the caſe of *The King* v. *Venables*, the court granted an information againſt the *juſtice* who made the conviction. *Vide Stra. vol.* 1. *p.* 678.

Trinity, 12 *Geo.* *Hill* v. *Bateman*, *et al'*.

The defendant *Bateman* being a *juſtice of peace*, had convicted the plaintiff for deſtroying the game, and tho' (as it was proved) the plaintiff had effects of his own, which might have been diſtrained, which were ſufficient to anſwer the penalty he had incurred, yet the defendant ſent him immediately to *Bridewell*, without endeavouring to levy the penalty on his goods, and an action of *treſpaſs* and *falſe impriſonment* being brought againſt *Bateman* for this commitment, *Raymond*, Chief Juſtice, was of opinion that the action was well laid.

The other defendant was the conſtable, who had executed this warrant of commitment; and as to him, it was agreed that the warrant was a ſufficient juſtification, it being a matter within the juriſdiction of the *juſtice of peace:* but if a *juſtice of peace* makes a warrant in a matter which is plainly out of his juriſdiction, ſuch warrant is no juſtification to a conſtable.

And it was agreed, that where actions of this kind are brought againſt *juſtices of peace*, they are obliged to ſhew the regularity of the conviction; and the informations, *&c.* laid before them, on which their convictions are grounded, muſt be produced and proved in court. *Vide Stra. vol.* 1. *p.* 710.

Hilary, 2 *Geo.* 2. *The King* v. *Woodham.*

On a motion for an information againſt the defendant, who was a *juſtice of peace*, it was held, that a perſon in execution in the *King's Bench* may there be charged criminally by a *juſtice of peace*'s warrant. But that no ſuch *juſtice* can take a priſoner of this court out of the cuſtody of the court, and ſend him to the *county goal. Vide Stra. vol.* 2. *p.* 828.

Trinity, 2 & 3 *Geo.* 2. *Anonymous.*

On a complaint to the *juſtices of the ſeſſions* againſt the clerks of the market of the county of *Middleſex*, the clerks produced their patent; on view of which the *juſtices* made an order, in which they declared, that the patent did not give the clerks any power beyond the limits of the little verge of the King's houſhold, and declared any act exerciſed without that diſtrict to be illegal; on which they made another order, that they would ſtand by the conſtable, who had refuſed to execute a warrant from the ſaid clerks, which related to their ſaid office, and the conſtable being now indicted for the ſame, the *juſtices* make a further order, that the treaſurer of the county ſhould ſupply the conſtable with money to defray the expence of the proſecution by the patentees: as theſe ſeveral matters were brought before the court by *certiorari*, the court was now moved to quaſh them.

Per curiam. Theſe matters not coming properly and judicially before the *juſtices*, their orders are but mere declarations of their opinion on the patent, and conſequently *nullities*, which by no means can affect the patentees; but if they had been indicted for *extortion*, or *preſented*, then perhaps the *juſtices* might have had juriſdiction, and have properly judged of the validity and extent of this patent.

It was further alledged by the council who moved to quaſh theſe orders, that the laſt order was ſuch a one as did not belong to the *juſtices* to make, and therefore muſt be quaſhed.

Page and *Probyn*, Juſtices, inclined, that though the order ſhould be found wrong, yet it ſhould be complained of by the parties aggrieved by it, and here the county alone ſeems concerned.

Raymond, Chief Juſtice. It is no matter whether the application is or is not made by the party aggrieved; we are to keep *inferior juriſdictions* within their bounds; and I think we ought to take notice of their acts of juriſdiction, on the information of a ſtranger, as a *friend to the court*; here is a record before us, and by whoſe means the ſame came here before us, we are not to examine; I do not take the patentees to be mere ſtrangers in the preſent caſe. Therefore a rule was made to ſhew cauſe why the laſt order ſhould not be quaſhed. *Vide Fitz-Gibbons*, *p.* 83.

Michaelmas, 3 *Geo.* 2. *The King* v. *Kimberley.*

See this caſe fully ſtated in page 179 of this work, under the head *Bail.*

Eaſter, 4 *Geo.* 2. *The Pariſh of Symſon* v. *The Pariſh of Woughton in the County of Bucks.*

An order of *two juſtices* to remove the father and *three* children from one pariſh to the other, in which the reſpective ages of the children was ſet forth, *viz.* one of *ſix*, another of *eight*, and the third of *nine* years of age: on appeal to the ſeſſions, the order of the *two juſtices* was reverſed as to the children, who were ſent back to the pariſh from whence they were ſo removed; but the order was confirmed as to the father: and the ſaid orders being now before the court by *certiorari*, it was moved to quaſh the order of ſeſſions, becauſe the children being of tender years ſhould have gone with the father to the place of his ſettlement.

But it was anſwered, and held by the court, that the order of ſeſſions does not ſet forth the ages of the children; and then as the *juſtices* have juriſdiction, it muſt be intended, that they determined right, *viz.* that the children were not of the ages ſet forth in the original order, though that reaſon is not given, but it would be otherwiſe if the reverſal was founded on a reaſon, not warranting the ſame: and they took a diſtinction between an order of reverſal and an order of confirmation, for this muſt be taken to purſue the original order, and to be founded on the ſame reaſons, and therefore muſt fall to the ground, if the original order be erroneous. So the order of ſeſſions was confirmed. *Vide Fitz-Gibbons*, *p.* 254.

Michaelmas, 8 *Geo.* 2. *Shergold* v. *Holloway.*

A *juſtice of peace* granted his warrant directed to the defendant in theſe words, "Whereas complaint is "made to me, on the oath of *John White*, that *William Shergold*, refuſes to pay him wages; theſe are "to require you to cauſe the ſaid *Shergold* to appear "before me, or ſome other *juſtice*, to anſwer the complaint aforeſaid; and give notice to the ſaid "*White*, before what *juſtice* you appear."

On this warrant the defendant took up the plaintiff, and carried him before the *juſtice*, who bound him over to the ſeſſions; on whichthe plaintiff brought his action, and a caſe being made at the aſſizes, the ſame was argued in this court, and the following points reſolved.

1ſt, That though *ſtat.* 5 *Eliz. c.* 5. does not expreſsly impower *juſtices* to order the payment of wages; yet they have been ſo long indulged with it by the courts, under the general power of ſetting the rate, that it is not now to be diſputed.

2dly, That the *juſtice* has no power to grant a warrant to apprehend the party, he might have iſſued a ſummons. And that a warrant expreſsly to arreſt the party, will not juſtify the officer, there being no pretence for ſuch a juriſdiction.

3dly, That this warrant, though oddly worded, was not a warrant to arreſt the plaintiff, for the defendant might cauſe him to appear by diſtreſs, and it was not equivalent to the words *bring before me.* So the plaintiff had judgment. *Vide Strange*, *vol.* 2. *p.* 1002.

Trinity, 14 *Geo.* 2. *Talbot* v. *Huddle.*

The queſtion in this caſe was, whether, as the city of *New Sarum*, had an excluſive commiſſion of the peace, the *juſtices* of the county of *Wilts* could by virtue of *ſtat.* 12 *Car.* 2. *c.* 23. and 15 *Car.* 2. *c.* 2. act in exciſe matters within the city.

This caſe was argued *three* times at *bar*, and this term, *Lee*, Chief Juſtice, delivered the reſolution of the court.

1ſt, That the Crown might grant to any city, to have *juſtices* of their own within themſelves, and exclude the *county juſtices* from intermedling in the ordinary buſineſs of a *juſtice of peace. Bro. Letters Patent* 111. *Dalton* 24. 2 *Inſt.* 71.

2dly, That in ſuch caſe the act of the *county juſtices* would be void, and not to be conſidered only as a breach of the franchiſe. 2 *Inſt.* 557.

3dly, That though *ſtat.* 12 *Car.* 2. gives the juriſdiction of exciſe matters to the *juſtices of peace* reſiding near the place where the forfeiture ſhall be made; or offence committed; yet it was never the deſign of the legiſlature to make any alteration in the reſpective juriſdiction of the *juſtices*, but only to veſt the *exciſe* juriſdiction in *juſtices* of counties, cities, and places, with reſpect to their ſeveral local juriſdictions within ſuch places. *Vide Strange, vol.* 2. *p.* 1154.

Michaelmas, 16 *Geo.* 2. *Between the Pariſhes of Great Chate and Kennington*

Two juſtices of peace made an order of removal, which was quaſhed at the ſeſſions, becauſe *one* of the *juſtices* was an inhabitant of the pariſh from whence the *pauper* was removed. On debate in this court it was inſiſted, that *ſtat.* 13 & 14 *Car.* 2. *c.* 12. gives the power to any *two juſtices of peace:* and ſo has been the practice. And the inſtance of corporations where there are but *two juſtices of peace*, or one pariſh, was inſiſted on; and beſides there lay an appeal.

But the court held, that this was a *judicial act*, and the party intereſted is tacitly excepted. Lord *Raymond*, who lived in the pariſh of *Abbot's Langley*, went off the bench, when *one* of their orders came before the court. They ſaid the practice could not overturn ſo fundamental a rule of juſtice, as that a party intereſted could not be a *judge*. And as to the caſe of corporations, they ſaid, that if it appeared, that there were no other *juſtices*, it might be allowed; to prevent a failure of *juſtice*; and therefore they confirmed the order of ſeſſions. *Vide Strange, vol.* 2. *p.* 1173.

Hilary, 18 *Geo.* 2. *The King* v. *Coningsby & al.*

The accounts of the overſeers of *Watford* in *Herts*, having been allowed by *two juſtices of peace*, an appeal was lodged at the *county ſeſſions*, which the *juſtices of peace* there refuſed to proceed on, being of opinion, that as *Watford* was within the liberty of *St. Alban*'s, the appeal ought to have been at the liberty ſeſſions. On this a *mandamus* was moved for, requiring the *county juſtices* to proceed. And it was inſiſted on, that by *ſtat.* 43 *Eliz. c.* 2. all appeals muſt be at the county ſeſſions: and if the liberty could have juriſdiction, it would at moſt be only a *concurrent one*, and the appeal might be at the election of the party.

But on ſhewing cauſe the rule was diſcharged, on an *affidavit*, that in fact the *juſtices of peace* of the liberty do, as ſuch, conſtantly appoint the overſeers, and determine about them at their ſeſſions, without one inſtance to the contrary; which the court ſaid, was to be conſidered as explanatory of the general words in *ſtat.* 43 *Eliz.* which is now confirmed by *ſtat.* 17 *Geo.* 2. *c.* 28. which mentions diviſions and franchiſes who have *four juſtices*, and here are many more. *Vide Stra. vol.* 2. *p.* 1222.

Eaſter, 19 *Geo.* 2. *The King* v. *James & al.*

The defendants were indicted at *Cumberland ſeſſions*, for faſtening nets acroſs the river *Eden*, contrary to *ſtat.* 2 *Hen.* 6. *c.* 15. there were many exceptions taken to it, but the objection for which it was quaſhed, was, that the ſtatute gives a penalty of 100 *s.* but gives no juriſdiction to the ſeſſions, and they cannot have it without expreſs words, in the caſe of a new created offence. *Vide Strange, vol.* 2. *p.* 1256.

Hilary, 20 *Geo.* 2. *The King* v. *The Inhabitants of Polſted.*

An appeal was made to the *quarter ſeſſions* in *Suffolk*, held the 7th of *April*, 1746, againſt an order of removal. The ſeſſions was adjourned to the 9th of *April* at *Woodbridge*, where for want of a ſufficient number of *juſtices*, nothing could be done. The 11th of *April*, a ſeſſions was held at *Ipſwich*, and adjourned to the 14th at *Bury*, where the appeal was allowed.

The court was moved to quaſh the order of ſeſſions, as made without juriſdiction, the ſeſſions ending at *Woodbridge* for want of an adjournment.

And of that opinion were the court, for the words in *ſtat* 2 *H.* 5. *c.* 4. *and more often if need be*, were never conſidered as giving more than one original ſeſſions in a quarter, but only impowering adjournments. The county muſt take notice of adjournments, but are not ſuppoſed to expect a new ſeſſions till the uſual time; therefore the order of ſeſſions was quaſhed. *Vide Strange, vol.* 2. *p.* 1263.

Hilary, 30 *Geo.* 2. *The King* v. *Gayer, Eſq.*

On ſhewing cauſe againſt quaſhing an order of *ſeſſions*, which (on appeal to them by the defendant) diſcharged an order of *two juſtices*, appointing the defendant and one *B. C.* to be overſeers of the pariſh of *Rockbear Com. Devon:*

The defendant only appealed from this order of appointment; and the ſeſſions diſcharged the ſame as to him: the words of the order were, "It *appearing to* "*this court*, &c. and alſo, &c. and that, &c. this "court does therefore vacate and make void the "ſaid warrant, as to the ſaid *J. Gayer*.".

On this appeal it appeared to the *ſeſſions*, that the defendant had ſome years been, and was at the time of the nomination, and alſo at the time of making the ſeſſions order, *an acting juſtice of peace* for the ſaid county, reſiding within the ſaid pariſh of *Rockbear*, and a ſubſtantial houſe-keeper there; and alſo a *lieutenant of marines in his Majeſty's ſervice, on half pay*; and that there were *other ſufficient* ſubſtantial houſeholders within the ſaid pariſh, for the doing ſuch office. The court, "therefore vacated and made void "the ſaid warrant, as to the ſaid *J. Gayer*."

After hearing the arguments of the council for and againſt quaſhing the order of ſeſſions, the court confirmed the order of ſeſſions, and quaſhed the order of the *two juſtices*.

Lord *Mansfield*. The preſent queſtion ſeems to lie in a very narrow compaſs. The *ſeſſions* on an appeal, have a right to exerciſe the ſame *latitude* of *diſcretion* in judging, "who are fit to be nominated overſeers," as the *two juſtices* had. They have given their opinion, "that Mr. *Gayer* was *not a proper perſon* to be "appointed overſeer," they are not *obliged* to give *any* reaſon for their opinion; becauſe the legiſlature has entruſted them, on an appeal, with the power or authority of appointing overſeers. If they had given *no* reaſon, their order had undoubtedly been good; we muſt have *preſumed* that they acted on *proper* grounds.

There was no neceſſity for appointing Mr. *Gayer*: the ſeſſions ſtate, "that there were other ſufficient "ſubſtantial houſeholders within the ſaid pariſh." They might think Mr. *Gayer* under *all* the circumſtances *improper* to be appointed; his being an acting *juſtice of peace* reſiding in the pariſh, and a *lieutenant of marines*, might be circumſtances which weighed with them among *others*; but it does not follow, nor is it ſaid, that for theſe reaſons they thought him *exempt* from ſerving the office of overſeer; and that they vacated the warrant on that account. They ſay there were other perſons qualified, ſuppoſing Mr. *G.* liable to ſerve the office, they might think him not ſo *proper* as many *others*. And therefore we are not obliged to ſay, "that the whole reaſon they went on is bad."

Deniſon and *Foſter*, Juſtices, concurred with the Chief Juſtice in opinion.

Per curiam. Let the order of *ſeſſions* be confirmed, and the order of the *two juſtices* be quaſhed. *Vide Bur. vol.* 1. *p.* 245.

Eaſter, 31 *Geo.* 2. *Hutchins* v. *Chambers, and others.*

See this caſe fully ſtated in page 377 of this work, under the head *Diſtreſs*.

Eaſter, 31 *Geo.* 2. *The King* v. *Young and Pitts, Eſqrs.*

See this caſe fully ſtated in page 561 of this work, under the head *Information*.

Eaſter, 32 *Geo.* 2. *The King* v. *Benjamin Cox, Eſq.*

The court granted a rule for the defendant, a juſtice of peace for the county of *Middleſex*, to ſhew cauſe why an information ſhould not be granted againſt him, for *refuſing to receive* an information regularly and duly laid before him, againſt a *baker* for exerciſing his *trade* on a *Sunday*, contrary to *ſtat.* 29 *Car.* 2. *c.* 7. "for the better obſervation of the Lord's day. Mr. *C*——— giving it as a reaſon for his refuſal, "That the *juſtices* of *Middleſex*, and of *Weſtminſter* had come to ſuch an agreement amongſt themſelves, not to receive ſuch informations.

After hearing the arguments of the council on both ſides, on ſhewing cauſe for and againſt this rule, the court diſcharged the ſame with coſts.

Lord Mansfield. The complaint now appears to have been founded on a miſrepreſentation of the fact: for the *affidavit* charges this *juſtice of the peace* to have refuſed *receiving* the information; and that he told them the juſtices had come to an agreement "not to grant warrants againſt perſons for baking on a *Sunday*," whereas it now appears that he *did hear* the charge; and that it was *not baking in general* on a *Sunday*; but baking *pies, puddings, and meat for dinner*; not ſaying a word about *bread*, which is the buſineſs of a baker's ordinary calling. And he told them, "That this *ſort* of baking or *dreſſing meat* on a *Sunday* was not, in his opinion, and in the opinion of the reſt of the *juſtices*, an offence within the *ſtatute*." I am not ſatisfied that their opinion was wrong. And if he really judged it not to be within the proviſion of any law, and had conſulted his brethren, who thought ſo too, the court would never grant an information againſt him, even tho' ſuch an opinion had been erroneous.

Denniſon, *Foſter*, and *Wilmot*, Juſtices, gave their opinions at large, and concurred with the *Chief Juſtice*.

Per curiam. Let the rule to ſhew cauſe why an information ſhould not be granted againſt the defendant be diſcharged with coſts. *Vide Bur. vol.* 2. *p.* 786.

Eaſter, 1 *Geo.* 3. *The King* v. *Palmer and Baine, Eſqrs. and others.*

Adjudged, "That where a *juſtice of peace* acts illegally, yet if he has acted *honeſtly* and candidly, *without* oppreſſion, malice, revenge, or any bad view, or *ill intention* whatſoever, The court will never puniſh him in the *extraordinary* courſe of an information: but leave the party complaining to the *ordinary* legal remedy, or method of proſecution, by *action* or *indictment*." *Vide Bur. vol.* 2. *p.* 1162.

Eaſter, 2 *Geo.* 3. *The King* v. *Williams.*

See this caſe fully ſtated in page 564 of this work, under the head *Information*.

Michaelmas, 3 *Geo.* 3. *The King* v. *Whitear, and others.*

On ſhewing cauſe why an order of *ſeſſions* ſhould not be quaſhed: this order was *originally* made at the *quarter ſeſſions* for the borough of *Portſmouth*; and purported to be an order made on the appeal of the preſent overſeers of the poor of the pariſh of *Portſmouth*, directing their predeceſſors, the *late* overſeers, to pay over to the appellants, the *preſent* overſeers, the balance of their accounts; which accounts were ſettled and balanced by the ſaid order of *ſeſſions*.

There were *four exceptions* taken to the order, but the court quaſhed the ſame on the *firſt exception*, which was as follows:

1ſt Exception. That the *ſeſſions* had not power to make an order on *late* overſeers to pay over monies to their ſucceſſors, by way of *original* order, in the *firſt* inſtance, without any *previous* application having been made to *two juſtices*, as directed by *ſtat.* 43 *Eliz. cap.* 2.

Per curiam. Let the order of *ſeſſions* be quaſhed. *Vide Bur. vol.* 3. *p.* 1365.

Hilary, 4 *Geo.* 3. *The King* v. *The Inhabitants of St. Andrews, Holborn, and St. George the Martyr.*

See this caſe fully ſtated in page 261 of this work, under the head *Certiorari*.

Hilary, 4 *Geo.* 3. *The King* v. *The Juſtices of the Peace for the City of London.*

On a motion for a *mandamus* to be directed to the *juſtices*, to *proceed* on a matter depending before them, on an application regularly made to them, before the repeal of the *forty-ſixth clauſe* of *ſtat.* 1 *Geo.* 3. *cap.* 17. by 2 *Geo.* 3. *cap.* 2. which application had been *duly* and in *due time* made by one *J. L.* againſt *W. M.* a debtor in their priſon, on the compulſory clauſe in the former *ſtat.* *then ſubſiſting* in its full force; and on ſuch application, *all the requiſites* had been complied with by the parties concerned; and *M.* had appeared, and given in a ſchedule of his effects on oath, and had *aſſigned* them over for the benefit of his creditors; but the court of *quarter ſeſſions*, in whom *juriſdiction* was thus properly *attached* before the repeal of the clauſe, voluntarily, and without neceſſity or ſufficient reaſon, and without the deſire or conſent of any of the parties, *adjourned* the matter till a day which was *ſubſequent* to the time when the *repeal* of the ſaid compulſory clauſe took place.

After hearing the arguments of the council on this motion, the court denied the ſame.

Lord *Mansfield.* We are very clear that *no* juriſdiction *now remains* in the *ſeſſions*, and therefore we have no *foundation* to ſupport our iſſuing ſuch a *mandamus* as is prayed.

Per curiam. Let the parties take nothing by their motion. *Vide Bur. vol.* 3. *p.* 1456.

Leaſes.

Hilary, 2 *W. & M.* *Cudlip* v. *Randall.*

See this caſe fully ſtated in page 18 of this work, under the head *Actions*.

Hilary, 2 *W. & M.* *Symonds* v. *Cudmore.*

See this caſe fully ſtated in page 12 of this work, under the head *Acceptance*.

Michaelmas, 2 *W. & M.* *Copley* v. *Hepworth.*

In an action of *covenant* to pay an annual rent of 60 *l.* and repair, the plaintiff ſet forth, that the defendant entered, but did not aver that a *leaſe* was made. The defendant pleaded, that he ought not to have rent for no *leaſe* was made.

Holt, Chief Juſtice. In mutual covenants, where the performance of one depends on another, the precedent covenant muſt be performed firſt.

Eyres and *Dolben*, Juſtices. The covenant and entry amounts to a *leaſe*; and ſo was the caſe of *Harrington* v. *Wiſe*.

Holt, Chief Juſtice. It has been held otherwiſe ever ſince. Judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 12. *p.* 1.

Michaelmas, 8 *W.* 3. *Hicks* v. *Downling. Alias Smith*, v. *Baker.*

See this caſe fully ſtated in page 21 of this work, under the head *Actions*.

Hilary, 9 *W.* 3. *Trevillian* v. *Andrew.*

In this caſe it was held, that if a *leſſee* holds over his term, an action of *treſpaſs* cannot be brought without an actual entry.

See this caſe fully ſtated in page 471 of this work, under the head *Executors and Adminiſtrators*.

Michaelmas, 9 *W.* 3. *Winter* v. *Lovedore, Lovedurr or Loveden, or Loveday* v. *Winter.*

In *ejectment* a ſpecial verdict was found, that *G. P.* was ſeiſed of the manor of *M.* and on the marriage of his ſon, ſettled the ſaid manor to the uſe of himſelf for life, remainder to his wife for life, remainder to his ſon in tail, with a *proviſo*, that he ſhould have power during his life, and ſo the wife after him, to *demiſe* the premiſes in poſſeſſion, for *one*, *two*, or *three lives*, or in reverſion for *one*, *two*, or *three lives*, or *thirty years*, or for any number of years determinable on *one*, *two*, or *three lives*, ſo as ſuch *demiſe* be not of the *demeſne lands*. *G. P.* reciting that *J. S.* and his wife held a copyhold tenement for life, *demiſed* the ſaid copyhold tenement to the *leſſee* for *thirty years*, to begin after the death, ſurrender, or forfeiture of *J. S.* and his wife; and the queſtion being, whether this *leaſe* of a copyhold was purſuant to, and warranted by the power?

Holt, J. C. held, 1ſt. That a *leaſe*, to commence *in future*, is in ſome ſenſe a *leaſe* in reverſion, as oppoſed to a *leaſe* in poſſeſſion; but a *leaſe* within ſuch a power muſt be conſtrued of a *leaſe* to commence in poſſeſſion after another *leaſe* or intereſt already created before the reſervation of the power, and not after; and that a *leaſe* to commence after any other *leaſe*, is properly a *leaſe in reverſion*; but that a *leaſe for life*, to commence after another *leaſe* in being, is a *concurrent leaſe*; becauſe a freehold cannot expect, but muſt commence in poſſeſſion preſently; however, this may be ſaid to be a *leaſe in reverſion* within ſuch powers.

2dly. That *G. P.* might make a *leaſe in reverſion* abſolutely for *thirty years*, by virtue of this power, becauſe the limitations and reſtrictions are disjoined, and the latter part is carried on by way of enlargement of the power; to which *Turton* and *Eyre*, Juſtices, agreed, but *Rokeby*, Juſtice, diſſented.

3dly. That this *leaſe* was void, becauſe it was of copyhold lands; for by a grant of the *demeſnes* the copyholds will paſs; and by the ſame reaſon, by excepting the *demeſnes* the copyholds are excepted; and the rather, becauſe the power is derived out of the inheritance, and the tenant at will by his *leaſes* might deſtroy the copyhold, which is unreaſonable; and if there were nothing elſe for the power to work on in this caſe, he may by virtue thereof *demiſe* the rents and ſervices. *Vide Salk. vol.* 2. *p.* 537. *Mod. Rep. vol.* 5. *page* 244. *Ibid. vol.* 12. *p.* 147. *Raym. vol.* 1. *p.* 267.

Summer Aſſizes, 11 *W.* 3. *Hermitage* v. *Tomkins.*

It was ruled by *Holt*, Chief Juſtice, at *Warwick*, on a trial at *niſi prius*, that if *A.* not having any property in certain land, *demiſes* it by indenture to *B.* and afterwards *A.* purchaſes the land, this will be a *good leaſe* by *eſtoppel*. But if it appears by recitals in the *leaſe*, that *A.* had nothing at the time of the *demiſe*, and afterwards he purchaſes the lands as aforeſaid, that will not enure y *eſtoppel*. *Vide Raym. vol.* 1. *p.* 729.

Michaelmas, 12 *W.* 3. *Anonymous.*

A motion was made for the warden of the *Fleet* to attend, for not returning an *habeas corpus*:

Holt, Chief Juſtice, ſaid on this occaſion, that by right a perſon in cuſtody of the *K. B.* ought not to be removed to any other priſon; if this was looked into, this way of removing priſoners from the *K. B.* to the *Fleet* would not be allowed. *Vide Forteſcue. p.* 243.

Hilary, 13 *W.* 3. *Leighton* v. *Theed.*

Holt, Chief Juſtice. If *H.* holds land at will, rendering rent *quarterly*, the *leſſor* may determine his will when he pleaſes; but if he determines it within a quarter, he ſhall loſe the rent which ſhould have been paid for that quarter in which he determines it. So the *leſſee* may determine it when he pleaſes, but then he muſt pay the quarter's rent. *Vide Salk. vol.* 1. *page* 222. *Ibid. vol.* 2. *p.* 414. *Raym. vol.* 1. *p.* 707.

Hilary, 13 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. If a perſon makes a *leaſe* at will from year to year, either party may determine it at pleaſure, at the loſs of the accruing rent to him that determines his will; but if a perſon makes a *leaſe* for a year, and ſo from year to year as long as both parties ſhall pleaſe, this is a *leaſe* for *one year* abſolutely; and if the *leſſee* continues on the firſt day of the *ſecond year*, he is bound for another year; ſo is the *leſſor*, if he has not warned him away before the beginning of the *ſecond year*. And a *leaſe* for *three years* to commence in *future* by *parol*, is not warranted by the ſtatutes of *frauds* and *perjuries*. *Vide Mod. Rep. vol.* 12. *p.* 6.0.

Hilary, 1 *Ann.* *Hunt* v. *Bourne.*

See this caſe fully ſtated in page 490 of this work, under the head *Fines and Recoveries.*

Michaelmas, 1 *Ann.* *Shortridge* v. *Lamplugh.* Error.

On a *writ of error*, brought on a judgment given in the *C. B.* in an action of *covenant* brought by the *aſſignee* of the reverſion againſt the *aſſignee* of the term for non-payment of rent, it was objected, that the uſe muſt be intended to be to the *re-leſſor* and his heirs, becauſe no conſideration of the *re-leaſe* nor expreſs uſe appeared by the pleading; ſo that without conſidering the operation of the conveyance, the queſtion was on the pleadings, whether the uſe ſhall be intended to the *re-leſſor*, unleſs it be averred to the *re-leſſee*?

Holt, Chief Juſtice. This way of pleading was certainly good before *ſtat.* 27 *H.* 8. ſo is *Plowd.* 478. and many precedents in *Co. Ent.* of *feoffments* averred in the ſame manner; for the uſe was a matter that was extrinſical to the deed, and depended on collateral agreements at *common law*, and then the uſe might, *as ſince the ſtatute of fraud by writing*, be averred by *parol*, and therefore in pleading, the conveyance was taken to the uſe of him to whom the conveyance was made, till the contrary appeared; if it were otherwiſe, it ought to come on the other ſide; and *ſtat.* 27 *H.* 7. has not altered the courſe of pleading, which is rather confirmed by the ſtatute; becauſe, if now the uſe be conſtrued to be to the *re-leſſor* or *feoffor*, the conveyance will be to no manner of purpoſe, it being ſtill the old eſtate to which the old warranty and other qualities remain annexed; whereas before the ſtatute there might be ſome end in making the *feoffment*, viz. to put the freehold out of him and prevent wardſhip; and *Co. Lit.* goes no further, than where there is a *feoffment* to particular uſes and eſtates, the reſidue of the uſe ſhall be to the *feoffor*, which is reaſonable; for the raiſing thoſe particular eſtates appears a ſufficient reaſon for the conveyance.

Powell, Juſtice, doubted, whether there could be a reſulting uſe on a *leaſe* and *releaſe*, unleſs where particular uſes are limited; for this way of conveyance is grounded on the ancient way of *releaſing* at *common law*, wherein there was a merger of eſtate, which is a good conſideration; as where the *leſſor* confirms to the *leſſee* and his heirs: but the other *two* juſtices concurring with the Chief Juſtice, the judgment of the *C. B.* was affirmed. *Vide Salk. vol.* 2. *p.* 678. *Raym. vol.* 2. *p.* 798. *Mod. Rep. vol.* 7. *p.* 71.

Michaelmas, 2 *Ann.* *Sutton's Caſe*, *Marſhal of the Court.*

Sutton not having attended for *two terms*, and a new Marſhal being preſented to the court to be ſworn in, he produced a *leaſe* from the patentees of the office, for a certain number of years, determinable on his death.

Per curiam. Though a *leaſe for years* abſolutely of this office is void, yet a *leaſe* of it for years determinable on the life of the *leſſee* is good; for the danger of the office's going to executors and adminiſtrators is thereby avoided, and that is the ſole reaſon why the office is not *grantable* for years. And the new Marſhal was accordingly ſworn in. *Vide Mod. Rep. vol.* 6. *page* 57.

Hilary, 7 *Ann.* *Legg* v. *Strudwick.*

In *replevin* the defendant avowed, for that he being ſeiſed in *fee* of the *place in which*, &c. demiſed the ſame to *A. to hold from year to year, and ſo on as long as both parties*

parties ſhall agree, to commence from *Lady-day* 1703, rendering an *annual rent*, payable quarterly. The *leſſee* entered, and died the 17th day of *December* 1706. And the rent for a year and a half ending at *Chriſtmas* before was in arrear, for which the *leſſor* entered and diſtrained. To this the plaintiff demurred.

Per curiam. 1ſt. After the *two years*, the *leſſor* or *leſſee* might determine the term; but if the *leſſee* held on, he was not then tenant at will, but for a *year certain*; for his holding on muſt be taken to be an agreement to the original contract, and in execution of it; and the firſt contract was from *year to year*.

2dly. The *third year* is not in the nature of a diſtinct intereſt, becauſe it ariſes from the ſame executory contract, and therefore the *leſſor* may diſtrain the *third year* for the rent of the *ſecond*; and ſuch an executory contract as this, is not void by the ſtatute of *frauds*, tho' it be for more than *three years*, becauſe there is hereby no term for above *two years* ever ſubſiſting at the ſame time; and there can be no fraud to a purchaſer, for the utmoſt intereſt that can exiſt to bind him, can be only one year.

Holt, C. J. cited this caſe tried before *Hale*, C. J. A compoſition was agreed on between the parſon and his pariſhioners for tythes, *as long as both parties ſhould agree*. If the pariſhioner ploughs and ſows, the parſon ſhall not that year recede, and demand tithe in kind, but muſt make his election at the beginning of the next year; for the pariſhioner would not perhaps have ſowed his land, had he not relied on his contract. *Cro. El.* 775. *Keilw.* 65. *Aleyn* 4. 2 *Jon.* 5. 1 *Sid.* 359. 14 *H.* 8, 10. *Vide Salk. vol.* 2. *p.* 414.

Michaelmas, 1 *Geo.* *Potter* v. *Pinkney.*

To an action of *treſpaſs* for goods taken and carried away, the defendant pleaded, that he was ſeiſed of ſuch a *leaſe*; but in making out his title to the *leaſe*, ſet forth ſuch matter as ſhewed the *leaſe* to have determined before it began; and then went on, and ſaid, that *by virtue* of ſuch a *leaſe*, he entered and made a *leaſe* to the plaintiff, reſerving ſuch rent; and for the rent behind juſtified the taking, *&c.* The plaintiff replied, that the goods diſtrained were ſold. The defendant in his rejoinder juſtified the ſale, by virtue of a late ſtatute. To the rejoinder the plaintiff demurred; and the defendant joined in demurrer.

It was inſiſted for the plaintiff, that there was no good title ſet forth to the *leaſe* in the plea; but matter directly deſtroying it; and that the *firſt leaſe* failing, the *ſecond* muſt do ſo too.

To which it was anſwered, 1ſt. That if the defendant had failed in deriving to himſelf a lawful ability to make the *leaſe* to the plaintiff, the conſequence will only be, that the entry which he ſets forth to be *by virtue* of the *leaſe*, muſt be taken to be a *diſſeiſin* and a *tortious* fee-ſimple, ſufficient to ſupport the *leaſe*.

2dly. That the plaintiff by his replication, though he had not ſaid, *it is true*, the defendant made ſuch a *leaſe*, *&c.* yet by pleading ſuch matters as abuſe of the diſtreſs, (matter confeſſing and avoiding the plea of the defendant) that ~~plea muſt~~ now be taken for true; as that there was ſuch a *leaſe* made, and the rent behind. And of this opinion was the court.

Parker, Chief Juſtice, moreover ſaid, that the title was but matter of conveyance or inducement; that the ſubſtance of the plea was the *leaſe*, and arrearages of rent.

Then the following exceptions were taken by the plaintiff's council to the rejoinder.

1ſt. That notice ſhould be given to the owner of the goods, not to the *leſſee*.

2dly. Notice in the ſtatute muſt be underſtood to be notice in writing; but it is not ſet forth in the pleading, that this notice was in writing.

3dly. It is ſaid in the pleading, that *immediately after the diſtreſs ſo taken*; he left notice of the taking, *&c.* and *for* cauſe thereof, whereas the cauſe ſhould have been ſet forth.

As to the *firſt exception*, it was over-ruled by the court, who held that the ſtatute did not require notice to be given to the owner, for he might not be known; but to the *leſſee*.

As to the *ſecond exception*, it was ſaid by the council for the defendant, that if the word *notice* did in the act import notice in writing, it muſt do ſo in the plea.

But the *third exception* to the rejoinder was by the court held fatal, for that it was direct nonſenſe; and that if it had been *with the cauſe*, though that had been ſenſe, yet it had been inſufficient; for the court ought to be informed on the pleading what the cauſe was that was left. Therefore judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 10. *p.* 265.

Hilary 3 *Geo.* *Smith* v. *Parks.*

A *leaſe* being in ſtrictneſs forfeited by nonpayment of the rent, the *leſſor* brought an *ejectment*. The *leſſee* by bringing into court what was due for arrears of rent with coſts, *&c.* obtained a rule to ſtay proceedings on the *ejectment*. The *leſſor* moved the court to diſcharge the rule, unleſs the defendant would give ſecurity for the payment of the rent, on *affidavit* that the defendant was a ſoldier, and ſo by law intitled to a protection.

Per curiam. If you will have equity you muſt do equity; if by the equity of the court the plaintiff loſes the benefit of the forfeiture of the leaſe which the law gives; it is but reaſonabe that he ſhould have ſecurity for the payment of the rent, eſpecially when it appears on oath, that the defendant is a perſon, who by law is privileged from payment of his debts. *Vide Mod. Rep. vol.* 10. *p.* 383.

Michaelmas 7 *Geo.* *Poultney* v. *Holmes.*

The defendant having a term of years whereof *one* year and three quarters were to come, agreed with the plaintiff, that he ſhould have the premiſes for the remainder of the term, paying to the defendant the ſame rent as was reſerved on the *original leaſe*. The plaintiff took poſſeſſion, and now brought an action of *treſpaſs* againſt the defendant for a re-entry.

It was objected, that this amounted to an aſſignment of the *leaſe*, and was therefore void by the ſtatute of *frauds* and *perjuries*, not being in writing; to which the plaintiff's council anſwered, that it muſt be taken as a *leaſe*, and not as an aſſignment, becauſe the reſervation was to the *leſſee*, and not to the original *leſſor*; and the *leſſee* might maintain an action of *debt* for rent on it, tho' he could not diſtrain for want of a reverſionary intereſt; and of this opinion was the Chief Juſtice, and the plaintiff obtained a verdict. *Vide Stra. vol.* 1. *p.* 405.

Hilary, 9 *Geo.* *Mackdonnel* v. *Welder.* Error.

In *replevin*, the defendant avows for rent under a *leaſe*, dated *the 24th day of* June, *To hold from the aforeſaid 24th day of* June, *&c. by virtue* whereof the plaintiff entered the ſaid *24th day of* June.

On demurrer in *C. B.* it was objected, that the plaintiff was a diſſeiſor by entering on the 24th, when the *leaſe* was not to commence till the next day, and conſequently the poſſeſſion was not under the *leaſe*.

But after conſideration, judgment was given for the avowant, the court being of opinion, there was a great difference between this caſe, and an *ejectment*, where the plaintiff who claims a term, does at the ſame time, ſhew he has gained a *tortious fee*; whereas here, be the *entry tortious* or not, it cannot diſcharge the contract for the payment of the rent. *Cro. El.* 169. 2 *Leon.* 99. 1 *Roll. Abr.* 65. Therefore the judgment of *C. B.* was affirmed. *Vide Stra. vol.* 1. *p.* 550. *Mod. Rep. vol.* 8. *p.* 54.

Michaelmas, 9 *Geo.* *The King* v. *Fairclough, and others, Inhabitants of Lambeth Pariſh.*

The caſe was, the rector of the pariſh of *C.* by a verbal agreement let his tithes to *Fairclough*, and others, paying to him 2*s.* 6*d. per* acre for *one* year, and *Fairclough* and the other farmers of the ſaid tithes, let the ſame to the reſpective tenants of the lands, paying to them 3 *s. per* acre for that year, excepting one tenant, for which they received the tithes in kind, and paid to the rector 2*s.* 6*d.* *per* acre.

Afterwards the ſaid *Fairclough*, and the other farmers were charged by the churchwardens, and overſeers of the poor of the ſaid pariſh of *G.* by a rate, towards the maintaining the poor of the ſaid pariſh, on *ſtat.* 43. *Eliz. cap.* 2. *as occupiers of the tithes*, and on an appeal to the ſeſſions they were diſcharged as to all, excepting only 7*s.* 6*d.* which they were ordered to pay for the tithes of that tenant, which they received in kind.

And the order being removed into this court by *certiorari*, the queſtion was, who ſhall be accounted *the occupier of theſe tithes*, the farmers who paid the rent to the rector, or the tenants of the lands, who paid their rent for the tithes to the farmers.

The court was of opinion, *viz.* That the farmers ſhall be accounted the occupiers of thoſe tithes; it is true, it might be otherwiſe if an *under leaſe* had been made thereof; but this is a particular caſe; and it appears by the rate, that the farmers have 6*d.* *per* acre profit, and if the rate is aſſeſſed, on the profits of the tithes, it ought to be aſſeſſed on them, becauſe it does not appear to the court, that the land-holders have any profit, for they may have a hard bargain.

Therefore they ſhall rather be accounted buyers of thoſe tithes, than occupiers; for where an agreement is made for tithes, they ſhall paſs by way of bargain, otherwiſe they cannot paſs at all, becauſe they lie in *grant*; and therefore cannot otherwiſe paſs than by *deed*, for a verbal agreement for them is good only for a year.

The money which the farmers receive of the land-holders, for thoſe tithes ſhall be accounted a *modus*, he who receives it ſhall be taken to be the occupier of the tithes.

So where a man has a wood or ſtanding corn, and ſells the ſame ſtanding, the ſeller ſhall pay the tithes, for that year.

In this caſe the rector who ſerves the cure for 2 *s.* 6 *s.* *per* acre, ſhall not contribute to the poors tax; but the farmers who have ſuch a benefit of 6 *d.* *per* acre, without any manner of conſideration for it, by raiſing ſo much on the land-holders.

Pratt, Chief Juſtice. I doubt, the farmer of the rector is to be eſteemed *at firſt ſight* occupier of theſe tithes: he retains the tithes, though he pays the value for them.

Eyre, Juſtice. The farmer is in this caſe the occupier, he having them by way of retainer, in purſuance of an agreement by parol. It would be otherwiſe if there had been an under *leaſe* of them. *Cro. Jac.* 137 *pl.*

Forteſcue, Juſtice. The farmer is the occupier, he having them in ſuch a manner as to make a profit of them.

Therefore the order of ſeſſions was quaſhed, and the rate confirmed. *Vide Mod. Rep. vol.* 8. *p.* 62.

Eaſter, 10 *Geo.* *Baggott* v. *Oughton.*

A caſe was ſtated and referred out of *Chancery* for the judgment of this court, *viz.*

Sir *Edward Baggott* (the father of the plaintiff) on his marriage with his wife, the plaintiff's mother, in conſideration of that marriage, and of a conſiderable ſum of money which he was to have with her as a marriage portion, which could not be raiſed otherwiſe than by ſelling her father's eſtate; and ſhe being the only child of the family; and for that reaſon, Sir *Edward* being unwilling the eſtate ſhould be ſold, it was agreed by *indenture* between them, that a *fine* ſhould be levied of the land, and the uſe thereof declared to Sir *Edward for life*, then to the uſe of his wife *for life*, remainder to the plaintiff in *tail*, &c. reverſion in *fee* to Lady *Baggott*, in which ſettlement there was a *proviſo*, that Lady *Baggott* ſhould have power to charge the whole eſtate with the payment of 500 *l.* to any perſon to whom ſhe ſhould give the ſame; and with a farther power, that any perſon who ſhould be actually *ſeiſed* of the lands by virtue of this ſettlement, might make a *leaſe* or *leaſes* for *three* lives, or for *twenty-one years*, of all or any part of the premiſes in the *indenture* of *fine* comprised, at ſuch *yearly rents, or more*, as the ſame were then let at.

Sir *Edward Baggott* died, and Lady *Baggott* being the next in remainder for life, entered, and afterwards married Sir *Adolphus Oughton*, (the now defendant) and then made a *leaſe* to him of the capital meſſuage for *twenty-one years*, but *reſerved no rent*, and about a month afterwards ſhe died; and the ſingle queſtion now before the court was, whether this was a *good leaſe*?

It was argued for the plaintiff that it was not, becauſe this capital meſſuage being never yet let, by conſequence there was no rent reſerved at the time of making this ſettlement, therefore this power can never be purſued, and for this the caſes of Lord *Mountjoy*, and *Fitz-Williams*, were cited as authorities in point.

The power in the principal caſe reſerved to make *leaſes* was intended for the benefit of the family, *viz.* to make *leaſes* of ſuch land which had been actually, antiently, and uſually let; and though it was indefinitely to make *leaſes* of all, or any part of the premiſes compriſed in the *indenture* of *fine*, yet theſe words are reſtrained in the latter part of the ſentence to ſuch *leaſes*, where the yearly rents, or more, were reſerved, *as the ſame were let at when the ſettlement was made*; and ſeveral authorities were cited to prove that general words in a *deed* are to be qualified and reſtrained by particular and ſubſequent words in the ſame clauſe.

It is true, this Lady had an intereſt coupled with her power, but her intereſt in reſpect to any charge to affect the remainder-man, is intirely void; for this *leaſe*, as to him, muſt ariſe out of her power, and is no more than if made by an attorney; now, ſuppoſing ſhe had made a *leaſe* of lands *not in poſſeſſion*, ſuch *leaſe* would have been abſolutely void, neither ſhall a *leaſe without rent reſerved* be good to charge the plaintiff, who is the remainder-man. Beſides, Sir *Walter Baggott* (the now plaintiff) is a purchaſer of this eſtate under the ſaid ſettlement, and is *heir at law* both to Sir *Edward* and the Lady, to whom this power was reſerved; and all powers given to tenants for *life* ſhould be ſtrictly conſtrued, becauſe they make the eſtate to continue as a charge on thoſe in remainder; therefore the words, viz. *to make leaſes*, &c. *at ſuch yearly rents, or more, as the ſame were then let*, muſt reſtrain this power to make *leaſes* only of ſuch lands which *were let at that time*.

It was argued for the defendant, that this was a *good leaſe*, and was warranted by the power, which is for the tenant in poſſeſſion to make *leaſes of all or any part of the lands compriſed in the indenture or fine*, &c.

Now, if the power had reſted there, this *leaſe* had been certainly good, and nothing could be objected to make it otherwiſe; but it had been ſaid, that the ſubſequent words, viz. *to make leaſes at ſuch yearly rents as the ſame were let at that time*, reſtrains this power to lands which were then let, and this capital meſſuage being never let, this power could never extend to it.

But theſe ſubſequent words are only explanatory of the *firſt* part of the ſentence, *viz.* that the lands uſually let may be *leaſed* at the uſual rent; now, by the *firſt* part of the *proviſo*, the tenant in poſſeſſion had power to make *leaſes* of all or any part of the lands compriſed in the ſettlement; and the ſubſequent part of the clauſe ſhall not controul that power without negative words, and there are no ſuch words in this caſe

Beſides, this power is reſerved to Lady *Baggott*, who had the inheritance of theſe lands, and from whom all the eſtates in the ſettlement moved; and it is not a power ſuperadded to the eſtate of a third perſon, ſo ſhould have a very favourable conſtruction.

As to Lord *Mountjoy's* caſe, there are ſome points reſolved, which have ſince been denied to be law; and in 2 *Roll. Abr.* 262. there is a contrary reſolution, but the caſe of *Walker* v. *Wakeman*, 1 *Vent.* 294. is full in point.

Now, as to the conſtruction of powers, it is various, according to the intent of the perſons by whom they were created, for ſometimes they are conſtrued liberally, and ſometimes very ſtrictly; but the power in the principal caſe being reſerved to her who had the inheritance of the eſtate originally before the ſettlement was made, is part of her old domain; and where the execution of ſuch a power is agreeable to the intention of the donor, and conſiſtent with his will at the time it was created, it muſt have a very liberal and favourable conſtruction; and this was the concurrent opinion of the *Court of Chancery* laſt term, in the caſe of *Lord and Lady Coventry*.

To which it was anſwered, that it is not material whether the eſtate moved from Lady *Baggott*, as being her inheritance before this ſettlement was made, becauſe the court will judge of this power as it appears on the face of the ſettlement.

It is true, there are no negative words ſimply in the ſubſequent part of this clauſe to controul the power given in the precedent part; but there are reſtrictive words, which imply a negative, and reſtrain the tenant from ever charging the reverſioner.

It is to be obſerved, that Lord Chief Juſtice *Vaughan*, in delivering the opinion of the court in a caſe ſtated by him, ſaid, that where a power is given to make *leaſes* of lands for *twenty-one years*, reſerving the rents which were thereon reſerved at the time of making the *deed*, that in ſuch caſe the lands *demiſeable* by that power muſt be lands then in *leaſe* on which ſome rent is reſerved; and the court were unanimouſly of that opinion for the plaintiff in this caſe. *Vide Mod. Rep. vol.* 8. *p.* 249.

Trinity, 10 *Geo. Salter* v. *Groſvenor.*

See this caſe fully ſtated in page 297 of this work, under the head *Corporations*.

Trinity, 12 *Geo. Frontin* v. *Small.*

See this caſe fully ſtated in page 146 of this work, under the head *Attorney*.

Michaelmas, 12 *Geo. Ryley* v. *Hicks.*

The plaintiff declared, that on the 24th of *February*, 1723, ſhe demiſed to the defendant a chamber, cellar, and half a ſhop, *to hold* from *Lady-day* then next, for a quarter of a year, and ſo from quarter to quarter, ſo long as both parties ſhould pleaſe, at 5 *l. per* quarter.

It was objected, that this being to commence at a future day was but a *leaſe at will*, ſince the ſtatute of *frauds*. The Chief Juſtice at firſt thought it a good objection, but on further conſideration he was of opinion, that the exception was not confined to *leaſes* that were to commence from the time of making, but was general as to all *leaſes* that were not to hold for above *three years* from the making. So the plaintiff had a judgment. *Vide Strange, vol.* 1. *p.* 651.

Hilary, 18 *Geo.* 2. *Lekeux* v. *Naſh.*

See this caſe fully ſtated in page 498 of this work, under the head *Fraud*.

Hilary, 30 *Geo.* 2. *Taylor on the Demiſe of Atkins, Eſq;* v. *Horde, and others.*

Adjudged, That there are two methods of *leaſing*, in common uſe in this kingdom, *viz.* at the beſt rent; and on fines; which, as the lives and *leaſes* drop, are conſidered among the annual profits. A *leaſe* is defined to be a contract between landlord and tenant, by which both are bound in *mutual* ſtipulations. *Vide Bur. vol.* 1. *p.* 121.

Trinity, 33 & 34 *Geo.* 2. *Ferguſon and Wife* v. *Corniſh.*

On a demurrer to the declaration in this cauſe, being an action of *covenant* on an indenture of *leaſe*, aſſigning a breach in the non-payment of rent.

The queſtion before the court on arguing this demurrer was, whether the plaintiffs have made a *good aſſignment* of a breach in non-payment of rent, ſuppoſed to have become due on this *leaſe*.

The defendant's council made *three objections* to the *leaſe*, but the matter turned on the firſt; which was, whether the covenant therein is a *relative* covenant: it being to pay *for and during* a term of 7, 14, or 21 years; but if no term was ever granted, the covenant fails. He argued, that no term was created by this indenture: for it is void for uncertainty on the authority of the *two* following caſes. *Plowd.* 273. *Say* v. *Smith* and *Fuller*, proves, "That every contract ſufficient to "make a *leaſe* for years, ought to have *certainty* in "*three* limitations; namely, the *commencement*, *con*"*tinuance*, and *end* of the term." 6 *Co. Rep.* 35. *The Biſhop of Bath's Caſe* lay it down as a *maxim*:" That the certainty of *continuance*, "is to be intended, either "where the term is made certain by an expreſs enu"meration of years: or by *reference to certainty*; or "by *reducing* it to certainty, by matter *ex poſt facto* "i. e. *done after the fact*; or by *conſtruction in law* by "expreſs limitation."

Therefore the *habendum* in this *leaſe* is *void* for *uncertainty*. It is a demiſe *to hold* from *Mich.* &c. for the term, of 7, 14, or 21 years, *as the leſſee ſhall think proper*.

If the *leſſee* ſhould not elect, the *leaſe* could never commence, at leaſt, the *continuance* of it is quite *uncertain*. It is not (as *leaſes* are uſually made) a *leaſe* for 21 years certain, covenanted to be defeaſible at the election of the *leſſee*; nor is it made certain by any reference to a thing which has certainty at the time of the *leaſe* made; nor is there any *ex poſt facto* act to be done, or averred to have been done; (and the leſſee's entry determines nothing; it can be no more than *evidence* even after 7 years poſſeſſion;) nor can here be any *conſtruction of law*, by *expreſs* limitation.

Lord *Mansfield*. The *leſſee* has certainly *entered*, and continues in *poſſeſſion*: and it is as certain that he *muſt pay the rent*.

It is undoubtedly a *leaſe* for 7 years; (whatever may be the validity of it as to the other *two* eventual terms of 14 and 21 years,) and the breach is aſſigned for non-payment of rent incurred *within the firſt* 7 *years*.

Per curiam. Let the plaintiff have judgment. *Vide Bur. vol.* 2. *p.* 1032.

Trinity, 1 *Geo.* 3. *John Enys, Eſq;* v. *Iſaac Donnithorne Executor of Nicholas Donnithorne.*

See this caſe fully ſtated in page 326 of this work, under the head *Covenant*.

Trinity, 4 *Geo.* 3. *Harker and others* v. *Birkbeck and others.*

Adjudged, That a *leaſe* cannot be given in evidence without being ſtamped. *Vide Bur. vol.* 3. *p.* 1553.

Michaelmas, 4 *Geo.* 3. *Right on the Demiſe of Francis Baſſet, Eſq;* v. *Thomas and another.*

Adjudged, That a covenant "to ſtand ſeiſed" entered into by the owner, is a *leaſe*. *Vide Bur. vol.* 3. *p.* 1446.

Michaelmas, 4 *Geo.* 3. *The ſame* v. *The ſame.*

Adjudged, That a writing, letting, or ſetting a liberty to dig for lead ore, during the whole of a grantor's term, is *no leaſe*, becauſe nothing is reſerved by ſuch writing to the grantor. *Vide Bur. vol.* 3. *p.* 1557.

Legacy.

Michaelmas, 2 *Ann. Ewer* v. *Jones.*

Holt, Chief Juſtice, held clearly, that a deviſee may maintain an action at *common law* againſt a ter-tertant for a *legacy* deviſed out of land; for where a ſtatute, as the ſtatute of wills, gives a right, the party by conſequence, ſhall have an action at law to recover it. *Vide Salk. vol.* 1. *p.* 415.

Michaelmas, 10 *Ann.* *D'aeth* v. *Baux.*

See this caſe fully ſtated in page 212 of this work, under the head *Baron and Feme.*

Eaſter, 9 *Geo.* *Goodright* v. *Opie.*

In *ejectment*, on *not guilty* pleaded, the jury found the defendant *not guilty* as to part, and as to the other part, there was a ſpecial verdict, the ſubſtance whereof was as follows:

The teſtator being ſeiſed in *fee* of ſeveral lands, did, in the year 1705, deviſe all his ſaid lands to *five perſons*, (namihg them) and *to their heirs as tenants in common*, that *one* of the ſaid deviſees died *two* years before the teſtator, who by another clauſe in the ſaid will, deviſed all his other meſſuages, lands, *&c.* not therein before given, deviſed, or bequeathed, and all his money, houſehold goods, plate, rings, *&c.* and all his eſtates real and perſonal whatſoever, of what nature or kind ſoever, to his *two* neices *M. Buce* and *M. Opie*, their heirs, executors and adminiſtrators; that the teſtator died without making diſpoſition of the ſaid *fifth part* of his lands, other than by his laſt will aforeſaid.

The queſtion was, whether the ſame ſhould deſcend to the heir at law of the teſtator, as not being diſpoſed by him in his life, becauſe the deviſee *died before him*, or whether it ſhould paſs to *B.* and *C.* as *reſiduary legatees* by the latter clauſe of the will, as an eſtate not before diſpoſed of by the teſtator.

Per curiam. An executor has not the ſame right to the perſonal eſtate, as the heir at law has to lands, becauſe an executor is no more than a truſtee made by the teſtator, but an heir is to ſit in the ſeat of his anceſtor.

But as to the principal matter, if a particular eſtate for life had been deviſed to *J. Paine* (who died) remainder over, ſuch a remainder had been good, and ſo is *Perkins* 108 *b.* 109 *a.* and ſo ſhould this; and there is no objection againſt it, but that it did not appear in the will, that the teſtator had any thing to diſpoſe of, he having deviſed all his lands before by the firſt clauſe in his will, to *five* perſons and their heirs. No judgment was given. *Vide Mod Rep. vol.* 8. *p.* 124.

Trinity, 9 *Geo.* *Hinton* v. *Parker.*

On a *prohibition* the caſe was, the widow of the teſtator exhibited an *inventory* of his goods in the *prerogative court*; and thereon complaint was made by a *legatee*, that ſeveral goods of which the teſtator died (naming them) were left out of this inventory, and an account was demanded to be given what became of thoſe goods.

The defendant pleaded, that the ſaid goods were diſpoſed of by the teſtator in his life-time, and by his leave; and on this plea the *ſpiritual court* gave coſts, for that it was a confeſſion of more aſſets than were in the inventory.

Whereon the defendant now moved for a *prohibition*, on a ſuggeſtion, that the court proceeded to falſify an inventory, which they had not power to do, becauſe by exhibiting thereof, their juriſdiction was determined.

The court were of opinion, that the *ſpiritual court* could not falſify an inventory at the ſuit of a creditor, but at the ſuit of a legatee they might. *Vide Mod. Rep. vol.* 8. *p.* 168.

Trinity, 13 *Geo.* *Thomas* v. *Batty.*

See this caſe fully ſtated in page 388 of this work, under the head *Eccleſiaſtical Matters, &c.*

Hilary, 30 *Geo.* 2. *Goſs* v. *Nelſon.*

Adjudged, That *legacies* are of a different nature; and they are determined by different rules of law: they are directions to the executor to pay; and in *legacies* there is a known diſtinction between the time being annexed to the *ſubſtance* of the gift, or to the payment. If complete words of gift direct the executor to pay; the other words only *fix the time* of ſuch payment; and then the *legacy* veſts, and is tranſmiſſible, though the *legatee* ſhould die before the day of payment. As a *legacy* given to be paid at *twenty-one*, but if the time is annexed to the *ſubſtance* of the gift, as a *legacy*, "*if* or *where*," he ſhall attain *twenty-one* years, it will not veſt before that contingency happens. *Vide Bur. vol.* 1. *p.* 327.

Eaſter, 30 *Geo.* 2. *Hope on the Demiſe of Brown and Wife* v. *Taylor.*

Adjudged, That the word, "*legacies*," does extend to lands, as well as to monies given by a teſtator. *Vide Bur. vol.* 1. *p.* 272.

See **Wills.**

Libel.

Michaelmas, 5 *W.* & *M.* *Cropp* v. *Tilney.* Error.

On a *writ of error* brought on a judgment given in *C. B.* in an action on the *caſe*, wherein the plaintiff declared, that he ſtood to be elected member of parliament, and that the defendant cauſed a *libel* to be printed of him, with theſe words as ſpoken by the plaintiff, *viz.* there is a war with *France*, of which I can ſee no end, unleſs the young gentleman on the other ſide of the water (meaning the Prince *Charles*) be reſtored, whereby he loſt his election *to the damage, &c.*

It was inſiſted, that an *innuendo* cannot beget an action, nor make that certain which was uncertain before, and that here was no ſcandal; and if ſo, this was not a *libel*.

Holt, Chief Juſtice. Scandalous matter is not neceſſary to make a *libel*, it is enough if the defendant induces an ill opinion to be had of the plaintiff, or to make him contemptible and ridiculous; as for inſtance, an action was brought by the huſband for riding *Skimmington*, and adjudged that it lay, becauſe it made him ridiculous, and expoſed him. Every man underſtands what is meant by *the young gentleman on the other ſide of the water*; if the words are falſe, the defendants may juſtify in an action, but not in an indictment. *Vide Salk. vol.* 3. *p.* 225.

The King v. *Pain.*

Holt, Chief Juſtice. On an information for a *libel*, there muſt be *fourteen* days notice of trial, and this notice of trial, is ſufficient for him to appear; and if he does not, the recognizance muſt be eſtreated, though on ſuch recognizance to appear *from day to day*, the party muſt have notice to appear (unleſs in the ſaid caſe) except the *firſt* and laſt day of the term, when they muſt appear, or the recognizance is forfeited. *Vide Forteſcue, p.* 357.

Hilary, 10 *W.* 3. *The King* v. *Bear or Beere.*

An indictment for making, writing, compoſing, and collecting ſeveral *libels*, *in one of which was contained according to the tenor and effect following*, &c. after a verdict this was held good, for *according to tenor* imports the ſame words; for *tenor* is a tranſcript, which it cannot be if it differs from the *libel*; if it had been *to the effect following*, it would not do, for that might import an *identity* in ſenſe, but not in words. *Vide Salk. vol.* 2. *p.* 417. *Ibid. vol.* 3. *p.* 226. *Raym. vol.* 1. *p.* 414. *Mod. Rep. vol.* 12. *p.* 218.

Trinity, 11 *W.* 3. *The King* v. *Alme and Nott.*

On an indictment for a *libel* againſt ſeveral ſubjects, *&c.* to the jury, unknown.

Per curiam. Where a *writing* which inveighs againſt mankind in general, or againſt a particular order of men; as for inſtance, men of the gown, this is no *li-*

bel, but it muſt deſcend to particulars and individuals to make it a *libel*. *Vide Salk. vol.* 3. *p.* 224.

Trinity, 11 *W.* 3. *The King* v. *Orme and Nutt*.

On a *certiorari* brought to remove an indictment for a *libel* at the *Old Bailey* for making, printing, and publiſhing, a *falſe and ſcandalous libel* againſt divers good ſubjects of the King to the jurors unknown, to the intent and purpoſe to defame the ſaid ſubjects of the King to other ſubjects of the King to the jurors *known, and to be known*, &c. wherein the defendants were found *guilty*. The court was moved in arreſt of judgment, that this *libel* did not appear to be prejudicial to any perſon, for the jurors did not know the perſons who were affected by the *libel*; therefore they could not properly ſay that the matter was falſe and ſcandalous, when they did not know the perſons of whom it was ſpoken; nor could they ſay that any perſon was defamed by it. Wherefore judgment was ſtaid until, *&c.* *Vide Raym. vol.* 1. *p.* 486.

Eaſter, 12 *W.* 3. *The King* v. *Saliſbury*.

Holt, Chief Juſtice. If a man prefers a ſcandalous petition to the houſe of Lords, or makes an *affidavit* containing a *ſcandalous libel* againſt *J. S.* in this court, a man cannot juſtify the publication of this, but it will be an offence indictable, becauſe it tends to a breach of the peace: and ſuch an indictment was denied to be quaſhed. *Vide Raym. vol.* 1. *p.* 341.

Trinity, 5 *Ann.* *The Queen* v. *Broun*.

An information was brought to have judgment for a *libel*, called *The Country Parſon's Advice to the Lord-Keeper*. The judgment was regularly ſigned, but the defendant did not move in arreſt of judgment within *four days*, and the court doubted, this being a criminal caſe, whether they could hear counſel ſpeak to this point. But afterwards, the Attorney General conſented they ſhould take their exceptions.

It was excepted, that this did not import a ſcandal, but in their natural ſignification carry a credit, *as to be wiſe as Somerſet*, &c. Suppoſe an indictment for a *nuiſance*, which in itſelf is ſo, it is enough to ſay ſo generally; but if it is only a nuiſance, as it is accompanied with circumſtances, there it ought to be particularly ſet out; as for building an inn; or to build an inn *to the common nuiſance*, is not good, *&c.* 2 *Roll. Rep.* 345. So here the manner of ſpeaking ought to be ſet out.

Holt, Chief Juſtice. An information will lie for ſpeaking ironically. And the Attorney General ſaid it was laid to be wrote *ironically*, and he ought to have ſhewed at the trial that he did not intend to ſcandalize them; and the jury are judges *with what intent* this was done. Accordingly the defendant was adjudged to ſtand in the pillory, and fined *forty merks*. *Vide Mod. Rep. vol.* 11. *p.* 86.

Michaelmas, 5 *Ann.* *Anonymous*.

See this caſe fully ſtated in page 36 of this work, under the head *Actions*.

Michaelmas, 5 *Ann.* *The Queen* v. *Drake*.

An information brought againſt the defendant ſet forth, that he being evilly diſpoſed, *&c.* did make a libel, intitled, *Mercurius*, containing divers ſcandalous matters, according to the tenor following, and ſo ſet forth ſome *paragraphs*, and in one of them was the word *nec* inſtead of *non*, ſo that it was not literally the ſame as in the libel; however, it did not alter the ſenſe; but on *not guilty* pleaded, this variance being perceived at the trial, the council for the defendant inſiſted, that it might be found ſpecially, which was done, and afterwards, on arguing the ſpecial verdict, judgment was given for the defendant.

It was objected againſt him, that this variance was immaterial, and that in every action for words, the plaintiff uſually declares for ſpeaking theſe *following Engliſh words*; but it is not neceſſary to prove every word; therefore to make every literal omiſſion or variation fatal, would be to make this action impracticable.

Per curiam. The *tenor* is the tranſcript of the copy of ſome original, to which it may be compared, and therefore there can be no *tenor* of words ſpoken, becauſe there is no written original; but there may be *tenor* of writing, which word always imports a true copy of the thing written, and conſiſts in identity.

Holt, Chief Juſtice. A libel may be deſcribed either by the ſenſe, or by the words, and therefore an information charging that the defendant made a writing, containing ſuch words, is good, and in ſuch caſe an exact niceneſs is not required, becauſe it is only a deſcription of the ſenſe and ſubſtance of the *libel*. But an information charging the defendant with making a writing *according to the tenor following*, there the *written libel*, and that ſet forth in the information muſt exactly agree, becauſe every word in the information is a mark of deſcription of the very *libel itſelf*.

Words are tranſient, and vaniſh in the air as ſoon as ſpoken, and there can be no *tenor* of them, as has been already obſerved, and therefore an identity is not required, and though the jury find ſome omiſſions, it will be ſufficient, if ſome be proved; and in ſuch caſe, the plaintiff ſhall recover; but when a thing is written, though every omiſſion of a letter may not make a variance, yet if ſuch omiſſion makes a word of another ſignification it is fatal. *Vide Salk. vol.* 3. *p.* 225.

Michaelmas, 6 *Ann.* *The Queen* v. *Rudd or Read*.

See this caſe fully ſtated in page 535 of this work, under the head *Indictment*.

Michaelmas, 7 *Ann.* *The Queen* v. *Lane*.

See this caſe fully ſtated in page 373 of this work, under the head *Disfranchiſement*.

Trinity, 10 *Ann.* *The Queen* v. *Derby*.

See this caſe fully ſtated in page 177 of this work, under the head *Bail*.

Eaſter, 7 *Geo.* *The Mayor of Northampton's Caſe*.

He ſent Lord *Hallifax* a licence to keep a public houſe, which the court ſaid was a *libel* in the caſe of a perſon of his quality, and granted an information for it. *Vide Stra. vol.* 1. *p.* 422.

Hilary, 8 *Geo.* *The King* v. *Bickerton*.

See this caſe fully ſtated in page 557 of this work, under the head *Information*.

Eaſter, 9 *Geo.* *The King* v. *Wiatt*.

See this caſe fully ſtated in page 135 of this work, under the head *Attachment*.

Eaſter, 9 *Geo.* *The King* v. *Earberry*.

See this caſe fully ſtated in page 179 of this work, under the head *Bail*.

Eaſter, 9 *Geo.* *The King* v. *Middleton*.

The court was moved for an attachment againſt the defendant for writing a *libel* againſt a Doctor of divinity in the Univerſity of *Cambridge*, the *libel* was contained in his preface to a *Latin* book about the library of the Univerſity, dedicated to Dr. *Snape*, then Vice Chancellor; he came into court voluntarily, and confeſſed that he was the author, and it was ſo recorded, and he was fined 50*l.* and ordered to find ſureties for his good behaviour. This was an honourable action in Dr. *Middleton*; for the firſt motion was made againſt the Bookſeller for publiſhing the book, but he was excuſed, on his getting the Doctor to confeſs that he was the author, as above. *Vide Forteſcue, p.* 201.

Michaelmas, 11 *Geo. The King* v. *Brereton.*

See this caſe fully ſtated in page 558 of this work, under the head *Information.*

Michaelmas, 1 *Geo.* 2. *The King* v. *Curl.*

An information being exhibited againſt the defendant for publiſhing an obſcene book, of which he was found *guilty*; his council moved the court in arreſt of judgment, for that, though the defendant may be puniſhable for this in the *Spiritual Courts*, as an offence *againſt good morals*, yet it cannot be a *libel* for which he is puniſhable in the *Temporal Court.* *Libellus* is a derivative from the word *liber*, and it is *libellus* from its being a book, and not from the matter of its contents.

Raymond, Chief Juſtice. I think this is a caſe of very great conſequence, tho' if it was not for the caſe of *The Queen* v. *Read*, I ſhould make no great difficulty of it. Certainly the *Spiritual Court* has nothing to do with it, if in writing; and if it reflects on religion, virtue, or morality, if it tends to diſturb the civil order of ſociety, I think it is a temporal offence. I do not think *libellus* is always to be taken as a technical word. The court were of opinion that it was a temporal offence: therefore they gave judgment for the King, and the defendant was afterwards ſet in the pillory. *Vide Stra. vol.* 2. *p.* 788.

Hilary, 2 *Geo.* 2. *The King* v. *Elizabeth Nutt.*

On an information for publiſhing a *treaſonable libel*, on the evidence it appeared, that the defendant kept a pamphlet ſhop, and that this *libel* was ſold in the ſaid ſhop, by the defendant's ſervant, for the defendant's uſe and account, in her abſence, and that ſhe did not know the contents of it, nor of its coming in or going out.

Raymond, Chief Juſtice. The defendant is *guilty* of publiſhing this *libel*, the ſhop being kept under her authority and direction, and it would be of very dangerous conſequence if the law was otherwiſe: and it has been ſo ruled in a great many inſtances. *Vide Fitz-Gibbons, p.* 47.

Eaſter, 2 *Geo.* 2. *The King* v. *Woolſton.*

The defendant was convicted on *four* informations for his blaſphemous diſcourſes on the *miracles of our Saviour.* And attempting to move in arreſt of judgment, the court declared they would not ſuffer it to be debated, whether to write againſt Chriſtianity in general was not an offence puniſhable in the temporal courts at *common law*; it having been ſettled ſo to be in *Taylor's* caſe, 1 *Vent.* 293. 3 *Keb.* 607. 621. and in the caſe of *The King* v. *Hall, Hilary* 7 *Geo.* They deſired it might be taken notice of, that they laid their ſtreſs on the word *general*, and did not intend to include diſputes between learned men on particular controverted points. The next term he was brought up, and fined 25 *l.* for each of his *four* diſcourſes, and ſentenced to ſuffer a year's impriſonment, and to enter into a recognizance for his good behaviour during his life; himſelf in 3000 *l.* and 2000 *l.* by others. *Vide Stra. vol.* 2. *page* 834. *Fitz-Gibbons, p.* 64.

Eaſter, 2 *Geo.* 2. *The King* v. *Butcheler.*

In this caſe it was laid down at the bar, that in granting an information for a *libel*, the only thing to be examined by the court is, whether the paper publiſhed contains any *libellus matter*; for then the application muſt be left to the jury; the court anſwered, that this rule is not to be taken ſo extenſively; for where the application is merely indifferent, they would not grant an information, but there muſt be a ſeeming and apparent application to be made. *Vide Fitz-Gibbons, p.* 57.

Eaſter, 4 *Geo* 2. *Harman* v. *Delany.*

See this caſe fully ſtated in page 42 of this work, under the head *Actions.*

Eaſter, 5 *Geo.* 2. *Lowfield* v. *Bancroft, and others.*

After a verdict for the plaintiff in an action for a *libel*, the judgment was arreſted, becauſe it was not laid that the *libel* was of or concerning the plaintiff; and *Cro. Jac.* 126 was cited. *Vide Stra. vol.* 2. *p.* 934.

Trinity, 22 & 33 *Geo.* 2. *Aſtley, Bart.* v. *Young, Eſq.*

See this caſe fully ſtated in page 50 of this work, under the head *Actions.*

Limitation. (Statutes of)

Trinity, 1 *W.* & *M.* *Hall* v. *Wybourn.*

To a plea in *bar* of the *ſtatute of limitation*, the plaintiff replied, that the defendant was beyond ſea, and it was held no plea, for the plaintiff might either file his *original*, or *outlaw* him; and in one *Bynion's* caſe, it was held by *Bridgman*, Chief Juſtice, that though the courts of juſtice were ſhut up ſo as no *original* could be filed, yet this ſtatute would *bar* the action; becauſe the ſtatute is general, and muſt work on all caſes which are not exempted by the exception. *Vide Salk. vol.* 2. *p.* 420.

Trinity, 2 *W.* & *M.* *Budd* v. *Berkenhead.*

The defendant having pleaded the *ſtatute of limitation*, the plaintiff replied in avoidance, that he ſued out an *attachment* returnable *Michaelmas* term, 34 *Car.* 2. and that ſuch proceedings were had thereon, that the defendant in *Mich.* term, 2 *Jac.* 2. appeared, &c.

Per curiam. This pleading is not good, it muſt be ſhewn that there were continuances till the time of declaring, and a *taliter proceſſum* is not ſufficient to ſhew a matter before the declaration, though it has been for matters after. *Vide Salk. vol.* 2. *p.* 420.

Michaelmas, 3 *W.* & *M.* *Coventry* v. *Aſtley.*

In an action of *treſpaſs* brought for impriſoning the plaintiff, and detaining him in priſon from 32 *Car.* 2. till the 3d day of *April*, 4 *Jac.* 2. The defendant pleaded as to all, till 34 *Car.* 2. ſuch a day, *not guilty within four years*; and as to the reſt, a *plaint* and a *capias* iſſued: to which the plaintiff demurred.

Per curiam. Though the impriſonment be complained of as one continued impriſonment, yet the defendant may divide the time, and plead the ſtatute as to part, and the plaintiff may reply the continuance; therefore as to this, judgment was given againſt the plaintiff on his demurrer, but for him as to the reſt; becauſe the *capias* was awarded by the court *officially*, and it did not appear that the defendant meddled in it. *Vide Salk. vol.* 2. *p.* 420.

Eaſter, 6 *W.* & *M.* *Cary and Wife* v. *Stephenſon.*

H. was indebted to *A.* who died, *B.* received the money, and afterwards the plaintiff's wife took out letters of adminiſtration to *A.* and within *ſix years* after the letters of adminiſtration, but not within *ſix years* after the receipt of the money, brought an *indeb. aſſum.* againſt *B.* as for money had and received to the uſe of him and his wife; the defendant pleaded *that he did not promiſe within ſix years*; the plaintiff replied the ſpecial matter; and on demurrer, the court were of opinion, that the ſtatute could be no *bar*, becauſe the plaintiff's title commenced by taking out letters of adminiſtration, and this was not a cauſe of action in the inteſtate; but they thought it hard to make this ſo much money received to the plaintiff's uſe, when at the time of this receipt he was not adminiſtrator.

Note. There was a faulty replication, and the court adviſed the plaintiff to bring a new action, and ſo the matter went off. *Vide Salk. vol.* 2. *p.* 124.

Eaſter 6, *or Hilary* 9 *W.* 3. *Jones* v. *Morley*.

Adjudged in this caſe, (which ſee fully ſtated in page 204 of this work, under the head *Baron and Feme)* that the *ſtatute of limitation* ſhall not be taken by conſtruction, to *bar* a man of his action, unleſs it be expreſsly found how the poſſeſſion has been. *Vide Raym. vol.* 1. *p.* 287. *Mod. Rep. vol.* 4. *p.* 261.

Hilary, 8 & 9 *W.* 3. *Draper* v. *Glaſſop*.

Holt, Chief Juſtice. If the defendant pleads *non aſſumpſit* he cannot give in evidence the *ſtatute of limitation*, becauſe the *aſſumpſit* goes to the *præter perfect tenſe*; but on *nil debet* pleaded, the ſtatute is good evidence, becauſe the iſſue is joined by *words of the preſent tenſe*, and without doubt *nil debet* by virtue of the ſtatute; and it is no debt at this time, tho' it was a debt. *Vide Raym. vol.* 1. *p.* 153.

Hilary, 10 *W.* 3. *Heyling* v. *Haſtings*.

See this caſe fully ſtated in page 23 of this work, under the head *Actions*.

Michaelmas, 10 *W.* 3. *Anonymous*.

Adjudged, That a *latitat*, when within the *ſix years*, and returnable after, will prevent the *ſtatute of limitation*. *Vide Raym. vol.* 1. *p.* 383.

Michaelmas, 10 *W.* 3. *Heyward or Hayward*, v. *Kinſey*. Error.

See this caſe fully ſtated in pages 358 and 370 of this work, under the heads *Day, Date, and Delivery*, and *Diſcontinuance*.

At the Summer Aſſizes at Lincoln, 11 *W.* 3. *Stockes or Stocker*, v. *Berry or Berny*.

Holt, Chief Juſtice. If *A.* has had poſſeſſion of lands for *twenty years* without interruption, and then *B.* gets poſſeſſion, on which *A.* is put to his *ejectment*, though *A.* is plaintiff, yet the poſſeſſion of *twenty years* ſhall be a good title in him, as if he had ſtill been in poſſeſſion.

The ſame point was ruled by *Holt*, Chief Juſtice, at *Lent aſſizes* for *Bucks*, 12 *W.* 3. becauſe a poſſeſſion for *twenty years* is like a deſcent, which *bars* the entry, and gives a right of poſſeſſion, which is ſufficient to maintain an *ejectment*. *Vide Salk. vol.* 2. *p.* 421. *Raym. vol.* 1. *p.* 741.

Hilary, 12 *W.* 3. *Collins* v. *Denning or Benning*.

On an *aſſumpſit*, in which the plaintiff declared, that the defendant being indebted to him (the plaintiff) in 20*l.* promiſed to pay it *on demand*, and that he (the plaintiff) had on ſuch a day and place demanded it, but the defendant refuſed to pay it; the defendant pleaded *he did not promiſe within ſix years*, &c. and on a demurrer to this plea it was inſiſted, that it was ill, for it ſhould not be *non aſſumpſit* but that *no action has accrued within ſix years*, &c. becauſe the duty ariſes from the *demand* and not from the *promiſe:* but this objection was not allowed, for payment on demand is no more than what is implied by law. *Vide Salk. vol.* 3. *p.* 227. *Mod. Rep. vol.* 12. *p.* 444.

Eaſter, 12 *W.* 3. *Morſe or Mois* v. *Braxton or Bruerton*. Error.

On an action on the *caſe*, in which the plaintiff laid his action in *Norfolk*, the defendant pleaded the *ſtatute of limitation*; the plaintiff replied an *original* taken out in *Suffolk*, on which they were at iſſue, and the plaintiff had judgment in *C. B.* But on a *writ of error* being brought in this court, that judgment was arreſted, becauſe an *original* in *one* county cannot maintain an action in another. *Vide Salk. vol.* 3. *p.* 228.

Maidſtone Lent Aſſizes, 13 *W.* 3. *Hatcher* v. *Fineaux*.

W. D. being poſſeſſed of a term for *one thouſand years*, aſſigned it to *R. P.* as a collateral ſecurity againſt a bond in which *P.* was bound jointly with *D.* in 1655. *P.* died, leaving *R. P.* his ſon his executor, *D.* died, leaving *K. D.* his wife his executor, and *K. D.* his daughter, his heir. In 1674 *R. P.* executor of *R. P.* and *K. D.* executrix of *W. D.* and *K. D.* the heireſs of *W. D.* aſſigned this term of *one thouſand years* to *J. H.* with a condition that on payment of 200*l.* the conſideration of the ſaid aſſignment, by *K. D.* the executrix, &c. *K. D.* received the profits till 1691, and paid the intereſt to the ſame time. And an *ejectment* being brought by the executor of *J. H.*

Holt, Chief Juſtice, *adjudged*, 1ſt. That he was not barred by the *ſtatute of limitation*, becauſe the ſtatute did not prejudice at the time of the aſſignment, there being but *nineteen years* elapſed; and then the joining of him in the aſſignment, who had the title to take advantage of the ſtatute, gives a new title.

2dly. If a man makes a mortgage for a collateral ſecurity, although the mortgage is not in poſſeſſion for *twenty years* and more; yet if the intereſt be paid on the bond according to the agreement of the parties, it ſhall not be barred by the *ſtatute of limitation*. *Vide Raym. vol.* 1. *p.* 740.

Hilary, 1 *Ann.* *Hunt* v. *Burn*.

The queſtion in this caſe was, whether it appeared by the verdict that the iſſue in *tail* was barred of his *writ of formedon* by *ſtat.* 21 *Jac.* 1.?

The court held, 1ſt. That the verdict was inſufficient; and that it ſhould have found that no *writ of formedon* was brought, elſe the court could not intend but that it was brought; for this is matter of *bar*, which ſhould be ſhewn on the defendant's part; and this act is not penned as the *ſtatute of fines*. It is enough in that caſe to find a fine, and you need not find that the party claimed or entered not, for that comes in by way of *proviſoe*; but here it is part of the body of the act.

2dly. They held, that ſuppoſing him *barred* of his *writ of formedon*, yet he is not thereby hindered to purſue his right of entry, which accrued to him by the death of the tenant for life; for this is a new right which he had not before: that where a man releaſes his right, he cannot purſue his action or remedy; but if a man has a right and ſeveral remedies, the diſcharge of one is not a diſcharge of the other; and that *ſtat.* 4 *H.* 7. enures and operates by way of *bar* to the right, which anſwers *Saul* v. *Clerk*'s caſe, *Jones* 210, 211. But *ſtat.* 21 *Jac.* 1. operates by way of *bar* to the remedy, and the word *right* there is right of entry. *Vide Salk. vol.* 2. *p.* 422.

Hilary, 1 *Ann:* *Reading* v. *Royſton, or Rawſterne*.

A perſon ſeiſed in *fee*, having iſſue *two* daughters, deviſed his lands to his grandſon by his eldeſt daughter in *fee*; the eldeſt daughter being dead at the time of the deviſe: the grandſon died without iſſue, and the heir of the grandſon being the heir on the part of the father, and the heir of the other co-parcener, entered into the land, and took the profit by moieties for *twenty years* together, thinking according to the opinion of Sir *Matthew Hale* in his younger years, (who was their council) that the deviſe was void for one moiety. Now the miſtake being diſcovered, the heir of the grandſon brought an *ejectment* againſt the heir of the other co-parcener; and on a ſpecial verdict found, it was objected in his behalf, that the deviſe was void as to one moiety; but this being over-ruled; it was then objected, that the bringing of this *ejectment* againſt the heir of the other co-parcener, for this moiety, admitted the plaintiff to be out of poſſeſſion for *twenty years*, and then he was *barred* by the *ſtatute of limitation*.

Per curiam. The *ſtatute of limitation* never runs againſt a man, but where he is actually *ouſted* or *diſſeiſed*; and true it is, one tenant in common may *diſſeiſe* another; but then it muſt be done by *actual diſſeiſin*, and not by the bare perception of the profits only; but here the difficulty is not ſo great; there is no tenancy in common in this caſe, for the heir of the grandſon has the whole by deviſe, and the other is a mere ſtranger; and where *two* men are in poſſeſſion, the law will adjudge it in him that has the right. A man may be a tenant in common by preſcription, yet he may not be a tenant in common by wrong; nor can a man be *diſſeiſed* of an undivided moiety; therefore the bringing the *ejectment* admits nothing; for if a man be ſeiſed of the whole, and makes a leaſe to another of a moiety undivided, and a ſtranger *ouſts* the leſſee, he muſt bring his *ejectment* of a moiety, and ſo if they be both *ouſted*, they muſt bring *ſeveral ejectments. Vide Salk. vol.* 2. *p.* 423. *Raym. vol.* 2. *p.* 829.

Eaſter, 1 *Ann. Atwood* v. *Burr.* Error.

See this caſe fully ſtated in page 370 of this work, under the head *Diſcontinuance.*

Eaſter, 1 *Ann. Wortley Montague* v. *Lord Sandwich.*

See this caſe fully ſtated in page 512 of this work, under the head *Heir.*

Eaſter, 1 *Ann. Green* v. *Rivett.*

On an *indebitatus aſſumpſit* laid ſeveral ways, the defendant pleaded *no action, becauſe the bill aforeſaid was exhibited on the* 29*th day of June, and not before, and that he for all the time within ſix years before the exhibiting the aforeſaid bill had not aſſumed,* &c. The plaintiff replied a *bill of Middleſex,* teſted, *&c.* returned the ſame day, whereon was returned, *he is not to be found,* and continuance entered to *Monday next after three weeks, &c.* to this it was demurred, and judgment given for the defendant; for there cannot be ſuch a *bill of Middleſex* as this, which is returnable the very day of its *teſte,* and the *ſtatute of limitation,* on which the ſecurity of all men depends, is to be favoured. *Vide Salk. vol.* 2. *p.* 421. *Mod. Rep. vol.* 7. *p.* 12.

Michaelmas, 1 *Ann. Gould* v. *Johnſon.* Error.

See this caſe fully ſtated in page 27 of this work, under the head *Actions.*

Eaſter, 2 *Ann. Brown* v. *Babbington.* Error.

On a *writ of error* brought on a judgment in the *C. B.* on an *indebitatus aſſumpſit* for 14 *l.* the queſtion was, whether a *clauſum fregit* in the *C. B.* will ſave the *ſtatutes of limitation.* The defendant in *error*'s council argued, that ſuppoſing the *clauſum fregit* was made out with intent to declare in another action, and was well continued till the time of declaring in the ſaid action; that will be a ſufficient proſecution within *ſtat.* 21 *Jac.* 1. *c.* 16. And though in this caſe the *clauſum fregit* was not continued, yet that will be aided by the verdict.

Holt, Chief Juſtice. This caſe is not like the caſe of *latitats* in this court; becauſe a *latitat* is an ancient proceſs of this court, and was a proceſs of this court at the time of making the *ſtatute of limitation*; and the uſe of them is only to bring in a man in cuſtody, and then they declare againſt him *in the cuſtody of the Marſhal of the Marſhalſea,* &c. But when a man is brought in by a *clauſum fregit* in the *C. B.* they do not declare againſt him *in the cuſtody of the Warden of the Fleet,* but on an original proper for the action. And this practice of the *clauſum fregit* in the *C. B.* is new, and they have another way to ſue there, *viz.* by *original*: but in this court a *latitat* in ſome actions is the only way to commence the ſuit. *North,* Chief Juſtice of the *C. B.* made a complaint of the writ of *latitat* in parliament, and the matter was thoroughly inveſtigated, but at laſt the *latitat* was approved of, as it is alſo by *ſtat.* 27 *Eliz. c.* 8. which gives a writ of error in the *Exchequer Chamber,* but excepts errors to be aſſigned for want of juriſdiction in this court. Now this being the proceſs of this court at the time of making the *ſtatute of limitation,* it muſt be underſtood to be compriſed within the meaning of the act. And he further ſaid, he imagined, that after the reverſal of the judgment in the caſe of *Kinſey* v. *Hayward* was affirmed in parliament, this point would never have been moved again. But here is a fault, *viz.* the plaintiff does not ſhew that the original was ever returned. Now if he ſues out a writ, and does not return it, that will not avoid the *ſtatute of limitation.* Accordingly the judgment which the plaintiff had obtained in the *C. B.* was reverſed. *Vide Raym. vol.* 2. *p.* 880.

Eaſter, 2 *Ann. Andrews* v. *Lynton.* Error.

See this caſe fully ſtated in page 412 of this work, under the head *Error.*

Michaelmas, 2 *Ann. Ewers* v. *Jones.*

On a *libel* exhibited in the *Admiralty court* by certain ſeamen againſt their owners for wages, the defendants pleaded the *ſtatute of limitation,* viz. *that it appeared by the libel,* that no ſuit was proſecuted for this matter *within ſix years,* whereas they ſhould have pleaded directly, that no ſuit had been brought *within ſix years* after the cauſe of action accrued; and if the ſtatute had been rightly pleaded, it would have been a *good bar.*

Holt, Chief Juſtice. Though the *ſtatute* does not extend to *maritime, ſpiritual,* or *equitable cauſes,* but only to *duties at common law,* yet mariners wages are a duty at *common law,* and if ſued for at *common law,* the *ſtatute* would have been a *good bar. Vide Salk. vol.* 3. *p.* 227. *Raym. vol.* 2. *p.* 934. *Mod. Rep. vol.* 6. *p.* 25.

Hilary, 3 *Ann. Green or Dean* v. *Crane.*

See this caſe fully ſtated in page 31 of this work, under the head *Actions.*

Hilary, 3 *Ann. Blackmore* v. *Tidderley.*

On an action of *treſpaſs* for an *aſſault* and *battery,* the defendant pleaded *not guilty within ſix years* by miſtake, and not according to the ſtatute, which is but *four years*: the plaintiff demurred, and after argument it was adjudged an ill plea; for if it be conſidered as at *common law,* there is no ſuch plea; if on the ſtatute, the act is not purſued, and the plaintiff can not take iſſue on it; for *that he is guilty within ſix years,* is an iſſue immaterial; becauſe it may be, the jury might find him *not guilty within four years,* but *guilty within ſix years.* Therefore judgment was given for the plaintiff. *Vide Salk. vol.* 2. *p.* 424. *Raym. vol.* 2. *page* 1099. *Mod. Rep. vol.* 6. *p.* 246.

Michaelmas, 4 *Ann. Hide* v. *Partridge.*

On a *libel* brought for mariners wages in the *Admiralty Court,* the defendant pleaded the *ſtatute of limitation, viz.* that no cauſe of action accrued within *ſix years next before the time mentioned in the libel*; and the plea was over-ruled there. And now on a motion for a *prohibition* it was urged, that mariners wages were ſuable in the *Admiralty courts* by indulgence only, and not of right; that at *common law* the ſtatute would be a good plea: on the other ſide it was ſaid, the ſtatute extended only to the *common law* courts; that it was not pleadable to a proceeding in the *ſpiritual court for violently laying hands on a clergyman*; a *prohibition* however was denied, becauſe the ſtatute was ill pleaded; but the plea was afterwards amended.

Holt, Chief Juſtice, ſaid, it was ſtrange that the ſame matter, well pleaded, ſhould be a defence in one court, and not in another. The *ſtatute of limitation* is a good plea in *Chancery*; it is true, it is no plea to a ſuit *for violently laying hands,* &c. but that is, becauſe the proceeding is *for reformation of manners,* and not for damages; and ſo it is at *common law,* it is no plea to an indictment for *treſpaſs,* otherwiſe in an action. *Adjourned. Vide Salk. vol.* 2. *p.* 426. *Ibid. vol.* 3. *page* 228. *Raym. vol.* 2. *p.* 1204.

Eaſter, 4 *Ann. Chievly* v. *Bond.*

An action on the *caſe* was brought on a promiſe made by the defendant to pay a bill of exchange drawn 14 *years* ſince.

The defendant pleaded the *ſtatute of limitations*, the words of which ſtatute are, that all actions of *treſpaſs*, &c. all actions of *accompt*, and on the *caſe*, (*other than ſuch actions which concern the trade of merchandize between merchant and merchant, their factors or ſervants*) ſhall be brought, &c.

The plaintiff replied, that the bill was a negotiable bill, and that it was on an *account between merchants*, &c.

The defendant demurred, and had judgment, becauſe the ſtatute excepts only *accounts which are current* between merchants, and not any that are ſtated; for if an action is brought againſt a drawer for value received, that is no account current, but a ſtated account. *Vide Mod. Rep. vol.* 4. *p.* 105.

Trinity, 4 *Ann.* *Page* v. *Hayward.*

See this caſe fully ſtated in page 271 of this work, under the head *Condition.*

Trinity, 6 *Ann.* *Hardwicke* v. *Gamball.*

See this caſe fully ſtated in page 272 of this work, under the head *Condition.*

Michaelmas, 6 *Ann.* *Matthews* v. *Phillips*

An action of *debt* was brought in the *Marſhalſea court*, after ſome proceedings there, the *ſix years* expired; the defendant ſued out an *hab. corp.* and removed the cauſe into this court, where the plaintiff declared *anew*, and the defendant pleaded, that the cauſe of action did not accrue within *ſix* years before the *teſte* of the *hab. corp.* and this was held to be a good plea, but that the plaintiff might reply the ſuit below, and have ſhewn that to have been within the *ſix* years; not that this ſuit was a continuance of the ſuit below; but that the plaintiff had rightfully and legally purſued his right; and it ſhould not be in the power of the defendant to defeat or hinder him of a remedy, without any *default*; as where a perſon brings an action before the expiration of *ſix* years, and dies before judgment, the *ſix* years being then expired, ſhall not prevent his executor from proſecuting the ſuit with effect. *Vide Salk. vol.* 2. *p.* 424.

9 *Ann.* *Williams* v. *Gunn.*

This caſe on evidence appeared to be thus: *B. Moye* the inteſtate, and one *Scarlett* were partners, who built a houſe for the defendant in the year 1693; afterwards the defendant failed, and came off by the ſtatute of compoſition. *Scarlett* dies, then *Moye* dies; adminiſtration was taken out by the plaintiff to *Moye*, who in the year 1708, ſent to the defendant to be paid his debt; the defendant acknowledged the debt, but inſiſted on it, that he ought to have the benefit of the ſtatute of the major and minor, by which he paid the reſt of his creditors only *two* ſhillings in the pound; and that therefore if the plaintiff would accept of *two* ſhillings in the pound as the reſt did, he would pay him. It was objected by the defendant's council, that this evidence was not ſufficient to take the plaintiff's debt out of the *ſtatute of limitation*.

Parker, Chief Juſtice, was of opinion, that there being a ſpecial promiſe laid in the declaration, it was neceſſary to prove the ſame, to prevent the operation of the ſtatute, and that a bare acknowledgment would not do; and ſo directed the jury to find for the plaintiff for 36 *s.* only, for which the promiſe was made. The defendant's council alledged, that this declaration was very oddly worded, for that the work was done by the inteſtate *B. Moye*, and the promiſe was ſaid to be made to the plaintiff without a new conſideration, which was ill; on which a verdict was found for the plaintiff, and the point reſerved. On further argument at another day, the Chief Juſtice held, that the declaration was rightly framed as to this caſe, and that if it had been otherwiſe, it would not have been good; for if the declaration had been of a promiſe made to the inteſtate, the evidence given would not have maintained the iſſue. The Chief Juſtice founded his judgment on the caſe of *Green* v. *Crane*, *Hilary* 3 *Ann.*

Another *exception* taken was, that the work being done by *Moye* and *Scarlett*, it ought to have been mentioned in the declaration that *Moye* ſurvived *Scarlett*, otherwiſe the plaintiff is not entitled to the debt. But it was over-ruled. *Vide Forteſcue*, *p.* 177.

Eaſter, 1 *Geo.* *Jaſſelyn or Joſceline* v. *Lacier or Laſſerre.* Error.

See this caſe fully ſtated in page 232 of this work, under the head *Bills of Exchange*, &c.

Eaſter, 9 *Geo.* *Holliſter* v. *Coulſon.*

The defendant pleaded, *That he did not promiſe within ſix years*, the plaintiff replied a *latitat* ſued out, and the court on demurrer held it well without ſhewing a *bill of Middleſex*. So judgment was given for the plaintiff. *Vide Strange*, *vol.* 1. *p.* 550.

Trinity, 9 *Geo.* *Grey* v. *Mendez.*

See this caſe fully ſtated in page 195 of this work, under the head *Bankrupts.*

Michaelmas, 9 *Geo.* *Holoway* v. *Thurſton.*

See this caſe fully ſtated in page 155 of this work, under the head *Averment.*

Trinity, 10 *Geo.* *The King* v. *The Pariſhioners of Wilby.*

On a motion to quaſh an order of ſettlement made by *two juſtices*, and which was confirmed on an appeal to the ſeſſions, the caſe appeared to be thus, *viz.* *Humphrey Carr* about *thirty* years laſt paſt, built a cottage in the pariſh of *B.* on the waſte of a manor belonging to the Earl of *Pembroke*, but without any licence or order ſo to do, and he enjoyed the ſame during his life, without any other right, and then died, leaving iſſue, *Elizabeth*, his only daughter and heir, who intermarried with *J. Darby*, who with his wife, *Elizabeth*, being ſeiſed of this cottage, ſold it to *J. Willy* for 30 *l.* and now the queſtion was, whether this marriage had gained *J. Darby* the huſband a ſettlement.

It was inſiſted, that it had not, becauſe the father of *Elizabeth*, the wife of this *Darby*, had no ſettlement there, for his entry was by diſſeiſin, which gains no ſettlement; and if the father had none, his daughter could not have any ſettlement there.

But the court were of another opinion, becauſe *thirty* years poſſeſſion is a good title againſt the Lord of a manor, by virtue of the *ſtatute of limitations*, if he ſhould bring an *ejectment* to recover the poſſeſſion.

Beſides, *Elizabeth*, the wife of *Darby*, and daughter of *H. Carr*, was in poſſeſſion by deſcent, which is a good title againſt any eſtreat the Lord might have at common law, and therefore her huſband gained a ſettlement by this marriage. *Vide Mod. Rep. vol.* 8. *p.* 287.

Michaelmas, 13 *Geo.* *Story* v. *Atkins.*

On an action on the *caſe* on ſeveral promiſes, the plaintiff declared on a promiſory note, dated the 25th of *March*, 1772, ſigned and ſubſcribed by the defendant, whereby he promiſed to pay the plaintiff or his order 12 *l.* 11 *s.* for value received, &c. there was alſo another count on an *indebitatus aſſumpſit* for 20 *l.* laid out by the plaintiff to the defendant's uſe, &c. damage 20 *l.* The defendant *as to the firſt promiſe and aſſumption in the declaration aforeſaid mentioned*, pleads in *bar*, *that for all the time within ſix years before the day of exhibiting the bill of him the ſaid plaintiff, the cauſe of action, as to the ſaid firſt promiſe and aſſumption, in the declaration aforeſaid mentioned, did not accrue to the ſaid* Joſeph *againſt the ſaid* Daniel, &c. And as to the *ſecond* and *third* promiſes in the declaration mentioned, the defendant pleaded *non aſſumpſit*, and iſſue was joined thereon.

And as to the defendant's plea to the *firſt* count, the plaintiff replied, and admitted, that the cauſe of action as to the *firſt* count did not ariſe within *ſix* years before his exhibiting his bill in this court, but that it aroſe on the 25th of *March*, 1720, and that on the 11th of *February*, 1725, in order to recover the money due to him on that promiſe, he levied his plaint in the ſheriff of *London*'s court in a *plea of treſpaſs on the caſe*, and avers, that according to the cuſtom of the aforeſaid city, he there declared againſt the defendant in an action on the *caſe*, and ſets forth his declaration; which was, *for that* the defendant ſuch a day was indebted to the plaintiff in 20 *l.* for divers ſums of money by the aforeſaid defendant, before that time due and owing to the plaintiff, which he promiſed to pay; then the plaintiff ſet forth, that the defendant hereon brought his writ of *hab. corp.* by virtue of which the ſaid plaint was removed into this court, and the plaintiff declared, againſt him *de novo*, and avers it to be *for the very ſame cauſe of action, for which he levied his plaint aforeſaid*, and then he averred, that the cauſe of action did not accrue within *ſix* years before his levying the ſaid plaint in the ſheriff's court, and therefore prays judgment, &c.

To this replication the defendant demurred, and ſhewed for cauſe, that it did not appear by the plaintiff's replication, that his bill againſt the defendant in this court was for the ſame cauſe of action, as that for which he levied his plaint in the court below, on which there was a joinder in demurrer.

Raymond, Chief Juſtice. The actions in the *two* courts are of ſuch a nature, that they may be averred to be the ſame; for *ſtat.* 3 & 4 *Ann*, only gives an additional remedy on promiſory notes, but does not take away the old one; and I think this note might have been given in evidence on an *indebitatus aſſumpſit*, for the note imports the drawer's having ſo much money of the other's in his hands; and though it may not perhaps be allowed in evidence in ſuch caſe as a promiſory note, without further proof of the conſideration; yet it may undoubtedly be given in evidence on an *indebitatus aſſumpſit*, as a paper or writing to prove the defendant's receipt of ſo much money from the plaintiff. *Hard's Caſe*, *Salk.* 23.

And as the *two* actions may therefore be averred to be the ſame, ſo I take the averment to be ſufficient and traverſable; and the averment is confined only to the *firſt* promiſe, which is ſingled out by the words *as to* in the replication, and cloſed as to the reſt.

As to the objection that is made againſt the declaration in the inferior court, I think it of no weight; for though the declaration ſhould be ill, yet if the plaint be regular, it is ſufficient to prevent the *ſtatute*.

Reynolds and *Probyn*, Juſtices, were of the ſame opinion.

Forteſcue, Juſtice, held ſtrongly, that the *two* actions were of ſo different a nature, that they could not be averred to be the ſame. He agreed, that the variance in the ſums did not prevent the averment of their being for the ſame cauſe; but he held ſtrongly, that ſince the *ſtatute*, a promiſory note could not be given in evidence on an *indeb. aſſump.* and cited the caſe put by *Hale*, Chief Juſtice. 1 *Vent.* 252.

In the other points he agreed with the reſt of the juſtices; and ſaid that the form of declaring in the court below was well enough, and that it had been ſo adjudged in the caſe of *Stephens* v. *Greenland* in this court, and that the caſes in 4 *Leon.* 105. was in point. Therefore judgment was given for the plaintiff. *Vide Strange*, *vol.* 2. *p.* 719. *Raym. vol* 2. *p.* 1427.

Michaelmas, 13 *Geo.* *Crokatt* v. *Jones.*

See this caſe fully ſtated in page 69 of this work, under the head *Amendment*.

Trinity, 2 & 3 *Geo.* 2. *Anonymous.*

In an action of *aſſumpſit*, the defendant pleaded *that he did not promiſe* within *ſix* years: the plaintiff replied, that he was beyond ſea till ſuch a time, after which he brought the preſent action at ſuch a day: to which the defendant demurred.

It was urged for the plaintiff, that tho' *aſſumpſit* be not within the letter of the *proviſoe* of the *ſtatute*, yet it is within the equity of it. *Treſpaſs* is expreſsly *excepted* and this action is in nature of a *treſpaſs*; *trover* is held to be within the equity, tho' not within the letter of the *proviſoe*. *Cro. Car.* 245. 246. and ſo is an *indebitatus aſſumpſit*. 2 *Saund.* 120, 121. 2 *Mod.* 71, 72, 73. 1 *Lutw.* 244. *Geary* v. *Coke.* And ſurely the makers of this *ſtatute* cannot be ſuppoſed to have intended to ſave actions for words, which are expreſsly within the *proviſoe*, and to have no regard to juſt debts due to the party by *aſſumpſit*: and the court being of this opinion, gave judgment for the plaintiff. *Vide Fitz-Gibbons*, *p.* 81.

Trinity, 3 *Geo.* 2. *Rochtſhilt* v. *Leibman.*

The plaintiff brought an action on a bill of exchange, to which the defendant pleaded the *ſtatute of limitation*, and the plaintiff replied that he was beyond ſea, to which the defendant demurred. It was objected, that no actions on the *caſe* are within the *proviſoe*, but actions on the *caſe* for words; and cited *Cro. Car.* 245. *Show.* 98.

Parker, Juſtice, held, that where the words of a ſtatute are general, they are to be underſtood in that ſenſe. 10 *Co.* 101. It is impoſſible to think ſo trifling an action as for words ſhould be ſaved, and not thoſe which are founded on a contract; beſides it has been determined that the *proviſoe* extends to this caſe.

Per curiam. Let judgment go for the plaintiff. *Vide Stra. vol.* 2. *p.* 836.

Trinity, 5 *Geo.* 2. *Wilcocks or Wilcox* v. *Huggins.*

In an action on the *caſe* brought by the executor of the executrix of *G. Wilcocks* againſt the defendant, on a promiſory note, dated the 30th of *July*, 1719. The defendant pleaded, *that the cauſe of action did not accrue within ſix years*: the plaintiff replied, that the firſt executrix, *Trinity*, 11 *Geo.* ſued out a bill of *Middleſex* againſt the defendant, returnable the *Mich.* term following, on which there was a continuance, and an *alias* taken out returnable in *Hilary* term following, before which the executrix died, and made the plaintiff her executor, who in *Michaelmas*, 3 *Geo.* 2. ſued out a *latitat* againſt the defendant, with intent to declare againſt him as above, which he accordingly did; and concluded with an averment, that the cauſe of action accrued within *ſix* years before the ſuing out the *firſt* bill of *Middleſex*.

To this the defendant demurred: and after ſeveral arguments, it was held, that the replication was ill, there being *four* years between the death of the *firſt* executrix, and the proceedings had by the now plaintiff, that the moſt that had ever been allowed was a year, and that within the equity of the *proviſoe* in the *ſtatute* which gives the plaintiff a year to commence a new action, where the judgment is arreſted or reverſed: but they ſaid they would not go a moment farther, for it would let in all the inconveniencies which the *ſtatute* was made to avoid. Indeed if the ſecond executor had been retarded by ſuits about the will or adminiſtration, and he had ſhewn that in pleading it would have been otherwiſe, becauſe then the neglect would have been accounted for: and wherever a ſuit is allowed to be continued by *journies accounts*, it muſt be a recent proſecution. 6 *Co. Spencer*'s caſe, which this can never be ſaid to be.

Per curiam. The defendant muſt have judgment. *Vide Strange*, *vol.* 2. *p.* 907. *Fitz-Gibbons*, *p* 170.

Trinity, 19 *Geo.* 2. *Lloyd* v. *Vaughan.*

See this caſe fully ſtated in page 424 of this work, under the head *Error*.

Trinity, 21 *Geo.* 2. *Remington* v. *Stevens.*

It was held in this caſe, that the *ſtatute of limitation* may be replied to a plea of ſet off. *Vide Strange*, *vol.* 2. *p.* 1271.

Michaelmas, 31 *Geo.* 2. *The King* v. *Stephens.*

See this caſe fully ſtated in page 562 of this work, under the head *Information.*

Hilary, 33 *Geo.* 2. *Johnſon & al. Aſſignees, &c. of Hargreaves a Bankrupt* v. *Smith, Widow, Executrix, &c.*

See this caſe fully ſtated in pages 9 and 157 of this work, under the heads *Abatement* and *Averment.*

Michaelmas, 1 *Geo.* 3. *Sir William Yea* v. *Fouraker.*

In an action on a promiſory note, tried before Mr. Juſtice *Noel*, on the *Weſtern* circuit. It was there *adjudged* by him, which adjudication was afterwards confirmed by the court, on a motion for a new trial without any argument allowed thereon, “That an acknowledgment of the debt, after the commencement of the action, takes it *out* of the *ſtatute of limitation.*” *Vide Bur. vol.* 2. *p.* 1099.

London. (its Cuſtoms)

Cuſtom of London, concerning Orphans and Freemen's Eſtates.

If a freeman of *London* has no wife, but has children, the half of his perſonal eſtate belongs to his children, and the other half the freeman may diſpoſe of; ſo if the freeman has a wife and no children, half of his perſonal eſtate belongs to his wife, and the other half he may diſpoſe of: But if a freeman hath a wife and children, *one third part* belongs to the wife, and *another third part* to the children, and the freeman may diſpoſe of the other *third part.* And if ſuch freeman dies inteſtate, the cuſtom affects only *two thirds*, and the remaining *third* is ſubject to the *ſtatute* of diſtributions, and ſo dividing the whole into *ninths*, *four ninths* belong to the wife, and *five ninths* belong to the children.

If a freeman of *London* has *two* ſons, and the eldeſt ſon dies leaving a ſon, and then the freeman dies, the grandchild, though in law a repreſentative of the ſon, who never was advanced, has no part by the cuſtom; for the cuſtom of *London* extends only to the children, and not to the grandchildren; and ſo it has been certified by the recorder into *chancery.*

If a freeman of *London* has but *one* child, and he has received ſome portion from his father, and the father dies, leaving this child and a wife, the child ſhall have his full orphan's part, without any regard to what he has already received; for that advancement in part is only to be brought into *hotchpot* with children, and not with others.

If a freeman of *London* has advanced any of his children with a portion; yet if it appears what the portion was, by any writing under the father's hand, or by the father's will, or his marriage-ſettlement, and by the ſaid will or ſettlement it is ſaid, That the ſaid portion is or was in full of his child's part by the cuſtom; yet this child ſhall come in for the cuſtomary part of the reſt of the father's perſonal eſtate, bringing the portion already received into *hotchpot*; it is otherwiſe, if it does not appear under the father's hand what the advancement was. *Vide Salk. v.* 2. *p.* 426.

Hilary 7. *W.* 3. *The Vintner's Company* v. *Clerke.*

On an *habeas corpus* directed to the keeper of *Newgate*, he returned, That the city of *London* is an ancient city, &c. and that there is a *cuſtom* in the ſaid city, if any complaint ſhould be made to the mayor and aldermen of the ſaid city, by the maſter and wardens of any company, of a liveryman choſen, and refuſing to take the office, being admoniſhed by that court to accept it; that then the mayor and aldermen have committed the perſon ſo refuſing to the cuſtody of the ſheriffs of *London*, or to any other officer, there to be detained until he ſhould conſent, and declare that he would take on him the ſaid office.

That theſe *cuſtoms* were confirmed by act of parliament; and that before the iſſuing of the ſaid writ, one *Iſaac Clerke* being a citizen of *London* and a freeman of the company of *Vintners*, was choſen of the livery, and required to take on him the ſaid office, which he refuſed; on complaint being made to the mayor, &c. by the maſter and wardens of that company, the ſaid *Clerke* was ſummoned to appear, &c. which he did and refuſed to take on him the ſaid office, and being admoniſhed by the court to conform, did ſtill refuſe, that the mayor, &c. by warrant in writing did commit him to the cuſtody, &c. there to remain till he ſhould *conſent and declare*, that he would accept the ſaid office; and that this was the cauſe of his impriſonment.

It was urged againſt this return, that it conſiſted of ſeveral facts, of which this court could not take any notice, but that none of theſe facts were contained in the warrant of commitment, and no matter ought to be put into the return which the warrant itſelf does not lead unto.

The *firſt exception* taken was, that the return is void, both in ſubſtance and form; and is void in form for the following reaſons:

Becauſe it is laid ſpecially, that the mayor and aldermen have a *cuſtom* to commit, till the offender ſhall *conſent and declare* his willingneſs to take on him the office; but did not ſet forth to whom he ſhould ſignify ſuch *conſent*; beſides it is a void and impertinent *cuſtom* to commit a man to priſon, until he ſhould *conſent and declare* to hold an office.

On the return of an *habeas corpus*, 1 *Mod.* 10. the cauſe of impriſonment appeared to be, for that he being choſen of the livery, refuſed to ſerve, &c.

2dly, The gaoler has not ſet forth his warrant *in theſe words*, but only that *by a certain warrant in writing according to the cuſtom*, &c. the defendant was committed, and this is introduced with a long ſtory, not pertinent to the commitment itſelf, of which he has not ſet forth any cauſe.

3dly, That in the return a *cuſtom* was laid for the mayor, &c. to commit the offender to the cuſtody of *the ſheriffs of London* or *other officer*; and the gaoler has returned, that he was committed *to my cuſtody*, when it does not appear that he was either ſheriff or officer at that time; ſo that more is put in the judgment than is warranted by the *cuſtom.*

Per curiam, A commitment, till he ſhould *declare* his conſent to accept the office, is more than if he had been committed till he ſhould actually *conſent*; therefore though the *court of aldermen* might commit him until he ſhould *conſent*, yet they have no power to impriſon him till he ſhould *declare it.*

As to the warrant, it is always ſet forth at large in a return made on an *extra judicial* commitment, but when a man is committed by a court of record, there is no warrant at all; therefore the court of aldermen in this caſe cannot be intended to proceed judicially, becauſe the commitment is by warrant in writing. They are the proper judges of an excuſe made by the defendant, why he will not take on him the livery, and if they adjudge it inſufficient, and appoint him to accept it, and he refuſes, it is a contempt of their authority, for which they may commit him.

But here he is committed to the keeper of *Newgate*, who may be an officer of the city, but not one attending the *court of aldermen*; ſo that it does not appear, that he is a proper officer of that court to receive him, and therefore not like a commitment by this court to the *Marſhal*, who is the proper officer always attending the court; and ſo is the ſheriff, where the commitment is made by a judge of *oyer* and *terminer*: Neither does it appear that *Newgate* is in *London*; but if it did, he ought to be committed to the ſheriffs, and not to the keeper of *Newgate*, though they might have taken him as their officer; but this court cannot take notice that he is an officer to the ſheriffs, no more than they can what boroughs ſend burgeſſes to parliament. As for inſtance; by *ſtat.* 17. *Car.* 2. *thoſe who preach in conventicles ſhall not come, or be within five miles of a borough which ſends burgeſſes to parliament.* A man was indicted on this *ſtatute* for living in ſuch a borough; but it was quaſhed in this court, becauſe it was not averred, that the borough wherein the defendant lived did ſend burgeſſes to parliament.

Now certainly it is as well known by this court, what boroughs ſend burgeſſes to parliament, as that the keeper of *Newgate* is an officer of the ſheriffs of *London*; for which reaſon the return was held inſufficient; and the defendant was diſcharged. *Vide Mod. Rep. v.* 5. *p.* 156.

Trinity, 7 *W*. 3. *Maſters* v. *Lewis*.

See this caſe fully ſtated in page 131 of this work, under the head *Attachment*.

Michaelmas, 7 *W*. 3. *Arnot* v. *Brown*.

See this caſe fully ſtated in page 327 of this work, under the head *Cuſtoms*.

Michaelmas, 10 *W*. 3. *Loveridge* v. *Whitrow*.

In this caſe it was ruled, that if *A*. brings an action of *debt* in *London* againſt *B*. and attaches the goods of *B*. in the hands of *C*. from whoſe poſſeſſion the goods are not removed; and *B*. by *certiorari* brings the cauſe into this court, and puts in bail, the attachment is at an end, and *C*. ought to deliver the goods to *B*. which if he does not, *B*. may have an action of *trover* or *replevin*; but this court will not compel him to deliver them, becauſe he is no party in court; and all things are now as if there never had been an attachment. *Vide Mod. Rep. vol.* 12. *p.* 213.

Michaelmas, 10 *W*. 3. *Adams* v. *Cox*.

See this caſe fully ſtated in page 159 of this work, under the head *Bail*.

Trinity, 11 *W*. 3. *The City of London* v. *Vanacre*.

See this caſe fully ſtated in page 292 of this work, under the head *Corporations*.

Michaelmas, 11 *W*. 3. *Anonymous*.

Holt, Chief Juſtice. The *huſtings* is the county court in *London*, and the ſheriff may grant *replevins* out of it as ſuch, by *ſtat. W*. 2. *Vide Mod. Rep. vol.* 12. *p.* 320.

Michalmas, 11 *W*. 3. *Anonymous*.

Holt, Chief Juſtice. An officer in *London* may take away ſome parcel of a perſon's goods to compel an appearance; but it muſt be a *reaſonable* parcel; and on an attachment of goods there, the *cuſtom* is to leave them in the party's hands till the matter is determined. *Vide Mod. Rep. vol.* 12. *p.* 326.

Trinity, 12 *W*. 3. *Anonymous*.

Holt, Chief Juſtice. We cannot take notice of a judgment on the *cuſtom* on a foreign attachment in *London*, without the *cuſtom* be ſpecially ſhewn. *Vide Mod. Rep. vol.* 12. *p.* 407.

Eaſter, 13 *W*. 3. *Anonymous*.

Per curiam. When a cauſe is removed from *London*, the record itſelf is never removed, becauſe they expect a *procedendo*. *Vide Mod. Rep. vol.* 12. *p.* 454.

Trinity, 1 *Ann.* *The Queen* v. *Rogers*.

See this caſe fully ſtated in page 327 of this work, under the head *Cuſtom*.

Hilary, 2 *Ann.* *Cuddon Chamberlain of London* v. *Provoſt*.

The return to an *hab. corp.* was, that *London* is an ancient city, &c. that time out of mind there was an ancient beam kept at the charge of the city for the weighing of all ſuch goods as are uſually bought or ſold by weight in *London*, at which all foreigners ought, and time, &c. uſed to weigh all ſuch goods, &c. and then ſet forth their *cuſtom* of making bye-laws for explanation of their *cuſtom*, and a bye-law made at ſuch a time, the ſame as in the caſe of *Bernardiſton*. 1 *Lev. viz.* that every foreigner who ſhould ſell goods uſually ſold by weight, without having weighed them at the common beam, ſhould pay 13 *s*. 4 *d*. for every weight, that the defendant being a foreigner, &c. And tho' all the exceptions taken in that caſe were inſiſted on here: yet the court awarded a *procedendo* according to the ſaid caſe in *Lev.* 14, 15. *Vide Mod. Rep. vol.* 6. *p.* 123.

Hilary, 2 *Ann.* *Cuddor* v. *Eaſtwick*.

See this caſe fully ſtated in page 239 of this work, under the head *Corporations*.

Michaelmas, 2 *Ann.* *Barber* v. *Dennis*.

Per curiam. The *cuſtom of London* for perſons under *one and twenty*, to bind themſelves apprentices, does not extend to *watermen*. *Vide Mod. Rep. vol.* 6. *p.* 69.

Eaſter, 3 *Ann.* *Anonymous*.

Holt, Chief Juſtice. The *gaol delivery of Middleſex* is held within the city of *London* by preſcription, but the *oyer* and *terminer* is not ſo, but at *Hicks's Hall* in the county of *Middleſex*; ſo that though of common right, the gaol delivery ought to be within the proper county, yet *cuſtom* and uſage time out of mind may make it otherwiſe. *Vide Mod. Rep. vol.* 6. *p.* 145.

Trinity, 3 *Ann.* *Fazacharly* v. *Baldo*.

See this caſe fully ſtated in page 506 of this work, under the head *Habeas Corpus*.

Eaſter, 5 *Ann.* *The Queen* v. *The Mayor and Aldermen of Norwich*.

Holt, Chief Juſtice, ſaid, the method of chuſing Aldermen in *London* was thus: The inhabitants of the ward chuſe *two*, and if the Court of Aldermen think them inſufficient, they may reject them, and order the ward to chuſe again; and he ſaid, that in the time *Kelynge*, Chief Juſtice, in the caſe of Mr. *Swallow*, the *cuſtom* of *London* was certified, that if a man is choſen Alderman, and refuſes to ſerve, the Court of Aldermen may commit him to *Newgate*, as for a contempt; but if he fines, then the way is, to ſwear him in Alderman, and then diſcharge him by conſent. *Vide Raym. vol.* 2. *p.* 1244.

Michaelmas, 8 *Ann.* *Anonymous*.

An action was brought in this court, and in the declaration it was laid to the damage of the plaintiff 50 *s*. The court was moved that this action ought to have been brought in the *Court of Conſcience* in *London* by *ſtat.* 1 *Jac.* 1. *c.* 14. which enacts, that if the cauſe of action be under 40 *s*. and the defendant be a freeman of *London*, it ſhall be brought in the *Court of Conſcience* as aforeſaid; on which an *affidavit* was offered, that the cauſe was under 40 *s*.

Powell, Juſtice, held, that it ought to appear on the trial that the cauſe of action was under 40 *s*. and he refuſed to take the oath of the party. *Vide Raym. vol.* 2. *p.* 1304.

Michaelmas, 10 *Ann.* *The King* v. *Sir G. Heathcote, Lord Mayor of London.*

The court was moved for a *mandamus* to be directed to *Sir G. Heathcote*, late Lord Mayor of the City of *London*, to return ſuch and ſuch perſons by name to the Court of Aldermen as the perſons choſe by the wardmote of *Broad-ſtreet*, or to ſhew cauſe why he would not. Now, Sir *G. Heathcote* had in fact made a return, but a return of different perſons, (as to three of them) than what (the council moving ſaid) appeared on the ſcrutiny to have been really choſen.

After hearing the arguments of the council on both ſides, the court refuſed to grant a *mandamus*, being of opinion that the granting of it would probably long continue that confuſion in the city, that a little good advice might ſoon put an end to. *Vide Mod. Rep. vol.* 10. *page* 49.

Trinity, 5 *Geo.* *Argyle* v. *Hunt.*

A libel was brought in the *ſpiritual Court* for the word *whore*, which on the face of the libel appeared to have been ſpoken in *London*; and after ſentence the court was moved for a *prohibition*, becauſe the defect of juriſdiction appeared in the libel itſelf, and the court will judicially take notice of the *cuſtom* of *London*, where an action lies for the word *whore*.

Per curiam. The rule is, that you ſhall never alledge matters *out of* the libel as a ground for a *prohibition* after ſentence, but the foundation of our granting it muſt ariſe out of the libel itſelf in defect of juriſdiction. And if there is a defect of juriſdiction appearing in the libel, then the party never comes too late, for the ſentence and all other proceedings are a mere nullity. But where the *ſpiritual court* has an original juriſdiction which is to be taken from them on account of ſome matter ariſing in the ſuit, as for defect of trial; there after ſentence the party ſhall never have a *prohibition*, becauſe he himſelf has acquieſced in their manner of trial. It is true, theſe words appear to be ſpoke in *London*, but how does the *cuſtom* of *London* appear to us! There is nothing of that in the libel, and though we have ſuch a private knowledge of it, that on motion we do not put the party to produce an *affidavit*, becauſe the other ſide never diſputes it, yet we cannot judicially take notice of it, and if any body will inſiſt on an *affidavit*, we muſt have it in every caſe. It was never known, that the court judicially takes notice of private *cuſtoms*, but they are always ſpecially returned. Therefore here a *prohibition* was denied. *Vide Stra. vol.* 1. *p.* 187.

Eaſter, 6 *Geo.* *Withers* v. *Warner.* Error.

On a *writ of error* brought on a judgment given in the *C. B.* in an action on the *caſe* on ſeveral promiſes, the want of an original and warrants of attorney were aſſigned for *error*.

It was argued by the defendant in *error*'s council, that as to the warrants of attorney, the plaintiff has not verified the *error* by the return of a *certiorari*, ſo we have entered to that *error*, that *he has not ſent the writ*, and laid that matter out of the caſe.

As to the *original*, I apprehend the plaintiff has not verified his *error* in the manner he has alledged it, which can only be done by one of theſe *two* ways, either by the party's coming in and confeſſing it, or by his procuring the return of a *certiorari*, that there is no *original* in the cauſe: here is no confeſſion of the *error*, and therefore the queſtion will be on the return of the *certiorari*, whether by that return the plaintiff in *error* has ſo far eſtabliſhed the truth of his aſſignment of *errors*, as to be entitled to have this judgment reverſed. And I take it he has not done ſo in this caſe, for the action being laid in *London*, therefore the *certiorari* commands the *cuſtos brevium* of the *C. B. that he ſearch for the original writ of the aforeſaid court of the Bench of London, of Eaſter term, in the fifth year of the King*, he ſhould certify to the court what he found about it. To this the *cuſtos brevium* returns, *that he has ſearched for the original writ of the ſaid Lord the King in his City of London, and has not any ſuch original writ of the City of London of the aforeſaid term in his cuſtody*, all which may be true, and yet there may be an *original* to warrant the judgment, directed (as all other writs are) to the ſheriffs of *London* only: and therefore the command being to ſearch for a writ directed to the *ſheriffs of London*, and the return being, that there is none directed to the *ſheriffs of the City of London*, that amounts to no more than if he had ſaid, *I am ordered, it is true, to ſearch the files of writs in London, but inſtead of that, I have peruſed all the writs of the City of London, and find none between theſe parties*; or in other words, *I cannot find an original directed, &c. as never any ſuch original in the world was ever made.*

It was further objected, 1ſt. That taking this return as a matter of fact, then, though *London* and the *City of London* are one and the ſame, yet in point of fact a writ directed to the *ſheriffs of London* is not a writ directed to the *ſheriffs of the City of London.* 2dly. In the next place, to take it as matter of law, it is to be conſidered how this *certiorari* and return are poſſible to be reconciled; and I can ſee but one way to do it, *viz.* by the court's taking notice judicially that *London is a City*, which I apprehend they never will do. *Adjourned.*

And this term *Pratt*, Chief Juſtice, and the reſt of the judges were of opinion that they muſt take notice that *London* was a City, it being mentioned ſo in the ſeveral acts of parliament; and therefore held the *error* to be verified, and the judgment of the *C. B.* was reverſed. *Vide Stra. vol.* 1. *p.* 309.

Trinity, 7 *Geo.* *Fazerakerſley* v. *Wiltſhire.*

On an *hab. corp.* directed to the Mayor's court of *London*, the *cuſtom* of *London* was returned, that the porterage from any veſſel in the river, and meterage of corn, roots, *&c.* imported or exported, belongs to the City, upwards from *Stain's Bridge* to *London Bridge*, and down as far as *Yendal* in *Kent*, and alſo another *cuſtom* to make bye-laws, confirmed by *Richard* 2. where any of their *cuſtoms* wanted a *proper remedy.*

That in the 18th year of *James* 1. a bye-law was made by the corporation, that the corn-porters ſhould be a company, with *twenty-four* aſſiſtants, who were called *free porters*, who ſhould work at a particular ſettled rate; and that none but the *free porters* ſhould intermeddle in importing or exporting any corn, roots, *&c.* within the bounds mentioned in the *cuſtom*, on pain of 20 *s.* for every offence, (except in time of danger or urgent neceſſity, or in the caſe of *periſhable goods*) the forfeiture to be recovered by action in the name of the Chamberlain, and thereby *four hundred* porters are appointed for the future.

That the free porters have ever ſince uſed and exerciſed this bye-law till the defendant intruded, by carrying of barley, tho' a free porter was preſent, *whereby he forfeited* 20 *s.* which the plaintiff as Chamberlain is entitled to *demand and to have*, and for which he ſues in the Mayor's Court.

The defendant's council argued againſt a *procedendo*, and that the return might be filed, 1ſt. Becauſe it is informal in ſetting out the claim. 2dly. Becauſe the *cuſtom* is ill. And then, 3dly. The bye-law muſt fall of courſe. Or, 4thly. Though the *cuſtom* ſhould be good, the bye-law is ill.

Pratt, Chief Juſtice. I am of opinion that both the *cuſtom* and bye-law are good, notwithſtanding the objections that have been taken: I ſhall not go over them all, becauſe the opinion of the court has been given as to ſome of them on the former arguments.

A *cuſtom* to reſtrain trade in a particular place is good; and ſurely much more ſo, where the reſtraint is only from bodily labour in one inſtance, than where it prevents a man from exerciſing an art he has been a long time learning. I think the *cuſtom* is good, as it is a convenience to the public, and that there is an equivalent by the obligation the city is under to provide porters; if they do not, I am of opinion that an action will lie, as in the common caſe of a *ferry*; neither

ther is the merchant obliged to rely on an action only, for he may certainly employ whom he pleaſes, if the free porters do not attend. The convenience to the merchant is very great, in having perſons ready to aſſiſt him as ſoon as he comes into port, and ſo not obliged to go and ſearch for porters who are ſtrangers to him.

As to the objection about the extent, I think it is fully anſwered by the ancient records that have been cited, and above all, by the confeſſion of the Attorney General, which is of more weight than any of the reſt; ſince it cannot be imagined, that the King's Attorney would confeſs a juriſdiction againſt the Crown, which the City had not the cleareſt right to. We muſt take the port to be within the limits; or if it went beyond the limits of the City, yet I do not ſee how this caſe can be diſtinguiſhed from that of the *Graveſend watermen.* The *cuſtom* of *meetage* extends as far, and yet that has never been queſtioned on this account.

There is no doubt but the *bye-law* may be good in part, and not as to the reſt; for where it conſiſts of ſeveral particulars, it is to all purpoſes as ſeveral bye-laws, though the proviſions are thrown together under the form of *one.* I am of opinion there ought to be a *procedendo.*

Per curiam. Let a *procedendo* iſſue. *Vide Stra. vol.* 1. *p.* 462.

Hilary, 9 *Geo.* *Hodgkins and Wife* v. *Corbet and Wife.*

The court was moved for a *prohibition* for theſe words ſpoken in *London*, " you are a cuckoldly dog, " and bid the bitch your wife come out." And the caſe of *Evans* v. *Howard, Hilary* 12 *Ann*, was cited, where the words, " ſhe is big with child," ſpoken of a ſingle woman, were held *tantamount* to calling her whore, and a *prohibition* iſſued. So *Eaſter* 1 *Geo. Wilbourn* v. *Coddy*, the wife libelled for calling her huſband *cuckold*; and a *prohibition* was granted.

Per curiam. Formerly, it was held that words *tantamount* were not within the *cuſtom* of *London*, but the later reſolutions have denied the caſe in *Lutw.* 1042. And *Michaelmas* 11 *W.* 3. *Smith* v. *Glaſs* in this court, the words ſpoken in *London*, were, " ſhe was " never married, and what is her hopeful ſon?" and by the opinion of the whole court a *prohibition* was granted: and ſo there muſt in this caſe. *Vide Stra. vol.* 1. *p.* 545. *Mod. Rep. vol.* 8. *p.* 115.

Trinity, 9 *Geo.* *Cooke* v. *Wingfield.*

On a *libel* exhibited againſt the defendant for *defamatory words* ſpoken by him in *London*, after ſentence, he moved for a *prohibition*, and obtained a rule that the plaintiff ſhould ſhew cauſe, *&c.* why a *prohibition* ſhould not go.

And it was ſhewn for cauſe, that it ought to appear on the face of the *libel* that the matter is not of ſpiritual conuſance; otherwiſe that court ſhall not be prohibited, eſpecially after ſentence; but no ſuch thing appears on this *libel*, for the defendant only ſuggeſts a *cuſtom in London*, that defamatory words ſpoken there are actionable, which ought not to be ſuggeſted, nor any thing offered in proof which is out of the *libel*, eſpecially ſince the defendant has ſubmitted ſo far to the juriſdiction of the *ſpiritual court* till ſentence was given againſt him.

If there had been any ſuch *cuſtom* it ought to have been pleaded in *bar* to the juriſdiction of that court, for the courts of *Weſtminſter* are not *officially* to take judicial notice that there is any ſuch *cuſtom* in *London.*

Per curiam, there is a difference between a motion of this kind before and after ſentence in the *ſpiritual court*, for in the one caſe this *cuſtom* need not be proved by *affidavit*, becauſe it is ſufficiently known; but a judicial notice ſhall never be taken of it after ſentence. So the rule was diſcharged. *Vide Mod. Rep. v.* 8. *p.* 176.

Michaelmas, 9 *Geo.* *The Chamberlain of London* v. *Lopes.*

See this caſe fully ſtated in page 346 of this work, under the head *Debt.*

Hilary, 10 *Geo.* *The Company of Muſicians*, v. *Green.*

A *bye-law* was made in *London*, that no perſon but a freeman of that city ſhould *exerciſe any trade or art therein* under ſuch a penalty. The defendant not being free of the city of *London* played as a muſician at ſeveral city entertainments, for which he was ſued in the *Mayor's* court in *London*, for uſing the trade of a muſician, not being free of the city; which cauſe being removed into this court by *hab. corp.* it was inſiſted for him that he was a *muſician*, and attended with other maſters in muſic at the feaſt of the ſons of the clergy, being imployed by the ſtewards of the ſaid feaſt, and becauſe they did not employ the city muſicians, they ſet up this proſecution againſt the defendant, and would now extend this *bye-law* to *muſick, which is a ſcience, and no trade*; beſides it is improper to have the *bye-laws* of *London* tried in any of the courts of *London.*

Per curiam. Let there be a conſultation, it not being proper to determine this queſtion on motion. The *cuſtoms of London* are always tried in their own courts; but if the judge refuſes (on requeſt) to let the fact be ſtated *ſpecially*, we will ſet aſide the verdict; and therefore a *procedendo* was granted, but with this direction, that the plaintiff ſhould admit the matter to be found ſpecially at the trial, otherwiſe the court would not grant another *procedendo* in the like caſe.

Afterwards the cauſe was tried in *London*; and at the trial a diſtinction was made between exerciſing ſuch handicrafts for lucre and gain (which was the defendant's caſe) and exerciſing them for diverſion and amuſement; and that the one was within the *bye-law*, and the other not; and thereon the plaintiff had a verdict and judgment; but afterwards the defendant took up his freedom and acquieſced. *Vide Mod. Rep. v.* 8. *p.* 211.

Trinity, 10 *Geo.* *The King* v. *Ludlam, Chamberlain of London.*

On a *mandamus* to admit *George Warren* to his freedom of the city of *London*, he having ſerved an apprenticeſhip to the warden of the company of merchant taylors, the chamberlain made a return of the *cuſtom* of *London* to make *bye-laws*, and that a *bye-law* was made the 19*th of October* 6 *W. & M.* That no perſon uſing the trade of a joiner ſhould be made free of any other company but that of the joiners, with an expreſs prohibition to the chamberlain to that effect: and that every perſon who had ſerved an apprenticeſhip to a joiner ſhould on notice take up his freedom, with a penaly of 10*l.* if he is admitted of any other company. That this man has uſed the trade of a joiner, wherefore he was never admitted.

The queſtion was, whether this is a good *bye-law* or not.

Per curiam. The common council have power to make any reaſonable *bye-laws*; and this ſeems to be of that nature.

Now this *bye-law* being agreeable to the conſtitution of the city, and not reſtraining trade, but rather regulating it by ſubjecting ſeveral artificers to be under the inſpection of others, who underſtand the ſame trade, which cannot be better done, than by compelling them to take their freedom in a company of that trade in which they are employed; therefore this was adjudged a reaſonable *bye-law.*

The freedom of the city cannot be taken from a man, provided he will take up his freedom in a proper company; and if that company will not admit him, the court will grant a *mandamus* to compel them; but on this return it appears, that every man who exerciſes the trade of a *joiner*, *&c.* within the city of *London*, ought to be free of the company of *joiners*, but it does not ſhew that the defendant did *exerciſe that trade in the city*, *&c.* but that he did exerciſe the trade of a *joiner* generally, without ſaying where, and then it might be at *York* or any where elſe; but it is his exerciſing it within the city of *London* which gives them juriſdiction; and for this cauſe the matter was adjourned. *Vide Mod. Rep. v.* 8. *p.* 268.

Michaelmas, 12 *Geo. The King* v. *Collingbourn.*

See this caſe fully ſtated in page 92 of this work, under the head *Apprentice.*

Michaelmas, 12 *Geo. Wannel* v. *the Chamberlain of the City of London.*

See this caſe fully ſtated in page 297 of this work, under the head *Corporations.*

Eaſter, 2 *Geo.* 2. *Sherborn* v. *Boſtock.*

See this caſe fully ſtated in page 329 of this work, under the head *Cuſtom.*

Hilary, 11 *Geo.* 2. *Boſworth v. Hearne.*

See this caſe fully ſtated in page 300 of this work, under the head *Corporations.*

Eaſter, 16 *Geo.* 2. *Sir John Hartop* v. *Alderman Hoare.*

See this caſe fully ſtated in page 190 of this work, under the head *Bailment.*

Hilary, 30 *Geo.* 2. *Plummer* v. *Bentham.*

The recorder of *London* came to the bar, and certified *two cuſtoms* of that city, *ore tenus*, i. e. *by word of mouth.*

On which the council for the motion moved, that the recorder of *London* might return two *writs of certiorari* directed to the lord mayor and aldermen of *London*, to certify *two* of the *cuſtoms* of their city.

The caſe was as follows, *viz.* An action of *treſpaſs* on the *caſe* brought by the plaintiff againſt the defendant, for *obſtructing his ancient lights*, by a *new erection or building* which the defendant had raiſed againſt them: To which the defendant had (by leave) pleaded two juſtifications, both of them were, that there is an ancient *cuſtom* in the city of *London*, "That if any perſon has a meſſuage or houſe in the city of *London*, "adjoining or contiguous to another meſſuage or "houſe, or to the ancient *foundations of one* in the ſaid "city, which former houſe has *ancient lights or windows* fronting oppoſite to or over ſuch other adjoining or contiguous meſſuage or houſe or ancient *foundation of one*, ſuch other perſon, *owner of the latter* "*meſſuage or houſe* or ancient *foundation of one*, may "well and lawfully *exalt* ſuch his *meſſuage or houſe*, or "*rebuild on the ancient foundations* of ſuch his adjacent "or contiguous *meſſuage or houſe* any new *meſſuage or* "*houſe*, to any heighth *that he ſhall pleaſe, againſt and* "*oppoſite to the ſaid ancient lights and windows* of ſuch "firſt mentioned neighbouring *meſſuage or houſe*, to "which his *meſſuage or houſe* or ancient foundations of "a *meſſuage or houſe* are ſo contiguous or adjoining; "and thereby *darken and obſcure* ſuch ancient lights "and windows of ſuch firſt mentioned neighbouring "houſe, having ſuch ancient lights and windows: "unleſs there had been ſome written inſtrument or "record of an agreement or reſtriction to the contrary."

On this plea iſſue was joined; and a *certiorari* iſſued, directed to the mayor and aldermen of the city of *London*, to certify whether they have or have not ſuch a *cuſtom.*

The ſecond plea, iſſue, and *certiorari*, were the ſame with the firſt, only with this difference, or rather *extenſion* of the cuſtom pleaded, *viz.* That the owner of any *erection or building*, or the ancient foundation of any *erection or building*, might well and lawfully exalt ſuch *erection or building*, or erect and build thereon a new erection or building to any heighth that he pleaſes, &c. and ſo on as in the former plea: only that the former plea confined the claim of the privilege, to *meſſuages or houſes*; which this latter plea extends to *all erections or buildings.*

The *Recorder of London* accordingly certified *ore tenus*, by command of the lord mayor and aldermen (after having recited the pleadings and *certiorari*), That there *is* ſuch a *cuſtom* as is alledged in the *former* plea; but that there *is* no ſuch *cuſtom* as is alledged in the *latter* plea.

Then the *Recorder* delivered in both the *writs of certiorari*, with *written copies* of the reſpective returns annexed. And the court ordered the *certiorari*, on which the *cuſtom* was allowed to be *filed*, and the return recorded. *Vide Bur. vol.* 1. *p.* 248.

Eaſter, 32 *Geo.* 2. *Ballard and another*, *Chamberlains of Worceſter*, v. *Bennet.*

The ſame v. *Clement.*

See this caſe fully ſtated in page 425 of this work, under the head *Error.*

Trinity, 2 *Geo.* 3. *The King*, v. *Sir Thomas Harriſon, Chamberlain of London.*

See this caſe fully ſtated in page 302 of this work, under the head *Corporations.*

Michaelmas, 5 *Geo.* 3. *Silk*, v. *Rennet*, *One*, &c.

See this caſe fully ſtated in page 147 of this work, under the head *Attorney.*

Michaelmas, 6 *Geo.* 3. *Lavie and another*, *Aſſignees of Jane Cox a Bankrupt*, v. *Phillips and others*, *Aſſignees of John Cox a Bankrupt.*

See this caſe fully ſtated in page 203 of this work, under the head *Bankrupts.*

Lunatics and Ideots.

Michaelmas, 8 *W.* 3. *Hard's Caſe.*

The court was moved to quaſh an order of juſtices, for removing an *ideot* to the place of the laſt legal ſettlement of his father; the council who moved the court compared it to the caſe of a baſtard, who is maintained by the pariſh where he is born.

Holt, Chief Juſtice. The father of an *ideot* ought to maintain him, and if he cannot, the pariſh or place where the father is ſettled muſt do it. There is no difference between an *ideot* and any other poor child. The caſe of a baſtard differs, for this reaſon, becauſe he has no father, or rather none that the law looks on as ſuch; and therefore till *ſtat.* 18. *Eliz. c.* 3. the pariſhes where they were born were bound to maintain them. Adjourned. *Vide Salk. v.* 2. *p.* 427.

Hilary, 9 *W.* 3. *Thompſon* v. *Leach.*

A tenant for life, being *non compos*, with remainder to his firſt ſon in *tail*, remainder to *B.* in *fee*, ſurrendered by deed of ſurrender to *B.* before he had a ſon; this deed of ſurrender was held abſolutely void, and the contingent remainder not deſtroyed. *Vide Salk. vol.* 2. *p.* 427. *Mod. Rep. v.* 12. *p.* 173.

Michaelmas, 11 *W.* 3. *Anonymous.*

Per curiam. A child ſhall follow the ſettlement of his parent, unleſs he gains a diſtinct ſettlement; and before *ſtat.* 1 *Jac.* 2. an *ideot* could gain a ſettlement, for till then notice was not neceſſary; but ſince that *ſtatute* he muſt follow the ſettlement of his father. *Vide Mod. Rep. v.* 12. *p.* 322.

Eaſter, 12 *Ann. The Queen* v. —— *Fellows, M. D.*

The defendant was convicted on an information in this court, for aſſaulting and beating one Mr. *A.* pretending he was a *lunatic*, and for impriſoning him as a *madman*, *until* he procured him to ſign and execute a letter of attorney directed to his wife, by colour of which, he had received and diſpoſed of to the value of 1000 *l.* but it was not ſet out that it was diſpoſed of to his own uſe. Now the court was moved for judgment againſt the defendant, to have corporal puniſhment, becauſe he was worth nothing.

The defendant's council objected in mitigation of the fine, that the form of the indictment was not right; for that *letter of attorney* was not proper, and that the latin word *litera* did not ſignify a writing.

Secondly. That it is not ſaid, that he diſpoſed of this money to his own uſe, for he might diſpoſe of it to the uſe of the proſecutor in payment of his debts.

Per curiam. It is well enough, *letter of attorney* is a technical term, and well known in the law; and it is ſaid it was ſigned and dated ſuch a day; and it is intended neceſſarily, that the money was diſpoſed of to his own uſe when received in this manner; for this is a fraud mixed with great violence.

At another day the defendant had judgment given againſt him, it appearing by the evidence, that by this cheat and violence he had procured to himſelf about 1000 *l.* that he had debauched his wife, that pretending to cure him of *lunacy*, he beat him, hand-cuffed him, gave him ſeveral ſtrong purges in the night, and carried him about at *one* or *two* o'clock in the morning bare-headed in the rain.

The defendant was adjudged to ſtand in the pillory, to be ſent to the houſe of correction in *Southwark*, to be whipped naked, to be kept at work there for the ſpace of one year, to be fined 600 *l.* and to find ſureties for his good behaviour during life. *Vide Forteſcue, page* 166.

Michaelmas, 5 *Geo.* 2. *The King* v. *Wright*.

See this caſe fully ſtated in page 509 of this work, under the head *Habeas Corpus*.

Michaelmas, 12 *Geo.* 2 *Yates* v. *Boen*.

See this caſe fully ſtated in page 465 of this work, under the head *Evidence*.

Eaſter, 17 *Geo.* 2. *The King* v. *Roberts*.

See this caſe fully ſtated in page 571 of this work, under the head *Inquiry, Inquiſition*.

Michaelmas, 3 *Geo.* 3. *The King* v. *Clarke*.

See this caſe fully ſtated in page 510 of this work, under the head *Habeas Corpus*.

Mandamus.

Michaelmas, 2 *W.* & *M.* *The King and Queen* v. *Lambert*.

A *mandamus* was awarded for the reſtitution of Dr. *Lambert* to the office of Archdeacon of *Saliſbury*; and the return was, *that he was not duly elected*; which was inſiſted to be bad, becauſe a negative pregnant, but it ought to be, *he was not elected as is ſaid*. 1 *Sid.* 209, 210.

Per curiam. The return is good; for the writ recites, *that he was lawfully and duly elected*, and the return is a direct anſwer; and ſo held in the caſe reported by *Siderfin*. *Vide Mod. Rep. vol.* 12. *p.* 2.

Eaſter, 3 *W.* & *M.* *The City of Exeter* v. *Glide*.

A *mandamus* was brought to reſtore the defendant to the place of Alderman and Chamberlain of *Exeter*.

The ſubſtance of the return was, that the city is an ancient city and body politic, that the Mayor thereof is an ancient officer; that there are *twenty-four* Aldermen, and ſo many citizens there, who have uſed to be of the common council, and had a court there, &c.

That the defendant being an inhabitant of the ſaid city, was choſen Alderman thereof, and as ſuch was a juſtice of the peace, which is an office of truſt and magiſtracy.

That being ſo choſen, *he retired from, and deſerted his habitation, and removed himſelf and family to Topſham, without the city, &c. and voluntarily neglected and refuſed to execute his ſaid office, and ſets forth wherein, &c.*

That ſeveral courts of common council were held there, of which he had *notice*, but did not attend, being abſent *forty* times in *three years*.

That when he was preſent he gave ſcurrilous and reproachful language to the court; for which he was removed from his ſaid office.

That he could not be reſtored; becauſe he had not taken the oaths before the 1ſt day of *Auguſt* 1991, according to a late act of parliament, &c.

The defendant's council argued, that the return was inſufficient as to the matter returned. And that the *firſt* part thereof was not good for *three* reaſons.

1ſt, Becauſe it was not alledged that *Topſham* was without the liberty of the city, for it may be without the city, and yet within the liberty of the city; beſides if it had appeared that *Topſham* was without the city, yet the defendant removing there did not give them cauſe to deprive him of his office, becauſe it does not appear by the return that he was diſabled from doing his duty by reaſon of his abode there, or that his attendance was neceſſary.

2dly, It is not ſaid, that the defendant abſented himſelf, and removed his family, without a reaſonable cauſe, as ſickneſs, &c. or how long he was abſent.

3dly, The next cauſe aſſigned, that he *voluntarily neglected* thoſe things which appertained to his office as a juſtice of the peace; this is too general, and a return to a *mandamus* ought to be as certain as a return to a *habeas corpus*.

After hearing the arguments of the council on both ſides, the court refuſed to grant a peremptory *mandamus*.

Three of the judges were of opinion not to grant a peremptory *mandamus*, for they held, that among the many cauſes returned of the disfranchizement of the defendant, one was ſufficient, *viz.* that being an Alderman and juſtice of peace of the city of *Exeter*, he deſerted and left his habitation there, and went and dwelt at *Topſham*.

They ſaid it was incident to the duty and place of an Alderman to be reſident where he is choſen, his very name imports it, and a removal therefrom, makes him incapable of doing his duty where he ought, that it was not a place of any profit, but of freedom for the government of the city. *Vide Mod. Rep. vol.* 4. *p.* 33.

Trinity, 3 *W.* 3. *Lee* v. *Oxenden*.

The plaintiff *Lee* ſuggeſting that he was *duly ſworn and admitted into the place and office* of a *proctor*, &c. and alſo that he was diſplaced and amoved from his ſaid office, prayed a *mandamus* to be reſtored, and inſiſted, that he had a freehold in his office, and that it concerned the adminiſtration of juſtice, but the *mandamus* was denied, becauſe this matter was merely ſpiritual, and this court cannot take notice of it, nor correct errors in their proceedings, in caſes where they have a proper juriſdiction and cognizance; ſo that this being of an *eccleſiaſtical* nature, and the deprivation being a judicial act, it cannot be avoided but by appeal. *Vide Salk. vol.* 3. *p.* 230.

Trinity, 5 *W.* & *M.* *King and Queen* v. *Gower*.

A *ſpecial mandamus* was directed to Dr. *Gower*, &c. reciting, that ſuch particular fellows of his college had not taken the oaths, ſo that their fellowſhips were void by *ſtat.* 1 *W.* & *M.* and requiring him to turn them out, and to place new fellows in their room; the return was of ſeveral ſtatutes, one of which was, that no one ſhall loſe his freedom without being heard and admitted to anſwer the charge, and that the perſons named in this *mandamus* were duly elected, *&c.* and that *it does not appear*, &c. but they had taken the oaths.

Per curiam. As to this laſt part of the return, it is ill, becauſe the oaths are to be taken before the *maſter and fellows*; but the chief queſtion was, whether a *mandamus* would lie in this caſe, and in this manner, and the court inclined, that it would not, becauſe the fellows who are to be turned out, are no parties to this writ, ſo that they would be diſplaced without being heard, and without anſwer; and this differs from the common caſes of *mandamus*, which are uſually to reſtore men to their rights, and are directed to them by whom the injury is done; and though it may happen, that even in ſuch caſe a man may be turned out of his place, yet that is collateral, and not by command of the writ. *Vide Salk. vol.* 3. *p.* 231.

The King v. *Taylor*.

On a *mandamus* to reſtore him to his place of an *Alderman of the city of Glouceſter*; the Mayor and Bailiffs, returned their power, *&c.* and that *Taylor* was removed by *thirty* of the common council men in the *council chamber aſſembled*, for that he was a *common drunkard*.

Per curiam. The return is ill, becauſe it does not appear that the *thirty common council men* were then and there aſſembled as a *common council*, for they might be there to feaſt, or to other purpoſes.

But the cauſe returned is ſufficient to remove him. It is true, if a man is drunk by accident, that would not be cauſe to remove him; but habitual drunkenneſs makes a man unworthy to be a magiſtrate, and diſables him in point of government.

Though the removal was by the Mayor and *thirty* of the common council men, yet the writ ought not to be directed to them, but to the corporation by its proper name, as it was in this caſe to the *Mayor* and *Bailiffs*.

But the return being ill for the reaſons before mentioned, a writ of reſtitution was granted; and afterwards the queſtion was, whether the corporation might proceed againſt him *de novo* for his drunkenneſs? And the court held they might. *Vide Salk. vol.* 3. *p.* 231.

Michaelmas, 5 *W. & M.* *The King and Queen* v. *St. John's College Cambridge*.

By *ſtat.* 1 *W. & M.* made for the abrogating of the oaths of *allegiance* and *ſupremacy*, and appointing of other oaths, it is enacted, that if any governor, head, or fellow of any college or hall in either of the univerſities ſhall neglect or refuſe to take the oaths thereby appointed, for *ſix* months after the *firſt* of *Auguſt*, and before ſuch perſon or perſons, as by any act or acts are *authoriſed and impowered to tender the abrogated oaths*, *&c.* that then the government or fellowſhip of every perſon ſo neglecting or refuſing, ſhall be void.

The abrogated oaths were enjoined by *ſtat.* 25 *Car.* 2. to be taken by all perſons in office, either *in the court of* Chancery, *or* King's Bench, *or quarter ſeſſions for the county where he or they ſhall inhabit*.

Several fellows of *St. John's college* in *Cambridge* had not taken the oaths purſuant to *ſtat.* 1 *W. & M.* and thereon a *mandamus* iſſued out of this court, directed to *Humphrey Gower*, who was head of the ſaid college, and to the fellows and maſters there, ſetting forth the ſaid act, and that ſuch fellows had not taken the oaths, and *and as we are informed* they ſtill continue in the quiet enjoyment of their fellowſhips; therefore by this writ they are commanded to amove them; but it was not ſaid, *or ſignify the cauſe to us*.

The return to the *mandamus* was, *ſtat.* 25 *Ed.* 3. whereby it is enacted, that none ſhall be put out of his freehold, unleſs he is duly brought in to anſwer, and be forejudged by the courſe of the law; and likewiſe *ſtat.* 28 *Ed.* 3. whereby it is enacted, that none ſhall be put out of his lands or tenements, without being brought to anſwer by due proceſs of law; that the *twenty* perſons mentioned in the writ, were in the *firſt* year of *W. & M.* ſworn fellows of the ſaid college, and were ſeized of a freehold in their fellowſhips, and that ſince the making of that ſtatute, they had not been brought to any trial, *&c.*

Then it was returned, *that it does not in any manner appear* that they had not taken the ſaid oaths.

It was further ſet forth, that the college was founded by *Margaret*, Counteſs of *Richmond*. That the Biſhop of *Ely* for the time being, was, by the laws of the foundreſs, appointed *viſitor*; that by ſome particular ſtatutes of the college (which were recited in the return) it is provided, that for great crimes the maſter, by the conſent of the ſenior fellows, on examination and enquiry, may proceed to an *expulſion*, and that they cannot expel for any other cauſe, *&c.*

This return was not ſubſcribed by any perſon, neither was the common ſeal of the college affixed to it, which (as was inſiſted on) ought to be done, becauſe without it *the perſons were not ſhewn* againſt whom to bring an action if the return ſhould be falſe.

But it was held, that the ſeal was not material, becauſe the writ was directed to the head of the college by name, therefore he is the perſon who is to make the return, and by conſequence againſt whom the action will lie if it is falſe.

It was argued againſt the writ, 1ſt, That it was illegal, and not warranted by law.

2dly, Admitting the writ to be good, then the matter returned is a ſufficient excuſe.

Per curiam. Stat. 1 *W. & M.* has a reference to *ſtat.* 7 *Jac.* the one appoints the oaths to be taken before ſuch perſons, who by any act were authoriſed to tender the oaths of *allegiance* now abrogated, and by the other the fellows of the colleges *as* fellows, are obliged to take them in the open hall, before the preſident; and therefore the members muſt and ought to take notice of ſuch public acts done in their college.

This cannot be taken to be a *peremptory writ*, becauſe it ſets forth the fact *as we are informed*, which words muſt go to the whole, and ſuch a conſtruction muſt be made when the writ is grounded on a ſuggeſtion as this is, but when on a judgment, it is otherwiſe.

The *viſitor* is made by the founder, and is the proper judge of the *private laws* of the college; he is to determine offences againſt thoſe laws. But where the law of the land is diſobeyed, this court will take notice thereof, notwithſtanding the *viſitor*, and in this caſe the proper way to put it in execution, is by the writ of *mandamus*. Adjourned. *Vide Mod. Rep. vol.* 4. *p.* 233.

Eaſter, 6 *W. & M.* *Knipe* v. *Edwin*.

A *mandamus* was directed to the Dean and Chapter of *Weſtminſter*, to admit the defendant to the office of high bailiff there, on the nomination of the Duke of *Ormond*, the high ſteward, and it was inſiſted, that he could not have an aſſize, becauſe he had not any ſeiſin or freehold before admittance.

Per curiam. An action on the *caſe* will not put a man in poſſeſſion of the office, for by that he ſhall only recover damages; on which a *mandamus* was granted, but without prejudice. *Vide Mod. Rep. vol.* 4. *p.* 281.

Michaelmas, 6 *W. & M.* *The King and Queen*, v. *St. John's College, Oxford*.

On an *alias mandamus* to admit one Mr. *King* to the place of a ſcholar in the college, being nominated thereunto by the mayor, *&c.* of *Briſtol*, to whom the right of nomination *for this turn*, *of right* did appertain, on the reſignation of one *B*.

The ſubſtance of the return was, *viz.* that the college was founded by Sir *Thomas White*; that the biſhop of *Winton* for the time being was the local viſitor thereof; that *B.* reſigned; that after the nomination of Mr. *King* by the mayor, *&c.* of *Briſtol*, the preſident of the ſaid college and *ten* ſenior fellows thereof aſſembled to conſider of his qualifications, and for that it was their opinion on proof of ſeveral facts, committed by Mr. *King*, *inconſiſtent with good manners*, he was by them refuſed as *incapable* of the ſcholarſhip, and therefore they admitted another.

It was argued in his behalf, that there was nothing in this return to hinder this court from granting a farther proceſs to compel the college to admit Mr. *King*, becauſe the reaſon of their refuſal was not poſitive, but general; and therefore it is impoſſible to try the falſehood of it in a collateral action, becauſe there is no fact returned.

For that part of the return which concerns the local viſitor is very immaterial, *viz.* that if Mr. *King* had any wrong done him he may appeal to the viſitor, and that therefore this court ſhould not interpoſe, until his ſentence be given.

For the viſitor has no juriſdiction in this caſe for *two* reaſons.

1ſt, Becauſe he is only a private judge appointed by the founder, or the law, to determine offences againſt the laws of the college or place where he is viſitor, ſo that his power extends only over collegiate perſons and things; but Mr. *King* is not of the college, before admittance.

2dly, His power is alſo to determine rights on the *ſtatutes* of the college; but not on grants, which muſt be tried at the common law; and the queſtion here ariſes on the grant of the founder to the city of *Briſtol*.

If there is any cauſe or truth in this return, the college may turn him out after he is admitted, for the very ſame reaſons they now refuſe to admit him; but if he is not to be admitted at all, then the right of the city of *Briſtol* is wholly defeated.

It is as reaſonable that this court ſhould grant a *mandamus* to the college to admit perſons, as to grant ſuch writs to corporations, or to a particular company to make a man free thereof, or to the ordinary to compel him to grant adminiſtration to the next of kin; for where the caſes are alike, the remedies ſhould alſo concur. But the matter was adjourned. *Vide Mod. Rep. vol.* 4. *p.* 368.

Michaelmas, 6 *W. & M. The King and Queen* v. *The Mayor of Cheſter.*

A *mandamus* was granted to reſtore one *Brett* and *eight* other perſons to the place of *common council men of Cheſter*; the Mayor made a bad return, however, the court quaſhed the *mandamus*, being *joint for nine perſons*, when they had *ſeveral offices and intereſts*, and ought to have ſeveral writs of *mandamus*. *Vide Salk. vol* 3. *page* 230. *Ibid. vol.* 2. *p.* 436. *Mod. Rep. vol.* 5. *p.* 10.

Hilary, 8 *W.* 3. *The King* v. *Shaw.*

On a return to a *mandamus* granted to reſtore *Shaw* to the place of *one* of the burgeſſes of *Wilton*, after arguments, a *peremptory mandamus* was granted, becauſe the crime for which they removed him, was not well alledged in the return. *Vide Mod. Rep. vol.* 12. *p.* 113.

Hilary, 8 *W.* 3. *Morgan Rees* v. *The Archdeacon of Cardigan*; *or*, *The King* v. *Morgan Rice.*

See this caſe fully ſtated in page 382 of this work, under the head *Eccleſiaſtical Matters, &c.*

Michaelmas, 8 *W.* 3. *The King* v. *Owen.*

On a *mandamus* to ſhew cauſe why the defendant did not deliver the *mace*, and other enſigns of mayoralty to one *Bennet*, the ſucceeding mayor, *&c.* in which writ the uſual clauſe *or ſignify the cauſe to us*, was left out; and on a motion made to quaſh the writ, it was argued, that thoſe words were ſo material, that they could not be omitted; and it was compared to a *precipe that he reſtore*, for land, or a *precipe, that he render* a juſt account, which writs muſt always conclude thus, or *ſhew cauſe why he has not done it.*

But on the other ſide, the caſe of *The King* v. *St. John's College*, was cited in this court, where the ſame words were left out of a *mandamus*, the writ concluding with the words, *as we are informed*, and the court would not quaſh it, becauſe it being a *mandatory writ*, the perſon to whom it was directed ought to make a return, or obey it, and it is not abſolutely neceſſary that theſe words ſhould be inſerted.

Per curiam. They were firſt introduced in *J. Bagg's* caſe, but have been omitted in many caſes ſince, and therefore a *pluries mandamus* was granted. *Vide Mod. Rep. vol.* 5. *p.* 314.

Michaelmas, 8 *W.* 3. *The King* v. *Cory.*

The court was moved for a *mandamus* to the juſtices of peace, for that they proceeded to remove *W. R.* from his place of abode, after he had offered to give ſecurity to indemnify the pariſh.

Holt, Chief Juſtice. In a *matter of right*, as for inſtance, where a *mandamus* is prayed to *reſtore a man, &c.* we never require an *affidavit of the fact*, but this is required on a ſuppoſed *failure of duty* in the juſtices, and therefore a *mandamus* cannot be granted till *affidavit* is made, *&c.* *Vide Salk. vol.* 3. *p.* 230.

Michaelmas, 8 *W.* 3. *Anonymous.*

In an action on the *caſe* in the *C. B.* for a falſe return of a *mandamus*, judgment was given for the plaintiff on demurrer; and now this court was moved for a *peremptory mandamus*; but the motion was denied.

Holt, Chief Juſtice. Every *mandamus* recites the fact, *as it appears to us by the record.* How can we ſay that in this caſe? we cannot take notice of the records of the *C. B.* You might have brought your action here. *Vide Salk. vol.* 3. *p.* 428.

Michaelmas, 8 *W.* 3. *The King* v. *The Mayor and Burgeſſes of Wilton.*

A *mandamus* iſſued to reſtore *Elias Chalk* to the place of a burgeſs of *Wilton*, to which was returned a cuſtom for the Mayor and Burgeſſes to remove for *miſbehaviour*: then they ſet forth ſeveral inſtances of *miſbehaviour*, and that he being thereon fully heard to all that was objected in the common council of the Mayor and Burgeſſes, and the fact being fully proved on him, they turned him out. It was objected, that it was not ſaid he was ſummoned. *Style* 51, 46, 452. 3 *Bulſt.* 189. 2 *Keb.* 489.

Per curiam. The end of the ſummons is, that he may be heard for himſelf, and therefore where he has been heard, want of ſummons is no objection; but this was afterwards determined on other objections, and a *peremptory mandamus* was granted. *Vide Salk. vol.* 2. *p.* 428. *Mod. Rep. vol.* 5. *p.* 254.

Michaelmas, 8 *W.* 3. *The King* v. *The Mayor, &c. of Oxford.*

A *mandamus* iſſued to the Mayor and Commonalty of *Oxford* to reſtore one *Slatford* to the office of *town-clerk*; they returned their charter of incorporation, which gives them power to chuſe a diſcreet perſon to be *town-clerk*, to hold at the will of the Mayor and Aldermen; *ſtat.* 13 *Car.* 2. *cap.* 2. and *ſtat. W. & M.* about taking the oaths, and that the office of *town-clerk* being void, they choſe *Slatford*, and that he took the oaths of office *before us the Mayor and Bailiffs*; but did not *before us the Mayor and Bailiffs* take the oath of allegiance, *whereby* his office became void, *and for this reaſon*, &c. on which theſe *three* points were argued and ſettled:

1ſt. Whether the party that comes in is to take the oaths at his peril, or they are to tender them; and if he refuſed, whether it muſt not appear on the return?

Per curiam. He muſt take them at his peril; the magiſtrate need not tender to him, but he muſt tender himſelf to the magiſtrate, and demand them; and if it be refuſed, muſt ſue out a *mandamus*, and the magiſtrate is puniſhable; if the law were otherwiſe, it would be in the power of the magiſtrate to elude the act in favour of the party.

2dly. Whether it be enough to ſay, he did not take the oaths before them? And this was held naught;

for *two* juſtices have a power to adminiſter the oath, and he might take the oath before them.

3dly. Whether a perſon that was only tenant at will ſhould have a *peremptory mandamus?*

Per curiam. We do not here determine whether there ought to be a good cauſe, or not, for ſuch removal; but ſuppoſe it may be without cauſe, yet ſtill they muſt determine their will: now they do not return a determination of his office by their will, as the reaſon why they do not admit him, but the ſpecial matter of his not taking the oaths; therefore ſince his office continues, and this excuſe is inſufficient, he ought to be reſtored. A *peremptory mandamus* was granted. *Vide Salk. vol. 2. p.* 428. *Mod. Rep. vol.* 5. *p.* 316.

Hilary, 9 *W.* 3. *The Mayor of Coventry's Caſe.*

A motion was made for an *attachment*, for not returning an *alias mandamus*.

Holt, Chief Juſtice. In caſe of a *mandamus* out of *Chancery*, no *attachment* lies till the *pluries*, for that is in the nature of an action to recover damages for the delay; but on a *mandamus* out of this court, the *firſt* writ ought to be returned; yet an *attachment* is never granted without a peremptory rule to return the writ, and then an *attachment* iſſues for the contempt; and in this caſe a peremptory rule was made. *Vide Salk. vol.* 2. *p.* 429

Trinity, 9 *W.* 3. *Lydſton* v. *The Mayor and Bailiffs of Exeter.*

They returned a *mandamus*, and there was neither the hand of the mayor, nor the ſeal of the corporation to it.

Per curiam. It is well enough without it; before the *ſtatute* of *York*, the ſheriff need not have ſet his hand to any return. If the return be falſe, you may bring your action againſt the whole body politic for making a falſe return; and againſt a particular perſon for procuring a falſe return. *Vide Mod. Rep. vol.* 12. *p.* 126.

Trinity, 9 *W.* 3. *The King* v. *The Mayor of Andover.*

On a *mandamus* to reſtore a perſon to the place of an Alderman in *Andover*, the return was, that he was ſo poor that he could not pay the taxes.

Holt, Chief Juſtice. Where a man through poverty cannot pay *ſcot and lot*, it is a fit ground to deprive him of magiſtracy, but not of liberty; wherefore a *mandamus* was denied. *Vide Salk. vol.* 3. *p.* 229.

Michaelmas, 9 *W.* 3. *Anonymous.*

A *mandamus* was granted laſt term to the judge of the *Spiritual Court*, to grant adminiſtration to *J. S.* who, as he ſuggeſted, was next of kin to the inteſtate.

The court was moved for a *ſuperſedeas* to it, for that the fact was, that *J. S.* being cited, refuſed to come in; on which another of the kindred ſued for adminiſtration, but was oppoſed in it by one who pretended there was a will; which matter was now under controverſy before the judge there, and therefore till that was determined, the *ſpiritual* judge could not obey the *mandamus*.

Holt, Chief Juſtice, ſaid, there is a difference between a controverſy and no controverſy; when there is no controverſy, we do ſo; but here is a controverſy, and we will not grant a *mandamus* till it is determined. For ſuppoſe the will ſhould prove good, what then will the granting adminiſtration ſignify? *Vide Mod. Rep. vol.* 5. *p.* 374.

Michaelmas, 9 *W.* 3. *Sir Richard Raine's Caſe.*

One Mr. *Grey* made a will, dated the 19th day of *March* 1697, but did not ſign it, in which he made Mr. *Tench*, &c. executors, and died in the *April* following. After his death the executors produced this will in the *Prerogative Court* to prove it, but the court doubting of the validity, becauſe it was not ſigned by the teſtator, iſſued a citation to ſummon in all the perſons, who would be entitled to adminiſtration, if this will ſhould be adjudged null. And they all appeared, and retained proctors, except the brother of the party deceaſed, who was in contempt, for which the court proceeded againſt him to *excommunication*. On which, on the laſt day of laſt *Trinity* term, the brother moved this court for a *mandamus* to be directed to the judge of the *Prerogative Court*, to command him to grant adminiſtration to him, as next of kin to his brother deceaſed, on ſuggeſtion that he died inteſtate. And a *mandamus* was granted, returnable the beginning of this term. And now the court was moved for a *ſuperſedeas* to the *mandamus*, on *affidavit* that Mr. *Grey* made a will, the validity of which is now in conteſt in the *Prerogative Court*; and a *ſuperſedeas* was granted by the whole court. 1ſt. Becauſe they ſaid, that the court was ſurpriſed in the former motion; for they were not informed that Mr. *Grey* the brother was in contempt in the *Prerogative Court*, of which, if they had been appriſed, they ſhould have denied the former motion; for the party who makes ſuch a motion ought *firſt* to reſort to the ſpiritual judge, and requeſt the granting of adminiſtration to him, and not be in contempt for the ſame thing.

Holt, Chief Juſtice, ſaid, that the diſtinction always is, when it is admitted on all ſides that the party died inteſtate, and when not. When it is admitted, then, if the Ordinary will not grant to the next of kin, this court will grant a *mandamus*. But if a will is produced, the judge of the *Spiritual Court* muſt determine whether the will is good or not, before he grants adminiſtration. For if he grants adminiſtration, and afterwards the will is proved, the grantee will be executor in his own wrong. And the judge of the *Spiritual Court* is the only proper judge to determine the validity of wills for things perſonal, and therefore the probate is undeniable evidence to a jury: therefore if Mr. *Grey*, the brother of the deceaſed, will demand a return of the *mandamus*, if the judge of the *Prerogative Court* makes a return of the ſubſtance of the *affidavit*, it will be a very good return; or if he returns that the deceaſed made a will poſitively, although there may be an appeal, and the will thereon adjudged null, yet no action on the *caſe* will lie on that return, becauſe the party who made the return was the proper judge of the ſubject matter, and no action lies againſt a man for what he does *judicially*. To which the other judges agreed. *Vide Raym. vol.* 1. *p.* 262.

Hilary, 10 *W.* 3. *Anonymous.*

A *mandamus* was granted to admit *J. S.* to the office of Mayor. The court was moved, that the Mayor in poſſeſſion might have a rule to ſee the charter, that he might be able to make a return; for the other who had ſued out the *mandamus* was not duly elected: but it was denied, for he may return that; and in an action for a falſe return, ſhall have a rule to ſee the charter and take a copy; and it was ſaid, that the court went always on that difference. *Vide Salk. vol* 2. *p.* 430.

Eaſter, 10 *W.* 3. *The King and Morrice* v. *The Mayor, &c. of Lincoln*; *or, The King* v. *Morrice.*

On a *mandamus* to admit *Morrice* to the freedom of the city of *Lincoln*, he having ſerved *ſeven* years apprenticeſhip there, which the Mayor refuſed, becauſe he refuſed to take the freeman's oath, he being a quaker, but offered to make his ſolemn affirmation according to the late ſtatute of 7 *W.* 3. *c.* 34. And the court were of opinion that he ought to be admitted on his ſolemn affirmation; for the office of a freeman is no place of profit, or office in the government within that ſtatute: by his ſerving his apprenticeſhip he had a right to the freedom, and his admiſſion, whereunto the taking of an oath is not eſſential, but only by cuſtom: and the intent of the act was, that unleſs in thoſe caſes excepted by *proviſoe*, the affirmation of a quaker ſhould be as available as his oath; and though it was returned in this caſe, that every freeman had the liberty to run a *cow* on the common within the ſaid city, yet that will not alter the caſe; but becauſe the writ was directed to the Mayor, *&c.* of the city of *Lincoln* in the county of *Lincoln*, and not in the county of the city of *Lincoln*, the writ was quaſhed; there being no ſuch perſons to whom a *peremptory mandamus* ſhould go.

The *mandamus* in this caſe being to admit him to the *place and office* of a freeman.

Holt, Chief Juſtice, was of opinion, that the writ ſhould have been to admit him to the *privilege* of a freeman, and not to the *place and office*. *Vide Mod. Rep. vol.* 12. *p.* 190. *Raym. vol.* 1. *p.* 337.

Eaſter, 10 *W.* 3. *The King* v. *Blythe.*

By the local *ſtatutes* of *Clare Hall* in the Univerſity of *Cambridge*, it is provided, that the perſon *choſen by the Maſter, and a Majority of the fellows, be accounted a fellow.*

It happened that Mr. *Jennings* was choſen by *eight* of the fellows, and another was choſen by *ſix*; and the Maſter of the Hall, Dr. *Blythe*, gave his vote with the *ſix*.

Mr. *Jennings*, ſuppoſing himſelf to be duly elected fellow brought his *mandamus* to be admitted, having been refuſed by the Maſter, *&c.* becauſe it was inſiſted that *his concurrence* was neceſſary; for by the ſtatutes of the founder, he muſt be *one*, and that without him a fellow could not be elected. The words are, *choſen by the Maſter and a majority of the fellows.*

There was a clauſe, that if any doubt ſhould ariſe about the expoſition of theſe ſtatutes, it ſhould be determined by the viſitor.

It was argued, that the viſitor had only a power to diſplace on miſdemeanor, he was appointed to a ſpecial purpoſe, *viz. for puniſhing*, and that the Maſter had only authority to correct for miſdemeanors.

Per curiam. It was never yet determined what power the viſitor has. In Dr. *Patrick*'s caſe, the queſtion was, who was viſitor? and the court were divided in opinion.

All eleemoſinary corporations, who are to receive the charity of the founder, have *viſitors*, if they are eccleſiaſtical corporations; and if a particular viſitor is not provided by the founder, then the Ordinary of the place is viſitor; if they are lay-corporations, the founder and his heirs are perpetual viſitors.

Rokeby, Juſtice, was of opinion, that a fellowſhip was ſuch an intereſt, for which a *mandamus* ought to be granted; and it would appear on the return, whether the party had ſuch an intereſt or not.

The court were alſo of opinion, that the maſter had only a negative vote in this caſe. *Vide Mod. Rep. vol.* 5. *p.* 404.

Trinity, 10 *W.* 3. *Wilkins* v. *Mitchell.*

In an action of *debt* for rent brought in an inferior court, the plaintiff was nonſuited, whereon the defendant had judgment, but they refuſing to execute it, this court was moved for a *mandamus*, but it was denied, becauſe the defendant had a legal remedy, *viz.* by writ *de executione judicii* out of *Chancery*. *Vide Salk. vol.* 3. *p.* 229.

Michaelmas, 10 *W.* 3. *The King* v. *The Mayor, &c. of Coventry.*

On a *mandamus* to reſtore *J. S.* to be one of the common council houſe; the defendants returned, that they were an ancient corporation, and that the King by his letters patent, reciting their cuſtoms, amongſt which was this of electing perſons to be of the common council houſe, and removing them *at pleaſure*, did grant and confirm all their liberties, cuſtoms, *&c.* and that they by force of the ſaid cuſtom time out of mind uſed, *according to the form of the letters patent aforeſaid*, did remove him: and *firſt*, it was agreed, that the eſtate, whether by cuſtom or charter, has this condition annexed to it, that the corporation might diſplace him at will, without aſſigning any cauſe; but this differed from the caſe of the Recorder of *Bath*, who was appointed by the commiſſioners for regulating corporations: by their cuſtom they were to chuſe one learned in the law for a recorder; the corporation turned out Lord *H.* and returned, that he was not learned in the law; and held good; for whoever put him in, he muſt be ſo qualified by the cuſtom, and he may bring an action for a falſe return, if he be a perſon learned in the law. 2dly. This return was held naught, becauſe it did not appear that the corporation had any ſuch power, but only by the recital; whereas they ſhould have returned, that they had ſuch a power *poſitively*. *Vide Salk. vol.* 2. *p.* 430. *Raym. vol.* 1. *p.* 391.

Michaelmas, 10 *W.* 3. *The King* v. *The Mayor, &c. of Exeter.*

Adjudged, that a *writ of mandamus* ought to be delivered to him who is to make the return, who was the mayor in this caſe. *Vide Mod. Rep. vol.* 12. *p.* 251.

Michaelmas, 10 *W.* 3. *The King* v. *Sir Richard Raine.*

See this caſe fully ſtated in page 471 of this work, under the head *Executors* and *Adminiſtrators*.

Hilary, 11 *W.* 3. *The King* v. *The Mayor, &c. of Norwich.*

A *mandamus* was granted to the Mayor, &c. of *Norwich*; it was moved, that the ſenſe of the Mayor differed from the majority of the corporation, and that he would execute the writ, whereas the corporation were for returning an excuſe, *&c.* And they prayed, that the Mayor might be ordered to deliver the writ to the reſt of the corporation; *but not allowed.*

Per curiam. He is the head and principal, ſo take your courſe againſt him. *Vide Salk. vol.* 2. *p.* 432.

Hilary, 11 *W.* 3. *The Biſhop of St. David's* v. *Lucy.*

In this caſe the court was moved on behalf of the biſhop, for a *mandamus* to the *commiſſioners delegates*, to admit the biſhop's allegations; and it was compared to the caſes where the court grants *mandamuſes*, to compel the granting of probates of wills, and letters of adminiſtration.

Holt chief juſtice, this court cannot grant a *mandamus* to them, to compel them to proceed according to their laws. Indeed *mandamuſes* are grantable to compel probates of wills, becauſe they concern temporal right; and to compel the grant of letters of adminiſtration, becauſe the *ſtatute* directs to whom they ſhall be granted. Therefore in the preſent caſe a *mandamus* was denied. *Vide Raymond vol.* 1. *p.* 544.

Trinity, 11 *W.* 3. *Buckly* v. *Palmer.*

An action was brought for a falſe return, and a verdict was found for the plaintiff, and a *peremptory mandamus* was moved for, and oppoſed, becauſe it was a hard verdict, *&c.*

Holt, Chief Juſtice. When an action is brought for a falſe return, and that is falſified, we cannot refuſe a *peremptory mandamus.*

Note. This motion cannot be made till *four days* are paſt after the return of the *poſtea*; becauſe the defendant has ſo long to move in arreſt of judgment. *Vide Salk. vol.* 2. *p.* 430.

Trinity, 11 *W.* 3. *The King* v. *The Bailiffs and Burgeſſes of Malden.*

A *mandamus* iſſued, reciting *that whereas* they ought to chuſe yearly *two bailiffs*, out of ſuch as had not been bailiffs for *three years* before, *therefore* they were commanded to chuſe. They returned their conſtitution by letters patent to be, to chuſe *two for Aldermen*, and that they had choſen *two*, *according to the form and effect of their letters patent* generally; and this was held naught, for they ought to deny their conſtitution to be as is mentioned in the writ, or ſhew a compliance with the writ; whereas they have acted according to a conſtitution ſet forth in the return different from the writ, and do not deny the ſuppoſal of the writ; wherefore a *peremptory mandamus* was granted. *Vide Salk. vol.* 2. *p.* 431. *Raym. vol.* 1. *p.* 481.

Michaelmas, 11 *W.* 3. *Uſher's Caſe.*

On a motion for a *mandamus* to the vice chancellor of *Oxford*, to receive an appeal on the expulſion of a fellow.

Holt chief juſtice, if a *mandamus* goes, it muſt be directed to the vice chancellor, maſter, and ſcholars in *convocation*. And the only queſtion in this caſe is, whether or no if an original viſitor refuſes to accept an appeal, and to do the party aggrieved juſtice, we ſhall compel him to do it? wherefore let us be attended with the *ſtatutes* of the college, and we will conſider of it. Adjourned. *Vide Mod. Rep. v.* 5. *p.* 452.

Michaelmas, 11 *or* 12 *W.* 3. *The King* v. *The Town of Andover.*

Five of the members of the corporation being turned out, ſued out a joint *mandamus*; and afterwards had it quaſhed on their own motion, becauſe they could not join.

Per curiam. The wrong done to one is no wrong done to the other. *Vide Mod. Rep. v.* 12. *p.* 332. *Salk. v.* 2. *p.* 433.

Michaelmas, 11 *W.* 3. *The King* v. *The Borough of Abington.*

See this caſe fully ſtated in page 292 of this work, under the head *Corporations.*

Michaelmas, 11 *W.* 3. *Anonymous.*

On an action on the *caſe*, for a falſe return to a *mandamus*, againſt the mayor and aldermen of *Norwich*; it was objected, that it was not alledged that it belonged to them to obey the writ.

Per curiam. By their alledging a reaſon why they could not obey the writ, they admit that. *Vide Mod. Rep. vol.* 12. *p.* 322.

Eaſter, 12 *W.* 3. *The King* v. *The Mayor, &c. of Abingdon.*

A *mandamus* was directed to the Mayor, Bailiffs, and all the principal burgeſſes of *A.* (except *R.* and *S.*) ſetting forth the conſtitution, and that *R.* and *S.* were capital burgeſſes, choſen by the commonalty to ſtand and ſerve for the Mayor for the enſuing year; and that they were to chuſe *one* of them. Therefore they were commanded to elect one of them accordingly. They returned *ſtat.* 13 *Car.* 2. *ſeſſ.* 2. *c.* 1. and that within *twenty years next after the* 25th *day of March* 1663, *R.* and *S. were elected principal burgeſſes*, and within a year before their election they had not received the ſacrament, *whereby the election of both became void, and they are not principal burgeſſes*; and this return was held naught: 1ſt. The court conſidered without the laſt words, *and they are not*, &c. And as to that, *Holt*, Chief Juſtice, ſaid, the writ ſuppoſes them to be burgeſſes, and ſo the court muſt intend them, and this is not anſwered by the ſpecial matter of the return, which ſhews only that they were once elected, and that was a void election; whereas they might qualify themſelves and be choſen again; and here is nothing to exclude the intendment of a ſubſequent election, which is according to the ſuppoſal of the writ.

2dly. The court conſidered it with the laſt words, and held the words, *and they are not principal burgeſſes, &c.* to be only part of the concluſion or inference; and the Chief Juſtice ſaid, the law requires the moſt exact certainty in theſe caſes, becauſe the party cannot *traverſe* nor *interplead*; and it is not enough to offer a matter, ſo that the party may be able to falſify it in an action; but the matter muſt be ſo alledged, that the court may be able to judge of it and determine, whether it be a ſufficient cauſe or not? If the matter ſet forth in this return had been ſo alledged in a plea in *bar*, the plaintiff might have replied a ſubſequent election: *therefore* this return is uncertain; for there might have been a ſubſequent election. *Vide Salk. vol.* 2. *p.* 432. *Mod. Rep. vol.* 12. *p.* 401. *Raym. vol.* 1. *p.* 559.

Eaſter, 12 *W.* 3. *The King* v. *The Mayor, &c. of Rippon.*

A *mandamus* was directed to the Mayor, Aldermen, and commonalty of *Rippon*, to reſtore Sir *Jonathan Jennings* to his place of Alderman of *Rippon*; they returned themſelves to be incorporated by another name, *viz. Mayor, Burgeſſes*, and *commonalty*; and farther, that Sir *Jonathan Jennings*, at ſuch a time, at an aſſembly of the corporation, came *and perſonally, freely, and in due manner reſigned* his office, declaring he would continue to ſerve no longer in that office; whereon they choſe another in his room: and this declaration in a corporate aſſembly was held good, eſpecially ſince the corporation accepted it, and choſe another in his place; but till ſuch election he had power to wave his reſignation, but not afterwards; and whether a deed was neceſſary, or not neceſſary, is not material, becauſe they have poſitively returned *that he reſigned*, which is falſe if a deed was neceſſary, and there was none: alſo the court held the writ naught, becauſe it was directed to the corporation by a wrong name, but refuſed to grant a new writ of *mandamus*, becauſe an action lay againſt the particular perſons for the falſe return of this: *therefore* a new one would be vexatious. *Vide Salk. vol.* 2. *p.* 433. *Raym. vol.* 1. *p.* 563.

Eaſter, 12 *W.* 3. *Butler* v. *Rews.*

An action for a falſe return to a *mandamus* was brought by *two churchwardens*, and the court was moved in arreſt of judgment, for that the action could not lie, becauſe the fees of the one were not the fees of the other, but ſeveral. The court took further time to conſider of the matter. *Vide Mod. Rep. v.* 12. *p.* 349.

Trinity, 12 *W.* 3. *The King* v. *The Inhabitants of Glamorganſhire.*

See this caſe fully ſtated in page 253 of this work, under the head *Certiorari.*

Trinity, 12 *W.* 3. *Anonymous.*

Holt chief juſtice, if an officer makes an ill return to a *mandamus*, he ſhall be *amerced*, and we will not allow him to quaſh the ill return and make another; and if on diſallowance of one return, he makes a *ſecond* bad return, an *attachment* ſhall iſſue. *Vide Mod. Rep. v.* 12. *p.* 410.

Trinity, 12 *W.* 3. *Lord* v. *Francis.*

Per curiam, an action for a falſe return is *local*, but may be laid in the county where it was made, or in that in which it appears on record.

Holt chief juſtice, if a perſon be irregularly choſen at firſt, and afterwards is owned by the town, and entered into the town book, or regularly choſe into a ſuperior dignity, I ſhould take what followed to be ſuch evidence of a good election as ought not to be controverted. *Vide Mod. Rep. v.* 12. *p.* 408.

Hilary, 13 *W.* 3. *Anonymous.*

The court was moved for a *mandamus* to ſwear in a ſteward of a copyhold court.

Holt chief juſtice, the true reaſon of *mandamuſes* was when aldermen, capital burgeſſes, or ſuch other officers concerned in the adminiſtration of juſtice, were kept out, to ſwear them into, or at leaſt reſtore them to their places; and we ought not to grant it to ſwear in a regiſter for a biſhop, tho' it is an office of a public nature; and he ſaid he ſhould not care to do it for the ſteward of a leet, tho' heretofore it was uſed to ſwear in a phyſician of the college; and it is rare to grant it, where the perſon has any other remedy; and here the perſon is a private officer to do ſervice for the lord. So the motion was denied. *Vide Mod. Rep. v.* 12. *p.* 666.

Michaelmas, 13 *W.* 3. *The King* v. *Love*

To a *mandamus* to ſwear in the defendant a common council man for the town of *Cambridge*, it was returned, ed, that he had not taken the oaths according to *ſtatute* 23. *Car.* 2.

Per curiam. The return is good. *Vide Mod. Rep. vol.* 12. *p.* 601.

Michaelmas, 13 *W.* 3. *Pollard or Ballard* v. *Gerrard.*

Holt chief juſtice ſaid in this caſe, which ſee fully ſtated in page 265 of this work, under the head *Commitment,* he would never grant a *mandamus* to ſwear the *regiſter* of a *ſpiritual court,* or an *official, but would put them to their writ of aſſize. Vide Mod. Rep. vol.* 12. *p.* 608.

Hilary, 1 *Ann.* *Gidden* v. *Drury.*

The court was moved for a *mandamus* to commit adminiſtration to *G. S.*

Per curiam. We cannot do that, but we may grant adminiſtration to *J. S.* or to the next of kin, according to the ſtatute. *Vide Mod. Rep. vol.* 7. *p.* 140.

Hilary, 1 *Ann.* *Steward* v. *Eddy.*

A *mandamus* iſſued to grant adminiſtration to the wife of the inteſtate, or to the next of kin, and it was ſhewed, that there was a will pretended below, and adjudged no will: on an appeal from that ſentence, (which being a ſuſpenſion thereof,) the rule for the *mandamus* was diſcharged by the court. *Vide Mod. Rep. vol.* 7. *p.* 143.

Trinity, 1 *Ann.* *Gay* v. *Croſs.*

See this caſe fully ſtated in page 27 of this work, under the head *Actions.*

Michaelmas, 1 *Ann.* *Dr. Watſon's Caſe.*

A *mandamus* was moved for, to ſwear in a ſurgeon to an hoſpital.

Holt, C. J. ſaid, it could not be; for he was but a private ſervant, and it was agreed, a *mandamus* had iſſued toſwear in a ſexton: therefore the rule was made for them to ſhew cauſe. *Vide Mod. Rep. vol.* 7. *p.* 118.

Michaelmas, 1 *Ann.* *The Queen* v. *Twitty and Maddicot.*

On a *mandamus* to ſwear in *A.* and *B.* as churchwardens, ſuggeſting that they were *in due manner elected:* the return was, that *A.* and *B. were not in due manner elected.* It was objected, that it ought not to be *in due manner;* but that it ought to be in the disjunctive, *nor was either of them elected.*

Holt, Chief Juſtice, reſolved; 1ſt, That one cannot be ſworn on this writ; for either both were choſen or the writ is miſconceived. 2dly, Where the writ is to ſwear one *in due manner elected, that he was not in due manner elected* is a good return, for it is an anſwer to the writ; but where it is to ſwear one *elected* churchwarden, there *that he was not in due manner elected* is naught; becauſe it is out of the writ, and evaſive. *Vide Salk. vol.* 2. *p.* 433. *Mod. Rep. vol.* 7. *p.* 83.

Hilary, 2 *Ann.* *The Queen* v. *The Inhabitants of Little-Port;* or, *Tawney's Caſe.*

A *mandamus* was directed to the churchwardens and overſeers of the poor of the pariſh of *Littleport* in the Iſle of *Ely,* to make a rule to reimburſe the old overſeer of the poor what money he had laid out of his own for the relief of the poor.

The return to the *mandamus* was, that the major part of the pariſhioners did not agree to his account, and the queſtion was, whether *Tawney,* having been formerly overſeer, ſhould have a *mandamus* to the preſent overſeers to make a rate to reimburſe him the money he had laid out of his own pocket, to relieve the poor? It was inſiſted on his behalf, that he ought to have a *mandamus,* becauſe he was indictable for not relieving the poor, though he had none of the pariſh money in his hands, and he might have died in his office, therefore it ſeems reaſonable that the law ſhould give him ſome remedy, ſince it ſubjects him to the charge.

Per curiam. The law does not oblige him to lay out his own money to relieve the poor; but he is to make a rate, and that is to be allowed by the juſtices, and the poor are to be relieved out of this money when raiſed, otherwiſe the conſequence would be, that overſeers of the poor would lay out what money they pleaſed, and charge the pariſh with it; ſo that what he did in this caſe was voluntary, being in no wiſe compellable to do it, and therefore it would be unreaſonable in this court to compel the ſucceeding overſeers to reimburſe him; he ſhould either have kept his own money, or taken care to have had a rate made, and that would have been his proper method, for this court never allows a *mandamus* where the law has provided another remedy, and a rate cannot be made for him, but to relieve the poor. *Vide Salk. vol.* 2. *p.* 531. *Ibid. vol.* 3. *p.* 236. *Mod. Rep. vol.* 5. *p.* 97. *Raym. vol.* 2. *p.* 1009.

Hilary, 2 *Ann.* *The Queen* v. *Guy.*

See this caſe fully ſtated in page 385 of this work, under the head *Eccleſiaſtical Matters, &c.*

Trinity, 2 *Ann.* *White's Caſe.*

The court was moved for a *mandamus* to reſtore the clerk of the butcher's company, which is a company by charter.

Holt, Chief Juſtice. Such *mandamuſes* have been granted, but I think they have gone too far in theſe caſes. I am of opinion, that no *mandamus* ought to be granted where the officer may have his *writ of aſſize;* therefore let the point be argued. *Vide Raym. vol.* 2. *p.* 959. *Mod. Rep. vol.* 6. *p.* 18.

Trinity, 2 *Ann.* *Anonymous.*

The court was moved to grant a *mandamus* to the maſter and warden of the company of gun-makers, to cauſe them to give a proof-mark to *J. S.* a freeman of that company, without which he could not ſell his guns; for neither the Queen nor any other perſon, would buy any guns which had not that mark.

Holt, Chief Juſtice. We cannot do it. They are no legal eſtabliſhment. You muſt petition the Queen to iſſue a *quo warranto* againſt them, to repeal their charter for this miſdemeanor; but we cannot help you. So the *mondamus* was denied by the whole court. *Vide Raym. vol.* 2. *p.* 989.

Michaelmas, 2 *Ann.* *The Queen* v. *The Mayor of Thetford.*

On an *affidavit,* that the defendant had been ſerved with a *mandamus* on the *ſecond* of *July* before, and made no return, the court was moved for an attachment againſt him, or at leaſt to have the *alias* returnable *peremptorily.*

Per curiam. It is matter diſcretionary in the court to let people run the line out, and we may make the *alias* returnable *immediately,* and for contempt grant an attachment; or if we ſee occaſion, we may make the firſt writ returnable *from day to day,* or we may give ſhort returns; as a *mandamus* returnable in a week, and an *alias* in *four days* after, and a *pluries* with the ſame ſhort return. *Vide Mod. Rep. vol.* 6. *p.* 25.

Michaelmas, 2 *Ann.* *Vaughan* v. *The Company of Gun-makers in London.*

The court was moved for a *mandamus* to reſtore the plaintiff to his place of approver of guns, and ſetting his mark of approver on the guns made by the company. It was urged, that ſelling guns not marked, was a forfeiture of their charter, and that by a *bye-law* made by them, they had appointed him an approver, but now turned him out.

Per curiam. It is a thing in which the public is no way concerned, nor is there any public law for it;

therefore out of the rule for granting a *mandamus*; but your way will be to petition the Queen, and ſhe perhaps will order the *Attorney General* to bring a *quo warranto* againſt them. *Vide Mod. Rep. vol.* 6. *p.* 82.

Eaſter, 3 *Ann.* *The Queen* v. *The Town of Clitheroe.*

On a *mandamus* directed to the bailiffs of the town, to ſwear in ſuch and ſuch perſons into the office of bailiffs;

The court was moved, that they ſhould not be obliged to make a return, for they could not well do it, becauſe the writ was not directed to them in their *corporate* capacities, and by their names, and two other perſons were bailiffs, ſo that it would be hard to put them to make a return.

Per curiam. If when bailiffs have ſworn in others, who were not rightly choſen, you notwithſtanding continue bailiffs ſtill, and therefore ought as ſuch to make a return to the Queen's writ; and they were ordered to make a return.

Holt, Chief Juſtice, ſaid, they might amend the writ any time before it was returnable; but they on the other ſide could not, except to quaſh it till a return thereto was made and filed. *Vide Mod. Rep. vol.* 6. *p.* 133.

Eaſter, 3 *Ann.* *The Queen* v. *Chapman, late Mayor of Bath.*

See this caſe fully ſtated in page 451 of this work, under the head *Evidence.*

Michaelmas, 3 *Ann.* *Peat's Caſe.*

The court was moved for a *mandamus* to the juſtices of the ſeſſions of the county of *Warwick* to admit *Peat* to take the oath of *allegiance*, and to ſubſcribe according to the act of *toleration*, in order to be qualified to teach a diſſenting congregation; and it was granted.

Holt, Chief Juſtice. The party ought to ſuggeſt whatever is neceſſary to entitle him to be admitted; and if that is not done, or if it is done, and the fact is falſe, that will be good matter to return. *Vide Mod. Rep. vol.* 6. *p.* 310.

Michaelmas, 3 *Ann.* *The Queen* v. *The Mayor of Hereford.*

A *mandamus* was directed to the defendant, to ſwear ſuch a one into the place of town clerk of *Hereford*, and a return was, that on the election of *B.* he had *eighteen voices*, and the party that ſued out the *mandamus* but *ſeventeen*, and that they ſwore in *B.*

Per curiam. It is a bad return, becauſe it is argumentative, when it ſhould be expreſs and direct, that he was not choſe.

Holt, Chief Juſtice, ſaid, that the caſe in Sir *Thomas Jones* was a ſtrange one, and contrary to ſubſequent reſolutions; but if the mayor had returned an election *de facto*, and that the party had given a bribe to get himſelf choſe, it had been ſomething. *Vide Mod. Rep. vol.* 6. *p.* 309.

Michaelmas, 4 *Ann.* *Coleſat* v. *Newcomb.*

See this caſe fully ſtated in page 386 of this work, under the head *Eccleſiaſtical Matters, &c.*

Michaelmas, 4 *Ann.* *Anonymous.*

A rule was made the *firſt* day of this term, *viz.* that if the corporation to which the *mandamus* is ſent, be above *forty* miles from *London*, then there ſhall be *fifteen days* between the *teſte* and the return of the *firſt* writ of *mandamus*; but if but *forty* miles, or under, but *eight* days only: and as to the *alias* and *pluries*, they made no rule, but ſaid they would conſider of that, and that the writ ſhould not be *teſted* before it was granted by the court; ſo that the *alias* and *pluries* may be made returnable *immediately* as they uſed to be: they further obſerved, that at the return of the *pluries*, if no return was made, and there was an *affidavit* of the ſervice, there ſhould go an *attachment* without hearing council to excuſe the *contempt.* *Vide Salk. vol.* 2. *p.* 434. *Mod. Rep. vol.* 11. *p.* 64.

Eaſter, 5 *Ann.* *The Queen* v. *Baines.*

The defendant being removed by the juſtices of peace of the county of *Weſtmoreland* from the office of clerk of the peace of the ſaid county, obtained a *mandamus* out of this court, to command them to reſtore him to that office, or to ſhew cauſe to the contrary.

An *exception* was taken to the return of the *mandamus*, that the offence was uncertainly alledged, *&c.* and therefore a *peremptory mandamus* was prayed.

But the court ſaid, the order was a judgment, till ſet aſide, and therefore adviſed the defendant's council to take exception to the order returned on the *certiorari*, and refuſed to grant a *peremptory mandamus.* *Vide Raym. vol.* 2. *p.* 1265.

Eaſter, 5 *Ann.* *The Queen* v. *The Mayor and Aldermen of Norwich.*

On a *mandamus* to admit one *Dunch* to be an Alderman of *Norwich*; they returned the charter of *Ed.* 4. *That the Aldermen be charged, and are charged as in London*; and that in *London*, if a perſon be elected Alderman by the ward, the court of Aldermen may refuſe him; and that *D.* was elected by the ward, but refuſed by the Mayor and Aldermen; becauſe he had not received the ſacrament *within a year then next preceding his election*, and that he was turbulent and factious, and procured his election by bribery; *and that he was not elected.*

The court agreed that ſeveral cauſes might be returned, and that either, *not qualified*, or *not elected*, had been a good return; but the Chief Juſtice queſtioned whether bribery would vacate the election, becauſe it did not appear to be an office concerning the adminiſtration of juſtice, and within the ſtatute *E.* 6. alſo the whole court agreed, that as ſoon as *D.* was choſe by the ward, it was an election, and that the Aldermen did not chuſe, (having but one perſon ſent them) but approve; and that before approbation, the election was complete; as a preſentation is before the biſhop approves a clerk; or as a nomination is a perfect nomination before the other preſents. It follows then, that this return is repugnant, and the court cannot tell what to believe; for at firſt they admit an an election, and avoid it; and yet at laſt they return, there was no election at all. Therefore a *peremptory mandamus* was granted. *Vide Salk. vol.* 2. *p.* 436. *Raym. vol.* 2. *p.* 1244.

Michaelmas, 6 *Ann.* *The Queen* v. *The Mayor, &c. of Derby.*

A *mandamus* directed to the Mayor, Aldermen, and capital burgeſſes of *Derby*, *viz.* Whereas *A.* and *B.* *&c.* removed the party complaining from his office of burgeſs, commanding them to command *A.* and *B.* to reſtore him, was quaſhed; for it is abſurd that the writ ſhould be directed to one perſon to command another. *Vide Salk. vol.* 2. *p.* 436.

Michaelmas, 6 *Ann.* *The Queen* v. *Sir Richard Raines.*

A *mandamus* was directed to the defendant to admit a woman to the *probate of a will*, by which ſhe was executrix; the return was, that ſhe was made *executrix* during the minority of *W. R.* and that the ſaid *W. R.* was now of full age, ſo that the teſtator remained inteſtate.

Holt, Chief Juſtice. He ſhould have returned generally, that ſhe was not *executrix*, or if he would return the ſpecial matter as he has done, he ſhould have averred that ſhe was not *executrix otherwiſe, or in any other manner*, but the return now made was not a direct anſwer to the writ, but only argumentative, to ſhew that ſhe was not *executrix*.

But the court would not grant a *peremptory mandamus*; they quaſhed this for the inſufficiency of the return, and *amerced* the defendant, and ordered an *alias mandamus*, that the ſuggeſtion of the writ might be fully and plainly anſwered. *Vide Salk. vol.* 3. *p.* 233.

Michaelmas, 6 *Ann*. *Anonymous.*

The court was moved for a *mandamus* to be directed to the ſurrogate of the Biſhop to grant adminiſtration to *B*. The caſe was, that adminiſtration had been committed to one who died, and made an executor, who would have had it committed to him, and not to the next of kin to the inteſtate.

Holt, Chief Juſtice. It cannot be, but it muſt be committed to the next of kin to the inteſtate. And a *mandamus* was granted for that purpoſe. *Vide Mod. Rep. vol.* 11. *p.* 138.

Hilary, 7 *Ann*. *The Queen* v. *The Commiſſioners of the Land-Tax for Barnwell.*

On the motion of the Recorder of *London*, the court granted a *mandamus* to the commiſſioners of the *land-tax for Barnwell* to tax the lands there equally. *Vide Mod. Rep. vol.* 11. *p.* 206.

Eaſter, 7 *Ann*. *The Queen* v. *The Corporation of Corn.*

Adjudged, That *he was not elected*, is a good return to a *mandamus*; but to ſet forth that a burgeſs is *preferred and ſworn* to that office, is not good. *Vide Mod. Rep. vol.* 11. *p.* 174.

Trinity, 7 *Ann*. *Wright* v. *Sharpe.*

In an action on the *caſe* for a falſe return to a *mandamus*, a verdict and judgment was given for the plaintiff; a motion was made for a *peremptory mandamus*, but it was oppoſed; becauſe a *bill of exceptions* was tendered for refuſing a book to be given in evidence on the part of the defendant. But nothing was mentioned of a *bill of exceptions* at the trial, nor any thing done in it till after the verdict.

Powell, Juſtice, was of opinion, that whether on making this motion, the bill was mentioned in time or not, it ſhould not ſtop a *peremptory mandamus*. If a motion had been made for a new trial, it would have hindered it; and a new trial would have been granted for refuſing of evidence; but he ſaid, if a writ of error had been brought, it would not ſtay the *peremptory mandamus*; and accordingly a *peremptory mandamus* was granted by the court. *Vide Mod. Rep. vol.* 11. *p.* 175.

See this caſe fully ſtated in page 452 of this work, under the head *Evidence*.

Hilary, 8 *Ann*. *The Queen* v. *Lane.*

See this caſe fully ſtated in page 294 of this work, under the head *Corporations*

Eaſter, 8 *Ann*. *The Queen* v. *The Corporation of Doncaſter.*

A *mandamus* was directed to the corporation of *Doncaſter* to reſtore one *Vicars* to be a capital burgeſs; to which they returned, that the corporation have time out of mind had a toll for coals, *viz.* for every wain load going through the town, a coal, of the value of *one penny*; for every cart-load, a coal, to the value of a *half penny*; and for every horſe-load, a coal, as big as a piece of wood, (kept time out of mind by the corporation) that the ſaid *Vicars* did, contrary to his oath, hinder the gathering of this toll, and told them, that he would uphold them in their refuſal.

After hearing ſeveral arguments, the court was of opinion that it was not a ſufficient cauſe to turn him out.

Powell, Juſtice, ſaid, that it was no more than ſaying the *toll* was unreaſonable, as it appears to the court, and alſo uncertain. Accordingly a *peremptory mandamus* was granted. *Vide Mod. Rep. vol.* 11. *p.* 214.

Eaſter, 8 *Ann*. *Kid* v. *Dr. Watkinſon.*

A *mandamus* was granted to reſtore a *pariſh-clerk*, he being elected by the pariſhioners, and diſplaced by the parſon. *Vide Mod. Rep. vol.* 11. *p.* 221.

Michaelmas, 8 *Ann*. *Butler* v. *Cobbet.*

A *mandamus* was directed to the Vice-Chancellor of *Cambridge*, and other commiſſioners of the land-tax, to make an equal aſſeſſment on the inhabitants of St. *Andrew's Barnwell.*

The court was moved to quaſh the writ; for that it ſhould have been to make an equal aſſeſſment on the occupiers of the land; for every occupier may not be an inhabitant.

Holt Chief Juſtice, ſaid, the writ was bad; but if it was good, a *mandamus* was not a proper remedy for an unequal taxation: but a proper remedy is by an appeal to the commiſſioners; but perhaps if the aſſeſſors refuſe to tax any part, as the caſe of *Stourbridge* fair was, a *mandamus* will lie.

Powell, Juſtice, ſaid, it was uſual to grant *mandamuſes* to overſeers, where they will not make a taxation, but not on ſuggeſtion that they intend to make an unequal tax.

Another exception was taken to the writ, that it ſet forth the year in figures; but being in *roman* figures, it might be good for all that; otherwiſe had it been in *Engliſh* figures. The writ was quaſhed, unleſs, &c. *Vide Mod. Rep. vol.* 11. *p.* 254.

Eaſter, 10 *Ann*. *The Queen* v. *Sir G. Heathcote, Lord Mayor of London.*

See this caſe fully ſtated in page 620 of this work, under the head *London*.

Hilary, 11 *Ann*. *The Queen* v. *The Corporation of Durham.*

See this caſe fully ſtated in page 294 of this work, under the head *Corporations*.

Michaelmas, 11 *Ann*. *The Queen* v. *The Mayor and Burgeſſes of Pomfret.*

A *mandamus* was directed to the Mayor and burgeſſes of *Pomfret*, to reſtore *William Lee* to the office of burgeſs. To this they returned, that he was ſuch a day *elected, and duly preferred*, then they ſhewed for cauſe of removing him, his non-attendance at the ſeſſions; then they ſaid that he had not taken the ſacrament within a year before his election, and that therefore his election was null and void.

The court was of opinion that this return was bad, by reaſon of the repugnant and contradictory matter contained in it.

1ſt. They return that he was ſuch a day *elected, and duly preferred*, then ſhew for cauſe of removing him, his not attending at the ſeſſions according to his duty, and then ſhew matter, that proves him never to have been elected; and conſequently, that it was ſo far from being his duty to attend, that it would have been an act of preſumption for him to have done it; and though ſeveral cauſes may be returned, yet they muſt not contradict one another: according to the caſe of *Dunch* v. *The City of Norwich, Eaſter* 5 *Ann.*

The court were likewiſe of opinion, that returns to *mandamuſes* were to be held to the ſame ſtrictneſs ſince the *mandamus* act, 9 *Ann.* as before; therefore they granted a *peremptory mandamus*.

See this caſe fully ſtated in page 373 of this work, under the head *Diſfranchiſement*.

Michaelmas, 11 *Ann. The Queen* v. *The Borough of Aldborough.*

See this caſe fully ſtated in page 295 of this work, under the head *Corporations.*

Trinity, 12 *Ann. The Queen* v. *The Corporation of Buckingham.*

See this caſe fully ſtated in page 295 of this work, under the head *Corporations.*

Hilary, 3 *Geo. The King* v. *Hunt, et al'.*

The court granted a *mandamus* on *ſtat.* 1 *Geo. c.* 34. directed to the juſtices of the peace, to allow the defendants, who were conſtables, their extraordinary charges in providing carriages on the late expedition into *Scotland. Vide Stra. vol.* 1. *p.* 42.

Trinity, 3 *Geo. The King* v. *The Bailiffs of Morpeth.*

A *mandamus* was iſſued to reſtore *A.* to the office of under ſchool-maſter of the grammar ſchool at *Morpeth*, or *the cauſe to us ſignify*; which writ ſet forth, that King *Edw.* 6. founded this ſchool, and appointed that there ſhould be *two* maſters, and an uſher for ever.

The return was, that at the time of publiſhing the act in the firſt year of his Majeſty's reign, *A.* was under ſchool-maſter, and that he had never taken the oaths by the act appointed to be taken; *by reaſon whereof* he became incapable, and therefore they cannot reſtore him.

It was objected, that this return was improper. The writ ſuggeſts a poſſeſſion and expulſion, and therefore they ought to lay the reaſons of turning him out before the court. There does not appear ſo much as a power of turning him out.

Parker, Chief Juſtice. This is of a public nature, being derived from the Crown. And I think the defendants were not obliged to ſhew cauſe why they turned him out, but only why they do not reſtore him. But ſtill this return is inſufficient: it is only that he did not take the oaths in the *act aforeſaid mentioned*, now he is not obliged to take the *Scotch* oath. They ſhould have ſaid, he did not take the oaths of allegiance, abjuration, and ſupremacy, or the oaths required to be taken by a ſchool-maſter. The act excepts officers in the *fleet*, &c. and therefore it ſhould appear that he is not excepted: for the party having no opportunity to plead in this caſe, the return ought to be certain to every intent. And though we grant a *peremptory mandamus*, that will not be final, for if he has not qualified himſelf, he is *ipſo facto* deprived, and our granting a *mandamus* will have no effect.

Eyre, Juſtice. All that is ſet forth in this return may be true, and yet this man no way diſqualified. In the caſe of a pariſh clerk, we granted a *mandamus* on ſolemn debate. So a *peremptory mandamus* was granted. *Vide Stra. vol.* 1. *p.* 58.

Trinity, 3 *Geo. The King* v. *The Mayor, &c. of Norwich.*

The court was moved for a *ſuperſedeas* to a *mandamus* directed to the mayor, aldermen, and common council, to go to the election of a town clerk, on an *affidavit* that the writ was miſ-directed; for it was neither to the corporation by their corporate name, nor to the mayor and aldermen only, in whom the right of election was.

The court ſaid, they would not expect a return to this writ, which was directed to the common council, who had no right, but grant a *ſuperſedeas becauſe improvidently iſſued.* But on a propoſal of trying the right in a feigned iſſue, no *ſuperſedeas* was iſſued. *Vide Stra. vol.* 1. *p.* 55.

Michaelmas, 4 *Geo. Anonymous.*

The court refuſed to grant a *mandamus* to the juſtices, to make a rate, to reimburſe *two* of the inhabitants their charges in defence of an indictment for not repairing a bridge. *Vide Strange, vol.* 1. *p.* 63.

Michaelmas, 5 *Geo. Brooke* v. *Ewers and Wife.*

The court was moved for a *mandamus* to the judge of the court of *Sandwich*, to give judgment on a verdict, though he had granted a new trial for exceſſive damages, without payment of coſts. And for the *mandamus* was quoted 1 *Vent.* 187. *Raymond* 214. 2 *Keb.* 871. And it was likewiſe inſiſted, that a judge of an inferior court cannot grant a new trial, as was held by *Holt* chief juſtice, *Mich.* 1 *Ann.* in the caſe of *Hall* v. *Hill*, 1 *Mod.* 84. and likewiſe by *Parker* chief juſtice, *Eaſt.* 12 *Ann*, *Page* v. *Round.*

And to that opinion the court inclined, and granted a *mandamus* unleſs cauſe ſhewn, *&c.* and on that the judge below, as well adviſed, *acquieſced. Vide Strange, vol.* 1. *p.* 113.

Michaelmas, 5 *Geo. The King* v. *The Churchwardens of Thame in the County of Oxford.*

A *mandamus* was directed to the churchwardens of the pariſh of *Thame*, to reſtore *J. W.* to the office of ſexton there.

They returned, that the pariſh of *Thame* is an ancient pariſh, *&c.* and that the ſexton is eligible by the churchwardens and pariſhioners, or the major part of them, for that purpoſe, at a day and place prefixed, aſſembled; which perſon ſo elected was to continue at the pleaſure of the electors, and was always amoveable by the major part of them in form aforeſaid aſſembled. That on the 1ſt of *May* 1703, *J. W.* was elected ſexton, and continued in the office till the 31ſt of *July* 1717, on which day the churchwardens and pariſhioners being duly aſſembled, *to continue or amove* the ſaid *J. W.* he at ſuch aſſembly, was, by the churchwardens and major part of the pariſhioners, removed from his ſaid office, *and for that cauſe* they cannot reſtore him.

It was argued, that the return is inſufficient. This is not a caſe within the *mandamus* act, ſo as the return might be traverſed; and therefore it muſt be certain to every intent. It muſt anſwer all the ſuggeſtions of the writ, which this return does not: It is laid that he was *duly elected, preferred, and admitted*: They anſwer to the *electing and preferring*, but not to the admiſſion: for though that may be implicitly taken to be anſwered, yet returns by implication, and ſuch as are argumentative only, are not good.

But the court held the return to be good.

Pratt chief juſtice. The admiſſion need not be anſwered, though it is fully done by the *preferring.* Nor does there need any ſummons, as he was not removed for any crime.

Forteſcue juſtice. We ought not to grant a *mandamus*, without a certificate that the ſexton was choſen for life. If he had been removed for a crime, a ſummons would have been neceſſary according to natural juſtice; but the preſent caſe is a removal for what the party cannot gainſay. *Vide Strange, vol.* 1. *p.* 115.

Michaelmas, 6 *Geo. Haſſel's caſe.*

The court was moved for a *mandamus* to be directed to the juſtices of peace for the county of *Cheſter*, commanding them to make a rate to reimburſe one *Haſſel* the money he had expended as ſurveyor of the highways, which was accordingly granted. *Vide Strange, vol.* 1. *p.* 211.

Michaelmas, 7 *Geo. The King* v. *The Mayor and Jurats of Dover.*

A *mandamus teſted* the 14th of *November*, returnable on the 28th, was moved to be ſuſpended, for want of *fifteen days* between the *teſte* and return. On this the practice was inquired into, and agreed to be, and ſettled accordingly, that where the party lives *forty* miles from *London*, there muſt be *fourteen days*, otherwiſe only *eight days*, and that one is to be taken *incluſive*, and the other *excluſive*; ſo that a writ teſted the 14th may be returned on the 28th. *Vide Strange, vol.* 1. *p.* 407.

I

Hilary, 8 *Geo.* *The King* v. *The Borough of Boſſiney, alias Tintagel, in Cornwall.*

See this caſe fully ſtated in page 298 of this work, under the head *Corporations.*

Hilary, 8 *Geo.* *The King* v. *The Dean and Chapter of Trinity Chapel, Durham.*

See this caſe fully ſtated in page 417 of this work, under the head *Error.*

Eaſter, 8 *Geo.* *The King* v. *The Inhabitants of Rufford and Dunnington in the County of Nottingham.*

A *mandamus* was directed to the juſtices of the peace, *&c.* to appoint overſeers of the poor in the town of *Rufford*, who returned that *Rufford* is an extra-parochial place, and therefore are not to provide for their poor.

It was objected againſt this return, that admitting it was true, yet the juſtices are obliged by *ſtat.* 43 *Eliz. c.* 2. to appoint overſeers of the *poor* even in the extra-parochial places, becauſe in the enacting part of the *ſtatute* the words are general, and extend to all places, viz. *That the churchwardens of every pariſh, and two more of every pariſh, and two or more houſeholders, there to be nominated yearly in* Eaſter-*week, or within one month after, under the hands and ſeals of the juſtices of peace, are to be called* overſeers of the poor, *&c.*

Per curiam. Extra-parochial places are within the words of the *ſtatute*; for the juſtices of the peace by the general words have power to name overſeers in all pariſhes, which muſt extend as well to extra-parochial places, as to all pariſhes in general; and no ſubſequent words ſhould controul the general words in the enacting part; and certainly all the poor laws ſhould be conſtrued to extend to ſuch places, as well as to other pariſhes, when they are within the ſame miſchief, and ſhall be ſubjected to the controul of the juſtices of the peace; and the penalty for not meeting in the church ſhall never be inflicted on the overſeers of the poor, becauſe the inhabitants of *extra-parochial places* have no church to meet in; moſt of the *foreſts* in *England* are extra-parochial, and ſo is *Chriſt Church* in *Oxford*, but they ought to maintain their poor.

Now this is a vill, conſiſting of ſeveral inhabitants, and ſo is within the proviſion of *ſtat.* 13 & 14 *Car.* 2. *cap.* 12. for a vill in a county, *not therein particularly mentioned*, will be within the remedy thereby provided; for all caſes within the reaſon are within the remedy of the law. There is no doubt but juſtices have the ſame power to appoint overſeers in towns and vills extra-parochial, as in pariſhes; and this has been ſettled. The word *pariſh* is not in the body of *ſtat.* 43 *Eliz.* but only in the preamble. *W. Jones*, 163. Therefore let a *peremptory mandamus* iſſue. *Vide Mod. Rep. vol.* 8. *p.* 39.

Michaelmas, 8 *Geo.* *The Churchwardens of Biſhopſgate,* v. *Alderman Beecher.*

The churchwardens of the ſaid pariſh, *&c.* made a tax for the *relief of their poor for a whole year*, which amounted to 600 *l.* and upwards, when they ſhould have made up a quarterly tax; and the ſame, through inadvertency, was confirmed by Alderman *Beecher*, who was Alderman of that ward; and afterwards he fearing that the churchwardens would collect the whole ſum, and make ſome ill uſe of it, refuſed to grant a warrant to diſtrain for this tax, whereon the churchwardens moved this court for a *mandamus* to compel him to grant his warrant, and obtained a rule for him to ſhew cauſe why a *mandamus* ſhould not be granted.

At another day the defendant by his council ſhewed all the matter before mentioned for cauſe, *&c.* and a rule was made, that he ſhould grant his warrant to diſtrain for the tax for one quarter of a year, and no more, for he could not confirm this tax in part; it muſt be for the whole, or for no part. *Vide Mod. Rep. vol.* 8. *p.* 10.

Trinity, 9 *Geo.* *Anonymous.*

The court was moved for a *mandamus* to the *Official* of the Biſhop of *Glouceſter*, to commit adminiſtration to the widow of an inteſtate.

Per curiam. That will be to deprive the Ordinary of his election, in granting it to her, or to the next of kin; therefore take your *mandamus* generally, to grant adminiſtration of the goods of the inteſtate. *Vide Stra. vol.* 1. *p.* 552.

Trinity, 9 *Geo.* *The King* v. *The Univerſity of Cambridge.*

A *mandamus* was directed to the Vice-Chancellor, maſters, and ſcholars of *Cambridge*, to reſtore Dr. *Bentley* to the degrees to which he had been admitted by the Univerſity, and from which he had been ſurreptitiouſly degraded, (as was ſuggeſted) or that they ſhould ſhew cauſe why he ſhould not be reſtored.

The council for the Univerſity deſired time to ſhew cauſe why a *mandamus* ſhould not go, for that there were ſeveral old books and charters which were neceſſary to be inſpected before they could ſhew cauſe, and thereon the time was prolonged for that purpoſe.

And on another day it was argued for the Univerſity, that by virtue of a charter given them by Queen *Elizabeth*, they had a court of judicature to try and determine all matters ariſing within their juriſdiction, in which court a plaint was levied by Dr. *Middleton* v. *Dr. Bentley*, and thereon a ſummons was ſent by the beadle to the Doctor, which he received, and ſpoke contemptuous words of the court, for which he was degraded, and from which no appeal would lie, no more than a *writ of error* would lie for oppoſing a fine by a temporal court, for a contempt; becauſe every court of record is intruſted with the final judgment of what ſhall be contempt to their authority.

After hearing the arguments of the council on both ſides, the court granted a *peremptory mandamus*; and in *Eaſter* 10 *Geo.* the Doctor was reſtored to his degree. *Vide Mod. Rep. vol.* 8. *p.* 149.

Trinity, 9 *Geo.* *The King* v. *Robbiſon, the Mayor of Helſtoun.*

The court was moved for a *mandamus* directed to him, to proceed to the election of a new Mayor on the next charter-day; it appearing by *affidavit*, that under a clauſe for holding over he had been in poſſeſſion for *four years*; and it being doubtful whether, where there is a charter-day, there can be an election at any ſubſequent day, the court granted the *mandamus*. *Vide Stra. vol.* 1. *page* 555.

Michaelmas, 9 *Geo.* *The King* v. *The Mayor and Aldermen of Carliſle.*

See this caſe fully ſtated in page 285 of this work, under the head *Conviction.*

Michaelmas, 9 *Geo.* *The King* v. *Tod, and others.*

By *ſtat.* 6 *Geo. c.* 21. the Juſtices of peace have juriſdiction given them in ſome caſes to receive an information, and make their determination, on a ſeizure of brandy; and on an information exhibited by an officer of the cuſtoms, the fact appeared not to warrant the ſeizure, but the juſtice in favour of the officer refuſed to diſmiſs the information, ſo as the owners might have their brandy again; on which the court was moved for a *mandamus* to compel him to determine the matter, which was accordingly granted. *Vide Stra. vol.* 1. *p.* 530.

Michaelmas, 9 *Geo.* *The King* v. *The Mayor and Burgeſſes of Tregony.*

On a motion for a *peremptory mandamus*, the caſe was, that a former *mandamus* was directed to the Mayor and burgeſſes of *Tregony* in *Cornwall*, commanding them, viz. *to elect and ſwear in a Mayor*, &c. *according to the authority in them veſted*, &c.

The court was moved for a *ſuperſedeas* to the *mandamus*, for that the writ was not good, becauſe it was directed to the Mayor and burgeſſes to elect and ſwear in a Mayor; whereas the power of electing is only in the burgeſſes, and the power of ſwearing in is in the Mayor alone; ſo that the Mayor cannot make a return of this writ as directed to him to elect; nor the corporation as directed to them to ſwear in a Mayor; ſo that if the burgeſſes ſhould make a return as to the ſwearing part, they would be uſurpers; and if they do not make a return, they will be in contempt.

Beſides, it is incongruous for a *mandamus* to be directed to *ſwear a Mayor* not yet elected; therefore it being directed to a perſon who had no power to act, it ought to be ſuperſeded, like the caſe of the *city of London*, where ſuch a *mandamus* was directed to the Mayor and Aldermen, *&c.* when the power was in the Mayor alone, and that was adjudged in this court not to be good.

But the court were all of opinion in this caſe, that they ought to make a *return*, for the writ commanding them, *to elect and ſwear a Mayor according to the authority in them veſted*, it ſhall be taken *as rendering to each his own*, and to be the return of both, *&c.* *Vide Mod. Rep. vol.* 8. *p.* 111.

Michaelmas, 9 *Geo.* *The King* v. *The Dean and Chapter of Dublin.*

Adjudged, That a *writ of error* will not lie on the award of a *peremptory mandamus*. *Vide Stra. vol.* 1. *p.* 536.

Michaelmas, 9 *Geo.* *The King* v. *Street and Stroud.*

On a motion for a *mandamus* to the old churchwardens of the pariſh of *C.* to deliver the pariſh-books to the new churchwardens, *&c.* a rule was made for them to ſhew cauſe on ſuch a day why a *mandamus* ſhould not iſſue; at which day it was ſhewn for cauſe that this was a new motion, and that the late Chief Juſtice *Holt* had denied to grant it to a ſteward of a court-baron.

But that which was now inſiſted on was, that the old churchwardens had a right to *keep* the pariſh-books; ſo the rule was diſcharged; for a conteſt between *pariſh-officers* which of them has a right to keep thoſe books, ought to be tried at law on a feigned iſſue. *Vide Mod. Rep. vol.* 8. *p.* 99.

Hilary, 10 *Geo.* *The King* v. *The Mayor of Kingſton upon Hull.*

A motion was made for a *mandamus* to the Mayor, to aſſemble and do the buſineſs of the corporation, and the writ was accordingly granted. In filling up the writ, it was made out for an aſſembly, and to admit all perſons having a right to their freedom, who ſhould appear before them and demand it. On which the court was moved to ſuperſede it, becauſe every perſon has a diſtinct right, and it would be hard to oblige the Mayor to make a return, that he had admitted all who had a right.

Per curiam. It muſt be ſuperſeded, for we never intended ſuch a complicated *mandamus* as this. *Vide Stra. vol.* 1. *p.* 178.

Trinity, 10 *Geo.* *The King* v. *Pindar.*

On an information in nature of a *quo warranto* againſt the defendant, for uſurping the office of Mayor in the corporation of *Penryn* in *Cornwall*; the defendant pleaded, that he was *duly elected*, and ſworn into the ſaid office, *&c.* The plaintiff replied, that he was *not elected*, and *ſworn in manner and form*, &c. as he had pleaded, and thereon they were at iſſue, and the jury found that he was *duly elected*, but that he was not duly ſworn into the office, *&c.* And on motion to ſet aſide this verdict, it was inſiſted that he was not Mayor till duly ſworn, and therefore had uſurped the office, and judgment of *ouſter* ought to be given and entered againſt him.

Per curiam. Let them enter their judgment according to law.

Raymond and *Forteſcue*, Juſtices, held, that it was rightly entered. *Reynolds*, Juſtice, doubted. However, the court gave judgment of *ouſter*, which was afterwards affirmed in the *Houſe of Lords*. *Vide Mod. Rep. vol.* 8. *p.* 235.

Trinity, 10 *Geo.* *The King* v. *Ludlam, Chamberlain of London.*

See this caſe fully ſtated in page 621 of this work, under the head *London*, *&c.*

Eaſter, 11 *Geo.* *The King* v. *Hearle or Serle.*

See this caſe fully ſtated in page 297 of this work, under the head *Corporations.*

Trinity, 11 *Geo.* *The King* v. *Harwood.*

To a *mandamus* directed to the defendant Dr. *Harwood*, as *Commiſſary* of the dean and chapter of St. *Paul's*, commanding him to ſwear *William Folbigg* one of the churchwardens of the pariſh of *St. Giles, Cripplegate, London*, being duly elected, *&c.* the defendant returned *he was not elected*. And it was inſiſted on behalf of *Folbigg* that the return was ill; that the archdeacon, who was only to return the writ, could not judge of the election, and therefore on ſuch a return a *peremptory mandamus* was granted laſt *Michaelmas term*. That the archdeacon could not judge of the qualities of a perſon choſen by the pariſh. *Hil.* 8 *W.* 3. *The King* v. *Rice*, 5 *Mod.* 325. But both *Raymond* chief juſtice, and *Reynolds* juſtice, held the return to be good.

But on the importunity of *Folbigg's* council, who preſſed the authority of the caſe of *The King* v. *White*, and no council for the defendant appearing, a rule was made for a *peremptory mandamus*, *niſi*, *&c.* At which *Raymond* chief juſtice, and *Reynolds* juſtice, were much diſſatisfied; and the defendant's council at another day coming to ſhew cauſe againſt the rule, they diſcharged it. But the court not being unanimous, it was ordered to come on again in the paper; but was never ſtirred again. *Raymond*, Chief Juſtice, however, ſtill retained his former opinion, that the return was good. *Vide Raymond, vol.* 2. *p.* 1405.

Trinity, 11 *Geo.* *The King* v. *Harwood.*

A *mandamus* was directed to the defendant as *Official* to the archdeacon of *L.* to ſwear *T. S.* churchwarden of the pariſh of *H.* who returned that *T. S. was not elected.*

Whereon iſſue was joined, and a verdict *was given for the King.*

The court was moved in arreſt of judgment, becauſe the return of *not elected* is a bad return; the archdeacon being no judge of the election.

Per curiam. The return is a void return, the writ of *mandamus* commands the defendant to ſwear the churchwarden, or to return cauſe why he cannot ſwear him. Now he may return ſome cauſes as an incapacity, for of that he is judge; but cannot deny the election, for of that he is no judge. The archdeacon is only a miniſterial officer, and therefore bound to ſwear him. The ſwearing is only matter of form; becauſe a churchwarden may act before he is ſworn. The office of a churchwarden is a temporal office. *Vide Mod. Rep. vol.* 8. *p.* 380.

Michaelmas, 11 *Geo.* *The King* v. *Beecher, and others.*

A motion was made for a *ſuperſedeas* to a *mandamus* to be directed to the juſtices of the peace to ſign a *poors-rate* made by one part of the pariſhoners only, by which rate part of the pariſh were not charged, on pretence that it was extra-parochial; and there was another rate made by the majority of the pariſhoners, by which that part of the pariſh not before charged was thereby charged, which laſt rate was ſigned by two juſtices; ſo if this *mandamus* ſhould be directed to them to ſign this rate, it would contradict what they had already done by ſigning the other rate, which ought to be determined on an appeal, before a *mandamus*

mandamus ſhould be granted for the ſigning another rate, for otherwiſe there would be a double appeal.

Per curiam If a *mandamus* was directed to the juſtices to ſign this rate, it would not be contradictory to that which was already ſigned, nor to themſelves, becauſe the conteſt is between the pariſhoners in which the juſtices are not concerned, therefore they ought to ſign this rate, and not conteſt the right, it being a queſtion of fact between the pariſhoners whether this place not charged in this rate, but charged by the other rate is extra-parochial or not, which is fit to be tried in a feigned iſſue. *Vide Mod. Rep. vol.* 8. *p.* 335.

Michaelmas, 11 *Geo.* *The King* v. *The Churchwardens of Rotherbithe in Surry.*

On a motion for a *mandamus* to the new churchwardens and overſeers of the poor, to make a *rate* to re-imburſe the old ones the ſeveral ſums by them expended for the maintaining the poor the laſt year, it was denied; it having already been reſolved in *Tawny*'s caſe, that a *mandamus* cannot be granted to the new overſeers to make a rate to raiſe money for the relief of the poor, for ſo is the act of parliament, which muſt be purſued; and an overſeer is not bound to lay out money till he has it; if he does, he muſt make a new rate for the relief of the poor, out of which he may retain as much as will pay himſelf. *Vide Mod. Rep. vol.* 8. *p.* 338.

Michaelmas, 11 *Geo.* *The King* v. *Simpſon.*

To a *mandamus* directed to the Archdeacon of *Colcheſter*, to ſwear *R. F.* into the office of churchwarden, he returned, that before he received the writ, he received an inhibition from the Biſhop of *London*, with a ſignification that he had taken on himſelf to act in the premiſes.

Per curiam. The return is ill. It does not appear that the town of *Colcheſter* is within the dioceſe of the Biſhop who inhibits; beſides, the Archdeacon is but a miniſterial officer, and is obliged to do the act, whether it is of any validity or not. Therefore a *peremptory mandamus* was granted. *Vide Strange, vol.* 1. *p.* 609. *Mod. Rep. vol.* 8. *p.* 325.

Michaelmas, 11 *Geo.* *The King* v. *Robinſon.*

See this caſe fully ſtated in page 137 of this work, under the head *Attachment.*

Michaelmas, 11 *Geo.* *Ravenhill's Caſe.*

The court granted a *mandamus* to ſwear him into the office of *ale-taſter* of *Honiton*; it appearing to be a previous requiſite to his being choſen *port-reeve*, who is the returning officer for members of parliament. *Vide Stra. vol.* 1. *p.* 608.

Hilary, 12 *Geo.* *Anonymous.*

The court was moved for a *mandamus* to be directed to the churchwardens of St. *Botolph*, *Biſhopſgate*, commanding them to call a veſtry in *Eaſter-week*, for the election of churchwardens: but the court refuſed it, ſaying there was no inſtance of ſuch a *mandamus*, and that they could not take notice who had a right to call the veſtry, and conſequently did not know to whom it ſhould be directed. *Vide Strange, vol.* 1. *p.* 686.

Eaſter, 12 *Geo.* *Foot* v. *Prowſe, Mayor of Truro.*

On a bill of exceptions, the court were of opinion, that the election of the Mayor was void for want of an annual election of the Aldermen, and on error brought, the judgment of the *Exchequer Chamber*, whereby the judgment given in this court for the defendant was reverſed, being now affirmed in parliament, the plaintiff came and moved for a *peremptory mandamus*: inſiſting, that he had now falſified the return, and conſequently ſet aſide the defendant's excuſe. To which it was objected, that no *peremptory mandamus* ought to iſſue, unleſs beſides the reverſal of the judgment given for the defendant, there had alſo been a new judgment given for the plaintiff; that a *peremptory mandamus* is a judicial writ, and muſt be founded on ſome judgment eſtabliſhing the party's right who applies for it.

But the court were of opinion, that a *peremptory mandamus* ought to iſſue; for this was not a judicial writ founded on the record, but is a *mandatory writ*, which the court always grants when they are ſatisfied of the parties right: the reverſal of our judgment is a declaring the opinion of the ſuperior court, that the plaintiff had a right; and there is no occaſion for any new judgment. We every day grant *peremptory mandamus's* on producing the *poſtea*; which ſhews a formal judgment is not neceſſary. Accordingly a *peremptory mandamus* was awarded. *Vide Stra. vol.* 1. *p.* 697.

Eaſter, 12 *Geo.* *Anonymous.*

A *mandamus* was granted on a motion, to ſwear in a director of the amicable aſſurance office, which is a company created by a charter from the crown. *Vide Stra. vol.* 1. *p.* 696.

Michaelmas, 12 *Geo.* *The King* v. *The Mayor of Canterbury.*

On a *mandamus* to reſtore a recorder, they returned, that he was only an officer at pleaſure, and that on the ſummons to chuſe another, they did chuſe another, and accordingly the former was removed.

It was objected, that this was only argumentative, and that returns to writs of *mandamus* ſhould be certain to every intent.

Per curiam. This is good general doctrine, but not applicable to this caſe. They need not have ſaid any thing of his being removed, becauſe the chuſing another is a determination of their will, which is enough for them to ſhew. *Adjourned.*

At another day the Solicitor General objected, that the ſummons was only to elect a new Recorder, and that many a man, who would have appeared, had the ſummons been to remove, might abſent himſelf when it was only to chuſe a new one.

Per curiam. We muſt preſume people know the effect and conſequence of their own acts; and in caſe of an officer at pleaſure, a new election is an actual amotion. 1 *Vent.* 352.

Then it was objected, that the letters patent are only ſaid to be granted *under the great ſeal of England*, without the word *ſealed.*

Per curiam. The word *under* imports it; and the other would be but a repetition. So the return was allowed. *Vide Strange, vol.* 1. *p.* 674.

Michaelmas, 12 *Geo.* *The King* v. *White.*

See this caſe fully ſtated in page 387 of this work, under the head *Eccleſiaſtical Matters, &c.*

Michaelmas, 12 *Geo.* *Pees* v. *The Mayor, &c. of Leeds.*

On the return of a *mandamus* it appeared, that the power of amotion is in the Mayor, Aldermen, *and others of the common council:* and the court was moved in arreſt of judgment, that the writ was directed to the Mayor, Aldermen, *and* common council, which infers, that the Mayor and Aldermen are no part of the common council, for want of the word *others*, which is in the power of amotion.

Per curiam. The writ ſhould be directed to the body who are to do the act: here is no body in this direction but who muſt join in the act; this is only repeating the ſeveral conſtituent parts of the corporation, and the mentioning the entire common council, after the Mayor and Aldermen, is but a repetition as to the Mayor and Aldermen. The writ is well enough, and there muſt be a *peremptory mandamus.* *Vide Strange, vol.* 1. *p.* 640.

Eaſter, 13 *Geo.* *The King* v. *The Commiſſioners of Sewers for the levels of Tendring, Lexden, and Winſhee, in the County of Eſſex.*

A *mandamus* bearing *teſte* the 10th of *February*, 12 *Geo.* returnable on *Wedneſday next after fifteen days of Eaſter*, was directed to the defendants, commanding them to make a rate on the occupiers of lands within the hundreds of *Lexden* and *Winſhee*, to reimburſe *D. B.* expenditor of thoſe hundreds 349 *l.* 5 *s.* 8 *d.* which he had diſburſed, and had been allowed him by the commiſſioners on his account. To which the defendants returned, that on the 25th of *November* 1725, they made a rate on the occupiers of lands within the levels of the hundreds of *Lexden* and *Winſtree*, within the limits of their commiſſion, for 799 *l.* 17 *s.* 4 *d.* *&c.* which when collected, will be ſufficient and applicable to pay the ſaid *D. B.* the ſaid 349 *l.* 5 *s.* 8 *d.* which rate they cauſed to be delivered to the collector, *&c.* with the privity and conſent of the ſaid *D. B.* to collect and levy, *&c.* for the uſes aforeſaid, which rate is ſtill in force: then they further returned, that the King on the 17th of *January*, in the *ſecond* year of his reign, by his letters patent, appointed them commiſſioners, *&c.* which commiſſion not being ſuperſeded, by virtue of the ſtatute, expired and determined on the 17th of *February*, 12 *Geo.* and that the *mandamus* was delivered to them on the 12th of *February*, 12 *Geo.* and not before; *and that on account of the ſhortneſs of the time, before the expiration and determination of our commiſſion aforeſaid, we could not execute that writ or precept, as within we are commanded.* And the court were of opinion, that this return was good, becauſe the time was too ſhort for the commiſſioners to make a new rate. And if a *peremptory mandamus* ſhould be granted, the commiſſioners could not now make a rate, the commiſſion being expired. *Vide Raym. vol.* 1. *p.* 1479. *Strange, vol.* 2. *p.* 763.

Eaſter, 1 *Geo.* 2. *The King* v. *The Biſhop of Cheſter.*

To a *mandamus* directed to the Biſhop, as warden of *Mancheſter* college, to admit a chaplain, he returned, that by the royal foundation he was appointed viſitor.

It was objected, that though a *mandamus* will not lie where there is a viſitor free from any objection; yet here the *two* offices being in the ſame perſon, he cannot viſit himſelf; and no caſe can be ſhewn, where the founder has once granted the whole out of him, and on ſuch a temporary ſuſpenſion it has reſulted back.

Per curiam. It is plain he cannot now, becauſe his power is ſuſpended, for thoſe are powers that may ceaſe, and revive, without inconvenience, ſince there is this court to reſort to. In a lay corporation the founder and his heirs are viſitors; in a ſpiritual one the juriſdiction is here, unleſs there is an expreſs viſitor appointed: the ground of our interpoſing in this caſe is, that at preſent there is no other viſitorial power in being; therefore a *peremptory mandamus* was granted. *See ſtat.* 2 *Geo.* 2. *cap.* 29. *Vide Strange, vol.* 2. *p.* 797.

Michaelmas, 1 *Geo.* 2. *The King, or Dacoſta* v. *The Ruſſia Company.*

A *mandamus* iſſued to receive *Dacoſta* into the *Ruſſia* company, and afterwards a rule having been made for the return of the ſame at a certain day, the court was now moved to ſet aſide the ſaid rule, this being a caſe not within *ſtat.* 9 *Ann. cap.* 20. which makes a *mandamus*, directed to corporations for reſtoring of corporated officers, returnable at a day certain; whereas before the ſaid act it was not ſo, but an *alias* and *pluries* iſſued, and now this *ſtatute* being introductive of a new law, is excluſive of all caſes not within the ſame.

Per curiam. Before the *ſtatute* we might have made a rule for the return of a *mandamus*, and the *ſtatute* has not taken away this power. *Vide Fitz-Gibbons, p.* 4. *Strange, vol.* 2. *p.* 783.

Eaſter, 2 *Geo.* 2. *The Caſe of Schriven and Turner.*

A *mandamus* was directed to the court of aldermen in *London*, to reſtore them to the office of yeoman of the wood-wharf, on an *affidavit* of its being an ancient office, and a freehold. *Vide Strange, vol.* 2. *p.* 832.

Trinity, 2 *Geo.* 2. *The Caſe of the Bailiffs of Bridgenorth.*

A *mandamus* was directed to the *two* bailiffs; one of whom was for obeying the writ, but the other would not, nor would he join in a return. And the court granted an attachment againſt both, for they ſaid it would be endleſs to try in all caſes, which was in the right, and it would be always uſed for a handle of delay. *Vide Strange, vol.* 2. *p.* 808.

Trinity, 2 & 3 *Geo.* 2. *Lewis* v. *Lewis.*

The plaintiff having exhibited articles of the peace againſt the defendant, the court was moved in behalf of the defendant, for a *mandamus* to be directed to the *three* juſtices of the peace, for the county of *Brecon* in *Wales*, to take ſecurity of him for his keeping the peace towards the plaintiff, in regard of the defendant's age and infirmity, and his great diſtance from *Weſtminſter*, he living in the county of *Brecon* aforeſaid, which the court granted on ſome precedents ſhewn and remembered. *Vide Fitz-Gibbons, p.* 85.

Hilary, 3 *Geo.* 2. *The King* v. *Betteſworth.*

A *mandamus* was granted to Dr. *Betteſworth*, as judge of the prerogative court of *Canterbury* to grant a probate of the will of the Earl of *Londonderry*, to the executors therein named. The day after it was returnable, a rule was prayed for the Doctor to return the writ *inſtantly*.

It was inſiſted for the Doctor, that it ought to be a *four* days rule, but on conference with the clerks of the crown-office, the court were of opinion, that there was no ſtated time for theſe rules, but that the diſtance of place ought to be the guide; and therefore they ordered the writ ſhould be returned the next day.

Whereon the Doctor returned, that it is the cuſtom and practice of the prerogative court, that if any creditor of the deceaſed enters a *caveat* againſt granting a probate, and ſwears himſelf to be a creditor, there iſſues a commiſſion of appraiſement, till the return whereof, the judge has not uſed, or ought to grant any probate: then he ſet out, that *two* creditors, who ſwore to their debts, entered a *caveat*, and prayed a commiſſion of appraiſement, which was decreed and iſſued, but is not yet returnable; *and for that cauſe* he cannot as yet grant a probate.

On argument, the court held the return to be ill, for that the judge can only ſtay the probate where there is a conteſt about the validity of the will. This commiſſion of appraiſement can be of no uſe but to ſpend money, and delay the executor from getting in the effects of the teſtator. And by *ſtat.* 21 *H.* 8. *c.* 5. the probate is to be granted *with convenient ſpeed, without any fruſtratory delay*; and the eccleſiaſtical court ſhall never be ſuffered to ſet up their practice againſt the law of the land: a peremptory *mandamus* was therefore granted.

An exception was taken to the writ, that it was only that the Earl *had effects* at *Weſtminſter*, and in divers dioceſes, but did not ſay within the province of *Canterbury*. But the court over-ruled it, ſaying they would not preſume an inferior juriſdiction, and it appeared he had already done ſome acts of office as the prerogative *judge*, and ſhall not be received now to ſay it does not appear he has any juriſdiction: ſo judgment was given for the defendant. *Vide Stra. vol.* 2. *p.* 857.

Trinity, 3 *Geo.* 2. *The King* v. *Lewis.*

The court was moved for a *mandamus* to *three* juſtices of peace in *Brecon*, to take ſecurity on articles of the peace exhibited againſt the defendant in this court; and on an *affidavit* being produced of his being *ſeventy* years of age, and unable to travel; and *Seymour*'s caſe, *Michaelmas*, 6 *Ann.* being cited, it was granted in this caſe. *Vide Strange, vol.* 2. *p.* 835.

Hilary, 4 *Geo.* 2. *Smith's Caſe.*

The court was moved for a *mandamus* to Dr. *Betteſworth*, commanding him to grant adminiſtration to *Smith* of the goods of his deceaſed ſon, during the minority of his grandſon.

The council inſiſted, that the father had not an equal right with the ſon; and that the ſpiritual court has always conſidered adminiſtrators only as truſtees for the infant, and have never kept to any rule in granting them, but according to the circumſtances of the family: where there are ſeveral in equal degree, as children, they have always choſen which they pleaſed.

Per curiam. When we grant *mandamus's*, it is to oblige the judge to do right to the party who ſues out the writ; but as there is no law which ſays to whom theſe adminiſtrations during minority ſhall be granted, there is no law to be put in execution. In the caſe of the next of kin he is entitled *of right*, and therefore in his caſe we will grant a *mandamus* of courſe. But we will grant no writ in this caſe. *Vide Strange, vol.* 2. *p.* 892.

Hilary, 4 *Geo.* 2. *The King* v. *Ward.*

On the return of a *mandamus*, the following points were reſolved by the court.

1ſt, That a *mandamus* lies for a *deputy regiſter* of the ſpiritual court, though it was objected, it did not lie for a deputy; and alſo that it did not lie to be admitted to a *judicial office* in the ſpiritual court, as that of a *regiſter* is, according to *Hale*'s opinion. 6 *Mod.* 18.

Lee, Juſtice, ſaid, that the late caſes have gone contrary to *Holt*'s opinion, *viz.* that a *mandamus* lies not for offices of a private nature, as to be admitted ſteward of a court-baron.

2dly, That it is no good return, that the office is filled by another perſon, for a *mandamus* gives no right; it only puts the party in a way to bring his action, and thereby to try the right; and a caſe between the *King* and —— was cited at the bar; and that *he was not elected*, was not a good return, was denied, for the court ſaid, that the caſe had been over-ruled, and that they hoped they ſhould never hear it cited again.

3dly, That to return, there is a conteſt before the delegates about this office, not yet determined, and for that reaſon, that the delegates had inhibited the defendant not to admit any perſon whatſoever to the ſaid office, before the aforeſaid ſuit was determined, is not good. *Vide Fitz-Gibbons, p.* 195. *Stra. vol.* 2. *p.* 893.

Michaelmas, 4 *Geo.* 2. *The King* v. *Wildman.*

A *mandamus* was granted to *Wildman* on motion, requiring him to deliver to the company of *blackſmiths*, all books, papers, &c. which he had in his cuſtody by virtue of being their clerk, from which office he had been removed.

The officer took the rule to deliver the books, &c. to the new clerk; but the *mandamus* was made out right, which varying from the rule was ſuperſeded; and afterwards, on motion, a new one was granted. *Vide Strange, vol.* 2. *p.* 879.

Michaelmas, 4 *Geo.* 2. *John Giles's Caſe.*

The court was moved for a *mandamus* to the juſtices of the city of *Worceſter*, to grant a licence to *Giles* to keep an ale-houſe, the council inſiſting that it being within a city, *ſtat.* 2. *Geo.* 2. *c.* 18. did not extend to it.

It was inſiſted on the other ſide, that it was diſcretionary in the juſtices; and *Salk.* 45. was cited, that no appeal lies from the denial of a licence; and if the owner be committed, the want of a licence can only come in queſtion, and not the reaſon why it was denied.

Per curiam. There never was an inſtance of ſuch a *mandamus*, and therefore we will not grant it. *Vide Stra. vol.* 2. *p.* 881.

Eaſter, 6 *Geo.* 2. *The Caſe of the Borough of Calne in Wilts.*

Affidavit being made, that the ſteward who kept the public books, had refuſed to produce them at the corporate meeting, to enter the elections of their members; a *mandamus* was granted to him, to attend with the books at the next corporate aſſembly. *Vide Strange, vol.* 2. *p.* 948.

Eaſter, 6 *Geo.* 2. *The Caſe of the Borough of Eveſham.*

See this caſe fully ſtated in page 406 of this work, under the head *Elections.*

Hilary, 7 *Geo.* 2. *Ruding* v. *Newel.* Error.

The plaintiff brought his *mandamus* to be reſtored to the office of regiſter of the Archdeacon; and *he was not appointed* being returned, brought his action, and falſified the return. The defendant brought error in the *Exchequer Chamber*, and it was held to be a *ſuperſedeas* to a *peremptory mandamus. Vide Strange, vol.* 2. *p.* 983.

Eaſter, 8 *Geo.* 2. *The King* v. *Wheeler.*

On ſhewing cauſe why a *mandamus* ſhould not iſſue to the defendant as regiſter of the *conſiſtory court* of *Durham*, to deliver over all the public books, records and entries to one *Trotter*; it came out on *affidavits* that *Trotter* had a grant of this office jointly with one *Hilton*, from the late lord *Crew* biſhop of *Durham*, and that *Trotter* ſurvived *Hilton*, and by deed poll the 7th of *Auguſt* 1731, made the defendant his deputy for *three years*, which expired on the 17th of *September* laſt, and that was the ground of *Trotter*'s application for this *mandamus*; but it appeared now on *affidavits* that the parties entered into an agreement in writing under their hands, but not ſealed, for *Wheeler*'s being his deputy for *three years* more, and that *Wheeler* had brought a bill in equity for the ſpecific performance thereof, which is now depending in *Chancery*, and is to be heard next term.

It was inſiſted that theſe writs are not *due in juſtice*, but at the diſcretion of the court; and that *Trotter* might have applied to the *Biſhop's court.*

Lord *Hardwicke*. The only material thing that has been ſaid for this *mandamus*, is, that *Trotter* appearing to be the legal officer, is intitled to this *mandamus in juſtice*: but I do not ſee that every officer who is rightfully the officer, though he has been diſſeiſed, is intitled to it *in juſtice*: the reaſon why we grant theſe writs is to prevent a failure of juſtice, and for the execution of the *common law*, or of ſome *ſtatute*, or of the King's charter; and never as a private remedy to the party, except on the *ſtatute* of Queen *Ann*, and that ſtands on another footing: nay the old caſes went ſo far as to refuſe a *mandamus* in all caſes where an aſſize lay; and though the court is not ſo ſtrict now, yet it ſhews in what light theſe writs are conſidered. Now here does not appear to be any failure of juſtice, but only a diſpute about a private right: if you ſay this is a *diſſeiſin* you may bring an aſſize. In the caſe of one *Vincent*, a *mandamus* was prayed to oblige the biſhop to grant a licence for preaching to a lecturer, and the court did not enter into the queſtion, whether that was a proper inſtance for granting a *mandamus*, but refuſed it becauſe a diſpute was then depending, whether *Vincent* was intitled to the lectureſhip.

Lee juſtice. The having a legal title to this office gives no title to the books, for if *Wheeler* has an equitable right it will bar the legal title, ſo that in this caſe how can it be ſaid that *Trotter* is intitled to the books *in juſtice*. Therefore the rule was diſcharged. *Vide Caſes temp. Lord Hardw. p.* 99.

Trinity, 8 *Geo.* 2. *The King* v. *Dr. Henchman.*

On a motion, a *mandamus* was granted to compel Dr. *Henchman* to ſwear in one *A.* to be churchwarden of the pariſh of *Finchley*. *Vide Caſes Temp. L. Hardw. p.* 130.

Hilary, 9th Geo. 2. Dr. Walker's Caſe.

A *mandamus* was directed to Dr. *Richard Walker*, vice-maſter of *Trinity* college in *Cambridge*, commanding him to execute the ſentence of the biſhop of *Ely*, viſitor of that college, and without delay to deprive Dr. *Richard Bentley* of the office of maſter of the ſaid college, and of all the privileges, emoluments, and advantages thereto belonging, he having been found guilty of dilapidation, and violation of the *ſtatutes*; or to ſignify cauſe to the contrary.

Dr. *Walker* returned, among other things, the ſentence *verbatim*, and further that by reaſon the ſaid college was of King *Henry* 8th's foundation, the now King is general viſitor thereof, and as general viſitor has an undoubted authority to cauſe the ſaid ſentence of deprivation to be executed by the vice-maſter of the ſaid college, and on his failure to puniſh him, as to the ſaid King as general viſitor ſhall ſeem meet, and that he the vice-maſter of the ſaid college is not ſubject to any juriſdiction whatſoever in the premiſes aforeſaid, other than the now King as general viſitor; and prays judgment if he ought to give any other anſwer to the ſaid writ, and whether this court will further intermeddle in the premiſes.

The cauſe being ſet down in the paper for argument, after hearing council on both ſides, Lord *Hardwicke* delivered his opinion as follows:

Lord *Hardwicke*. There are two things which ſeem to be aimed at by this writ and return, which I do not ſee that the court can do. 1ſt, To aid the juriſdiction of the biſhop of *Ely* as viſitor: and 2dly, to determine that the King is general viſitor. This general rule muſt be admitted, that if there be a lay foundation, the viſitor has the ſole and intire power to execute juſtice, and all the caſes of applications to this court for admitting fellows have been refuſed if there has been a viſitor. I do not know any inſtance where the court has granted a *mandamus* to a viſitor to execute his power, though at the ſame time I do not know but the court may do ſo, for it is a kind of juriſdiction, but not taken notice of by the *common law*. This court only iſſues *mandamus's* for executing that authority which the party has, and I do not know that they have ever been granted in aid of any juriſdiction. But however in this caſe, the writ is *felo de ſe*; for it ſuggeſts that the biſhop is viſitor of the college, and the return will not help it: Now is there any caſe where a general viſitor has come to this court for us to help him to viſit his college? In the caſe of *Phillips* v. *Berry* it was held, that the ſentence of the general viſitor makes the place void, ſo that an action will lie for the *meſne* profits. So then if this writ be *felo de ſe*, the biſhop is taken to be the viſitor and judge, and the vice-maſter is only a miniſter to put his ſentence in execution; and can it be ſaid that ever any *mandamus* went to an officer of an inferior court to compel him to do his office? No ſure, for if the inferior officer will not do his duty, the judge of the inferior court muſt turn him out; and this objection is the ſame, whether the Biſhop or the King be viſitor in this caſe. And no defect of juſtice will enſue for want of a *mandamus*, for if the biſhop be viſitor, as the writ ſuggeſts he is, then he may viſit, or remove, or puniſh the vice maſter, and we could do no more; and if the King be viſitor you may apply to the King for him to viſit; ſo that I am very clear the return ſhould be allowed, or the writ be quaſhed.

The court took time to conſider, and on the laſt day of the term, they gave judgment that the writ ſhould be quaſhed, but ſaid they did not intend it ſhould be underſtood that they had thereby determined whether the King or the biſhop was general viſitor. *Vide Caſes temp. Lord Hardwicke. p.* 212.

Eaſter, 9 Geo. 2. The King v. *Everett.*

Humphreys and *Slater* were candidates for the office of common councilman in the ward of *Baſſiſhaw* in *London*, and *Humphreys* had the majority on the poll; whereon *Slater* demanded a ſcrutiny, but did not deliver his objections againſt the bad pollers till the 12th day; whereas *ſtat.* 11 *Geo. c.* 18. directs, that the candidates ſhall within *ten days* next after the receipt of the copy of the polls taken at ſuch election, deliver to the preſiding officer the objections, *&c.* and therefore, *Humphreys* objected to the ſcrutiny's going on, for the defect in not delivering the objections in *ten days*. And thereon *Slater* moved for a *mandamus* to *Everett* the deputy alderman of the ward, for him to proceed in the ſcrutiny; and hereon the queſtion was, whether the *ten days* in that *ſtatute* were only directory, or were compulſory; and it was objected likewiſe, that as the *ſtatute* had laid a penalty on the preſiding officer if he offended in the premiſes, for that reaſon a *mandamus* ought not to iſſue.

Lord *Hardwicke*. As to the penalty there is nothing in it; for whenever an act of parliament directs ſomething to be done, the court will enforce the doing of it by *mandamus*; ſo on the act of parliament to oblige mayors of corporations to attend at the aſſemblies, we always grant a *mandamus* notwithſtanding the penalty.

The court ſaid, that as this was a queſtion of great conſequence, they would not determine it on motion, and therefore granted the *mandamus*, that it might come before them on the return. *Vide Caſes Temp. Lord Hardwicke. p.* 261.

Trinity, 9 Geo. 2. The King v. *The Corporation of Oxford.*

On application being made for a *mandamus* to the members of this corporation to proceed to the election of a Mayor purſuant to *ſtat.* 11 *Geo. c.* 4. It was objected, that the ſtatute extended only to the defect of election within the year, whereas here has been no Mayor ſince the year 1730, that is to ſay, no legal Mayor, for others have been actually choſen, but illegally, and have all ſince that year been ſucceſſively *ouſted* on writs of *quo warranto*.

Lord *Hardwicke*. This is a remedial law, and therefore the court ſhould make it as effectual as the words, or any conſtruction of them, can warrant; and the court has always made a liberal conſtruction of it in theſe caſes; ſo in the caſe of the *borough of Tintagel*, 2 *Strange p.* 1003. As to the objection that this is not within a year, whatever might be the intention of the ſtatute as to that, there are however no words to tie it up to a year; and as there are not, I think, a *mandamus* ought to iſſue in this caſe; and I rely on the proviſion intended by the ſtatute, which was, to prevent the diſſolution of corporations, and to give room for the election of head-officers; though theſe ſeveral elections have been adjudged void; but there are no words to diſſolve the corporation, but on the contrary the ſtatute ſays, if the election is held void, the corporation ſhall have power to elect, and ſhall not be diſſolved; ſo that here is a corporation in being, and capable of acting, and an expreſs clauſe in the ſtatute to enable the court to grant a *mandamus*, and no negative words to reſtrain it. The caſe of *the borough of Macclesfield* is in point. So the court unanimouſly agreed to grant a *mandamus* in this caſe.

Afterwards on the ſame day, the council who had oppoſed this *mandamus* moved for the like *mandamus*, that they too might have the carrying down a *mandamus*, and urged that *two* writs were ſo granted in the caſe of the *borough of Eveſham*.

Per curiam. Be it ſo. *Vide Caſes Temp. Lord Hardw. p.* 178.

Trinity, 9 Geo. 2. Kynaſton v. *The Mayor, &c. of Shrewſbury.*

See this caſe fully ſtated in page 299 of this work, under head *Corporations*.

Michaelmas, 9 Geo. 2. The King v. *The Overſeers of the Poor of Spotland.*

A *mandamus* was directed to the defendants to make a rate for the poor, who returned that there are *two* townſhips, *Further Spotland* and *Nearer Spotland*, and that overſeers are appointed for the townſhip of *Further*

ther Spotland; and that the inhabitants thereof have made a rate, and provided for their poor; and on this return, in behalf of the townſhip of *Nearer Spotland*, an information was moved for againſt the defendants as for a falſe return; for the queſtion is between theſe places, whether they ſhall join in the maintenance of the poor, as one pariſh or townſhip, or not; there being many in *Nearer Spotland*, and very few in the other; and therefore *Nearer Spotland* alledged that they are not diſtinct, but one and the ſame townſhip, which now on ſhewing cauſe was denied by *Further Spotland*, and they offered to try the matter.

Lord *Hardwicke*. If this had been a *mandamus* on *ſtat.* 9 *Ann*, *c.* 20, the return might have traverſed; or had it been a *mandamus* concerning ſome private right, the party might have had an action for a falſe return; and ſo a *peremptory mandamus*, if the return had been wrong; but here there cannot be an action for a falſe return, becauſe no one is particularly intereſted, ſo there is no remedy but an information, and there being a direct contrariety in the affidavits, it is the courſe of the court to grant an information to try the fact.

Per curiam. Let the information iſſue. *Vide Caſes Temp. Lord Hardw. p.* 184.

Michaelmas, 11 *Geo.* 2. *Clarke* v. *The Biſhop of Saliſbury.*

A *mandamus* was granted to admit the plaintiff to a canonry or prebend of *Saliſbury*, and to inſtitute, induct, and inveſt him therein; which was ſtrongly oppoſed on ſhewing cauſe, as turning the *common law* remedy by a *quare impedit* into another channel.

But the court ſaid, that though formerly *mandamus's* were not ſo frequent, eſpecially where the party had another remedy; yet they being found to be more expeditious and leſs expenſive, had been more allowed of late. And as to there being another remedy, it might be ſaid with equal propriety in caſes where an *aſſize*, or an action on the *caſe* would try the right; and yet that was never thought a ground to deny a *mandamus*; ſo the writ was ordered, but never iſſued, the parties agreeing to refer the diſpute. *Vide Stra. vol.* 2. *p.* 1082.

Trinity, 13 *Geo.* 2. *The King* v. *Whaley.*

A *mandamus* was granted, directed to the defendant as maſter of *Peter-houſe* College in the Univerſity of *Cambridge*, to admit *Thomas Rogers* to a fellowſhip of that college, on an affidavit of his election. A motion was made to ſuperſede this writ, on affidavits of there being a viſitor, *viz.* the Biſhop of *Ely*. But the court put the maſter to make a return, and refuſed to determine the point on affidavits, where the other party had no opportunity to right himſelf by an action. *Vide Stra. vol.* 2. *p.* 1139.

Trinity, 14 *Geo.* 2. *The Caſe of the Corporation of Aberyſtwith.*

In this caſe, the court held, that though it was diſcloſed that there was in fact an election, yet if, on examining it, there was good reaſon to think it void, they would award a *mandamus* on the ſtatute, to proceed to a new election, and not wait the event of any controverſy about the former. *Vide Stra. vol.* 2. *p.* 1157.

Hilary, 16 *Geo.* 2. *The Caſe of the Corporation of Scarborough.*

A *mandamus* was moved for on *ſtat.* 11 *Geo.* 1. *cap.* 4. *ſect.* 2. for the corporation to elect bailiffs, coroners, chamberlains, and other anual officers, on ſuggeſtion that there had not been any good officers ſince the year 1736, and ſeveral of thoſe that have been in fact choſen have had judgment of *ouſter* againſt them. And on conſidering the caſes of the corporations of *Tintagel* and *Aberyſtwith*, the court granted a *mandamus*: here being no reaſonable expectation of juſtifying the right of the preſent poſſeſſors, and the ſtatute being made to prevent the confuſion in corporations that muſt enſue. And the court further ſaid, it ſhould go not only for the head officer, but alſo for the others who were neceſſary conſtituent parts of the corporation, and equally within the reaſon of the ſtatute. *Vide Stra. vol.* 2. *p.* 1180.

Trinity, 16 *Geo.* 2. *The Caſe of the Lecturer of St. Ann's Weſtminſter.*

The court on conſideration refuſed to grant a *mandamus* to the Biſhop of *London* to grant his licence to a lecturer, who appeared to have nofixed ſalary, but wholly depended on voluntary contributions; and where there was no cuſtom, and the rector had refuſed his leave to preach in the church to the perſon now applying. *Vide Stra. vol.* 2. *p.* 1192.

Eaſter, 17 *Geo.* 2. *The Caſe of the Rector of Wigan.*

The rector claimed as lord of the manor to hold a *court-leet*, at which the in-burgeſſes of *Wigan* ought to attend to make a jury, which they having refuſed, and neglected to do at *two* courts, whereby no buſineſs could be done, the court granted a *mandamus* to enſorce their attendance. *Vide Stra. vol.* 2. *p.* 1207.

Trinity, 18 *Geo.* 2. *The King* v. *Sir Henry Penrice.*

A *mandamus* iſſued, ſuggeſting that *M. Hubbard* was in *Eaſter* week choſen churchwarden of *Heſton*, and commanding the defendant to ſwear him in, or ſhew cauſe to the contrary. To this he returned, that *Hubbard* was not elected in *Eaſter*-week, and that on his offering to ſwear him in, *Hubbard* refuſed to accept the office.

To this it was excepted, that the return had confined it to a particular time, and was in the nature of a *negative pregnant*, for he might be choſen at ſome other time; and returns (which are not traverſable) muſt be certain to every intent. *Salk.* 432. and *Hubbard's* refuſal could be no reaſon, for he might change his mind, and the pariſh had an intereſt in making him ſerve the office: and the court held the latter part of the return inſignificant; but as to the firſt *exception*, they held it good, as it purſued the ſuggeſtion of the writ: and therefore allowed the return. *Vide Stra. vol.* 2. *page* 1235.

Trinity, 19 *Geo.* 2. *The King* v. *The Churchwardens of Weobly.*

The court refuſed to grant a *manaamus*, directing to inſert particular perſons in the poor's rate, on *affidavits* of their ſufficiency, and of their being left out to prevent their having votes for parliament-men, for that the remedy was by appeal, and this court never went further, than to oblige the making a rate, without meddling with the queſtion, who is to be put in or left out; of which the pariſh officers are proper judges, ſubject to an appeal. *Vide Strange, vol.* 2. *p.* 1259.

Hilary, 30 *Geo.* 2. *Green* v. *The Mayor of Durham.*

See this caſe fully ſtated in page 300 of this work, under the head *Corporations.*

Eaſter, 31 *Geo.* 2. *The King* v. *The Biſhop of Durham.*

See this caſe fully ſtated in page 389 of this work, under the head *Eccleſiaſtical Matters*, *&c.*

Hilary, 32 *Geo* 2. *The King* v. *The Mayor, Bailiffs, and Common Council of the Town of Liverpool.*

See this caſe fully ſtated in page 200 of this work, under the head *Bankrupts.*

Eaſter, 32 *Geo.* 2. *The King* v. *The Corporation of Wigan*; *or*, *The King* v. *Curghey*, *Eſq*; *and others.*

On a *vacancy* in a corporation, if a proper application for a *mandamus to go to election*, be made and granted, it is not of courſe, that any *other* like motions may be made *by other parties*, for the ſame thing: but if there be a *reaſonable cauſe to ſuſpect*, "that the party "who firſt moved for it, does not *really mean* to carry

“ it into execution,” *this* muſt be particularly laid before the court by *affidavit*; and then a rule ſhall be made “ to ſhew cauſe,” which method was taken in the preſent caſe, where the other party had made a prior application: for on *affidavits* of particular circumſtances, a rule was made, to ſhew cauſe why a *croſs mandamus* ſhould not iſſue, directed to *William Curgbey*, Eſq; commanding him to hold a *court-leet* in order to proceed to the election of a Mayor.

After hearing the arguments of the council on both ſides, on ſhewing cauſe to this rule, the court diſcharged the ſame.

Lord *Mansfield*. The queſtion ſeems to be now taken up, (though not before diſputed) “ Whether theſe *croſs* or *concurrent* writs of *mandamus* are to be granted of *courſe*, without ſome *ſpecial* and *particular* reaſon.”

If we ſhould grant writs to *both* parties, it would occaſion not only *double expence* and *double trouble*, but *double elections*: which would be infinitely inconvenient to corporations, and could not be prevented under ſuch *double* writs.

The very words of *ſtat.* 11 *Geo.* 4. ſhew that it would be determining the right before-hand, if we ſhould order to whom the writ ſhall be directed.

As to the ſuſpicion *here* offered, the *affidavits* are extremely looſe, and built on mere imagination, therefore there is no ſufficient ground for granting *two* writs in this caſe.

Deniſon, *Foſter*, and *Wilmot*, Juſtices, gave their opinions, and concurred with the Chief Juſtice.

Per curiam. Let the rule be diſcharged. *Vide Bur. vol.* 2. *p.* 783.

Trinity, 32 & 33. *The King* v. *The Mayor and Jurats, of Rye.*

On a rule to ſhew cauſe why an attachment ſhould not iſſue againſt the *Mayor* and *Jurats*, for not returning a *mandamus* directed to them; commanding them “ to admit and ſwear *Edwin Wardroper* into the office of one of the *Jurats* of that corporation; or to ſhew cauſe *why they refuſe* to admit him.”

The right claimed by the Mayor was, “ to fill up the vacancy of *Jurats*, happening during his year, *generally*:” but the *Jurats* deny that the Mayor has ſuch a right, *generally*; though they admit that he has it on the *ſingle day* of his election; but not afterwards.

On ſhewing cauſe to this rule, the matter ended in a rule by conſent, to try the right in a feigned iſſue, at the ſittings after this term, for *Middleſex*; on the queſtion, “ Whether *Edwin Wardroper* was duly elected, or not;” and further, that the books ſhould be inſpected, and copies taken, &c. and the books themſelves produced at the trial, on proper notice, &c. and that the party who ſhall prevail, may be at liberty to enter up this judgment as of this term. *Vide Bur. vol.* 2. *p.* 798.

Eaſter, 33 *Geo.* 2. *The King* v. *Marſh, Deputy Governor of the Turkey Company.*

This caſe (purſuant to what had been before ſettled) came on in the *crown paper*, on the return to a *mandamus*, which had iſſued ſince the laſt motion: which *mandamus* and return were as follows:

The writ was directed to *John Marſh*, Deputy Governor of the company of merchants trading into the *Levant* ſeas, commonly called the *Turkey Company*.

The return was in ſubſtance as follows:

And I do further humbly certify and return to our ſaid preſent moſt ſerene ſovereign Lord the King, that the ſaid *Iſaac Rogers*, in the ſaid writ named, hath *not* taken, but hath refuſed to *take* the ſaid oath required by *ſtat.* 26 *Geo.* 2. either before the Governor or Deputy Governor of the ſaid company, or before *two* of his Majeſty's juſtices of the peace: and *therefore* I cannot admit, or cauſe to be admitted, him the ſaid *Iſaac Rogers* into the ſaid company of merchants trading into the *Levant* ſeas, commonly called the *Turkey Company*, as by the ſaid writ I am commanded.

JOHN MARSH, *Deputy Governor.*

The queſtion before the court on this caſe was, whether a *quaker*, who has in due manner made and ſubſcribed his *ſolemn affirmation and declaration* to the effect of the oath, can be admitted to the *freedom of this company*, without actually taking the *oath* appointed by *ſtat.* 26 *Geo.* 2. *cap.* 18. enabling every ſubject of *Great Britain*, deſiring admiſſion into that company, to be admitted into it, on paying or tendering 20 *l.*

After hearing the arguments of the council on both ſides, Lord *Mansfield*, now delivered the opinion of the court as follows:

This man's claim is nothing more than to be admitted into a company of merchants trading to a particular part of the world. And ſurely, there can be no pretence to call *this a place or office of profit in the government*. Therefore this return muſt be quaſhed, and a *peremptory mandamus* muſt iſſue.

Per curiam. Let the return to this writ be quaſhed for the inſufficiency thereof; and let a *peremptory mandamus* iſſue. *Vide Bur. vol.* 2. *p.* 1000.

Trinity, 33 & 34 *Geo.* 2. *Crawford* v. *Powell.*

This was a *caſe* reſerved at *niſi prius* before Lord *Mansfield* at *Guildhall* on the *trial of an action for a falſe return to a mandamus.*

The *mandamus* was directed to *G. P.* commanding him to deliver to *G. C.* the common ſeal, books, papers, and records of the corporation of *Harwich*, which the ſaid *C.* claimed to belong to his cuſtody, as having been *duly elected* town-clerk of that corporation; to this writ of *mandamus*, (to deliver the *inſignia*, &c.) the defendant *G. P.* returned, “ that the ſaid *G. C.* was not *duly elected* town-clerk:” on which return, alledged to be a falſe one, the foregoing action was brought:

On this caſe being argued before the court, the matter contended for was, that it was incumbent on the plaintiff to ſhew that he was *duly elected*, which he could not be, unleſs he had taken the ſacrament within the year, according to *ſtat.* 2 *Car.* 2. and 13 *Car.* 2.

After hearing the arguments of the council on both ſides, the court gave judgment for the plaintiff.

Lord *Mansfield.* Since *ſtat.* 5 *Geo.* 1. *cap.* 6. the election of a perſon who has not taken the ſacrament within a year next preceding it, is *not void*, but *only voidable in caſe of a removal or proſecution within the time limited*; and conſequently, as here was no ſuch removal or proſecution within that limited time, the plaintiff's election ſtood *confirmed*, and became *abſolute.* It is not like the caſe of *Tufton* v. *Nevinſon* in Lord *Raymond's Reports*, becauſe that aroſe on the officer's bringing a *mandamus* to ſwear him *into his office*, being then *out of poſſeſſion*; whereas this plaintiff is *in poſſeſſion* of the *office*, and only brings his *mandamus* for the *inſignia*, and other things belonging to it.

Per curiam. Let judgment go for the plaintiff. *Vide Bur. vol.* 2. *p.* 1013.

Trinity, 33 & 34 *Geo.* 2. *The King* v. *Blooer.*

On ſhewing cauſe againſt a *mandamus* which had been prayed to be directed to one *Samuel Blooer*, a pariſhioner of *Matfield* in *Staffordſhire*, and an inhabitant of the chapelry within that pariſh, (who had turned Mr. *William Langley*, the curate of that chapel, out of it, after he had been *eleven weeks* in poſſeſſion, and locked it up) commanding him to *reſtore* the ſaid *William Langley*, clerk, to the place and office of *curate* of the ſaid *chapel.*

After hearing the arguments of council on both ſides, the court propoſed to the parties, to try the merits in a feigned iſſue, which was declined on the part of *Blooer*; who inſiſted on taking the opinion of the court, “ whether the rule ought not to be diſcharged.”

Lord *Mansfield.* This is a mere *temporal* queſtion.

Three objections have been offered againſt making the rule abſolute.

The *firſt* was, “ That there is no ſufficient *ground* for aſking a *mandamus*.”

Anſwer. But this chaplain has ſhewn an *appointment*, and a *licence*, and was in quiet *poſſeſſion* for *eleven weeks.*

Second objection. That he has *not* the *right*; for the nomination was not in the *vicar*, but in the inhabitants.

Anſwer. We cannot try the merits on *affidavit.* He claims *a right*, though it is litigated: and that is ſufficient for the preſent purpoſe.

Third objection. That, even ſuppoſing him to have a title, and to have been in poſſeſſion, and turned out of it; yet he ought not to be aſſiſted by way of *mandamus*, but be left to his ordinary legal remedy, by *ejectment* or an action of *treſpaſs.*

Anſwer. A *mandamus* to *reſtore* is the true ſpecific remedy, where a perſon is wrongfully diſpoſſeſſed of any office or function which draws after it *temporal* rights; in all caſes where the eſtabliſhed courſe of law has not provided a *ſpecific* remedy by another form of proceeding: which is the caſe with regard to rectories and vicarages.

Here are lands annexed to this chapel, which belong to the chaplain in reſpect to his function. If the Biſhop had refuſed, without cauſe, to licence him, he might have had a *mandamus* to compel the Ordinary to grant him a licence. He is now turned out of the chapel, and every thing belonging thereto, by force. Such chapels were not objects of attention in the days when the regiſter was formed: and therefore there is no particular remedy provided for *this* caſe.

It is ſaid, “ he may bring an *ejectment*, or an *action of treſpaſs*,” I am not ſure that he could. It does not appear that the *legal* property is in *him*; on the contrary, it is certain, that it is *not*. It might originally be in feoffees. Thoſe feoffees may not have been regularly continued. It may be impoſſible to find the heir of the ſurvivor. If they have been continued, the preſent feoffees may refuſe to let Mr. *Langley* make uſe of their names. *Neither* of theſe actions, if he could bring them, would be a ſufficient remedy. In the *one*, he might recover damages, in the *other*, he might recover the land: but by neither would he be reſtored to his pulpit, and quieted in the exerciſe of his function and office. We may well take notice too, that the inhabitants refuſe to try the merits, in an iſſue. If a *mandamus* iſſues, we ſhall ſee what return they make to it. And this is what ought to be done in the preſent caſe.

Deniſon, Juſtice, concurred in opinion with the Chief Juſtice.

On which the rule was made abſolute for granting a *mandamus*, but no return was made thereto: the parties agreeing to try the merits in a feigned iſſue; which was accordingly done. *Vide Bur. vol.* 2. *p.* 1043.

Trinity, 1 *Geo.* 3. *The King* v. *Walter Erle*, *Gent.*

On ſhewing cauſe againſt granting a *mandamus* to the defendant, *treaſurer* of the county of *Dorſet*, requiring him as treaſurer of the ſaid county, to *reimburſe* and pay to *R. B.* and *E. A.* late conſtables of the borough of *Shafton*, otherwiſe *Shafteſbury*, in the county of *Dorſet*, the ſeveral ſums of money (mentioned in the paper-writing annexed to the *affidavit* of the ſaid *R. B.* and another) expended by them in conveying and maintaining ſeveral rogues, vagabonds, and other idle and diſorderly perſons, according to an order made at the general quarter ſeſſions of the peace, holden at *Shafteſbury*, on the 10th day of *July* 1744, in purſuance of an act of parliament, made in the 17th year of *Geo.* 2. intituled, “ An act to amend and make more effectual the laws relating to rogues, vagabonds, and other idle and diſorderly perſons, and to houſes of correction.”

The council againſt granting the *mandamus* inſiſted, that the *ſeſſions* have a juriſdiction to *examine into the accounts* of the conſtables: whereas theſe are only allowed by a *ſingle juſtice*, which was denied on the other ſide.

Lord *Mansfield.* They are obliged by the act to apply to the *quarter ſeſſions*, and the *ſurplus* only is to be paid over: which ſhews, that the *ſeſſions have a juriſdiction* to make deductions. There is waſte enough on theſe occaſions, already; therefore diſcharge the rule. *Vide Bur. vol.* 2. *p.* 1197.

Hilary, 2 *Geo.* 3. *The King* v. *Barker and others.*

On a motion for a *mandamus* to be directed to the ſurviving truſtees, under a deed of releaſe, made by one *C. V.* to *J. E.* a diſſenting miniſter at *Plymouth*, and other truſtees, ſettling a then new-built *meeting-houſe*, garden, &c. on the ſaid truſtees *in truſt* (among other things) “ to ſuffer the *meeting-houſe* to be for the public worſhip of God by ſuch congregation of proteſtant diſſenters, commonly called *preſbyterians*, as ſhould ſit under and attend the miniſtry of the ſaid Mr. *J. E.* or ſuch other preſbyterian miniſter or miniſters as ſhould in his or their room ſucceſſively, in all times then coming, be, *by the members in fellowſhip* of the ſaid, or ſuch like congregation or congregations, regularly and fairly *choſen and appointed* to be the miniſter, preacher, or paſtor, to preach in the ſaid meeting,” requiring them to admit *C. M.* to the uſe of the pulpit thereof, as paſtor, miniſter, or preacher there, he the ſaid *C. M.* being duly elected thereto.

The council for the motion produced an *affidavit* of the facts, and of Mr. *M.*'s election; and of a demand and refuſal of the uſe of the meeting-houſe: and cited the caſe of the *King* v. *Blooer*, which was for a *mandamus* to reſtore *William Langley* to the office of curate of a chapel; and that rule was made abſolute on this principle, “ that where there is a *temporal right*, this court will aſſiſt by *mandamus*.”

Lord *Mansfield* took this opportunity of declaring, that the court had thought of that caſe of the curate of the chapel of *Calton*, ſince the determination of it, as well as before: and they were thoroughly ſatisfied with the grounds and principles on which that *mandamus* was granted.

After hearing the arguments of council on this motion, Lord *Mansfield* delivered the opinion of the court as follows:

Every reaſon concurs here, for granting a *mandamus*. We have conſidered the matter fully: and we are all clearly for granting it. Here is a *function*, with *emoluments*; and no ſpecific legal remedy. The right depends on election; which intereſts all the voters. The queſtion is of a nature to inflame men's paſſions. The refuſal to try the election in a feigned iſſue, or proceed to a new election, proves a determined purpoſe of violence. Should the court deny this remedy, the congregation may be tempted to reſiſt violence by force; a diſpute, “ who ſhall preach chriſtian charity,” may raiſe implacable feuds and animoſities; in breach of the public peace, to the reproach of government, and the ſcandal of religion. To deny this writ, would be putting proteſtant diſſenters and their religious worſhip out of the protection of the law. This caſe is entitled to that protection; and cannot *have* it in any other mode, than by our granting this writ.

The defendants have *refuſed* either to go to a new election, or to try the matter in a feigned iſſue. We were all opinion, when a trial was propoſed to them, that a *mandamus* ought to iſſue, in caſe of refuſal. Their anſwer ought to be put into the rule, as *prefatory* to it; and I do this, with a view that their refuſal may be authentically given in evidence to the jury on a trial.

Deniſon, *Foſter*, and *Wilmot*, Juſtices, concurred with the Chief Juſtice in opinion.

Per curiam. Let a writ of *mandamus* iſſue. *Vide Bur. vol.* 3. *p.* 1265.

Eaſter, 3 *Geo.* 3. *The King* v. *The Corporation of Weſt-Loe.*

On a motion for a *mandamus* to the corporation, to go to the election of a Mayor; there being a judgment of *ouſter* againſt Mr. *B.* the late Mayor.

After hearing the arguments of the council on both ſides on this motion, the court denied the ſame.

The *four day rule* being expired, the adverſe parties had a trial of ſkill, “ which of them ſhould *get the ſtart* of the other in moving for a *mandamus*.”

But after hearing the arguments of council, the court were clear, that the proſecutor was entitled to the *priority* of this motion for a *mandamus*, and granted it to him accordingly. *Vide Bur. vol.* 3. *p.* 1386.

Trinity, 3 *Geo* 3. *The King* v. *Dr. Harris.*

On a *mandamus* directed to Dr. *Harris*, commiſſary of the *conſiſtorial* and *epiſcopal* court of the Biſhop of *Wincheſter*, directing him to *admit* and *ſwear* in *H. G.* and *T. G.* churchwardens of St. *Olave's*, *Southwark*, they being duly elected, &c

A like *mandamus* was alſo directed to him, to ſwear and admit *D. G. P. C. J. A.* and *W. S.* into the ſame office.

To the *firſt* writ the Doctor returned, that there were two cauſes depending before him, which had afterwards been conſolidated into one; in which, it was diſputed, "Who were elected churchwardens;" the *former*, on the promotion of *G. C. A.* and *S.* aſſerting *themſelves* to have been duly elected, and praying to be ſworn; the *latter*, on the promotion of *G.* and *G.* and two others, againſt *G. C. A.* and *S.* and the parties on each ſide reciprocally denied the others to be duly elected. By reaſon whereof, and of the law and practice of the *epiſcopal* court, he could not ſwear or admit the ſaid *H. G.* and *J. G.* into their office till it had been judicially determined before him, that the ſaid *H. G.* and *T. G.* were duly elected.

To the other writ of *mandamus* at the inſtance of *D. G. P. C. J. A.* and *W. S.* was the ſame return only it was added at the end, (after the words, "were "duly elected into ſuch office,") "*by a majority of* "*legal votes.*"

Note, Both theſe cauſes ſtood together, in the *crown-paper*, for argument; and the like rule was made in *both:* but it was the *former* only that was actually argued; and the fate of *this*, of courſe, determined the *other*.

After hearing the arguments of the council on both ſides, the court diſallowed the return, and ordered a *peremptory mandamus* to iſſue.

Lord *Manſfield* and *Wilmot*, Juſtice, obſerved, that the Doctor ought to obey both writs. *It being without prejudice to the right* of either claimant.

Lord *Manſfield*. All the caſes, cited on both ſides, prove this return to be *wrong*. It would be ſo, *even if* he *could* try it; (which he *cannot* do:) he cannot try the *legality of the votes*.

Wilmot, Juſtice, concurred with the Chief Juſtice in opinion.

Per curiam. Let the return be diſallowed; and a *peremptory mandamus* iſſue.

Note, The court propoſed, and the parties conſented, to try *the right* in a *feigned iſſue*; and the execution of the *peremptory mandamus* to be *ſuſpended* till after the trial; and then the *peremptory mandamus* to go "to ſwear in the *victors* at the trial," *unleſs* the judge who tries it, ſhall declare himſelf diſſatisfied with the verdict. *Vide Bur. vol.* 3. *p.* 1420.

Hilary, 4 *Geo*. 3. *The King* v. *Bankes*, *Eſq*; *and others*.

On ſhewing cauſe againſt a rule made on *John Bankes*, Eſq; Lord of the *leet* for the *borough*, manor or lordſhip of *Corſe-Caſtle* in the iſle of *Purbeck*, in the county of *Dorſet*, and ſundry other officers of the ſaid *leet*, to ſhew cauſe why a writ or writs of *mandamus* ſhould not iſſue againſt them to proceed to the election of a Mayor of the ſaid borough of *Corſe-Caſtle*, for this preſent year, and do all other neceſſary acts for that purpoſe as the law directs.

Their council did not go on the merits; but only objected to the want of notice to the Mayor *de facto*; who ought (he ſaid) to have been made *a party to this rule*, being *in poſſeſſion of the office* already; and ought in common juſtice, therefore to be *heard* in *defence* of his *right*, before the iſſuing of a *mandamus* to proceed to the election of *another* in his ſtead.

The court allowed this reaſoning, and ordered, that the *rule* ſhould be *amended* by inſerting the name of Mr. *P.* the Mayor *de facto*, and that he ſhould be ſerved with it.

Afterwards on ſhewing cauſe againſt making the rule *abſolute*, the defendants council inſiſted,

1ſt, That this election of the Mayor *de facto* was not apparently and clearly ſuch a one as was *merely colourable* only and void.

2dly, That if it was, yet the proſecutors would not be entitled to this *ſpecial mandamus*, but only to a *general* one.

Lord *Manſfield*, propoſed, that the council for the defendants ſhould *file their affidavits*; that the proſecutor's council might be able to judge, whether, on the *affidavits* on both ſides compared together, it was a *doubtful* election, and fit to be tried on an information in nature of a *quo warranto*; or whether it was a *mere colourable* election, and *clearly void*. For if the *former* ſhould prove to be the caſe, the court ought not to grant a *mandamus:* in the *latter* caſe, they ought: but ſtill, he ſaid, this *ſpecial mandamus*, which *confined* it to the very *individuals*, who were ſummoned on the 24th of *October*, was *certainly wrong*; ſo that the rule cannot be made abſolute in its *preſent* form.

The defendants council conſented to file his *affidavits*.

Four days afterwards the proſecutor's council having read over the *affidavits* filed on the part of the defendants, was content to give up his rule, in caſe the defendants would not inſiſt on coſts.

Mr. *Bankes* not being willing to quit his claim to coſts on the rule being diſcharged, that point was litigated.

The court having heard the council on both ſides, thought it reaſonable, on the circumſtances diſcloſed to them, to diſcharge the rule *without* coſts. *Vide Bur. vol.* 3. *p.* 1452.

Trinity, 4 *Geo*. 3. *The King* v. *The Juſtices of Peace for Wilts*.

See this caſe fully ſtated in page 517 of this work, under the head *Highways*, &c.

Hilary, 5 *Geo*. 3. *The King* v. *Holmes*, *Mayor of Wigan*.

On a motion to take off of the file the *return* to a *mandamus*, directed to the defendant *Holmes*, commanding him to reſtore *E. L.* to the office of an in-burgeſs of *Wigan*; on affidavit, "that *Holmes* was dead at the "time of the return being filed:" the import of it was, "that *Holmes* was dead *before the motion* was "made for filing the *return*."

Lord *Manſfield*, and *Wilmot*, Juſtice, obſerved, that it turned on, "whether the court would have admitted the return to have been filed, *if* the fact had been "diſcloſed to them?"

Note. The *mandamus* iſſued in 1759, and *Holmes* died about *three years* ago.

The difficulty was, *againſt whom* to grant the rule; both *Holmes* and *L.* being dead.

This motion ended in a conſent, that the matter ſhould ſtand over till the *firſt day* of the preſent term; the proſecutor's council undertaking to ſhew cauſe then, and file his affidavit in anſwer to the preſent affidavit a week before the term.

On the firſt day of the term the proſecutor's council ſhewed the following cauſe why the writ of *mandamus* and the *return* thereof ſhould not be taken off the file, *viz.* That the return was *duly made* in 1759, and then actually *ſigned* by the Mayor, at a common-hall, and in *July* 1760, delivered over to Mr. *H. Lee*, the agent for the proſecutors of the writ: and the perſons commanded by the writ to be reſtored always afterwards, *acted* as inn-burgeſſes, *in conſequence* of ſuch reſtoration. *Holmes* died in 1762. And *Bromley*, the preſent agent for this motion, *knew* all this; but has ſuppreſſed it. We did not indeed *then* think it neceſſary to *file* it: but we had a *right* to file it, even after *Holmes*'s death; and it was no *irregularity* to do ſo.

After hearing the arguments of the council for and againſt this motion, and the court taking time to conſider the point, the opinion of the court being moved for, they delivered the ſame as follows:

Wilmot, Juſtice. I think this return ought to ſtand on the record.

The *mandamus* was moved for as of courſe, and was directed "to the Mayor" *alone*. I think it ought to have been directed to thoſe who had power to return it. If ſo, the writ and return ſeem to be a nullity. But I do not go on *that*.

The writs were delivered to the Mayor in 1759; he called a common-hall; the common-hall reſtored the perſons named in the writs; the Mayor then ſigned a return, “ that he had reſtored them;” in *July* 1760, he delivered this return to *Lee*, their agent; the Mayor died in 1762; in *Trinity* 1764, the writs were filed.

The queſtion is, “ whether they ought to have been “ filed *after the Mayor's death*, under theſe particular “ circumſtances?”

If the return ought not to have been *received*, it ought to be *taken off* the file.

In general, every return is ambulatory, and in the breaſt of the perſon to whom the writ is directed, *till it is filed*. *Signing* is not neceſſary, nor material.

Though this *mandamus* is directed to the Mayor only, yet he himſelf underſtood the return to be made with the *conſent of the corporation, or common-hall*.

This return, if it ſhould ſtand, may be urged as a *concluſive evidence*, not only “ that it was made by him,” but alſo “ that it was made with the conſent of the “ corporation.”

As long therefore as this return ſtands, the queſtion, “ whether the reſtoration was or was not *with the con-* “ *ſent of the corporation*,” is bound down, and can never be entered into: for no evidence can *now* be received to controvert this fact of the corporation's conſent. And as it may be applied to this purpoſe, I therefore think the return ought to be taken off the file.

The council for the motion continued to inſiſt on the return being *taken off the file*; and offered to admit the fact, “ that the Mayor himſelf *did* make ſuch a re- “ turn.”

Lord *Mansfield*, and *Wilmot*, Juſtice. If a returning officer was to die immediately after ſigning a return, and before the filing it, the court might direct an iſſue to try the validity of it.

Wilmot, Juſtice. I conſider this return, now, as ſtanding on the admiſſion of the proſecutors of the writ, “ that no other uſe ſhall be made of it than “ barely that the Mayor *did* reſtore him *in fact*,” without prejudice to the queſtion concerning the *legality* of this reſtoration, or entering into the queſtion about the corporation's concurring with him or not.

Lord *Mansfield*. Let this be taken down, as by the conſent of council on both ſides, in all the cauſes. *Vide Bur. vol. 3. p. 1641.*

Eaſter, 5 *Geo.* 3. *The King* v. *The Vice-Chancellor, &c. of Cambridge.*

On a *mandamus* being moved for on behalf of Lord *Hardwicke*, directed to the Vice-Chancellor and others of the Univerſity of *Cambridge*, to complete the election of the ſaid Earl into the office of High-Steward of that Univerſity, a rule to ſhew cauſe was granted.

After hearing the arguments of the council on both ſides for and againſt the rule, the ſame was granted by the court.

Lord *Mansfield*. As to the remedy, there is *no other* than what is now applied for. And this is the very reaſon of the court's iſſuing the prerogative writ of *mandamus*, becauſe there is *no other ſpecific remedy*.

It is admitted, that a *mandamus* would lie, if it can be conſidered as the caſe of a ſteward of a court-leet.

But it is ſaid, “ that the franchiſe of the court-leet is in the *town of Cambridge*, and not in the *Univerſity*.

But the Univerſity have enjoyed it long; and they are now in *poſſeſſion* of it: and they have elected Lord *Hardwicke under* this claim of many ages ſtanding. And the *town* do not appear, to us, to *diſpute* it.

But if it was *not* ſo, I ſhould ſtill think that, as here is *no other ſpecific remedy*, the court *ought to grant* the writ. And ſo they will do in *eccleſiaſtical caſes*, where it appears that there is *no other ſpecific remedy*.

The laſt queſtion is, how the *mandamus* ought to be *directed*?

The council for the motion has gone fully into the argument, “ that the rule for a *mandamus* ought to be “ founded on the *merits of the election*, and not on the “ declaration of the proctors.”

It now appears that Lord *Hardwicke* was duly elected; and the laſt part of the rule will procure him the proper remedy. Therefore the *mandamus* ought to go to the keepers of the ſeal for the time being, requiring and commanding them *to put the ſeal* of the Univerſity to the inſtrument of his appointment; and the two former parts of the rule ought to be diſcharged.

Wilmot, *Yates*, and *Aſton*, Juſtices, gave their opinion at large, and concurred with the Chief Juſtice, “ that “ a *mandamus* ought to go; and that it ought to be di- “ rected to the keepers of the Univerſity-ſeal, com- “ manding them to affix it to the *diploma* of Lord “ *Hardwicke's* appointment to the office of High- “ Steward.”

Lord *Mansfield*. Let the rule be taken in the manner we have directed. *Vide Bur. vol. 3. p. 1647.*

Eaſter, 6 *Geo.* 3. *The King* v. *The Rector of St. Ann's, Soho.*

See this caſe fully ſtated in page 406 of this work, under the head *Elections*.

Manor.

Eaſter, 5 *W. & M.* *Auſtin* v. Bennet.

In an action of *treſpaſs* for taking a *cow*, the defendant pleaded that *J. S.* was ſeiſed of *&c.* and died, and that he ſeiſed the *cow* as an *heriot-ſervice*, but did not ſhew that he ſeiſed her within the *manor*.

Per curiam. He may ſeiſe either for *heriot*, *cuſtom*, or *ſervice*, any where; but cannot diſtrain for them out of the *manor*. *Vide Salk. vol. 1. p. 356.*

Michaelmas, 6 *W & M.* Warrington v. *Moſely*. Error.

See this caſe fully ſtated in page 483 of this work, under the head *Fairs*, *Markets*, &c.

Michaelmas, 9 *W.* 3. *Winter* v. *Lovedore*, *Lovedure*, *or Loveden*; *or*, *Loveday* v. *Winter*.

See this caſe fully ſtated in page 434 of this work, under the head *Eſtates*.

Eaſter, 2 *Ann.* *Tomkin* v. *Crocker*. Error.

In *replevin* for a *braſs-pan* taken by the defendant in a place called the *Kitchin*, at the pariſh of *St. Agnes* in *Cornwall*, judgment was given for the defendant in the *C. B.* on which a *writ of error* was brought by the plaintiff, and the general *errors* were aſſigned.

The plaintiff's council objected, 1ſt. That the tenure found in the verdict varies in its nature from that which the conuſance mentions, and conſequently the verdict does not maintain the iſſue; and therefore the judgment being given for the defendant is erroneous, and ought to be reverſed, becauſe the ſuit to the court mentioned in the conuſance muſt be intended to be a ſuit to the *Court Baron*, tenure at common law; but the ſuit to the court found by the verdict is cuſtomary tenure, becauſe it is a ſuit to the *cuſtomary court*. *The court of the manor* muſt be intended to be a *Court Baron*. It is the peculiar ſtile of the court.

2dly. It was argued for the plaintiff in *error*, that admitting the court would intend the ſervice in the conuſance, and that in the verdict to be the ſame, yet it appeared by the verdict that the *manor* is deſtroyed; and if there is no *manor*, there is no court; if no court, no ſuit can be due to it. And for this it was urged, that the *manor* was deſtroyed, becauſe there was but one ſuitor, and the court cannot be held, but before *two* ſuitors at leaſt. That it is found poſitively, that there has been but *one* free ſuitor for *twenty years* laſt paſt; that the verdict being ſpecial, ſhall not be aided by intendment; and therefore it ſhall not be intended, that any of the other freeholds are only ſuſpended, and that ſo the tenure remains, and the *manor* continues.

Holt, Chief Juſtice. There muſt be *two* ſuitors at leaſt to continue the *manor*, for without *two* no court can be held. Now, in this caſe, the jury have expreſsly found that this was a *manor*. The queſtion then will be, whether it appears to be deſtroyed: and in my opinion it does not. For ſuppoſe there were *two* ſuitors, and one of them makes a leaſe for life, the leſſee for life does not hold of the lord, but of the reverſioner, and he holds of the lord; and then for that time there is but *one* free ſuitor. The *manor* ſeems to be ſuſpended *for a time*, but the ſuit-ſervice remains, notwithſtanding the ſuſpenſion. As where lands held by *homage* are granted to a corporation aggregate, the tenure remains, though the corporation cannot do homage; and if the corporation grants it over, the *homage* will revive. Farther, the iſſue is, whether *Hugh Tonkins* held by rent, ſuit of court, *&c.* which is not confined to any time, and the jury have found expreſsly a time when he held ſo, *viz.* before the *twenty years* laſt paſt: and therefore this objection will not avail here. Accordingly the judgment was affirmed. *Vide Raym. vol.* 2. *p.* 860.

Eaſter, 33 *Geo.* 2. *The King* v. *Vandewall*, *Eſq.*

On a motion to quaſh an order of *ſeſſions*, which had confirmed a rate made on Mr. *Vandewall*, Lord of the Manor of *Aldenham*; from which rate, he had appealed to them, a rule to ſhew cauſe was obtained.

On ſhewing cauſe to this rule, the queſtion was, "Whether the *Lord* of a *manor is aſſeſſable* to the poor-rates, under *ſtat.* 43 *Eliz. cap.* 2. for the *quit-rents*, *heriots*, and *caſual profits* of his *manor*."

After hearing the arguments of the council on both ſides on this rule, the court took time to conſider the point.

On *Tueſday* the 13th of *May* 1760, Lord *Mansfield* delivered the opinion of the court, *viz.* "That theſe *quit-rents* and caſual profits of the *Manor* are *not* rateable to the poor's tax;" which he ſaid, was ſo clear, that there was no need to enter into any reaſoning thereon. They were *never rated before*, in *this pariſh*; *and as far as appears to us*, the rating ſuch *quit-rents* and *caſual profits* has never been *at all* attempted before: and there is no colour for this attempt now, after more than a century and an half has elapſed ſince the making of the act of parliament, on which it is grounded.

Per curiam. Let the rule be made abſolute for quaſhing the rate; and alſo the order of ſeſſions confirming it. *Vide Bur. vol.* 2. *p.* 991.

Maritime Affairs.

Eaſter, 1 *W.* & *M.* *The King* v. *Perry.*

Holt, Chief Juſtice. An obligation taken in the *admiralty* to appear and ſue there, is ſuable in that court, for it is a *ſtipulation* in nature of bail at *common law*; but where there were *thirteen part owners of a ſhip*, and one of them refuſed to let her go to ſea, whereon a *ſtipulation* was taken for the ſhare of the party refuſing, and afterwards the ſhip went her voyage, and this *ſtipulation* being put in ſuit in the ſaid court, a *prohibition* was granted, becauſe the ſhip was built, and the charter party made at land. *Vide Salk. vol.* 3. *p.* 23.

Hilary, 3 *W.* & *M.* *Anonymous.*

Adjudged, That where there is a falſe capture of goods at ſea, the Admiral has juriſdiction; and if they be brought to land, the *common law* has; and the cauſe may be brought in either place, at the plaintiff's election. *Vide Mod. Rep. vol.* 12. *p.* 16.

Eaſter, 5 *W.* & *M.* *Opy* v. *Child, and others.*

The *Attorney General* moved for a *prohibition* to the *Court of Admiralty*, in a ſuit depending there for *mariners wages*, on a ſuggeſtion of a contract made for them at land.

The court held, that for convenience of *ſeamen*, the *Admiralty* had been allowed to hold ſuit for *mariners wages*; but yet with this limitation, that if there be any ſpecial agreement by which the *mariners* are to receive their wages in any other manner than is uſual; or if the agreement be under ſeal, ſo as to be more than a *parol* agreement, in ſuch caſe a *prohibition* ſhall be granted, and it was accordingly granted in this caſe. *Vide Salk. vol.* 1. *p.* 31.

Eaſter, 5 *W.* & *M.* Sir *Joſiah Child* v. *Sands*; *or*, *Sands* v. *Child, and others.* Error.

The plaintiff *Sands* in his declaration ſet forth the *ſtatutes* 13 *R.* 2. 15 *R.* 2. and 2 *H.* c. 11. which gives the party grieved double damages, and 13 *l.* to the King; and that he was owner of a ſhip lying in the *Thames*, *within the body of the county*, laden with divers goods, wherein he had a *fifth* part to his own ſhare; that the ſhip was ready to ſail, and that the defendant cauſed a proceeding to be made in the *Admiralty* againſt the ſhip, and the ſhip to be arreſted and ſtaid *until* he gave ſecurity not to go to the *Madeiras*, or to the *Eaſt-Indies*, whereby he was ſtaid *three months*, and loſt his voyage, *to his damages of* 3000 *l.* On *not guilty* pleaded, the jury found *ſpecially*, that the *E. I.* Company by charter had the ſole trade to the *E. I.* and *Madeiras*, and that the plaintiff was going thither; and Sir *Joſiah Child*, one of the defendants, was governor of the company, and procured an order of council to the King's Advocate General to proceed in this manner, *&c.* and that the defendants ſued this proceſs out of the Court of Admiralty; and if a verdict is found *for the plaintiff*, the jury find 1500 *l.* damages, and 51 *l.* coſts, which were doubled in the judgment according to the ſtatute. Judgment was given for the plaintiff in the *C. B.* on which a writ of *error* was brought,

1ſt. In this caſe it was agreed, that the King might lay *imbargoes*, but then it muſt be *pro bono publico*, and not for the private advantage of a particular trader or company.

2dly. Though here was but *one* act, and but *one* offence, yet every ſeveral perſon injured might have an action, and recover damages, and on every conviction the defendant would forfeit 10 *l.* to the King. Thus, if *H.* drives a diſtreſs above three miles from the place where it was taken, by *ſtat.* 1 & 2 *P.* & *M.* *c.* 12. he is to forfeit 5 *l.* to the party aggrieved. In that caſe, ſuppoſe the diſtreſs be of three cattle, and every beaſt has a diſtinct owner, *H.* ſhall forfeit three times 5 *l.* *Noy* 62, 158. *Dyer* 351. *b.* 2 *Lev.* 8.

3dly. Though there be a proceſs only and no ſuit, nor no plaintiff and defendant, yet this is a proſecution within the meaning of the ſtatute, for it is in the uſual way of proceeding there, and of the ſame miſchief.

4thly. That *Child* was a proſecutor within the ſtatute, though no ſuit was in his name, becauſe he promoted and maintained it: and if he did it of his own head, then it is properly his own action; if as agent to the company, and by their command, then that command being to do an unlawful act, muſt be void; but they held a mere attorney would not be a proſecutor within the ſtatute.

5thly. That all the *five* proprietors being *joint-owners*, ſhould have joined in this action; but this being not pleaded in *abatement*, as it ſhould have been, all is now well; for though it appears by the declaration that there were *four* others, joint-tenants of theſe goods with the plaintiff, yet it does not appear but they are dead, and then *Sands* alone is entitled to the action; and wherever *joint tenancy* is pleaded in *abatement*, the life of the other joint-tenant not named is averred in the plea, otherwiſe the plea is ill. 1 *Saund.* 29.

Note. Whether theſe were joint-tenants, or tenants in common, either way the action ſurvives. Therefore the judgment was affirmed. *Vide Salk. vol.* 1. *p.* 31. *Mod. Rep. vol.* 4. *p.* 176.

Anonymous.

The court was moved for a *prohibition*, on a ſuit in the *Admiralty* by a maſter of a ſhip, againſt the part-owners for *ſeamen's wages*, he having paid off the ſeamen, and would now ſtand in their places.

Per curiam. Let a *prohibition iſſue*: for when the maſter has paid the ſeamen, and they are diſcharged, there is an end of that privilege and indulgence to the ſeamen, which is perſonal, and cannot be transferred. *Vide Forteſcue, p.* 230.

Michaelmas, 6 *W.* & *M.* *Wilſon* v. *Bird.*

A ſhip was libelled againſt in the *Admiralty*, for that the maſter being taken by a *French* privateer had ranſomed the ſhip for 300 *l.* and had ſued for the payment of it, and was carried priſoner to *Dunkirk*, and the money was not paid, *&c.* and ſentence was given in the *Admiralty* againſt the ſhip. And the court being moved for a *prohibition*, it was denied by *Holt*, Chief Juſtice, who was alone in court; becauſe the taking and pledge being on the high ſeas, the ſhip, by the law of the *Admiralty*, ſhall anſwer for the redemption of the maſter by his own contract. *Vide Raym. vol.* 1. *p.* 22.

Hilary, 8 & 9 *W.* 3. *Benzen* v. *Jeffries.*

A motion was made for a *prohibition* to the *Court of Admiralty*, where a ſuit was proſecuted againſt a ſhip, which the maſter had *hypothecated* for neceſſaries, being on the ſea in ſtreſs of weather; and the ſuggeſtion was, that the agreement was made, and the money lent on land, *viz.* in the port of *London*, it being a *Venetian* veſſel, which came here by way of trade, and not ſtreſs of weather.

Holt, Chief Juſtice. The maſter of the ſhip has power to *hypothecate* it, but cannot ſell it; and by the pawning the ſhip becomes liable to condemnation. This was reſolved on ſolemn argument in the caſe of *Coſtard* v. *Lewſtie*, 2 *W.* & *M.* There is no remedy here for the *hypothecation*, but by way of contract; therefore ſince this court cannot do right to the parties, it will not hinder the *Admiralty*; for if this court allows the *hypothecation*, and yet denies the remedy, it will be a manifeſt contradiction.

An action was brought on *ſtat.* 2 *Hen.* 4. *c.* 11. for ſuing in the *Admiralty* on an *hypothecation*, and it was held to be out of the ſtatute, in Lord *Hale*'s time. And as to the objection that the contract was made on the land, and money paid there, it muſt be ſo; for if a man be in diſtreſs on the ſea, and is compelled to go into port, he muſt receive the money there, or not at all. And if his ſhip be impaired by a tempeſt, ſo that he is obliged to borrow money to refit, otherwiſe ſhe will be loſt, and for ſecurity of this money he pledges his ſhip; ſince the cauſe of the pledging ariſes on the ſea, the ſuit may well be brought in the *Admiralty court.* But becauſe there was a precedent, where a *prohibition* in ſuch a caſe had been granted, the court granted one here, and ordered the plaintiff to declare on it, for the law ſeemed clear to them as before recited. *Vide Raym. vol.* 1. *p.* 152.

Eaſter, 9 *W.* 3. *Lambert* v. *Aeretree.*

There were ſeveral part-owners of a ſhip, ſome of whom were deſirous that the ſhip ſhould go to ſea, to which the others would not agree; on which they procured the ſhip to be arreſted by a proceſs out of the *Admiralty*, and compelled thoſe who intended to ſend the ſhip a voyage, to enter into a recognizance in the *Admiralty*, conditioned, that the ſhip ſhould ſafely return. After which, the ſhip began a voyage, in which ſhe was loſt; on this the perſons who were bound for the ſafe return of the ſhip, were ſued in the *Admiralty*: on which this court was moved for a *prohibition.* 1ſt, Becauſe the recognizance not being in the nature of a ſtipulation, the *Admiralty* had not power to compel the party to enter into it. 2dly, Becauſe this ſuit being in nature of *debt* on a recognizance, the *Admiralty* had no cognizance of it.

The court refuſed to grant a *prohibition*, (*Holt*, Chief Juſtice, being abſent) becauſe this ſuit being between the part-owners of the ſhip, the property is admitted; and therefore it is properly conuſable there. 2dly, If the *Admiralty* had not power to take ſuch recognizances, all navigation muſt be obſtructed, if one obſtinate part-owner would not conſent, that the ſhip ſhould go a voyage; and on the other ſide it is very reaſonable, that he ſhould have ſecurity, that the ſhip ſhall return in ſafety, ſince he does not conſent to the voyage. *Vide Raym. vol.* 1. *p.* 223.

Trinity, 9 *W* 3. *The King* v. *Broom.*

The defendant by letters of *mart*, &c. from the *African* Company, took a *French* ſhip in the river of *Beſaw*, near *Gambore*, which he carried to *Africa*, and the *Admiralty* there condemned it as the King's prize: After this *Broom* ſold the ſhip at land, and applied the money to his own uſe; and came into *England*, and was ſued in the *Admiralty* here for an account. After ſentence againſt him he appealed, and then moved for a *prohibition*, but it was not obtained; for the ſuit here is but an execution of the firſt ſentence, by which the ſhip is adjudged the King's prize; now the *Admiralty* having a juriſdiction, that ſentence has bound the property, and we cannot examine the property, but muſt take it according to their determination, which cannot be gainſaid till it be repealed on an appeal. So the rule for a *prohibition* was diſcharged. *Vide Salk. vol.* 1. *p.* 32. *Mod. Rep. vol.* 12. *p.* 134.

Trinity, 9 *W.* 3. *Blackett* v. *Anſley.*

Thirty-ſeven part-owners of a ſhip would ſend her a voyage, but *two* or *three* of the other part-owners would not conſent. On which the *admiralty* took a ſtipulation in the nature of a recogniſance of the *thirty-ſeven*, as a ſecurity for the ſafe bringing back the ſhip. And the ſhip being loſt, the *two* or *three* part-owners who oppoſed the voyage, *libelled* on this ſtipulation againſt the *thirty-ſeven.* On which the court was moved for a *prohibition*, but the motion was denied.

Per curiam. Though by the law of *England two* or *three* part-owners may hinder the others from ſending the ſhip a voyage without their conſent, yet the law of the *admiralty* is otherwiſe. For the *court of admiralty*, for the encouragement of navigation, will permit the ſhip to make the voyage, on ſecurity given to bring her back ſafe. For it is reaſonable that the others, who oppoſe the voyage, ſhould have ſome ſecurity for their ſhare. Then, if the ſhip be loſt, it is at the peril of the adventurers, and they ſhall be ſuable on their ſtipulation by the others in the *admiralty*; for now it is not doubted, but the *admiralty* may take ſtipulations. *Vide Raymond, vol.* 1. *p.* 235.

Michaelmas, 9 *W.* 3. *Terremoulin or Shermoulin,* v. *Sandys or Sands.*

The defendant was proprietor of a ſhip called the *Conſtant Mary*, and ſent her to ſea, where ſhe was taken off *Yarmouth*, *on the high ſeas*, by one *Dubart* of *Dunkirk*, who ſold her to the plaintiff; after which the ſhip being at *Spithead*, the defendant ſeized her by the *admiralty* proceſs, whereon a ſuit was commenced in the *admiralty court* by the defendant againſt the ſaid ſhip, and then *Terremoulin* came in *for his intereſt*, and ſuggeſted, that the ſhip was his, and that he had been in poſſeſſion of her *three years* laſt paſt, and prayed his poſſeſſion might be reſtored; whereon *Sandys* put in his *libel*, that he was poſſeſſed of the ſaid ſhip divers years till 1689, that then the ſhip was forcibly taken away from him, without ſaying *on the high ſeas*, and thereon prayed reſtitution. *Terremoulin* replied, that the ſhip was taken by one *Dubart on the high ſeas*, who ſold it to him at *Bergen* in *Norway*. *Sandys* rejoined, that after the taking, the ſhip was never *condemned as a prize*, and ſo his property ſtill continued: Accordingly, after examination of the caſe, the *Admiralty* gave judgment for *Sandys*; *for a capture without condemnation alters not the property by their law*; whereon *Terremoulin* appealed to the *Delegates*, and now againſt his own appeal prayed a *prohibition.*

Holt Chief Juſtice. The *libel* does not ſay, that the violent taking away was at ſea; and if it was not, what have the *admiralty* to do with it, and how can it be cured by any ſubſequent matter; for if the *admiralty* have not the conuſance of the original cauſe, though a civil queſtion ariſe, they ſhall not have juriſdiction; and if they have juriſdiction, and a common law queſtion ariſe, yet they ſhall determine it. And *Holt* Chief Juſtice, and *Rokeby* Juſtice were of opinion, that a *prohibition* ſhould iſſue, becauſe the *libel* was a mere *replevin* at *common law.*

But *Turton* and *Eyre* Juſtices held otherwiſe: becauſe it appeared by a ſubſequent allegation, that the capture was *on the high ſeas*; wherefore the rule for the *prohibition* was diſcharged. *Vide Mod. Rep. vol.* 12. *p.* 143. *Raymond. vol.* 1. *p.* 271.

Michaelmas, 10 *W.* 3. *Anonymous.*

Holt Chief Juſtice denied a *prohibition* to the *admiralty*, for refuſing to give a copy of the *libel*; becauſe *ſtat.* 2. *H.* 5. *c.* 3. extends only to the *eccleſiaſtical court*, and not to the *admiralty*. *Vide Mod. Rep. vol.* 12. *p.* 244.

Michaelmas 10, *or Eaſter* 11, *W.* 3. *Rigdon or Rigden,* v. *Hedges.*

Goods were arreſted in the river *Thames* by a proceſs out of the *court of admiralty*, and a reſcue being made, a warrant iſſued againſt *Rigden* for a contempt of their proceſs; and on a motion for a *prohibition* it was ſuggeſted, that the original proceſs was of a thing out of their juriſdiction, and therefore there could not be a contempt.

On the other ſide it was urged, that this ſuggeſtion came too ſoon, becauſe it cannot be known whether they have juriſdiction or not, till bail is put in to try the action, and ſo it is in the *eccleſiaſtical* or *inferior* courts, if a *prohibition* be ſued on ſuggeſtion that the cauſe of action is out of their juriſdiction. 1 *Vent.* 180. 1 *Mod.* 81.

Holt Chief Juſtice. Sure the cauſe that brings it within their juriſdiction ought to be ſet forth in their proceſs; and it is too general to ſay a *maritime cauſe*; if goods are taken at ſea by pirates, and ſold by them at ſea, and afterwards brought on ſhore, whether a prize or not ſhall be tried in the *admiralty.*

Per curiam. If a ſhip be arreſted by a warrant out of the *court of admiralty* within their juriſdiction, and is afterwards reſcued, they may re-ſeize it out of their juriſdiction, and no *prohibition* lies. *Vide Mod. Rep. vol.* 12. *p.* 246. *Raymond, vol.* 1. *p.* 446.

Michaelmas, 10 *W.* 3. *Hartford* v. *Jones & others.*

On an action of *trover* for goods, the defendants pleaded that they were in a ſhip, and that the ſhip took fire, and that they hazarded their lives to ſave them, and therefore they were ready to deliver the goods, if the plaintiff would pay them 4 *l.* for ſalvage, *&c.* to which plea the plaintiff demurred generally.

Holt Chief Juſtice held, that they might retain the goods until payment, as well as a taylor, hoſtler, or a common carrier. And *ſalvage* is allowed by all nations, it being reaſonable that a man ſhall be rewarded, who hazards his life in the ſervice of another. But though the detainer be lawful, yet it does not amount to a converſion, no more than a *diſtreſs* for rent. And he ſaid, he never knew but one ſpecial plea good in *trover*, except a releaſe. And *Yelv.* 198. a man may plead that ſpecially, which he might give in evidence on *not guilty*, if he confeſſes and avoids the fact. For the reaſon why you may plead ſpecially is not the doubt in the law; but it is, becauſe the matter of the plea cannot be given in evidence on *not guilty.* But this cannot be good though after a general demurrer, becauſe it does not confeſs a converſion. Therefore a rule was made by conſent, that the defendant ſhould waive the ſpecial plea, and plead the general iſſue. *Vide Raymond, vol.* 1. *p.* 393.

Michaelmas, 10 *W.* 3. *Hook* v. *Moreton.*

The court was moved for a *prohibition* to be directed to the *admiralty court*, to ſtay a ſuit there on a *libel*, by the mate of a ſhip for *mariners wages*, on ſuggeſtion of ſeveral *ſtatutes*, which reſtrain the *admiralty* from proceeding on contracts made on land.

On the other ſide it was argued, that if all the *mariners* ſue for their wages in the *admiralty*, this court at preſent will never grant a *prohibition*, and there is no difference where the ſuit is brought by one *mariner*, or by many.

Per curiam. There is no difference. For the reaſon why this court permits *mariners* to *libel* in the *admiralty* for their wages, is not only becauſe they are privileged to join in the ſuit in the *admiralty*, whereas they ought to ſever at *common law*, becauſe the contracts are ſeveral; but alſo becauſe by the *maritime law mariners* have a ſecurity in the ſhip for their wages, and it is a ſort of implied *hypothecation* to them. Therefore this court allows *mariners* to ſue in the *admiralty* for their wages, becauſe they have the ſhip there for a ſecurity. But the queſtion here is, whether the mate of a ſhip differs from any other *mariner*; for if the plaintiff had been a ſingle *mariner*, doubtleſs no *prohibition* would have been granted; and the court were of opinion that a mate is but a *mariner.*

Holt Chief Juſtice. Heretofore the *common law* was too ſevere againſt the *admiralty*; it did not allow ſtipulations, but at preſent they are always allowed. Wherefore a rule was made that the court ſhould be moved for their opinion at another day. *Vide Raymond, vol.* 1. *p.* 397.

Smith v. *Croſby.*

A ſeaman ſued in the *admiralty court* for his own wages, on a contract with a freighter; and the words of the *libel* were, *between the ebbing and flowing of the ſea.*

It was urged that the *libel* ought to ſtate the contract to have ben made *on the high ſeas.*

Holt C. J. In this caſe it need not be ſo, becauſe in the caſe of wages they may ſue in the *admiralty*, though thecontract be not on the high ſeas; and where the queſtion is on the payment of wages, it is proper enough in the *admiralty court.* Accordingly a *prohibition* was denied. *Vide Forteſcue. p.* 230.

Hilary, 11 *W.* 3. *Wiggan* v. *Branthwaite.* Error.

On an action of *treſpaſs* for taking goods, the caſe was: a manor to which wrecks belonged by *preſcription* came to the King's hands, who granted to *A.* the office of *high admiral*, with all wrecks at ſea, and all profits to the ſaid office belonging; and to *B.* the above *manor.*

Holt Chief Juſtice, at the trial in *Suffolk*, held, that as the wreck belonged to the manor by *preſcription*, it could not paſs as appurtenant to the office of *high admiral*; and it being moved to have the matter found ſpecially, it was refuſed; and a bill of exceptions was tendered and ſealed, and a *writ of error* brought, and error aſſigned; and it was argued, that beſides the grant of wreck appurtenant to the office of *high admiral*, there is alſo a grant of *goods thrown up by the ſea*, which is not relative to the office, and will comprehend a grant of all wreck then in the hands of the King; and the reſtraining clauſe of *thereunto relating and belonging*, ſhall not relate to the wreck of ſea granted; for wreck cannot belong to the office by preſcription, for the office itſelf is within time of memory.

Holt Chief Juſtice. Wreck may be claimed by preſcription, and may belong to the *lord admiral* by preſcription; for it is an ancient office *from time whereof, &c.* though it might not be veſted in a ſingle perſon, or in the ſame manner, as it is now. *Dy.* 152. *b.* there is a preſcription for the lord *high admiral* to grant the office of regiſter of the *admiralty* for life; and no doubt but ſome wreck may belong to the *admiral* by preſcription; as that about the *Cinque Ports*, and ſuch places where he was moſt converſant in ancient times. And as to the objection that there is but one *conceſſit* or word of grant, all the clauſes ſhall be taken to be dependant on it, and the clauſe of reſtraint ſhall extend to all of them; otherwiſe if there had been any word of grant intermediate. So the judgment was affirmed. *Vide Mod. Rep. vol.* 12. *p.* 261. *Raymond, vol.* 1. *p.* 476.

Hilary, 12 *or* 13 *W.* 3. *Anonymous.*

On a motion for a *prohibition* to a ſuit in the *admiralty court* for *mariners wages.*

Holt Chief Juſtice held, that if a ſhip is loſt *before* ſhe arrives at any *port of delivery* the *ſeamen* loſe all their wages, but if ſhe is loſt *after* ſhe comes to any port of delivery, then they loſe all their wages from the laſt port of delivery: but if they run away, though it is after ſhe come to a port of delivery, they loſe all their wages. *Vide Salk. vol.* 3. *p.* 23. *Mod. Rep. vol.* 12. *p.* 408. *Ibid. vol.* 12. *p.* 442. *Raym. vol.* 1. *p.* 639.

Trinity, 12 *W.* 3. *Clay* v. *Snelgrave, Snalgrave, or Sudgrave.*

The adminiſtrator of a maſter *libelled* againſt a ſhip for the *maſter's* and *ſeamen's wages*; and a *prohibition* was moved for on ſuggeſtion that the contract was made on land. It was agreed by the court that the ſuggeſtion was naught, in the caſe of a ſuit for *ſeamen's wages* only; but the doubt was as to the maſter.

Holt Chief Juſtice. It is by indulgence that ſeamen may ſue for their wages in the *admiralty*, but that was never extended to maſters but once, which was in Lord *Herbert*'s time; for the maſter's caſe differs from that of the *mariners*, for he is a principal ſervant, and contracts with the part-owners, and the *mariners* with him; and a *prohibition* is a matter of right, with ſome reſtrictions; and that which is the ground for *prohibitions* in theſe caſes, is the contract being made on land; but that does not hold in all caſes; for in *Croſby* v. *Loſmell's* caſe, the money was taken up at land for the uſe of the ſhip diſtreſſed in her voyage; and a conſultation was granted; otherwiſe, if it had been taken up before the voyage began. And in the caſe of a *local* juriſdiction, as that of the *admiralty* is, there is no difference between the contract's being by deed and by parol.

To which *Gould* Juſtice agreed. Wherefore a *prohibition* was granted. *Vide Mod. Rep. vol.* 12. *p.* 405. *Raymond, vol.* 1. *p.* 576. *Salk. vol.* 1. *p.* 33.

Trinity, 12 *W.* 3. *Bayly* v. *Grant, or Grant* v. *Bailey.*

The mate ſued the maſter for his wages in the *Admiralty*, and this court was moved for a *prohibition*, becauſe the maſter himſelf could not ſue there, and the mate was not in nature of a *mariner*, but was to ſucceed the maſter, if he died in the voyage.

Holt, Chief Juſtice. The maſter contracts with the owners, but the mate contracts with the maſter for his wages, as the reſt of the *mariners* do. Therefore a *prohibition* was denied. *Vide Salk. vol.* 1. *p.* 33. *Raym. vol.* 1. *p.* 632. *Mod. Rep. vol.* 12. *p.* 440.

Eaſter, 13 *W.* 3. *Betts* v. *Hancock.*

In a ſuit in the *Admiralty*, the principal died before ſentence: notwithſtanding this, that court proceeded againſt the bill on the ſtipulation in the nature of a recognizance, by which he bound himſelf and his heirs. This court was moved for a *prohibition*, and it was inſiſted that the court could not take notice of the courſe or law of the *Admiralty* being not pleaded, becauſe it was foreign to the *common law*; and there was a particular reaſon why they took notice of the *ſpiritual law*, *viz.* That both the ſpiritual and temporal laws were originally adminiſtered in the ſame court, a reaſon which failed in this caſe: alſo that lands were intirely under the protection of the *common law*, and they could not take ſtipulation in the realty. Laſtly, that if the defendant had been in gaol, and had died within the walls of the priſon, the ſuit muſt have abated; and there was no reaſon why the ſuit ſhould be in a better condition by the defendant's being in cuſtody of his bail, than in caſe he had been in actual cuſtody. And that whereas the ſecurity given was only that the defendant ſhould abide their judgment, the *Admiralty* now have extended it to the defendant's executor. On the other ſide it was ſaid: The bail in the *Admiralty* are ſued as principals, and this is the courſe of this court, becauſe the plaintiff and defendant, being *ſea-faring men*, are more than others ſubject to caſualties.

The matter was adjourned, and afterwards compounded. *Vide Salk. vol.* 1. *p.* 34.

Eaſter, 13 *W.* 3. *Lane* v. *Sir Robert Cotton and Sir Thomas Frankland.*

In an action on the *caſe* brought againſt the defendants as poſtmaſter-general, *Holt* Chief Juſtice cited a record out of *Molloy* 24. *Ed.* 3. *n.* 45. that the maſter of a ſhip may reimburſe himſelf out of the wages of the *mariners*, if a loſs happpen by their negligence. *Vide Raymond vol.* 1. *p.* 650.

Eaſter, 13 *W.* 3. *Anonymous.*

Holt Chief Juſtice. A maſter of a ſhip may keep the goods till he is paid his freight, but if he once parts with the poſſeſſion of them, he cannot retake them. *Vide Mod. Rep. vol.* 12. *p.* 511.

Trinity, 13 *W.* 3. *Maddox* v. ——.

A *prohibition* was moved for to ſtay a ſuit in the *admiralty*, brought by a ſurgeon of a ſhip for his wages; and the ſuggeſtion was, that all was paid to the maſter.

Per curiam. Payment to the maſter is not payment to the ſeamen, but the ſhip itſelf is liable for their wages. *Vide Mod. Rep. vol.* 12. *p.* 526.

Michaelmas, 1 *Ann.* *Juſtin* v. *Ballam.*

The defendant *libelled* in the *Admiralty*, for that the ſhip being in great diſtreſs on the *ſea*, and wanting a cable, the maſter contracted with the defendant for a cable, which he delivered, *&c.* And for that he *libelled* in the *Admiralty*; the plaintiff ſuggeſted the contract was made at land, *viz.* at *Ratcliffe* on the River *Thames*, where the ſhip then lay. The caſe of *Coſtard* and *Lewſtie* was urged, where an hypothecation at *Rotterdam* was allowed to be within the juriſdiction of the *Admiralty*; and though the cable was ſold at land, yet the want of the cable was occaſioned by ſtreſs of weather at ſea; which was the cauſe of ſuit: and that all matters, incident to navigation, belonged to the *Admiralty*'s juriſdiction by the laws of *Oleron.*

Per curiam. By the *maritime law*, every contract of the maſter implies an hypothecation; but by the *common law* it is not ſo, unleſs it be ſo expreſsly agreed: in *Coſter*'s caſe there was an expreſs hypothecation, and that was in a place where hypothecations were allowed good; for that reaſon we allowed the juriſdiction of the *Admiralty* in that caſe, for there was no remedy at *common law*: but in this caſe there is nothing but a mere common contract at land. So a *prohibition* was granted.

Note alſo, the maſter may hypothecate either ſhip or goods, for the maſter is entruſted with both, and repreſents the traders as well as owners of the ſhip. *Vide Salk. vol.* 1. *p.* 34.

Trinity, 2 *Ann.* *Johnſon or Jonſon*, v. *Shippin or Shepney.*

A Ship put in at *Boſton* in *New-England*, and there the maſter took up neceſſaries, and gave a bill of ſale by way of hypothecation; and now there being a ſuit brought againſt the ſhip and owners to compel re-payment, a *prohibition* was moved for. And the court held, that the maſter could not by his contract make the owners perſonally liable to a ſuit, and therefore as to them granted a *prohibition*; but as to the ſuit againſt the ſhip denied a *prohibition*; for the maſter can have no credit abroad but on giving ſecurity by hypothecation, and it is not reaſonable we ſhould hinder the court of admiralty from giving a remedy, where we can give none ourſelves. *Vide Salk. vol.* 1. *p.* 35. *Raym. vol.* 2. *page* 982. *Mod. Rep. vol.* 6. *p.* 79. *Ibid. vol.* 11. *p.* 30.

Michaelmas, 2 *Ann.* *Tranſer or Tranter,* v. *Watſon.*

A proceſs was awarded by the *Admiralty* at the ſuit of the maſter againſt the owners, to arreſt the goods at *Briſtol, on account of ſalvage,* and now before appearance, the court was moved for a *prohibition,* on *affidavits* of the matter on the proceſs before the libel, whereby it appeared the goods landed were arreſted *on account of ſalvage*; and *Sands*'s caſe was cited, where on a proceſs to ſtay a ſhip in the river, a *prohibition* was granted before appearance.

Per curiam. Though the goods be now arreſted at land, yet the *ſalvage* which was the cauſe of that arreſt, might be at ſea, which will appear by the *libel*; therefore we will not grant a *prohibition* before appearance or *libel* to try the validity of their proceſs; the rather, becauſe the party may have another remedy by action of *treſpaſs* or *replevin*; and this is not like *Sands*'s caſe, for that proceſs was not for an appearance, as this is; but in the nature of an execution. *Vide Salk. vol.* 1. *p.* 35. *Raym vol.* 2. *p.* 931. *Mod. Rep. vol.* 6. *page* 11.

Michaelmas, 2 *Ann.* *Ewers* v. *Jones.*

See this caſe fully ſtated in page 615 of this work, under the head *Limitation.*

Hilary, 3 *Ann.* *Hide* v. *Partridge.*

See this caſe fully ſtated in page 615 of this work, under the head *Limitation.*

Eaſter, 3 *Ann.* *More* v. *Rowbothom.*

Among ſeveral part-owners of a ſhip, ſome were againſt freighting her; but by the practice in the *Admiralty* in ſuch caſe for advancing of navigation, it was decreed that the majority ſhall prevail and freight, they giving the diſſenting party caution for their parts of the ſhip againſt all riſques; which was done here, and the ſhip being loſt, the caution was libelled againſt, and ſentence given in the *Admiralty*; on which a *prohibition* was moved for, ſuggeſting that the caution was given on land, and that all matter of property is to be ordered by the *common law* only: and the court were of opinion, that they had ſuch power; and if ſo, by conſequence they had juriſdiction over the caution, as incident thereto: yet it being a matter of conſequence, and never yet determined, they granted a *prohibition,* and directed them to declare according to their ſuggeſtion forthwith: and though it be after ſentence, yet if they had no juriſdiction, a *prohibition* ought to iſſue. And it was ruled accordingly. *Vide Mod. Rep. vol.* 6. *page* 162.

Trinity, 3 *Ann.* *Anonymous.*

Holt, Chief Juſtice. If a ſhip be bound for the *Eaſt Indies,* and from thence to return to *England,* and the ſhip unlades at a port in the *Eaſt Indies,* and takes a freight to return to *England,* and in her return is taken by enemies; the *mariners* ſhall have their wages for the voyage to the *Eaſt-Indies,* and for half the time that they ſtaid there to unlade, and no more. *Vide Raym. vol.* 1. *p.* 739.

Michaelmas, 3 *Ann.* *Wells* v. *Oſman or Oſmond.*

On a motion for a *prohibition* to the *Admiralty,* in a ſuit there for ſeamen's wages, the caſe appeared to be thus: *Wells* the plaintiff built a ſhip, and launched her, and afterwards on a treaty between him and one *B.* who was to buy the ſhip, in order to get to be *maſter* of her, (as is uſual in ſuch caſes) but before any bill of ſale was executed by *Wells* to him, *B.* hired *Oſman* and other ſeamen to launch and rig the ſhip, and to go with him in this ſhip a voyage propoſed, and ſent them on board the ſhip, and *Wells* permitted them to come on board; and there the ſeamen continued for *four months,* fitting out the ſhip for ſea, but afterwards, on ſome difference happening between *B.* and *Wells,* the treaty for the ſhip was broke off, and the things fetched from on board the ſhip, and the ſeamen diſcharged, having never been with the ſhip any lower than *Deptford,* where the ſhip lay when they went on board. And now the ſeamen *libelled* in the *Admiralty* againſt the body of the ſhip for their wages, and on ſuggeſtion that the work and labour was done *within the body of the county,* the court was moved for a *prohibition.* And the council grounded their motion on this, that though here was a voyage intended, yet no voyage having been made, the *mariners* could not ſue in the *Admiralty* for their wages.

It was alſo objected, that this was the common courſe of dealing between ſhip-builders and maſters of ſhips; and that it would be very hard to ſubject the builders of ſhips to the ſeamen's wages, where the contract never proceeded, the builders having nothing to do with the ſeamen; but they ſhould be put to their remedy againſt the maſter who contracted with them.

Per curiam. If a contract be made with ſeamen to go a voyage, and they, in order there to work in an harbour, and afterwards the voyage is intercepted through the owner's fault, as if the ſhip be arreſted for his debt, *&c.* the ſeamen ſhall ſue in the *Admiralty* for their wages, for their work ſo done in the harbour in purſuance of a contract to go on a voyage, is as much as if they had gone the voyage; *otherwiſe* if the retaining of them had only been to do the work in the harbour; and in this caſe the ſhip ought to be liable for their ſuit, becauſe the builder, by putting it into the owner's poſſeſſion, gave him an opportunity of engaging with ſeamen, who are the more eaſily induced, becauſe they ſee him in poſſeſſion of it; and they being ſtrangers to the builder's bargain with the owner, ought not to ſuffer by its not being performed; for the builder might have taken care to ſecure himſelf from any ſuch charge, when he entruſted the owner with poſſeſſion of the ſhip, whereby he rendered it ſubject to the wages of ſuch ſeamen as he ſhould bring on board, in order to a voyage in her. So the motion for a *prohibition* was denied.

The court alſo ſaid, that the true reaſon why ſeamen may ſue for their wages in the *Admiralty,* though the real contract be at land, is, that there the ſhip itſelf is made liable to them; and beſides, there they may all join in the ſuit, neither of which can be at *common law,* and yet both are much for the eaſe of poor ſeamen. *Vide Raym. vol.* 2. *p.* 1044. *Mod. Rep. vol.* 6. *p.* 238. *Ibid. vol.* 11. *p.* 31.

Michaelmas, 4 *Ann.* *Benns* v. *Parre.*

The court was moved for a *prohibition* to a ſuit in the *Court of Admiralty* for ſeamen's wages, on ſuggeſtion that the contract was made by deed at land. But on reading the ſuggeſtion, it appeared to be general, that the contract was made at land. Then the court directed the ſuggeſtion to be amended; on which it was amended, and made *by writing.*

But the court held that it was not ſufficient, for it might be by writing, and yet not by deed; and if it was ſo, that would not alter the caſe, for notwithſtanding the writing, it is but a *parol* contract.

It was then urged, that it was a *ſpecial* agreement.

But the court held, that even this did not withdraw it from the *Admiralty*'s juriſdiction. Wherefore the motion was denied. *Vide Raym. vol.* 2. *p.* 1206.

Michaelmas, 4 *Ann.* *Wiggins* v. *Ingleton.*

On an action brought for *mariners* wages for a voyage from *Carolina* to *London,* it appeared, that the plaintiff had ſerved *three* or *four* months, and before the ſhip came to *London,* which was the delivering port, he was impreſſed into the Queen's ſervice; and afterwards the ſhip came ſafe to the delivering port.

Holt, Chief Juſtice, ruled, on evidence, that the plaintiff ſhould recover *for as long* as he had ſerved, the ſhip having arrived ſafe to the delivering port.

Afterwards, in another cauſe, *viz. Chandler* v. *Mead* at the ſittings after this term at *Guildhall*, it appeared, that the plaintiff was hired by the defendant at *Carolina*, to ſerve on board the *Jane* ſloop, whereof the defendant was maſter, from *Carolina* to *England*, at 3 *l. per* month: that he ſerved *two months*, then the ſhip was took by a *French* privateer and ranſomed; and juſt as ſhe came off *Plymouth*, the plaintiff was impreſſed, *&c.* and then the ſhip came ſafe into the river *Thames*, where ſhe diſpoſed of her cargo.

Holt, Chief Juſtice. The plaintiff can have no wages, the ſhip having been taken by the enemy and ranſomed.

It was inſiſted by the plaintiff's council, that he ſhould recover for a proportionable part, and that the uſage among merchants was ſo.

Holt, Chief Juſtice, ſaid, if it could be proved it would do; but wanting proof of it, the plaintiff was nonſuited. *Vide Raym. vol.* 2. *p.* 1211.

Eaſter, 5 *Ann.* *Brown and others*, v. *Benn and others.*

The court was moved for a *prohibition* to the court of *Admiralty* in a ſuit there brought by *ſeamen* for their wages, on a ſuggeſtion that the court refuſed to allow the defendants, allegation, that the place, on the arrival at which the plaintiffs intitled themſelves, was not a port of delivery; and that they refuſed to receive the allegation, unleſs the defendants would bring the money demanded into court.

But *Holt*, Chief Juſtice, and *Powell*, Juſtice held, that the *Admiralty court* were judges of that matter, and that if they did not do the defendant juſtice, his only remedy was by appeal; but it was no ground for a *prohibition*: that the juriſdiction of the *Court of Admiralty* in caſe of ſeamen's wages was an ancient concurrent juriſdiction, as ancient as the conſtitution of the *Admiralty court* here: and that you cannot appeal in the *Court of Admiralty* before definitive ſentence, for a *grievance*, as you may in the *Eccleſiaſtical court*.

The ſuit here was for wages on the arrival of the ſhip at *Guinea*.

Powell, J. ſaid, he remembered a caſe of thelike nature, where a ſuit was commenced in the *Court of Admiralty* by ſeamen for their wages, on the arrival of the ſhip at *Newfoundland*; and though the merchants all held it no port of delivery, yet the *Court of Admiralty* held the contrary. And ſo did the court of *C. B.* on a motion for a *prohibition*. *Vide Raym. vol.* 2. *p.* 1247.

Eaſter, 6 *Ann.* *Degrave* v. *Hedges.*

There were *eight* part-owners of a ſhip, *ſix* of them would ſend her a voyage, to which *two* would not conſent, the *ſix* thereon libelled in the *Admiralty* againſt the others, in order to obtain a decree of that court, that the ſhip ſhould make the voyage, which was decreed accordingly; and that the *ſix* ſhould enter into a ſtipulation to the other *two* for the ſafe return of the ſhip. The ſhip ſailed, and was loſt in the voyage: the *two* ſued the other *ſix* on this ſtipulation in the *Admiralty*. On which this court was moved for a *prohibition* to ſtay the ſuit, on ſuggeſtion of *ſtat.* 13 *Rich.* 2. *c.* 5. and 15 *Rich.* 2. *c.* 3. and of the facts before alledged.

The court were of opinion, that this point was not fit to be determined on motion, but ordered the plaintiff to take a *prohibition*, and declare on it, and then on the defendant's demurrer, the point would come judicially before them, and would receive a more ſolemn determination.

Holt, Chief Juſtice, ſaid, that the *Court of Admiralty* might take ſtipulations for bail, and that they might proceed on them, and it was conſtantly allowed, though *Co.* 4. *Inſt.* 135. is of another opinion, and yet ſuch ſtipulations are as much within the words of *ſtat.* 13 & 15 *Rich.* 2. as the recognizance in this caſe. But the queſtion in this caſe is, if by the cuſtom of *England* the *Admiralty* has not ſuch a juriſdiction, if it has, neither the ſtatute, nor common law will reſtrain them. *Vide Raym. vol.* 2. *p.* 1285.

Creed v. *Mallet.*

Holt, Chief Juſtice. A *ſhip carpenter*, though a warrant officer, is held to be within *ſtat.* 2 *Ann.* for diſcharging enliſted ſoldiers and *Mariners*.

Per curiam. If any officers join with common *mariners*, they cannot ſue in ſuch manner in the *Admiralty court* for wages, but *on the contrary* a *ſhip carpenter* may; he was not arreſted, nor need be ſo. *Vide Forteſcue, p.* 231.

Edmonton v. *Francklyn.*

A libel was brought for *ſeamen's wages* in the *Court of Admiralty*, and at the ſame time they ſued for their wages at law, and iſſue was joined on ſuch action, and a *prohibition* was moved for to the *Admiralty court*.

Per curiam. You ought firſt to plead this ſuit in the *Admiralty Court*, and if they refuſe the plea, then it will be proper to move for a *prohibition*.

By *ſtat.* 4 & 5 *Ann.* *ſeamen's wages*, are to be ſued for within *ſix* years in the *Admiralty Court*, and not after. *Vide Forteſcue, p.* 231.

Hilary, 10 *Ann.* *Aſſievedo* v. *Cambridge.*

See this caſe fully ſtated in page 571 of this work, under the head *Inſurance*.

Michaelmas, 1 *Geo.* *Clerk* v. *Lee.*

See this caſe fully ſtated in page 143 of this work, under the head *Attorney*.

Michaelmas, 7 *Geo.* *Campion* v. *Nicholas.*

The cargo of a ſhip was loſt by the capture of the ſhip by a *Swediſh* privateer, who carried her into *Gottenburgh*; the maſter ſtaid there *three months*, to refit the ſhip, and take in new lading; to prevent the ſeamen from going away, he agreed to pay them ſo much *per* month whilſt they ſtaid there: and in an action brought for this the maſter would have diſcharged himſelf, on the rule that freight is the mother of wages, and that none are ever paid while the ſhip is lading and unlading; which *Pratt* Chief Juſtice agreed to be the general doctrine: but he held it not to be ſufficient to controul a ſpecial agreement, as there was in this caſe, and where too there was ſo long a ſtay at *Gottenburgh*. *Vide Strange vol.* 1. *p.* 405.

Michaelmas, 10 *Geo.* *Anonymous.*

A *prohibition* was moved for to the *admiralty court*, on affidavit that the cauſe of action did not ariſe on the high ſea.

It was denied by the court, becauſe ſentence was paſſed; and then no *prohibition* ought to be granted but for ſome cauſe apparent on the face of the record. *Vide Mod. Rep. vol.* 8. *p.* 194.

Trinity, 11 *Geo.* *The Mariners Caſe.*

A *libel* was brought in the court of *admiralty for mariners wages*, the plaintiff ſuggeſted for a prohibition, a contract reduced into writing for the wages; but the prohibition was denied, for the court always indulges *mariners* to ſue in the *admiralty*, becauſe by the courſe of that court, many of them may join in the ſuit, and it is the cheapeſt and moſt expeditious method to recover their wages; if there is a ſpecial contract, as is now ſuggeſted, the defendant may plead it in that court; and if they do not allow that plea, then it is proper to move this court for a *prohibition*; for if it ſhould be granted before the plea is diſallowed, it is a prejudging the juſtice of the *admiralty court*. *Vide Mod. Rep. vol.* 8. *p.* 379.

Eaſter, 12 *Geo.* *Liſter* v. *Baxter.*

One *Liſter* being maſter of a ſhip that was in diſtreſs at ſea, put in at *Amſterdam*, and there borrowed 60 *l.* of

Baxter to repair the ſhip, and *hypothecated* it for repayment of the money. The money not being paid *B.* *libelled* in the *admiralty*; whereon a *prohibition* was moved for, on account of its being a contract at land; and it not appearing by the words of the contract, that the ſhip was on her voyage, it would be preſumed ſhe was only to begin her voyage from *Amſterdam*.

But the court were clearly of opinion, no *prohibition* ſhould iſſue, it appearing by the *libel* that the ſhip was on her voyage; and if ſhe was not, it might be pleaded below, which would *ouſt* the *admiralty court* of juriſdiction, the maſter having no power to *hypothecate* the ſhip in port, before ſhe ſet out on her voyage. *Vide Strange, vol.* 1. *p.* 695.

Trinity, 12 *Geo.* *Wheeler* v. *Thompſon.*

On a motion for a *prohibition* to the *admiralty*, it was held that a carpenter may ſue for wages in that court. 2 *Vent.* 181. *Salk.* 33. 1 *Mod.* 93. *Vide Strange, vol.* 1. *p.* 707.

Eaſter, 13. *Buck.* v. *Atwood.*

In a ſuit in the *admiralty* for *mariners* wages, a deed was pleaded to have been made at land, whereby the *mariners* agreed to ſubject themſelves to the loſs of their wages on particular circumſtances; and it being replied thereto, that the deed was obtained by fraud and circumvention, it was ſo declared below, and a ſentence given for the wages.

The court was moved for a *prohibition.* It was urged that the *admiralty* has no original juriſdiction for wages, but it is connived at for the eaſe of *mariners*, who may join in the ſuit, which they cannot do at *common law*: but then it muſt be on a *parol* contract, and not by deed; and here being a deed made at land, that is the ſubſiſting contract, and will deſtroy the other. *Salk.* 31.

Per curiam. This is only a deed on one ſide, to forfeit the wages on particular circumſtances; but that will not enable them to ſue for their wages at law. The deed therefore comes only by way of incident, and then they may proceed to try it. Therefore we can grant no *prohibition. Vide Strange, vol.* 2. *p.* 761.

Michaelmas, 13 *Geo.* *Barber and Philpot* v. *Wharton.*

A maſter of a ſhip ſued for his wages in the *admiralty court*, and laid the contract to be made *within the ebbing and flowing of the ſea, within the juriſdiction of the admiralty court.*

On ſhewing cauſe why a *prohibition* ſhould not iſſue, it was ſuggeſted that the contract was made on land, *&c.* according to the caſe of *Clay* v. *Snellgrave, Trin.* 12 *W.* 3. reported in *Salk.* 33. and that the matter could not be within the juriſdiction of the *admiralty*, unleſs it was laid to be *on the high ſea.* But the court held the words *within the juriſdiction of the admiralty* ſufficient, though they denied a *prohibition*, the motion coming too late as being after ſentence. *Vide Raymond, vol.* 2. *p.* 1452.

Michaelmas, 2 *Geo.* 2. *Graham or Garnham.* v *Bennet.*

On a motion for a new trial, it was held, that the repairer of a *ſhip* has his election to ſue the maſter who employed him, or the owners, but if he undertakes it on a ſpecial promiſe from either, the other is diſcharged. *Vide Strange, vol.* 2. *p.* 816.

Hilary, 3 *Geo.* 2. *Ragg* v. *King.*

A *prohibition* was granted to a ſuit for wages by a maſter in the *admiralty*, but was denied as to the *Boatſwain*, who is to be conſidered as a *common mariner* only. *Salk.* 33. *Vide Strange, vol.* 2. *p.* 858.

Hilary, 4 *Geo.* 2. *Dimmock* v. *Chandler.*

The court was moved for a *prohibition* to the *admiralty* in a ſuit there, brought by one part owner againſt the other, who would go to ſea with the ſhip, in order to oblige him to give ſecurity. And *Carth.* 26. *Hard.* 473. were cited.

But the court ſaid, theſe caſes were denied, 7 *Ann. Grave* v. *Hedges*; and that if ſecurity was offered and refuſed, they would grant a *prohibition*; but not before. *Vide Strange. vol.* 2. *p.* 890.

Trinity, 5 & 6 *Geo.* 2. *Rutherford* v. *Scott.*

The defendant being brought up by *habeas corpus* from the *admiralty*, appeared to be charged there at the ſuit of ſeveral owners, with embezzling the goods of the ſhip. And the plaintiff here making an *affidavit* that he was indebted to him on a promiſſory note, the court took him from the *admiralty*, and delivered him to the cuſtody of the marſhal. For they ſaid the cauſe in the *admiralty* might as well be followed in an action of *trover*: and they paid no regard to the *admiralty* method of ſending over a commiſſion to examine foreign witneſſes, which was a privilege, as was urged, the plaintiffs below could not have in this court. *Vide Strange, vol.* 2. *p.* 936.

Trinity, 5 & 6 *Geo.* 2. *Read* v. *Chapman.*

A perſon went out mate, and in the voyage the maſter died, and he ſucceeded to the command of the ſhip. And having brought her home, he ſued in the *admiralty* for his wages as mate, and for a further allowance after he became maſter. And the court granted a *prohibition* as to the time he was maſter, and refuſed it as to the time he was mate. *Vide Strange, vol.* 2. *p.* 937.

Eaſter, 7 *Geo.* 2. *Day et al.* v. *Searle.*

In this caſe the *mariners* libelled on a contract under ſeal, and a *prohibition* was granted, on the authority of *Salk.* 31. *Vide Strange, vol.* 2. *p.* 968.

Hilary, 8 *Geo.* 2. *Boucher* v. *Lawſon.*

On a trial at *Guildhall*, a ſpecial verdict was found as follows, *viz.*

That the defendant was ſole owner of the ſhip; that he appointed one *F.* to be maſter of her; that the plaintiff put goods on board this ſhip to be carried from the river *Tagus* to *London*, and the bill of lading was found *in theſe words, viz.* whereby the plaintiff was to pay ſo much freight for the goods, and that the goods were to be delivered at the port of *London* on the 9th day of *Auguſt*, dangers of the ſea excepted; which bill of lading was ſigned by the maſter.

They further find, that the ſhip did arrive ſafe at *London*; that the plaintiff had no aſſignment of the goods; that in *September* the plaintiff made a demand of them, and that the defendant refuſed to deliver them; and that the plaintiff was ready to pay the defendant the freight: They further find, that the goods were *Portugal* gold, and that to export it is an unlawful trade, according to the law of *Portugal.* They laſtly found it to be uſual, that when any gold is exported from *Portugal* to this kingdom for the maſter of the veſſel to take the whole freight to his own uſe, without accounting for any part of it to his owners, unleſs there be ſome ſpecial agreement between them to the contrary, and that in the preſent caſe there was no ſuch ſpecial agreement.

It was argued for the plaintiff, that this caſe did not differ from the common caſe of owners of ſhips, who in like manner as carriers are liable for the maſter's neglect in reſpect of freight, and in ſupport of this argument, the following caſes were cited, *Mors* v. *Sluce*, 1 *Mod.* 85. 2 *Lev.* 69. 1 *Vent.* 238, 190. *Boſon* v. *Sandford, Carth.* 60. 2 *Salk.* 440. 3 *Lev.* 268. *Comb.* 116. 1 *Show.* 29. *Brandon* v. *Peacock, Eaſter* 3 *Geo.* 2. And urged, that this was likewiſe the practice in *Chancery*, 2 *Vern.* 442.

Lord *Hardwicke.* Since by ſtatute 7th *Geo.* 2. *cap.* 15, owners of ſhips are liable for goods taken in by their maſters without their privity, no further than their intereſt in the ſhips and in the freight, the point of law here brought in queſtion, only concerns the Parties in this ſuit, and will not affect any future determinations.

Had this caſe been directly within the reaſon of *Boſon* v. *Sandford*, or *Mors* v. *Sluce*, the ſpecial verdict would not have been directed to have been found. Theſe *two* caſes are under the like reaſon, as is likewiſe that of *Brandon* v. *Peacock*, and therefore muſt be taken for law not now to be ſhaken, and where there is a trading ſhip concerned in a voyage, it muſt be conſidered in the nature of a common carrier, and the owners are liable for the negligence or fraud of the maſter. Theſe caſes depend on *two* grounds, 1ſt. That the owners appoint the maſters; and, 2dly. That the freight comes to the owners.

Here it is found by the verdict, that the laſt of theſe reaſons fails, and therefore it will ſtand on this ſingle ground, that the maſter being the owner's ſervant, they are liable for his act.

The *firſt* difference attempted to be made between this caſe and the other is, that this trade of exporting gold is found to be a trade prohibited by the laws of *Portugal*, but though the trade is found to be there unlawful, yet the verdict has not found the conſequences of it, whether it might incur the loſs of the ſhip, or a perſonal penalty on the maſter only; and I am not ſatisfied that this will make any difference: the carrying on indeed a trade prohibited by the laws of *England*, is of material conſequence, and it is ſaid that the parties in that caſe ſhall receive no relief, as they are both *parties to the crime*, and therefore the law will not give one any remedy againſt the other. But if it ſhould be laid down, that becauſe goods are prohibited to be exported by the laws of any foreign country, from whence they are brought, therefore the parties ſhall have no remedy or action here, it would cut off all benefit of ſuch trade to this kingdom, which would be of very bad conſequences to the principal and moſt beneficial branches of our trade, nor does it ever ſeem to have been admitted.

In the time of *Car*. 2. a ſuit was brought on a contract of marriage, the ſentence of the eccleſiaſtical court at *Turin* was given in evidence, and allowed to be concluſive.

But though a determination in a particular caſe may be binding here, yet that will not make the general rule of their laws concluſive in this kingdom, therefore it does not ſeem that the unlawfulneſs of this trade in *Portugal*, ſince it is lawful in *England*, will have any effect on the determination of this caſe.

The next diſtinction made is, that it is found to be uſual when any gold is exported from *Portugal* to *London*, that the maſter ſhould take the freight to his own uſe, without accounting for it to his owners, unleſs there is ſome ſpecial agreement to the contrary. This point, if any, will make the material difference; but it wants to be a little more cleared up.

The bill of lading is found by the verdict *in theſe words*, and in it are theſe words, *to pay freight for the ſaid goods*: now freight being the fruit and earnings of the ſhip, by rule of law belongs to the owners, and the maſter is only entitled to his wages. And therefore had it ſtood on the bill of lading, and nothing elſe, the court would have took it, that the freight belonged to the owners.

But the queſtion is, whether the ſubſequent finding of this uſage will make any difference: now as to that the point will be, whether this is to be taken as a ſtrict cuſtom, or for no more than the common practice, and that the owners only make an allowance to the maſter of this part of the freight, whether that they pay him leſs wages, or any other conſideration; for then it is only an allowance of part of their profits to the maſter, and they are notwithſtanding liable; and therefore if this finding on the uſage is to be taken conſiſtently with the bill of lading, and the reward for carrying the gold is freight, and conſequently by the rule of law belonging to the owners, they are within the caſe of *Boſon* v. *Sandford*.

Per curiam. Let the matter ſtand over.

In *Hilary* term 9 *Geo*. this caſe came on again, when the court unanimouſly gave judgment for the defendant. *Vide Caſes Temp. Lord Hardw. p.* 85. 194.

Trinity, 9 *Geo*. 2. *Smith qui tam* v. *Gibſon*.

An action was brought on the ſtatutes of 13 *R*. 2. *c*. 5. 15 *R*. 2. *c*. 3. and 2 *H*. 4. *c*. 11. for impleading the plaintiff in the *Admiralty* for a matter at land, and arreſting the *two-and-thirtieth* part of a ſhip, which *two-and-thirtieth* part belonged to the plaintiff, whereby the ſhip was detained, and he put to expence.

The defendant pleaded in *abatement*, that there were other part-owners not joined in the action, who it appeared were injured as well as the plaintiff, ſince the whole ſhip was detained in detaining a *two-and-thirtieth* part.

Per curiam. The *giſt* of this action is the ſuit in the *Admiralty*, which was againſt the plaintiff only, and therefore the reſt of the part-owners could not join, and therefore there muſt be a *reſpondeas ouſter*. *Vide Stra. vol*. 2. *p*. 1045.

Trinity, 10 *Geo*. 2. *Burton* v. *Fitzgerald*.

In an action on a charty-party to go to *Calais*, and there to take in corn for *Spain*, the defendant pleaded, that the ſhip was unfit for the voyage, being rotten, and therefore he did not load her. And iſſue being joined on the goodneſs of the ſhip, and ſeveral witneſſes examined, the defendant offered to give in evidence a proceeding in the *Admiralty Court* at *Calais*, whereby commiſſioners were appointed to ſurvey the ſhip, on whoſe report there was a ſentence of condemnation. It was objected, that this being a contract under ſeal on land here, the *Admiralty* had no juriſdiction, and conſequently their ſentence was void. It appeared that the plaintiff had intervened in the ſuit, and had an inſpector of his own nomination put into the commiſſion. And it was inſiſted, that faith was to be given to theſe proceedings; and that it was not to be ſuppoſed that the ſame boundaries between courts ſubſiſt there as here: and that on inſurances nothing is commoner than to read proteſts made in *foreign Admiralties*.

Lee, Chief Juſtice, refuſed to let it be read, this being a contract under ſeal at land, in which caſe, according to our law, the *Admiralty* has no juriſdiction. *Vide Stra. vol*. 2. *p*. 1078.

Hilary, 19 *Geo*. 2. *Tonge* v. *Watts*.

See this caſe fully ſtated in page 573 of this work, under the head *Inſurance*.

Trinity, 3 *Geo*. 3. *The Mayor of Yarmouth* v. *Eaton*.

See this caſe fully ſtated in page 358 of this work, under the head *Declaration*.

Hilary, 6 *Geo*. 3. *Hernaman* v. *Bawden, and others, Executors of Ford*.

On a motion for a new trial without payment of coſts, by conſent of the judge who tried the cauſe, on a verdict for the defendant in an action brought by a *ſailor* for *wages* " in a voyage to *Newfoundland*; and " from thence to *Spain* or *Portugal*, or ſome port in " the *Mediterranean*."

The queſtion was, " whether *ſailors* in ſuch voy- " ages are entitled to their wages at *Newfoundland*, " or not till the ſhip's arrival at the *port of delivery of* " *the fiſh*."

The contract was, " that the wages ſhould be paid " *at that port* at which ſuch wages were uſually due."

The fact was, " that this ſhip was taken, *after* its " arrival at *Placentia* in *Newfoundland*; and on its " voyage *from Newfoundland* to it's port of delivery of " the fiſh."

After hearing the arguments of the council on this motion, the court ordered the *poſtea* to be delivered to the defendant.

Lord *Mansfield*. It depends on a matter of *fact*, whether this caſe is within the general rule of law; which matter of fact is, " where *the firſt place or port of* deli- " very, on this voyage or contract is."

This is a voyage from *Barnſtaple to Portugal or Spain*, or other *port in the Mediterranean*, taking in a cargo of fiſh at *Newfoundland*; and ſo is the very contract itſelf:

ſelf: which deſcribes it as *one ſingle voyage*, which is to *end* either in *Spain* or *Portugal*, or ſome port in the *Mediterranean*, at the election of the freighter. The ſhip was loſt *before* it arrived at its port of delivery: therefore the verdict is right.

Wilmot, *Yates*, and *Aſton*, Juſtices, concurred with the Chief Juſtice in opinion.

Per curiam. Let the *poſtea* be delivered to the defendant. *Vide Bur. vol.* 3. *p.* 1844.

Michaelmas, 6 *Geo.* 3. *Ricord* v. *Bottonham.*

On an action brought for a *Ranſom bill* by the plaintiff, who was captain of a *French* privateer, againſt the defendant, who was captain of an *Engliſh* ſhip called the *Syren*, for the ranſom of the ſaid ſhip, which had been taken by the ſaid *French* privateer.

The cauſe was tried before Lord *Mansfield* at *Guildhall*, at the ſittings after *Eaſter* term, 1765, on which a ſpecial caſe was ſtated for the opinion of the court, the purport of which was as follows:

That the *capture* of the *Syren*, by the *Badine* privateer, commanded by the plaintiff, was four leagues off *Cape Negrillo* at ſea, the 24th of *Auguſt*, 1762.

The plaintiff was then *a natural born ſubject of the French King*, from whom he had a commiſſion. The defendant was *a natural born ſubject of Great Britain*: And the *Syren* was the property of the defendant's owners, being *Britiſh ſubjects*.

On the capture of the ſaid ſhip, a *ranſom-bill* was given at *ſea* the ſaid 24th of *Auguſt* 1762, ſigned by the plaintiff, the defendant, and *J. B.* the mate of the ſaid ſhip *Syren*, (who was given as a hoſtage to the plaintiff).

The value of the *ranſom bill* given was 300 *piſtoles*, or 236*l.* *ſterling*, though the ſhip *Syren* was of *greater* value.

J. B. the mate died in *priſon*, at *Port au Prince*, on the 12th of *October* 1762.

The ſhip *Syren* being ſo ranſomed as aforeſaid, arrived at her deſtined port, *viz. St. Lucca Martha Brae*.

That at the time of the capture, and till the 3d of *Nov.* 1762, there was an *actual war* between *Great Britain* and *France*.

The queſtion was, whether, on theſe facts, the plaintiff is entitled to recover in this action.

After hearing the arguments of the council on both ſides, on arguing this ſpecial caſe, and Mr. *Blackſtone*, who was of council for the defendant, obſerving to the court that he had made enquiries abroad, and had anſwers from very eminent lawyers of *France* and *Holland*, "that ſuch an action had been allowed, and on "principles that could not be diſputed."

Lord *Mansfield* ſaid, the court were all of the ſame opinion.

Per curiam unanimouſly. Let judgment go for the plaintiff. *Vide Bur. vol.* 3. *page* 1734.

N. B. There were ſeveral other actions depending on this queſtion, but on this judgment (which gave univerſal ſatisfaction) the ranſoms in thoſe actions were paid.

Marriage, &c.

Trinity, 1 *W. & M.* *Alleyne and Wife* v. *Grey.*

In an action of *debt* on a bond, the defendant pleaded *ne unques accomple in loyal matrimony*, the plaintiff demurred, and had judgment, for it alters the trial; inſtead of trying it, *per pais*, it puts the trial on a certificate from the Ordinary. 2dly, It admits a *marriage*, but denies the legality of it; whereas a *marriage de facto* is ſufficient, and whether legal, or not legal, is no ways material. *Vide Salk. vol.* 2. *p.* 437.

Eaſter, 5 *W. & M.* *Hinks* v. *Harris.*

The defendant *married* one ſiſter, who died, and afterwards he *married* the other, by whom he had iſſue, he was proſecuted in the *Archdeacon's court* of *Litchfield* for an *inceſtuous marriage*; pending that ſuit his *ſecond* wife alſo died. It was urged, that according to *Kenn*'s caſe, all proſecution in the *eccleſiaſtical court* ought to ceaſe; for after the death of either of the parties before a *divorce*, they cannot proceed to make the *marriage* void, and baſtardize the iſſue.

But notwithſtanding that authority, ſentence was given in this caſe, declaring the *marriage* to be void; and on motion in this court for a *prohibition*, cauſe was ſhewn why it ſhould not go, *viz.* becauſe this was an offence of *eccleſiaſtical* cognizance, and that court had the proper juriſdiction over it.

Kenn's caſe is, that no proceedings ſhall be in order to be a *divorce*, where *both parties* are dead; but here is *one living* who may defend the ſuit.

It was argued on the other ſide, that there is no occaſion for a *divorce*, when the death of *one* of the parties has determined the *marriage*; but the conſequence of this proceeding is to baſtardize the iſſue.

The *inceſt* may be ſtill determinable in that court, but then the *marriage* muſt not be declared void; let the party be puniſhed if the *marriage* was *inceſtuous*, but *as to* the ſentence of *divorce*, a *prohibition* was prayed, which was granted *niſi*. *Vide Mod. Rep. vol.* 4. *p.* 182.

Hilary, 7 *W.* 3. *Haines, or Hains* v. *Jeffell, or Jeſcott.*

A day was appointed in this cauſe to hear council, why a *prohibition* ſhould not be granted to the *ſpiritual court* of *Worceſter*, to ſtay a ſuit againſt *Hains* for *marrying* with the baſtard daughter of his ſiſter.

It was urged for the *prohibition*, that it was not prohibited by any law, for there was neither affinity nor conſanguinity, for a baſtard is *nobody's daughter*. *Co. Lit.* 123, 157. It is no conſideration to raiſe an uſe 5 *Co.* 65. 41 *Ed.* 3. 19. *Old Bendl.* 102.

The court was of opinion that no *prohibition* ſhould be granted; for though baſtards are deprived of privileges by particular laws, the ſame reaſon prohibits them from *marrying*, as others. And it has been always held accordingly, eſpecially where it is the child of a woman relation. And as it is argued, *Hains* might *marry* his own baſtard, which doubtleſs could not be allowed. The matter was adjourned. *Vide Raym. vol.* 1. *p.* 68. *Mod. Rep. vol.* 5. *p.* 168.

Michaelmas, 10 *W.* 3. *Harriſon or Harris* v. *Cage and Wife.*

See this caſe fully ſtated in page 23 of this work, under the head *Actions*.

Michaelmas, 11 *W.* 3. *Clement* v. *Beard.*

On a *libel* in the *ſpiritual court* againſt the defendant, for having *married* and cohabited with his wife's ſiſter, it was urged, that it is prohibited by the *Levitical law*. 1 *Inſt.* 235. 2 *Jac.* 1. *Rot.* 1032. *Jo.* 2. 191. *Noy.* 29. *Vaugh.* 303.

It was further argued, that by ſome of the books, an uncle might *marry* his niece, but that a man may not *marry* his aunt, by reaſon of the ſuperiority which ſhe has over him. Therefore a *conſultation* was prayed.

Holt, Chief Juſtice. What ſuperiority has an aunt over a nephew? What ground is there for the diſtinction? I cannot ſee any difference between the *two* caſes. Now for this caſe it is certainly within the degrees of *affinity*, and in the ſame degree of *conſanguinity*, there can be no doubt of it; for a man cannot *marry* his own ſiſter's daughter. I thought this caſe had been ſettled, there is a caſe in the books againſt you in point.

But indeed, if this *marriage* is not within the *Levitical* degrees, we are to hinder the *ſpiritual court* from proceeding on a wrong foundation. *Adjourned.* *Vide Mod. Rep. vol.* 5. *p.* 448.

Hilary, 1 *Ann.* *Taylor* v. *Rains.*

See this caſe fully ſtated in page 207 of this work, under the head *Baron and Feme*.

Eaſter, 2 *Ann. Jeſſon* v. *Collins, or Collins* v. *Jeſſat.*

The court was moved for a *prohibition*, to ſtay a ſuit in the *ſpiritual court* on a contract of *marriage by words in the preſent tenſe*, ſuggeſting that the contract was in fact *by words in the future tenſe*, for which if not performed the party had a remedy at *common law*.

Holt Chief Juſtice ſaid, that tho' it was by *words in the future tenſe*, yet it was a *matrimonial* matter, and the *ſpiritual court* had juriſdiction; and this was the great objection againſt actions at law, when *firſt* brought up in thoſe caſes. But in anſwer to this it was held, that the remedy in the *ſpiritual court* was waved by betaking himſelf to damages for the breach. He alſo ſaid, that a contract *by words in the preſent tenſe*, was a *marriage, viz. I marry you: You and I are man and wiſe*; and this is not releaſeable: *By words in the future tenſe; I will marry you, I promiſe to marry you, &c.* which does not intimate an *actual marriage*, but refers it to a future act; and this is releaſeable: and as it is releaſeable, the party may admit the breach and demand ſatisfaction.

He alſo ſaid, he remembered a caſe on evidence, *viz.* an action of *aſſumpſit*, in conſideration that the plaintiff promiſed to *marry* the defendant, the defendant promiſed to *marry* him; on evidence it was proved that there was a promiſe; yet the defendant producing a ſentence in the *ſpiritual court*, in diſaffirmance of that contract, it was held good counter-evidence, and the plaintiff was nonſuited. Therefore a *prohibition* in this caſe was denied. *Vide Salk. vol.* 2. *p.* 437. *Mod. Rep. vol.* 6. *p.* 155.

Trinity, 5 *Ann. Andrews* v. *Strowd.*

This caſe was, a *ſettlement* made to huſband and wife for life, and if he died without iſſue male living, or in *ventre ſa mere* at the time of his death; a remainder over to truſtees for *five hundred years*, to raiſe portions for the daughters; the huſband died, leaving iſſue male at the time of his death; which iſſue male ſoon after died without iſſue male; the wife dies; the queſtion was, if this term ſhould riſe again for the benefit of the daughters? The court was of opinion, that it ſhould not, it being a condition precedent, and not a remainder on the determination of the eſtate tail. This judgment was reverſed for this reaſon, *viz.* That the time of his death related only to the *ventre ſa mere*; and then it was no more than an uſual limitation; for the wife was not pregnant. *Vide Mod. Rep. vol.* 11. *p.* 88.

Michaelmas, 5 *Ann. Wigmore's Caſe.*

The wife ſued in the *ſpiritual court* for *alimony*. In fact, the huſband was an anabaptiſt, and had a licence from the biſhop to *marry*, but *married* this woman according to the forms of their own religion.

Holt Chief Juſtice. By the *canon law* a contract *by words in the preſent tenſe*, is a *marriage*; *as I take you to be my wife*: ſo it is of a contract *by words of the future tenſe, viz. I will take, &c.* If the contract is executed, and he does take her, it is a *marriage*, and they cannot puniſh the parties for fornication. *Vide Salk. vol.* 2. *p.* 438.

Hilary, 4 *Geo. Strutville* v. ———.

See this caſe fully ſtated in page 213 of this work, under the head *Baron and Feme.*

Eaſter, 10 *Geo. Baggott* v. *Oughton.*

See this caſe fully ſtated in page 69 of this work, under the head *Leaſes.*

Michaelmas, 1 *Geo.* 2. *Middleton and Wife* v. *Croft.*

See this caſe fully ſtated in page 8 of this work, under the head *Abatement.*

Michaelmas 1 *Geo.* 3. *Palmer Robinſon, Eſq;* v. *Anne Bland, Adminiſtratrix de bonis non of Sir John Bland, Bart. deceaſed.*

Lord Mansfield obſerved in this caſe, that it had been laid down at the bar, "That a *marriage* in a foreign country muſt be governed by the law of *that* country where the *marriage* was held," which, in general, is true. And that *marriages* in *Scotland* of perſons going *from hence for that purpoſe*, were inſtanced by way of example. But *they* may come under a very different conſideration; according to the opinion of *Huberus page* 33, and other writers. *Vide Bur. vol.* 2. *p.* 1079.

Michaelmas, 33 *Geo.* 2. *The King* v. *The Inhabitants of Preſton near Feverſham.*

Adjudged, that the *marriage* of a minor, though with a licence, if without the conſent of the father, is *abſolutely null* and *void*, by the expreſs words of the *marriage act, viz. ſtat.* 26 *Geo.* 2. *cap.* 33. *Vide Bur. S. C. vol.* 2. *p.* 486.

Maſters and Servants.

Michaelmas, 1 *W. & M. Boſon* v. *Sandford, and others.*

In an action on the *caſe* brought againſt *A.* and *B.* part owners of a ſhip, for that he put goods on board, and the defendants undertook to carry them ſafely for hire, but yet were ſo negligent, that the goods were ſpoiled: on *not guilty* pleaded, in evidence it appeared, that *C.* and *D.* were alſo part-owners, and that the ſhip was under the care of a *maſter*, to whom the goods were delivered; and this being found ſpecially it was argued for the plaintiff. That the action is grounded on the wrong, and may be againſt all, or any of the proprietors: there was alſo another doubt ſtarted, and that was, whether the owners were liable, when in truth they did not undertake, but in fact the *maſter undertook on himſelf, &c.*?

Eyre, Juſtice, held, there was no difference between a land-carrier and a water-carrier, and that the *maſter* of a ſhip was no more than a *ſervant* to the owners in the eye of the law; and that the power he has of hypothecation, *&c.* is by the *civil law*.

Holt, Chief Juſtice. The owners are liable in reſpect of the freight, and as employing the *maſter*; for whoever employs another, is anſwerable for him, and undertakes for his care, and ſo alſo for all that makes uſe of him 2dly. The court held, that all the owners were liable, for they are charged in point of contract as employers, and are all equally entitled to the freight: either *maſter* or owners may bring an action for the freight; but if the owners bring the action, they muſt all join: therefore they muſt all be joined, as the freight belongs to all, ſo all are equally undertaking; and a breach of truſt in one is a breach of truſt in all; as where *two* make *one* officer, the act of one is the act of the other. 3dly. The court held this was not an action on the *caſe*, but in *nature of a contract*, and that it was not the contract of one but all; that there was no other *tort* but a breach of truſt. Therefore the court gave judgment for the defendant, becauſe all the owners were not joined. *Vide Salk. vol.* 2. *p.* 440.

Hilary, 8 *&* 9 *W.* 3. *Chamberlain* v. *Harvey.*

In an action of *treſpaſs* for taking a *negro* worth 100 *l.* the jury found a ſpecial verdict, *viz.* that the father of the plaintiff was poſſeſſed of this *negro*, and of ſuch a manor in *Barbadoes*, and that there is a law in that country, which makes the *negro* part of the real eſtate: that the father died ſeiſed, whereby the manor deſcended to the plaintiff as ſon and heir, and that he endowed his maſter of his *negro*, and of a *third* part of the manor; that the mother married one *Watking*, who brought the *negro* into *England*, where he was baptized without the knowledge of the mother; that *Watking* and his wife are dead, and that the *negro* continued ſeveral years in *England*; that the defendant ſeiſed him, *&c.* And after ſeveral arguments at the bar, this term it was adjudged, that this action would not lie; but *treſpaſs* will lie for taking an apprentice, or *heir apparent*; an abbot might maintain *treſpaſs* for his monk, and any man can maintain *treſpaſs* for another, if he declares with a *whereby he loſt his ſervice*; but it will not lie in this caſe.

Holt, Chief Juſtice, ſaid, an action of *trover* will not lie for a *negro*, contrary to 3 *Keb.* 685. *Butts* v. *Penny. Vide Raym. vol.* 1. *p.* 146.

Sir Robert Wayland's Caſe.

Sir *Robert* uſed to give his *ſervant* money every *Saturday* to defray the charges of the foregoing week, the *ſervant* kept the money.

Holt, Chief Juſtice The *maſter* is chargeable, for the *maſter* at his peril ought to take care what *ſervant* he employs; and it is more reaſonable that he ſhould ſuffer for the cheat of his *ſervant* than ſtrangers and tradeſmen; ſo if a ſmith's man pricks my horſe, the *maſter* is liable for the damage. *Vide Salk. vol.* 3. *p.* 234.

Eaſter, 9 *W.* 3. *Boulton* v. *Arlſden.*

In this caſe it was held, that where a *ſervant* uſually buys for his *maſter* on *credit*, and takes up things in his *maſter*'s name, but for his own uſe, that the *maſter* is liable, but it is not ſo where the *maſter* uſually gives him ready money.

That where the *maſter* gives the *ſervant* money to buy goods for him, and he converts the money to his own uſe, and buys the goods on *credit*, yet the *maſter* is liable, ſo as the goods come to his uſe, or otherwiſe not.

That a note under the hand of an apprentice ſhall bind his *maſter*, where he is allowed to deliver out notes, though the money is never applied to the *maſter*'s uſe.

But where he is not allowed or accuſtomed to deliver out notes, there his note ſhall not bind the *maſter*, unleſs the money is applied to the *maſter's* uſe. *Vide Salk. vol.* 3. *p.* 234.

Eaſter, 9 *W.* 3. *Bolton* v. *Hillerſden.*

The defendant being a merchant, his apprentice delivered a note to the plaintiff, obliging his *maſter* to pay 100 *l.* to the plaintiff or his order, according to the cuſtom of merchants. On this note *aſſumpſit* was brought againſt the defendant; and on the trial this note was proved to be the writing of the apprentice, and that the apprentice had once given ſuch a note to one Mr. *Monpeſſon* for money received by the apprentice of Mr. *Monpeſſon*, which was applied to the *maſter's* uſe, and that Mr. *Monpeſſon* had recovered the money of the *maſter*.

The proof for the defendant was, that he did not truſt his apprentice to give ſuch notes; and that was proved by ſeveral, who had been his apprentices. The apprentice himſelf ſwore, that he had loſt 100 *l.* of his *maſter*'s money at play, and that the day following a foreign bill was drawn on his *maſter*, which he could not pay, and the money he had loſt at play too; therefore he reſorted to the plaintiff *Bolton*, with whom his *maſter* uſually had dealings: and becauſe the perſon who brought the foreign bill would not receive *guineas*, being the only money that he had, he perſuaded the plaintiff to receive the *guineas*, and pay the foreign bill, which the plaintiff did; and the apprentice gave this note to the plaintiff for the money received of him to pay the 100 *l.* which he had loſt at gaming.

Holt, Chief Juſtice. In *Stowell*'s caſe it was reſolved, that though *Stowell* gave ready money to his ſervant to buy proviſions, yet the *ſervant* took them on credit, and becauſe they came to the uſe of *Stowell*, he was adjudged liable, but I doubt it. So in the caſe of Sir *Robert Wyland*'s, who every *Saturday* gave his *ſervant* money to diſcharge the expences of the week; the *ſervant* did not pay the money due for ſeveral weeks together, though he received it of his *maſter*; yet the vendor recovered againſt *Wylands* for goods delivered to the *ſervant*, becauſe every man ought to take care what *ſervant* he makes uſe of; and if a *maſter* happens to have a *bad ſervant*, it is more reaſonable that he ſhould ſuffer for the negligence or villainy of his *ſervant* than a mere ſtranger.

2dly. If a *maſter* has never intruſted a *ſervant*, to charge him by ſigning of notes in the *maſter*'s name; yet if the money for which ſuch note is ſigned comes to the uſe of the *maſter*; or if in this preſent caſe the *ſervant* gave the note to raiſe money to pay the foreign bills charged to his *maſter*, though he never permitted the *ſervant* to ſign ſuch notes before. But if in this caſe the note was given for the money which the apprentice loſt at gaming, and which did not come to the *maſter*'s uſe, the *maſter* ought not to be bound by it. But the jury gave a verdict for the plaintiff; which *Holt*, Chief Juſtice, approved. *Vide Raym. vol.* 1. *p.* 224.

Michaelmas, 9 *W.* 3. *Turberville* v. *Stampe.*

In an action on the *caſe* for negligently keeping his fire, whereby the plaintiff's heath was conſumed, it was ſet forth in arreſt of judgment, that the defendant's *ſervant* had kindled this fire by way of huſbandry, and a wind and tempeſt aroſe, and drove it into his neighbour's field. It was urged that it could be no neglect in the defendant, *but the act of God.*

Holt Chief Juſtice. If my *ſervant* throws dirt in the highway I am indictable. So in this caſe if the defendant's *ſervant* kindled the fire in the way of huſbandry and proper for his employment, though he had no expreſs command of his *maſter*, yet his *maſter* ſhall be liable to an action for damage done to another perſon by the fire, for it ſhall be intended, that the *ſervant* had authority from his *maſter*, it being for his *maſter's* benefit. *Vide Raymond, vol.* 1. *p.* 264.

Michaelmas, 10 *W.* 3. *Anonymous.*

Holt Chief Juſtice. If the *ſervant* of *A.* drives his cart againſt another cart wherein is a pipe of ſack, and over-turns the cart and ſpoils the ſack, an action lies againſt *A.* So where a carter's *ſervant* drove his cart over a boy, it was held the boy ſhould have his action againſt the *maſter*. So in the caſe of *Lane* v. *Cotton*, a letter with bills in it was delivered at the poſt office to a ſervant, and it was held that an action on the caſe lay againſt the *poſt-maſter*, and not againſt the *ſervant*, unleſs he had ſtole them, for then he was a wrong doer, as were a gaoler ſuffers an *eſcape* wilfully; otherwiſe if negligently. *Vide Salk. vol.* 2. *p.* 441. *Raymond vol.* 1. *p.* 739.

Michaelmas, 10 *W.* 3. *Jones* v. *Hart.*

A pawnbroker's *ſervant* took a pledge; the pawnor came and tendered the money to the *ſervant*; he ſaid he had loſt the goods. On this the pawnor brought an action of *trover* againſt the *maſter*, and *Holt* Chief Juſtice held the action was well brought. *Vide Salk. vol.* 2. *p.* 44.

Michaelmas, 12 *W.* 3. *Roſiere* v. *Sawkins.*

On an action of *treſpaſs* brought by the *maſter* for a battery on the *ſervant*, *whereby*, *&c.* The defendant pleaded, that the plaintiff and three more were owners of a boat for conveying of paſſengers between *L.* and *G.* and they conſtituted the defendant *maſter* of it; and that finding the ſaid *ſervant* on board damage feaſant, he took him and turned him out. The plaintiff replied, that being part-owner, he commanded him to go on board and ſerve there, to which the defendant demurred; and adjudged *for the defendant*; for when the part owners had made the defendant *maſter*, they could not put any *ſervants* on him without a ſpecial agreement for it, for breach whereof an action would lie; for the very making him maſter impowers him to chooſe his ſervants, for he is anſwerable for all events, and therefore but reaſonable he ſhould have liberty of chooſing ſuch men as he can confide in, and for whoſe honeſty and diligence he may take ſecurity; and the owners have no means to avoid it, but to recall the *maſter's* authority; and it is one of the inconveniences of joint-tenancy, that one alone cannot do that: therefore judgment was given for the defendant. *Vide Mod. Rep. vol.* 12. *p.* 434.

Eaſter, 13 *W.* 3. *Anonymous.*

Holt Chief Juſtice. A lieutenant of a man of war may give moderate correction to a ſeaman, but not wound him, for that is not moderate correction. *Vide Mod. Rep. vol.* 12. *p.* 504.

Michaelmas, 13 *W.* 3. *Anonymous.*

Holt Chief Juſtice. If a *ſervant* uſually employed to pawn goods for his *maſter*, or to borrow money for him, borrows of me, or pawns his *maſter's* goods with me for money; I can maintain an action of *debt* againſt the *maſter* thereon.

2dly. If my *ſervant* has a note for money due to me, or other goods which in their nature are not properly in the cuſtody of a *ſervant*, that is evidence *at firſt ſight* that he has an authority from me to apply them to ſuch uſe as he afterwards puts them to; but the contrary may be given in evidence, as that he came by the note by undue means, or had it for another particular purpoſe, which was agreed to by the court. *Vide Mod. Rep. vol.* 12. *p.* 564.

Michaelmas, 1 *Ann.* *The Queen* v. *Gouche or Gouch.*

An order was made by *two* juſtices on the defendant, reciting, that 42 *s.* and 4 *d.* was due from him to *J. S.* for work and labour in huſbandry, which they ordered him to pay.

On this order being removed into this court by *certiorari*, the defendant's council took an exception to the order, that it does not appear to be *ſtatute* wages, and that only ſuch are within their juriſdiction.

Powell and *Gould* Juſtices, ſaid, though the *ſtat.* gives them a power only to ſet the rate for wages, and not to order payment; yet in conſequence thereof, they have alſo taken on them to order payment; and the courts of law are indulgent in remedies for wages, as appears by their ſuffering the *admiralty court* to have cogniſance of mariners wages, and therefore we will intend it to be ſuch wages as are within the *ſtatute*. Therefore the order was affirmed. *Vide Salk. vol.* 2. *p.* 44. *Raymond vol.* 2. *p.* 820.

Hilary, 2 *Ann.* *Ward* v. *Evans.*

The plaintiff ſent his *ſervant* to receive a note of 50 *l.* of *B.* who went with him to Sir *S. Evans's* ſhop, who indorſed off 50 *l.* from a note *B.* had on him, and gave *Ward's ſervant* a note of 50 *l.* on one *Wallis* a goldſmith, to whom the note was carried the next day by *Ward's ſervant*, *Wallis* refuſed to pay it, and that day broke; on this the note was ſent back to Sir *S. Evans.*

The court held, 1ſt, that this money was received by Sir *S. Evans.*

2dly, That the act of the *ſervant* ſhall not bind the *maſter*, unleſs he acts by the authority of his *maſter*; and therefore if a *maſter* ſends his *ſervant* to receive money, and the *ſervant* inſtead of money takes a bill, and the *maſter*, as ſoon as told thereof, diſagrees, he is not bound by this payment, but the acquieſcence in any ſmall matter will be a proof of the *maſter's* conſent, and that will make the act of the *ſervant* the act of the *maſter*.

3dly, That this was no payment; for a goldſmith's note is only paper, and received conditionally, *if paid*; and not otherwiſe, without an expreſs agreement to be taken as caſh.

4thly, That the party receiving ſuch note ſhould have a reaſonable time to receive the money, as in this caſe, the next day, and is not obliged as ſoon as he receives it, to go directly for his money: ſo judgment was given for the plaintiff. *Vide Salk. vol.* 2. *p.* 442. *Raymond vol.* 2. *p.* 928.

Trinity, 3 *Ann.* *The Queen* v. *London.*

An order was made for payment of wages, which recited, that *two* perſons were retained by the defendant, who was overſeer of the works in the gardens of *Hampton Court*, at ſo much *per day*, and had worked there ſo many days; therefore the order was, that the defendant ſhould pay them.

Per curiam. The ſtatute extends only to *ſervants* in *huſbandry*, not to *gentlemen's ſervants*, nor to journeymen with their *maſters*: had the order been general, *viz.* to pay ſo much to *two* of his labourers, *&c.* or *two* of his *ſervants*, the court would have ſuppoſed them *two* of his *ſervants* in *huſbandry*, but here is no room for ſuch intendment, ſince the contrary appears. *Vide Salk. vol.* 2. *p.* 442.

Eaſter, 5 *Ann.* *Smith* v. *Gould.*

On an action of *trover* for a *negro*, and ſeveral other goods, the defendant let judgment go by *default*, and the *writ of enquiry* of damages was executed before *Holt*, Chief Juſtice, at *Guildhall* in *London*, on which the jury gave *ſeveral* damages, as to the goods and the *negro*; and as to the *negro* a motion was made in arreſt of judgment, that *trover* would not lie for him, becauſe one perſon could not have ſuch a property in another as to maintain this action.

It was argued for the plaintiff, that a *negro* was a chattel by the law of the plantations, and therefore *trover* would lie for him; and that by the *Levitical* law, the *maſter* had power to kill his ſlave, *Exodus, cap.* 20. *verſ.* 21. it is ſaid he is but the *maſter's* money; that if a Lord confines his *villain*, this court cannot ſet him at liberty. *Fitzh. Villain* 5. and the caſe of *Butts* v. *Penny.* 2 *Lev.* 201. 3 *Keb.* 785. was relied on as a certain point, where it was held that *trover* would lie for *negroes*: *But not allowed.*

Per curiam. This action does not lie for a *negroe*, no more than for any other man; for the *common law* takes no notice of *negroes* being different from other men. By the *common law*, no man can have a property in another, but in ſpecial caſes, as in a villain, but even in him not to kill him: ſo in captives took in war, but the taker cannot kill them, but may ſell them to ranſom them: there is no ſuch thing as a *ſlave* by the law of *England*. And if a man's ſervant is took from him, the *maſter* cannot maintain an action for taking him, unleſs it is laid *whereby he loſt his ſervice.* If *A.* takes *B.* a *Frenchman* captive in war. *A.* cannot maintain an action, *wherefore he took* B. *his priſoner from* France. And the court denied the opinion in the caſe of *Butt* v. *Penny*, therefore judgment was given for the plaintiff for all but the *negroe*, and as to the damages for him, *that the plaintiff take nothing by his bill. Vide Raym. vol. p.* 1274.

Eaſter, 5 *Ann.* *Sir Charles Thorold* v. *Smith.*

The defendant being indebted to Sir *Charles* in 100*l.* Sir *Charles* ſent his *ſervant* to receive the money; the *ſervant* took a goldſmith's note on one *Johnſon*, and gave a receipt to *Smith*; within a week after *Johnſon* failed, the queſtion was, if this was good payment to Sir *Charles*, or if the *ſervant* had purſued his authority in taking a note in lieu of money, and had a power to give a receipt, and diſcharge the debt without receiving the money.

Holt, Chief Juſtice. A bill is no payment; but if a man will give a receipt, he by that accepts the bill as money, and payment; and therefore this caſe turns on the receipt.

Powell, Juſtice. Sir *Charles* ſhould have ſent his man back again the ſame day to have diſſented, elſe it is a preſumption that his *maſter* was acquainted with, and acquieſced in what he had done, and this might have altered the caſe. To which the court agreed, and ſaid this caſe differed from the caſe of *Ward* v. *Evans.* Adjourned.

In *Trinity* term following, the matter came on again, when *Holt*, Chief Juſtice, held, the receipt of a *ſervant* that had power, was the receipt of the *maſter*. *Vide Mod. Rep. vol.* 11. *p.* 71. 87.

Trinity, 6 *Ann.* *Savage* v. *Walthew.*

See this caſe fully ſtated in page 36 of this work, under the head *Actions.*

Michaelmas, 8 *Ann.* *Taylor* v. *Tregott*, *or* ——

See this caſe fully ſtated in page 454 of this work, under the head *Evidence.*

Michaelmas, 11 *Ann.* *Nickſon* v. *Brohan.*

See this caſe fully ſtated in page 231 of this work, under the head *Bills of Exchange, &c.*

Hilary, 8 *Geo.* *Mead* v. *Hammond.*

The plaintiff according to the common courſe of dealing delivered to the defendant's *ſervant*, an ingot of gold to aſſay; and it not being returned, he brought an action of *trover* againſt the *maſter*.

Pratt, Chief Juſtice, held, that the delivery to the *ſervant* was ſufficient to maintain the action againſt the *maſter*, on proving the ſubſequent demand and refuſal; ſo the plaintiff had a verdict. *Vide Strange, vol.* 1. *p.* 505.

Hilary, 8 *Geo.* *Hazard* v. *Treadwell.*

The defendant who was a conſiderable dealer in *iron*, and known to the plaintiff as ſuch, though they had never dealt together before, ſent a waterman to the plaintiff for *iron* on credit, and paid for it afterwards. He ſent the ſame waterman a *ſecond* time, with ready money, who received the goods, but did not pay for them. *Pratt*, Chief Juſtice, held the ſending him on truſt the *firſt* time, and paying for the goods, was giving him credit, ſo as to charge the defendant on the *ſecond* contract. *Vide Strange, vol.* 1. *p.* 506.

Michaelmas, 8 *Geo.* *Cary* v. *Webſter.*

The defendant was a clerk of the *South-Sea* company, and took in the payments on the *third* ſubſcription: the plaintiff paid him 600 *l.* and he by miſtake never entered it in the book, but however paid it over to the company.

Pratt, Chief Juſtice, held, that no action would lie againſt him. That if he had not paid it over, the plaintiff would have had his election, either to charge him, or the company; as in the common caſe of payment to a goldſmith's *ſervant*, who does not carry it to the account of his *maſter*, the party has an election to ſue either; he may charge the *ſervant*, becauſe till the money is paid over, he receives it to his own uſe; or he may paſs by the *ſervant* and make his demand on the *maſter*, becauſe payment to the *ſervant* is made in confidence of the credit given him by the *maſter*. *Vide Stra. vol.* 1. *p.* 480.

Michaelmas, 7 *Geo.* 2. *Barfoot* v. *Reynolds and others.*

On an action of *treſpaſs*, *aſſault, and battery* againſt *Reynolds* and *Weſtwood*, *Reynolds* pleaded *ſon aſſault*, and *Weſtwood* pleaded that he was *ſervant* to *Reynolds* the other defendant, and that the plaintiff having aſſaulted his *maſter* in his preſence, he in defence of his *maſter* ſtruck the plaintiff. And on demurrer the plea was held ill, for the aſſault on the *maſter* might be over, and the *ſervant* cannot ſtrike by way of revenge, but in order to prevent an injury; and the right way of pleading this matter is, that the plaintiff would have beat the *maſter*, if the *ſervant* had not interpoſed, *as it was lawful for him to do*: ſo the plaintiff had judgment. *Vide Stra. vol.* 2. *p.* 953.

Michaelmas, 7 *Geo.* 2. *Thomas* v. *Biſhop and others.*

See this caſe fully ſtated in page 44 of this work, under the head *Actions.*

Michaelmas, 11 *Geo.* 2. *Jarvis* v. *Hayes.*

See this caſe fully ſtated in page 465 of this work, under the head *Evidence.*

Merchants and Factors.

Anonymous.

A factor of the *Eaſt-India* Company carried over 1200 *l.* in gold to *India*, where a cuſtom was due for it, but ſaved by the factor, and never paid.

Per curiam. The factor ſhall have the benefit of it, and not the *Eaſt-India* Company, for it was due from them, and ought to have been paid; therefore they cannot make a title to it againſt one who has the poſſeſſion, for that is ſufficient againſt all perſons but againſt him who has the very right, and the non-payment in this caſe was at the peril of the factor. *Vide Salk. vol.* 3. *p.* 235.

Hilary, 2 *W.* & *M.* *Jefferies* v. *Legendra.*

See this caſe fully ſtated in page 19 of this work, under the head *Actions.*

Hilary, 3 *W.* & *M.* *Meggadow* v. *Holt.*

An action was brought on a *bill of exchange*, in which the plaintiff declared, that the defendant drew a bill of exchange *according to the cuſtom of merchants*, on one *W.* a *merchant* at *Rotterdam*, payable to *H.* within *two uſances and an half*; and alledged them to be at *Rotterdam two months* and an half; and then ſet forth the cuſtom, that if ſuch bill be proteſted for non-payment, the drawer is liable; that the bill was aſſigned over, and being tendered to *W.* he did not pay it: whereon the plaintiff proteſted, and brought this action againſt *Holt*.

Per curiam. The plaintiff muſt have judgment: 1ſt, becauſe *the law of merchants* is *the law of nations*, and part of the *common law*, and therefore we ought to take notice of it, when ſet forth in pleading. 1 *Inſt.* 11 *b.* 182. *a.* The *law of merchants* in this caſe is, that if he, who has ſuch bill, lapſes his time, and does not proteſt, or make his requeſt, if any accident happens by his neglect, in prejudice to the drawer, he has loſt his remedy againſt him; but if ſuch a thing had happened, it ought to have come from the other ſide; and not being ſo, we muſt judge on the declaration. It is not neceſſary to ſhew the *cuſtom of merchants*, but neceſſary to ſhew how the uſance ſhall be intended, becauſe it varies as places do. *Vide Mod. Rep. vol.* 12. *p.* 15.

Mich. 4 *W.* & *M.* *Lethulier's Caſe.*

On an action brought on a policy of inſurance ſigned by the defendant at *London*, who inſured a ſhip from thence to the *Eaſt-Indies*, *warranted to depart with convoy*; and the declaration ſhewed that the ſhip went from *London* to the *Downs*, and from thence with convoy, and was loſt. After a frivolous plea and demurrer, the caſe ſtood upon the declaration; to which it was objected, that here was a departure without convoy.

Per curiam. The clauſe, *warranted to depart with convoy*, muſt be conſtrued according to the uſage among *merchants*, *i. e.* from ſuch place where convoys are to be had, as the *Downs*, *&c.*

Holt Chief Juſtice, *contra.* We take notice of the *laws of merchants* that are general, not of thoſe that are particular uſages. It is no part of the *law of merchants* to take convoy in the *Downs*. *Vide Salk. vol.* 2. *p.* 443.

Michaelmas, 9 *W.* 3. *Evans* v. *Martell.*

In an action brought againſt the *part-owners* of a ſhip, called the *Upton Galley*, a verdict was given for the plaintiffs; and the following point was ſaved to the defendants, *viz.* one *Harvey* loaded the goods for which the plaintiff brought this action, and conſigned them to the plaintiff by a bill of lading, but the goods appeared by the invoices to be *Harvey's*; and the queſtion was, whether *Harvey* or *Evans* ought to bring the action.

The court were of opinion that the invoices ſignified nothing; but that the conſignment in a bill of lading gives property, except where it is for the account of another; ſo that if a bill of lading is made to *A.* he has thereby an ownerſhip to maintain an action; but if it is to *A.* for the account of *B.* then *A.* is only *B.'s factor*, and *B.* has the ownerſhip, and muſt bring the action; and in this caſe the action is well brought by the plaintiff. *Vide Mod. Rep. vol.* 12. *p.* 156.

Eaſter, 10 *W.* 3. *Martin* v. *Crump.*

Adjudged, that if *two joint merchants* make *B.* their *factor*; and one dies leaving an executor; this executor and the ſurvivor cannot join, for the remedy ſurvives, but not the duty; and therefore on recovery he muſt be accountable to the executor for his teſtator's ſhare. *Vide Salk. vol.* 2. *p.* 444. *Raym. vol.* 1. *p.* 340.

Michaelmas, 11 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. If a ſhip be inſured under Captain *J. S.* the part-owners may change the captain, without notice to the inſurers. *Vide Mod. Rep. vol.* 12. *p.* 325.

Eaſter, 13 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. Every *factor* of common right is to ſell for ready money; but if he be a *factor* in a ſort of dealing or trade, where the uſage is for factors to ſell on credit, there, if he ſells to a perſon of good credit at that time, and he afterwards becomes inſolvent, the *factor* is diſcharged; but otherwiſe, if it be to a man who is notoriouſly diſcredited at the time of the ſale: but if there is no ſuch uſage, and he, on the general authority to ſell, ſells on truſt, let the vendee be ever ſo able, the *factor* only is chargeable; for in that caſe the *factor* having gone beyond his authority, there is no contract created between the vendee and the *factor's* principal; and ſuch ſale is a converſion in the *factor*; but if the ſale is not in a market *overt*, the property is not thereby altered, but *trover* will lie againſt the vendee. So likewiſe if it be in a market *overt*, and the vendee knows that the *factor* ſells as *factor*. *Vide Mod. Rep. vol.* 12. *p.* 514.

Michaelmas, 13 *W.* 3. *Anonymous.*

Holt Chief Juſtice. The proper remedy againſt a *factor*, acting as ſuch, is an action of *account*; but if he converts, *trover* will lie againſt him. If *A.* finds goods, the property of *B.* and refuſes to deliver them to him, his remedy is *trover*; and if *C.* happens to get them, *A.* may maintain *trover* againſt him, but he ſhall have but one ſatisfaction; but after *A.* has recovered againſt *B. B.* may maintain *trover* againſt *C.* *Vide Mod. Rep. vol.* 12. *p.* 602.

Hilary. 1 *Ann.* *Anonymous.*

A ſhip that was inſured, being on her voyage, was ſeized by the government and converted into a fire ſhip: the queſtion was, whether the inſurers were liable?

Holt Chief Juſtice thought it was within the word *detention*, but the cauſe was referred. *Vide Salk. vol.* 2. *p.* 444.

Michaelmas, 1 *Ann.* *Green* v. *Young.*

See this caſe fully ſtated in page 571 of this work, under the head *Inſurance.*

Hilary, 2 *Ann.* *Bond* v. *Gonſales.*

On an action on the *caſe* on a policy, which was to inſure the *William Galley* in a voyage from *Bremen* to the port of *London*, *warranted to depart with convoy*: The caſe was, the galley ſet ſail from *Bremen* under the convoy of a *Dutch* man of war to the *Elbe*, where they were joined by *two* other *Dutch* men of war, and ſeveral *Dutch* and *Engliſh* merchant ſhips; from thence they ſailed to the *Texel*, where they found a ſquadron of *Engliſh* men of war, and an admiral: After a ſtay of *nine* weeks they ſailed from the *Texel*, when the galley was ſeparated in a ſtorm, and taken by a *French* privateer: But being afterwards taken from the *French* by a *Dutch* privateer, paid 80 *l. ſalvage.*

Holt Chief Juſtice, held, that the voyage ought to be according to *uſage*, and their going to the *Elbe*, though in fact out of the way, was no deviation; for till after the year 1703, there was no convoy for ſhips directly from *Bremen* to *London*. Therefore the plaintiff had a verdict. *Vide Salk. vol.* 2. *p.* 445.

Trinity, 2 *Ann.* *Buller* v. *Crips.*

See this caſe fullly ſtated in page 230 of this work, under the head, *Bills of Exchange*, *&c.*

Michaelmas, 2 *Ann.* *Bates* v. *Grabham & al.*

On an action on the *caſe* on a policy of inſurance, on *non aſſumpſit* pleaded, the caſe was as follows, *viz.* one Mr. *Criſp* being at the *Weſt Indies*, ſent a letter to one *Bates* to inſure goods on the *Mary Galley* of St. *Chriſtopher's*, Captain *A. Hill*, Commander, at *London*, *Bates* carried the letter to one *Stubbs*, an inſurance broker, and he by miſtake made the aſſurance on the *Mary*, Captain *Haſlewood*, commander, *&c.* this policy thus made, was ſubſcribed to by the defendant. The *Mary Galley* was loſt, and then *Stubbs* applied to the inſurers to conſent to alter the policy, to which they agreed, and the miſtake was rectified. It was objected at the trial, that the *Mary* was a ſtouter ſhip than the *Mary Galley*, and that the inſurers ought to have an increaſe of *premium* for the alteration.

Holt, Chief Juſtice, held, that the action well lay, and that the miſtake might be ſet right, and that *Stubbs* was a good witneſs, and cited a caſe which happened when *Pemberton* was Chief Juſtice, where an *inſurance* was made from *Archangel* to the *Downs*, and from the *Downs* to *Leghorn*; but there was a *parol* agreement at the ſame time, that the policy ſhould not commence till the ſhip came to ſuch a place; and it was held, that the *parol* agreement ſhould avoid the writing. *Vide Salk. vol.* 2. *p.* 444.

Trinity, 3 *Ann.* *The Mayor*, *&c.* *of London* v. *Wilks.*

Holt, Chief Juſtice. The word *merchant* includes all ſorts of traders, as well and as properly as *merchant adventurers*. *Vide Spelman. Guilda*, *Dy.* 279. *b.* A *merchant-taylor* is a common term. *Vide Salk. vol.* 2. *p.* 445.

Michaelmas, 3 *Ann.* *Ward* v. *Apprice.*

On an *indeb. aſſumpſit* for money received to the plaintiff's uſe, the caſe was: the plaintiff, and defendant and others, were part-owners of a ſhip, and ſeveral ſums of money were given by the reſt of the part-owners to the defendant for the uſe of the ſhip, for the receipt whereof he had given a note; that the defendant had actually laid out the ſaid ſums on the ſhip and voyage, and entered an account of the manner, &c. in a certain book kept for the affairs of the ſhip; and then an allowance thereof was entered likewiſe in that book, which book belonged to the plaintiff, defendant, and other part-owners in common, and now was in the plaintiff's poſſeſſion; and on this matter the court was moved, that the plaintiff ſhould either produce that book at the trial, or let the defendant take copies of ſuch entries, and allowances of payment therein, as would be proper for him to make his defence by; and it was argued, that this ought to be as well in this caſe as if a man brings an action of *covenant* on an indenture, and the defendant ſwears he never had a copy, the court will not compel him to plead till the plaintiff furniſhes him with a copy, to which the court agreed.

Per curiam. Here the defendant ſhould have taken up his note on account being allowed, and you have intruſted him with the cuſtody of this book; and if he has broke his truſt, you muſt ſeek for remedy in equity; and if an action is brought by a ſhop-keeper for money due on the ſale of goods, we never oblige him to produce his books; but if very ſlender evidence be againſt him, then if he will not produce his books, it brings a great ſlur on his cauſe.

Holt, Chief Juſtice, ſaid, the plaintiff would do well to conſider whether an *indeb. aſſumpſit* would lie in this caſe; and they would do nothing in it: they notwithſtanding owned it to be a miſchievous caſe, as where many are tenants in common, or co-partners in a trade, and have one common book of their tranſactions, and one has poſſeſſion of it, and then brings actions againſt the others. *Vide Mod. Rep. vol.* 6. *p.* 264.

Eaſter, 8 *Ann.* *Anonymous.*

A. and *B.* being *joint merchants*, and having goods jointly between them, *A.* delivers the whole to *C.* in truſt for his executors, and dies, and *C.* delivers them to the executors accordingly, *B.* as ſurvivor brings *trover* againſt *C.* The court held, that there is no ſurvivor in merchandize, but an action of *account* given by the ſtatute; and *C.* having performed his truſt, is diſcharged, ſo that the action ſhould be brought againſt the executor only. *Vide Mod. Rep. vol.* 11. *p.* 223.

Hilary, 1 *Geo.* ——— v. *Ormſton.*

See this caſe fully ſtated in page 232 of this work, under the head *Bills of Exchange, &c.*

Hilary, 16 *Geo.* 2. *Paterſon* v. *Taſh.*

It was held by *Lee*, Chief Juſtice, that though a *factor* has power to ſell, and thereby bind his principal, yet he cannot bind or affect the property of the goods by pledging them as a ſecurity for his own debt, though there is a regular bill of parcels and receipt; and here the jury found accordingly. *Vide Stra. vol.* 2. *p.* 1178.

Hilary, 16 *Geo.* 2. *Scrimſhire* v. *Alderton.*

See this caſe fully ſtated in page 190 of this work, under the head *Bailment.*

Hilary, 31 *Geo.* 2. *Godin and others* v. *The London Aſſurance Company.*

It is held, as a ſettled point, that a *factor*, to whom a balance is due, has a lien on all goods of his principal, ſo long as they remain in his poſſeſſion, on the authority of the caſe of *Kruzer and others* v. *Wilcox and others in Chancery*. *Vide Bur. vol.* 1. *p.* 494.

Hilary, 33 *Geo.* 2. *Foxcroft and another Aſſignees of Satterthwaite, a Bankrupt* v. *Devonſhire and others.*

See this caſe fully ſtated in page 202 of this work, under the head *Bankrupts.*

Eaſter, 5 *Geo.* 3. *Pillan and Roſe* v. *Van Merop and Hopkins.*

See this caſe fully ſtated in page 240 of this work, under the head *Bill of Exchange, &c.*

See Bills of Exchange and Inſurance.

Miſnomer *ſee* Plea.

Murder *ſee* Appeal, Certiorari, Conſtable, Conviction, and Indictment.

Nonconformiſts and Papiſts.

Hilary, 6 *W. & M.* *The King* v. *Larwood.*

An information was exhibited againſt the defendant for not taking on him the office of ſheriff of *Norwich*: he pleaded *ſtat.* 13 *Car.* 2. that he had not qualified himſelf, for that he had not taken the *ſacrament* as enjoined by that ſtatute, according to the uſage of the *church of England*, &c. The Attorney-General replied, that he was obliged by law, and ought to have received the ſacrament, &c. The defendant rejoined, that he was a *proteſtant diſſenter*, and exempted by the *toleration-act*, which he ſet forth; and on a demurrer to this rejoinder it was adjudged, that this is a private act, of which the court cannot take notice without pleading it; that by ſeveral other ſtatutes all perſons are to obſerve the *diſcipline* of the *church of England*; that the law took no notice of *diſſenters* before this act of *toleration*, which extends only to ſuch *diſſenters* who take and ſubſcribe the declaration at the quarter-ſeſſions; that *ſtat.* 13 *Car.* 2. now pleaded by the defendant, does not exempt men from ſerving in offices to which they were obliged before that act was made, but to qualify them to execute it, and that the ſubject cannot be exempted from this office, but by act of parliament, or a grant from the King. *Vide Salk. vol.* 3. *p.* 134. *Ibid. vol.* 1. *p.* 167. *Raym. vol.* 1. *p.* 29. *Mod. Rep. vol.* 4. *p.* 269. *Ibid. vol.* 12. *p.* 67.

Michaelmas, 7 *W.* 3. *The King* v. *Hill.*

See this caſe fully ſtated in page 524 of this work, under the head *Indictment.*

Hilary, 9 *W.* 3. *The King* v. *Sanchee.*

See this caſe fully ſtated in page 383 of this work, under the head *Eccleſiaſtical Matters*, &c.

Eaſter, 10 *W.* 3. *The King and Morice*, v. *The Mayor, &c. of Lincoln, or the King* v. *Morrice.*

See this caſe fully ſtated in page 626 of this work, under the head *Mandamus.*

Eaſter, 11 *W.* 3. *Hilton* v. *Byron.*

The plaintiff being a *quaker*, moved for an attachment againſt *Byron*, offering to take his *ſolemn affirmation*, according to the late act, that he went in danger of his life; but the motion was denied, unleſs he would take his oath in the common form, becauſe this was a criminal caſe, and not within the ſtatute. *Vide Salk. vol.* 3. *p.* 133. *Mod. Rep. vol.* 12. *p.* 243.

Michaelmas, 3 *Ann. The Queen* v. *Peach.*

A *diſſenting miniſter* having qualified himſelf according to the *toleration act* in *one* county, kept a *conventicle* in that county; and afterwards removed into another, and kept a *new conventicle* without a new qualification. The Juſtices convicted him, notwithſtanding the *toleration.* The Attorney General moved for an *attachment* againſt the juſtices, but it was denied; then he moved for a *mandamus* to permit him to preach, and that was denied alſo.

The court held, 1ſt. That a *mandamus* is always granted to do ſome act in execution of the law, whereas this would be in nature of a writ *de non moleſtando.*

2dly. That a *diſſenting miniſter* is ſtill liable to the old penal laws for preaching in *conventicles,* unleſs he qualifies himſelf according to the *act of toleration.*

3dly. That a licence enrolled at the ſeſſions in *one* county, will not extend to another, but he muſt have a licence enrolled in the county where he preaches.

Note. The law is ſince altered in this particular, by *ſtat.* 10. *Ann* for preſerving the proteſtant religion, by better ſecuring the church of *England. Vide Salk. vol.* 2. *p.* 572.

Michaelmas, 3 *Ann. The Queen* v. *Ride.*

A *popiſh recuſant convict* made his wife executrix, and afterwards ſhe was permitted by the *ſpiritual court* to prove the will; but a *prohibition* was granted, becauſe ſhe is diſabled by the general clauſe of *ſtat. Eliz. c.* 4. *ſect.* 22. and not enabled by the *proviſoe. Vide Salk. vol.* 3. *p.* 133.

Trinity, 7 *Geo. Robins* v. *Sayward.*

Per curiam. We cannot ground an *attachment* for non-performance of an award on the information of a *Quaker*; for though it be in a ſuit between party and party, yet it is a criminal proſecution within the *proviſoe* of *ſtat.* 7 & 8 *W.* 3. *c.* 34. *Vide Stra. vol.* 1. *page* 441.

Eaſter, 8 *Geo. Curwin or Colvin* v. *Fletcher.*

See this caſe fully ſtated in page 12 of this work, under the head *Abatement.*

Trinity, 8 *Geo. The King* v. *Green.*

The court was moved for leave to exhibit articles of the peace on behalf of one *Elizabeth Collet,* a *quaker,* but ſhe refuſing to ſwear, the court would do nothing in it. *Vide Stra. vol.* 1. *p.* 527.

Hilary, 13 *Geo. The King* v. *The Inhabitants of St. Thomas, Southwark.*

One *Read* was charged to the *poor's rate* in reſpect of his being an occupier of a *meeeting-houſe* where he preached, and on an appeal to the ſeſſions they diſcharged him, and the order being brought up by *certiorari,* it was confirmed, 1ſt. Becauſe, as a preacher he is no more chargeable as an occupier than any of his audience; and it is not ſtated, and that he lets out pews, ſo as to make him a perſon that occupies and reaps a profit from it. 2dly. If he was liable, yet it muſt be expreſsly alledged, and the charging him in reſpect of his being an occupier, is too uncertain. *Vide Stra. vol.* 2. *p.* 745.

Hilary, 3 *Geo.* 2. *Caſtell, Widow,* v. *Bambridge and Corbet.*

In the courſe of the evidence in this caſe, which ſee fully ſtated in page 81 of this work, under the head *Appeal,* the appellant's council called a *quaker,* and inſiſted that an *appeal for murder* was a civil ſuit in which be might be a witneſs.

Raymond, Chief Juſtice, ſaid, it was to this purpoſe a criminal proceeding, and therefore he could not be a witneſs. *Vide Stra. vol.* 2. *p.* 854.

Trinity, 4 *Geo.* 2. *The King* v. *Wych.*

In this caſe it was denied to read a *quaker's* affirmation, on a motion for an information for a miſdemeanor. *Vide Stra. vol.* 2. *p.* 872.

Hilary, 6 *Geo.* 2. *Oliver* v. *Lawrence.*

A rule to anſwer the matters in an *affidavit* was diſcharged on motion, becauſe on the *affirmation* of a *Quaker,* and this being a criminal proſecution. *Vide Stra. vol.* 2. *p.* 946.

Trinity, 9 *Geo.* 2. *The King* v. *Luckup.*

See this caſe fully ſtated in page 501 of this work, under the head *Gaming.*

Trinity, 11 *Geo.* 2. *Rice* v. *Oatfield.* Error.

On a *writ of error* brought on a judgment given in the K. B. in *Ireland* in a ſuit in *ejectment,* there brought on the demiſe of *Mary Rice,* on *not guilty* pleaded, there was a verdict and judgment for the plaintiff, and a bill of exceptions was ſealed, wherein it was ſtated, that the plaintiff made title under Sir *Stephen Rice,* who was ſeized in *fee* and died a *papiſt* in *February* 1715, leaving *three* popiſh ſons, *Edward, James,* and *Thomas:* that *Edward* in *January* 1716, renounced the errors of the church of *Rome,* and *conformed* as by law required, and died in 1720, leaving iſſue the leſſor of the plaintiff. That in oppoſition to this the defendant gave in evidence, that *Edward* in the year 1720 deviſed the premiſes to one under whom the defendant claimed. To ſurmount which, the plaintiff inſiſted that *Edward* died a papiſt, and conſequently was by the law in *Ireland* diſabled to deviſe; and this was offered to be proved by witneſſes, which was oppoſed by the defendant, who inſiſted that the plaintiff ſhould produce ſome record of the conviction of *Edward*; notwithſtanding which the judges admitted the evidence, and the jury found for the plaintiff.

And now it was argued on behalf of the defendant, 1ſt, That the plaintiff *could not* be allowed to contradict his former evidence; or 2dly if he could, yet *parol* proof of the *apoſtacy* was not ſufficient.

To the firſt it was anſwered, that here is no contradiction; he might *conform* in 1716, which is all the plaintiff ſhewed at firſt, and relapſe in 1720, which is the latter proof produced. But if there was any contradiction, it is no objection, for in the caſe of *Pike* v. *Badmering* on a trial at bar in this court in Lord Chief Juſtice *Pratt's* time, where the three ſubſcribing witneſſes to a will were called and denied their hands, the court admitted the plaintiff to contradict that evidence; and he ſupported the will againſt ſuch teſtimony.

As to the *ſecond* point it was anſwered, that *ſtatutes* 2 or 8 of *Ann* in *Ireland* do neither of them require a conviction; and it would be abſurd if they did, for a man cannot be convicted after his death, and any conviction before cannot prove that he died a *papiſt,* which is the circumſtance inducing the diſability: and as this is mere matter of fact, it may be proved by witneſſes, as all other facts are.

Beſides, it was ſaid to be a point determined in the *houſe of Lords* here 2d *February* 1729 *Roſs* v. *Cloſe.* The appellants claimed as purchaſers under Sir *George Maxwell*: the reſpondents inſiſted that he was a *papiſt,* and could not diſpoſe: in anſwer to which the appellants inſiſted that he was never convicted: but the court and the *houſe of Lords* were of opinion, that a conviction was not neceſſary, to avoid any voluntary diſpoſition; though to ſubject a *papiſt* to the penalties impoſed by the act for a relapſe, it might.

And on the authority of this caſe, and the reaſon of the thing, the court here were all of opinion, that the *parol* evidence was well received; and affirmed the judgment. *Vide Strange, vol.* 2, *p.* 1095.

Trinity, 16 *Geo.* 2. *The King* v. *Groſvenor.*

See this caſe fully ſtated in page 561 of this work, under the head *Information.*

Hilary, 18 *Geo.* 2. *The King* v. *Turner* & *others.*

A rule to ſhew cauſe why an appointment of overſeers for *Cirenceſter* ſhould not be quaſhed, was moved on behalf of a *quaker*, and on his *affirmation* made abſolute; this not being looked on as a criminal proſecution, though on the crown ſide, and the rule intitled in the King's name. *Vide Strange, vol* 2. *p.* 1219.

Hilary 31 *Geo.* 2. *The King* v. *Wakefield and others.*

Adjudged that *ſtat.* 1 *Geo.* 1. *ſtat.* 2. *cap.* 6. relating to tythes and church-rates, was made in *favour* to, and for the *caſe* and *benefit* of *Quakers*, and to ſave them from troubleſome and expenſive proſecutions. The law *never meant*, that a *mere ſcruple* of theirs, or an *obſtinate with-holding* of the tythes, ſhould be any hinderance to the matter's being determined by the Juſtices of Peace. This would have fruſtrated the very intention of the ſtatute, which meant to give this juriſdiction to the Juſtices in *that very caſe*, where the *real right and title* to them ſhould not be in diſpute between the parties. See this caſe fully ſtated in page 260 of this Work, under the head *Certiorari.*

Eaſter, 33 *Geo.* 3. *The King* v. *Marſh, Deputy Governor of the Turkey Company.*

See this caſe fully ſtated in page 640 of this work, under the head *Mandamus.*

Hilary, 1 *Geo.* 3. *The King* v. *John Gardener, Eſq.*

In this caſe, which was on ſhewing cauſe on a rule for an information againſt the defendant for a miſdemeanor, the court held, that a *quaker*'s affirmation could *not* be read, in ſupport of a *criminal* charge: but thought that an affirmation *might* be read in *defence* of a criminal charge, if the perſon charged *himſelf* was a *quaker*, in order to exculpate himſelf. *Vide Bur. vol.* 2. *p.* 1127.

Eaſter, 5 *Geo.* 3. *The King* v. *Wroughton, Eſq*; *and others.*

See this caſe fully ſtated in page 567 of this work, under the head *Information.*

Nonſuit.

Eaſter, 8 *W.* 3. *Kent* v. *Barker.*

See this caſe fully ſtated in page 368 of this work, under the head *Diſcontinuance*, &c.

Trinity, 9 *W* 3. *Crawley* v. *Blewett* & *Wolfe, Sheriff of Middleſex.*

In an action on the *caſe* for a falſe return of *no goods* on a *fi. fa.* when there were goods ſufficient, the plaintiff declared on a judgment in *C. B.* and in evidence produced a copy of a record of *Mich.* 8 *W.* 3. in the margin of which was wrote *Cook* (who was one of the prothonotaries of the *C. B.*) but there was no *pleas before*, &c. at the top; for which omiſſion the defendant inſiſted that this was no fair copy of a record, and that it did not appear who this *Cook* was. That the plaintiff declared of a plea held before Sir *G. Treby*, and it did not appear that the record produced by him was ſuch a one; and of that opinion was *Holt* Chief Juſtice, who tried the cauſe, which the plaintiff perceiving was a *nonſuit*, moved the court, though in ſtrictneſs he ſhould have began again, that the *nonſuit* might be ſet aſide, and that they might try the cauſe *de novo.*

Holt Chief Juſtice. Formerly, and eſpecially in *Twiſden's* time, if you had declared that ſuch a one was impleaded in this court *by bill*, if you had produced the plea roll, where it is entered, that *memorandum* ſuch a one came and *exhibited his bill*, this was not adjudged ſufficient, unleſs you had alſo produced a copy of the bill on the file, for want of which there were frequent *nonſuits*; though I could never be of that opinion; and have on debate ruled a copy of the plea roll to be a ſufficient proof of the bill. But in this caſe the defendant would not conſent; wherefore the court ſaid, they could not do it: when he had, by his voluntary act, put himſelf out of court, they could not by their own authority bring him in again. *Vide Mod. Rep. vol.* 12. *p.* 127.

Trinity, 12 *W.* 3. *Lover* v. *Salkeld.* Error.

On an action of *treſpaſs* againſt *two* defendants, a verdict was given for the plaintiff, one of the defendants being an infant, the plaintiff took judgment againſt the other, and entered a *non proſ.* after judgment againſt the other: on this judgment the plaintiff ſued out execution, on which a *writ of error* was brought.

It was objected, that the execution and judgment could not vary from the demand of the writ.

On the other ſide it was argued that the *torts* were *ſeveral*, and that the plaintiff might as well enter a *non proſ*, as to one defendant on a trial by verdict, as if one defendant had demurred, and a verdict had been given againſt the other; and that a *non proſ.* may be entered after judgment as well as before; and for a *non proſ.* entered after judgment he cited 15 E. 4. 26. 14. E. 4. 6. *Hob.* 71. 1 *Ro. Rep.* 3. 79. 2 *Ro. a. b.* 100. *fol.* 5.

Holt Chief Juſtice ſaid, he ſuppoſed theſe were interlocutory judgments wherein it might well be, but a final judgment was different: for that being once wrong a ſubſequent entry would not ſet it right. But the matter was adjourned. *Vide Salk. vol.* 2. *p.* 445.

Trinity, 12 *W.* 3. *Allington* v. *Vavaſor.*

A *latitat* was ſued out againſt *four* defendants in an action of *treſpaſs*; the plaintiff was *nonſuited* for want of a declaration, and the defendant's attorney entered *four nonſuits* againſt him; and it was held to be irregular, becauſe the treſpaſs is joint, and though the plaintiff may declare ſeverally againſt the defendants, yet it remains joint till it is ſevered by the count. *Vide Salk. vol.* 2. *p.* 455.

Michaelmas, 12 *W.* 3. *Muſgrave* v. *Eſcourt.*

Holt Chief Juſtice. A man may be *nonſuited* in term time, and the record made up in the vacation; but it muſt be on a roll of the preceding term. *Vide Mod. Rep. vol.* 12. *p.* 417.

Hilary, 13 *W.* 3. *The King* v. *Cranmer.*

On an indictment for *perjury*, the defendant entered into a recognizance to try it, and was deſirous to carry it down to try, but the proſecutor entered a *non pros.*

Per curiam. It was an ancient but an illegal practice, that if an indictment had lain ſtill for a long time to enter a *non proſ.* on it. But that ought not to be without the leave of the Attorney General, not even at the requeſt of the proſecutor; for it would be of intolerable miſchief, that it ſhould be at the diſcretion of the proſecutor to make an end of the King's ſuit, and alſo to get a bill for an infamous crime found of record againſt one, and by ſuch entry of a *non proſ.* deprive him of the means of clearing himſelf by trial. And for theſe reaſons the court ſet it aſide; for if the indictment is vitious, an acquittal on it will be no bar to a new one. *Vide Mod. Rep. vol.* 12. *p.* 647.

Hilary, 13 *W.* 3. *Gree* v. *Rolle* & *Newell.*

See this caſe fully ſtated in page 392 of this work, under the head *Ejectment.*

Trinity, 1 *Ann.* *Cooke* v. *Foſter, or Foſter's Caſe.*

Adjudged, that if a man appears at the day of the return of the proceſs and puts in bail, though he never was arreſted, nor the proceſs returned; yet if the plaintiff does not declare againſt him in two terms, a *non proſ.* may be entered againſt him. *Vide Salk. vol.* 2. *p.* 455. *Mod. Rep. vol.* 7. *p.* 32.

Michaelmas, 1 *Ann.* *Anonymous.*

Per curiam. If a *pauper* be *nonſuited*, there ſhall be coſts taxed, and he ſhall not go on without paying the coſts, or ſhewing according to the ſtatute that he was whipped. *Vide Mod. Rep. vol.* 7. *p.* 114.

Michaelmas, 1 *Ann.* *Read* v. *Tregeagle.*

Holt, Chief Juſtice. After a *writ of error* is ſued out, if a *ſci. fac.* be brought againſt the plaintiff in *error*, to ſhew cauſe why there ſhould not be execution and judgment; the end of it is to compel the plaintiff to aſſign errors; execution ought not in ſtrictneſs to be taken out, till a *non pros.* is entered. *Vide Mod. Rep. vol.* 7. *p.* 49.

Michaelmas, 1 *Ann.* *The Queen* v. *Parker.*

See this caſe fully ſtated in page 550 of this work, under the head *Indictment*.

Trinity, 3 *Ann.* *Jenkins and Wife* v. *Plombe.*

See this caſe fully ſtated in pages 208 and 306 of this work, under the heads *Baron and Feme*, and *Coſts*.

Michaelmas, 3 *Ann.* *Goddard* v. *Smith.*

See this caſe fully ſtated in page 34 of this work, under the head *Actions*.

Michaelmas, 8 *Ann.* *Anonymous.*

The plaintiff brought an action, and was *nonſuited*, and afterwards brought another action for the ſame cauſe, on which a motion was made to ſtay proceedings till he paid his coſts on the *firſt nonſuit*, and the motion was granted by the court. *Vide Raym. vol.* 2. *p.* 1308.

Eaſter, 12 *Ann.* *The Queen* v. *Ridpath.*

See this caſe fully ſtated in page 177 of this work, under the head *Bail*.

Eaſter, 1 *Geo.* *Temple* v. *Welds.*

In an action of *indeb. aſſump.* for money received by the defendant to the plaintiff's uſe, on evidence the caſe came out to be thus: the plaintiff and another laid a wager; the defendant held ſtakes; the plaintiff brought evidence that he had won the wager; but *Blencowe*, Juſtice, who tried the cauſe, being of opinion, that the plaintiff had miſtaken his action; becauſe the money could not, at the time the action was brought, be ſaid to be money received to the plaintiff's uſe, ſince the defendant was not to pay the money, till the wager was proved to be won; the plaintiff was *nonſuited*.

The plaintiff now moved to ſet aſide his own *nonſuit*; becauſe by the judge's miſtaking the law.

Per curiam. The action is well brought, for on the wager being won, the money was actually the plaintiff's, though he could not receive it before the fact was made to appear. But the matter was adjourned. *Vide Mod. Rep. vol.* 10. *p.* 315.

Hilary, 3 *Geo.* *The King* v. *Theed.*

Parker, Chief Juſtice. It is a general rule, that whenever the court are poſſeſſed of a record, they will proceed on it. And on this ground it is, that if a plaintiff in *appeal* becomes *nonſuited*, the court will nevertheleſs oblige the party to plead to it. *Vide Mod. Rep. vol.* 10. *p.* 353.

Hilary, 6 *Geo.* *Arnold* v. *Johnſon.*

The cauſe was called, and the jury ſworn, but no council, attornies, parties, or witneſſes, appeared of either ſide. Serjeant *Whitaker* was of opinion, that the plaintiff ought to be called, for the jury being charged, the cauſe muſt be carried on to ſome determination.

Pratt, Chief Juſtice, ſaid, that nobody had a right to demand the plaintiff but the defendant, and therefore the defendant not demanding him, he could not order him to be called, but the only way was, to diſcharge the jury. And a caſe was remembered where *Parker*, Chief Juſtice, did ſo on the like occaſion. *Vide Stra. vol.* 1. *p.* 267.

Hilary, 8 *Geo.* *Snow* v. *Como.*

In this caſe, there was a demurrer to *one* count, and an iſſue on the other, and the *venire* was awarded as well to try the iſſue as to aſſeſs contingent damages on the demurrer. The plaintiff was *nonſuited* on the iſſue; and *Pratt*, Chief Juſtice, would not go on to aſſeſs the damages, ſaying, he had no power ſo to do, the plaintiff being out of court. *Vide Stra. vol.* 1. *p.* 507.

Trinity, 10 *Geo.* *Serle or Searle*, v. *Barrington.*

See this caſe fully ſtated in page 244 of this work, under the head *Bonds*.

Michaelmas, 10 *Geo.* *Anonymous.*

See this caſe fully ſtated in page 419 of this work, under the head *Error*.

Hilary, 11 *Geo.* *Ancell* v. *Sloman.*

The plaintiff being admitted *in forma pauperis* by this court, brought an action againſt the defendant, in which he was *nonſuited*, and was taken in execution for the coſts of this *nonſuit*, an eſtate having fallen to him ſince; and it was now moved, that he might be diſcharged, becauſe by law, he who was *in forma pauperis* ſhall pay no coſts, but ſuffer ſuch puniſhment as the court ſhall think fit.

The court were of opinion, that if the plaintiff was a *pauper* when the cauſe was tried, he ſhould not pay coſts, and that the deſcent of lands to him ſhould have no relation to that time; ſo a rule was made to diſcharge him. *Vide Mod. Rep. vol.* 8. *p.* 344.

Trinity, 30 *Geo.* 2. *Weller* v. *Goyton and Walker.*

On a motion for the directions of the court to the maſter, that he ſhould tax the defendant *Goyton* his coſts, *purſuant to rule.*

The plaintiff brought his action againſt the above defendants, on a joint-promiſe; judgment was given againſt the defendant *Walker*, by *default*; on which iſſue was joined by the defendant *Goyton*; and the plaintiff neglecting to bring the cauſe on to trial, the *common rule* for judgment as in caſe of a *nonſuit* was obtained.

The queſtion before the court on this motion was, "Whether the maſter would tax the coſts as in caſe of a *nonſuit*, as there was a judgment by *default* for the *plaintiff* againſt the *other* defendant."

Lord *Manſfield* expreſſed a doubt, "Whether there *could be judgment as in caſe of a nonſuit*, in a caſe where the plaintiff was not *liable* to a *nonſuit*."

Stat. 14 *Geo.* 2. enacts, "that all judgments given by virtue of it, ſhall be of the like force and effect as judgment on *nonſuit*, and of no other." *Sect.* 2. provides, "that the defendant or defendants ſhall, on ſuch judgment, be awarded his, her, or their coſts, in any action or ſuit *where he, ſhe, or they would on nonſuit be entitled to the ſame*, and in no other action or ſuit whatſoever." So that the point ſeems to be, "whether the plaintiff could, in this caſe, have been *nonſuited* at the trial." For if he could not, then the caſe of a *nonſuit* does not *exiſt* in this caſe; and conſequently the court cannot give judgment and coſts, as *in caſe* of a *nonſuit*, when the caſe of a *nonſuit* does not at all *exiſt*. Here a *judgment* was obtained by the *plaintiff againſt one* of the defendants: how then can the plaintiff be out of court as to him? But if he is *nonſuited* in this action, he will be out of court, as againſt *both* defendants.

Deniſon Juſtice concurred with the Chief Juſtice in opinion.

Per curiam let the defendant take nothing by this motion. *Vide Bur. vol.* 357.

Michaelmas, 2 *Geo*. 3. *Morris* v. *Pugh and Harwood*.

See this caſe fully ſtated in page 358 of this Work, under the head *Declaration*.

Notice.

Hilary, 3 *W*. & *M*. *Pitcher* v. *Tovy*.

See this caſe fully ſtated in page 13 of this work, under the head *Acceptance*.

The King v. *Pain*.

See this caſe fully ſtated in page 611 of this work, under the head *Libel*.

Michaelmas, 5 *W*. & *M*. *Pitman* v. *Bidlecombe*.

On *debt* brought on a bond, the condition thereof was, that if the defendant ſhall pay all ſuch charges as ſhall appear to be due to *J. S.* (who was attorney for the plaintiff) in proſecuting the defendant at his ſuit, that then, &c.

The defendant pleaded, that it did not appear what was due to the attorney, &c.

The plaintiff replied, that 9*l*. was due to the ſaid attorney, of which the defendant had *notice*, but had not paid it.

It was rejoined, that it did not appear what was due, &c. and traverſed that he had *notice* thereof.

On demurrer, judgment was given for the plaintiff, becauſe the attorney was a ſtranger to the action, and the defendant ought to take *notice* at his peril what was due to the attorney; and ſo it was adjudged in the caſe of *Dewel* v. *Wilmot*.

It is true, where the matter falls under the cognizance of the plaintiff himſelf, then he ought to give the defendant *notice*; as on an *aſſumpſit* to pay for part of the goods after the rate the plaintiff ſhould ſell the reſt, there *notice* muſt be given both of the ſale and price; but that is not like this caſe. *Vide Mod. Rep. vol.* 4. *page* 230.

Trinity, 7 *W*. 3. *The King* v. *Harpur*.

See this caſe fully ſtated in page 524 of this work, under the head *Indictment*.

Hilary or Michaelmas, 7 *W*. 3. *Fletcher* v. *Ingram*.

Adjudged, That a man, who is elected conſtable, ought to have *ſpecial notice* of ſuch election, otherwiſe he ſhall not incur a penalty for not ſerving. *Vide Raym. vol.* 1. *p.* 71.

Michaelmas, 8 *W*. 3. *The Pariſh of Dalbury* v. *The Pariſh of Foiſton*.

Per curiam. *Adjudged*, That *notice* by implication will defeat the laſt *ſtatute*, 3 & 4 *W*. & *M*. which is explanatory of *ſtat*. 1 *Ja*. 2. and muſt be purſued; for the court cannot go beyond that explanation. *Vide Mod. Rep. vol.* 5. *p.* 331.

Hilary, 10 *W*. 3. *Clayton* v. *Kinaſton*.

In an action of *covenant* brought by an executor, on play-houſe articles, wherein, among other things it was covenanted between the parties, that if *Winterſhall* ſhould quit the company of actors of comedies, and give *notice* thereof in writing *three* months before; or if *Kinaſton* and the others ſhould declare him incapable of acting by note in writing under their hands; that after *three* months after ſuch *notice*, as aforeſaid, or ſuch declaration, *Winterſhall* ſhould be allowed by them, or others, to be added to the company, 5 *s*. a day for every day of acting out of the profits of acting; and after his death, 100 *l*. ſhould be paid to his executors within *three* months; and if *Winterſhall* ſhould die before ſuch *notice*, &c. then his executors ſhould have 100 *l*. within *ſix* months after his death, provided that ſuch *notice* ſhould not be given, but in an acting week, and the *three* months to be compleat by acting weeks, and the plaintiff aſſigns for breach, that *Winterſhall* died the 17th of *January* 1679, and the 100 *l*. was not paid within the *ſix* months, nor at any time after. The defendant pleads another deed, executed between the ſaid parties, whereby he became diſcharged, in defeaſance to *Winterſhall*'s deed. Among others, an exception was taken to the plea, that it was not averred that *notice* was given in an acting week, according to the covenants; ſo that notwithſtanding it appeared the defendant was ſtill of the company. And the court held the plea incurable for this defect. *Vide Raym. vol.* 1. *p.* 419.

Trinity, 11 *W*. 3. *Turner* v. *Maine*.

See this caſe fully ſtated in page 344 of this work, under the head *Debt*.

Trinity, 11 *W*. 3. *The City of London* v. *Vanacre*.

See this caſe fully ſtated in page 292 of this work, under the head *Corporations*.

Michaelmas, 11 *W*. 3. ——— v. *Harriſon*.

See this caſe fully ſtated in page 228 of this work, under the head *Bills of Exchange*, &c.

Michaelmas, 12 *W*. 3. *Maſon* v. *Keeling*.

On an action on the *caſe* brought by the plaintiff againſt the defendant, for being bit by his dog,

Holt, Chief Juſtice, held, that the declaration was ill for want of ſhewing that the defendant had *notice* that the dog was fierce. For there is a great difference between horſes and oxen, in which a man has a valuable property, and which are not ſo familiar to mankind, and dogs; the former the owner ought to confine, and take all reaſonable caution that they do no miſchief, otherwiſe an action will lie againſt him; but otherwiſe of dogs, before he has *notice* of ſome miſchievous quality. But in the former caſe, if the owner puts a horſe or an ox to graſs in his field, which is adjoining to the high-way, and the horſe or the ox breaks the hedge, and runs into the high-way, and kicks or gores ſome paſſenger, an action will not lie againſt the owner; otherwiſe if he had *notice*, that they had done ſuch a thing before. *Vide Raym. vol.* 1. *p.* 608.

Michaelmas, 12 *W*. 3. *Anonymous*.

Per curiam. When exception is taken to bail, there ought to be *notice* of it to the defendant's attorney. *Vide Mod. Rep. vol.* 12. *p.* 435.

Trinity, 13 *W*. 3. *Anonymous*.

Per curiam. When a motion is made to have ſubmiſſion to award, made a rule of the court, there ought always to be an affidavit of *notice*, becauſe the *ſtatute* gives the court power to examine the juſtice of the award. *Vide Mod. Rep. vol.* 12. *p.* 525.

Michaelmas, 2 *Ann*. *Lazier or Leſauld*, v. *Dyer*.

On iſſue joined and entered in *Trinity* term, the plaintiff reſted till *Trinity* term following, and then gave *notice* of trial after the term, and a *venire facias* and *diſtringas* were taken out in the vacation, but teſted and entered as of the term.

Per curiam. This is not ſufficient *notice*; for tho' in law, this was a proceeding within the term; yet in fact it was a proceeding in vacation: and therefore there was not a term's *notice* of trial. *Vide Salk. vol.* 2. p. 457. *Mod. Rep. vol.* 6. *p.* 57.

Eaſter, 3 *Ann.* *Williams* v. *Jackſon.*

On a queſtion, what *notice* there ſhould be to defendants of trials, and executing of writs of inquiry, the following points were agreed by the court:

1ſt. That convenient *notice* was as much neceſſary, and fit to be given of the executing of a writ of inquiry, as of a trial.

2dly. That by a late rule of the court, if a writ of inquiry or iſſue is to be tried in *London* or *Middleſex*, and the defendant lives not above *forty* miles off, *eight* day's *notice* will ſuffice; but if it is above *forty* miles, there ought to be *fifteen* days *notice* in either caſe.

3dly. That the reaſon is the ſame in all other caſes, where the parties are above *forty* miles diſtant from the place where the trial is to be, though they be country cauſes. Yet, becauſe it is an ancient rule, that *eight* days *notice* ſhould be ſufficient in all country cauſes, and that had been done in the caſe now in queſtion, it being a country cauſe, the execution of the writ of inquiry ſtood, and the court ſaid, they would conſider of altering the rule.

Per curiam. The reaſon why by common law there are *fifteen days* between the *teſte* and return to a proceſs, is, becauſe that was a ſufficient time to come from any part of the kingdom to another, for at *twenty* miles a day a man in *fifteen* days will travel all over the land. *Vide Mod. Rep. vol.* 6. *p.* 146.

Hilary, 4 *Ann.* *The Queen* v. *The Bailiffs, Burgeſſes, and Commonalty of Ipſwich.*

On a *mandamus* to reſtore Mr. Serjeant *Whitaker* to the place and office of recorder of the town of *Ipſwich*, (among other things) the *notice* was objected to; 1ſt. that there was no time appointed by the *notice* when he ſhould appear to anſwer the matters charged therein. 2dly. That he was not charged in the *notice* with not holding a ſeſſions of the peace, but of *Oyer* and *Terminer*, and goal delivery.

To theſe objections it was anſwered and reſolved, that the Serjeant appearing, and being charged, and anſwering, ſupplied the want of *notice*, both of the time and of the offence.

Holt, Chief Juſtice, alſo ſaid, that the court could not take *notice* of towns any otherwiſe than they appeared to them on the record, though they did of counties. *Vide Raym vol.* 2. *p.* 1233.

Eaſter, 4 *Ann.* Smith v. ——.

Holt, Chief Juſtice, held, that on a general promiſe to pay money when a bond is delivered up, it muſt be intended to be delivered up to the obligor, though he is a *third* perſon; and the defendant ought to take *notice* of the delivery, for he might have applied to the obligor to have had *notice*. For where every party may have *notice* by their own inquiry, *notice* is not neceſſary. In caſe of marriage of one's ſelf, *notice* need not be averred, becauſe marriage is of itſelf notorious. *Vide Mod. Rep. vol.* 11. *p.* 48.

Eaſter, 4 *Ann.* Smith v. Goff.

The plaintiff declared, that *H.* owed him 30 *l.* on bond, and the defendant promiſed, that if the plaintiff delivered up the ſaid bond, he would pay him the ſaid 30*l.* and ſays he delivered up the ſaid bond to *H. before* the action was brought, and that the defendant had *notice*, and had not paid it. On *non aſſumpſit* pleaded, a verdict was given for the plaintiff; on motion in arreſt of judgment, it was held, 1ſt. That the delivery muſt be intended to the obligor, for that is properly delivering up; and delivering up muſt be conſtrued the moſt effectual delivering; which is ſuch as that the bond may be cancelled. 2dly. That there needs no *notice*, becauſe the defendant knew who to reſort to; and the diſtinction is, where a perſon is named, and where not. *Vide Salk. vol.* 2. *p.* 457. *Raym. vol.* 2. *p.* 1126.

Hilary, 8 *Ann.* *Anonymous.*

On a motion to ſet aſide an *execution* executed after a writ of *error* was allowed: the court held, that tho' there was no *notice* given to the plaintiff's attorney of the allowance of the writ of *error*, yet it was a *ſuperſedeas* to the execution: but to bring the attorney into contempt, he muſt have had *notice*; ſo the motion was granted. *Vide Mod. Rep. vol.* 11. *p.* 272.

Trinity, 8 *Ann.* *Rice* v. *Wilmer.*

Adjudged, That if the defendant brings on a trial by *proviſoe*, he muſt firſt give the plaintiff a rule to enter iſſue, which is conſidered as *notice* of trial, or elſe if the plaintiff is nonſuited, ſuch nonſuit will be ſet aſide as irregular. *Vide Mod. Rep. vol.* 11. *page* 237.

Note. The above practice is now altered by *ſtat.* 14 *Geo.* 2.

Hilary, 6 *Geo.* *Whitehead* v. *Barber.*

Per curiam. On conference with the other courts, we are of opinion, that within the reaſon of *ſtat.* 4 & 5. *W.* & *M. c.* 21. which appoints, that the delivery of a declaration againſt a priſoner to the goaler ſhall be good, a *notice* of trial to him is good alſo; though the defendant has an attorney in one caſe, and not in the other. *Vide Stra. vol.* 1. *p.* 248.

Michaelmas, 6 *Geo.* *Byron* v. *Philips.*

Adjudged, That there muſt be the ſame *notice* of executing a *ſcire fieri* inquiry, as a common writ of inquiry. *Vide Stra. vol.* 2. *p.* 235.

Michaelmas, 6 *Geo.* *Harvey* v. *Porter.*

Per curiam. If on an old iſſue *notice* of trial is given before the firſt day in full term, it is ſufficient; and need not be given before the *Eſſoign-day*. *Vide Stra. vol.* 1. *p.* 210.

Michaelmas, 8 *Geo.* *The Inhabitants of Warminſter* v. *Leiceſter.*

One who was hired to be a ſervant for a year, but had ſerved there three quarters of a year only, was removed by two juſtices, ſuppoſing he ſhould give *notice*, it being before *ſtat.* 3 & 4 *W.* & *M.* which orders ſervice but for a year.

Per curiam. It is a good ſettlement, though he did not ſerve out the year, and he need not give *notice*; for no *notice* is required of a ſervant or an apprentice, becauſe it is to no purpoſe; for if they were to give *notice*, they could not be removed from their maſters. *Vide Forteſcue, p.* 326.

Michaelmas, 9 *Geo.* *Green* v. *Gauntlett.*

The court on motion for a new trial held, that the giving *notice* of trial at the end of half a year after iſſue joined, would prevent the neceſſity of giving a term's *notice*, till a year after the laſt *notice* which was given and countermanded. *Vide Stra. vol.* 1. *p.* 531.

Hilary, 10 *Geo.* *The King* v. *The Chancellor*, &c. *of the Univerſity of Cambridge.*

A *mandamus* was directed to the Chancellor, maſters, and ſcholars of the Univerſity of *Cambridge*, commanding them to reſtore Dr. *Bently* to his degrees.

The council on behalf of the Doctor, among other things, inſiſted, that there was a fatal fault in the return, which could not be anſwered; which was, that it did not appear that the Doctor was ſummoned, or had *notice* of the proceedings againſt him, therefore he had no opportunity of making his defence.

After hearing the arguments of the council on both ſides, *Pratt*, Chief Juſtice, delivered the reſolution of the court as follows:

The return is ill: for as it is not ſhewn that the proceedings in the Vice-Chancellor's court, or in the congregation, are according to the rules of the *civil law*, they muſt be intended to be agreeable to the rules of the *common law*; and if ſo, it not appearing that the party has any redreſs by applying to another court, this court will relieve him, if he has been proceeded againſt and degraded without being *heard*, which is contrary to natural juſtice. This caſe therefore will fall under the rules for the removing of corporations, which cannot be done without *ſummoning* the party, and giving him an opportunity of being heard. The caſes determined on that head are ſo numerous, and the rule ſo well ſettled and known, that it cannot be diſputed; for want of doing which, this ſuſpenſion or degradation cannot be ſupported: therefore a *peremptory mandamus* was granted. *Vide Raym. vol.* 2. *p.* 1334.

Eaſter, 11 *Geo.* *Steed* v. *Layner.*

The execution of a *ſcire fieri inquiry* was ſet aſide on motion, becauſe no *notice* was given of the time the writ was to be executed, for which purpoſe it is neceſſary to give *notice*; and ſo it was held before in a like caſe in *Trinity* 9 *Geo.* in this court, and an inquiſition taken on ſuch a writ ſet aſide. It is not like executions by *elegit*, or on *extents*, in which caſe *notice* is not uſually given. *Vide Raym. vol.* 2. *p.* 1382.

Eaſter, 11 *Geo.* *Stead* v. *Lateward.*

See this caſe fully ſtated in page 570 of this work, under the head *Inquiry, Inquiſition.*

Trinity, 11 *Geo.* *Moorfoot* v. *Chivers.*

See this caſe fully ſtated in page 420 of this work, under the head *Error.*

Michaelmas, 3 *Geo.* 2. *Whitlock* v. *Humphries.*

On debate it was ſettled, that to ſave coſts for not going on to trial, it would be ſufficient to countermand *notice* in a town-cauſe *two* days, and in a country-cauſe *four* days before the aſſizes; and that it ſhould be a general rule, without conſidering the charges or inconveniences in any particular caſe. *Vide Stra. vol.* 2. *p.* 849.

Michaelmas, 7 *Geo.* 2. *Bates* v. *Pettipher.*

The defendant lived at *Ayleſbury*, and not having *fourteen* days *notice* of trial, moved to ſet aſide the verdict, on an affidavit that it meaſured *forty-two* miles from *London*, and that he paid for ſo many miles.

For the plaintiff it was ſworn, that it was computed to be but thirty-three miles.

Per curiam, We muſt go by the uſual computation; our rule was ancienter than theſe poſt-miles, and conſequently reſpected the computation before the erection of poſt-miles. It was therefore held that the notice was good. *Vide Stra. vol.* 2. *p.* 954.

Michaelmas, 12 *Geo.* 2. *Peyton* v. *Burdus.*

An interlocutory judgment was ſigned in *Trinity* term 1737, and in *Auguſt* 1738, a writ of enquiry was executed on *eight* days *notice*; which was ſet aſide as irregular, and held, that where a term's *notice* of trial is required, there muſt be the ſame *notice* of executing a writ of inquiry. *Vide Stra. vol.* 2. *page* 1100.

Michaelmas, 13 *Geo.* 2. *Green* v. *Giffard.*

The cauſe was tried on a day to which it was continued by a ſecond countermand; and the defendant making no defence, the verdict was ſet aſide, it being only in the plaintiff's power to continue his *notice* once in a term.

Page, Juſtice, ſaid, it was ſo ſettled in Chief Juſtice *Holt*'s time, on examining the attornies. *Vide Stra. vol.* 2. *p.* 1119.

Michaelmas, 14 *Geo.* 2. *Iſon* v. *Fowen.*

The *notice* was to execute a writ of inquiry by *ten* o'clock; and no defence being made, the court ſet it aſide for uncertainty. *Vide Stra. vol.* 2. *p.* 1142.

Eaſter, 15 *Geo.* 2. *Bogg* v *Roſe.*

Adjudged, that when a term's *notice* of trial is required on an old iſſue, the *notice* muſt be given before the *Eſſoign-day*, and that is deemed a full term. *Vide Stra. vol.* 2. *p.* 1164.

Michaelmas, 18 *Geo.* 2. *Oſgood* v. *Lyon.*

Adjudged, that *Odiam* in *Hants*, is computed from thirty-five to thirty-eight miles diſtance from *London*; but now on ſetting up mile-ſtones, it appears to be above forty miles. And the queſtion was whether *eight* days *notice* of trial was good? The court held it to be ſo, they going by the computed miles. *Vide Stra. vol.* 2. *p.* 1216.

Michaelmas 19 *Geo.* 2. *Henbury* v. *Roſe.*

On the back of the iſſue was wrote, *Take notice of trial at the next aſſizes.* And though there was no date, county, or attorney's name mentioned, yet the *notice* being on the back of the iſſue, the court held it good; but that it would not be ſo on a ſeparate paper. *Vide Stra. vol.* 2. *p.* 1237.

Hilary, 30 *Geo.* 2. *The Maſter, &c. of the Vintners Company* v. *Paſſey.*

See this caſe fully ſtated in page 300 of this Work, under the head *Corporations.*

Michaelmas, 30 *Geo.* 2. *The King* v. *Killinghall.*

See this caſe fully ſtated in page 289 of this Work, under the head *Coroner.*

Eaſter, 31 *Geo.* 2. *The King* v. *Richardſon.*

See this caſe fully ſtated in page 301 of this work, under the head *Corporations.*

Hilary, 32 *Geo.* 2. *The King* v. *the Mayor, Bailiffs, and Common Council of the Town of Liverpool.*

On a return to a *mandamus* to reſtore one *Joſeph Clegg* into the place and office of one of the *common-council* of the ſaid town. *Adjudged*, that if a *ſelect* number of the corporation have power to remove a corporator, and do remove ſuch corporator at a meeting holden on *a day not directed by charter*, &c. all that are within the *ſummons* muſt be *ſummoned*; and ſo held in Mr. *Kynaſton*'s caſe, determined in this court, *Trin.* 8 & 9 *Geo.* 2. *Vide Bur. vol.* 2. *p.* 731.

Nuiſance.

Hilary, 1 *W. & M.* *The King and Queen* v. *Wilcox.*

The owner of the glaſs-houſe at *Lambeth*, was indicted for maintaining that houſe, being a *nuiſance*, and was convicted and fined; and now the court was moved, that by the act of general pardon the defendant was excuſed and diſcharged, both as to the fine, and the abatement of the *nuiſance*; but the court upon conſideration held, that he ſhould be diſcharged only as to the fine, and not as to the abatement; for that is not a puniſhment of the party, but a removal of that which is a grievance to other people, and any perſon may abate a *common nuiſance*. *Vide Salk. vol.* 2. *p.* 458.

Hilary, 9 *Will.* 3. *The King* v. *Webb.*

It was ruled by *Holt*, Chief Juſtice, on an indictment for a *nuiſance*, that the building of an houſe in a larger manner than it was before, whereby the ſtreet became darker, was not any *public nuiſance* by reaſon of the darkening. *Vide Raym. vol.* 1. *p.* 737.

Michaelmas, 9 *Will.* 3. *Lodie* v. *Arnold.*

In an action of *treſpaſs* for breaking his cloſe, and throwing bricks and other materials, there lying towards the building an houſe, into the ſea; the defendant ſhewed it was a *nuiſance*, being a houſe built acroſs the way, and that he pulled down the walls, *&c.* and they rolled into the ſea: the plaintiff demurred, and judgment was given for the defendant.

And, 1ſt, The court ſeemed to agree, that the treſpaſs, which is juſtified, is not the treſpaſs complained of, for that was throwing materials there lying; this, which is confeſſed, is pulling down a wall. 2dly, That when *H.* has a right to abate a *public nuiſance*, he is not bound to do it methodically, and with as little hurt as poſſible; and therefore was not anſwerable in this caſe for the rolling into the ſea. In the caſe of *James* v. *Haward*, the defendant might have opened the gate without cutting it down; yet the cutting was lawful; and the court denied *Hill*'s caſe, 3 *Cro.* 384. that matter of aggravation need to be anſwered. But, 3dly, The court held, that the declaration was repugnant and inſenſible; there could not be materials towards the building of a houſe which was already built. *Vide Salk. vol.* 2. *p.* 459.

Michaelmas, 9 *W.* 3. *Arnold* v. *Jefferſon.*

In this caſe *Holt*, Chief Juſtice, held, that a writ of aſſize or *quod permittat, &c. wherefore he erected a certain edifice*, is good, for there may be a building without a proper name; it lies of a *fabric*, which is a word more uncertain than edifice, yet it will not lie *de mole*, becauſe the thing itſelf is not to be recovered as in a *præcipe*. *Vide Salk. vol.* 3. *p.* 247.

Michaelmas, 10 *Will.* 3. *Roſewell* v. *Prior.*

See this caſe fully ſtated in page 24 of this work, under the head *Actions*.

Michaelmas, 10 *W.* 3. *Johnſon* v. *Long.*

The plaintiff brought an action on the *caſe* againſt the defendant, and declared that the defendant, 21ſt *April* 9 *W.* 3. erected a wall which ſtopped the ancient lights of the plaintiff's houſe. The defendant pleaded, that the plaintiff brought an action in *Eaſter* term laſt paſt, for the erecting of this wall the *firſt* of *October* before, and recovered; and averred, that this was the ſame erection, *&c.* The plaintiff demurred, whereon judgment was given for the defendant; for though he might have another action for the continuance, yet he cannot have another action for the ſame erection. *Vide Raym. vol.* 1. *p.* 370.

Michaelmas, 11 *W.* 3. *Anonymous.*

One was indicted for a *nuiſance* for keeping ſeveral barrels of gun-powder in a houſe in *Brentford* town, ſometimes two days, ſometimes a week, till he could conveniently ſend them to *London*.

Holt, Chief Juſtice, reſolved, 1ſt, That to ſupport this indictment there muſt be apparent danger, or miſchief already done. 2dly, That though it had been done for *fifty* or *ſixty* years, yet if it is a *nuiſance*, time will not make it lawful. 3dly, If at the time of ſetting up this houſe in which the gun-powder is kept, there had been no houſes near enough to be prejudiced by it, but ſome had been built ſince, it would be at the peril of the builder. 4thly, Though gun-powder is a neceſſary thing, and for the defence of the kingdom, yet if it is kept in ſuch a place as to be dangerous to the inhabitants, or paſſengers, it will be a *nuiſance*. *Vide Mod. Rep. vol.* 12. *p.* 342.

Hilary, 13 *W.* 3. *The King* v. *Clerk.*

On an information for public *nuiſance*, the jury found the defendant *guilty*; yet becauſe it appeared to the court to be doubtful on the evidence, and that the jury had not had a view, though very proper in this caſe, they hoped the parties would conſent to let this jury have a view, and come to trial again; and it was ſo done by conſent. And this the court did, becauſe it was a queſtion of right, and the trial would be peremptory to the defendant. *Vide Mod. Rep. vol.* 12. *p.* 626.

Eaſter, 13 *W.* 3. *The King* v. *Sir Polycarp Wharton, and others.*

See this caſe fully ſtated in page 528 of this work, under the head *Indictment*.

Eaſter, 13 *W.* 3. *The Caſe of the Farmers of Hampſtead-Water.*

See this caſe fully ſtated in page 333 of this work, under the head *Damages*.

Eaſter, 1 *Ann.* *Anonymous.*

If a leſſee for years builds an houſe on the leaſed premiſes, it is waſte; and if he lets it fall, it is a new waſte. If a man has an upper room an action lies againſt him by one who has an under room, to compel him to repair his roof; and ſo where a man has a ground room, they who live over him may have an action to compel him to keep up and maintain his foundation. See *ſtat. Weſtm.* 2. *c.* 23. 2 *Inſt.* 403. *Moor.* 374. 6 *E.* 4. 7. *Kelw.* 98. *Reg.* 153. But *quere*, whether if a man builds a new houſe, under the roof of an old houſe which is ready to tumble, if he ſhall have a writ *de reparatione facienda*; becauſe *he ought, and is uſed, or has been uſed*, are neceſſary words in the declaration. 1 *Vent.* 274.

Holt, Chief Juſtice. Every man of common right ought toſuppor this own houſe, ſo as it may not be an annoyance to another.

Powell, Juſtice, put this caſe; ſuppoſe a man makes a vault, and builds a wall thereto, and then his neighbour makes a cellar adjoining to the vault, which is damaged by a default in the wall of the vault, he thought that the owner of the cellar might well have an action.

But *Holt*, Chief Juſtice, was of a different opinion, ſaying, that before the party could entitle himſelf to an action in that caſe, he ought firſt to build a wall to his cellar, as well as the other to his vault, otherwiſe he ought not to have any benefit from the *firſt wall*, unleſs it indeed be agreed, that he ſhall contribute to the repair of it, *&c.* Suppoſe a man has a vacant piece of ground, and there builds a houſe on part thereof, and then ſells the reſt, the vendee cannot build ſo as to ſtop any lights in the firſt houſe, but muſt take the ground ſubject to the incumbrance of the former lights. *Vide Mod. Rep. vol.* 11. *p.* 17.

Eaſter, 3 *Ann.* *The Queen* v. *Leich.*

The defendant was indicted for a *public nuiſance* to *Billingſgate Dock*, the indictment ſet forth, that *Billingſgate Dock* was a common dock, to which all ſmall ſhips coming with proviſions to the markets of *London* might come, but that no great ſhip ought, or uſed to come there; that, notwithſtanding, the defendant brought a great ſhip, of *three hundred tons*, into it, to the *common nuiſance* of all the Queen's ſubjects, *&c.*

It was excepted, on a motion for quaſhing this indictment, that it was inconſiſtent to ſay that a place is a *common dock*, and that it would be a *nuiſance* for a great ſhip to come there; for a *common dock*, in its nature, is free for all ſhips.

Per curiam. Why may there not be a *common dock* only for ſmall ſhips, as well as a *common pack* and *horſe-way*. And if a man with a cart uſes ſuch a way, ſo as to plow it, and render it leſs convenient for horſemen, will not that be a *nuiſance* indictable. Beſides, we never quaſh indictments for *nuiſances*. But if a *nuiſance* is removed, and the party confeſſes it, it will be a great mitigation of the fine; and it may in that caſe be proper to offer *affidavits* to the court to leſſen the offence, but not otherwiſe. And they put the defendant to demur, which he did. *Vide Mod. Rep. vol.* 6. *p.* 145.

Eaſter, 4 *Ann.* *The Queen* v. *Wigg.*

See this caſe fully ſtated in page 534 of this work, under the head *Indictment*.

Hilary, 12 *Geo.* *The King* v. *Pappineau.* Error.

On a writ of *error* directed to the juſtices of the peace of the county of *Surry* to remove a conviction for a *nuiſance* on an indictment for building a mole *on a certain river adjacent, and contiguouſly adjoining to the common highway of the King, and alſo near ſeveral dwelling-houſes; and for ſteeping and dreſſing in the ſaid water thirty ſheep-ſkins, which emitted a ſtink and unwholſome ſmell,* &c. *whereby the air there was greatly infected, and ſtill is corrupted and infected, to the common nuiſance,* &c.

After *not guilty* pleaded, a trial was had, and the defendant found *guilty*; on which the judgment was entered, that the defendant be fined 100 *l.* for the ſaid *nuiſance, and that he be taken,* &c.

On this judgment the general *errors* were aſſigned, and the Coroner and Attorney General pleaded *no error.*

Raymond, Chief Juſtice. Regularly the judgment ought to be, to abate ſo much of the thing as makes it a *nuiſance*, 9 *Co.* 53. *Godb.* 221. *Winch.* 3. If a houſe be built too high, only ſo much of it as is too high ſhall be pulled down. Here the erecting of the *mole* was not the *nuiſance*, (for it might be lawful to do that) but the *nuiſance* ariſes from the uſe it was put to; and therefore the judgment muſt be affirmed. To which *Powys*, Juſtice, agreed.

Forteſcue, Juſtice. The queſtion is, whether in the caſe of a *public nuiſance* it is not neceſſary to give *two* judgments in all caſes. I am not ſatisfied this is not a *permanent nuiſance*; the erecting is the cauſe of the *nuiſance*, and the concluſion of the indictment to the *common nuiſance, &c.* goes to the whole, as well the erecting, as the ſteeping. I remember the caſe of a glaſs-houſe, where the judgment was to abate the *nuiſance*, not that the houſe ſhould be pulled down, but only to prevent his uſing it again as ſuch; which might have been done in this caſe to prevent his dipping ſkins again. *Co. Ent.* 92. *b.* 9 *Co.* *Batten*'s caſe, it appears the plaintiff could not go on for damages after the defendant had abated the *nuiſance*, which ſhews an abatement to be the moſt neceſſary part. 2 *Roll. Abr.* 84. And as no inſtance is given where the judgment has varied in purſuance of the diſtinction now ſet up between *permanent* and *tranſitory nuiſances*, I am of opinion that this judgment is erroneous, and ought to be reverſed.

Reynolds, Juſtice. I think the judgment is right. Every judgment ſhould be adapted to the nature of the caſe; where the erection is the *nuiſance*, there ought to be a demolition. Roaſting of coffee was formerly thought a *nuiſance*, and yet nobody ever imagined the houſe in which it was roaſted ſhould be pulled down; and what other way is there to abate ſuch a *nuiſance?* A glaſs-houſe is a *nuiſance* in its own nature; but this is a lawful act, provided the ſkins which are dipped are not ſtinking ſkins. I ſhould think it would have been going too far, if they had adjudged the whole erection to be abated for a particular abuſe of it in dipping ſome ſtinking ſkins.

The judges took further time to conſider; and in *Trinity* term following it was mentioned again, and all ſtanding to their former opinions, the cauſe was again adjourned.

It was put in the papers about a year afterwards, and nobody appearing for the defendant, the judgment was affirmed. *Vide Stra. vol.* 1. *p.* 686.

Trinity, 12 *Geo.* *The King* v. *Smith.*

The defendant was convicted on an indictment, for making a great noiſe in the night with a ſpeaking-trumpet, to the diſturbance of the neighbourhood: which the court held to be a *nuiſance*, and fined the defendant 5 *l.* *Vide Stra. vol.* 1. *p.* 704.

Trinity, 15 *Geo.* 2. *The King* v. *Taylor.*

The court granted an information againſt him as for a *nuiſance*, on *affidavits* of his keeping great quantities of gunpowder, to the endangering the church and houſes in the place where he lived. *Vide Stra. vol.* 2. *p.* 1167.

Eaſter, 30 *Geo.* 2. *The King* v. *White and Ward.*

See this caſe fully ſtated in page 549 of this work, under the head *Indictment*.

Eaſter, 30 *Geo.* 2. *Cooper* v. *Marſhall.*

See this caſe fully ſtated in page 268 of this work, under the head *Common*.

Michaelmas, 6 *Geo.* 3. *Bulbrook* v. *Sir Robert Goodere, and others.*

On a demurrer brought to an action for a *treſpaſs* committed in breaking and entering the plaintiff's cloſe, called the *River Thames*; and taking up, breaking, and deſtroying his bucks, there erected and placed for the catching of fiſh; and taking his fiſh out of the bucks, and carrying them away, and converting them to their own uſe.

After hearing the arguments of the council on both ſides, on arguing this demurrer, the court gave judgment for the plaintiff.

Lord *Mansfield*. An offence is here *created* by an act of parliament. If you take advantage of the *ſtatute*, you muſt purſue the method preſcribed by it. This is the plaintiff's own fiſhery; and he might have done what he would in it, before this prohibition by the ſtatute.

Wilmot, Juſtice, concurred, and obſerved, that this is not to be conſidered as a *nuiſance*, either public or private. The violation of this public law is not within the idea of a *nuiſance*.

Yates, Juſtice, concurred, and ſaid, this was the plaintiff's own fiſhery; and the defendants have taken up the bucks, and taken the fiſh. The laying the bucks was no *nuiſance*; and no power is given by the ſtatute "to ſeize." The defendants are not to be their own judges. They ought to have followed the method preſcribed by the ſtatute. The water bailiff has no right to take the nets of a perſon fiſhing in his own fiſhery.

Aſton, Juſtice, concurred with the Chief Juſtice, and the other Judges.

Per curiam. Let judgment go for the plaintiff. *Vide Bur. vol.* 3. *p.* 1768.

Obligation, *ſee* Bond.

Officer, Offices.

Hilary, 3 *W. & M.* *The City of Exeter* v. *Glide.*

See this caſe fully ſtated in page 623 of this work, under the head *Mandamus*.

Michaelmas. 3 *W. & M.* *The King* v. *Evans.*

On a *mandamus* to reſtore *Evans* to the *office* of clerk of the peace, a miſbehaviour was returned, *to wit*, that a demand having been made of the rolls, he did not deliver them to the *Cuſtos Rotulorum*; on which a peremptory *mandamus* was moved for, when it was urged, that *ſtat. W. & M.* veſts a freehold in the clerk, *ſo long as he behaves himſelf well*, he cannot be removed but on miſdemeanor in execution of his *office*, and articles againſt him are to be put in writing, which is not ſaid to have been done.

Holt, Chief Juſtice. The keeping of the rolls of right belongs to the *Cuſtos Rotulorum*; the clerk of the peace is a *diſtinct officer*, and not a mere ſervant, and it is his buſineſs to make up the rolls and enter them. So a peremptory *mandamus* was granted. *Vide Mod. Rep. vol.* 12. *p.* 13.

Eaſter or Michaelmas, 3 *W. & M. Jones* v. *Pugh*, *or Beau*.

On an action on the *caſe* for diſturbing the plaintiff in his *office* of vicar-general, a ſpecial verdict was found, *viz*. That the Biſhop of *Llandaff* granted the office of vicar-general to the plaintiff and *J. S. to hold jointly and ſeverally to be exerciſed by themſelves, or their ſufficient deputy*. It was objected, that a *judicial office* could not be granted to *two*; for if they differ, nothing can be done. To which it was anſwered, that may be ſaid of *four* judges, as in this court, and in *miniſterial offices*, as *two* ſheriffs.

But the court held the grant good, and ſaid, if an *office* be granted to *two*, and *one* dies, the *office* does not ſurvive, but determines; as if there were *two* ſheriffs, and *one* dies, the other cannot act; otherwiſe if granted to *two* and the ſurvivor of them. *Vide Salk. vol.* 2. *p.* 465. *Mod. Rep. vol.* 12. *p.* 10. *Ibid. vol.* 4. *p.* 16.

Hilary, 4 *W. & M. Harcourt* v. *Fox*.

See this caſe fully ſtated in page 502 of this work, under the head *Grants*.

Eaſter, 5 *W.* 3. *Serjeant Hutchins's Caſe*.

Hutchins being made *King's Serjeant* by patent, during pleaſure, with a ſalary of 40 *l. per annum*, was afterwards made one of the *Commiſſioners of the Great Seal*, which commiſſion being afterwards diſſolved, the queſtion was, whether he ſhould ſtill take place as *King's Serjeant*; and by the opinion of all the judges, his patent of King's ſerjeant is determined, becauſe his commiſſion put him into an *office* of judicature, which is inconſiſtent with the ſervice and duty of his *office* to be performed as *King's ſerjeant*; and it is the ſame as if he had been made Lord Keeper, or a judge. *Vide Salk. vol.* 3. *p.* 252.

Michaelmas, 6 *W. & M. Crump* v. *Halford*.

See this caſe fully ſtated in page 599 of this work, under the head *Juſtices of Peace*.

Trinity, 7 *W.* 3. *The King* v *Kemp*, *or Kempe*.

See this caſe fully ſtated in page 432 of this work, under the head *Eſtates*.

Hilary 7 *or* 8 *W.* 3. *Gulliford*, *or Culliford*, v. *De Cardonell*, *or Cardonmy*.

On an action of *debt* bought on an obligation; on *Oyer* thereof the condition was, that whereas the defendant was made deputy to the plaintiff in *his office*, on condition that he pay the plaintiff half the profits, then, *&c*. The defendant pleaded ſtatute 5 & 6 *Ed.* 6.

Per curiam. This bond is not within the ſtatute, becauſe the condition is not to pay him ſo much in groſs, but half the profits, which muſt be ſued for in the principal's name; for they belong to him, though out of them a ſhare is to be allowed to the deputy for his ſervice. *Vide Salk. vol.* 2. *p.* 466. *Mod. Rep. vol.* 12. *p.* 90.

Hilary, 8 *W.* 3. *Linch* v. *Coote*.

A tenant for life, with remainder to his *firſt* ſon in tail, remainder to *J. S.* in fee, was attainted of *high treaſon*, and died without iſſue. It was objected, that the whole eſtate being veſted in the King by *ſtat.* 33 *H.* 8. without finding the *office* ſpecial, the remainder-man cannot enter, for the ſtatute veſts it in the King like a *general office*; and if a *general office* had been found, it would have been ſuppoſed a *fee*.

Holt, Chief Juſtice. No other eſtate veſts in the King, by virtue of the act of parliament, than the party attainted had; juſt as if a *ſpecial office* had been found: and therefore in this caſe, as in that, the remainder-man may enter on the King, his eſtate being determined, for the ſtatute ſaves the rights of others; otherwiſe where an *office* finds an eſtate in fee in the party attainted, for then it muſt be avoided by traverſe, or *amoveas manum*. *Dyer* 335. *b. Hob. Sheffeild* v. *Ratcliffe*, *Moor* 109. 3 *Cro.* 640. *Dy.* 354. *pl.* 230. *Vide Salk. vol.* 2. *p.* 469.

Hilary 9, *or Trinity*, 10 *W.* 3. *Saunders*, *or Sanders*, v. *Owen*. Error.

On a writ of aſſize of *novel diſſeiſin* for the *office* of clerk of the peace of *Kent*, the recognizors found a ſpecial verdict, *viz*. that the Earl of *Winchelſea* being *Cuſtos Rotulorum* of that county, made *P. Owen* clerk of the peace, to hold at his pleaſure, by writing under his hand and ſeal; and becauſe the juſtices of peace at their ſeſſions ſcrupled to admit him upon this paper, the Lord *Winchelſea* came into court, and ſaid, *I nominate* P. Owen *to be clerk of the peace, according to act of parliament*.

And the court held, that it always belonged to the *Cuſtos Rotulorum* to nominate the clerk of the peace, but the clerk of the peace was removeable whenever the *Cuſtos* was removed or changed; and moreover was removeable at the will of the *Cuſtos* till *ſtat.* 32 *H.* 8. which makes him hold his office as long as the *Cuſtos* ſhall continue in power. Now by the late act, he is to continue for life; and though the words be, *give and grant to him*; yet it is only an appointment, and conſequently may be without deed: that it cannot be a grant from the *Cuſtos*, or enure as ſuch, is plain, becauſe the *Cuſtos* is only at will; and he that has an *office at will*, cannot make a grant for life, becauſe there is no original eſtate ſufficient to ſupport it; therefore this muſt enure as an appointment, or the execution of a power given by the ſtatute; like a power to an executor to ſell, or a tenant for life to make leaſes; the conſequence of all which is, that this was a good appointment, though without deed; for whatever is to take effect out of a power or authority, or by way of appointment, is good without deed; otherwiſe, where it takes an effect out of an intereſt, and is to enure as a grant; for then, if it be of a thing incorporeal, it muſt be by deed. *Vide Salk. vol.* 2. *p.* 467. *Ibid. vol.* 3. *p.* 250. *Mod. Rep. vol.* 12. *p.* 199. *Ibid. vol.* 5. *p.* 386.

Michaelmas, 11 *W.* 3. *Anonymous*.

The court was moved againſt the clerk of the county-court for granting a *replevin* without taking a bond or ſurety of the plaintiff to proſecute; but the Court made no rule, becauſe it was a ſtale cauſe of complaint of near two years ſtanding; beſides, it was only a ſingle inſtance; but the court ſaid, that when it grew into a practice, as if a ſheriff conſtantly or frequently uſed to let perſons at large without bail, then it is an abuſe of his *office*, and the court will interpoſe.

Per curiam. *Holt* abſent. Bring your action. *Vide Salk. vol.* 2. *p.* 467.

Michaelmas, 3 *Ann. Godolphin* v. *Tudor*.

Sir *William Godolphin* being auditor of *Wales* made a deputy *during his good behaviour*, who, by articles of agreement between them, was to have the fees, and in conſideration thereof to pay Sir *William* 200 *l. per annum*, and ſave him harmleſs. On an action of *debt* on the bond for the performance, judgment was given againſt the plaintiff.

1ſt, The court held this an *office* within *ſtat.* 5 & 6 *E.* 6. *c.* 16.

2dly, The court held, that where an *office* is within the ſtatute, and the ſalary is certain, if the principal makes a deputy, reſerving a leſſer ſum out of the ſalary, it is good: ſo if the profits be uncertain, ariſing from fees, if the principal makes a deputy, reſerving a ſum certain out of the fees and profits of the *office*, it is good; for in theſe caſes the deputy is not to pay, unleſs the profits amount to ſo much; and though a deputy by his commiſſion is in place of his principal, yet he has no right to the fees, they ſtill continue to be the property of the principal; ſo that as to him, it is only reſerving a part of his own, and giving away the reſt to another; but where the reſervation or agreement is not to pay out of the profits, but to pay generally a certain ſum, it muſt be paid at all events, and ſuch bond is void by the ſtatute. *Vide Salk. vol.* 2. *p.* 468. *Ibid. vol.* 3. *p.* 251. *Mod. Rep. vol.* 6. *p.* 234.

Trinity, 4 *Ann*. *Lee* v. *Drake*.

On an action on the *caſe* wherein the plaintiff declared, *that whereas being* clerk of ſuch a pariſh, the defendant diſturbed him in the exerciſe of his *office*, and hindered him to ſit in the clerk's ſeat, whereby he loſt the profits of his *office*. It was objected, that this was rather a ſervice or employment than an *office*; that if it be an *office*, it is *eccleſiaſtical*, for of common right the parſon appoints the clerk, and the court will not intend a cuſtom; and unleſs a clerk comes in by the election of the pariſhioners according to cuſtom, he has not a *temporal* right; and the court will not grant a *mandamus* for a clerk, without an affidavit that he is appointed by the pariſh. 2dly, It does not appear that any fees appertain unto this *office*, and no action lies at common law for diſturbance in the enjoyment of a ſeat in the church, without a *temporal* right; and ſo it is here. *Adjourned*. *Vide Salk. vol.* 2. *p.* 468.

Eaſter, 11 *W.* 3. *The King* v. *Dr. Burrel.*

An information was exhibited againſt Dr. *Burrel* for exerciſing the *office* of Cenſor of the College of Phyſicians, he not having taken the oaths directed by the ſtatutes.

To this information the defendant pleaded *not guilty*, on which the jury found a ſpecial verdict.

Holt, Chief Juſtice. The only queſtion is, whether Dr. *Burrel* is a *public officer* or not?

Rokeby, Juſtice. I do not think but a popiſh Doctor may be a good Doctor to a proteſtant patient, but I do not think that a popiſh governor can be a good governor for a proteſtant ſubject.

Holt, Chief Juſtice. Ay, but a popiſh cenſor is not ſo proper to ſuperviſe and inſpect all the proteſtant phyſicians. *Vide Mod. Rep. vol.* 5. *p.* 431.

Eaſter, 12 *W.* 3. *The King* v. *The Mayor, &c. of Rippon.*

See this caſe fully ſtated in page 628 of this work, under the head *Mandamus*.

Michaelmas, 13 *W.* 3. *Anonymous.*

A *prohibition* was granted to ſtay a ſuit in the *Spiritual Court* for the ſalary of a pariſh clerk. *Vide Mod. Rep. vol.* 12. *p.* 583.

Anonymous.

Per curiam. The *office of Marſhal* of the K. B. cannot be granted to a perſon for a term of years *abſolutely*, becauſe in ſuch caſe it might go to an executor or adminiſtrator. But it may be granted to a perſon for *ninety-nine years*, if he ſhall ſo long live, becauſe there can be no inconvenience in ſuch a grant, and the preſent marſhal ſucceeded *Sutton* by virtue of ſuch a leaſe. *Vide Salk. vol.* 3. *p.* 251.

Hilary, 1 *Ann*. *Chambers* v. *Jennings*.

See this caſe fully ſtated in page 317 of this work, under the head *Courts*.

Michaelmas, 2 *Ann*. *Sutton's Caſe, Marſhal of the Court*.

See this caſe fully ſtated in page 607 of this work, under the head *Leaſes*.

Michaelmas, 3 *Ann*. *Anonymous*.

The court was moved on behalf of a perſon who had a grant of the *office* of Chamberlain of the *K. B.* priſon, to admit him to the *office*, the Marſhal refuſing to let him exerciſe ſuch *office*.

Holt, Chief Juſtice, ſeemed to be of opinion, that the grant of the *office* was void, it being an incident inſeparable from the *office* of Marſhal, becauſe the Marſhal is reſponſible for the Chamberlain's good conduct, and conſequently, though on the grant of the *office* of Marſhal, this *office* was reſerved, ſuch a reſervation would be void.

However, this was ſuch an *office* as the court would not take any notice of, and therefore denied the motion. *Vide Raym. vol.* 2. *p.* 1038.

Michaelmas, 3 *Ann*. *The Queen* v. *Buck and Hale*.

See this caſe fully ſtated in page 534 of this work, under the head *Indictment*.

Eaſter, 5 *Ann*. *The Queen* v. *The Mayor and Aldermen of Norwich*.

See this caſe fully ſtated in page 630 of this work, under the head *Mandamus*.

Eaſter, 10 *Ann*. *Templeman* v. *Caſe*.

See this caſe fully ſtated in page 38 of this work, under the head *Actions*.

Michaelmas, 10 *Ann*. *The Caſe of Whitehorn, Mayor of Portſmouth*.

See this caſe fully ſtated in page 294 of this work, under the head *Corporations*.

Michaelmas, 10 *Ann*. *The Queen* v. *Sutton*.

See this caſe fully ſtated in page 294 of this work, under the head *Corporations*.

Michaelmas, 11 *Ann*. *The Queen* v. *The Mayor and Burgeſſes of Pomfret*.

See this caſe fully ſtated in pages 185 and 631 of this work, under the heads *Disfranchiſement* and *Mandamus*.

Hilary, 1 *Geo*. *Kitton* v. *Fagg*.

See this caſe fully ſtated in page 185 of this work, under the head *Bail-bond*.

Michaelmas, 2 *Geo*. *Dorſet* v. *Chaplin*.

See this caſe fully ſtated in page 415 of this work, under the head *Error*.

Trinity, 9 *Geo*. *The King* v. *Alexander*.

On motion, a rule was made for the defendant to ſhew cauſe why an information in nature of a *quo warranto* ſhould not be granted againſt him, to ſhew by what authority he claimed the *office* of Mayor of *Leſtwithiel* in the county of *Cornwal*; it appeared that he had been Mayor of this place for *ſixteen years*.

The Chief Juſtice held, that by *ſtat.* 9 *Ann, c.* 20. no perſon who has or ſhall be in an *annual office* for *one year* ſhall be choſen into the *ſame office* the next year, *&c.* therefore this being ſufficient cauſe for an information; the rule was made abſolute. *Vide Mod. Rep. vol.* 8. *p.* 132.

Michaelmas, 9 *Geo.* *The King* v. *The Mayor and Aldermen of Carliſle.*

See this caſe fully ſtated in page 285 of this work, under the head *Conviction.*

Hilary, 12 *Geo.* *The King* v. *Williams, Mayor of Helſtone.*

The defendant was elected a corporator *eight years* ago, and an entry was made in the corporation books of his taking the oath of *office*, and the oaths of allegiance and ſupremacy; the court was now moved for an information in the nature of a *quo warranto*, on the *affidavit* of the town-clerk, who ſwore that he did not adminiſter the oath of allegiance, though he made the entry in the manner it appeared to be.

But the court would do nothing in it, after ſo long an acquieſcence; and ſaid, it would be of dangerous conſequence, to allow a *town-clerk* to diſqualify members by his own oath, contrary to the record. *Vide Stra. vol.* 1. *p.* 677.

Michaelmas, 12 *Geo.* *The King* v. *the Mayor of Canterbury.*

See this caſe fully ſtated in page 635 of this work, under the head, *Mandamus.*

Eaſter, 17 *Geo.* 2. *The King* v. *Roberts.*

See this caſe fully ſtated in page 571 of this work, under the head, *Inquiry, Inquiſition.*

Hilary, 30 *Geo.* 2. *Sir John Trelawny, Bart.* v. *the Biſhop of Wincheſter.*

See this caſe fully ſtated in page 389 of this work, under the head *Eccleſiaſtical Matters, &c.*

Michaelmas, 6 *Geo.* 3. *Money and others* v. *Leach.*

Adjudged, that an *officer*, acting *under a warrant* of a ſecretary of ſtate or juſtice of peace, muſt juſtify the act done by him by ſhewing, "that he acted in obedience to ſuch warrant." *Vide Bur. vol.* 3. *p.* 1742.

Orders, on Removals, Settlements, &c.

Eaſter, 4 *W.* & *M.* *The King* v. ———

The court was moved to quaſh an *order* made by *two* juſtices of the peace at their ſeſſions, which reciting a precedent order made by *two* juſtices to remove a poor man from *H.* to *B.* in the ſame county, becauſe it appeared to them that he rented a farm of 10 *l. per annum* in *H.* they ordered that he ſhould be removed to *H.* The motion was, that the matter might be examined here; but the motion was denied.

The court agreed, that in all caſes where the ſtatute gives appeal from *two* juſtices to the ſeſſions, the *order* on ſuch appeal is final, though the ſtatute does not expreſly ſay ſo; and this court cannot examine the fact, but only quaſh the *order* if contrary to law.

Dolbin, Juſtice. If a conviction be on the ſtatute againſt *deer-ſtealing*, the fact cannot afterwards be examined here; for the parliament has made the juſtices ſole judges of ſuch petty matters.

Then the court was moved to quaſh the *order*, becauſe the ſeſſions ought only, as was urged, to quaſh or confirm the *order* of the juſtices; yet they have not reverſed the *former order*, but only *ordered* a ſettlement at *H.*

Dolbin and *Eyre*, Juſtices. The ſettlement at *H.* being the place from which he was removed, is a reverſal of the *firſt order*.

Holt, Chief Juſtice, thought the ſeſſions had not power to ſettle him at *H.* becauſe it did not appear that he had been ſettled there *forty days*; for though he had a farm there, yet it is not a ſettlement if he leaves it within *forty days*; then the ſeſſions ought to have quaſhed the *firſt order* of the juſtices, but not to have ſettled a poor perſon who had no ſettlement. But the other juſtices being of a contrary opinion, and *Gregory* Juſtice abſent, the *order* was confirmed. *Vide Mod. Rep. vol.* 12. *page* 20.

Trinity, 4 *W.* & *M.* *Anonymous.*

An *order* was made at a *mineral court*, held at *Mendipp*, in the county of *Somerſet*, that the defendant ſhould forfeit his mineral tools and goods, and be baniſhed from *Mendipp* hills for ever.

This *order* being returned, the court was moved to quaſh it; and the court held it to be an *order* againſt law, and not to be ſupported but by ſome ſpecial cuſtom. *Vide Mod. Rep. vol.* 4. *p.* 148.

Hilary, 6 *W.* 3. *The King* v. *Barebaker.*

See this caſe fully ſtated in page 218 of this work, under the head *Baſtards.*

Hilary, 7 *W.* 3. *The King* v. *The Pariſh of Wootton-Rivers.*

See this caſe fully ſtated in page 599 of this work, under the head *Juſtices of Peace.*

Eaſter, 7 *W.* 3. *The Pariſh of Dumbleton* v. *The Pariſh of Beckford.*

On a *certiorari* was returned an *order of ſeſſions* in *Glouceſterſhire*. A girl of near *thirteen* years old had been at *Dumbleton* in the ſaid county, and had always lived there with her grandmother; her father was legally ſettled at *Beckford* in the ſame county: ſhe wanting relief, was by the *order* charged on *Beckford*, becauſe her father was ſettled there.

Per curiam. The *order* muſt be quaſhed; for tho' till *eight years* of age children are accounted nurſe-children, yet they muſt afterwards have maintenance from the pariſhes where they themſelves are ſettled, and for any thing that appears, ſhe may have gained a ſettlement. *Vide Salk. vol.* 2. *p.* 470.

Michaelmas, 7 *W.* 3. *Lewſly* v. *Budd.*

Two orders were made, grounded on *ſtat.* 2. *W.* & *M. for ſcavengers rates for cleanſing the ſtreets of Newington.* One was, that all the inhabitants ſhould contribute to it; the other, that only thoſe who lived on the pavement ſhould contribute. And the queſtion was, which of them was good?

Holt, Chief Juſtice. We are of opinion that all the inhabitants ſhould contribute.

For though it may be thought hard, that thoſe inhabitants ſhould pay towards the pavement who did not live on it; yet the words of the ſtatute are ſo ſtrong, that it lays the charge on all the inabitants without diſtinction; and where the ſtatute does not make a diſtinction, we have no power to do it; wherefore the *firſt order* is good, and the other bad, and muſt be quaſhed. *Vide Mod. Rep. vol.* 5. *page* 68.

Michaelmas, 7 *W.* 3. *The King* v. *Gately.*

See this caſe fully ſtated in page 87 of this work, under the head *Apprentice.*

Michaelmas, 7 *W.* 3. *Anonymous.*

Adjudged, That if an apprentice be diſcharged from his maſter, the ſtatute requires that the diſcharge be under the hands and ſeals of *four* juſtices of peace; but in a *certiorari* to remove the *order*, it is ſufficient in the return to take notice of the *order* ſo made; for it is not neceſſary to certify the diſcharge itſelf. *Vide Salk. vol.* 2. *p.* 470.

Michaelmas, 7 *W.* 3. *The Inhabitants of the Pariſh of Talbor and Boſton.*

Adjudged, That if a man is taxed, and after taxation ſtays in the pariſh *forty days* without giving notice, it is no ſettlement within the new ſtatute, unleſs he pays the tax; for it muſt be *taxing and paying*, and not *taxing* only, that makes a ſettlement, and is equivalent to a notice in writing. *Vide Salk. vol.* 2. *p.* 524.

The King v. *Randal.*

See this caſe fully ſtated in page 566 of this work, under the head *Inn-keepers.*

Hilary, 8 *W.* 3. *The King* v. *Turner or Purnall.*

An *order* was made at the general quarter-ſeſſions of the peace for the county of *Wilts*, by which the defendant was aſſeſſed towards the relief of another perſon by virtue of *ſtat.* 43 *Eliz.* and was indicted for diſobeying that *order*; which being removed hither, the following exception was taken to it, *viz.* That the *order* was laid to be *at the general ſeſſions of the peace*, &c. and does not ſay *quarter ſeſſions*, &c. when it is expreſsly required by the *ſeventh ſection* of that ſtatute, *that the relief ſhall be as the juſtices of peace, at their general quarter ſeſſions, ſhall aſſeſs:* for which reaſon the *order* was quaſhed. *Vide Mod. Rep. vol.* 5. *page* 329. *Salk. vol.* 2. *p.* 475.

Hilary, 8 *W.* 3. *The Pariſh of Trowbridge* v. *The Pariſh of Weſton.*

See this caſe fully ſtated in page 600 of this work, under the head *Juſtices of Peace.*

Hilary, 8 *W.* 3. *The King* v. *Matthews.*

This court was moved to quaſh an *order* of *two juſtices* made on the defendant, for maintaining a baſtard-child: 1ſt. Becauſe it was not ſaid the child was likely to become chargeable: And, 2dly. The defendant was ordered to pay 18 *d. per* week *indefinitely*, without limiting any certain time. To which it was anſwered, that no *order* relating to a baſtard-child can be quaſhed, except the reputed father be preſent in court. *To which the court agreed.* However, this being a hard caſe, a rule was made to ſhew cauſe; and the matter being ſtirred again the next term, the court would not quaſh it, till the reputed father came into court; and then the firſt exception was over-ruled; for it is ſelf-evident, that every baſtard-child is likely to become chargeable. *Vide Salk. vol.* 2. *page* 475.

Hilary, 8 *W.* 3. *The Pariſh of Talbury* v. *The Hamlet of Foſton in Scropton.*

An *order* was made by *two juſtices* of the peace in *Derbyſhire*, to remove one *Robert Floud* to *Foſton* in the pariſh of *Scropton*. On appeal the *firſt order* was quaſhed, and the party ordered to be removed to *Talbury*, and the matter of fact being now ſtated ſpecially to the court; the caſe was,

Floud was born in *Talbury*, and ſerved *ſeven years* apprenticeſhip there, which ended in the year 1693; ſince 1693, he lived in *Foſton* and other places out of the pariſh of *Talbury*, and the blackſmith that lived in *Foſton* dying, and the inhabitants wanting one, in 1694 *Floud* went thither, and rented the ſhop and a chamber of the widow of the former blackſmith for a year, at 52 *s. per annum*, with the conſent of the bailiff of the lord of the manor: here he worked publicly, was publicly employed by the pariſhioners, and particularly by the bailiff of the lord of the manor, the vicar, and the juſtices of peace; and now having never given notice, nor rented a tenement of 10 *l. per annum*, or exerciſed any office, the queſtion was, whether this public way of living was not *tantamount* and equivalent to notice in writing, which was only deſigned to prevent clandeſtine entries and livings.

Per curiam. This public notice taken by the pariſh might perhaps have ſatisfied *ſtat.* 1 *Jac.* 2. but there being doubts concerning the notice preſcribed by that act, *ſtat.* 3 & 4 *W. & M. c.* 11. was made to explain it, and this latter ſtatute has particularized the notice, and what ſhall be *tantamount* to it, and what not; but this is not among the particulars of the ſtatute; for which reaſon the *order* was confirmed. *Vide Salk. vol.* 2. *p.* 475.

Hilary, 8 *W.* 3. *Hatton's Caſe.*

An *order* was made by *five juſtices* to maintain a baſtard child; and it was objected, that the complaint is not ſaid to be made by any pariſh or officers there, but only of a town which may include ſeveral pariſhes; but the court held that well enough. 2dly. That the *order* is under the hands of *five juſtices*, whereas it ſhould be only under the hands of the *two* next; but the court held that well, for the ſtatute is not reſtrictive to *two*, but there muſt be *two* at leaſt. 3dly. That it does not appear that either of thoſe was a juſtice of the *quorum*; on this laſt objection it was quaſhed, but the party was bound to appear at the next ſeſſions. *Vide Salk. vol.* 2. *p.* 477.

Hilary, 8 *W.* 3. *The Pariſh of Cuckfield* v. *Boxſtead.*

One *Anne Talby* was by an *order* removed from *Cuckfield* to *Boxſtead*; and this *order* being appealed from, was confirmed at the ſeſſions; but the ſeſſions after that made an *order of review*, and quaſhed the *former order* of ſeſſions, becauſe made by ſurprize.

Per curiam. The *order of review* muſt be quaſhed; for the juſtices have no power after the firſt ſeſſions. *Vide Salk. vol.* 2. *p.* 477.

Hilary, 8 *W.* 3. *The King* v. *The Pariſh of Broughton in Kent.*

See this caſe fully ſtated in page 601 of this work, under the head *Juſtices of Peace.*

Hilary, 8 *W.* 3. *Spencer's Caſe.*

An *order* was made by *two juſtices*, to remove S. from *H.* in *Leiceſterſhire* to *R.* in *Warwickſhire*, who appealed; and at the adjourned ſeſſions, the *two* pariſhes agreed to put off the determination of the cauſe till the next ſeſſions, which ſeſſions vacated the *order* of the *two juſtices*; and now it was moved, to ſet aſide that *order*, becauſe the appeal ought to be at the next ſeſſions, by *ſtat.* 13 *Car.* 2. and *ſtat.* 3 & 4 *W.* 3. there to be finally determined; and for this reaſon it was quaſhed. *Vide Salk. vol.* 3. *p.* 258.

Eaſter, 8 *W.* 3. *The King* v. *The Pariſh of Haſwell; or the Pariſh of Oſwell, or Haſwell, or Horewell*, v. *The Pariſh of Woking or Oking.*

See this caſe fully ſtated in page 600 of this work, under the head *Juſtices of Peace.*

Trinity, 8 *W.* 3. *The Pariſh of St. Nicholas* v. *The Pariſh of St. Helen.*

Two orders were made for ſettling one *R.* a poor man, the *firſt* by *two juſtices*, the other by the ſeſſions on appeal, confirming the former. The caſe was, *R.* being *ſix years* ago legally ſettled at *St. Nicholas*'s, clandeſtinely came into the pariſh of *St. Helen*, and lived there without giving notice to the officers of the pariſh of *St. Helen* during all that time; they ſent him back to the pariſh of *St. Nicholas*, &c. And the queſtion was, whether living in *St. Helen*'s ſo long as *ſix years* ſhould not induce the court to preſume the notice and other things requiſite well done, to gain a ſettlement?

Per curiam. No perſon that is not a removeable perſon, is to give notice; as he that rents a tenement of 10 *l. per annum*, a ſervant, &c. need not give notice, becauſe they cannot be diſturbed: in this caſe, if it had appeared on the *order*, that the pariſh of *St. Helen* had taken notice of him, and looked on him as one of the pariſh, as by relieving of him, making him an officer, *&c.* there, after ſo long a time, we would have preſumed notice given, becauſe the notice need not be exactly proved; for the churchwarden to whom it was given, and the witneſſes atteſting the matter, may be dead; but here it is returned on the *order*, that he clandeſtinely removed himſelf, ſo that he might eaſily continue in the ſame manner; wherefore in ſuch caſes we muſt conſtrue the ſtatute ſtrictly; and therefore the *order* was confirmed. *Vide Salk. vol.* 2. *p.* 472.

Michaelmas, 8 *W.* 3. *The Pariſh of Chidingfold or Chittinſton*, v. *The Pariſh of Penſhurſt or Penhurſt.*

See this caſe fully ſtated in page 600 of this work, under the head *Juſtices of Peace.*

Michaelmas, 8 *W.* 3. *Anonymous.*

An *order* was made by *two juſtices* to remove a poor perſon, and exception was taken, that it did not appear by the *order* that the juſtices were of the diviſion, or that either of them was of the *quorum*: the laſt was held a good exception, but the firſt was over-ruled, for in that the ſtatute is only directory. *Vide Salk. vol.* 2. *p.* 473.

The King v. *Dobbyn.*

An *order* of *two juſtices* was quaſhed, becauſe it did not appear they were *juſtices* of the county, or for the county, but only reſiding in the county. *Vide Salk. vol.* 2. *p.* 474.

Michaelmas, 8 *W.* 3. *The King* v. *Turnock.*

On an indictment found againſt the defendant for refuſing to relieve and maintain *Elizabeth* the wife of his ſon *John Turnock*, according to an *order* made at the ſeſſions, which *order* was ſet forth in the indictment, *in theſe words*, viz. *at the general ſeſſions of the peace held at Marlborough in and for the ſaid county of Wilts*, &c. on motion the indictment was quaſhed, becauſe the *order* was only ſaid to be made at the *general ſeſſions*, and not at the *general quarter-ſeſſions*; for the *quarter ſeſſions* are appointed by *ſtat.* 2 *H.* 7. *c.* 4. though it appears by the ſame ſtatute that there may be a *general ſeſſions* at other times; and *ſtat* 43 *E. c.* 2. *ſ.* 7. appoints *orders* in theſe caſes to be made at the *general quarter ſeſſions*. *Vide Salk. vol.* 2. *p.* 474.

Michaelmas, 8 *W.* 3. *The Pariſh of Much-Waltham* v. *The Pariſh of Peram in Eſſex.*

The court was moved to quaſh an *order of ſeſſions* for the ſettlement of a baſtard child of *E. L.* She being big with child, a little before her delivery was removed by the *order* of *two juſtices* of peace, from *Much-Waltham* to *Peram*; before the next ſeſſions ſhe was delivered at *Peram* of a baſtard child: at the ſeſſions *Peram* appealed, and the juſtices adjudged the woman to be legally ſettled at *Much-Waltham*, and *ordered* her to be ſent back thither; after which an *order* was made for ſettling the child at *Peram*, which the court was moved to quaſh, becauſe, though regularly baſtards muſt be maintained where born, yet in this caſe, where there ſeems to be a contrivance, it ſhall not be ſo, as in *Tuming*'s caſe, 2 *Bul.* 349. Whenever an *order* is reverſed, all things happening ſubſequent thereunto, ſhall be avoided thereby: this child being born pending the *order*, ſhall be eſteemed in law to be born in that pariſh whereunto the mother on the appeal is returned back. The court ſeemed to agree to this; and a rule was made to ſhew cauſe, but none was ſhewn. *Vide Salk. vol.* 2. *p.* 474

Michaelmas, 8 *W.* 3. *The Caſe of the Pariſh of Amner.*

At the complaint of the churchwardens of *Terrent-Keinſton* in *Dorſetſhire*, to *two* juſtices of the peace of the ſaid county, concerning a poor man and his wife; they the ſaid juſtices adjudged him to be laſt legally ſettled at *Tirrin-Crawford*, on which they appealed; and there it was *ordered*, that it appearing to the ſeſſions that he was laſt ſettled at *Amner*, therefore they diſcharged *Tirrin-Crawford*, and *ordered* the poor man to be removed to *Amner*: this was quaſhed on motion, becauſe it was making an *original order*, which the juſtices at ſeſſions have no power to do; they might have reverſed the *firſt order*, and ordered the party to be carried back to *Terrent-Keinſton*, but they could not remove the party to *Amner*, a third pariſh, which was noways concerned in the *order* or appeal; and if they are really chargeable with it, it muſt be at the complaint of *Terrent-Keinſton* to *two juſtices* of the peace. *Vide Salk. vol.* 2. *p.* 475

8 *W.* 3. *The King* v. *Harding.*

A *certiorari* was directed to the Lord Mayor and juſtices of peace of *London*, to remove an *order*; before filing whereof a *procedendo* was prayed: the fact was, the ſervant of one *Harding* complained to the ſeſſions, that her maſter was in arrear to her for wages: on hearing the matter, both parties agreed to refer it to Sir *Thomas Lane*, late Lord Mayor, to be determined; which was done accordingly by *order of ſeſſions*: he made an award or *order*, but before a report was made thereof, this *certiorari* was brought, whereon a *procedendo* was now prayed.

Per curiam. A judge of *niſi prius*, by conſent of parties, may make a rule after a cauſe, but the ſeſſions cannot do ſo, though by conſent: they may refer a thing to another to examine, and make a report to them for their determination, but cannot refer a thing to be determined by another: and therefore the *certiorari* was filed, and no *procedendo* granted. *Vide Salk. vol.* 2. *p.* 478.

The Pariſh of St. Mary le More v. *The Pariſh of Heavy-Tree in Devonſhire.*

One *Facy* was ſettled at *Heavy-Tree*, and afterwards went into the pariſh of St. *Mary le More* in *Exeter*, and took a houſe there of 1 *l. per annum*, wherein he lived a year and a half, and paid the rates and taxes due for the ſaid houſe; and the juſtices at their ſeſſions held, that the rate for a houſe, without a rate on his perſon, was not ſufficient to make a ſettlement; but the court of *K. B.* quaſhed this *order* for this very cauſe, and held him ſettled in St. *Mary le More.* *Vide Salk. vol.* 2. *page* 478.

The King v. *Beard.*

An *order* was made by *two juſtices* of the peace in *Suſſex*, adjudging *Beard* to be the father of a baſtard child, which was quaſhed, becauſe it appeared thereby, that the examination of the woman was by *one juſtice* only, though the *order* was ſaid to be made by both; and *Beard* was bound over to the next ſeſſions. *Vide Salk. vol.* 2. *p.* 478.

Hilary 9 *W.* 3. *The Pariſh of Downhead* v. *The Pariſh of Broadchalk in Wilts.*

Two juſtices of the peace made an *order* to remove one *John Rainsford*, his wife and three children, from *Rowborough* in *Somerſetſhire*, to *Broadchalk* in *Wilts*, which *order*, on an appeal to the *quarter-ſeſſions*, was confirmed; after this *Rainsford*, with his wife and *three* children, came into the pariſh of *Downhead*; whereupon *two juſtices*, reciting the former *order* and confirmation thereof, *ordered* him to *Broadchalk*; and and now it was objected to this *order*, that it did not appear that *one* of the *juſtices* was of the *quorum*. On the other ſide it was argued, it was not neceſſary here, becauſe it was not an *original order*, but an *order* made in purſuance of an *order of ſeſſions*.

Per curiam. A ſettlement by *order* upon appeal, binds all parties: if the poor man goes to the pariſh from whence he is removed, the ſeſſions muſt ſee their *order* obeyed; but if he goes to another pariſh not concerned in the appeal, then it is proper for *two juſtices* of the peace to remove him to the pariſh where he was ſettled by the ſeſſions by the *original order*; but then it muſt appear therein that one of them was of the *quorum*. And for this defect the *order* was quaſhed. *Vide Salk. vol.* 2. *p.* 481.

Hilary, 9 *W*. 3. *The Pariſh of King's Norton in Wigorn*, v. *The Pariſh of Swolhill in Warwick*.

An *order* was made to remove a poor woman from *Yarly* in *Worceſterſhire*, to *Swolhill* in *Warwickſhire*; afterwards *two juſtices* in *Warwickſhire* made an *order* to remove her to *King's Norton* in *Worceſterſhire*; whereupon *two juſtices* of *Worceſterſhire* ſent her back to *Swolhill*; and upon an appeal to the ſeſſions in *Warwickſhire*, the juſtices confirmed her ſettlement at *King's Norton*, and then an *order* was made by *two juſtices* of the peace to execute the ſaid *order*: theſe *orders* being brought up by *certiorari*, the court was moved to quaſh all except the *firſt*, all the others being made before no judge; for when an *original order* is made, it binds all perſons until it be ſet aſide, and it cannot be ſet aſide but on appeal to the ſeſſions. On the other ſide it was inſiſted, that though in this caſe *two juſtices* could not ſend the woman back again to *Yarley*, yet they might ſend her back to a *third* place, as *King's Norton* is in this caſe; ſo that as to *King's Norton* it is but an *original order*.

But the court ſeemed to be of another opinion, for then *King's Norton* might ſend to *Yarley*, and there would be a perpetual circuity; but ſeeing in this caſe *King's Norton* had appeared at the ſeſſions, and had been concluded there, they would not quaſh the *order*, and ſeveral other queſtions ariſing, the whole was referred to a judge of aſſize. *Vide Salk. vol.* 2. *p.* 482.

Hilary 9 *W*. 3. *The Pariſh of Dimchurch* v. *The Pariſh of Eaſtchurch*.

An original *order* was made at the *quarter-ſeſſions*, ſetting forth, that whereas the pariſh of *Dimchurch* was over-burdened with poor, and the pariſh of *Eaſtchurch* had no poor, the pariſh of *Dimchurch* ſhould be annexed to the pariſh of *Eaſtchurch*, and that the occupiers of lands there ſhould contribute 20 *l. per annum*, by equal monthly payments to *Dimchurch*, as long as that was over-burdened with poor, and *Eaſtchurch* had none.

It was objected, 1ſt. That the juſtices of peace cannot alter pariſhes, and annex one to another.

2dly, That the ſeſſions cannot make an *original order*.

Holt, Chief Juſtice. There are *two* ways by *ſtat.* 43 *Eliz.* to make *one* pariſh contributory to the poor of *another* pariſh, *viz.* either the juſtices may tax particular perſons in aid to that pariſh which cannot relieve its own poor; or they may aſſeſs the whole pariſh in a certain ſum, and leave it to the churchwardens and overſeers to levy the ſame, or to particular perſons, which was well done in this particular caſe; but ſo much of it as concerns the annexing of the pariſhes is void, and the reſt good. The court however took time to adviſe. *Vide Salk. vol.* 2. *p.* 481.

Eaſter, 9 *W*. 3. *Tudy* v. *Padſtow*.

An *order* made by *two juſtices* for ſettling a poor man at ſuch a place, was quaſhed at the ſeſſions; but becauſe it did not appear that it came before them by way of *appeal*, the *order of ſeſſions* was quaſhed, for they have no original juriſdiction, but the matter muſt be brought before them by *appeal*. *Vide Salk. vol.* 3. *p.* 257.

Eaſter, 9 *W*. 3. *The Pariſh of St. Giles Cripplegate*, v. *The Pariſh of Hackney*.

An *order* reciting, whereas complaint has been made to us, that *Elizabeth Fulford*, wife of *Uriel Fulford*, is lately come into the pariſh of *St. Giles Cripplegate*, and is likely to become chargeable to the ſame; and whereas, an oath made by the ſaid *Elizabeth Fulford*, it appears that her huſband was laſt legally ſettled at *Hackney*; theſe are therefore, &c. was quaſhed, becauſe there was no judgment of the juſtices concerning the legal ſettlement, but only the oath of the woman. *Vide Salk. vol.* 2. *p.* 478.

Eaſter, 9 *W*. 3. *Anonymous*.

An *order* made by *two juſtices* of the peace for ſettling a poor perſon, was quaſhed by the ſeſſions; but becauſe it did not appear to this court, that it came before them by way of appeal, without which they have no juriſdiction, this *order of ſeſſions* was quaſhed. *Vide Salk. vol.* 2. *p.* 479.

Eaſter, 9 *W*. 3. *The Pariſh of Berry* v. *The Pariſh of Arundel*.

An *order* reciting, whereas complaint has been made to us, that *Jacob Duckin*, with his wife and children, came from his place of abode and laſt legal ſettlement in *Berry* to *Arundel*; we therefore require you, &c. was held naught; becauſe there was no adjudication of the juſtices, which was his laſt legal ſettlement, but only a complaint, that *Berry* was, the truth or falſehood of which does not appear. *Vide Salk. vol.* 2. *p.* 479.

Eaſter or Trinity, 9 *W*. 3. *Elizabeth Aſhley's Caſe*.

Two orders were removed by *certiorari*, the *return* whereof was quaſhed, becauſe the return in the ſchedule annexed to the writ, was not made by *two juſtices*, but by the *clerk of the peace*, who was not the perſon to whom the *certiorari* was directed, and thereon a new *certiorari* was granted, which being returned and filed, it was objected, that the *order* made by *two juſtices* to remove the poor perſon, &c. was naught, becauſe it was not ſaid, that it was made by *two juſtices* of the diviſion, &c. according to *ſtat.* 13 & 14 *Car.* 2.

Per curiam. The ſtatute as to this matter is only directory, it is not reſtrictive or qualificatory, as the word *quorum*. *Vide Mod. Rep. vol.* 12. 138. *Salk. vol.* 2. *p.* 258. *Ibid. vol. page* 479. 400.

Trinity, 9 *W*. 3. *The King* v. *The Pariſh of Cheſterfield*.

One *Jerriſon* was a ſervant to Sir *Paul Jenkinſon* in *Waltham*; afterwards he left his ſervice, and was put out by his maſter, Sir *Paul Jenkinſon*, to a barber in *Cheſterfield*, who was to teach him to ſhave and make periwigs, for which he was to have 5 *l.* from Sir *Paul*: *Jerriſon* continued a year in this employment, according to covenants between Sir *Paul* and the barber, to which *Jerriſon* was no party; and the court adjudged that this did not make a ſettlement at *Cheſterfield*, becauſe it was no ſervice; and that the ſaid *Jerriſon* was thereby no more than a boarder there for his education, which is no ſervice to make a ſettlement. *Vide Mod. Rep. vol.* 5. *p.* 328. *Salk. vol.* 2. *p.* 479.

Trinity, 9 *W*. 3. *The King* v. *Brown*.

An *order* was made, adjudging the defendant to be the father of a baſtard-child, *May* 2, 1696. And in *Michaelmas* ſeſſions following, the ſaid *order* was diſcharged: now both *orders* being brought here by *certiorari*, the latter was quaſhed, becauſe it appeared thereon, that *Michaelmas* ſeſſions was the firſt ſeſſions after notice given to the reputed father, of his being ſo adjudged; for though *ſtat.* 18 *Eliz.* appoints the appeal not to be the *firſt ſeſſions* after the *order* of the *two juſtices*, but the *firſt ſeſſions* after the party has notice of the ſaid *order*; yet, by *ſtat. H.* 5. there might be a ſeſſions intervening, as in this caſe, between the *order* by the *two juſtices* and the *order of ſeſſions*; and it muſt appear on the *order*, that this was the *firſt ſeſſions* after notice had been given of the former *order*: afterwards the *firſt order* by the *two juſtices* was quaſhed, becauſe there was an adjudication therein, that the reputed father ſhould pay a certain ſum weekly, till the child be *ſeven years* of age; whereas they cannot charge the father for any certain determinate time, but as long as the child ſhall be chargeable to the pariſh. *Vide Salk. vol.* 2. *p.* 480.

Hilary,

Hilary, 10 *W.* 3. *Bayly's Caſe.*

A *maid-ſervant*, before the 25th *of March* 1707, was an inhabitant legally ſettled at *Overton in Hampſhire*, and then contracted with one *J. O.* an inhabitant of *S.* for ſo much wages, to ſerve him from the ſaid 25th *day of March* till *Michaelmas* following, which ſhe did accordingly, and then made a new contract with the ſame maſter, to ſerve him for a longer time, and accordingly did ſerve him on that contract till *April following, in all above a year.*

Per curiam. Though this was not an entire contract for a year, yet it gained her a ſettlement at *S.* according to *ſtat.* 9 *W.* 3. *Vide Salk. vol.* 3. *p.* 257.

Hilary, 10 *W.* 3. *The Caſe of the Churchwardens of Topſham.*

Three juſtices took the account of the churchwardens, *&c.* of *Topſham*, for the year 1697, and adjudged that there was thereupon due from them to the pariſhioners of *Topſham* 69 *l.* 18 *s.* 10 *d.* for the re-payment whereof to the ſucceeding overſeers for the year 1698, the juſtices made an *order*, to which it was excepted, that the juſtices had no power to make ſuch *order*, but only to iſſue warrants to diſtrain.

But the court ruled the *order* to be well made, and confirmed the ſame. *Vide Salk. vol.* 2. *p.* 484.

Hilary, 10 *W.* 3. *Anonymous.*

A *mandamus* was granted to the juſtices of peace on *ſtat.* 43. *Eliz.* commanding them to compel the precedent overſeers of the poor of the pariſh of *A.* to come to an account with the preſent overſeers, and this writ was now quaſhed: 1ſt, For that the account by *ſtat.* 43 *Eliz.* is to be given to *two juſtices*, and not to the ſucceeding overſeers. 2dly, Two of the perſons named in the writ, whom the juſtices were to compel to come to account, do not appear to have been overſeers. *Vide Salk. vol.* 2. *p.* 525.

Hilary, 10 *W.* 3. *The Pariſh of Overton* v. *The Pariſh of Steventon.*

A perſon ſaid in the order to be a ſingle woman, (but not ſaid, as in the words of the ſtatute, *unmarried perſon* not having) was hired for half a year, and ſerved it up, and then contracted with the ſame perſon for a year, and ſerved half a year, and then went away by conſent.

Rokeby, *Turton*, and *Gould*, Juſtices. This anſwers the end of the ſtatute; ſuch ſervice as this is a good ſervice for a year, and a good order, though ſaid ſingle woman, for that infers ſhe had no children, nor ever was married. *Vide Forteſcue, p.* 316.

Eaſter, 10 *W.* 3. *The Pariſh of Batterſea* v. *The Pariſh of Weſtham.*

Two juſtices made an order to remove a poor man from *Weſtham* to *Batterſea*, on which the *pariſh of Batterſea* appealed to the ſeſſions, where the *order* of the juſtices was ſet aſide; afterwards, but in the ſame ſeſſions, on the allegation of council, the ſeſſions *ſuperſeded* the *firſt order*, and confirmed the order of the *two juſtices*; and on a motion being made to this court, it was urged, that the record was in the breaſt of the court during the whole ſeſſions, and therefore they might lawfully *ſuperſede* their own *ord r.* And accordingly the court affirmed the *ſecond order* of ſeſſions, and quaſhed the *firſt. Vide Mod. Rep. vol.* 5. *p.* 396.

Hertford Summer Aſſizes, 10 *W.* 3. *Hampton* v. *Lammas.*

A *warrant* was made by the juſtices of peace to levy a *poor's rate* on *J. S.* which was directed to the conſtables of *A. J. S.* had land in the pariſh of *A.* on which he had no chattels; but his houſe ſtood in the adjoining pariſh of *B.* in the ſame county, in which he had goods. The conſtables of *A.* levied theſe goods by virtue of the ſaid warrant.

Holt, Chief Juſtice, ruled on evidence at the trial, that the goods were well levied. *Vide Raym. vol.* 1. *p.* 735.

Trinity, 10 *W.* 3. *The King* v. *Shaw.*

An *order* was made by *two juſtices* of the peace, adjudging *Shaw* to be the reputed father of a baſtard; whereupon he appealed to the next *quarter-ſeſſions* of the peace after notice, where the *order* of the *two juſtices* was diſcharged; and now it was here moved to quaſh the *order* of ſeſſions, becauſe by the ſtatute the appeal muſt be to the next *general ſeſſions*, and there might have been a *general ſeſſions* before the *general quarter-ſeſſions*, as in *London* and *Middleſex*, where there are *four general ſeſſions* in a year, beſides the general quarter-ſeſſions. And for this fault the *order* was quaſhed. *Vide Mod. Rep. vol.* 12. *p.* 203. *Salk. vol.* 2. *p.* 482.

Michaelmas, 10 *W.* 3. *The King* v. *The Inhabitants of Wangford in Suffolk.*

An *order* was made to remove *three* men and their families; it was urged that it was too general, for ſome of their family might not be removeable.

Holt, Chief Juſtice. If a man who is ſettled at *A.* marries a woman who is ſettled at *B.* and has children by a former huſband; his wife ſhall be removed with him to *A.* but her children, ſuch of them as are above *ſeven years* old, ſhall not be removed; thoſe under ſhall be removed, but that only for nurture; for they ſhall be kept at the charge of the other pariſh: but ſuch a *general order* ſweeps all away; wherefore the *order* was quaſhed. *Vide Raym. vol.* 1. *p.* 395. *Salk. vol.* 2. *p.* 412. *Ibid. vol.* 3. *p.* 260

Michaelmas, 10 *W.* 3. *The King* v. *Albert*, *Alberton*, or *Albertſon.*

See this caſe fully ſtated in page 219 of this work, under the head *Baſtards.*

Michaelmas, 10 *W.* 3. *Anonymous.*

It was urged by council, that it was ſettled in the caſe of *Wooton-Baſſet*, that if the firſt *order* be naught, no ſubſequent *order* on an appeal can make it good. *Hilary*, 11 *W.* 3. In this court the ſame rule was taken by *Holt* Chief Juſtice, and both *orders* quaſhed; and, *Trinity*, 2 *Ann.* the ſame reſolution between *Selon* and *Ripley*. *Vide Salk. vol.* 2. *p.* 482.

Michaelmas, 10 *W.* 3. *Anonymous.*

Per curiam. If overſeers of the poor being convened before *two juſtices* to make their accounts, do refuſe, the remedy is, to appeal to the quarter ſeſſions. *Vide Mod. Rep. vol.* 12. *p.* 251.

Michaelmas, 10 *W.* 3. *The King* v. *Pope.*

The court was moved to quaſh an *order* made by the juſtices of peace at their ſeſſions for ſevants wages, and coſts of ſuit, they having committed a perſon to priſon for not obeying it, which, as was urged, they had no power to do, for they ought to have indicted him for diſobeying their *order*; and the juſtices of peace have no power to compel the payment of ſervants wages.

Holt, Chief Juſtice. Let it be quaſhed *niſi. Vide Raym. vol.* 5. *p.* 419.

Michaelmas, 10. *W.* 3. *The Caſe of the Pariſh of St. Leonard Shoreditch.*

The churchwardens, *&c.* made a rate for relief of the poor, which was confirmed by *two juſtices*, and therein nothing was taxed for the perſonal eſtate, but all upon the real, which was erroneous. Several inhabitants appealed to the ſeſſions, and the rate was there quaſhed; and the churchwardens, *&c.* *ordered* to make a new rate, upon both real and perſonal eſtates: in the new rate there was ſtill a great inequality, the real eſtate being taxed ten times more, in proportion, than the perſonal eſtate; for this reaſon ſeveral inhabitants appealed again, and this rate was likewiſe vacated by *order* of the ſeſſions. And now the court was moved to quaſh theſe *orders*, for that the ſeſſions could only relieve particular perſons overrated or grieved, but could not ſet aſide whole rates at once.

Per curiam. Surely the juſtices at ſeſſions, upon an appeal of particular perſons grieved, may, if they ſee cauſe, ſet aſide the rate; for the act is, that if any perſon or perſons find themſelves aggrieved, it ſhall be lawful for the juſtices at the *quarter-ſeſſions* to make ſuch *order* therein, as by them ſhall be thought convenient. *Stat.* 43 *Eliz. c.* 2. *ſect.* 6. And in either of theſe caſes, of the *firſt* or *ſecond* rate, the juſtices could not have given relief without ſetting aſide the whole rate, becauſe the rate was burthenſome to a whole ſet of men; and they may make a new rate themſelves, or *order* the churchwardens and overſeers to make a new rate, as was done in this caſe; they having it in their diſcretion to make a new rate at ſeſſions, or remand it to the churchwardens, *&c.* to make one. Therefore the *orders* were confirmed. *Vide Salk. vol.* 2. *page* 483.

Michaelmas, 10 *W.* 3. *The King* v. *Ricelip, or Riſlip, Hendon, and Harrow.*

A poor man was removed from *Harrow* to *Ricelip* by an *order* of *two juſtices*, which *order* was confirmed on an appeal to the next ſeſſions, ſo that now he became ſettled at *Ricelip*; afterwards the pariſhioners of *Ricelip* diſcovering that *Hendon* was the place of his ſettlement, got an *order* from *two juſtices* to remove him thither; and on a *certiorari* to remove that *order* into this court, the queſtion was, whether after an adjudication on an appeal, *Ricelip* is *eſtopped* to ſay, that is not the laſt place of his legal ſettlement, and adjudged they are; for if *Ricelip* had not been the laſt place of his ſettlement, they could not have ſent him there, but he would have been ſent back to *Harrow*, which was *firſt* poſſeſſed of him, ſo that this is in effect but the ſame queſtion again, which has been already determined; and there muſt be an end put to it. *Vide Raym. vol.* 1. *p.* 394. *Salk. vol.* 2. *p.* 524. *Ibid. vol.* 3. *p.* 261. *Forteſcue, p.* 311.

Hilary, or Michaelmas, 11 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. If *H.* being ſettled at *A.* becomes afterwards a vagrant, ſome juſtices have thought that to be a determination of the ſettlement; but I never could think ſo; for if *H.* be found a vagrant within *ſtat.* 39 *Eliz. c.* 24. he may be ſent to the place of his birth; but then by *ſtat.* 43 *Eliz. c.* 2. he may be ſent from thence as a poor perſon, to the place of his laſt legal ſettlement; for his being ſent to the place of his birth, ſatisfies *ſtat.* 39 *Eliz.* and ſo both the ſtatutes agree. *Vide Mod. Rep. vol.* 12. *p.* 319. *Salk. vol.* 2. *p.* 525.

Hilary, 11 *W.* 3. *The Pariſh of St. Michael Bedenham,* v. *The Pariſh of Kingſton-Bowſey.*

One *H.* was ſent by the *order* of *two juſtices* from St. *Michael Bedenham* to *Kingſton-Bowſey*, and that *order* was reverſed upon an appeal to the ſeſſions: then the man went to *Bedenham*, and *Bedenham* ſent him to *D.* and a motion was made to quaſh this *order*, becauſe the *order* of reverſal upon the appeal as to *Kingſton-Bowſey*, was concluſive againſt all the world.

But the court held, that the determination upon the appeal between other parties, ought not to bind a *third* pariſh which was no party. *Vide Raym. vol.* 1. *page* 513. *Salk. vol.* 2. *p.* 486.

Hilary, 11 *W.* 3. *The Pariſh of Eaton-Bridge* v. *The Pariſh of Weſtram in Kent.*

An *order* was made at the *quarter-ſeſſions* for the relief of poor priſoners in gaols, and providing materials to ſet them at work, upon the ſtatutes 14 *Eliz. c.* 5. and 19 *Car.* 2. *c.* 4. whereby a ſum was aſſeſſed on the ſeveral pariſhes, not exceeding what is allowed by both acts; but the *order* was quaſhed, becauſe they ought to have made *diſtinct orders* on the different ſtatutes, the money to be levied by virtue of each ſtatute being applicable to different purpoſes. *Vide Salk. vol.* 2. *p.* 487.

Hilary, 11 *W.* 3. *The Pariſh of the Precinct of Bridewell* v. *The Pariſh of Clerkenwell.*

A *ſpecial order of Seſſions* was, that *H.* was bound apprentice, and ſerved *ſeven years* to a hemp-dreſſer, within the precincts of *Bridewell*, and afterwards he lived *nine years* in *Clerkenwell* pariſh, but gained no ſettlement there: the juſtices ſent him to *Bridewell* as his laſt legal ſettlement, by an *order* which ſet forth *Bridewell* to be an *extra-parochial* place.

Holt, Chief Juſtice. If a place is *extra-parochial*, and has not the face of a pariſh, the juſtices have no authority to ſend any man thither; and ſo it was reſolved in the caſe of Sir *John Oſborn*: poſſibly a place *extra-parochial* may be taxed in aid of a pariſh, but a pariſh ſhall not be taxed in aid of that. This is *an omitted caſe*. Therefore the *order* was quaſhed. *Vide Raym. vol.* 1. *p.* 549. *Salk. vol.* 2. *p.* 486.

Trinity, 11 *W.* 3. *The Inhabitants of Kings Langley* v. *The Inhabitants of St. Peter's in St. Alban's.*

See this caſe fully ſtated in page 601 of this work, under the head *Juſtices of Peace.*

Trinity, 11 *W.* 3. *The Pariſh of Beckenham* v. *The Pariſh of Camberwell.*

The queſtion was on *ſtat.* 8 *&* 9 *W.* 3. *c.* 3. which *enacts*, that an unmarried perſon hired for a year, ſhall not be ſettled, unleſs he ſerves the whole year, whether that extended only to caſes that might happen after the ſtatute, or to ſuch alſo as had happened?

Per curiam. To ſuch only as may happen after the ſtatute. It can have no retroſpect, but declares a law for the future, notwithſtanding the words, *declared and enacted*. So *adjudged* on a *ſpecial order*. *Vide Salk. vol.* 2. *p.* 525.

Trinity, 11 *W.* 3. *The Pariſh of St. Nicholas, Guilford in Surrey,* v. *The Pariſh of Killington in Suſſex.*

The court was moved to quaſh an *order* of *two juſtices* to remove a woman and her baſtard child from *A.* to *B.* whereas it appeared in the *order*, that the child was born at *C.*

Holt, Chief Juſtice. The baſtard muſt be kept where it is born. *Vide Salk. vol.* 2. *p.* 485.

Trinity, 11 *W.* 3. *The Caſe of Chriſt's Hoſpital.*

A poor child was left in *Chriſt Church Hoſpital*; upon complaint of the wardens of the hoſpital, two juſtices made an *order* on the overſeers of the poor of the pariſh, to receive and maintain the child; but this *order* was quaſhed, becauſe it was not ſaid, that the parents were unknown, or likely to become chargeable to the pariſh; for though a child of three months old be helpleſs, yet the parents are bound to provide for it. As to the principal matter which was hinted, *viz.* That the hoſpital was bound to provide for poor children there expoſed, the court thought there was nothing in that. *Vide Salk. vol.* 2. *p.* 485.

Michaelmas, 11 *W.* 3. *The King* v. *The Inhabitants of Chertſey.*

The court was moved to quaſh an *order of ſeſſions*, for that the only ground for ſettling a poor perſon in a pariſh appeared on the *order* to have been, that the bans of matrimony of the poor perſon were publiſhed in the pariſh church; which is ill, for the notice given to the pariſh muſt not only be in writing, but the other ceremonies required by *ſtat.* 3 & 4 *W.* & *M.* muſt be obſerved, and that ſtatute being an explanatory one, cannot be taken by equity.

Per curiam. Let it be quaſhed. *Vide Mod. Rep. vol.* 5. *p.* 454.

Michaelmas, 11 *W.* 3. *Anonymous.*

See this caſe fully ſtated in page 622 of this work, under the head *Lunatics and Ideots.*

Michaelmas, 11 *W.* 3. *The Pariſh of Grindon in Northamptonſhire,* v. *The Pariſh of Overcott in Warwick.*; *or the Pariſh of Overcott* v. *The Pariſh of Grindon.*

A *conditional order* was made, *viz.* that in caſe the court of *K. B.* ſhould be of opinion, that where a ſervant was hired at a fair *ten days* after *Michaelmas* till *Michaelmas* next, ſuch hiring and ſervice did gain a ſettlement, then &c. And for this reaſon the *order* was quaſhed. *Vide Mod. Rep. vol.* 12. *p.* 323, 376.

Michaelmas, 11 *W.* 3. *The Pariſh of Bloxom.* v. *The Pariſh of Kingſton.*

An *order of ſeſſions*, ſetting forth, that the perſon was likely to become chargeable, as we are credibly informed, was quaſhed. *Vide Mod. Rep. vol.* 12. *page* 323.

Hilary, 12 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. There needs no notice to churchwardens of a ſervant's coming into a pariſh to gain a ſettlement, becauſe the juſtices of peace, tho' there had been notice, cannot diſturb him. *Vide Mod. Rep. vol.* 12. *p.* 441.

Hilary, 12 *W.* 3. *The Pariſh of Thackham* v. *The Pariſh of Findon in Suſſex.*

A poor perſon was removed in 1694 from *Weſt Starring* to *Findon*; whereon *Findon* did not appeal. In 1700 the man went to *Thackham*, and *Thackham* ſent him by *order* of *two juſtices* to *Findon*; *Findon* appealed, and the *order* was diſcharged. All *three* being now brought up by *certiorari*, it was moved to quaſh the *order* made on appeal, and urged that *Findon* was bound by the *firſt order* from *Weſt-Starring* to them, from which they never appealed, with reſpect to all the world, and are concluded to ſay, that the place of his laſt legal ſettlement was not with them: but in reſpect of the diſtance of time, the court could not tell but he might have gained a new ſettlement at *Thackham*, and that might appear to the juſtices, and they might have good ground to diſcharge the *order* of the *two juſtices*. Then the council offered to produce an *affidavit*, that there was no new ſettlement proved; but the court held they could not examine that by *affidavit*, nor inquire thereby into the reaſon of making the *order*. *Vide Salk. vol.* 2. *p.* 489.

Eaſter, 12 *W.* 3. *The King* v. *Somerton.*

An *order* of adjudication of the reputed father of a baſtard child, was held bad for *two* faults, 1ſt. That it did not appear that one of the juſtices was of the *quorum*. 2dly. Nor that the examination was by them both. And either of the defects was held to be fatal; but becauſe the defendant was not preſent in court as he ought to have been, the *order* was only quaſhed *niſi*. *Vide Mod. Rep. vol.* 12. *p.* 392.

Eaſter, 12 *W.* 3. *The King* v. *The Inhabitants of Kirford.*

An *order* was made by *two juſtices* to remove a man with his wife and family, which *order* was wholly quaſhed; becauſe the family might have another ſettlement: ſo it would be, if the *order* was to remove him and his children. *Vide Mod. Rep. vol.* 12. *p.* 398.

Trinity, 12 *W.* 3. *The King* v. *The Inhabitants of Marlborough.*

A *certiorari* was directed to the juſtices of ſeſſions to ſend up what *orders* they had before them; and hereon an *order* of *two juſtices* for the removal of a woman ſervant, who was got with child within the year of her ſervice, was certified without ſhewing how it came there.

Per curiam. 1ſt. The *order* is well removed; for when *two juſtices* make an *order*, it is very proper for them to certify it to the ſeſſions, and when they do ſo, the ſeſſions are legally poſſeſſed of it, and it may well be removed from thence hither.

2dly. If a perſon hires a maid-ſervant for a year, and before the year's end ſhe is pregnant, ſhe ſhall not for that be removed, but ſhall ſerve out her time; there ſhall be a year's continual ſervice to make a legal ſettlement for the charging of a pariſh; but till the year be out, none ſhall diſturb the party from ſerving. And ſince ſhe is not removeable within the year, if ſhe leaves her maſter without his conſent, ſhe may be ſent back to her ſervice; but then it is to ſerve her time, and not to charge the pariſh.

Holt, Chief Juſtice. On complaint made to *one juſtice* of a perſon's being likely to become chargeable to a pariſh, *two juſtices* may examine and *order* jointly; but they muſt both join in the examination and *order*. *Vide Mod. Rep. vol.* 12. *p.* 402.

Trinity, 12 *W.* 3. *The Crown* v. *The Inhabitants of Glamorganſhire.*

See this caſe fully ſtated in page 253 of this work, under the head *Certiorari.*

Trinity, 12 *W.* 3. *The Inhabitants of the Foreſt of Dean* v. *The Pariſh of Linton.*

One *H.* lived *ten years* in the foreſt of *Dean*, and then died, and left ſeveral children: *two juſtices* made an *order* to remove them to *Linton* in *Herefordſhire.*

Holt, Chief Juſtice. If a place be a reputed pariſh, and has churchwardens and overſeers of the poor, it is within *ſtat.* 43 *Eliz.* though in truth it be no pariſh; but if it be merely *extra-parochial*, as the juſtices cannot ſend to ſuch a place, ſo they cannot ſend from it: as it is exempt from receiving, ſo it ſhall not have the benefit of removing, for they have not proper perſons to complain. Perſons in *extra-parochial* places muſt ſubſiſt on private charity, as all perſons did at common law before *ſtat.* 43 *Eliz.* which enacts, that every pariſh ſhall keep their own poor; in conſequence of which the juriſdiction of removals was *firſt* ſet up before *ſtat.* 14 *Car.* 2. For unleſs the poor were removed to their own pariſhes, every pariſh could not maintain their own poor. But *ſtat.* 43 *Eliz.* does not extend to *extra-parochial* places.

Gould, J. ſtarted a queſtion, whether the juſtices of the county where the pariſh lies, wherein he was laſt legally ſettled, might not make an *order* upon the pariſh to make a rate for the relief of this poor man in the *extra-parochial* place, becauſe not having gained a ſettlement there, he remains an inhabitant of that pariſh ſtill, elſe the man may be ſtarved for want of relief?

Holt, Chief Juſtice. Quaſh this *order*, and then get another *order*: *viz.* foraſmuch as *H.* was ſettled in the pariſh of *Liton*, and is not able to provide for himſelf, theſe are, &c. *Vide Salk. vol.* 2. *p.* 487.

Trinity, 12 *W.* 3. *The Pariſh of Chalbury* v. *The Pariſh of Chipping-Farringdon.*

One *H.* was removed by the *order* of *two juſtices*, from the pariſh of *A.* in *Warwickſhire*, to *Chalbury* in *Oxfordſhire*; from thence, by *order* of *two juſtices*, to *Chipping-Farringdon* in *Berkſhire.* It was objected, that *Chalbury* ought to have appealed, and got the *order* upon them diſcharged, to which *Holt*, Chief Juſtice, agreed; for ſending the poor man to another place, is falſifying the *firſt order*, which cannot be done but by appeal; for the *order* of *two juſtices* is a determination of the right againſt all perſons, till it be reverſed: *Chalbury* ſhould have appealed from the *Warwickſhire order*, and got that ſet aſide, and ſent the man back thither, and the juſtices there ſhould have ſent him to *Chipping-Farringdon*; therefore the *order* is naught. *Vide Salk. vol.* 2. *p.* 488.

Trinity, 12 *W.* 3. *The Inhabitants of Ware* v. *The Pariſh of Stanſtead-Mount-Fitchet.*

An *order* was made by *two juſtices*, to remove one *H.* with his wife and children, from *Ware* in the county of *Eſſex*, to *Stanſtead* in the ſame county. The following exceptions were taken to this *order*:

1ſt, Becauſe it was ſaid, with his wife and children.

2dly, Becauſe it was ſaid, *It appears upon examination before us, or one of us, &c.* and the examination ought to be before *both*, becauſe both are to make the judgment of removal. The council would have diſtinguiſhed this, as to the firſt exception, from the caſe of *Michaelmas*, 10 *W.* 3. becauſe he might have ſervants not removeable, but children ought to follow their parents. To the ſecond he ſaid, that by *ſtat.* 14 *Car.* 2. *c.* 12. the complaint is directed to be made to any juſtice, and in conſequence *one* juſtice may examine; and it was only neceſſary that *two* ſhould join in removing.

To the *firſt* point *Holt*, Chief Juſtice, ſaid, ſuppoſe *H.* had put his ſon out to ſervice at *ſixteen years* old at *B.* and accordingly he had ſerved there a year, and after the father comes to live at *B.* himſelf, and the ſon to live with him; ſuch an *order* would remove the ſon, though he be not removeable.

To the *ſecond*, *Gould*, Juſtice, ſaid, the ſtatute directed, and the practice was, to make complaint to *one juſtice*, and he grants his warrant to bring the poor man before *two juſtices*, and then they *two* examine and remove. *Vide Salk. vol.* 2. *p.* 488.

Michaelmas, 12 *W.* 3. *The King* v. *The Inhabitants of Long-Critchell, or Long-Crickhill.*

A man was removed from the pariſh of *Allhallows* to the pariſh of *Long-Critchell.* He went from *Long-Critchell* to P They got *ſeveral orders* from *two juſtices*, by way of *execution* of the *firſt order*, to remove him from *P.* to *Long-Critchell.* But all of them were quaſhed, becauſe *P.* ought to have made an original complaint, and upon that have got an *order*, and not have grafted on the *order of removal* from *A.* to *Long-Critchell*, though they might have uſed that as evidence to induce the juſtices to make ſuch *original order*; for *P.* is a *third* pariſh, againſt which *Long-Chritchell* is not bound by the *order of removal* from *Alhallows* to *Long-Critchell*, but may conteſt the right of ſettlement with them. An exception was then taken, that the enforcing *orders* did not appear to be made by *two juſtices*, one of the *quorum.*

Holt, Chief Juſtice, ſeemed to think that a good exception, becauſe ſuch perſons as cannot make an *order*, cannot execute it: but the *orders* were quaſhed upon the firſt reaſon. *Vide Mod. Rep. vol.* 12. *p.* 419. *Salk. vol.* 2. *p.* 489.

Michaelmas, 12 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. An *order* of juſtices of peace, whereby the churchwardens were ordered to pay a ſcrivener 5 *l.* due to him for drawing indentures for ſetting out poor children to trades, was quaſhed, as being a thing out of their power; but the way had been, to *order* a pariſh rate for levying ſo much a week till a convenient ſum was raiſed; and in that caſe, as ſoon as the money was raiſed, an action could not lie for the ſcrivener againſt the churchwardens. *Vide Mod. Rep. vol.* 12. *p.* 417.

Michaelmas, 12 *W.* 3. *Mayfield* v. *Heathfield.*

An *order* for removing *E. A.* and four children from *Mayfield* to *Heathfield*; an *order of ſeſſions* on appeal was made, making mention of the woman and her four children, and it diſcharged the *order* of the *two juſtices*; it was moved by the pariſh of *Mayfield* to quaſh their own *order* of *two juſtices*, for not ſaying *her children.*

Holt, Chief Juſtice, would not quaſh the *order* of the juſtices, becauſe it was vacated by the juſtices in ſeſſions; he held it was naught; but the *order* is now gone: and ſo the *order of ſeſſions* was confirmed. The *order of ſeſſions* only quaſhed the *order of two juſtices*, but no other adjudication in order to ſend them to *Mayfield.* *Vide Forteſcue*, *p.* 307.

—— 12 *W.* 3. *The King* v. *The Pariſh of Bakewell, Derbyſhire.*

An *exception* was taken to an *order* of ſeſſions, which was, to remove a child to the place of his mother's ſettlement, and it was ſet forth he was an infant, but did not ſay his laſt ſettlement, and though he was an infant, yet he might gain a ſettlement of himſelf; accordingly the *order* was quaſhed. *Vide Forteſcue, page* 307.

—— 12 *W.* 3. *The King* v. *Saxmundham.*

Adjudged, That a child of a former huſband, where a woman is married to another, though but a year old, cannot gain a ſettlement where its mother goes with the *ſecond* huſband, but ſhall only go there for nurture, but muſt be maintained by the pariſh where the child's father had a ſettlement. So of a baſtard. *Vide Forteſcue*, *p.* 307.

The King v. *Gregory.*

An *order* was made by the juſtices of peace for the defendant to pay 40 *s.* for wages, generally; and becauſe it was not ſaid for what wages, the court was moved to quaſh it; for they can only ſettle wages in huſbandry.

Per curiam. We will intend it for ſuch wages, ſince the contrary does not appear. *Vide Salk. vol.* 2 *p.* 485.

The Caſe of Sylvanus Johnſon.

The juſtices of *Suſſex*, on complaint that *Johnſon* was come into the pariſh of *Brood*, in the ſaid county, and was likely to become chargeable to the ſaid pariſh, and adjudging *Sandhurſt* in *Kent* to be his laſt legal ſettlement, *ordered* that *Johnſon*, and his wife and family, ſhould be removed to *Sandhurſt*; which was quaſhed; becauſe *it does not appear* what is meant by his family, and ſome of them may have a legal ſettlement at *Brood*, though *Johnſon* himſelf had not. *Vide Salk. vol.* 2. *p.* 485.

Michaelmas, 12 *W.* 3. *The King* v. *The Inhabitants of Audly.*

An *order* of ſeſſions made on an appeal from a *poor's rate*, being removed into this court by *certiorari*, the caſe was, on *September* 11, 1665, a certain rate was agreed to by the inhabitants of the pariſh of *Audly*; which had been followed ever ſince till the laſt year, when a new rate was made. On appeal to the ſeſſions the new rate was quaſhed, and the old one ordered to ſtand: and now it was objected, that it did not appear this was a poor's rate, being called a *pariſh-levy*, which might be as well for the church as the poor, and then the juſtices had no juriſdiction.

Holt, Chief Juſtice. *Twiſden*, C. J. uſed to ſay, if a particular juriſdiction does not ſhew the Matter to be within its authority, it muſt be taken to be out of it. Another exception was taken, *viz.* that the whole rate could not be quaſhed at the complaint of one man; and alſo that the old rate, however juſt at firſt, might not be unequal now, and therefore the juſtices could not make a ſtanding rate; which laſt exception was allowed; for lands may be improved. By *ſtat.* 43 *Eliz.* the rate muſt be equal; therefore it ought to be continually altered, as circumſtances alter. The juſtices could not confirm an old rate, and in that caſe their *order* is naught: and the Chief Juſtice obſerved, that though the juſtices at ſeſſions need not give a reaſon for their *order*; yet if they give a reaſon which is wrong, we muſt be guided by it, and quaſh the *order*, becauſe it appears to us to be their reaſon. *Vide Salk. vol.* 2. *p.* 525.

Hilary, 13 *W.* 3. *The Pariſh of Halſtead* v. *The Pariſh of Melford.*

An *order* made to remove a woman and her children to the place of the huſband's laſt legal ſettlement, was held bad as to the children, for they might have a legal ſettlement different from the huſband, but it might ſtand as to the wife.

To this *order* another exception taken, *viz.* that there was no adjudication that any of them were likely to become chargeable to the pariſh from whence they were removed; and though it was ſaid they came to ſettle here contrary to law, yet, for the laſt exception, the *order* was quaſhed in the whole. *Vide Mod. Rep. vol.* 12. *p.* 667.

Hilary, 13 *W.* 3. *The Pariſh of Godſtone* v. *The Pariſh of Eaſt Grinſtead.*

An *order* of *two juſtices*, made for the removal of a poor perſon, was quaſhed at the *quarter ſeſſions*, and before the poor perſon came back, the pariſh, whoſe *order* was quaſhed, made a *new order* to fix him in another place.

Per curiam. It cannot be good, becauſe a *new order* ought not to have been made till the party was returned; and if that *order* had been confirmed here, it would not have made it good, becauſe it was merely void. *Vide Mod. Rep. vol.* 12. *p.* 633.

Hilary, 13 *W.* 3. *The Pariſh of Wolverton* v. *Solden.*

An *order* of juſtices, in which it was ſaid that he *may* become chargeable, was quaſhed. *Vide Forteſcue, p.* 314.

Hilary, or Michaelmas, 13 *W.* 3. *Mynton Pariſh* v. *Stony Stratford: or The King* v. *The Pariſh of Minton.*

A poor man was ſent by an *order* of *two juſtices* to *Mynton*, and on an appeal to the ſeſſions, the *order* was diſcharged; then by *another order* of *two juſtices*, he was ſent to *Stony Stratford*, and on an appeal to the ſeſſions, that *order* was confirmed: afterwards he was by *another order* of *two juſtices*, ſent to *Mynton* again.

Per curiam. This laſt *order* is illegal.

Holt, Chief Juſtice. Where an *order* is *diſcharged on an appeal*, it binds only between the *contending pariſhes*, but where an *order* is *confirmed on an appeal*, it is concluſive to all parties, for it is an adjudication, that the place to which he was ſent is the laſt place of his legal ſettlement, which can never be avoided but by the pariſh againſt whom it was made; and that a pariſh in reputation is chargeable, if it has officers, as churchwardens, *&c. Vide Mod. Rep. vol.* 12. *p.* 668. *Salk. vol.* 3. *p.* 260.

Eaſter, 13 *W.* 3. *The King* v. *Dillon, or Ditton.*

An original *order* of ſeſſions was made on him to diſcharge his apprentice, purſuant to *ſtat.* 5 *Eliz. c.* 4. *ſect.* 35. and alſo to refund ſome of the money he had received with him.

It was objected, 1ſt. That they had no power by the ſtatute to order him to refund the money, but only to diſcharge the apprentice; and that on an enrollment of the diſcharge the indentures were defeated.

But it was ruled, that clearly they had power to award reſtitution by neceſſary conſequence; for ſuppoſe the apprentice had given a conſiderable ſum, and had ſerved but two months.

2dly. It was objected, that they had no power to make an *order*, but on the appearance of the maſter on being ſummoned, which is not ſhewn to have been done here.

To which it was anſwered, that the words are indeed, *that they ſhall make an order on appearance*, but it would be hard to conſtrue it that they ſhall not meddle if the maſter will not appear, for then he would take the advantage of his own wrong; but it ought to appear that he was ſummoned, or warned to appear.

3dly. It was excepted, that it appeared that this was originally begun at the ſeſſions, whereas they have no juriſdiction till after application to the principal magiſtrate of the corporation, or to a juſtice of peace.

And of this opinion was *Holt*, Chief Juſtice; but on conſideration, that the precedents tended the other way, the *order* was confirmed. *Vide Mod. Rep. vol.* 12. *p.* 498. *Salk. vol.* 2. *p.* 490.

Eaſter, 13 *W.* 3. *The Pariſh of Watford* v. *The Pariſh of Wendover.*

Two juſtices of St. *Albans* made an *order*, that whereas they were credibly informed, that *Wendover* was the place of *H*'s laſt legal ſettlement, but no where adjudged it to be ſo; from this *order* there was an appeal to the *quarter ſeſſions* of St. *Albans*, where it was confirmed; and afterwards both were quaſhed; the *firſt*, becauſe there was no adjudication of what was the place of his laſt legal ſettlement; and the *ſecond*, becauſe the appeal ought to have been to the *ſeſſions of the county*, not of the corporation; and as it was, it was *before no judge. Vide Salk. vol.* 2. *p.* 490.

Trinity, 13 *W.* 3. *The Pariſh of Suddlecomb* v. *The Pariſh of Burwaſh.*

An exception was taken to an *order* of *two juſtices*, becauſe it was only ſaid to be complained of by the churchwardens, that the perſon removed was likely to become chargeable, but not adjudged ſo by the juſtices.

Holt, Chief Juſtice, ſaid, that the juſtices cannot remove a man, unleſs he be likely to become chargeable, for otherwiſe they might remove a man of real property; and he made a diſtinction, that where the *order* is, *Whereas it appears to us*, &c. *on the complaint*, &c. *that* J. S. *is likely to become chargeable to the pariſh*, that will be well enough; but where it is, as here, *Whereas complaint has been made*, &c. that is ill: but it was agreed to be referred to the judge of aſſize. Afterwards, *Eaſter*, 2 *Ann. The caſe of the inhabitants of* Darnall *in Cheſhire*, the ſame point was reſolved. It ought to appear, that the perſon removed, is a perſon removeable, and there ought to be a particular averment, that he is likely to become chargeable. *Vide Salk. vol.* 2. *p.* 491.

Trinity, 13 *W.* 3. *The King* v. *Johnſon or Jonſon.*

See this caſe fully ſtated in page 88 of this work, under the head *Apprentice.*

Trinity, 13 *W.* 3. *Anonymous.*

Per curiam. If an *order* of *two juſtices* be quaſhed here, an *order of ſeſſions* confirming that *order*, falls of courſe; for the juſtices at ſeſſions have not power to make an *original order.*

And if an *order* of juſtices for the removal of a poor perſon be confirmed on appeal, the appellants are for ever concluded from diſcharging themſelves of that poor perſon as to all places; for if another pariſh than that from which he is ſent to them by the *two juſtices*, be the laſt place of his legal ſettlement, they may ſend him there by *order* of *two juſtices* to be made for that purpoſe; or on an appeal another place being the laſt place of his legal ſettlement, may be given in evidence at the ſeſſions.

Note. A perſon cannot be removed to an extra-parochial place. *Vide Mod. Rep. vol.* 12. *p.* 548.

Trinity, 13 *W.* 3 *Minchamp's Caſe.*

He being a merchant at *Mile-End, two juſtices* bound a poor girl apprentice to him; he appealed to the ſeſſions, and the *order* was diſcharged; becauſe they thought it unfit to compel a merchant to take an apprentice; and now this court, on conſideration of the matter, confirmed the *order* of ſeſſions; becauſe the late act having made perſons compellable to take apprentices, and given an appeal to the ſeſſions, it was in the diſcretion of the juſtices at ſeſſions to determine, whether it was, or was not fittting to put an apprentice upon any one; and therefore the court would not diſturb what the ſeſſions had done, but confirmed the *order*. *Vide Salk. vol.* 2. *p.* 491.

Michaelmas, 13 *W.* 3. *The Pariſh of St. Andrew Underſhaft in London* v. *Jacob Mendez de Breta.*

The defendant, being a *Jew*, had an only daughter, who embraced *Chriſtianity*, whereon he turned her out of doors, and refuſed to allow her any maintenance. On which complaint was made to the juſtices at their general quarter-ſeſſions, where they, reciting that ſhe was the defendant's daughter, and that he was a man able to maintain her, made an *order*, that the defendant (who was very rich) ſhould allow her 20 *s. per month* for her maintenance, under the penalty of 12 *l.* and founded their *order* on *ſtat.* 43 *Eliz.*

The court was moved to quaſh this *order*, when it was urged, that the juſtices had not any juriſdiction to make ſuch an *order*, it not being within the ſaid ſtatute, becauſe it was not alledged that ſhe was poor, or likely to become chargeable to the pariſh. And accordingly the *order* was quaſhed. *Vide Raym. vol.* 1. *page* 699.

Michaelmas, 13 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. *Five* juſtices of the peace are too many to join in an *order* for ſettling a poor perſon; for they may well make a majority at the ſeſſions, and ſo confirm their own *order*. *Vide Mod. Rep. vol.* 12. *p.* 559.

Harriſon v. *Lewis.*

The court was moved to quaſh an *order* made at the *quarter-ſeſſions* in *Coventry*: the caſe was, *Lewis*, with his wife and children, were ſettled in the pariſh of *A.* and from thence they removed to the pariſh of *B.* where the *huſband gained a ſettlement*; but the pariſh of *A.* having given a *certificate* to the pariſh of *B.* that they (the ſaid pariſh of *A.*) would receive them again whenever *Lewis* ſhould become chargeable to *B.* and he now being chargeable, they obtained an *order* from *two juſtices* to ſend him and his wife and children to *A.* again; which *order* was confirmed upon an appeal to the ſeſſions, and he was ſent thither accordingly; but the *order* was by this court quaſhed: for though it was according to the *agreement* made between the *two* pariſhes, yet a *private agreement* in this caſe ſhall not alter the law. *Vide Salk. vol.* 3. *p.* 253.

The Pariſh of Silveſter v. *The Pariſh of Aſhton.*

An *order* was made for removing one *E. C.* who was hired in *Aſhton* for a year, as a ſervant, and ſerved there *ſix months*, and then the maſter removed into *Silveſter*, where ſhe ſerved out the year.

The queſtion was where ſhe was ſettled.

Per curiam. She was ſettled at the laſt place.

Holt, Chief Juſtice. She could not be ſent from her ſervice before the ſtatute; if ſhe was hired for a year, and ſtayed there *forty days*, ſhe was ſettled. A man is an hired ſervant in every place where his maſter goes, if he ſtays *forty days*, for he is hired to ſerve him the whole year; ſuch ſervice is a ſervice for a year on the ſame contract, and the continuance was to be *forty days*; for then he could not be removed; and there is no difference between *unremoveable* and *ſettled*. Like the caſe of one *Edgar*, who had a ſmall copyhold, his children could not be ſent away, and if he could not be ſent away, he was ſettled. *Vide Forteſcue, p.* 308.

The King v. *The Inhabitants of Corſham and Weſtbury.*

Holt, Chief Juſtice, held, that where juſtices remove a woman big with child from *A.* to *B.* and ſhe is brought to bed in *B.* before the *order* can be quaſhed, and afterwards it is quaſhed; *A.* ſhall maintain the child, becauſe *A.* ſhall not take advantage of their own wrong, the *order* being illegal. *Vide Forteſcue, p.* 315.

The Pariſh of Kentis-Beer v. *The Pariſh of Halberton.*

An *order* recited, that *Halberton* had notice, and that *Kentis-Beer* prevented the appeal, but the other did not appear, and that the pariſh of *Halberton* not appearing, the poor perſon was for ever ſettled in *Kentis-Beer*.

Holt, Chief Juſtice. I put it on the overſeers not appearing; they have made default; to what purpoſe was it to give evidence, when nobody was there to defend? So the *order of ſeſſions* muſt be affirmed. *Vide Forteſcue, p.* 308.

The King v. *The Pariſh of St. Nicholas in Abingdon.*

One *D.* was an inhabitant of the pariſh of St. *Helens*, in *Abingdon*, where he had *four* Children, and removed from thence into the pariſh of St. *Nicholas*, where he lived ſome time, and was *taxed to the poor* there, but was removed back to St. *Helens* before he paid the tax, and there he died; afterwards his children were by *order* of the juſtices removed into the pariſh of St. *Nicholas*, for that their father had gained a ſettlement there, by being taxed to the poor, and this by *ſtat.* 3 & 4 *W.* 3.

Per curiam. There muſt be a *paying as well as taxing*, to make a ſettlement by that ſtatute. *Vide Salk. vol.* 2. *p.* 252.

The King v. *The Inhabitants of Winſly.*

One *M. T.* a poor woman, was, by the *order* of *two juſtices*, removed from *Beverley* to *Knaveſborough* in the *Weſt-Riding* of *Yorkſhire*, that being adjudged by them to be the laſt place of her legal ſettlement: *Knaveſborough* appealed to the next ſeſſions, and thereon an *order* was made, reciting the difference between *Beverley* and *Knaveſborough*, but that it appeared to them, that this woman was laſt legally ſettled at *Winſly*, which was a *third pariſh* not concerned before, and ſo ſhe was by that *order* removed to *Winſly*; but it was quaſhed, becauſe the ſeſſions had no juriſdiction, but only to *affirm* or *reverſe* the *order* between the contending pariſhes, and not to make an *order* to charge a *third* pariſh. *Vide Salk. vol.* 3. *p.* 254.

Scrivenham Pariſh v. *The Pariſh of St. Nicholas.*

An *order* to remove a poor perſon was quaſhed, becauſe it was not ſaid, that he was *poor*, or *likely to become chargeable to the pariſh*, &c. *Vide Salk. vol.* 3. *p.* 255.

Luckington v. *St. Auſtin's Pariſh.*

The caſe was, one *S. H.* was ſettled at *L.* in *Wilts*, but afterwards he and his wife came into the pariſh of St. *A.* in *Briſtol*, where he lived ſome time, and had a child born there, which child was now *under the age of ſeven years*; the father went to ſea, and there died, the mother returned to *L.* and there ſhe died; *two* *juſtices* made an *order* to ſend the child to *L.* that being the place where the father was ſettled, which *order* was confirmed upon an appeal; but the court was moved to quaſh this *order of ſeſſions*, becauſe the child muſt be ſent to the place where it was born, unleſs it can be ſent *to his parents*, where they are ſettled, which could not be done in this caſe, becauſe they were both dead. *Vide Salk. vol.* 3. *p.* 257.

Eaſter, 1 *Ann. The Pariſh of Swanſcomb* v. *The Pariſh of Shensfield.*

A poor man was ſent by *two juſtices* to *Shensfield*, and on an appeal the *order* was confirmed; afterwards *Shensfield* ſent him by an *order* to *Swanſcomb*: theſe *orders* being brought up by *certiorari*, the *order* to ſend him to *Swanſcomb* was quaſhed, becauſe by the determination of the juſtices in affirmance of the *order* on the appeal, the pariſh of *Shensfield* was *eſtopped* againſt all the world to ſay, that was not the place of his laſt legal ſettlement, for the juſtices cannot remove but to the place of the laſt legal ſettlement; and ſhewing any place of ſettlement will diſcharge the *order* on the appeal; and the diſtinction is between an *order* diſcharged and an *order* confirmed on appeal, or not appealed from. In the *firſt* caſe, the matter is at large as to all places, but the place to which the poor man was ſent, which, on the appeal, was determined not to be the place of his laſt legal ſettlement. But in the latter caſe, the place to which he was ſent is bound, and the *order* final and concluſive as to all the world. *Vide Salk. vol.* 2. *p.* 492.

Eaſter, 1 *or* 2 *Ann. The Pariſh of Farringdon in Berks* v. *The Pariſh of Wilcot or Witty in Oxfordſhire.*

A ſervant came into the pariſh of *S.* was hired for a year, and having ſerved half a year of the time, married a woman in the pariſh of *Witty*; and the queſtion was, 1ſt, Whether the juſtices, on complaint of the churchwardens, could make an *order* to remove him to the place of his laſt legal ſettlement? 2dly, Whether his ſerving here would not gain a ſettlement? To the firſt point it was admitted, that the contract between the maſter and ſervant was not diſſolved by the marriage; and that admitting it might be diſſolved by an *order* made on complaint of the maſter, yet without that, and upon complaint of the officers only, it could not be diſſolved.

Powell, Juſtice, *contra.* That an *order* to diſturb him and not remove him, was not within the meaning of the act; diſturbing him, without power to remove, is vain; and this does not unſettle, nor is like the caſe of *forty days* ſettlement. 2dly, It was queſtioned, whether ſuch a ſtay, *&c.* would gain a ſettlement; becauſe the ſtatute makes the party's being unmarried a qualification as well as his ſtay, *viz.* if any ſuch perſon, *being unmarried, being hired*, &c. *ſuch ſervice*, &c. So that the words *ſuch ſervice* go to all, not only the ſtay, but the ſtate of the party.

Holt, Chief Juſtice. *Such* is only *ſuch ſervice*, and the marriage does not hinder the ſervice; the contract continues; and ſuppoſe the woman he marries be of the ſame pariſh, ſhall not that gain a ſettlement? *Vide Salk. vol.* 2. *p.* 528, 529.

Trinity, 1 *Ann. The Pariſh of All-Saints* v. *The Pariſh of St. Giles in Northampton.*

On an appeal a *ſpecial order* was made, and the caſe was; a perſon was born at *A.* came and lived at *B.* ſome years, but never gained any ſettlement there; then he removed to *C.* for convenience of getting his livelihood, and *B.* gave him a certificate according to the late act. The man became chargeable, and was ſent back to *B.* who found that he was laſt legally ſettled at *A.* and ſent him thither.

Holt, Chief Juſtice. The reaſon of the act of parliament about certificates, was only to encourage pariſhes were minded to go, to receive them; and therefore it *enacts*, that when the poor perſon ſhall be chargeable, the pariſh which gave the certificate ſhall receive and provide for him as a ſettled inhabitant, which words lay an obligation on the pariſh which gave him the certificate to receive and provide for him againſt that pariſh which they gave the certificate to. But as to all other pariſhes, they are as they were before, for the concluſion is only by reaſon of the words of the act of parliament, which extend only to the pariſh to which he was ſent; by conſequence the concluſion can extend no farther.

Powell, Juſtice, concurred with the Chief Juſtice. *Vide Salk. vol.* 2. *p.* 531.

Trinity, 1 *or* 2 *Ann. Cumner Pariſh* v. *Milton Pariſh.*

A man who was ſettled at *Cumner*, having ſeveral children born in that pariſh, afterwards removed to *Milton* with his children, and rented a farm of 10 *l. per annum* there, by which he gained a ſettlement in the pariſh of *Milton*, and becoming very poor, his children born in *Cumner* were, by an *order* of *two juſtices*, ſent thither, (*viz.*) thoſe who were *under ſeven years old*, the juſtices apprehending that the place of their *birth* was the place of their lawful ſettlement, and this *order* being removed into this court by *certiorari*, it was inſiſted to maintain the *order*, that the children had gained a ſettlement in *Cumner by birth*, which was not altered or defeated by any ſubſequent act of their *father*, in gaining a ſettlement at *Milton*, for his children were with him there only as *nurſe-children*, and his ſettlement ſhall not be the ſettlement of his children.

Holt, Chief Juſtice. The place where a *baſtard* is born is the place of his ſettlement, unleſs there is ſome trick to charge the pariſh; but the place where *legitimate children are born* is not the place of their ſettlement, for let that be where it will, the children are ſettled where their parents are ſettled; as for inſtance, if the father is ſettled in the pariſh of *H.* but goes to work in the pariſh of *B.* and before he gains any ſettlement there, has a ſon born in the pariſh of *B.* and then dies, this child ſhall be ſent to the pariſh of *H.* for it is not the birth, but the ſettlement of the father that makes the ſettlement of the child; and if the father has gained a new ſettlement for himſelf (as he had done in the preſent caſe) he has likewiſe gained a new ſettlement for his children, who do not go with him to his new ſettlement as *nurſe-children*, but as part of his family: and to what purpoſe is the father, upon coming into a new pariſh, to give notice of the number of his family, but only upon a ſuppoſition that they may gain a ſettlement there: but if a man is ſettled in the pariſh of *H.* and has children born there, and dies, and afterwards the mother of theſe children marries a huſband, who is ſettled in another pariſh, the children ſhall go along with her, not as part of her family, but as nurſe-children, to be maintained at the charge of the pariſh where they were born, and where their father, whilſt living, was ſettled, and to that pariſh they may be ſent *after ſeven years old*, as to the place of their lawful ſettlement; for this accidental ſettlement of their mother, which was only by the marriage with a ſecond huſband, whereby ſhe is now become one perſon with him, ſhall not gain a ſettlement for her children. *Vide Salk. vol.* 3. *p.* 259.

Michaelmas, 1 *Ann. The Queen* v. *The Inhabitants of Caple in Surrey.*

An *order* of *two juſtices* was made to remove a man and his two children from the pariſh of *C.* where he might become chargeable, he not having rented a tenement of 10 *l.* a year.

The court held, that ſaying he might become chargeable was not well; but it ſhould have been, that they were likely to become chargeable: but that ſaying he had not rented a tenement of 10 *l.* a year was ſufficient.

It was held bad as to the children, for they are only removeable as perſons not ſettled and likely to become chargeable, or ſo young as they are not able to provide

vide for themſelves; wherefore the *order* was quaſhed as to the children. *Vide Mod. Rep. vol.* 7. *p.* 54.

Michaelmas, 1 *Ann. The Queen* v. *Harris.*

An *order* of *two juſtices* made for diſcharging an apprentice on *ſtat.* 5 *Eliz.* was quaſhed, it not being ſigned by them as that ſtatute requires: and it was ſaid by the council, that one piece of wax might be the ſeveral ſeal of ſeveral people, by their putting their ſeals on it ſeverally. *Vide Mod. Rep. vol.* 7. *p.* 55.

Michaelmas, 1 *Ann. The Queen* v. *Gouche or Gouch.*

See this caſe fully ſtated in page 655 of this work, under the head *Maſters and Servants.*

Michaelmas, 1 *Ann. Ode* v. *Norcliffe.*

See this caſe fully ſtated in page 254 of this work, under the head *Certiorari.*

Michaelmas, 1 *Ann. The Queen* v. *Aberford-Eaſt.*

An *original order* made at the general quarter ſeſſions for the *Weſt Riding of Yorkſhire*, was removed into this court by *certiorari*; the tenor of which was as follows: "It is *ordered* that the churchwardens and
" overſeers of the poor of the pariſh of *Aberford* do
" make an aſſeſſment to the church and poor by a
" *pound rate*, and in the ſaid aſſeſſment do aſſeſs *Graſtonfield* lands, and all other lands within the ſaid
" conſtabulary to the uſe aforeſaid by a *pound rate.*"

The court was moved to quaſh this *order*, becauſe the juſtices have not any juriſdiction to make ſuch *original order* at the quarter ſeſſions, though it had been otherwiſe if it had come before them by appeal. And a day was given to hear council on both ſides. At which day nobody appearing to maintain the *order*,

It was quaſhed by *Powell*, *Powys*, and *Gould*, Juſtices. *Holt*, Chief Juſtice, abſent. *Powell*, J. ſaying it was impoſſible to make it good. *Vide Raym. vol.* 2. *p.* 798.

Hilary, 2 *Ann. The Pariſh of Weſtbury* v. *Coſton.*

A woman big with child was removed by *order* of the juſtices from *Weſtbury* to *Coſton*, and pending the *order*, before the next quarter-ſeſſions, ſhe was delivered of a baſtard child: *Coſton* appealed, and thereupon the *order* of the *two juſtices* was reverſed; but the child was ſent back to *Coſton*, as the place of its birth.

Holt, Chief Juſtice. Though there be no fraud, here was a wrongful removal, and the reverſal makes all void from the beginning: fraud, or not fraud, is not material in this caſe; but the ſettlement of the child depends on the removal, for if that was wrong, they ſhall not eaſe themſelves by it. *Vide Salk. vol.* 2. *p.* 532.

Hilary, 2 *Ann. The Queen* v. *The Inhabitants of Little-Port*; *or Tawney's Caſe.*

See this caſe fully ſtated in page 629 of this work, under the head *Mandamus.*

Hilary, 2 *Ann. The Queen* v. *Corbett.*

See this caſe fully ſtated in page 602 of this work, under the head *Juſtices of Peace.*

Eaſter, 2 *Ann. The Queen* v. *Savil or Savin.*

See this caſe fully ſtated in page 602 of this work, under the head *Juſtices of Peace.*

Trinity, 2 *Ann. The Pariſh of Little-Kire* v. *The Pariſh of Woolfall.*

A pariſhioner of the pariſh of *A.* came to *B.* with a certificate, according to the late act of parliament; and the juſtices reciting that matter, and becauſe he was likely to become chargeable to *B.* ſent him back to *A.* It was moved to quaſh the *order*, becauſe he was not removeable till he was actually chargeable by the expreſs words of *ſtat.* 8 & 9 *W.* 3. *c.* 30.

Per curiam. Let the *order* be quaſhed, *niſi.*

Powell, Juſtice, *contra.* If there was a fault in the certificate, it ought to appear to be the reaſon why he was ſent back, and the juſtices at their ſeſſions have not a juriſdiction by way of appeal on ſuch a certificate. *Vide Salk vol.* 2. *p.* 530.

Trinity, 2 *Ann. The Pariſh of Malden* v. *The Pariſh of Fletwick.*

An *order* reciting, that whereas complaint has been made unto us by the, &c. that *J. S.* who is lately come into the pariſh of, &c. with a certificate according to *ſtat.* 8 & 9 *W.* 3. is actually chargeable to the pariſh, was quaſhed; for the juſtices muſt adjudge him to be chargeable, or at leaſt muſt ſay it appeared to them that he was ſo; but the juſtices need not adjudge the place that gives the certificate to be the place of his laſt legal ſettlement. *Vide Salk. vol.* 2. *p.* 530.

Hilary, 3 *Ann. The Caſe of Foxham-Tithing in Wilts.*

A juſtice of peace was ſurveyor of the highway, and a matter which concerned his office coming in queſtion at the ſeſſions, he joined in making the *order*, and his name was put in the caption.

Holt, Chief Juſtice. It ought not to be; as if an action be brought by the Chief Juſtice of the Common Pleas in the court of Common Pleas, the *placita* muſt be *before Edw'ro Nevill Mil. & ſociis ſuis*, and not *before Thomas Trevor*, &c. Wherefore the *order* was quaſhed. *Vide Salk. vol.* 2. *p.* 607.

Eaſter, 3 *Ann. The Queen* v. *The Inhabitants of Newnham Murrey.*

An *order* of juſtices was, "whereas complaint has
" been made to us by the churchwardens, &c. of *A.*
" that *B.* came to ſettle in ſuch a pariſh contrary to
" law, therefore we *ordered* him to another place;"
which *order* was quaſhed for want of an adjudication that he was likely to become chargeable. *Vide Mod. Rep. vol.* 6. *p.* 163.

Trinity, 3 *Ann. Tracy* v. *Talbot.*

A man took part of an houſe in the pariſh of *D.* and was *rated* as an inhabitant of that pariſh, &c. and a diſtreſs was made for *that rate*; an in *replevin* it was held, by *Holt*, Chief Juſtice, that if *two* houſes are inhabited by *two* families, and there is but *one common door* where both enter, yet, in reſpect of their original, which is ſeveral, they continue ſeveral houſes, and are ſeverally rateable to the poor; and if one family goes away, the part where he dwelt ſhall be taken as an *empty houſe*; but if one houſe is divided by partitions, and inhabited by ſeveral families; as for example, if the owner dwells in *one* part, and a ſtranger in another part, theſe are likewiſe ſeveral tenements, and the inhabitants thereof ſeverally rateable to the poor whilſt they dwell in theſe ſeveral tenements; but if the ſtranger removes out of his part, and his family goes away, then the whole becomes an entire tenement, and the poſſeſſion thereof is devolved on the owner, and he is rateable for the whole as one tenement, &c. *Vide Salk. vol.* 3. *p.* 260.

Trinity, 3 *Ann. The Queen* v. *London.*

See this caſe fully ſtated in page 655 of this work, under the head *Maſters and Servants.*

Michaelmas, 3 Ann. The Queen v. *Branworth.*

See this caſe fully ſtated in page 534 of this work, under the head *Indictment.*

Michaelmas, 3 Ann. The Pariſh of St. Andrew's Holborn v. *The Pariſh of St. Clement's Danes.*

The *court of quarter ſeſſions* of *Middleſex* made an *order*, and afterwards the ſame ſeſſions vacated it by a *ſubſequent order*, and a *certiorari* being brought, *both orders* were returned thereon.

Holt, Chief Juſtice. You ſhould not have returned the *vacated order*, but only the latter. This is as if we, diſliking our judgment, ſhould the ſame term make an entry of two different judgments, and return both on a writ of *error*, which ought not to be: the ſeſſions is all one day, and the juſtices may alter their judgments at any time, while it continues: thus, at the *Old Bailey*, you ſee judgment *de pain forte & dure* given; and yet, if the party will plead, we will ſet aſide that judgment, and admit him to plead. *Vide Salk. vol.* 2. *p.* 494.

Hilary, 4 Ann. The Queen v. *The Inhabitants of Saint George.*

On an *order of ſeſſions* made to remove a child, which was inſiſted to be a baſtard, though born in lawful matrimony, becauſe the man and his wife were divorced by the *Spiritual Court*.

Per curiam. It is a baſtard; for being divorced we will not intend that the man and wife had been together unleſs it had appeared not to be ſo; and it was held to be a good *order*, though it did not ſay they did not come together. *Vide Forteſcue, p.* 315.

Hilary, 4 Ann. The Pariſh of St. Bride v. *The Pariſh of St. Saviour's.*

A poor perſon was ſent from St. *Bride*'s in *London* to St. *Saviour's* in *Southwark*, and on an appeal a *ſpecial order* was made: the caſe was, *B.* was bound apprentice for *four years* to *J. S.* and lived out theſe *four years* at St. *Bride*'s with him; *J. S.* was only a lodger, and had no ſettlement there.

And the court held, that the apprentice was well ſettled in St. *Bride*'s, for he was not a perſon removeable, nor does his ſettlement depend on his maſter, as that of a wife on her huſband; but he gains a ſettlement for himſelf within *ſtat.* 14 *Car.* 2. by *forty days* inhabitation, and ſo of a hired ſervant; but the matter went off upon another exception. *Vide Salk. vol.* 2. *p.* 533.

Michaelmas, 4 Ann. The Queen v. *Whiten.*

On a motion to quaſh an *order of ſeſſions* on a ſettlement, for that it was not in the *order*, that they adjudged him to be laſt ſettled in ſuch a pariſh, which he came from:

The court held it not neceſſary ſo to adjudge it; but it not appearing in the *order* that he had been chargeable to a pariſh, but only, that *whereas he was likely to become chargeable*, the court quaſhed it; for by the certificate the pariſh is bound to receive him, and cannot remove him till he becomes chargeable *actually*. *Vide Mod. Rep. vol.* 11. *p.* 64.

Michaelmas, 4 Ann. The Queen v. *Hedges.*

An *order* was made at the quarter-ſeſſions upon appeal: the caſe was, *Hedges*, an overſeer of the poor, accounted before *two juſtices*, and this account was allowed; the pariſh appealed to the quarter-ſeſſions from this allowance, and they diſallowed the account, and *ordered* him to pay ſo much over, which they adjudged to be in his hands; and for not doing this, they committed him. On a motion to quaſh this *order*, becauſe by *ſtat.* 43 *Eliz. c.* 2. *ſect.* 4. they ſhould have levied the arrears by diſtreſs and ſale, and in default of diſtreſs have committed him: the whole court agreed, that the juſtices at the ſeſſions upon the appeal muſt execute their judgment in the ſame manner as the *two juſtices* muſt do, and that the *two juſtices* muſt have ſent their proceſs to diſtrain, and on a return that there was no diſtreſs, ſhould have committed him. Then it was moved, that it might be only quaſhed as to this part; *but not allowed:* then it was further objected, that the *firſt order*, as recited in the *order of appeal* for the allowance of the account, was not by *two juſtices*, one of whom was of the *quorum*; but not allowed.

Per curiam. We cannot judge of that upon recital, ſo as that you may take advantage of it; you muſt bring in that *order* by *certiorari*. *Vide Salk. vol.* 2. *p.* 533.

Hilary, 5 Ann. The Queen v. *The Inhabitants of Barkin, and the Hamlets of Donneſdon and Needham in the ſame Pariſh.*

On quaſhing of ſeveral *orders* made relating to the *poor's rate*, the following queſtion was ſubmitted, by conſent, to the opinion of the judges of this court, *viz.* "whether a farmer for his ſtock ſhall not be chargeable to the *poor's rate*, as well as a tradeſman for his ſtock in trade."

Powell, Powys, and *Gould*, Juſtices, were of opinion, that a farmer for his ſtock was not taxeable, contrary to the opinion of *Holt*, Chief Juſtice. *Vide Raym. vol.* 2. *p.* 1280.

Eaſter, 5 Ann. Jenkins's Caſe.

An *order of ſeſſions* was made, that the defendant ſhould pay 2 *s. per* week towards the ſupport of his father, till that court ſhould order the contrary; which was held good, becauſe it was indefinite and no ſet time limited; and if an eſtate happened to fall to him, they might apply to the juſtices; otherwiſe if a time was limited. *Vide Salk. vol.* 2. *p.* 534.

Eaſter, 5 Ann. The Queen v. *The Inhabitants of Buckingham.*

A *ſpecial order* was made, wherein the caſe was; *H.* being a poor perſon went to *Buckingham*, where he took part of a houſe of *W. T.* at 3 *l. per annum*, and inſiſted when he took this apartment, that he would pay no taxes for it, but that the leſſor ſhould; this was agreed to, his rent being the more and the greater on that account: this appeared upon evidence, and alſo that this apartment before the taking, and while he continued in it, was diſtinct from the reſt of the houſe, without communication, and was taxed as a houſe of itſelf, and that the tax was laid upon *W. T.* the leſſor; and that while *H.* lived there he took up his freedom in the corporation, and once voted as a freeman at the election of bailiffs for the corporation. The juſtices at the quarter-ſeſſions adjudged this to be a good ſettlement; but on motion it was quaſhed. It was inſiſted, that ſince the explanatory *ſtat.* 3 & 4 *W. & M.* nothing makes a ſettlement within that ſtatute which does not come within the words; an explanatory act implying a negative of every thing elſe.

Holt, Chief Juſtice, and *Powell*, Juſtice. The coming into a pariſh, and being taxed by the pariſh, makes a good ſettlement without a notice in writing, within *ſtat. Jac.* 2. But the law is altered by *ſtat.* 3 & 4 *W. & M.* and as to his voting, we cannot take notice that it implied a ſettlement; for a bare reſidence might, by the conſtitution of the corporation, intitle him to that, and his voting was an act that related to the corporation, and not to the pariſh. *Vide Salk. vol.* 2. *p.* 534.

Michaelmas, 5 Ann. St. George Southwark v. *Saint Margaret's Weſtminſter.*

See this caſe fully ſtated in page 220 of this work, under the head *Baſtards.*

Michaelmas, 6 Ann. The Queen v. *Simmons.*

See this caſe fully ſtated in page 221 of this work, under the head *Baſtards.*

Eaſter, 7 *Ann. The Queen* v. *Atkins.*

See this caſe fully ſtated in page 221 of this work, under the head *Baſtards.*

Trinity, 7 *Ann. The Queen* v. *Collins.*

See this caſe fully ſtated in page 221 of this work, under the head *Baſtards.*

Michaelmas, 7 *Ann. The Pariſh of St. Giles's in the Fields*, v. *The Pariſh of Weybridge in the County of Surry.*

See this caſe fully ſtated in page 89 of this work, under the head *Apprentice.*

Eaſter, 8 *Ann. The Queen* v. *The Inhabitants of Puttenham.*

On a motion to *quaſh an order of ſeſſions*, it was excepted, that it did not appear that there was any complaint of the overſeers, only *A. B. &c.* one of the *quorum*, do *order*, &c.

Per curiam. The juſtices have no power but on complaint of the overſeers; therefore the *order* muſt be quaſhed.

Alſo a like *order of ſeſſions* in the caſe of *The Queen* v. *The Inhabitants of Crediton*, was quaſhed for the ſame reaſon. *Vide Mod. Rep. vol.* 11. *p.* 222.

Michaelmas, 8 *Ann. The Queen* v. *Cecil.*

The court was moved to quaſh an *order of ſeſſions*, made on the defendant to pay one *J. Y.* his ſervant in huſbandry 7 *l.* for wages; to which *order* the *two* following *exceptions* were taken:

1ſt. That *Y.* was a covenant ſervant, and the ſtatute does not extend to covenant ſervants.

2dly. That by the *order*, it appears to be made on the oath of the ſervant.

Powell, Juſtice, ſaid, that as to the *firſt exception*, the ſtatute having always had a favourable conſtruction, has been extended to covenant ſervants in huſbandry.

As to the *ſecond*, he ſaid it would be hard to charge the maſter on the oath of his ſervant on a private contract or covenant between them, and that it is againſt a rule of law, that any perſon ſhould be a witneſs in his own cauſe; and the ſtatute not directing that the ſervant's oath ſhould be taken in this cauſe, the juſtices ſhould have proceeded according to the rules of law. But the matter was adjourned.

And on the laſt day of the term it being moved again, and the *laſt exception* urged a ſecond time,

Powell, Juſtice. The oath of the party has been allowed ſometimes in caſe of neceſſity, but there is no neceſſity in this caſe, for there might have been evidence of the ſervice.

To which *Powys* and *Gould*, Juſtice, agreed; wherefore the *order* was quaſhed. *Vide Raym. vol.* 2. *p.* 1305. *Mod. Rep. vol.* 11. *p.* 266.

Michaelmas, 9 *Ann. The Pariſh of South Cadbury* v. *The Pariſh of Braddon in Somerſetſhire.*

On an appeal to the ſeſſions, that court diſcharged the *firſt order*, and now this court was moved to ſet aſide the *order of diſcharge*, becauſe the juſtices did not ſay whether they diſcharged it for form, or on the merits; for if it was for form, the pariſh is not bound; but if on the merits, the pariſh in conſequence is hereby diſcharged for ever.

Per curiam. The juſtices are not bound to expreſs the reaſon of their judgment in the judgment, no more than other courts; and if it was otherwiſe held in the late Chief Juſtice's time, it paſt without due conſideration. The reaſon of their judgment muſt be collected from the record; as where judgment is arreſted on an inſufficient indictment.

If the ſeſſions reverſe the *firſt order*, and that being removed appears not to be good, we muſt intend it was reverſed for form, and affirm the *order of reverſal.*

So if the ſeſſions affirm the *firſt order*, and that appears to be good, we muſt affirm the *order of ſeſſions.*

But if the *firſt order* appears bad, and the ſeſſions affirm it, this court muſt reverſe it, becauſe it appears bad. *Vide Salk. vol.* 2. *p.* 607.

Michaelmas, 9 *Ann. The Pariſh of Dunsfold* v. *The Pariſh of Ridgwick.*

It appeared by a *ſpecial order*, that a perſon hired a ſervant to live at *Ridgwick* for half a year, and after that the ſervant was hired again to live there for another half year with the ſame perſon, and thereupon ſerved a year in one continued entire ſervice, but by ſeveral hirings: it was urged, that here was a ſervice for a year, and a hiring for a year, though by ſeveral contracts; and that the hiring need not be by one entire contract, and that ſo it had been held.

Per curiam. It ought to be one entire contract, and one entire ſervice; the one is required by the ſtatute, as well as the other. If a ſervice under ſeveral contracts ſhall gain a ſettlement, a perſon who ſerves by the month, by the week, or by the day, may, if he continues a year, gain a ſettlement; one may hire by the day for charity; but there is danger of being chargeable in hiring ſuch a perſon by the year: for ſuch a term as a year it is not ſuppoſed a maſter would hire one, unleſs able of body, and ſo a perſon not likely to become chargeable. Alſo the Chief Juſtice obſerved, that by *ſtat. Eliz.* the retainer of ſervants was for a year; that *ſtat.* 14 *Car.* 2. requires *forty days* ſtay, and that this was inconvenient, for by gaining a ſettlement in *forty days*, ſervants grew inſolent; and that theſe latter ſtatutes, *viz.* 3 & 4 *W.* 3. *c.* 11. and 8 & 9 *W.* 3. *c.* 30. only turn the *forty days* into a year's ſervice, and the hiring to be a retainer for a year according to the ſtatute of *Eliz. Vide Salk. vol.* 2. *p.* 535.

Michaelmas, 9 *Ann. The Pariſh of Honiton* v. *The Pariſh of St. Mary-Axe.*

One *H.* came to *Honiton* with a certificate from the pariſh of *A.* after this he went to the pariſh of *B.* and now being ſent to the pariſh of *A.* the ſaid pariſh offered to prove that he was ſettled at the pariſh of St. *Mary-Axe*; and the queſtion was, whether *A.* was bound by the certificate as to *Honiton* only, or concluded as to all pariſhes whatſoever?

Per curiam. Before the ſtatute a certificate was only an evidence of a private undertaking between the pariſhes, in the nature of a contract; but now it is a ſolemn acknowledgment, like the conuzance of a fine; and thereby the party is owned to be legally ſettled there, and that they will provide for him; and as all other pariſhes on this certificate are bound to receive him, ſo the pariſh that certifies is concluded as to all other pariſhes. And there is no reaſon why it ſhould differ from an adjudication, ſince this is the acknowledgment of the pariſh ſigned by the proper officers, and made before two juſtices of peace, who are proper judges, and upon leſs evidence could have adjudged it a ſettlement, by which ſentence all parties would be bound, and there is no remedy but to repeal it. *Vide Salk. vol.* 2. *p.* 536.

Hilary, 10 *Ann. The Pariſh of Gatton* v. *The Pariſh of Milwich.*

An *order* was drawn up *ſpecially* for the opinion of the court; and the queſtion was, whether one appointed clerk of the pariſh by the parſon, and executing the office for a year, ſhould gain a legal ſettlement within *ſtat.* 3 & 4 *W. & M.* of which the words are, *viz. ſhall execute any annual office or charge?* For it was objected, that this was not an annual office.

Powell, Juſtice. His being put in by the parſon makes no difference, no more than where the conſtable is put in by the leet, and not by the pariſh; it is more than an annual office, he is not removeable, and has fees.

Eyre, Juſtice. He is but a ſervant to the parſon at will: where he comes in by election, he has an eſtate for life by the cuſtom; but here is no deed or writing: how can he have an eſtate for life in this office?

Powell, Juſtice. At that rate he has not an office at will, for a man cannot have an office at will without deed. The office of churchwarden was by common law, and yet that is for a year without any deed or writing. So it is with a pariſh-clerk, he is by common law an officer, and is in for life without deed; ſo ruled in the abſence of *Parker*, Chief Juſtice. *Vide Salk. vol. 2. p.* 536.

Trinity, 10 *Ann. The Pariſh of Petworth's Caſe.*

The court being moved to quaſh an *order* of juſtices, the following *exceptions* were taken.

1ſt. That there was a former *order* from the pariſh of *A.* to that of *P.* and this *order* being affirmed on an appeal to the ſeſſions, it was final not only between the pariſhes that were parties, but to all others, except a ſubſequent ſettlement could be found out: that therefore this *order* which was to remove one *W. P.* and *K.* his wife, together with their children, from *P.* to *R.* ſhould be quaſhed.

The *ſecond exception* was, that the ages of the children not appearing, they may have gained a ſubſequent ſettlement.

The *third exception* was, that three was no adjudication to become chargeable, but likely to become chargeable.

Per curiam. The *firſt* and *ſecond exceptions* are good; and the *firſt* is a point lately ſettled. Notwithſtanding the laſt, the order is valid. *Vide Mod. Rep. vol.* 10. *p.* 26.

Michaelmas, 10 *Ann. The Inhabitants of Southwell*, v. *The Inhabitants of Sneedon in Nottingham.*

See this caſe fully ſtated in page 221 of this work, under the head *Baſtards.*

Eaſter, 11 *Ann. Anonymous.*

Adjudged, That if a poor perſon is removed from the pariſh of *A.* to the pariſh of *B.* by *order* of *two juſtices*, and the pariſh of *B.* removes him to the pariſh of *C.* the *order* of the juſtices removing him to the pariſh of *B.* is become final, becauſe *B.* did not appeal to the quarter ſeſſions. *Vide Mod. Rep. vol.* 10. *p.* 84.

Eaſter, 11 *Ann. Anonymous.*

See this caſe fully ſtated in page 221 of this work, under the head *Baſtards.*

Michaelmas, 11 *Ann. The Caſe of the Inhabitants of Ware.*

In *Tawney*'s caſe, which does not materially differ from this, the queſtion was, whether a rate might be made to reimburſe an overſeer of a former year? and the court reſolved that it could not; and on this ground, that the preſent inhabitants are by law bound only to the maintenance of the preſent poor; for at that rate nobody that comes into a pariſh can tell what he is to truſt to. *Vide Mod. Rep. vol.* 10. *p.* 104.

Hilary, 12 *Ann. The Queen* v. *The Inhabitants of Mancheſter.*

The court was moved to quaſh an *order* of juſtices made for the payment of *two ſhillings per week* till further *order*, to *H.* for the relief of herſelf and her four poor children.

The *firſt exception* was, that the *order* did not ſet forth that *H.* was *indigent*, which is the very foundation of the juſtices juriſdiction; and for this reaſon the *order* was quaſhed.

Another fault in the *order* was, that the money was made payable till further *order*, whereas it ſhould have been during her poverty.

Eyre, Juſtice. Had this been an *order* for a ſettlement, the not naming the children would have been a fault. *Vide Mod. Rep. vol.* 10. *p.* 221.

Hilary, 12 *Ann. The Queen* v. *Dunn*; *or the Pariſh of Halifax*, v. *The Pariſh of Overton in the Weſt Riding of Yorkſhire.*

An *order* made on the father-in-law, for maintaining the widow of the ſon, was quaſhed, becauſe it did not ſet forth in the *order*, that the father was of ſufficient ability, in which caſe only the act enables the juſtices, *&c. Vide Mod. Rep. vol.* 10. *p.* 221.

Hilary, 12 *Ann. The Pariſh of Sandridge* v. *The Pariſh of Luton.*

In an *order* of removal of a baſtard child, it was ſtated, that a baſtard male-child about *three months* old was brought into *Sandridge*, and that ſuch a child was a baſtard, and was born in, and ſo ſettled in *Luton*; it was objected, that the *order* did not name the mother, nor ſay *unknown*; and the caſe of *Southwell* v. *Sneedon* was cited; it was held a good exception, and the *order* was quaſhed. *Vide Forteſcue, p.* 314.

Michaelmas, 12 *Ann. The Queen* v. *The Inhabitants of Riſborough.*

A woman who was ſettled at *A.* married a *Scotchman*, who by no means could have a ſettlement in *England*, (as the caſe was); and therefore the woman was returned to her firſt ſettlement at *A.* where ſhe ought to remain. *Vide Forteſcue, p.* 314.

The Pariſh of St. George v. *The Pariſh of St. Olave Southwark.*

Two orders were returned, the *firſt* for ſettling a poor man, one *Thomas Gill*, and the *ſecond* a confirmation of the *firſt*, on an appeal to the quarter-ſeſſions: the *firſt order* recited, "That whereas complaint has been "been made to us, *&c.* that *T. G.* had of late intruded into the pariſh of St. *George*'s, we adjudge him "to be laſt legally ſettled at St. *Olave*'s: theſe are "therefore to require you to convey the ſaid *T. G.* to "the pariſh of St. *Olave*'s;" and the direction on the *order* was, "To the churchwardens and overſeers of "the poor of the pariſh of St. *Olave*'s". The *order* was quaſhed. For they ought, and can only *order* the pariſh-officers where the intruſion is made, to make the removal. *Vide Salk. vol.* 2. *p.* 493. *Ibid. vol.* 3. *p.* 257.

Hilary, 1 *Geo. The King* v. *The Inhabitants of Bury-Pomroi.*

A poor child, of the pariſh of *Stock-Fleming*, was, by the churchwardens, bound apprentice to *A.* in that pariſh, and there lived with his maſter *two years*. Then *A.* removed to the pariſh of *Bury-Pomroi*, but gained no ſettlement, and there the apprentice ſerved out the remaining *five years* of his time.

It was held, that this was a ſettlement of the apprentice in the pariſh of *Bury-Pomroi*; and that it was not neceſſary that the binding and ſervice ſhould be in one and the ſame pariſh.

Stat. 12 *Ann.* whereby it is declared that the ſervant can gain no ſettlement, unleſs the maſter does, relates only to certificate-maſters. *Vide Mod. Rep. vol.* 10. *p.* 279.

Hilary, 1 *Geo. The Pariſh of Brightwell* v. *The Pariſh of Henley.*

Three weeks after *Michaelmas* a ſervant was hired, till the *Michaelmas* following; and on *Michaelmas-day*, he was hired for a year until the next *Michaelmas*; but did not ſerve out the year, though his ſervice in both years was above a year.

The queſtion was, whether this was a ſettlement? For though here was a hiring for a year, and a ſervice for a year, yet it was not a year's ſervice ſubſequent to that hiring.

Parker, Chief Juſtice, and his brethren, concurred, that it was a ſettlement; for here is a hiring for a year, and a ſervice for a year, though not under that hiring; which was reſolved not to be neceſſary, in the caſe of *Overton* v. *Steepleton*.

If a ſervant, during a whole year, is hired from week to week, and then is hired for a year, and ſerves one week; this is no ſettlement, for want of continuance in the ſervice *forty days* after the ſecond hiring. *Vide Mod. Rep. vol.* 10. *p.* 287.

Eaſter, 1 *Geo. The King* v. *Gully*

An *order of ſeſſions*, ordering the father to pay ſo much *per week* towards the maintenance of his daughter, was quaſhed; becauſe it was not ſet forth in the *order*, that ſhe was unable to work, without which the juſtices have no juriſdiction.

By being unable to work, the act means a perſon not able by work to get his own living; and not a perſon that is able to get nothing at all.

Another exception to the *order* was, that this allowance was to be paid until further *order*; whereas it ſhould have been, as long as the father continued able to allow, and the daughter poor and unable to work.

But this exception was over-ruled. *Vide Mod. Rep. vol.* 10. *p.* 308.

Michaelmas, 1 *Geo. The Pariſh of Pawlet* v. *The Pariſh of Burnham.*

A covenant-ſervant for a year, at the rate of 3 *l. per annum*, left his maſter by conſent, *three weeks* ſhort of a year; his maſter deducting *ſix* ſhillings for the *three weeks* out of his wages.

By *order* of *two juſtices*, it was adjudged a good ſettlement.

On an appeal to the ſeſſions, the court being divided, the *order* of the juſtices was confirmed. The caſe being ſtated ſpecially, and removed here by *certiorari*, it was urged in ſupport of the *order*,

1ſt, That it being ſet forth in the *order*, that he was a covenant-ſervant, it muſt be intended a covenant in writing; for the law knows nothing of a parol-covenant; if ſo, the covenant could be diſcharged by parol, and conſequently in point of law, he continued a ſervant to the end of the year.

2dly, It was ſaid, that his departure, only three weeks before the end of the year, ſhews it to have been a fraud, contrived to prevent a ſettlement.

Per curiam. Let the *order* be quaſhed, for an actual ſervice for a year is neceſſary. *Vide Mod. Rep. vol.* 10. *p.* 261.

Michaelmas, 1 *Geo. The King* v. *Miles.*

See this caſe fully ſtated in page 221 of this work, under the head *Baſtards*.

Michaelmas, 1 *Geo. The Pariſh of Newark* v. *The Pariſh of Workſworth, in the County of Derby.*

One *W.* and his wife and children were, by an *order* of two juſtices, removed to *Workſworth* as the place of their laſt legal ſettlement.

On an appeal to the ſeſſions it appeared, that *Newark* was the laſt legal ſettlement of *W.* and conſequently of his wife and children; they are therefore all removed to *Newark*.

The court was moved to quaſh the *order* of ſeſſions *as to the children*, becauſe it was no conſequence that *Newark*, being the laſt legal ſettlement of the father, muſt be ſo of the children, for they might have gained a new ſettlement.

Per curiam. This is not to be ſuppoſed. *Vide Mod. Rep. vol.* 10. *p.* 272.

Trinity, 2 *Geo. The Pariſh of Pancras* v. *The Pariſh of Rumbald in Suſſex.*

See this caſe fully ſtated in page 603 of this work, under the head *Juſtices of Peace*.

Trinity, 3 *Geo. The Pariſh of Horton* v. ——

The caſe ſtated on an *order* was as follows:

A ſervant was hired for *eleven* months, and then went home with his cloaths to his father for a week; and afterwards was hired for eleven months more by the ſame perſon, and then went home for a week; and ſo, *&c.*

The queſtion was, whether this was a ſettlement?

It was inſiſted that it was not, for by ſeveral reſolutions there muſt be a hiring for a year, and a ſervice for a year.

On the other ſide it was urged, that if this was no ſettlement, the act of parliament was eluded; and there will be no more ſettlements in this pariſh by virtue of it. That the fraud was very apparent from the circumſtances of the caſe; and that it is a rule in pleading, that nothing need be averred, that appears ſufficiently without.

That the reaſon on which this ſtatute was founded was, that a perſon of that bodily ſtrength as to be fit to be hired for a year, is not ſuch a perſon as the law preſumes is likely to become chargeable. Beſides, ſome regard is to be had to ſervants that they ſhould gain a ſettlement, and not be hurried from place to place.

And of this opinion was *Parker*, Chief Juſtice.

Pratt, Juſtice, was of a contrary opinion: ſo the matter was adjourned. *Vide Mod. Rep. vol.* 10. *p.* 392.

Trinity, 3 *Geo. The Inhabitants of St. Mary Colechurch* v. *Ratcliff.*

See this caſe fully ſtated in page 90 of this work, under the head *Apprentice*.

Michaelmas, 3 *Geo. The King* v. *The Inhabitants of Hyworth.*

An *order* was made to pay 3 *s.* weekly to *A.* by the pariſh of *Hyworth*, ſo long as he ſhould continue poor.

It was urged, that by *ſtat.* 43 *Eliz. c.* 2. it ought to appear, that they are poor and impotent. 1 *Keb.* 489. 2 *Keb.* 744. 643. *Eaſter*, 1 *Geo. The King* v. *Gully.* An *order* for a father to pay ſo much to his daughter was quaſhed, becauſe it was not ſaid *poor and impotent*, but only that ſhe was in a poor and deſtitute condition, and wanted relief. 5 *Mod.* 197. And *poor* is to be underſtood, *poor* and *old*, *poor* and *blind*, *poor* and *impotent*.

Parker, Chief Juſtice. I favour theſe *orders* as much as I can, becauſe no body takes care to draw them up for the poor; but it muſt be quaſhed.

In *Eaſter*, 4 *Geo.* in the caſe of *The King* v. *the Inhabitants of Stoke-Urſey*, an *order* was quaſhed, on the authority of this caſe, for the ſame fault; as was alſo an *order* to maintain a daughter in law in the caſe of the *King* v. *Tipper*, *Eaſter*, 5 *Geo. Vide Stra. vol.* 1. *p.* 10.

Hilary, 4 *Geo. The Inhabitants of Weſtwood.*

In an *order* of removal the complaint was recited to be made to *one juſtice* only, but the ordering part was by *two juſtices*; and this was held good. An exception was taken, that there was no adjudication of the place to which he was removed, being his laſt legal ſettlement, but only, *We order him to be removed to* A. *as the place of his laſt legal ſettlement.* And for this fault the *order* was quaſhed. *Vide Stra. vol.* 1. *p.* 73.

Hilary, 4 *Geo. The Pariſh of Tulby* v. *The Pariſh of Willerton.*

The juſtices remove a certificate-man, being likely to become chargeable.

Per curiam. On another *order*, the juſtices adjudged, that a perſon may become chargeable.

Per curiam. This is not ſufficient, for the ſtatute only enables the juſtices to remove perſons likely to become chargeable; for a man of the greateſt eſtate may poſſibly one time or other become chargeable, tho' it is very unlikely; and is ſuch perſon removeable? There is as much difference in this caſe between the words *may* and *likely* as between a poſſibility and a probability. *Vide Stra. vol.* 1. *p.* 77.

Eaſter, 4 *Geo.* *The Inhabitants of Horncaſtle* v. *The Inhabitants of Boſton.*

The queſtion was on the certificate of the pariſh, which is to be ſigned by the churchwardens and overſeers, and to be atteſted by two witneſſes, and to be allowed and ſubſcribed by two juſtices of the peace.

It was ſigned, ſealed, and delivered in the preſence of *S. H.* Mayor, and *Thomas Maſcal*, and it appeared he was a juſtice of peace; and the queſtion was, whether this atteſting by the juſtices was allowing?

Per curiam. It is not a good certificate, for the juſtices ought to allow, and theſe are only witneſſes here to the execution, and it is no mark of their approbation, which is matter of judgment. *VideForteſcue, p.* 301.

Eaſter, 4 *Geo.* *Between the Inhabitants of Joyford and Solebury.*

An unmarried perſon was hired by one *K.* from *Michaelmas* for a year, and he ſerved with that maſter half a year till *Lady-day*, as ſervant and ſhepherd; at *Lady-day* the maſter turned over his buſineſs and farm to one *S.* and the ſervant too, and paid him half a year's wages, but there was no new contract between the ſervant and *S.* but at the end of half a year *S.* paid him 5*s.* advance-wages for working in huſbandry, and he ſerved the other half year with *S*; this was held a good ſervice, becauſe the contract was not altered, it is a ſervice in purſuance of the ſame hiring. *Vide Forteſcue, p.* 317.

Trinity, 4 *Geo.* *The Inhabitants of Almonſbury* v. *The Inhabitants of Hodsfield in Yorkſhire.*

See this caſe fully ſtated in page 81 of this work, under the head *Appeal.*

Trinity, 4 *Geo.* *The Inhabitants of Bodington* v. *The Inhabitants of Barwell.*

A perſon was hired as a ſervant, and ſerved *ſix months* only; then came *ſtat.* 8 & 9 *W.* 3. which enacts and declares, they ſhall ſerve for a year.

Per curiam. This ſtatute ſhall have no retroſpect. *Vide Forteſcue, p.* 302.

Trinity, 4 *Geo.* *The Caſe of the Inhabitants of Weſtwood-Hay.*

The queſtion in this caſe was, whether the hiring from the ſtatute-fair after *Michaelmas* to the *Michaelmas* following was a good hiring?

And the court held it not a good hiring for a year; if a man wants a day of being of age, it is all one as if he wanted a year. Therefore the *order* was quaſhed. *Vide Forteſcue, p.* 303.

Trinity, 4 *Geo.* *Between the Inhabitants of Mereſly and Granborough.*

A woman, who was intitled as *ceſtui que truſt*, to the truſt of a term of *ninety-nine years*, for her life only, of *two rooms*, &c. the reſt of the houſe being let by her for twenty-one years, married.

Per curiam. The huſband has a good ſettlement; the ſtatute was meant of thoſe who went from one pariſh to another, to rent tenements under value, not of ſuch as had them; and if you cannot remove him, he is ſettled. Theſe are ſynonymous. *Vide Forteſcue, page* 302.

Trinity, 4 *Geo.* *The Caſe of the Pariſh of Freeport.*

An *order* of ſeſſions for one pariſh to relieve another pariſh in the ſame hundred was quaſhed; for the ſeſſions have power only when out of the hundred, and *two juſtices* when in the ſame hundred. *Vide Forteſcue, page* 303.

Hilary, 5 *Geo.* *Between the Inhabitants of Stallamberg and Haney.*

An *order* was made by *two juſtices* to remove one *A.* unleſs they ſhew cauſe.

Per curiam. This is not final, but conditional.

It was alſo objected that the juſtices ſaid we do believe.

Per curiam. It is ill. *Vide Forteſcue, p.* 323.

Eaſter, 5 *Geo.* *The Pariſh of Burclear* v. *The Pariſh of Eaſtwood-Hay.*

An *order* of ſeſſions being brought into this court by *certiorari*, it was adjudged, that the deſcent of a copyhold to the wife of a certificate-man gives him a ſettlement: the *order* of removal was therefore quaſhed. *Vide Stra. vol.* 1. *p.* 163.

Trinity, 5 *Geo.* *The King* v. *The Inhabitants of South-Marſton.*

The *order* ran thus; "whereas *J. C.* and his wife "are come into your pariſh, endeavouring to ſettle "*themſelves* contrary to law, and *are* likely to become chargeable: theſe are therefore to require you "to convey the ſaid *C.* and his wife *from your* ſaid pariſh to the pariſh of *A.* &c.

The court was moved to quaſh the *order*, for the uncertainty whether the huſband or wife came into the pariſh, it being in the ſingular, when it ſhould have been in the plural number; and *Salk.* 122. was cited, where an *order* of *two juſtices* was *doth*, and was quaſhed.

Pratt, Chief Juſtice. I do not think it neceſſary to ſhew they came in, but only an endeavour to ſettle; for that may be where the party never came in, as in the caſe of children born in one pariſh, when the ſettlement of the parent is in another. But if it was neceſſary, it is implicitly ſet forth, which in the complaint is ſufficient.

To which *Powys* and *Eyre*, Juſtices, agreed.

Forteſcue, Juſtice. The only *two* things that are requiſite for the juſtices to adjudge is the place of the laſt legal ſettlement, and that the party is likely to become chargeable. And theſe muſt be poſitive, though as to the complaint it is well enough to take it by implication. This is not falſe grammar as *doth*, which was in *Weſt's* caſe, for it is common for *Latin* authors to put the ſingular number where there are *two* nominative caſes. Therefore the *order* was confirmed. *Vide Stra. vol.* 1. *p.* 189.

Trinity, 5 *Geo.* *The King* v. *Munday.*

An *order* was made for the huſband to maintain the wife's mother, which *order* was made againſt both the huſband and wife. It appeared by the *order*, that the huſband had conſiderable effects with the wife, and that her mother fell into poverty after the marriage.

Per curiam. The *order* muſt be quaſhed, becauſe the ſon in-law is not within the act of parliament, and the wife cannot be of ability, becauſe her eſtate is a gift to the huſband, and he is a purchaſer for a valuable conſideration; and it would be inconvenient if the wife ſhould have children by a former huſband. *Vide Forteſcue, p.* 303.

Trinity, 5 *Geo.* *The Pariſh of White Waltham* v. *The Pariſh of New Windſor.*

See this caſe fully ſtated in page 250 of this work, under the head *Certificate.*

Hilary, 6 *Geo.* *The Pariſh of Ivinghoe* v. *The Pariſh of Stonebridge.*

On a ſpecial *order* of ſeſſions, the caſe was ſtated for the opinion of the court, that in 1702 one *Richard Plower* was bound apprentice to *John Emmerton*, who was legally ſettled in *Ivinghoe*; that he ſerved part of his time there, and then the maſter went with all his family as a certificate-man to *Stonebridge*, where he purchaſed an eſtate of the value of 60 *l.* and after ſuch purchaſe, the apprentice lived with him *ſix months* till the apprenticeſhip expired; and becauſe *ſtat.* 12 *Ann*, *c.* 18. provides that the apprentice of a certificate-man ſhall gain no ſettlement in the pariſh to which the maſter goes by certificate; therefore the juſtices adjudge the ſettlement at *Ivinghoe*, where the binding and great part of the ſervice was.

Per curiam. The *order* muſt be quaſhed, for as the apprenticeſhip expired in 1709, *ſtat.* 12 *Ann* is out of the caſe, not being made with any retroſpect; and then the caſe is no more than that an apprentice of a certificate-man lives *forty days* in *Stonebridge*, which before that ſtatute was enough to gain him a ſettlement. But if this had been a caſe ſince that ſtatute, yet we think the ſettlement would be in *Stonebridge*; for according to the caſe of *Burclear* and *Eaſtwood-Hay*, *Eaſter* 5 *Geo.* when the certificate-man makes a purchaſe, he immediately ceaſes to be there in nature of a certificate-man, and becomes a ſettled inhabitant; ſo that laying the ſtatute out of the caſe, (as we muſt do, it being nothing to the purpoſe) in this view here is a ſervice for *ſix* months as an apprentice in a pariſh where the maſter was legally ſettled, which is more than ſufficient to give a ſettlement to the apprentice. *Vide Stra. vol.* 1. *p.* 265.

Hilary, 6 *Geo.* *The King* v. *Furneſs.*

An *order* for non-payment of ſmall tithes was quaſhed, becauſe ſaid only *on complaint* generally, and *ſtat.* 7 & 8 *W.* 3. *c.* 6. requires the complaint to be in writing. *Vide Stra. vol.* 1. *p.* 264.

Eaſter, 6 *Geo.* *The Pariſh of Albrighton* v. *The Pariſh of Skipton.*

On an appeal from an *order* of removal made by *two juſtices*, one of whom was of the *quorum*, the ſeſſions, reciting that they had peruſed the charter of *Albrighton*, and it not appearing *thereby* that the *two juſtices* were either of them of the *quorum*, therefore they quaſhed the *order* of removal.

Per curiam. The *order of ſeſſions* muſt be quaſhed, not for want of our power in the ſeſſions to look into the juriſdiction of the *two juſtices*, for that they certainly have; but becauſe that want of juriſdiction is not ſufficiently alledged, ſince they might have a juriſdiction, thought it did not appear on the charter of *Albrighton*. The ſeſſions ſhould have ſaid in general, that it appeared to them that the *two juſtices* were neither of them of the *quorum*, and that would have been a good cauſe to quaſh the *order* of the *two juſtices*. *Vide Stra. vol.* 1. *p.* 300.

Trinity, 6 *Geo.* *The King* v. *The Inhabitants of Telſcombe.*

Per curiam. The *order* muſt be quaſhed, for it being for the contributory pariſh to make a rate at 6 *d.* in the pound is ill for uncertainty: it ſhould have been, to raiſe ſuch a certain ſum. *Vide Stra. vol.* 1. *p.* 314.

Michaelmas, 6 *Geo.* *The Pariſh of Little Bitham* v. *The The Pariſh of Somerby.*

An *order* was made by *two juſtices* to ſend *A.* to *B.* as the laſt place of his legal ſettlement. *B.* appeals, and the *order* is confirmed. Soon after, without ſtating that *A.* had gained any new ſettlement, *B.* ſends him to *C.*

Per curiam. An *order* of reverſal is final only between the *two* pariſhes; but if it is confirmed, it is final as to all the world; and therefore no new ſettlement appearing, the *order* of removal from *B.* muſt be quaſhed. *Vide Stra. vol.* 1. *p.* 232.

Eaſter, 7 *Geo.* *The Pariſh of Ratcliffe Culy* v. *The Pariſh of Exall in Coventry.*

On an *order* for the removal of a widow and her *two* children from *Exall* to *Ratcliffe Culy*, it appeared that ſometime ſince *A. B.* was hired, and ſerved for a year in the pariſh of *R. C.* and gained no other before his death, therefore the juſtices adjudge the wife and her children to be ſettled in *R. C.* and ſend them thither, which was the ſettlement of the huſband.

The court was moved to quaſh the *order*, becauſe a married man gains no ſettlement by any hiring or ſervice; and likewiſe becauſe the children are called *her* children, and not *his*.

Per curiam. We never make intendments to deſtroy an *order*, and it does not appear he was married at the time of the hiring, and if he was married during the ſervice, that will not prevent his ſettlement. And as to the children, we muſt intend them to be *his* children by *her*, till the contrary appears; and that they are ſo, is implicitly averred in the adjudication of the children's being ſettled with him; for that they could not be, if they were her children by a former huſband; we muſt then conclude them to be his. Therefore the *order* was confirmed. *Vide Stra. vol.* 1. *p.* 211.

Eaſter, 7 *Geo.* *The King* v. *The Inhabitants of Iſlip.*

One *W.* was hired by one *J.* as ſervant for a year in the pariſh of *Iſlip*; in the year he fell was for about *ſix days*, and was abſent from his maſter's houſe *four days*, to ſee his mother who lay ſick, without his maſter's leave, and *three days* before the end of the year he aſked his maſter's leave to go to *Biceſter* to be hired for the next year; but he refuſed to give leave, and ſaid, if he did go he ſhould go for good and all, and he would deduct *ſix pence per* day for his wages for the *three days*; but the ſervant refuſed to conſent to any ſuch deduction, and ſaid he would ſerve out the year, but agreed to deduct for his ſickneſs *ſix pence*, and for his *four days* abſence *ſix pence* more. whereon the maſter paid him his wages all but the *two ſhillings* and *ſix pence* deducted as before. The ſervant went to *Biceſter* and did not return after; the maſter twice at different times during the ſaid year, told the ſervant he ſhould not have any ſettlement at *Iſlip*. This was an *order* of *two juſtices* made to ſend him to *Iſlip*.

Per curiam. The *order of appeal* muſt be affirmed, for the ſickneſs was the *act of God*, and that will not make him ceaſe to be a ſervant; and going to ſee his mother was his duty, and but a ſmall neglect, and the maſter received him again: as to the *three days* before the end of the ſervice, it is well enough, it was reaſonable to go to be hired, he ought not to have been denied, and he would not conſent to go away. But beſides, it is apparent fraud in the maſter, and done to prevent a ſettlement; for he declaring twice that he ſhould not be ſettled. Therefore he is ſettled at *Iſlip*. *Vide Forteſcue, p.* 305.

Trinity, 7 *Geo.* *The King* v. *Butcher.*

An exception was taken to an *order* of baſtardy, that it did not appear the child was born in the pariſh to which the relief is *ordered*; for it ran thus, *we* A. *and* B. *two juſtices of the borough of* Lime Regis, *reſiding within the limits wherein the pariſh church is, within which pariſh the child was born, do*, &c. which is only an averment that the juſtices reſided in that pariſh where the child was born, but that might not be the ſame pariſh to which relief is given; and for this fault the *order* was quaſhed. *Vide Stra. vol.* 1. *p.* 437.

Michaelmas, 7 *Geo.* *The Pariſh of Barleycroft* v. *Coleoverton in the County of Rutland.*

An *order* of removal was made from *B.* to *C.* reciting that the party had *fifteen* years ſince come with a certificate allowed according to the act of parliament from *C.* to *B.* and being now actually chargeable, they ſend him back to *C.*

The court was moved to quaſh it; 1ſt. Becauſe they do not ſay that during the *fifteen years* he gained no ſettlement in *B.* for a certificate-man may gain a ſettlement as well as any other: *but not allowed*; for all that is neceſſary to be ſhewn, is the certificate, and that the party is chargeable, and the length of time makes no difference.

2dly. That it was not mentioned that the certificate was atteſted, but only that it was allowed.

Per curiam. The atteſtation is by the ſtatute made previous to the allowance, and therefore when they ſay it was allowed according to the act of parliament, we muſt intend it was atteſted, or elſe it could not be allowed. Therefore the *order* was confirmed. *Vide Stra. vol.* 1. *p.* 402.

Michaelmas, 7 *Geo.* *The Pariſh of Maidſtone* v. *The Pariſh of Dething.*

In an *order* of removal it was held well, to ſhew a complaint that the party is come into the pariſh of *A.* and is likely to become chargeable, without ſaying farther, *to the ſaid pariſh of* A. *Vide Stra. vol.* 1. *p.* 393.

Eaſter, 8 *Geo.* *The King* v. *The Inhabitants of Brickhill.*

Two juſtices of the peace made an *order* to remove one *Green*, his wife, and ſeven children from the pariſh of *Horewood* to the pariſh of *Brickbill*, which *order* was confirmed on an appeal to the ſeſſions; and both the ſaid *orders* being removed into this court by *certiorari*, the caſe appeared to be thus:

This *Green* being a poor man, lived at *Horewood* at a place called *Roſcoe's Tenement*, and paid taxes there by the name of the occupier of *Roſcoe's*, and for that reaſon he, his wife, and children were ſent thither.

The court was moved to quaſh theſe *orders*, becauſe this man ought to be *perſonally charged to pay taxes*, otherwiſe he gains no ſettlement by paying them as occupant of a tenement, though he was likewiſe charged as a *farmer* thereof at that time; for the word *farmer* does not prove him to be occupant, becauſe he may let the tenement over to another.

But on the other ſide it was inſiſted, that *paying taxes* by the name of occupant of *Roſcoe's* tenement, and naming him farmer of the ſame at that time, is a ſufficient deſignation of the perſon to gain a ſettlement there; and the court being of that opinion, theſe *orders* were quaſhed. *Vide Mod. Rep. vol.* 8. *page* 38.

Trinity, 8 *Geo.* *The Pariſh of Hobey* v. *Kingſbury.*

Two juſtices adjudging the ſettlement of the huſband to be at *Kingſbury*, and that he is likely to become chargeable to *Hobey*, they ſend him, his wife, and ſon of one year old, to *Kingſbury*, and whether this was good as to the wife and child, was the queſtion: and it was held well enough; therefore the *order* was confirmed. *Vide Stra. vol.* 1. *p.* 527.

Trinity 8, *or Michaelmas* 9, *Geo.* *The King* v. *Fairclough and others, Inhabitants of Lambeth.*

See this caſe fully ſtated in page 608 of this work, under the head *Leaſes.*

Michaelmas, 8 *Geo.* *The King v. Cleg.*

An *order* of baſtardy was made at the ſeſſions, which was admitted to have original juriſdiction. It was objected, that it was not ſaid the defendant was ever ſummoned or appeared, and natural juſtice required that he ſhould at leaſt have an opportunity to defend himſelf.

Prtt, C. J. Theſe *orders* made originally at ſeſſions are very rare, the uſual way being to bring the matter before the ſeſſions by way of appeal from the *order* of *two juſtices*. If it ſhould be taken, that the *order* of *two juſtices* is ſufficient, without their ſhewing a ſummons or appearance; yet, I think this caſe will fall under a very different conſideration. For in the other caſe the party has an opportunity to relieve himſelf by appeal, whereas on an *original order* at ſeſſions he can have no opportunity to bring the matter to a farther examination; ſo that it is but a lewd woman's going behind his back and ſwearing a baſtard on him, and the moſt innocent in the world may be condemned. In the caſe of the *Queen* v. *Simpſon*, *Raym.* 1406, it was long debated, whether there ought not to have been a perſonal appearance of the *deer-ſtealer*; at laſt it was determined, that a ſummons was ſufficient, but it was never offered to be ſupported on the footing of not ſhewing a ſummons; ſo far from it, that exceptions were taken to the manner of the ſummons, and the court delivered a ſpecial opinion as to them.

I do not ſee to what purpoſe we exerciſe a ſuperintendency over all inferior juriſdictions, unleſs it is to inſpect their proceedings, and ſee whether they are regular or not. I have often heard it ſaid, that nothing ſhall be preſumed one way or the other in an inferior juriſdiction. And as to the caſe of wages, it was always wondered at; in Lord *Parker's* time it was actually contradicted, in the caſe of the *King* v. *Helling. Adjourned.* In *Trinity*, 12 *Geo.* the matter was again moved, and confirmed without oppoſition. *Vide Stra. vol.* 1. *p.* 475.

Michaelmas, 8 *Geo.* *The Pariſh of Chewton* v. *The Pariſh of Compton Martin.*

Two juſtices made an *order* for the removal of *two* different families, and the ſeſſions on appeal quaſhed the *order* for inſufficiency; and to maintain the *order of ſeſſions*, it was objected to the *order* of *two juſtices*, that though the pariſhes are the ſame in both caſes, yet the removal of two families by one *order*, is ill; for ſuppoſe the removal of one is legal, and the other illegal, and there is an appeal to the ſeſſions as to both, and the *order* is confirmed as to one, and reverſed as to the other; what is to be done in that caſe as to coſts? *Stat.* 8 & 9 *W.* 3. *c.* 30. giving coſts to the pariſh in whoſe favour the appeal is determined, and now the appeal will be determined in favour of neither, and of both; it cannot be ſaid that the *order* is reverſed, becauſe it ſtands good as to part; and it cannot be ſaid to be confirmed, becauſe it is not held good as to the whole.

Eyre and *Forteſcue*, Juſtices, were of opinion, that the *order* was ill, giving this reaſon, that the party removed had a right to appeal; for it may be he was removed from his own eſtate, and then, on his appeal, it will conſequentially draw over the other matter, in which perhaps the parties on all ſides acquieſce.

The Chief Juſtice ſaid, he had not fully conſidered it; but the other juſtices were clear, that the *order* of the *two juſtices* was ill, and the council for the maintenance of that *order*, refuſing to refer the whole matter to the judge of aſſize, he pronounced that the *order* of ſeſſions ſhould be confirmed. *Vide Stra. vol.* 1. *p.* 471.

Hilary, 9 *Geo.* *The Pariſh of St. Michael in Bath* v. *The Pariſh of Nunny in the County of Somerſet.*

An *order* of removal was made, reciting that the wife of *B.* who is now living, and *C.* his child, had intruded, &c. and were likely, &c. and that the place of ſettlement of the wife and children was in St. *Michael*, they are therefore removed thither. The court was moved to quaſh the *order*, becauſe it did not appear that the huſband was, at the time of the removal, in the pariſh of St. *Michael*, ſo that it may be, they ſent the wife away from the huſband.

Per curiam. We cannot intend he was not; if he was in the pariſh from which ſhe was ſent, that indeed would vitiate the *order*; but as neither of theſe facts appear againſt the *order*, to ſatisfy us that it is bad, we are not to preſume it to be ſo; therefore the *order* muſt be confirmed. *Vide Stra. vol.* 1. *p.* 544.

Trinity, 9 *Geo.* *The Pariſh of Foſton* v. *The Pariſh of Carlton.*

Two juſtices of peace ſent a poor perſon from *F.* to *C.* On appeal the *order* was quaſhed; and at *three months* end *two juſtices*, without ſhewing any new ſettlement ſince the laſt *order*, made a new *order* to remove him from *F.* to *C.* a ſecond time.

Per curiam. The laſt *order* muſt be quaſhed. The caſe of *Barrow* v. *Ingoldſby*, *Eaſter*, 11 *Ann.* was at the diſtance of *nine months*; but the court quaſhed it, becauſe there could be no inconvenience in putting them to ſhew a new ſettlement. *Vide Stra. vol.* 1. *p.* 567.

Trinity, 9 *Geo.* *The Pariſh of Alhallows on the Wall* v. *The Pariſh of St. Olave in Surry.*

On a *ſpecial order* of ſeſſions, a caſe was ſtated, that an apprentice was bound to *A.* in one pariſh, but by agreement ſerved *B.* in another pariſh, and the ſeſſions ſettle him with *B.*

Per curiam. The *order* muſt be confirmed. This is exactly the caſe that was in this court, *Michaelmas*, 3 *Geo. Between the Pariſhes of Holy Trinity and Shoreditch*, where *F.* was bound to *T.* with an intent to ſerve *G.* (which he did) and the court, on a ſpecial reſolution, adjudged the ſettlement to be with *G.* *Vide Stra. vol.* 1. *p.* 554. *Mod. Rep. vol.* 8. *p.* 169.

Michaelmas, 9 *Geo.* *The King* v. *The Inhabitants of St. Peter's in Oxon, and Wycomb.*

One *S.* a ſtage-coachman, lived at St. *Peter's*, *Oxford*, and had occaſion to take freſh horſes at *Wycomb*, and he hired one *D.* for a year to look after theſe horſes at *Wycomb* for a year.

The court held him ſettled at *Wycomb*, becauſe of his ſervice and inhabitancy; his maſter's reſidence is nothing; nor whether he was ſettled or no, he could not be ſent to St. *Peter's*, becauſe it did not appear on the ſpecial ſtate of the *order*, that he was there for the ſpace of *forty days*. *Vide Forteſcue, p.* 318.

Hilary, 10 *Geo.* *The Pariſh of St. Giles in Reading* v. *The Pariſhes of Everſly and Blackwater.*

Per curiam. The father's ſettlement is a good ſettlement of a legitimate child in a pariſh where the child never lived. The father was ſettled in the pariſh of *A.* and the child was born in the pariſh of *B.* the child is not ſettled where it was born, but where the father was ſettled. *Vide Forteſcue, p.* 320. *Raym. vol.* 2. *p.* 1332.

Eaſter, 10 *Geo.* *The Inhabitants of Buckington or Puckington* v. *The Inhabitants of St. Michael, Sebington, in Somerſetſhire.*

See this caſe fully ſtated in page 91 of this work, under the head *Apprentice.*

Trinity, 10 *Geo.* *The King* v. *The Inhabitants of St. John the Baptiſt, within the Borough of the Deviſes, Co. Wilts.*

See this caſe fully ſtated in page 91 of this work, under the head *Apprentice.*

Eaſter, 11 *Geo.* *The King* v. *Sheringbrook.*

An *order* of juſtices of peace, made for appointing the defendant overſeer of the poor, being removed into this court by *certiorari*, was quaſhed on motion; becauſe it did not appear by the *order* that the defendant was a ſubſtantial houſeholder, which is expreſsly required by *ſtat.* 43 *Eliz. c.* 2. *Vide Raym. vol.* 2. *p.* 1394.

Trinity, 11 *Geo.* *The King* v. *The Inhabitants of St. Leonard, Shoreditch.*

This pariſh has *three liberties*; one liberty made a ſcavengers' rate of 9*d.* in the pound, excluſive of the reſt, and on appeal to the ſeſſions, that rate was quaſhed, and the *order* of ſeſſions was affirmed by this court, becauſe it appeared that there were not the officers in this liberty which are required by *ſtat.* 2 *W. & M.* to make a ſcavenger's rate, and here were no church-wardens. *Vide Forteſcue, p.* 324.

Trinity, 11 *Geo.* *The King* v. *Auſtin.*

See this caſe fully ſtated in page 537 of this work, under the head *Innkeepers.*

Trinity, 11 *Geo.* *The King* v. *The Inhabitants of St. John's, Clerkenwell.*

This queſtion was on *ſtat.* 10 *Ann.* for building new churches and dividing pariſhes; St. *John's* was a new pariſh taken out of the pariſh of St. *James, Clerkenwell*, and the officers, as ſcavengers, *&c.* were appointed for the new pariſh, yet the officers of the whole pariſh made a rate to reimburſe the ſcavengers of the old and whole pariſh, for the new pariſh as well as the old one to pay; this *order* was appealed from to the ſeſſions, and affirmed; and being removed by *certiorari* into this court, was held a *good order*, and that no rate for ſcavengers could be made by the new pariſh, until there was an effective and perpetual diviſion made as the act directed; as to the other great rates, ſuch as for the relief of the poor, church-rates, and for highways, which by the *order* appeared was not done. *Vide Forteſcue, p.* 324.

Trinity, 11 *Geo.* *The King* v. *Venables.*

See this caſe fully ſtated in page 567 of this work, under the head *Innkeepers.*

Michaelmas, 11 *Geo.* *The King* v. *Trinity Pariſh, in Cheſter.*

Two juſtices made an *order* to remove the father and mother, and *J. E.* and *S.* their children, from the pariſh of, *&c.* to the pariſh of, *&c.* The court was moved to quaſh it, becauſe it did not ſet forth the reſpective ages of the children, for they might be apprentices, or ſervants for a year, and ſo gain a ſettlement elſewhere; and for this reaſon it was quaſhed as to the children; but held good as to the father and mother. *Vide Mod. Rep. vol.* 8. *p.* 337.

Michaelmas, 11 *Geo.* *The Pariſh of Aſhbrittle*, v. *The Pariſh of Wyley.*

On a ſpecial *order* of ſeſſions, the caſe appeared to be, that *thirty years* ſince, *H. C.* built a cottage on the waſte in *Wyley*, belonging to the Earl of *Pembroke*, and lived on it till his death, about *three years* ſince, when it deſcended to his daughter *E.* who was then married to *J. D.* that they entered and enjoyed it *three quarters of a year*, and then ſold the poſſeſſion of it to *J. W.* who has enjoyed it ever ſince without any moleſtation from the lord; but no original grant appears. And whether *J. D.* and his family are ſettled in *Wyley*, where they lived *three quarters of a year* in the cottage, in right of his wife, or in *Aſhbrittle*, which was the place of his laſt legal ſettlement before the marriage, was the queſtion; and by the *order* of *two juſtices*, and the *order of ſeſſions*, it was adjudged to be a ſettlement in *Wyley*.

Per curiam. The *order* muſt be confirmed; he lived *forty days* in the capacity of a perſon irremoveable, and that is a ſettlement of itſelf. Here has been an enjoyment for *thirty years*, during all which time the lord never claimed any thing. The leaſt that can be made of it is a title by diſſeiſin, and a deſcent is caſt. This man had undoubtedly a title againſt all the world, but the lord, and even againſt him it may be doubtful, after ſo long a poſſeſſion. Therefore in this caſe there is no colour to determine againſt his right, when the lord does not think fit to impeach it; though if he did, it would never be allowed to determine the title on an *order of removal*, but on an *ejectment* only. *Vide Stra. vol.* 1. *p.* 608.

Hilary, 12 *Geo.* *The Pariſh of Weſtham* v. *The Pariſh of Chiddingſtone.*

It was ſtated, that a ſingle woman ſettled at *C.* was married to a man who is ſince dead, but his ſettlement did not appear.

Per curiam. Her ſettlement before marriage ſtands. *Vide Stra. vol.* 1. *p.* 683.

Eaſter, 12 *Geo.* *The King* v. *The Inhabitants of Leofield.*

An *order* of removal was made, whereby *J. S.* was adjudged *likely to become chargeable*, without ſaying, *to the pariſh from whence removed*, and it was confirmed. *Vide Stra. vol.* 1. *p.* 698.

Eaſter, 12 *Geo.* *The King* v. *The Inhabitants of St. Mary the Virgin, in Marlborough.*

An *order* was made on *ſtat* 43 *Eliz.* for a neighbouring pariſh to contribute, *ſo long as we the ſaid juſtices ſhall think fit.*

Per curiam. It muſt be quaſhed; for the diſcretion that is left in the juſtices is as to the *quantum*, and not as to the duration of the contribution. *Vide Stra. vol.* 1. *p.* 700.

Trinity, 12 *Geo.* *The King* v. *Davie.*

See this caſe fully ſtated in page 92 of this work, under the head *Apprentice.*

Trinity, 12 *Geo.* *The Caſe of the Inhabitants of Borough-Fenn.*

An *order* made to tax this place in aid of another pariſh.

It was objected, *firſt*, That it was not ſhewn that *Borough-Fenn* was out of the pariſh.

2dly, They have made a rate, and taxed only ſome particular perſons.

Per curiam. The *order* is naught, particularly for the *firſt* objection; becauſe it is the foundation of their authority that it lies in another pariſh.

The Chief Juſtice doubted as to the *ſecond*, becauſe of the words, *any other of other pariſhes*, though he thought it reaſonable the rate ſhould be equal. *Vide Forteſcue*, *p.* 326.

Michaelmas, 12 *Geo.* *Between the Inhabitants of Capel and Weſt-Pecham.*

An *order* was made to ſend a poor perſon from *Capel* to *Weſt-Pecham*, and on appeal to the ſeſſions this *order* was quaſhed on the merits; and *four years* afterwards, *two juſtices* ſent the ſame perſon from the ſame place to the ſame place.

It was inſiſted, that the court would intend a new ſettlement in *four years.*

Per curiam. The *order* muſt be quaſhed; for here is a judgment that *Pecham* was not the place of ſettlement; and as long as that is in force, the juſtices have no authority to ſend to the ſame place, unleſs a new ſettlement was gained, or a good reaſon had appeared in the *order* as a foundation for their authority, for the court can intend nothing. *Vide Forteſcue*, *p.* 327.

Michaelmas, 12 *Geo.* *The King* v. *The Inhabitants of St. George.*

An *order* was made by juſtices at ſeſſions to make a rate on other pariſhes, becauſe that pariſh was not ſufficient; and though it did not appear whether the *order* was made before the *ſix days* work was done, or after, yet it was held well.

The court held, that it was founded on *ſtat.* 3 & 4 *W. & M.* and not on *ſtat.* 1 *Geo.* 1. which ties up the appeal to the next ſeſſions, and that *ſtat.* 4 *Geo.* 1. was only explanatory of *ſtat.* 3 & 4 *W. & M.* and though they did not appeal to the next ſeſſions, yet they might at another ſeſſions; and as to the matter of accompting, that is within *ſtat.* 3 & 4 *W. & M.* only; ſo they may appeal clearly as to that, after the next ſeſſions. *Vide Forteſcue*, *p.* 327.

Hilary, 13 *Geo.* *The King* v. *Reed.*

The defendant being a diſſenting miniſter, was rated on *ſtat.* 43 *Eliz.* as occupier of a meeting-houſe; but the *order* was quaſhed. *Vide Forteſcue*, *p.* 306.

Hilary, 13 *Geo.* *Between the Inhabitants of Paulſbury and the Inhabitants of Woodon, or Woodend, in Com. Northampton.*

On a *ſpecial order* of ſeſſions, the caſe was as follows: A man, with his wife and child, were ſettled in *Paulſbury* at his death; after which the wife removed to a copyhold of her own in *Woodon*, and carried the child, being *fourteen years old*, with her, where it lived *many years.* And now the queſtion was, where the child was ſettled? And the juſtices adjudged, that it had gained no ſettlement with the mother, and therefore ſent it back to the father's ſettlement in *Paulſbury.*

And on conſideration the court quaſhed the *order*, ſaying, it had been adjudged that a child was ſettled with the mother in the caſe of *the Pariſh of St. George* v. *the Pariſh of St. Catherine*, *Michaelmas*, 1 *Geo.* But it was there ſaid, if it had been an *entire thing*, they ſhould have doubted, whether a ſettlement, gained under the head of the family, could be diveſted by a derivative one from the inferior. *Vide Stra. vol.* 2. *p.* 746. *Raym. vol.* 2. *p.* 1473.

Hilary, 13 *Geo.* *The King* v. *The Inhabitants of Portſmouth.*

A perſon was retained as a weekly ſervant to a captain in 1690, before the ſtatute for retaining a year. and ſerving for a year. They quartered in *Wincheſter*, and the ſervant continued with the ſaid captain *two months*, and lodged in the ſame inn; but the *order* did not ſay he continued in the ſame ſervice, or as his ſervant; for he muſt continue as his ſervant for *forty days*; it was agreed that there was no need of notice in the caſe of a ſervant; and the *order* was quaſhed. *Vide Forteſcue*, *p.* 328. *Stra. vol.* 1. *p.* 746.

Michaelmas, 13 *Geo.* *The King* v. *Benoier.*

The court was moved to quaſh an *order*, made at the quarter-ſeſſions at *Hereford*, whereby the father-in-law was ordered to maintain his daughter-in-law: it was urged, that he was not, by law, obliged to maintain her, and the caſe of *The King* v. *Mundy*, *Trinity*, 5 *Geo.* was cited, where an *order* was made by the juſtices on a ſon-in-law to maintain his mother-in-law, which *order* was quaſhed. Accordingly a rule was made to ſhew cauſe why this *order* ſhould not be quaſhed; and in *Hilary* term following the rule was made abſolute, no cauſe being ſhewn to the contrary. *Vide Raym. vol.* 2. *page* 1454.

Michaelmas, 13 *Geo.* *The King* v. *Tenant.*

See this caſe fully ſtated in page 222 of this work, under the head *Baſtards.*

Michaelmas, 1 *Geo.* 2. *The King* v. *The Inhabitants of Aynhoe.*

On a *writ of certiorari*, *two orders* of juſtices for removing *T. P.* and *C.* his wife from the pariſh of *Aſhenden cum Pollicut* to *Aynhoe*, had been confirmed on an appeal at the quarter ſeſſions held for the county of *Bucks*, were removed into this court; and the facts ſpecially ſtated were theſe, *viz.*

That one *T. E.* about *fourteen years* ſince, was hired for a year to one *A. W.* at *Aynhoe*, and ſerved him the ſame year, and received his wages, and afterwards at *Michaelmas* 1725 went to *T. P.* at *Biceſter* in the county of *Oxford* to be hired, who told him that he would not hire him then, for that he expected a man-ſervant in *three weeks*; but if he the ſaid *T. E.* would ſupply the place of ſuch man-ſervant till he came, that he the ſaid *T. P.* would pay him for his time: whereon the ſaid *T. E.* entered into the ſervice of the ſaid *T. P.*

and lived there till near *Chriſtmas* following, and then was hired to him, and ſerved him at *Biceſter* till *Michaelmas* then following; and then at *Michaelmas* 1726 he was hired at *Biceſter* aforeſaid for a year to his ſaid maſter *P.* and ſtayed in his ſervice till the *Midſummer* following, and no longer.

It was argued, that the *order* ought to be quaſhed, *T. E.* appearing to be ſettled at *Biceſter*, becauſe though the ſtatute requires a hiring for a year and a year's ſervice, it does not require the hiring and ſervice to be under the ſame contract. And the caſe of *the Inhabitants of Brightwell* v. *the Inhabitants of Weſthanning*, was relied on as a caſe in point.

And the court, on the authority of that caſe, held, that theſe hirings and ſervice did make a ſettlement; for he was hired for a year, and ſerved a year: wherefore the *orders* were quaſhed. *Vide Raym. vol.* 2. *page* 1511.

Eaſter, 8 *Geo.* 2. *The Inhabitants of Cheſham in Bucks* v. *The Pariſh of Stepney in Middleſex.*

The court was moved to quaſh an *order* for removing one *J.* his wife and children, from *C.* to *S.*

It was objected that the juſtices ſtile themſelves in the *order*, *juſtices for the county aforeſaid*, which, as was urged, was quite uncertain, for both *Middleſex* and *Bucks* had been mentioned in the preceding part of the *order*, ſo that it does not appear whether they are juſtices of *Bucks*, which they ought to be, but is quite uncertain.

2dly. That the judgment of the *order* is not direct, but only by way of recital, *whereas complaint has been made to us, juſtices of the peace for the county aforeſaid, and we do adjudge*, &c.

Lord *Hardwicke*. As to the *ſecond objection*, though the ſtile of the *order* is a little incorrect, yet we ſhould not be too ſtrict in ſuch caſes, and the word *adjudge* being here, it is ſufficient. But as to the *firſt objection*, I think it is intirely uncertain to which county the word *aforeſaid* refers; if to the county laſt before mentioned, that is, *Middleſex*, and they have no juriſdiction, for the power is only given to the juſtices for the place whence the perſon is removed; and this court can intend nothing in this caſe, but muſt take the *order* as it appears; and it not appearing to be by the juſtices for *Bucks*, it is a bad *order*. Therefore the rule was made abſolute to quaſh the *order*. *Vide Caſes Temp. Lord Hardw. p.* 100.

Eaſter, 8 *Geo* 2. *The Pariſh of Whaddington* v. *The Pariſh of Tedford, in Lincolnſhire.*

On a ſpecial *order* of ſeſſions it was ſtated, that the *pauper* contracted for the purchaſe of a houſe in *Whaddington* for 39 *l.* and paid 9 *l.* out of his own money, and the remaining 30 *l.* was by his order paid by another perſon, to whom the premiſes were mortgaged for it: that the *pauper* had lived upon it *four years*, when the mortgage was foreclosed, and he turned out; and the queſtion being, whether he had gained a ſettlement hereby? the ſeſſions adjudged that this was a fraudulent purchaſe, and conſequently no ſettlement was gained thereby.

Per curiam. The order muſt be quaſhed. The purchaſe-money, by *ſtat.* 9 *Geo.* 1. *c.* 7. need only be 30 *l.* and the advancing the money by another makes no alteration. And the fact being ſpecially ſtated, we can judge as well as the ſeſſions, whether it be fraudulent or not. The circumſtance of his continuing *four years* ouſts all preſumption of fraud. *Vide Stra. vol.* 2. *p.* 1014.

Michaelmas, 8 *Geo.* 2. *The King* v. *Lloyd.*

A complaint in writing was exhibited to the quarter ſeſſions of *Cardigan* againſt *T. Lloyd*, clerk of the peace of that county, containing ſeveral charges of miſbehaviour, which, if true, were a ſufficient cauſe to remove him from that office. The ſeſſions received the complaint, and ordered the defendant a copy, and time to make his defence. And on the day appointed, reciting the complaint and notice, “on due examination thereof openly this day in court, and of the ſeveral matters and charges therein contained, and herein before partly ſpecified, alledged, and charged againſt the defendant, and on full hearing and examination of ſeveral witneſſes, and other due proofs, touching the ſeveral charges againſt the defendant in the ſaid articles contained, openly this day in court, in the preſence and hearing of the defendant, and of his council, who now attended in this court on his behalf, and made a defence for him; and on hearing what is alledged and inſiſted on by the defendant and his council in his defence, the court adjudged him *guilty* of ſeveral of the articles, and removed him from his office, purſuant to *ſtatute*.”

A *certiorari* was brought to remove the complaint into this court. It was objected, that this being a conviction in a ſummary way before juſtices of peace, and without a jury; and *ſtat.* 1 *W.* & *M. c.* 21. requiring the removal to be on due proof of the miſdemeanor complained of; the evidence in this caſe ought to be ſet out, that this court may ſee whether there was due proof; and not truſt the juſtices, who may have deprived the defendant of his *freehold* on leſs evidence than they ought to have done, or perhaps on that which is no evidence in point of law.

Lord *Hardwicke*. It is fully ſettled, that in convictions the evidence muſt be ſet out; and if this was to be conſidered as a conviction, it therefore would be bad. But we are of opinion, it is to be conſidered as an *order*. In the *three* caſes which have been on the act, the *certioraries* were to remove them as *orders*, and they are in *Engliſh*, which could not be, if they were convictions. *Bains*'s caſe was before all the judges, and they treated it as an *order*. And though it is ſaid, here is a puniſhment that follows, *viz.* the loſs of the office, yet the ſame may be ſaid of moſt of the acts of juſtices, where very ſevere penalties often follow. The caſes of *orders* of *baſtardy* are very ſtrong, which are grounded on much the ſame words in *ſtat.* 18 *Eliz. c.* 3. as in *ſtat.* 1 *W.* & *M. c.* 21. And as to the caſes of ſetting out evidence on demurrers; it is abſolutely neceſſary to have it on record, and the ſuperior courts are judges of the fact as well as the law; which on a *certiorari* they are not. *Vide Stra. vol.* 2. *p.* 996.

Trinity, 9 *Geo.* 2. *The Pariſh of Heptonſtall* v. *The Pariſh of Evingdon in Yorkſhire.*

A man and *four* children were ſent to *Heptonſtall* as the place of their laſt ſettlement. It was excepted, that the ages of the children were not ſet out.

Per curiam. That is only neceſſary where they are ſent out in conſequence of the father's ſettlement, but here is an expreſs adjudication of their actual ſettlement: ſo the *order* was confirmed. *Vide Stra. vol.* 1. *p.* 1047.

Michaelmas, 9 *Geo.* 2. *The King* v. *The Inhabitants of Oulton.*

On a *certiorari* to remove an *order of ſeſſions*, which had confirmed an *order* made by *two juſtices* for the removal of *three* poor children; the *order* was returned, which recited the *order* of the *two juſtices*, and that there was an appeal, It is *ordered* that the ſaid *order* be confirmed: they likewiſe returned, that council had applied to the juſtices to ſtate the fact ſpecially in the *order*, which they refuſed, whereon the council humbly delivered in their *bill of exceptions*, which ſays the return is hereto ſubjoined, the effect of which is, that it was proved the father of the children hired a farm in the pariſh of *Oulton* of 100 *l.* *per annum*, and the children were born there in lawful marriage, and that his wife had a copyhold eſtate in her own right in the pariſh of *Burnham Overy*, and after the father's death the children dwelt *three months* with the mother there, and then the eſtate was ſold; and therefore they think the juſtices ought to have adjudged the children to be ſettled at *Burnham Overy*.

But the court would not grant this motion, becauſe no exceptions were made to the *order* itſelf, for that allegation of what was the fact proved, is not part of the juſtice's *order*, but only the allegation of the council. *Vide Caſes Temp. Lord Hardw. p.* 169.

Trinity, 11 *Geo.* 2. *The King* v. *Wykes, and others.*

It was held, that though the complaint of a *pauper*'s ſettling may be made to *one juſtice*, yet the examination ought to be by *two*; and ſuch juſtices are to ſign the *order* of removal. *Vide Stra. vol.* 2. *p.* 1092.

Eaſter, 13 *Geo.* 2. *The Pariſh of Hasfield* v. *The Pariſh of Furley, in Glouceſterſhire.*

On a ſpecial *order of ſeſſions*, relating to the ſettlement of a boy of *eight years*, and a girl of *ſix years* of age, who had been removed by *two juſtices* from *Furley* to *Hasfield*, it was ſtated, that the mother of theſe children had an eſtate of 4 *l. per annum* in *Furley*, where ſhe and her huſband lived, and had theſe children; that ſhe dying, the huſband became tenant by the curteſy, and whilſt ſuch, he took 30 *l. per annum* in *Hasfield*, and lived *one* year there with his *two* children, and then died; that the children being found with their grand-mother at *Furley*, were both removed to *Hasfield*; which *order* the ſeſſions confirmed.

The court confirmed the *orders* as to the girl, but quaſhed them as to the boy. For as to the boy, he was tenant in fee of the 4 *l. per annum*; and though it was not ſtated, that he was actually on that ſpot, yet it was enough that he had ſuch an eſtate in the pariſh, from which he could not be removed. But as to the daughter, it was otherwiſe; ſhe could demand no maintenance out of her brother's eſtate; and it was never yet determined, that children ſhould go to a grandmother for *nurture*: ſhe may indeed be charged to contribute to their relief in the pariſh where they are ſettled. *Vide Stra. vol.* 2. *p.* 1131.

Trinity, 14 *Geo.* 2. *The Pariſh of Kirton* v. *The Pariſh of Weſton, in Nottinghamſhire.*

On a ſpecial *order of ſeſſions* it was ſtated, that the *pauper* took a farm of 10 *l. per annum* in *Kirton*, which had been let at that rent for *ſix years* laſt paſt, but before only at 7 *l. per annum*; and he alſo took a bye-tack of 20 *s.* a year in *Kirton*, and his family lived *ten months* there; that when he firſt took to theſe tenements he was not of ability to ſtock them; and being told by the former tenant, that 10 *l. per annum* was too much, he anſwered he did not regard the dearneſs, for as it was 10 *l.* a year it would gain him a ſettlement, and put an end to a diſpute between *two towns*; but deſired the former tenant to take no notice of this to any body. The ſeſſions determined this to be no ſettlement in *Kirton*. But the *order* being removed, it was quaſhed; for the court ſaid, that they could not hold this to be fraudulent, it not being ſo adjudged; and evidence of fraud is not ſufficient; and as to the value, they muſt take it to be according to the rent, unleſs the contrary was ſtated; for as it is a removal of a man from his farm, it ſhould be ſhewn to be under value. *Vide Stra. vol.* 2. *p.* 1156.

Trinity, 14 *Geo.* 2. *The King* v. *The Inhabitants of Great Bedwin.*

See this caſe fully ſtated in page 73 of this work, under the head *Amendment.*

Michaelmas, 14 *Geo.* 2. *The King* v. *The Inhabitants of Petham.*

On a ſpecial *order* it was ſtated, that the *pauper* was bound to a certificate-man in *Tenterden*, and after living with him there *two years*, was by him aſſigned over to a pariſhioner of *Lidd*, with whom he inhabited and ſerved for the remainder of the *ſeven years.* And the queſtion aroſe on *ſtat.* 12 *Ann. c.* 18. which ſays, "the apprentice of a certificate-man ſhall gain no "ſettlement;" whether the aſſignment could give him one? And the court were all of opinion, he had gained a ſettlement in *Lidd*; for the act had not made the binding void, but has only taken away one of the conſequences of ſuch binding for the ſake of the certificated pariſh. It never intended to meddle with the caſe of a legal pariſhioner's apprentice, and when once there is an aſſignment to ſuch a one, it is the ſame as if it had been an original binding: the true conſtruction of the ſtatute is, that *in reſpect to the certificated-pariſh*, ſuch binding and inhabitation ſhall give no ſettlement. *Vide Stra. vol.* 2. *p.* 1147.

Hilary, 15 *Geo.* 2. *The Pariſh of St. Nicholas in Harwich* v. *The Pariſh of Woolverſtone in Suffolk.*

The *pauper* came into *Harwich* with a certificate from *Woolverſtone*, addreſſed to the pariſh of *Harwich* near *Dover-Court*, and delivered it to a pariſhioner, who did not appear to be an officer of the pariſh. The ſeſſions were of opinion, he had not taken 10 *l. per annum* in *Harwich*, and was therefore not ſettled there; but as there was a miſtake of the name of the pariſh in the addreſs of the certificate, they held *Woolverſtone* could not be obliged to receive the *pauper.* But upon debate it was ruled they were; for it is not to be conſidered as a certificate to any particular pariſh, but as a general acknowledgment of his being a pariſhioner of *Woolverſtone*, and is concluſive againſt them to all the world; and the delivery of it to an officer is not neceſſary. *Vide Stra. vol.* 2. *p.* 1163.

Eaſter, 15 *Geo.* 2. *The King* v. *The Inhabitants of Sherborne.*

A certificate-man has a ſon born in the pariſh to which he was certified, who, when ſixteen years old, hires himſelf as a ſervant to a button-maker in the ſame pariſh, and ſerves a year. And upon conſidering the words of *ſtat.* 9 & 10 *W.* 3. *c.* 11. which declares, "That no perſon or perſons, who come in "by certificate, ſhall be adjudged to gain a ſettlement "by any act whatſoever, except he takes 10*l. per* "*annum*, or executes an annual office."

The court held, that the ſon of the certificate-man was equally within it, and that therefore the hiring and ſervice in this caſe gave him no ſettlement. *Vide Stra. vol.* 2. *p.* 1165.

Trinity, 15 *Geo.* 2. *The Pariſh of Lydlynch* v. *The Pariſh of Hilton.*

See this caſe fully ſtated in page 224 of this work, under the head *Baſtards.*

Trinity, 16 *Geo.* 2. *The Pariſh of Deddington* v. *The Pariſh of Dunfrew.*

A certificate-man purchaſed a houſe for 42 *l.* lived in it many years, then ſold it, and becoming chargeable, was ſent back. It was inſiſted, that *ſtat.* 9 & 10 *W.* 3. *c.* 11. ſaying, "A certificate-man ſhall gain "a ſettlement by no act whatſoever, unleſs the tak"ing 10 *l. per ann.* or ſerving an annual office:" this man, notwithſtanding the purchaſe, might be ſent back; and it was ſaid to differ from the caſe of *Burclear* v. *Eaſtwoodhay, Eaſter*, 5 *Geo.* 1. where the ſurrender of a copyhold to the certificate-man's wife was held to gain him a ſettlement; becauſe there it was not his own act, (as this purchaſe is) but it came to him by operation of law. The court did not think this a ſufficient diſtinction, and ſaid, A purchaſe was in its nature an excepted caſe; and his ſelling it afterwards made no alteration, as was held, *Trinity*, 12 *Geo.* 2. between *Saint Neots* and *Saint Clear.*

This alſo, as to a purchaſe by a certificate-man, was held the laſt term, in the caſe of the pariſh of *Stansfield. Vide Stra. vol.* 2. *p.* 1193.

Michaelmas, 16 *Geo.* 2. *The Pariſh of Nympsfield* v. *The Pariſh of Woodcheſter, in Glouceſterſhire.*

A man and his wife were removed from *Nympsfield* to *Woodcheſter*, and there was no appeal. They afterwards returned to *Nympsfield*, and there had three children, who were now ſent from *Nympsfield* to *Woodcheſter*, together with the father. And on appeal, as to the children, it was offered to be given in evidence that the man had a former wife, and conſequently the children born at *Nympsfield* were to be conſidered as baſtards ſettled there. The ſeſſions refuſed to let *Woodcheſter* go into this evidence, being of opinion, that *Woodcheſter* was concluded by the firſt *order* unappealed from, and that it made no difference that the children were born afterwards.

The court, on debate, confirmed *both orders*; for the marriages being eſtabliſhed by the firſt *order*, the ſettlement of the children, which is derivative, follows of courſe, and can no way be impeached, but by entering into the merits of the *firſt order*, which has been acquieſced in; and no doctrine is more eſtabliſhed than that an *order* unappealed from, is concluſive. *Vide Stra. vol. 2. p.* 1172.

Michaelmas, 17 *Geo.* 2. *The King* v. *The Inhabitants of Madley in the County of Stafford.*

See this caſe fully ſtated in page 260 of this work, under the head *Certiorari.*

Michaelmas, 17 *Geo.* 2. *The Pariſh of Wingham* v. *The Pariſh of Sellindge in Kent.*

It was ſtated in a ſpecial *order*, that a certificate-man having notice that he was appointed borſholder, never took the oath of office, but once executed a warrant of a juſtice directed to the borſholder: and this the ſeſſions determined to be gaining a ſettlement within *ſtat.* 9 & 10 *W.* 3. *c.* 11.

Per curiam. The *order* muſt be quaſhed, for the words of the act are, "being legally placed in ſuch "office;" that is, being the officer both of the *fact* and of the *right*, which this man was not, the *order* ſtating negatively that he was not legally placed therein, which can only be by an appointment, and ſwearing in. *Vide Stra. vol. 2. p.* 1199.

Trinity, 18 *Geo.* 2. *The Pariſh of Maidſtone* v. *The Pariſh of Hedcome in Kent.*

Maidſtone certificated *Richard Burden* and *Mary* his wife, who came therewith into *Hedcome*, and had *four* children. And on his becoming actually chargeable, they were all ſent back to *Maidſtone* by an *order* of *two juſtices* of the peace.

On appeal to the ſeſſions it was ſtated, that the man in 1715 lawfully intermarried with *Mary Lee*, who then appeared in court, and by whom he had ſeveral children, who were all maintained at *Maidſtone* as his wife and children. That in 1730 he (in fact) married *Mary Broomhall*, who was the woman that removed with him to *Hedcome*, and is the ſame that is now ſent back to *Maidſtone*; but the ſeſſions conſidering they were both called *Mary*, and that *Maidſtone* actually maintains *Mary* the real wife, and all her children; were of opinion the others were not to be ſent back to *Maidſtone*; and therefore confirmed the *order* of the *two juſtices* as to the man, and quaſhed it as to the woman, and the children of the ſecond marriage.

And now on debate in this court it was held, that the *two juſtices* of the peace had done right in ſending them all back to *Maidſtone*, for the certificate is concluſive to *Maidſtone*: and on the fact ſtated it does ſufficiently appear what *Mary* it was that was meant by the certificate: and that this caſe did not differ from that of *New Windſor* v. *White Waltham*; nor did it alter the caſe, that *Maidſtone* had the real wife and children to maintain alſo: they therefore confirmed the *order* of ſeſſions as to the man, quaſhed it as to the reſt, and confirmed the *order* of the *two juſtices* of the peace in the whole. *Vide Stra. vol. 2. p.* 1233.

Eaſter, 19 *Geo.* 2. *The Pariſh of Oſgathorpe* v. *The Pariſh of Diſeworth.*

A perſon was removed by an *order* of *two juſtices* of the peace from *Diſeworth* to *Oſgathorpe*, which *order*, on appeal, was diſcharged. He was by a ſecond *order* ſent from *Diſeworth* to *Oſgathorpe*, as a certificate-man, and upon an appeal it was ſtated, that the firſt removal was *before he became chargeable*, and the ſecond *after* he became ſo; and the ſeſſions were of opinion, that the firſt determination was not final between the pariſhes, and therefore confirmed the ſecond *order* of removal.

And it was moved to quaſh theſe *two laſt orders*, on the authority of *Salk.* 492. 524, which ſays, A reverſal is final between the parties.

Per curiam. So it would be, if the ſpecial matter did not appear; a certificated perſon cannot be ſent back, until he is actually a charge; a removal before is premature. The conſequence of which only is, that he muſt be ſuffered to remain till he does become chargeable, but not to make a premature removal final for ever. The laſt *orders* muſt be confirmed. *Vide Stra. vol. 2. p.* 1256.

Hilary, 30 *Geo.* 2. *The King* v. *Gayer, Eſq;*

See this caſe fully ſtated in page 605 of this work, under the head *Juſtices of Peace.*

Hilary, 30 *Geo.* 2. *The King* v. *The Inhabitants of Chidingfold.*

On a motion to quaſh an *original order* of *two juſtices*, made for the removal of one *R. G.* his wife and three children, from *W.* in *Hants* to *C.* in *Surry*, and alſo the *order* of ſeſſions confirming ſuch *order*;

The council for quaſhing theſe *orders* only ſtated the queſtion, *viz.* "Whether the tenant's paying the "land-tax (which was allowed him again by his "landlord) amounts to ſuch a *notice* as ſhall gain the "tenant a ſettlement?"

On coming to ſhew cauſe, the council who was to ſhew cauſe againſt quaſhing the *two orders*, acknowlowledged that he could not ſupport them, as the point had been already fully ſettled.

On which the court made the rule abſolute for quaſhing the *two orders*. *Vide Bur. S. C. vol. 2. p.* 415.

Eaſter, 30 *Geo.* 2. *The King* v. *The Inhabitants of Alton.*

On a motion made to quaſh *two orders*, *viz.* One made by *two juſtices* to remove *A. C.* the wife of *R. C.* jun. and her four children, from *Elvetham* to *Alton*, in *Hants*; the other made at ſeſſions confirming the *order* of the juſtices.

Caſe *R. C's.* Father and mother came by certificate from *A.* to *E.* where *R. C.* jun. was born ſubſequent to the certificate. *R. C.* jun. became a hired ſervant to one Sir *H. C.* at *E.* (where Sir *H. C.* reſided) and ſerved in the whole *ten years*. The laſt *forty days* of the *ſecond* year's ſervice was at *Scarborough*. Without ever quitting his ſervice, he applied to his maſter at the end of the *ſecond* year to continue for another year, which was agreed to by his maſter, after they returned to *E.* and he ſerved him the *third year* at advanced wages in *E.* and continued with him *ſeven years* after in *E.* after which he married and had thoſe children.

Adjudged, That the wife and children were properly removed by the juſtices to the ſettlement of the father, and that if the father ſhould hereafter come to *E.* he may be removed by another *order* to *A.* which gave the certificate, as his proper ſettlement. *It was held*, that a ſervant may gain a ſettlement in a place where his maſter has none, or where he never reſides himſelf. In this caſe the ſervant gained no ſettlement at *S.* his maſter being *there* only a ſojourner, and no inhabitant. What paſſed between him and his maſter at *S.* was not a completion of the original contract between them, it *was* only an adjournment of the contract, and the re-hiring was at *E.* ſo that the whole was but a continuance of the original ſervice firſt *begun* under the certificate from *A.* The court therefore affirmed the *two orders*. *Vide Bur. S. C. vol. 2. p.* 418.

Eaſter, 30 *Geo.* 2. *The King* v. *The Inhabitants of Fremington.*

On a motion made for a rule to ſhew cauſe why the *order* of ſeſſions ſhould not be quaſhed, and the *original order* affirmed.

Caſe, *M. B.* a *pauper*, was bound apprentice by a pariſh indenture, and before the expiration of her time, her maſter having no work for her, permitted her to get another place, where ſhe ſerved upwards of *forty days*, and then returned to her maſter, where ſhe only ſerved *eight days* before her indenture expired; and the queſtion was, whether ſhe had not loſt her original ſettlement by ſuch new ſervice?

Adjudged, That ſhe was not ſettled in the laſt maſter's pariſh where ſhe had ſerved *forty days*, for ſuch ſervice was under the indenture of apprenticeſhip, which was never diſcharged.

Per curiam. Let the *order* of ſeſſions be quaſhed, and the *order* of the *two juſtices* be affirmed. *Vide Bur. S. C. vol.* 2. *p.* 416.

Eaſter, 30 *Geo.* 2. *The King* v. *The Inhabitants of Bentley.*

On a motion to quaſh *two orders*, viz. one an *order* of *two juſtices* for removing *J. P.* his wife and ſon, from *Baxterley* to *Bentley* in *com. Warwick*; the other an *order* of ſeſſions confirming ſuch *order*.

Caſe. J. P. was hired, and ſerved for a year in *Bentley*, and before the (then) laſt general quarter ſeſſions, he was removed by proper *order* from *Baxterley* to *Stourbridge*, as the place of his laſt legal ſettlement: which *order* of removal was quaſhed on an appeal by the ſaid (then) general quarter ſeſſions. Since the ſaid laſt ſeſſions, the *pauper* being removed from *Baxterley* aforeſaid to *Bentley*; *Bentley* appealed, and offered to prove a ſettlement in *Stourbridge*, by a hiring and ſervice for a year in *Stourbridge*, before the ſaid laſt ſeſſions, but ſubſequent to the ſaid hiring and ſervice in *Bentley*, but the ſeſſions refuſed to go into it, being of opinion that the determination was *final* and *concluſive*.

After hearing the arguments of the council on both ſides,

Adjudged, That an *order* of confirmation (on an appeal to the ſeſſions) is *concluſive*, and *binds all the world*: but that an *order* of *diſcharge* or *reverſal* is only *final* between the contending pariſhes, and no *third* perſon is bound or affected thereby.

Per curiam. Let both *orders* be quaſhed. *Vide Bur. S. C. vol.* 2. *p.* 425.

Trinity, 30 & 31 *Geo.* 2. *The King* v. *The Inhabitants of Uffculme.*

On a motion to quaſh an *order* of ſeſſions made for quaſhing an *order* of *two juſtices* for the removing *J. H.* and *T.* his wife, and *J.* and *J.* their children, from the pariſh of *Uffculme* to that of St. *Sidwell* in *Exeter*.

Caſe. J. H. the *pauper*, purchaſed a tenement in St. *Sidwell*'s: for which he gave 8 *l.* in money, and a note for 4 *l.* more; amounting in all to 12 *l.* *H.* lived in the ſaid tenement with his family; and was in the year 1746 rated to the *land-tax* in manner following; to wit, "occupier, late widow *Hooper*'s, now *J. H.*'s "tenement, 12 *l.*" and for the year 1747, in the following manner: "occupier, late widow *Hooper*'s te"nement, now *J. H.*'s tenement, 12 *l.*" The ſaid *J. H.* was in 1746 rated to the poor's rate as follows: "occupier of the late *James Hooper*'s tenement, three"fourth *per* week:" and the ſame for 1747. The ſaid *J. H.* did after ſuch rating live in the ſaid pariſh of St. *Sidwell* for about one year; and did, during his reſidence there, pay the ſaid rates, both to the *land-tax* and the *poor*, according to the rates aforeſaid; and then ſold the ſaid tenement, and went with his family into the ſaid pariſh of *Uffculme*: from whence he was removed into the pariſh of St. *Sidwell*.

The ſeſſions being of opinion that the ſaid *J. H.* did not gain a ſetttlement in St. *Sidwell*'s by being rated as aforeſaid, the conſideration of the ſaid purchaſe being under 30 *l.* did therefore vacate the ſaid *order* of the juſtices.

After hearing the arguments of the council on both ſides, on ſhewing cauſe on this rule, the court gave their opinion.

Lord *Mansfield.* We are all clearly of opinion that *ſtat.* 9 *Geo.* 1. againſt *fraudulent purchaſers* of leſs value than 30 *l. bona fide* paid, only means to put a *negative* on a perſon's gaining a *ſettlement*, by making a ſmall purchaſe, with a *fraudulent intention* to gain a *ſettlement* thereby, in the pariſh where ſuch purchaſe is made; and that it does not *affect* any other method of *ſettlement*.

It is but reaſonable that perſons who have been rated, and have paid towards the public taxes and levies of a pariſh, ſhould receive aſſiſtance from that pariſh, when they become neceſſitous themſelves.

Per curiam. Let the *order* of ſeſſions be quaſhed, and the *order* of the *twa juſtices* be affirmed. *Vide Bur. S. C. vol.* 2. *p.* 430.

Trinity, 30 & 31 *Geo.* 2. *The King* v. *The Inhabitants of Great Torrington.*

On a motion to quaſh *two orders*, viz. *one* of *twa juſtices*, for removing *M. B.* a ſingle woman, from *Biddeford* to *Great Torrington*; the other, an *order* of ſeſſions confirming ſuch *order*.

Caſe. H. B. his wife and two daughters, *viz. M.* and *E.* came into *Biddeford* by certificate from *Lancraſs*, directed to *Biddeford*, and inhabited there ſome years; and that *M.* the *pauper* was then bound apprentice by the officers of the pariſh of *Lancraſs*, by the allowance of *two juſtices* of the peace, to *Thomas May*, for an eſtate in *Lancraſs*; and lived in *Great Torrington* an apprentice for *ſeven years*, under the ſaid indenture. That after the apprenticeſhip expired, the ſaid *M.* hired herſelf a ſervant for a year, with *Solomon Lyon* in *Biddeford*, and lived with him there for ſuch year, and for *eleven months* after.

The ſeſſions were of opinion, "That the ſaid *M.* "coming at firſt into the ſaid pariſh of *Biddeford*, un"der the ſaid certificate as aforeſaid, did not gain a "ſettlement there, by the ſubſequent ſervice as "aforeſaid in that pariſh," and confirmed the ſaid *order*.

The council, who was to have ſhewn cauſe, candidly acknowledging, that he had looked into the caſes, and was ſatisfied that theſe *orders* could not be ſupported.

Per curiam. Let the rule to quaſh theſe *orders* be made abſolute. *Vide Bur. S. C. vol.* 2. *p.* 428.

Trinity, 30 & 31 *Geo.* 2. *The King* v. *The Inhabitants of Milwich.*

On a motion to quaſh *two orders*, viz. *one* of *two juſtices*, for removing *T. T.* and *M.* his wife, and *A. T. J. W. H.* and *M.* their children, from the *Vill* of *Creyton* in the county of *Stafford* to *Milwich* in the ſame county. The *other*, an *order* of ſeſſions confirming the *order* of the juſtices.

Caſe. T. was hired by *M. B.* of *Milwich* for *eleven months*, for 4 *l.* 10 *s.* It was agreed between them, "That *T.* ſhould give Mr. *B.* a month's ſervice in, "beyond the *eleven months*." *T.* ſerved Mr. *B.* the *eleven months*, in *Milwich*; and alſo all the given-in month, except the laſt *three days*: and as to thoſe *three days*, *T.* could not ſay where he ſerved them, or went away without ſerving them; but he received the whole 4 *l.* 10 *s.* wages.

The ſeſſions confirmed the *order*; being of opinion, "that this was a hiring for a year, and a ſervice for "a year."

On this motion the council took two exceptions, *viz.*

1ſt, That this is not a good hiring for a year, within *ſtat.* 3 & 4 *W.* & *M. cap.* 11. being only for *eleven months*.

2dly, That this is not a good ſervice for a year; becauſe *three days* are wanting at the end of it.

The court were extremely clear, 1ſt, That this agremeent (taking all together) is an evident contract "to ſerve for a year;" notwithſtanding the expreſſion, they ſaid, the real queſtion was no more than, "whether *eleven months* and *one month* made *twelve months*." There are no particular *technical* words neceſſary to make a ſerving for a year. The ſubſtance of this agreement is "to ſerve *twelve months* "for 4 *l.* 13 *s.*" Every contract to ſerve, is a contract to ſerve *for a year*, unleſs there be ſomething to explain it otherwiſe; here there is nothing of that ſort.

2dly, That as to the ſervant's going away *three days* before the end of the year, the fact does not ſupport the objection; for it does not appear that he *did* go away before the end of the year. It is only ſtated, "that he "could not *ſay* whether he ſerved thoſe *three days*, or "went away without ſerving them." It is poſitively ſtated, "that he *received* the *whole* 4 *l.* 10 *s.* wages;" which at leaſt ſeems to imply the *maſter's conſent* or permiſſion.

Per curiam. Let both *orders* be affirmed. *Vide Bur. S. C. vol.* 2. *p.* 433.

Michaelmas, 30 *Geo.* 2. *The King* v. *The Inhabitants of Aythrop Rooding.*

Two juſtices removed *S. G.* and four children, (one of them nine years of age, and the other *three* under ſeven) from *A. R.* to *White Rooding*; which *order* of the juſtices was quaſhed by the ſeſſions on an appeal.

The caſe was, *W. G.* the huſband, being legally ſettled at *W. R.* went from thence and left his wife and children. On which the wife and children went and lived for *forty days*, *without her huſband*, in a copyhold tenement of her *huſband's own* at *A. R.* But legal notice "to depart" was given her, within the *forty days* by *A. R.* which ſhe not complying with, *two juſtices* made this *order* for removing her, *as being likely* to become chargeable, from *A R.* to *W. R.* which they adjudged to be the laſt legal ſettlement of her huſband. The ſeſſions, conceiving that the wife, *though without* her huſband, *could not* be removed from her huſband's own eſtate, quaſhed the *order*.

And now this court was moved to quaſh the *order* of ſeſſions, and to affirm the *original order*; on which a rule to ſhew cauſe was obtained.

After hearing the arguments of the council on both ſides on this rule, the court affirmed the *order* of ſeſſions, and quaſhed the *order* of the *two juſtices*.

The court were unanimous and clear, that the *two juſtices* had *no power* to remove her from her *huſband's own property*, on her being *only likely* to become chargeable to the pariſh where it lay.

Per curiam. Let the *order* of ſeſſions be affirmed, and the *order* of the *two juſtices* be quaſhed. *Vide Bur. S. C. vol.* 2. *p.* 414.

Hilary, 31 *Geo.* 2. *The King* v. *The Inhabitants of Biſhop's-Hatfield.*

On a motion to quaſh an *order* of *two juſtices* made for the removal of *J. A. Ann* his wife, and *E. M.* and *A.* their children, from *Saundridge* to *Biſhop's Hatfield* in *com. Hertford*; and alſo an *order* of ſeſſions confirming ſuch *order*, being founded on a miſtaken judgment.

Caſe. *J. A.* was hired to one *P.* a pariſhioner of *Saundridge*, at 5 *l.* for one year, to wit, from *Michaelmas* 1752 to *Michaelmas* 1753, with liberty to let himſelf for the *harveſt month* to any other perſon. That the ſaid *J. A.* ſerved the ſaid *P.* till the ſaid *harveſt month*; and a little before the *harveſt month*, without the knowledge of the ſaid *P.* hired himſelf for the *harveſt month* to one *T.* of the ſame pariſh: but went, with the knowledge of the ſaid *P.* and worked with the ſaid *T.* for the *harveſt month*, and received wages for the ſame. In the *harveſt month* the ſaid *A.* brewed for the ſaid *P.* and afterwards ſerved the ſaid *P.* for the remainder of the year. And the ſaid *A.* lodged in the ſaid *P.*'s houſe in the ſaid pariſh of *Saundridge* during the whole year; and at the end thereof the ſaid *A.* received the ſaid 5 *l.* for his year's wages. Whereon the ſeſſions adjudged the ſaid *J. A.* under the ſaid hiring and ſervice with the ſaid *P.* in the ſaid pariſh of *Saundridge*, did not gain any ſettlement in the ſaid pariſh; and therefore they confirmed the *order* of the *two juſtices*, and diſallowed the appeal.

After hearing the arguments of the council on both ſides, on ſhewing cauſe on this rule, the court gave their opinion.

Lord *Mansfield*. It is in effect only a hiring for *eleven months*; and the *harveſt month* is the principal month of the year. It is ſafeſt to keep to the ſtatute. If we allow *this*, we ſhall not know where to ſtop.

Deniſon, *Foſter*, and *Wilmot*, Juſtices, gave their opinion at large, and concurred with the Chief Juſtice.

Per curiam. Let the rule to ſhew cauſe be diſcharged, and let the *two orders* be affirmed. *Vide Bur. S. C. vol.* 2. *p.* 439.

Hilary, 31 *Geo.* 2. *The King* v. *The Inhabitants of Auſtrey.*

See this caſe fully ſtated in page 95 of this work, under the head *Apprentice*.

Hilary, 31 *Geo.* 2. *The King* v. *The Inhabitants of Mayfield.*

On ſhewing cauſe againſt quaſhing an *order* of ſeſſions, made for diſcharging an *order* of *two juſtices*, made for the removal of *R. F.* and *M.* his wife from *Mayfield* to *Horſted-caines*, both in the county of *Suſſex*.

Adjudged, That an *order* of ſeſſions made on an appeal is not obliged to ſtate the caſe *ſpecially*; and where their expreſſion in ſuch *order* is not abſolutely clear and explicit, they ſhall be intended to have done right; and that being the caſe here, the rule was diſcharged, and the *order* of ſeſſions affirmed. *Vide Bur. S. C. vol.* 2. *p.* 453.

Hilary, 31 *Geo.* 2. *The King* v. *The Inhabitants of Cold Aſhton.*

On a motion to quaſh an *order* of ſeſſions made for the reverſal of an *order* of *two juſtices* made to remove *M. H.* widow, and her *four* children, from *Cold Aſhton* to *Woodcheſter* in the county of *Glouceſter*.

Caſe. In *July* 1725, *D. H.* and *M.* his wife, and *W. H.* their ſon, went from *Woodcheſter* to *Cold Aſhton*, with a certificate from *Woodcheſter*, directed to *Cold Aſhton*, acknowledging "that they the ſaid *D. H.* and "*M.* his wife, and *W. H.* the ſon, and ſuch other "children as they the ſaid *D. H.* and *M.* his wife "ſhould have afterwards born in *Old Aſhton*, were inhabitants legally ſettled in *Woodcheſter*."

That *D. H.* and *M.* his wife, and *W. H.* their ſon, lived in the pariſh of *Cold Aſhton* under the ſaid certificate, from *July* 1725 to about *Chriſtmas* 1728, at which time *W. F.* the father of *M.* wife of *W. H.* died inteſtate, leaving *M.* his daughter, and *five* other children; he was at the time of his death poſſeſſed or intitled to a tenement, and *two acres and a half* of land, of the yearly value of 6 *l.* 17 *s.* in *Cold Aſhton*, for the remainder of a term of *ninety nine years*, determinable on the death of himſelf and of the ſaid *M.* his daughter, the wife of the ſaid *D. H.*

That on the death of the ſaid *W. F.* the ſaid *D. H.* and *M.* his wife, and the ſaid *W. H.* their ſon, (he being then *five years* old) entered on the ſaid premiſes; and the ſaid *D. H.* and his wife have lived in and occupied the ſame ever ſince.

There being a *cuſtom* in the hundred of *Pucklechurch*, in which the ſaid pariſh of *Old Aſhton* lies, "for the "occupiers of ſmall tenements within the ſaid hun"dred, to ſerve the office of *tythingman* for half of a "year only at a time." The ſaid *D. H.* about *twenty-*"*five years* ago ſerved the office of *tythingman* for the ſaid pariſh of *Cold Aſhton* for half a year only; and about *five years* ago ſerved the ſame office for the ſame pariſh for another half year only.

That no adminiſtration of the ſaid goods or perſonal effects of the ſaid *W. F.* was ever granted to, or taken out by the ſaid *D. H.* and *M.* his wife, or either of them, or any other perſon.

That the ſaid *W. H.* lived with the ſaid *D. H.* and *M.* his wife in the ſaid tenement till about *eight* or *nine years* ago; when he married the above named *M.* (his now wife) by whom he had iſſue *C. G. W.* and *T. H.* their ſaid children.

That after the marriage of the ſaid *W. H.* the father of the *pauper* children, with the ſaid *M.* his wife, they lived in the ſaid pariſh of *Cold Aſhton* ſeparate and apart from the ſaid *D. H.* and *M.* his wife, his parents, till the death of the ſaid *W.* which happened about a year and an half ago.

The ſaid *M.* the widow of the ſaid *W. H.* and her *four* children, after his death, become *actually chargeable* to the ſaid pariſh of *Cold Aſhton.* They were, by the *order* of *two juſtices*, removed from *Cold Aſhton* to *Woodcheſter*; they the ſaid *W. H.* or his father, or children, not having gained a ſettlement, after the giving of the ſaid certificate, *except* as aforeſaid.

After hearing the arguments of the council on both ſides on ſhewing cauſe to this rule, the court gave their opinion.

Lord *Mansfield.* This cauſe ſeems to turn on *two* queſtions:

1ſt. Whether *D. H.* the father of *W.* gained a ſettlement himſelf in *Cold Aſhton*, to which place he is agreed to have come originally as a certificate-man.

2dly. Whether *W.* the ſon of the ſaid *D. H* gained a derivative ſettlement there from his father.

As to the *firſt queſtion*, *D. H.* had been *twenty-nine years and a half* in poſſeſſion of the premiſes, at the date of the *order*; the queſtion is, whether he is within *ſtat*, 9 & 10 *W.* 3. *cap.* 11. which mentions only *two* methods, whereby certificate perſons can gain ſettlements in pariſhes, to which they come with certificates, *viz.* taking a leaſe of a tenement of 10 *l. per annum*, or executing an annual office.

An eſtate of a man's own, from which he cannot be removed, has been, by conſtruction, (and a very reaſonable one too) holden to be within the ſtatute: for it would be a very hard thing to remove a man from his own eſtate, and the rule holds as well in the caſe of a certificate perſon as in any other caſe, "that no "man ought to be removed from his own property "and eſtate." The principle of this determination is, becauſe a property of a man's own is a ſtronger caſe than hiring another perſon's of 10 *l. per annum* value.

The true queſtion is, "whether *D. H.* acquired "ſuch a right, that he became irremoveable, or not?"

He had acquired a poſitive right by *twenty years* poſſeſſion; which is much more than a mere negative right or a *bar*. This was ſuch a poſitive right as would have ſufficed to ſupport an action. He might have brought an *ejectment* on a *twenty years* poſſeſſion. Therefore it is diſtinguiſhable from the caſe of a *bar*, (a mere negative right) or a limitation: for it does not merely bar the remedy; but it gives a right on which he may recover in *ejectment.* As to the *ſecond queſtion*, The children of all parents muſt have the ſettlement of the father *till* they acquire another for themſelves. Here the ſon is *not* ſtated to have acquired *one* of his *own.* Therefore he had ſuch as he derived from his father. And his father had gained one in *Cold Aſhton*. And there is no ground here to ſay that the ſon muſt *neceſſarily* be taken to have left his family before the time that the father acquired a full and comple ſettlement in *Cold Aſhton* for *himſelf.* Therefore I think the ſeſſion's *order*, which fixes the *paupers* on *Cold Aſhton*, ought to be affirmed.

Deniſon and *Wilmot*, Juſtices, gave their opinions at large, and concurred with the Chief Juſtice.

Per curiam. Let the *order* of the ſeſſions be affirmed, and let the *order* of the *two juſtices* be quaſhed. *Vide Bur. vol.* 2. *p.* 444.

Eaſter, 31 *Geo.* 2. *The King* v. *The Inhabitants of Caverſwall.*

On a motion to quaſh *two orders*, viz. one made by *two juſtices* for removing *S. B. M.* his wife, and *five* children from *Trentham* to *Caverſwall*, in the county of *Stafford.* The other, an *order* of ſeſſions confirming the *order* of the juſtices.

Caſe. *S. B.* the *pauper* was hired for a year, and ſerved a year in *Caverſwall.* He was afterwards hired for a year to *E. B.* of *Trentham*, at 5 *l.* wages, and ſerved him till within *three weeks* of the end of the year: on ſome diſpute ariſing between him and his maſter, he was, with his own conſent, diſcharged from his ſervice, and received all his wages, except what was deducted for the *three weeks.* On his leaving his ſervice he went to *London*, and was abſent about a fortnight. On his return to the country, at Mrs. *B.*'s requeſt, (his maſter being then from home) he went again into their ſervice; and within a week after the expiration of the *firſt* year, his ſaid maſter hired him again for another year; and he ſerved him, in *Trentham*, for about *ſix months* of the *ſecond year*, and then left him.

The ſeſſions being of opinion, "That as the *pauper* "had abſolutely quitted his ſervice before the *firſt year* "was expired, the ſubſequent ſervice, under the *ſecond* hiring, though with the ſame maſter, could not "be taken in aid ſo as to make up a year's ſervice, "and give a ſettlement within the meaning of *ſtat.* "8 & 9 *W.* 3." confirmed the *order* of removal from *Trentham* to *Caverſwall.*

After hearing the arguments of the council on both ſides, on ſhewing cauſe on this rule, the court gave their opinion:

Lord *Mansfield* ſaid, the determinations on theſe poor laws ought to be according to plain common ſenſe, and with the leaſt ſubtlety poſſible.

A *hiring* for a year was neceſſary, under *ſtat.* 3 & 4 *W.* & *M. c.* 11. *ſect.* 7. a ſervice for a year was added by *ſtat.* 8 & 9 *W.* 3. *c.* 30. *ſect.* 4.

Where the maſter gives leave, it is a *continuance* in the ſame ſervice: it has not been required that the hiring for the whole year ſhould be ſtrictly reckoned from the firſt moment of the ſervice; but it ſhall be conſidered as ſufficient, that there were both a hiring for a year, and a ſervice for a year.

Here was a *chaſm* of a *fortnight* or *three weeks.* And the firſt contract was abſolutely diſſolved, and ſo continued for a *fortnight* or *three weeks*; therefore this laſt ſervice cannot be connected with the former part of the year. For if a *chaſm* of a *fortnight* or *three weeks* be not a *diſcontinuance* of the ſervice, it will be hard to ſay what is. Therefore I hold, in this caſe, there was no ſettlement gained in *Trentham.*

Deniſon, *Foſter*, and *Wilmot*, Juſtices, gave their opinions at large, and concurred with the Chief Juſtice.

Per curiam. Let both *orders* be affirmed. *Vide Bur. S. C. vol.* 2. *p.* 461.

Trinity, 31 *Geo.* 2. *The King* v. *The Inhabitants of Painſwick.*

On a motion to quaſh *two orders*, viz. *one* an *order* of *two juſtices* for removing *J. M. H.* his wife, and *five* children, from *Cirenceſter* to *Painſwick*, both in the county of *Glouceſter.* The *other* an *order* of ſeſſions confirming the *order.*

Caſe. On the 13th day of *September* 1737, *J. M.* the *pauper* was bound apprentice by indenture, to one *H. P.* of *Painſwick*, taylor, for *ſeven years*, and lived with him, as his apprentice, in the ſaid pariſh of *Painſwick*, for *three years* and upwards; and then, the ſaid *P.* failing, the ſaid *J. M.* left him, and never returned to him again. That in the year 1753, the ſaid *J. M.* took a houſe lying in the ſaid pariſh of *Cirenceſter*, of one *T. C.* for a year, at the yearly rent of 32 *s.* and 6 *s.* and agreed to pay the land-tax and poor's taxes, and all the other taxes, for the ſaid houſe, for the ſaid year.

That the poor's rate of the ſaid pariſh of *Cirenceſter* being produced in court at the ſaid trial of the ſaid appeal, it appeared, from them, to the court, that the poor's taxes for the ſaid houſe, during the year the ſaid *J. M.* rented the ſame, were rated or charged in the manner following, viz. "*T. C.* or tenant."

That the ſaid *J. M.* occupied the ſaid houſe the ſaid year, for which he took the ſame, and more, and paid the ſaid year's rent and the land-tax, and poor's rate, and all other *parochial* taxes for the ſaid houſe, during the whole time that he ſo as aforeſaid occupied the ſame houſe; and had ſeveral receipts given to him, in his own name, by the overſeers of the poor of the pariſh of *Cirenceſter*, for the ſeveral payments by him to them made to the poor's rates of the ſame pariſh; *one* only of which receipts was produced and read in court at the ſaid trial: but that the ſaid *J. M.* did not know whether his name was or was not inſerted in the ſaid rates.

The ſaid *T. C.* during the whole time of the ſaid *J. M.*'s ſo occupying the ſaid houſe as aforeſaid, lived *five miles* diſtant from the ſaid pariſh of *Cirenceſter.*

After hearing the arguments of the council on both ſides on this rule, the court gave their opinion.

Three Judges (Lord *Manſfield* being abſent) were clear about this matter, that the *pauper* was ſufficiently rated to gain him a ſettlement in *Cirenceſter*.

Per curiam. Let both *orders* be quaſhed. *Vide Bur. S. C. vol.* 2. *p.* 465.

Michaelmas, 31 *Geo.* 2. *The King* v. *The Inhabitants of the Tything of Milland.*

On ſhewing cauſe againſt quaſhing *two orders*, viz. an *original order* of *two juſtices* made for *taxing*, *rating*, and *aſſeſſing*, the inhabitants of the tything of *Milland*, in and part of the pariſh of St. *Peter's Cheeſehill*, in the ſame county; and the *order* of ſeſſions confirming it.

The queſtion before the court was, whether it was "ſufficiently ſtated, that both theſe places, (*viz. Milland* and St. *Peter's*) lie within the ſame hundred:" which is a circumſtance eſſentially neceſſary to be aſcertained, in order to give the *two juſtices* any *juriſdiction* in the preſent caſe.

After hearing the arguments of the council for and againſt the rule, the court thought it beſt to ſend it back to the ſeſſions, in order to have the matter better ſtated and explained.

On the matter being brought before the court again, the council for the *orders* prayed the opinion of the court, and the council againſt them candidly owning, that as the facts were *now* ſtated, he could not contend but that it does appear (*ſubſtantially*) to be a *hundred*, though the diviſion was called by another name.

The court diſcharged the rule to ſhew cauſe, and affirmed the *two orders*, *Vide Bur. vol.* 1. *p.* 577.

Hilary, 32 *Geo.* 2. *The King* v. *The Inhabitants of Weſtbury.*

On a motion to quaſh *two orders*, viz. *one* an *order* of *two juſtices* for removing *W. S.* and *S.* his wife from St. *Cuthbert* in *Wells* to *Weſtbury*, both in the county of *Somerſet*. The other an *order* of the ſeſſions confirming the *order* of the juſtices.

Caſe. W. S. the *pauper*, being ſettled in St. *Cuthbert's* in *Wells*, was bound an apprentice on the 4th *Dec.* 1753, to *J. C.* who then, and for ſeveral years before, reſided in *Weſtbury*, but whoſe legal ſettlement was at *Harptree*, a neighbouring pariſh; and accordingly entered into the ſervice of the ſaid *J. C.* on the ſaid 4th *December*. The ſaid *J. C.* having been before applied to by the pariſh officers of *Weſtbury*, to obtain a certificate from *Harptree*, (which he then promiſed to do) did afterwards, on the 26th of the ſame month, obtain a certificate from *Harptree*, owning him to be their inhabitant legally ſettled; which certificate was, the ſame day, delivered to the overſeers of *Weſtbury*.

W. S. the *pauper*, ſerved the ſaid *J. C.* under the ſaid indenture, from the ſaid 4th *December* for *three years*, and reſided all that time with the ſaid *J. C.* in *Weſtbury*, and then married the ſaid *S.*

After hearing the arguments of the council on both ſides on this rule, the court gave their opinion:

Adjudged, That in this caſe an apprentice to a certificate-man does not gain a ſettlement, where the maſter (being certificated at the time ſuch apprentice was bound) obtains and delivers a certificate, before the apprentice has ſerved him *forty days*; for by *ſtat.* 12 *Ann. cap.* 18. this is deemed a condition *precedent* to the apprentice's gaining a ſettlement, "That he muſt have been bound to and ſerved for *forty days* a maſter who did not either come into or reſide in the pariſh by licence of a certificate." Therefore the court quaſhed both the *orders*. *Vide Bur. S. C. vol.* 2. *p.* 470.

Eaſter, 32 *Geo.* 2. *The King* v. *The Inhabitants of Shenſton.*

On a motion to quaſh *two orders*, viz. *one* an *order* of *two juſtices* for removing *J. L.* and *A.* his wife, from the pariſh of *Gratwich* to *Shenſton*, both in the county of *Stafford*. The other an *order* of ſeſſions, confirming ſuch *order* of the juſtices.

Caſe. The ſaid *J. L.* the *pauper*, having gained a ſettlement at *Shenſton*, by a year's *hearing* and *ſervice*, afterwards, about *fifteen years* ago, took a houſe in the pariſh of *Gratwich*, at 30*s.* a year, which he has enjoyed ever ſince, till removed by this *order*; and five years ago took *two acres* of land in the pariſh of *King's Bromley* in the county of *Stafford*, for the growing of potatoes, from *Candlemas* to *Michaelmas*, for 9*l.* and at the ſame time, and from the ſame perſon took, in the aforeſaid pariſh, *half an acre* of land, at 40*s.* for the like term; and paid his rent for all the ſaid premiſes, which were of the aforeſaid value.

The *pauper* entered on and enjoyed the land during the ſaid term; and the latter part of the time, to wit between *Midſummer* and *Michaelmas*, lodged above *forty days* in the pariſh of *King's Bromley*, where the lands lay for the convenience of digging up and diſpoſing of his potatoes.

After hearing the arguments of the council on both ſides on this rule, the court gave their opinion:

Lord *Manſfield*. This matter ſtands on a ſingle queſtion, "Whether this man's taking above 10*l.* a year in the manner ſtated, is a ſettlement?"

Stat. 13 & 14 *Car.* 2. *c.* 12. and the certificate act of 8 & 9 *W.* 3. *c.* 11. ought to be conſidered together, being in part material. There being no determination to the contrary, I have no doubt but that this is a ſettlement, on the acts here ſtated.

Deniſon, *Foſter*, and *Wilmot*, Juſtices, gave their opinions at large, and concurred with the Chief Juſtice.

Per curiam. Let the rule be made abſolute for quaſhing both the *orders*. *Vide Bur. S. C. vol.* 2. *p.* 474.

Eaſter, 32 *Geo.* 2. *The King* v. *The Inhabitants of Nether-Heyford.*

On a motion to quaſh *two orders*, viz. an *order* of *two juſtices* for removing *J. G.* and his wife, from *Kiſlingbury* to *Nether-Heyford*, both in the county of *Northampton*; the other an *order* of ſeſſions confirming the *order* of the ſaid juſtices.

Caſe. The *pauper's* laſt ſervice for a year was at a farm-houſe, called *Dirt-houſe*, which the *pauper* ſometimes ſaid was in the pariſh of *Nether-Heyford*, and at other times that it was in another pariſh (named in the *order* of ſeſſions;) but they ſtated that it laid in *one* or the *other* of the ſaid two pariſhes.

This matter by conſent was ſent back to the ſeſſions, to ſtate to the court which pariſh the ſaid *Dirt-houſe* ſtands in, and on the return thereof it was moved to file the new *order* of ſeſſions, which was granted.

After hearing the arguments of council on both ſides on ſhewing cauſe, the court gave their opinion:

Lord *Manſfield*. This caſe turns on this ſingle queſtion, "Whether his abſence of *five weeks* was a diſſolution of the contract?" If he had his miſtreſs's leave, it was *not*. If he had it not, it *was*. And we are all of opinion, that it was only an abſence with leave; for it appears that both parties conſidered the contract between them as ſubſiſting and not diſſolved. He paid her the *whole* that he had earned in the *five weeks* that he was abſent, that is, he voluntarily deducted it from the wages ſhe laid down to him, conſidering himſelf as her ſervant during that time; for otherwiſe the deduction could not have been a deduction of the particular ſum earned by him, but a deduction in proportion of his whole year's wages to the time of his abſence. And he looked on himſelf as liable to be called back within the *five weeks*. Therefore it was only a leave to be abſent for the *whole* time, or for *part* of the time, as ſhe ſhould call him back, ſooner or later. And as ſhe did not call him back ſooner, it was a leave for the *whole five weeks*. We are, upon the whole circumſtances of the caſe ſpecially ſtated, of opinion, "that the contract was *not* diſſolved."

Per curiam. Let the rule be made abſolute, and let both *orders* be quaſhed. *Vide Bur. S. C. vol.* 2. *p.* 479.

Hilary, 33 *Geo.* 2. *The King* v. *The Inhabitants of Weyhill.*

On a motion to quaſh *two orders*, viz. *One* an *order* of *two juſtices*, for removing *J. P. W.* from *Corfe Caſtle* in the county of *Dorſet* to *Weyhill* in the county of *Hants*; the *other*, an *order of ſeſſions*, confirming the *order* of the ſaid juſtices.

Caſe. T. W. deceaſed, being ſettled in *Corfe Caſtle* about 1711, had iſſue the *pauper*, who continued there with his father, till he was *eight years* of age; at which time, his father being under misfortunes, *R. P.* Eſq; who then lived in the pariſh of *Worth Matraverſe*, in the county of *Dorſet*, took the ſaid *pauper* into his family, *out of charity*, and gave him his meat, drink, lodging, and clothes, while with him, which was about *two years* in *Worth Matraverſe* aforeſaid, and afterwards *four years* more in the pariſh of *Weyhill*, to which pariſh the ſaid *P.* and his family removed.

There was no contract between the parties, in relation to the *pauper*'s ſervice, as to wages or other gratuity to be paid him.

While he continued with the ſaid *P.* he was employed in running on errands, or whatever elſe he was bid by the ſaid *P.* or his ſervants. That no wages were ever paid or given him. And that, in the *pauper*'s apprehenſion, he was, during all the ſaid time aforeſaid, at liberty to quit ſuch ſervice, or to be turned off by the ſaid *P.* The *pauper* quitted the ſaid *P.* and the ſaid pariſh of *Weyhill*, after reſiding there as aforeſaid, and has done no act to gain a ſettlement ſince, except as aforeſaid.

The ſeſſions were of opinion, "that at this diſtance "of time, *a hiring for a year*, according to the ſta-"tute, between the ſaid *P.* and the *pauper*'s father, "ought to be preſumed." So they adjudged the ſettlement of the *pauper* was in the pariſh of *Weyhill*, and confirmed the *order* of the *two juſtices* accordingly.

After hearing the arguments of the council on both ſides, the court gave their opinion.

The court ſaid they were clear this was *no hiring* at all; *no contract*: but that the *pauper* was taken out of *charity*; when he came to the age of *fourteen years*, and was capable of doing more ſervice, then he left the ſaid *P.* They ſaid, where there is a *hiring ſtated*, the court will preſume it to have been a regular one, unleſs the reverſe appears.

Per curiam. Let the rule be made abſolute, and both the *orders* be quaſhed. *Vide Bur. S. C. vol.* 2. *p.* 491.

Eaſter, 33 *Geo.* 2. *The King* v. *The Inhabitants of Chriſtchurch.*

On a motion to quaſh an *order* of ſeſſions, made for diſcharging an *order* of *two juſtices*, made for removing of *E. M. ſpinſter* from *Chriſtchurch* to *St. Matthew's Bethnal Green*, both in the county of *Middleſex.*

Caſe. E. M. on the 24th of *Auguſt*, 1757, was hired by one *R. G.* of *Chriſtchurch* for a year, and continued in ſuch ſervice from the ſaid 24th of *Auguſt* till the 7th of *Auguſt* then next following, when ſhe was taken with fits, and rendered incapable of ſervice. Her maſter being taken ill, and diſturbed by her fits, her miſtreſs deſired the ſaid *E. M.*'s ſiſter to take the ſaid *E. M.* to one Mr. *L.*'s in the ſaid pariſh of St. *Matthew's Bethnal Green*, and to requeſt Mrs. *L.* to receive her into their houſe, that ſhe might be there under the care of her ſiſter; but if the ſaid Mrs. *L.* refuſed to admit her, ſhe was then to bring her back to her maſter's houſe. Mr. *L.* received her, and ſhe reſided there about *five days*, and then was taken into the *hoſpital.* The day after *E. M.* came to Mr. *L.*'s, he went to her maſter's houſe to fetch away her clothes, and her miſtreſs gave her 2 *s.* which, with what ſhe had received before, made up her whole year's wages. No words of diſcharge paſſed between the ſaid *E. M.* and her miſtreſs. The ſaid *E. M.* looked on herſelf as then diſcharged from the ſaid ſervice, but *believed*, that had ſhe recovered, her maſter would have taken her again into his ſervice.

The ſaid *E. M.* continued under this infirmity till *after the year*, from the time of *hiring*, was expired, and never returned again into her ſaid ſervice. On the 17th of *Auguſt*, 1758, her maſter hired another ſervant in her ſtead.

The appellants admit, that the ſaid *E. M.* was legally ſettled in St. *Matthew's*, unleſs a ſubſequent ſettlement was gained by her in *Chriſtchurch*, under the afore-mentioned circumſtances.

The ſeſſions, on conſideration of the matter, allowed of the appeal, and vacated the juſtices *order*; and further *ordered*, that the ſaid *E. M.* ſhould be removed from St. *Matthew's Bethnal Green* to *Chriſtchurch*, and required the pariſh of *Chriſtchurch* to *receive* the ſaid *E. M.* and *provide* for her, till they could free themſelves from ſuch burthen by due courſe of law.

After hearing the arguments of the council on both ſides on this rule, the court gave their opinion:

Lord *Mansfield* This muſt appear a very clear caſe to any perſon of common ſenſe and underſtanding. It is certainly a fair *bona fide* ſervice for a year, without any fraud on either ſide, either of the maſter or of the ſervant. If the maſter gives his ſervant leave to go on any other ſervice, or to be abſent for a ſhort time, and pays him the whole wages, this is a fair *bona fide* ſervice. If the ſervant is taken ill, by the act of God, it is a condition incident to humanity, and is *implied* in all contracts. Therefore the maſter is *bound* to provide for and take care of the ſervant ſo taken ill in his ſervice, and *cannot deduct* wages in proportion to the continuance of the ſervant's ſickneſs.

I ſee no difference between ſuch an accident of *ſickneſs* happening in the *middle* or the *end* of the year: it is equally the act of Providence, and not the fault of the ſervant.

Deniſon, *Foſter*, and *Wilmot*, Juſtices, gave their opinions at large, and concurred with the Chief Juſtice.

Per curiam. Let the *order* of ſeſſions be confirmed, and the *order* of the *two juſtices* be quaſhed. *Vide Bur. S. C. vol.* 2. *p.* 494.

Eaſter, 33 *Geo.* 2. *The King* v. *The Inhabitants of Berwick St. John.*

On a motion to quaſh *two orders*, viz. *one* of *two juſtices* for the removal of *B. B. M.* his wife and two children from *Hanley* in the county of *Dorſet* to *Berwick St. John's* in the county of *Wilts*; the *other* an *order* of ſeſſions confirming ſuch *order*.

Caſe. In *September* 1756, *B. B.* being then an unmarried man, and legally ſettled in *Hanley*, happening to meet Mr. *S. J.* then head keeper of *Ruſhmore-Lodge*, (one of the lodges of *Cranborne-Chaſe*,) who reſided there, which lies within the pariſh of *Berwick St. John's* aforeſaid, and had then lately parted with one *E. H.* who had been for many years one of his ſervants or under-keepers, at the wages of 3 *l.* a year, and a keeper's livery, beſides meat, drink, and lodging. The ſaid Mr. *J.* addreſſed the ſaid *B. B.* in theſe words: "*Do you like the life of a keeper?*" which he anſwered in the affirmative. The ſaid Mr. *J.* further ſaid, "*Then go into* Ned H.'s *place*; *you ſhall* "*want no encouragement*; *and I'll give you a ſuit of* "*clothes immediately.*" The ſaid *B. B.* readily agreed thereto; and, *without further converſation, went directly into the ſaid ſervice*, and remained *there for the ſpace of three years*, living during that time with his maſter at *Ruſhmore-Lodge*, within the pariſh of *Berwick St. John's* aforeſaid.

Soon after entering into the ſaid ſervice, he was furniſhed with a *keeper's livery*; was, while he lived there, provided with meat, drink, and lodging, and at the end of the *three years* was paid 9 *l.* for his ſervice. When the converſation firſt paſſed between the ſaid *B. B.* and Mr. *J. B. B.* did not know on what terms the ſaid *H.* had ſerved the ſaid Mr. *J.* The ſaid *B. B.*'s ſervice being agreeable, the queſtion, "whether or no he was at liberty to quit it?" never occurred to him; but that in his apprehenſion, if it had been diſagreeable, he ſhould have conſidered himſelf at liberty to have quitted it, as nothing to the contrary had been agreed between them. The ſaid *B. B.* thought he ought to be paid the ſame wages *H.*

had; but did not conſider himſelf as having a legal title to wages, ſince there had been no mention of any between them. The ſaid *B. B.* after leaving the ſaid ſervice, married the ſaid *M.* his now wife, and had iſſue by her three children, mentioned in the *order*, and has done no act to gain a ſettlement but as aforeſaid. Therefore the ſeſſions were of opinion, "that "the ſettlement was in the pariſh of *Berwick St.* "*John's*," and confirmed the *order* of the juſtices.

After hearing the arguments of the council on both ſides on this rule, the court gave their opinion.

Lord *Mansfield.* This man ſerved *three years*, and received *three years wages*: it is objected, "that he "was never hired at all."

It is admitted, "that if he was hired at all, it "would, by law, be a hiring for a year." And on the diſcourſe, ſtated in the *order*, between the ſaid *B. B.* and Mr. *J.* it is a *clear hiring*; for *H.* was a *hired* ſervant. Therefore the juſtices have done right.

Three of the judges concurred with the Chief Juſtices.

Per curiam. Let the *orders* be affirmed. *Vide Bur. S. C. vol. 2. p. 502.*

Michaelmas, 33 *Geo. 2.* *The King* v. *The Inhabitants of Fulham.*

On a motion to quaſh *two orders*, viz. *one* made by *two juſtices* for removing *A. B.* widow of *J. B.* from St. *Margaret's*, *Weſtminſter*, to *Fulham*; the *other* an *order* of ſeſſions confirming the *order* of the ſaid juſtices.

Caſe. J. B. deceaſed, late huſband to *A.* being ſettled at *Fulham fourteen years* ago, afterwards took a meſſuage in St. *Margaret's*, *Weſtminſter*, at 6*l.* 10*s.* a year, which he occupied for ſeveral years; and during ſuch occupation he the ſaid *J. B.* was poſſeſſed, and taxed by the aſſeſſors of the land-tax there, in proportion to his rent, for the land-tax due in reſpect of the ſaid premiſes, and paid the ſame to the collector of the land-tax in the ſaid pariſh of St. *Margaret*'s: afterwards he was allowed the land-tax ſo paid as aforeſaid by his landlord on ſettling with him for the rent of the ſaid houſe. The ſaid *J. B.* never gained any ſettlement in any pariſh ſince. *A.* his widow, and her *four* children, by him, are become poor; and neither the ſaid *A.* or either of the ſaid children, have gained any ſettlement in their own right. The ſeſſions therefore ratified and confirmed the *original order*, and diſmiſſed the appeal.

After hearing the arguments of the council on the rule to ſhew cauſe,

The court, on the ground of this being a ſettled point, that the parties had gained no ſettlement by ſuch occupation, made the rule abſolute, and quaſhed both the *orders*. *Vide Bur. S. C. vol. 2. p.* 488.

Michaelmas, 33 *Geo. 2.* *The King* v. *The Inhabitants of Preſton near Feverſham.*

On a motion to quaſh *two orders*, viz. *one*, an *order* of *two juſtices* for removing *E. Y.* the younger, *R.* his wife, and *M.* his child, from *Chilham* to *Preſton*, near *Feverſham*, both in the county of *Kent*; the *other* an *order* of ſeſſions confirming the *order* of the ſaid juſtices.

Caſe. E. Y. the younger being legally ſettled at *Preſton*, and not being then a widower, on the 25th day of *January*, without the conſent of his father, who was then living, was married by licence in the pariſh church of *Tenham* to *R. D.* (who was ſettled in the ſaid pariſh of *Tenham*, and who is removed to *Preſton* by the ſaid *order*, as the wife of the ſaid *pauper*) the ſaid *E. Y.* being then an infant of *twenty years* old; and that afterwards the ſaid *R.* was brought to bed in the pariſh of *Chilham* of the ſaid *M.* removed by the *order*: whereon they adjudged and ordered, that the ſaid *order* ſo made by the *two juſtices* be, in all points, confirmed.

The council who moved to quaſh the *order* took exception to the part of them, which relates to the *woman* and *child*: for that the marriage was abſolutely void, by the expreſs words of *ſtat.* 26 *Geo. 2. cap.* 23. as the *pauper* not being a widower, and being under age, was married by licence, without the conſent of his father, (who was then living.)

After hearing the arguments of the council on both ſides on ſhewing cauſe, the court gave their opinion.

Lord *Mansfield.* The marriage-act is made againſt both; and the marriage is declared "abſolutely null "and void to all intents and purpoſes whatſoever."

The other judges on the bench concurred with the Chief Juſtice in opinion.

Per curiam. Let the *orders* as to the man be confirmed, but as to the woman and child let them be quaſhed. *Vide Bur. S. C. vol. 2. p.* 486.

Michaelmas, 33 *Geo. 2.* *The King* v. *The Inhabitants of St. Matthew, Bethnal Green.*

On a motion made to quaſh an *order* of ſeſſions, made for diſcharging an *order* of *two juſtices*, made for removing *M. C.* widow, and her three children, from the pariſh of St. *Matthew Bethnal Green* to the precinct of St. *Katherine.*

Caſe. C. the *pauper*, was born in St. *Matthew's Bethnal Green*, of a father ſettled in St. *Leonard's Shoreditch*, became wife of *A. C.* born in St. *Matthew's Bethnal Green*, but ſon of a foreigner who had no ſettlement at all, and of a mother ſtated to have been born in St. *Katherine's*; the children are the iſſue of that marriage. The queſtion was, "Whether *M.* and "her children are ſettled in St. *Katherine's*, or not?"

The objection taken to the *order* of ſeſſions, by the council who moved to quaſh the ſame, was, "That "the ſettlement of the *anceſtor* ſhall here take place of "the ſettlement by *birth*:" and in arguing the matter, treated the ſame as a derivative ſettlement.

After hearing the council for and againſt the rule, the court gave their opinion.

Lord *Mansfield.* There is no difference between an *acquired* and a *derivative* ſettlement. The father's ſettlement is the ſettlement of the children. The father here, was the ſon of a foreigner, who never gained any ſettlement, and of *Eliz. Taylor*, who was born in St. *Katherine's.*

On this *order*, as ſtated, it muſt be taken, that St. *Katherine's*, where *E. T.* was born, was the place of her ſettlement; conſequently, *A. C.* her ſon, was legally ſettled there.

Deniſon, *Foſter*, and *Wilmot*, Juſtices, gave their opinion at large, and concurred with the Chief Juſtice

Per curiam. Let the *order* of ſeſſions be quaſhed, and the original *order* affirmed. *Vide Bur. S. C. vol. 2. p.* 482.

Eaſter, 2 *Geo. 3.* *The King* v. *The Inhabitants of St. Devereux.*

On a motion to quaſh *two orders*, viz. *one* of *two juſtices* for the removal of *S. M.* from *Much Dewchurch* in the county of *Hereford* to St. *Devereux* in the ſame county: the *other* an *order* of ſeſſions confirming the *order* of the ſaid juſtices.

Caſe. S. *M.* was, before her ſuppoſed marriage with *J. M.* hereafter named, ſettled in St *Devereux*, and the ſaid *J. M.* was and is, legally ſettled in *Langaran* in the ſaid county; and was not in the pariſh of St. *Devereux* at the time of the *order*. One *J. B.* proved on oath, "that he and one *W. J.* were pre"ſent on the 7th day of *February* 1758, when *S.* and "*J. M.* were married in the pariſh of St. *Devereux*, "by *bans.*" The entry of ſuch marriage in the pariſh-regiſter was made as follows: "1758, *J. M. and J.* "*S. were married by bans.*" But ſuch entry was not ſigned by the *miniſter*, parties, or witneſſes, and therefore the ſeſſions were of opinion, "that ſuch marriage "was not legally proved;" and confirmed the *order.*

After hearing the arguments of the council on both ſides on ſhewing cauſe, the court gave their opinion.

Lord *Mansfield.* It was not incumbent on the perſons married to prove, "that *bans* were publiſhed;" nor does the entry directed to be made affect the validity of the marriage

Per curiam. Let the rule be made abſolute for quaſhing both *orders*. *Vide Bur. vol. 2. p.* 506.

Trinity, 2 *Geo.* 3. *The King* v. *The Inhabitants of Stockland.*

On a motion to quaſh an *order* of ſeſſions made for quaſhing an *order* of *two juſtices* made for the removal of *J. M.* and *M.* his wife, and *ſix* children, from *Stockland* in the county of *Devon*, to the pariſh of *Chardland* in the county of *Somerſet*, and to affirm the *original order*.

Caſe. The ſettlement of the *paupers* appeared to depend on the queſtion, "whether *J.* and *E.* the father "and mother of the ſaid *J. M.* were to be conſidered "as huſband and wife at the time of his birth."

The ſeſſions were of opinion, "that the ſaid *J. M.* "and *E. M.* are ſufficiently proved to have been law- "fully married at the time of the birth of their ſaid "ſon; and that the ſettlement of the ſaid *paupers* is in "the pariſh of *Stockland.*"

Lord *Mansfield* ſeemed to think that *thirty years cohabitation* as man and wife was ſufficient proof to the juſtices to found an *order* of removal on. However, a rule to ſhew cauſe was granted.

On the laſt day of term the council for the motion gave up his objection, and by conſent the *order* of ſeſſions was affirmed, and the recognizance was diſcharged. *Vide Bur. S. C. vol.* 2. *p.* 508.

Michaelmas, 4 *Geo.* 3. *The King* v. *The Inhabitants of Titchfield.*

On ſhewing cauſe why an *order* of ſeſſions, made for quaſhing an *original order* of *two juſtices* for removing of *P. W. A.* his wife, and *two* children, from *Titchfield* to *Milford*, both in the county of *Hants*, ſhould not be quaſhed; and why the ſaid *original order* ſhould not be affirmed.

The council in ſupport of the *order* of ſeſſions *urged*, that it appeared from times and dates, that *P. W.* muſt have been a married *man* when he bound himſelf apprentice; and as *ſtat.* 3 *&* 4 *W. & M.* requires *celibacy* in a *hired* ſervant in one *clauſe*, the ſubſequent *clauſe* concerning apprentices muſt be conſtrued alſo to require them to be unmarried.

That *W.* the *pauper*, was ſettled in *Bewley* by inhabiting *forty days* with his maſter's conſent. And the delivering up the indentures was *not* a ſufficient diſcharge of the apprentice without *cancelling* them.

The council againſt the *order* of ſeſſions *argued*, that *ſtat.* 3 *&* 4 *W. & M.* does not require this circumſtance of *celibacy* in an apprentice, though it does in a hired ſervant. *Sect.* 7. of this ſtatute relating to *hired* ſervants, ſays, "if any *unmarried* perſon." *Sect.* 8. ſays, relating to apprentices, "if any perſon:" ſo that the ſtatute itſelf makes an *eſſential* difference between the two caſes. There is *no difference* between the indenture's being given up, and its being *cancelled*. They amount to the *ſame* thing.

The court agreeing in opinion with the council againſt the *order* of ſeſſions, the *order* of ſeſſions was quaſhed, and the *original order* affirmed. *Vide Bur. S. C. vol.* 2. *p.* 511.

Michaelmas, 4 *Geo.* 3. *The King* v. *The Inhabitants of St. Peter's in Dorcheſter.*

On a motion to quaſh *two orders*, viz. *one* an *order* of *two juſtices* for the removal of *J. M. C.* his wife, and *two* children, from the pariſh of the *Holy Trinity* in the borough of *Dorcheſter*, to that of St. *Peter*'s in the ſame borough: the *other* an *order* of ſeſſions, confirming the *order* of the *two juſtices*.

Caſe. *J. M.* was born in the pariſh of the *Holy Trinity*; but his father's ſettlement was in St. *Peter*'s. Soon after his birth his father died, and his mother marrying again to one *E. O.* an inhabitant of the pariſh of the *Holy Trinity*, the *pauper* her ſon removed with his mother to the houſe of his ſtep-father, and reſided there till the age of *ſixteen*; during all which time he was employed by his ſtep-mother in his trade of a button-maker; who had the benefit of his labour without any other recompence than *maintenance* and *pocket-money*, as the ſtep-father thought fit.

About the age of *ſixteen* the ſaid *J. M.* inſiſted on a larger allowance for his labour, and the ſtep-father refuſing the ſame, he left him and went to *Briſtol*. After continuing there ſome time, he returned to the pariſh of the *Holy Trinity*, where he and his ſtep-father came to an agreement, by which the ſon was to *live* with him in his houſe, and to work as heretofore at his trade, and be paid at the rate of *one penny per groſs* for the buttons he ſhould make, deducting at the rate of 5 *s.* a week for his meat, drink, waſhing, and lodging. There was no other *hiring* or *agreement* between the parties.

On this agreement the ſaid *J. M.* lived and worked with his ſtep-father in the pariſh of the *Holy Trinity four* or *five years*, and received wages, and paid for his maintenance at the rate aforeſaid.

The ſtep-father was examined as a witneſs, and declared he thought himſelf at liberty to have turned the ſaid *J. M.* off, or the ſaid *J. M.* to have left him at any time, if either party had been ſo inclined, there being nothing in the agreement between them to the contrary. The ſaid *J. M.* had done no other act to gain a ſettlement: and his wife and children had no other ſettlement than what they derived from him. On theſe facts, the ſeſſions were opinion, "that his ſettle- "ment is in the pariſh of St. *Peter*'s;" and they confirmed the *order*.

After hearing the arguments of the council on both ſides on this motion, the court gave their opinion.

Lord *Mansfield*. This is the caſe of a workman *hired* to work by the *piece*. Indeed, hiring in general and indefinitely gives a preſumption of a hiring for a year, where the nature of the ſervice and ſubſequent facts concur to render it probable that it was ſo *intended*: but the nature of the preſent ſervice is quite otherwiſe. In this caſe it is very clear, that there was *no hiring for a year* either expreſs or implied. Therefore the rule muſt be diſcharged.

Per curiam. Let the *original order*, and *order* of ſeſſions, be confirmed. *Vide Bur. S. C. vol.* 2. *p.* 513.

Eaſter, 5 *Geo.* 3. *The King* v. *The Inhabitants of Burton-Bradſtock.*

On a motion to quaſh *two orders*, viz. *one* an *order* of *two juſtices*, made for the removal of *J. C.* and *C.* his wife, from *Bothenhampton* in the county of *Dorſet* to *Burton-Bradſtock* in the ſame county. The *other* an *order* of ſeſſions, confirming the *order* of the ſaid juſtices.

Caſe. *J. C.* being ſettled at *Beamiſter*, in the county of *Dorſet*, was on the 28th *March* 1754, bound apprentice to *J. M.* of *Bridport*, in the county of *Dorſet*, then owner of a ſhip, called The *John* and *Samuel*, to ſerve him as an apprentice, and to learn navigation and the art of a ſailor, for the term of *ſeven years*. The ſaid *J. C.* did, immediately after executing the indenture of apprenticeſhip, enter on board the ſaid ſhip, and did there ſerve the ſaid *J. M.* for the ſaid term, as his apprentice.

The ſaid ſhip, during all the time of his apprenticeſhip, was employed in a *coaſting-trade*, from a place called *Bridport-Harbour*, in the county of *Dorſet*, to many other ports and places; during all which time *Bridport-Harbour* was conſidered by the captain and ſailors as the proper home of the ſaid ſhip, and to which ſhe returned at the end of every voyage, and always took her departure from thence when ſhe made a voyage.

While the ſaid *J. C.* was in his apprenticeſhip, the ſhip was many times in *Bridport-Harbour*, *viz.* for a *fortnight*, a *month*, and ſometimes *two months* at a time; but never in any other *harbour*, *port*, or *place*, for more than a month at a time.

On the 7th *December*, 1760, the ſaid ſhip arrived in *Bridport-Harbour*, and remained there till the 22d *January*, 1761, being more than *forty days*; during which time the ſaid *J. C.* *reſided*, *lodged*, and *ſerved* the ſaid *J. M.* his maſter, as his apprentice, on board the ſaid ſhip, to take care of his maſter's goods and effects therein. The ſaid ſhip was never in any other *harbour*, *port*, or *place*, *forty days* together after that time.

On the 11th *March*, 1761, the ſaid ſhip again returned to *Bridport-Harbour*, and remained there till after the 25th day of the ſame month, on which day the ſaid *J. C.*'s apprenticeſhip *expired*; during which time, the ſaid *J. C.* reſided, lodged, and ſerved the ſaid *J. M.* as his apprentice, on board the ſaid ſhip, to take care of his goods and effects as aforeſaid.

Since the apprenticeſhip expired, the ſaid *J. C.* married *C.* his preſent wife, and has gained no ſettlement, ſave as aforeſaid.

On theſe facts the ſeſſions adjudged the ſaid *J. C.* ſettled in the pariſh of *Burton-Bradſtock*, and confirmed the *order* of removal.

After hearing the arguments of the council on both ſides on this rule, the court gave their opinion.

Lord *Mansfield.* *Lying in a pariſh* is the ſame, whether it be on board a ſhip, or on *land.* *Caſual* reſidences, or accidental inhabitants, are out of the queſtion in the preſent caſe. The ſervice was *bona fide*, without any pretence of colluſion, performed in the pariſh of *Burton-Bradſtock*. Therefore there ſeems to be no material difference between this caſe, and the *ordinary* caſes of ſetttlements in pariſhes by apprenticeſhip.

Wilmot, *Yates*, and *Aſton*, Juſtices, gave their opinions at large, and concurred with the Chief Juſtice.

Per curiam. Let the rule be diſcharged, and the *orders* affirmed. *Vide Bur. S. C. vol. 2. p.* 531.

Trinity, 5 *Geo.* 3. *The King* v. *The Inhabitants of St. Luke's, in Middleſex.*

See this caſe fully ſtated in page 95 of this work, under the head *Apprentice.*

Hilary, 6 *Geo.* 3. *The King* v. *The Inhabitants of Silcheſter.*

On a motion to quaſh *two orders*, viz. *one* an *order* of *two juſtices* made for the removal of *J. M.* a ſingle woman, from *Enborn* in *Yorkſhire* to *Silcheſter* in *Hants*: the *other* an *order* of ſeſſions confirming the *order* of the ſaid juſtices.

Caſe. In *July* 1764, *J. M.* the *pauper*, together with one *G. W.* was ſent by an *order* of removal under the hands and ſeals of *two juſtices*, from the pariſh of *Newbury* to that of *Enborn*, by the names of *G. W.* and *J.* his wife: and there was no appeal from the ſaid *order* to the next, or any other ſeſſions: afterwards the ſaid pariſh of *Enborn* finding that *J.* was not the wife of *G. W.* removed her, by an *original order*, by the name of *J. M.* ſingle woman, from the ſaid pariſh of *Enborn* to the pariſh of *Silcheſter*, under an *order* of *two juſtices.* From which *order* the pariſh of *Silcheſter* appealed. And on hearing the appeal, it was proved, "that the ſaid *J.* never "was married to the ſaid *G. W.*" therefore the ſeſſions affirmed the *order* of the *two juſtices.*

The council, who was to have ſupported the *orders*, acknowledged it to have been *fully ſettled*, "that an "*order* of removal to a pariſh, confirmed without appeal by ſuch pariſh, concludes that pariſh againſt "all the world."

The court were ſo clear of the ſame opinion, that without hearing the council on the other ſide, they made the rule abſolute for quaſhing both *orders.* *Vide Bur. S. C. vol.* 2. *p.* 551.

Eaſter, 6 *Geo.* 3. *The King* v. *The Inhabitants of Ecleſal Bierlow in Sheffield.*

See this caſe fully ſtated in page 95 of this work, under the head *Apprentice.*

Trinity, 6 *Geo.* 3. *The King* v. *The Inhabitants of Frome-Selwood.*

On a motion to quaſh an *order* of ſeſſions, made for diſcharging an *order* of *two juſtices*, made for the removal of *B.*'s widow and her five children, from *Frome-Selwood*, in the county of *Somerſet*, to *Brixton Deverel*, in the county of *Wilts.*

Caſe. *R. S.* the huſband was hired for a year by *W. P.* at *King's Weſton*, at the wages of 5 *l. per* year and, under this contract, he ſerved the ſaid *W. P.* in *King's Weſton*, till within *ten days* of the end of the year, when the ſaid *R. S.* declaring to his maſter, "that he "wiſhed *not* to be ſettled in *King's Weſton*," aſked his leave to viſit his relations: to which his maſter agreed. After the year was expired, the ſaid *R. S.* returned to his maſter, and then hired himſelf to his ſaid maſter as a *day-labourer*, and continued with him *three months.* After *R. S.* returned, his maſter and he made up their accounts; and he allowed him for the time he had been abſent in the preceeding year out of his daily wages.

On ſhewing cauſe, the court held the ſaid *R. S.* to be ſettled in *King's Weſton*, and conſidered the *leave* and *conſent* of his maſter as fraudulent, and a mere evaſion of the ſettlement. Therefore they affirmed the *order* of ſeſſions, and quaſhed the *order* of the *two juſtices.* *Vide Bur. S. C. vol.* 2. *p.* 565.

Hilary, 10 *Geo.* 3. *The King* v. *The Inhabitants of Llanrhydd.*

See this caſe fully ſtated in page 82 of this work, under the head *Appeal.*

Hilary, 10 *Geo.* 3. *The King* v. *The Inhabitants of Merevall.*

Adjudged, That the delivery of an *order* of removal, and of the *paupers*, to a churchwarden, where there is no *overſeer* for that part of the pariſh, is ſufficient. *Vide Bur. S. C. vol.* 3. *p.* 661.

Eaſter, 11 *Geo.* 3. *The King* v. *The Inhabitants of Honiton.*

It was held in this caſe, that an *order* of removal, adjudging "that the *paupers* have become chargeable," imports that they were ſo at the time of making ſuch *order.* *Vide Bur. S. C. vol.* 3. *p.* 680.

Outlawry.

—— 1 *W.* & *M.* *The King* v. *Tippin.*

A perſon was *outlawed* on an information for ſeducing a young gentleman to marry a young woman of a lewd character, and fined 5000 *l.* And it was moved in behalf of the defendant, that he could not be fined on the *outlawry*, becauſe in *miſdemeanor* the *outlawry* does not enure as a conviction for the offence, as it does in caſes of *treaſon* and *felony*; but as a conviction of the contempt for not anſwering, which contempt is puniſhed by the forfeiture of his goods and chattels; and if he might be fined now, he muſt be fined again on the principal judgment. And the firſt was held to be irregular, for the *outlawry* in theſe caſes is not a conviction. *Vide Salk. vol.* 2. *p.* 494.

Michaelmas, 5 *W.* & *M.* *The Attorney General* v. *Baden.*

A. owed money to *B.* on a judgment, and to *C.* on bond; *A.* was *outlawed* at the ſuit of the obligee, and his lands ſeized on the *outlawry*; and the queſtion was, whether the conuſee of the judgment could extend theſe lands? And it was held that the *outlawry* ſhould be preferred, and that the King's hands ſhould not be amoved, unleſs the conuſee could ſhew *covin* and practice between the obligor and obligee. *Vide Salk. vol.* 2. *p.* 495.

Michaelmas, 6 *W.* & *M.* *Green* v. *Mooer.*

The caſe was this: the declaration was in *Trinity* term; the defendant imparles till *Michaelmas* term. In the vacation the plaintiff was *outlawed*, and then in *Michaelmas* term the defendant pleads the *outlawry* in bar,

bar, but does not ſay the *outlawry* was ſince the laſt *continuance*, for it appears to be ſo here.

Holt, Chief Juſtice. The plea is good enough.

Eyre, Juſtice. Since the record does appear, why ſhould it not be pleaded?

Per curiam. Let it go over till the next term; becauſe it being a juſt action, you may in the mean time reverſe the *outlawry*, and then may plead *ſince the laſt continuance*. *Vide Mod. Rep. vol.* 5. *p.* 11.

Trinity, 7 *W*. 3. *The King* v. *Hornby*.

Holt, Chief Juſtice. If a man be *outlawed* in this court, and the party's goods are ſeiſed into the King's hands, and then the *outlawry* is reverſed, there can be no reſtitution; becauſe this court cannot ſend a writ to the treaſurer of the Exchequer, and the court of *Exchequer* have no record before them to iſſue out a warrant for a reſtitution: ſo if an attainder be reverſed, the *meſne* profits taken into the *Exchequer* cannot be reſtored for the ſame reaſon; and alſo for that the King cannot have made a diſſeiſor, and the ſtatute gives a remedy only as to parliament. *Vide Mod. Rep. vol.* 5. *p.* 61.

Michaelmas, 7 *W.* & *M.* *The King* v. *Hill*.

It was argued, that though the ſtatute of *recuſancy* ſays, that all *outlawries* for recuſancy ſhall not be removed for want of form, yet in Serjeant *Trinder*'s wife's caſe, 1 *W.* & *M.* it was adjudged in this court that it ſhould, that the ſtatute might be made ſenſe: but an indictment or information for recuſancy ſhall not be quaſhed for form; but yet on *traverſe* of the fact, and bail given, the *outlawry* ſhall be reverſed for form: *to which the court agreed.*

Holt, Chief Juſtice. On the reverſal of an *outlawry* in an information for ſending children beyond ſea to be bred papiſts, the defendant muſt plead inſtantly. *Vide Mod. Rep. vol.* 5. *p.* 141.

Eaſter, 8 *W*. 3. *Wolfe* v. *Daviſon*.

See this caſe fully ſtated in page 427 of this work, under the head *Eſcape*.

Michaelmas, 8 *W*. 3. *Arthur's Caſe*. Error.

Arthur was *outlawed* for *felony* on *five indictments*, and afterwards came in, and was brought to the bar, and being aſked what he had to ſay, why judgment ſhould not be given, he produced *five writs of error*.

Holt, Chief Juſtice. If there be no lands, the Attorney General may confeſs error, and then he ſhall plead preſently, and be tried on the indictments; if there be lands, there muſt be a *ſcire facias* againſt the Lords, mediate and immediate, to ſhew cauſe why he ſhould not have reſtitution. But if it be ſuggeſted on the roll that he has no lands, and the Attorney General confeſſes it, there needs no *ſci. fa.* *Vide Salk. vol.* 2. *p.* 495. *Raym. vol.* 1. *p.* 154.

Michaelmas, 9 *W*. 3. *The King* v. *Harriſon and Duke*.

The defendants were convicted and *outlawed* on informations of *perjury*, and the *writ of exigent* was filed; and it was moved that the court would pronounce judgment on the defendants, as the proſecutor could go no further; but the court ſaid they never knew any judgment given for a *corporal* puniſhment, even in the caſe of an *outlawry*, in the abſence of the party: when a man is *outlawed* for *felony*, there is never any award of execution againſt him till he is brought to the bar; and ſince in this caſe a *corporal puniſhment* would be part of the ſentence, they could not do it; and, on ſearch, no ſuch precedent could be found. *Vide Mod. Rep. vol.* 12. *p.* 156.

Michaelmas, 10 *W*. 3. *Anonymous*.

One *H.* was *outlawed* in *two* actions, one was for 10*l*, the other for 40*s*. and on reverſing the *outlawry*, the court took ſpecial bail for the *firſt*, and an appearance for the other, on *ſtat.* 4 & 5 *W.* & *M. c.* 18.

Note. The firſt recognizance was took purſuant to *ſtat.* 31 *Eliz. c.* 3. and now by *ſtat.* 4 & 5 *W.* & *M.* a perſon *outlawed*, except for *treaſon*, or *felony*, need not appear in perſon to reverſe it, but by attorney. *Vide Salk. vol.* 2. *p.* 496.

Michaelmas, 10 *W*. 3. *Matthews* v. *Erbo*.

The court was moved to ſet aſide an execution on an *outlawry* againſt the defendant, on an *affidavit* that the defendant was an alien merchant, and lived beyond the ſea, and was reſiding there during all the time that the plaintiff proceeded to *outlaw* him. But it was denied by the whole court, becauſe by this means any perſon may contract debts, and then go beyond ſea, and ſo he will be out of the reach of the law. But the defendant may bring error, and reverſe the *outlawry*, if he pleaſes. *Vide Raym. vol.* 1. *p.* 349.

Michaelmas, 11 *W*. 3. *Anonymous*.

Holt, Chief Juſtice. I never liked the exception *for the county* in an *outlawry*, though it has been done before I was born; but ſure the firſt that obtained it had good luck. *Vide Mod. Rep. vol.* 12. *p.* 337.

Eaſter, 12 *W*. 3. *Lady Frankland* v. *Shanim*.

In an action of *debt* on a bond, it was pleaded in *bar*, that in a former action on that bond, the defendant had pleaded the late ſtatute of the King, laying taxes on bonds for ſecurity of money, and that none ſhould recover ſuch debts if they had not taxed the ſame, and that on that plea the plaintiff was barred.

It was objected, that the ſtatute was only a *temporary* law, and now expired, and therefore the impediment being removed, the plaintiff ſhould recover; it was compared to the caſe of *excommengement* pleaded, where the judgment is, that the plaint remain without a day, until, &c. which is but a *temporary* plea, by which the parties are put out of court, but may be brought in by a re-ſummons, or re-attachment; but where the *outlawry* is pleaded in *abatement* after a pardon or reverſal thereof, the party muſt begin *de novo*.

Holt, Chief Juſtice. Here the defendant had a good plea, when the *firſt* action commenced, and time ſhall not wear it out; and he obſerved, that *Co. Lit.* 128. *b.* and 135. *b.* is to be underſtood on this diſtinction, when the cauſe of action accrues to the plaintiff at a time at which he is under the diſability of *outlawry*; there the plea of *outlawry* in *abatement* ſhall quite overthrow the writ, and after removal thereof, he muſt begin *de novo*; but where the diſability of *outlawry* is only a *temporary* diſability, which does not abate the writ, but is only *until*, &c. and after removal thereof, he may re-continue the action by re-ſummons, &c. *Vide Mod. Rep. vol.* 12. *p.* 400.

Trinity, 12 *W*. 3. *Hill* v. *Wilks*.

In this caſe, it appearing to the court plainly, that *W.* had got *H.* *outlawed* when he was viſible, and to his knowledge eaſily might be ſerved with a proceſs; therefore he was ordered to reverſe it at his own charges. *Vide Mod. Rep. vol.* 12. *p.* 413.

Trinity, 12 *W*. 3. *Wilbraham* v. *Doyley*, *or* *Doley*. Error.

The court was moved to ſtop a writ of error out of *Chancery*, for refuſing an *outlawry* in the County Palatine of *Cheſter*, and 4 *Inſt.* 214. was urged, where *Coke* holds, that in a writ of error to *Cheſter*, a day ſhould be given for ſo long a time as that *three county-courts* might be held before the return of the writ into the *King's Bench*, which is *four months*; by which time the juſtices, or lieutenants within the ſame county, might redreſs the error, if they would.

On the other ſide it was urged, that though there was ſuch an antient uſage, yet now *ſtat.* 32 *Hen.* 8. *c.* 43. has taken away the antient courſe, and enacted, that the adminiſtration of juſtice uſed heretofore

fore to be had at *eight ſhire days*, ſhould be hereafter executed by the Juſtice of *Cheſter* at two times in the year only, *viz.* at the ſeſſions next after *Eaſter*, and at the other ſeſſions next after *Michaelmas*, (which, by *ſtat.* 33 *Hen* 8. *c.* 13. is made moveable at the pleaſure of the juſtice, ſo as proclamation be made of the time (*fifteen days* before) in like manner as is practiſed in the County Palatine of *Lancaſter*. And by that ſtatute it is made impracticable in point of time; for if it ſhould be executed now, it would delay the parties at leaſt *two years*, inſtead of the *four months* delay before.

2dly, This cuſtom, if it now remained, extends only to caſes of judgments given by the judges *by reaſon of the tenure*, to ſave their fine; and therefore it does not extend to a fine, nor conſequently to this caſe, becauſe the judgment *that he be outlawed* is given to the coroners.

3dly, Before *ſtat.* 33 *Hen.* 8. *c.* 13. there were no *outlawries* in *Cheſter*, the electing of coroners in the ſame county being firſt appointed by the ſaid ſtatute, and therefore the cuſtom could not extend to judgments of *outlawry*.

Holt, Chief Juſtice, agreed *in all the points*, and ſaid, that there was no colour for the motion; and ſaid farther, that there was no Chief Juſtice of *Cheſter* before the time of Queen *Elizabeth*, there being but one juſtice before.

See the account of this cuſtom at large in *Dyer*. 345. 320-1. from whence *Coke* tranſcribes it in 4 *Inſt.* 212. *Vide Raym. vol.* 1. *p.* 591. *Mod. Rep. vol.* 12. *p.* 545.

Michaelmas, 12 *W.* 3. *Wilbraham* v. *Doyley*. Error.

On a *writ of error* to reverſe an *outlawry* in *Cheſter*, the defendant pleaded that no bail was put in before the allowance of the *writ of error*; according to ſtatute 31 *Eliz. cap.* 3. for *error* in reverſing *outlawries*.

Per curiam. This is no plea; for it is well enough, if bail be put in at any time before the reverſal. The *error* here was the want of the words, *for the country. Vide Raym. vol.* 1. *p.* 605.

Michaelmas, 12 *W.* 3. *Anonymous*.

Holt, Chief Juſtice. By an *outlawry*, a leaſe for years is forfeited before any ſeizure, and therefore if it be ſold after the *outlawry*, and before ſeizure, the King ſhall avoid the ſale; but if a perſon *outlawed* ſells an eſtate in fee before ſeizure, the ſale is good, and the King ſhall not have the *pernancy* of the profits; but if the ſale be after ſeizure, the ſale ſhall hold, but the King ſhall have the *pernancy* of the profit: but even in caſe of a leaſe, there ought to be an office found for the King, *Cro. Jac.* 82. *Vide Mod. Rep. vol.* 12. *p.* 438.

Trinity, 13 *W.* 3. *The King* v. *Yates*.

An *outlawry* for *high treaſon* was reverſed, on the exception, that it did not appear where the *firſt* court was held. *Vide Mod. Rep. vol.* 12. *p.* 542.

Hilary, 2 *Ann.* *Morgan* v. *Tomkins*.

If there be an *outlawry* on an indictment, and that is afterwards ſet aſide, the judgment ſtands good and open to proceed upon; but if judgment be on an indictment by *nil dicit*, or any other judgment by the court, and that be reverſed, all is ſet at large, and there is an end of the indictment. And it has been held, in *Keiling*'s time, that if a forcible entry were traverſed, yet there ſhould not be a reſtitution, in the caſe of *The King* v. *Carle*. But the contrary has been held ſince, and before; and that there is no way to prevent reſtitution, but by a *certiorari*, or pleading that the party had poſſeſſion for *three years* before, on *ſtat.* 39 *Eliz.*. *Vide Mod. Rep. vol.* 6. *p.* 116.

Eaſter, 4 *Ann.* *Symmons* v. *Bingee and Cook*.

The defendant *Bingee* being a *feme*, it was now moved on her behalf, that on filing common bail ſhe might have liberty to reverſe the *outlawry*.

Per curiam. The *writ of error* to reverſe the *outlawry* muſt be brought in the name of both the parties that are *outlawed*; and if one only appears, the other may be ſummoned and ſevered, and then the *outlawry* may be reverſed for the benefit of him who appears only. Before it can be reverſed for want of proclamations, the party *outlawed* muſt give bail to appear, and to anſwer in another action.

If the party *outlawed* comes in *gratis* on the return of the *exigent*, *alias*, or *pluries*, he may be admitted, by motion to reverſe the *outlawry*, for any other cauſe but want of proclamations, without putting in bail. If he comes in by a *cepi corpus*, then he ſhall not be admitted to reverſe the *outlawry*, without appearing in perſon, as in ſuch caſe he was obliged to do at *common law*; or putting in bail with the ſheriff for his appearance on the return of the *cepi corpus*, and on doing what the court ſhall order. Appearing by attorney is an indulgence given by *ſtat.* 4 & 5 *W.* & *M.* and the bail is to be ſpecial or common, according to the nature of the caſe, in this, as in other caſes. *Vide Salk. vol.* 2. *p.* 496.

Eaſter, 7 *Ann.* *The Queen* v. *Lord Griffin*.

Lord *Griffin* being brought up by *habeas corpus* into court upon his *outlawry*, deſired council to take exceptions to the ſaid *outlawry*.

Powell, Juſtice, (*Holt*, Chief Juſtice, being abſent) denied it; and ſaid, that though the ſtatute gives council in high treaſon at the trial, yet none is to be allowed after an *outlawry*, except the priſoner ſhew ſome particular error, on which the court may aſſign him council; but the court is his council, and will do him juſtice; and on that, execution was ordered to be awarded by rule of court: the ſolicitor-general then then moved, that ſome time might be *pronounced*, which he ſaid the Lord Chief Juſtice *Holt* told him was moſt proper. But the court ſaid, the practice had been otherwiſe; and directed that a rule ſhould be *that they do execution* generally. *Vide Mod. Rep. vol.* 11. *p.* 168.

Eaſter, 7 *Ann.* *The Queen* v. *Cope*. Error.

A writ of *error* was brought to reverſe an *outlawry*; the error for which it was reverſed was, becauſe it did not appear where the *county court* was held. *Vide Mod. Rep. vol.* 11. *p.* 173.

Michaelmas, 12 *Ann.* *The Queen* v. *Stafford*. Error.

Stafford had been *outlawed* for high treaſon, and had obtained from the crown a writ of error to reverſe this *outlawry*: and the Attorney-General had orders to confeſs in court the error aſſigned, which was an error in fact, *viz.*

That he was *outlawed* by a wrong addition; which the Attorney-General did accordingly; the court was therefore prayed, that the *outlawry* might be reverſed.

Parker, Chief Juſtice, was of opinion, that though in *outlawry* for treaſon there is no need of warning the Lords, of whom the lands are held by a *ſcire facias*, before the *outlawry* be reverſed, as muſt be done in caſe of felony, and *outlawry* for treaſon, as to the ter-tenants; for in caſe of treaſon, where the forfeiture is to the crown, the crown may grant theſe lands to others, who ought to be heard what they can ſay for themſelves before they loſe their lands.

He thought therefore there ſhould have been a *ſcire facias* to the ter-tenants, and grounded his opinion on a caſe in *Hen.* 4. where there was a *ſcire facias* to the ter-tenant; and though this was an *outlawry* for felony, yet the King's being immediate Lord, made it all one as if it had been an *outlawry* for treaſon.

And the entry, in caſe of felony, as may be ſeen in *Cook's Entries* 318. mentions the ſuing out of a *ſcire facias* as a thing of abſolute neceſſity, without which the judge could not reverſe the *outlawry*.

But upon ſearching into precedents, it was found, that in fact, in *outlawries* for treaſon, there uſed to be no *ſcire facias*; and the precedents being ſo, and it being a ſuppoſition, not of neceſſity, that the crown ſhould grant theſe lands, and then *ouſt* the patentees, by ſuffering a writ of error to be brought, the *outlawry* was reverſed. *Vide Mod. Rep. vol.* 10. *p.* 188.

Hilary, 3 *Geo. The Queen* v. *Simpſon.*

In this caſe, which ſee fully ſtated in page 84 of this work,

Parker, Chief Juſtice obſerved, in the firſt caſe of *outlawry* for treaſon or felony, the law interprets the abſence of the party as a ſufficient evidence of his guilt; and without requiring further proof or ſatisfaction, the law accounts him guilty of the fact; corruption of blood and forfeiture of the eſtate enſues.

In real actions, the ſecond default is final and concluſive; and the court, without regarding the merits of the cauſe, will give judgment that he ſhall loſe his land.

Outlawry in leſſer crimes, or in perſonal actions, does not, as in the firſt caſe, in judgment of law, occaſion the party to be looked upon as guilty of the fact; or as in the ſecond caſe, occaſion a judgment for the King in demand, but yet is in its conſequences more penal and fatal than if it did.

For a reſtraint of the liberty of the party, if he can be found, the profits of the land, while the *outlawry* remains in force, and all his goods and chattels forfeited to the King, together with an excluſion from the benefit and protection of the law, follow on it. *Vide Mod. Rep. vol.* 10. *p.* 379.

Hilary, 8 *Geo. The King* v. *The Marquis of Powis.*

On a writ of error to reverſe an *outlawry* for high treaſon, the error aſſigned was, that the proceſs of *outlawry* againſt the Marquis was directed to the ſheriff of *London,* when he the Marquis lived in the pariſh of St. *Giles's,* in the county of *Middleſex,* which is an error in fact; for the proceſs of *capias* muſt be always directed to the ſheriff of the county were the party lives, and for this reaſon the *outlawry* was reverſed, on the confeſſion of the Attorney-General. *Vide Mod. Rep. vol.* 8. *p.* 27.

Trinity, 9 *Geo. The King* v. *Erbury, or Earbury.*

See this caſe fully ſtated in page 179 of this work, under the head *Bail.*

Hilary, 2 *Geo.* 2. *The King* v. *Roger Johnſon.*

The priſoner being brought up on the 25th *November,* 1727, and the *outlawry* againſt him being read, he was called upon to know what he had to ſay why execution ſhould not be awarded; upon which he pleaded *ore tenus,* his being beyond ſea at the time of the *outlawry* pronounced; and the Attorney-General *inſtantly* replied *ore tenus,* that he was then within the realm, and traverſed that he was beyond ſea according to his plea, and offered an iſſue upon it; the defendant thereupon ſaid, that he joined iſſue; and the jury came inſtantly to the bar, and were ſworn. And then *the council for the defendant* (for it was urged he was to have council, as to *fact* and *law both,* in this collateral iſſue, though not on the indictment itſelf, the offence as to the coin being excepted out of the ſtatute of *W.* 3.) opened the iſſue, and ſeveral witneſſes were examined to prove him beyond ſea; and after the King's council had been heard, and had examined their witneſſes, the priſoner's council replied; and afterwards the evidence was ſummed up, and the jury found the iſſue for the defendant.

Upon bringing in the verdict, the defendant was immediately arraigned, and pleaded *not guilty.* And he was ordered to be tried at the bar the next term. On the firſt day of which, the Attorney General moved the court to appoint a day for trial; but the defendant not being at the bar, the court would make no rule, it being a capital caſe. And he was the next day brought to the bar, and then the time for trial was fixed; and upon the evidence the defendant was acquitted. *Vide Stra. vol.* 2. *p.* 824.

Eaſter, 4 *Geo.* 2. *Cookes* v. *Champneſs, or Champneys.*

J. S. was *outlawed* on *meſne proceſs* at the ſuit of the plaintiff, and taken by a *capias utlegatum,* but ſuffered to eſcape by the defendant; whereon the plaintiff brought an action on the caſe *qui tam* for the ſaid eſcape; and whether the action lay, was the point before the court.

It was inſiſted for the defendant, that where the *outlawry* is on *meſne proceſs,* the party *outlawed* is in cuſtody merely at the ſuit of the King, and that the plaintiff has no intereſt in his body but where the *outlawry* is after judgment; the party is in execution for the plaintiff; *Cro. Eliz.* 606, 707. By the *outlawry* on *meſne proceſs,* the plaintiff is at the end of his ſuit; he cannot declare againſt the defendant, he muſt bring a new *original* by *ſtat.* 13 *H.* 4. 1. nor is the nature of the debt changed by the *outlawry*; all which the court admitted, and therefore the defendant's council would inſiſt that the plaintiff could have no loſs by the eſcape.

He then excepted to the declaration, *viz.* that the *exigent* was awarded in a foreign county; and then by *ſtat.* 6 *H.* 8. *cap.* 4. proclamation ſhould have been made in the county in which the defendant then was, and that not being done, the *outlawry* is utterly void by the expreſs proviſion of the ſtatute, and the ſheriff ſhall not be charged when the proceſs is void.

To this the Chief Juſtice ſaid, that the ſtatute is to be underſtood that the *outlawry* muſt be avoided by plea.

The council on the other ſide, to maintain the action, cited *Cro. Eliz.* 652. 2 *Cro.* 360. 1 *Lutw.* 122. *Moor.* 834. 2 *Bulſt.* 236. 1 *Ro. Rep.* 47. that it is enough there may be a poſſibility of damage to the plaintiff, and that the party *outlawed* cannot have his *outlawry* reverſed without ſecurity firſt given to appear to a new *original*; and therefore the plaintiff is delayed in the recovery of his debt, which is a damage: and the court being of this opinion, gave judgment for the plaintiff. *Vide Fitz-Gibbons, p.* 265.

Trinity, 6 *Geo.* 2. *Ducket* v. *Martin.* Error.

Pending *error* on an *outlawry* on *meſne* proceſs, the defendant in error moved to quaſh the writ, becauſe no bail was given.

Per curiam. That is never done till the *outlawry* is reverſed, and then we take bail to appear to an original to be brought within *two terms.* And ſo it was done in this caſe. *Vide Stra. vol.* 2. *p.* 951.

Hilary, 16 *Geo.* 2. *Serecold* v. *Hampſon, Bart.* Error.

The defendant was *outlawed* in a perſonal action, without any *affidavit* made of the plaintiff's demand; and having brought *error,* he aſſigned his being beyond ſea at the time of the *outlawry,* for which the court made no difficulty to reverſe it. But then the queſtion was, upon what terms they ſhould do it; the plaintiff inſiſting on ſpecial bail, and having now made a proper affidavit; and the defendant inſiſting to file common bail only.

The court, upon conſidering the words of *ſtat.* 4 & 5 *W.* & *M. c.* 18. *ſect.* 3. which impowers the *outlaw* to appear by attorney, (as he did here) and ſays, "It ſhall be reverſed without bail in all caſes, but "where ſpecial bail ſhould be ordered by the court," declared they were of opinion, they had a diſcretionary power to require it, or not; and that the want of an affidavit before was no objection, becauſe that is only requiſite to warrant an arreſt, and here was one in time for the new action that muſt be brought. And though *ſtat.* 31 *Eliz. c.* 3. *ſect.* 3. is the only act that expreſsly requires bail, it is not to be inferred from thence, that in other caſes it ought not to be inſiſted on; for that act makes a new error, and the bail upon it is abſolutely to pay the condemnation-mony. *Vide Stra. vol.* 2. *p.* 1178.

Trinity, 31 *Geo.* 2. *The King* v. *Davis.*

See this caſe fully ſtated in page 510 of this work, under the head *Habeas Corpus.*

Eaſter, 4 *Geo.* 3. *Cracraft* v. *Gledowe.*

See this caſe fully ſtated in page 174 of this work, under the head *Bail.*

Trinity, 6 *Geo.* 3. *Campbell* v. *Daley.*

The queſtion before the court was, "whether in a "caſe *originally* requiring ſpecial bail, and the defen- "dant ſtanding out to an *outlawry*, he can come in "and appear to the *outlawry*, without putting in ſpe- "cial bail?"

Per curiam. There ought to be *ſpecial bail.* It would be very unreaſonable that the defendant ſhould gain an *advantage* by ſtanding out till proceſs of *outlawry.* He certainly ought not to be in a better caſe then, than if he had appeared at firſt. And accordingly the direction given was, "that the *filacer* ſhould not iſſue a *ſu-* "*perſedeas* till the defendant put in *ſpecial bail.*" *Vide Bur. vol.* 3, *p.* 1920.

Oyer of Deeds, Writs, &c.

Michaelmas, 4 *W.* & *M.* *Saliſbury* v. *Williams.* Error.

In *debt* on bond in the grand ſeſſions of *Wales*, the plaintiff omitted in his declaration to make a *profert*, &c. Judgment was for the plaintiff; and now in *error* this omiſſion was inſiſted on, and the court held it only matter of form, of which no advantage could be taken after verdict, or on a general demurrer, and therefore affirmed the judgment. *Vide Salk. vol.* 2. *p.* 497.

Trinity, 7 *W.* 3. *Morris's Caſe.*

In *replevin*, the defendant avowed for a rent-charge, and made title by a will, and pleaded it with a *profert*, and the plaintiff inſiſted to have *oyer*, alledging it was the avowant's folly to make a *profert* of it, and he ought to take the advantage of it.

Per curiam. He was not bound to plead it ſo; it is but *ſurpluſage*, and we will not compel him to give *oyer* of it. *Vide Salk. vol.* 2. *p.* 497.

Trinity, 10 *W.* 3. *Theobald* v. *Long.*

If the defendant pleads another action depending for the ſame cauſe in the ſame court, the plaintiff may pray [illegible] record, being in the ſame court; and if [illegible] the record, the plaintiff may ſign judgment [illegible]. For in all caſes where a deed or record is pleaded, and *oyer* prayed; if *oyer* is not granted, the plea is to be conſidered as no plea. *Keil.* 95, 96. *Vide Raym. vol.* 1. *p.* 347.

Michaelmas, 13 *W.* 3. *Roberts* v. *Arthur.*

On the *profert* of a deed, it remains in court all that term, but no longer, unleſs it be controverted; but letters teſtamentary, or of adminiſtration, do not remain in court; for the party may have occaſion to produce them elſewhere. *Stat.* 36 *H.* 6, 30.

Holt, Chief Juſtice. Where the letters patent pleaded, are recorded in the ſame court where the plea is pleaded, the party need not ſhew them; but where in another court, he muſt plead them with a *profert* in court, or the exemplification of them under the great ſeal. *Vide Salk. vol.* 2. *p.* 497.

Eaſter, 1 *Ann.* *The Queen* v. *Ewer.*

It was *urged*, that if a perſon would except againſt a writ, he ought to have *oyer* of it, and that notwithſtanding it be ſet out in *hæc verba.* But it was anſwered, that it were vain to demand *oyer* of a writ which is already ſet out in *hæc verba* on the roll. Indeed it is true, none can except againſt an original writ that is not ſet out in *hæc verba*, without having *oyer* of it. *Vide Mod. Rep. vol.* 7. *p.* 9.

See this caſe fully ſtated in page 254 of this work, under the head *Certiorari.*

Trinity, 1 *Ann.* *Anonymous.*

Holt, Chief Juſtice. If a deed has no date, or an impoſſible date, you may declare that the defendant, by his deed on ſuch a day and year did ſo and ſo, and on *oyer* there will be no variance; but if you ſay that by his deed of ſuch date, or bearing date ſo and ſo, and on *oyer* the deed has no date, or one impoſſible, it will be a variance. *Vide Mod. Rep. vol.* 7. *p.* 38.

Eaſter, 2 *Ann.* *Green* v. *Walter.* Error.

On *debt* on bond, the defendant craved *oyer* of the condition, which was, that if the defendant ſhould anſwer the determination of the law, touching ſuch a ſhip and goods; and in caſe the law ſhould adjudge the ſaid ſhip and goods to be a prize, or otherwiſe forfeited, if then the defendant ſhould deliver the ſaid ſhip and goods to the plaintiff, that then, &c. The defendant pleaded, that the law did not adjudge the ſaid ſhip and goods to be a prize, or otherwiſe forfeited. The plaintiff replied, that his ſhip and goods were condemned in the Admiralty of *England* to be a prize, and aſſigns a breach that the defendant had not delivered the ſaid ſhip and goods, *and this he is ready to verify*, and at the end of his plea makes a *profert in curia* of the ſentence under the great ſeal of the Admiralty. The defendant craves *oyer* of the ſentence, and the exemplification of the ſentence was ſet out in *theſe words*, to which the defendant demurs: This action was brought in the Common Pleas in *Ireland*, and judgment was there given for the plaintiff on error brought, that judgment was affirmed in the King's Bench in *Ireland*, on which judgment error was now brought here.

The exceptions taken to the replication were, that by making a *profert* of the ſentence, the plaintiff had deprived the defendant of taking iſſue upon the ſentence, and when he comes on *oyer* demanded to ſet out the ſentence, he pleads only an exemplification of it, which is not pleadable; but if it were, does not prove the plaintiff's replication, being variant in many particulars from the ſhip and goods mentioned in the condition of the bond, and ſo does not prove the law has made any determination as to them; and beſides, it does not appear in the ſentence that the capture ever was upon the high ſea, and conſequently the *Admiralty* had no juriſdiction; and then alſo there is no legal determination: and that the breach was not well aſſigned.

Holt, Chief Juſtice. By pleading that the law has made no determination, the defendant has confeſſed, that he has not re-delivered them, and therefore the plaintiff need not aſſign a breach; and it is not like the caſe of an award, which is a ſingle caſe, and ſtands by itſelf.

As to the *profert*, the defendant needed not have made it, becauſe it is no deed, but only a *judicial* determination in a court, not of record; and though he did make a *profert*, he needed not have ſet it out: and notwithſtanding the *profert*, the defendant might have traverſed the ſentence, and then the *query* is, whether this impertinent matter will hurt, or leſſen the ſtrength of a good and ſubſtantial replication? for this is not the ſentence, though it be called ſo, but mere idle impertinent matter, which ſhall never hurt a good replication, well averred.

The judgment of affirmance in the King's Bench in *Ireland* was affirmed as to the affirmance, and reverſed as to the coſts, *niſi.* *Vide Raym. vol.* 2. *p.* 891.

Trinity, 2 *Ann.* *Sir Edward Longueville* v. *The Hundred of Iſleworth.*

See this caſe fully ſtated in page 418 of this work, under the head *Error.*

Michaelmas, 3 *Ann.* *Armit* v. *Bream.*

Holt, Chief Juſtice. Where a man has obliged himſelf to make a deed, and is ſued for not doing it; it is not enough to ſay, that he made the deed, *viz.* the leaſe, bond, *&c.* but he muſt ſet it forth, that the court may judge of its ſufficiency; for it ought to be a good deed; but if it be to deliver, or ſhew, or produce a deed, that is, a deed already made, there it is enough to ſay, that he delivered, or ſhewed, or produced it. *Vide Salk. vol.* 2. *p.* 498.

See this caſe fully ſtated in page 103 of this work, under the head *Arbitration* and *Award.*

Michaelmas, 3 *Ann.* *Anonymous.*

See this caſe fully ſtated in page 359 of this work, under the head *Deeds.*

Michaelmas, 3 *Ann.* *Cook* v. *Remmington.*

In *debt* upon a bond, the defendant demanded *oyer* of the condition, which was, to perform covenants in an indenture, and then demanded *oyer* of the indenture; and the plaintiff gave it him, omitting an indorſement, which was made before the execution of the deed; upon this *oyer* the defendant pleaded performance; the plaintiff replied and ſet forth the indorſement, and prayed judgment for the variance.

Per curiam. 1ſt, The defendant ſhould have ſet forth the indenture himſelf, being a party to it, and ſhould have pleaded performance to all the covenants therein.

2dly, The plaintiff was not obliged to give *oyer* of the indenture, and though he did, yet being what he need not do, the ſetting it forth is not at his peril, as where he is obliged to ſet it forth; nor is he concluded to ſay, that there is more contained in the indenture, but at liberty, as well as if the defendant himſelf had ſet it forth; and the court held, that as the defendant was bound to ſet it forth, ſo he was bound to ſupply this omiſſion, and make his plea complete; and for this judgment was given for the plaintiff. *Vide Salk. vol.* 2. *p.* 498.

Trinity, 4 *Ann.* *Ball* v. *The Bail of Ruſſel.*

See this caſe fully ſtated in page 165 of this work, under the head *Bail.*

Michaelmas, 6 *Geo.* *Stibbs* v. *Clough.*

See this caſe fully ſtated in page 244 of this work, under the head *Bonds.*

Hilary, 7 *Geo.* *Shepherd* v. *Shorthoſe.*

See this caſe fully ſtated in page 479 of this work, under the head *Executors* and *Adminiſtrators.*

Eaſter, 8 *Geo.* *Curwin or Colvin* v. *Fletcher.*

See this caſe fully ſtated in page 12 of this work, under the head *Acceptance.*

Michaelmas, 12 *Geo.* *The King* v. *The Mayor of Canterbury.*

See this caſe fully ſtated in page 635 of this work, under the head *Mandamus.*

Eaſter, 16 *Geo.* 2. *Soreſby* v. *Sparrow.*

The plaintiff declared in *covenant*, making a *profert* of the counter-part executed by the defendant, and aſſigned the breach of non-payment of rent. The defendant demanded *oyer*, and on ſearch the plaintiff could not find it; and on an *affidavit* of his inability, to give *oyer*, applied to the court to diſpenſe with it, the defendant having the original leaſe, and therefore not put to any inconvenience. But the court, on conſideration, declared they could not do it; the plaintiff was bound to make a *profert*, or elſe his declaration might be demurred to; the defendant is by law entitled to *oyer*, and the denial of it would be error. They ſaid, this does not depend on any particular rule of court, but on the general right of the law, which the court cannot diſpenſe with, 1 *Mod.* 266. It was the plaintiff's fault to bring the action, before he had the deed, or a proper diſcovery; and this is not like the caſe of a defendant, whoſe deed is in the plaintiff's hands, where the court will grant imparlances from time to time until it is produced. *Vide Stra. vol.* 2. *p.* 1186.

Michaelmas, 17 *Geo.* 2. *White* v. *The Earl of Montgomery.*

In *debt* on bond the defendant craved *oyer*, which the plaintiff was not able to give him, the bond being in the hands of Mr. *Strickland*, a gentleman of the bar, who had refuſed to produce it, and enable the plaintiff to force the defendant to plead. And the court being moved againſt Mr. *Strickland*, his excuſe was, that the bond was left with him to wait the event of a ſuit ſtill depending.

Per curiam. That is a matter the defendant may avail himſelf of by plea, and we will not determine it on motion, there muſt be a rule on Mr. *Strickland* to give *oyer* of the bond, and produce it at the trial, if required by the plaintiff. *Vide Stra. vol.* 2. *p.* 1198.

Michaelmas, 19 *Geo.* 2. *The Weavers Company*, *qui tam*, v. *Forreſt*, *and four others*, *on ſeparate Actions.*

The weavers company brought actions, as common informers, for the penalties in *ſtat.* 7 *Geo.* 2. *c.* 7. for ſelling printed *callico*, and ſet out their charter to ſhew they had power to ſue, and be ſued, with a *profert.* The defendants demanded *oyer*, and had a copy of the charter delivered to them, after which they put in the general iſſue of *no debt*, taking no notice of the *oyer.* The plaintiffs made up the iſſue, and inſerted the prayer and *oyer* at the head of the pleas, and demanded to be paid for it; on which the court was moved to expunge it; for though the defendants had a right to ſee whether the plaintiffs *may* ſue, yet they are not bound to inſert the *oyer*, but may plead to the merits.

On the other ſide it was inſiſted, that the demand and giving *oyer* is the act of the court, whoſe acts either party has a right to record. And *Carthew.* 301. *Raym.* 969. 1055. 1 *Saund.* 306. *Lutw.* 680. 1 *Vent.* 37. 2 *Mod.* 189. *Cro. Jac.* 679. *Co. Litt.* 260. were cited.

But the court held, that if the plaintiffs would avail themſelves of the letters patent being ſet out at large, they ought to do it by praying them to be enrolled at the head of their replication, and ought not to do it at the defendants expence; and therefore the court ordered the *oyer* to be expunged. *Vide Stra. vol.* 2. *p.* 1241.

Michaelmas, 20 *Geo.* 2. *Robinſon* v. *Stone.* Error.

On an action on the *caſe* brought by an indorſee of a promiſſory-note, indorſed by a woman as adminiſtratrix:

It was objected, that there was no *profert* of the letters of adminiſtration.

Per curiam. That is only required where the action is brought *by* an adminiſtrator, but not where a *third* perſon only derives a title *through* the *firſt.* Therefore the judgment was affirmed. *Vide Stra. vol.* 2. *p.* 1261.

Pariſh Officers.

Michaelmas, 4 *W.* & *M.* *Rudd* v. *Foſter.*

In *replevin* for taking of a gelding, the defendant juſtified by virtue of *ſtat.* 43 *Eliz. c.* 2. for money due on the poor tax.

The parties being at iſſue, it was tried at the bar, and the queſtion was, whether the vill of *Stratton* was in the *pariſh* of *Biggleſwade* in *Bedfordſhire*, or not?

The poor's rate was admitted.

And the evidence to prove it to be in that *pariſh* was, that there were but *two churchwardens*, and *two overſeers* of the poor, and that marriages, burials, and chriſtenings, and all other *parochial* rites, were done at *Biggleſwade*.

On the other ſide, to prove that *Stratton* was a reputed *pariſh* by itſelf at the time of making this ſtatute, this evidence was given, *viz.*

In the reign of *Ed.* 3. there was a public chapel there, where the people went to hear maſs, and that divine ſervice was read in that chapel at the time of making of this ſtatute.

Then it was proved, that a rate was made there in the year 1654, and that formerly they had diſtinct conſtables, and repaired their own highways till the year 1634, and then the difference between them was ſettled by the judges in their circuit.

And the council would have compared this to the caſe between the *pariſhes* of *Totteridge* and *Hatfield*, which was a *ſpecial* verdict on this ſtatute. The plaintiff lived in *Totteridge*, and had no lands in *Hatfield*, but had lands where he lived, he was rated to the poor of *Hatfield*, but becauſe at the time of making the ſtatute, *Totteridge* was a reputed *pariſh*, and had diſtinct conſtables, churchwardens, and overſeers of the poor, and made their own rates and aſſeſſments, which were levied by their own *officers*; for this reaſon it was held to be a diſtinct *pariſh* from *Hatfield*.

But *Stratton* was not ſo much as a *pariſh* in reputation at the time of making of the act, and ſo not like that caſe; for all that was proved was, that they had made rates ſince the ſtatute, and had a chapel before; but making rates will not make it a *pariſh*, without all other *parochial* rights; and therefore it was held to be a *vill* in the *pariſh* of *Biggleſwade*. *Vide Mod. Rep. vol.* 4. *p.* 157.

Hilary, 7 *W.* 3. *The King* v. *Hemmings or Commings, and Ghent.*

See this caſe fully ſtated in page 524 of this work, under the head *Indictment*.

Trinity, 7 *W.* 3. *Harman* v. *Renew.*

In this caſe, (which ſee in 1 *Salk.*) it was held, that at common law two churches might be *united* by the concurrence of the *patron*, *parſon*, and *Ordinary*; it was farther held, that though in ſuch caſe there is but one parſon to both churches, yet the two churches remain, and the two patronages, and the two pariſhes. But where they are *united by act of parliament*, as in the principal caſe, the pariſh of St. *Mary Bothaw* was by *ſtat.* 22 *Car.* 2. *united to the pariſh of St. Swithin*, and the queſtion ariſing, whether after ſuch union the pariſhioners of St. *Mary Bothaw* ſhould contribute towards the repair of the pariſh church of St. *Swithin*, it was adjudged, that they ſhould; becauſe where two pariſhes are united by act of parliament, one of thoſe two pariſhes is extinct, and both patrous preſent but as to one church, though it is *alternately*. *Vide Salk. vol.* 3. *p.* 89.

Hilary, 8 & 9 *W.* 3. *The King* v. *Rice.*

Holt, Chief Juſtice. In *London* both the *churchwardens* are choſen by the pariſhioners; in other places the parſon appoints one, and the pariſh the other; by the cuſtom of *England*, they are ſworn and admitted by the *Archdeacon* of the dioceſe, and though they are unfit, he cannot refuſe them. *Vide Raym. vol.* 1. *p.* 138.

Michaelmas, 10 *W.* 3. *The King* v. *The Juſtices of the Peace and Overſeers of Shipton Mallet.*

A *mandamus* was granted to the juſtices of the peace and to the overſeers of *Shipton Mallet*, to give an account for certain monies which they had received, &c.

The *juſtices* and *overſeers* made a return that there was an account given of their monies, and that they had diſpoſed of ſeveral ſums in ſuch a particular manner, &c.

Per curiam. Both the return, and the writ of *mandamus*, are ill.

Holt, Chief Juſtice. You ſhould have ſaid in your writ that you could not have your ordinary remedy.

Turton, Juſtice. That ought to have appeared as well in the writ itſelf as on the ſuggeſtion of the council at the bar. *Vide Mod. Rep. vol.* 5. *p.* 420.

Michaelmas, 12 *W.* 3. *The Caſe of the Churchwardens of St. Bartholomew.*

One *Fiſhburne* left 25 *l. per annum*, for the maintenance of a weekly lecturer, and appointed, that the lecturer ſhould be choſen by the pariſhioners, and to preach on any day in every week as they ſhould think beſt. The pariſhioners fixed on *Thurſday*, and choſe a lecturer every year; and now Mr. *Turton* being lecturer, and the pariſh having choſen Mr. *Rainer*, the other would not ſubmit to the choice, whereon the *churchwardens* ſhut *Turton* out of the church; afterwards the Biſhop of *London* determined in his favour, and granted an *inhibition and monition* for that purpoſe.

Holt, Chief Juſtice. A *prohibition* was granted to try the right; it is true, a man cannot be a *lecturer* without a *licence from the Biſhop or Archbiſhop*; but their power is only as to the qualification and fitneſs of the perſon, and not as to the right of the lectureſhip, and the *eccleſiaſtical* court may puniſh the *churchwardens*, if they will not open the church to the parſon, or to any one acting under him, but not if they refuſe to open it to any other. *Vide Salk. vol.* 3. *p.* 87.

Michaelmas, 13 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. If an *overſeer* of the poor contracts with tradeſmen on account of the poor, and on his own credit, as ſoon as he receives ſo much of the poor's money it becomes his own debt. *Vide Mod. Rep. vol.* 12. *p.* 559.

Hilary, 2 *Ann.* *The Queen* v. *The Inhabitants of Littleport.*

See this caſe fully ſtated in page 629 of this work, under the head *Mandamus*.

Hilary, 2 *Ann.* *The Queen* v. *Guy, or Guiſe.*

See this caſe fully ſtated in page 385 of this work, under the head *Eccleſiaſtical Matters*.

Michaelmas, 2 *Ann.* *The Caſe of the Pariſh of St. Andrew's.*

An order of *two* juſtices for one's taking on him the office of *overſeer* of the poor, being removed, ſeveral exceptions were taken againſt it. 1ſt. That it did not appear that the party was an inhabitant, or a houſe-keeper, and you will not intend him to be either, for it is not like the caſe in *Hob.* 312. where a man ſhall be intended to be in his ſenſes, or a witneſs of credit, till the contrary appears. And the way was for the pariſh to preſent theſe *officers* to the juſtices, to be by them confirmed.

The *ſecond exception* was, the order appointed him *overſeer* of the poor in that part of the *pariſh* which lies in *Middleſex*, (for the *pariſh* of St. *Andrew* extends both in *London* and *Middleſex*); and for this the caſe of the houſe of *Correction* for *Blackheath* was relied on. And the court ſeemed to think the appointment ought to have been for the whole *pariſh*, but afterwards they might have ordered him to *Middleſex* only, within ſuch a diviſion. *Vide Mod. Rep. vol.* 6. *p.* 77.

Trinity, 3 *Ann.* *Britton* v. *Standiſh.*

Standiſh, the *parſon* of *H.* libelled againſt *Britton*, for not coming to his pariſh church on *Sundays*, and for not receiving the ſacrament at *Eaſter:* the plaintiff ſuggeſted for a *prohibition*, that the bounds of *pariſhes* and the conſtructions of ſtatutes belonged to the juriſdiction of the *temporal* courts, *&c.* The queſtion was, whether a pariſhioner is bound by law to come to his own *pariſh church*, or whether he is excuſed if he goes to ſome other church, as it appeared the plaintiff did? It was inſiſted againſt the *prohibition*, that by *ſtat.* 1 *Eliz.* every *pariſhioner* is obliged to come to his *pariſh church*, which ſtatute is ſtill in force, and not altered by any ſubſequent act, but only by the act of *toleration* in reſpect to diſſenters; on the other ſide it was admitted, that the words of *ſtat.* 1 *Eliz.* are, *that every pariſhioner ſhall repair to his pariſh church*, but that thoſe words were corrected or explained by ſome ſubſequent ſtatutes; as for inſtance, by *ſtat.* 3 *Jac.* by which every *pariſhioner* is required to repair to his pariſh church, *or to ſome other church*; it is likewiſe corrected by the act of *toleration.*

Holt, Chief Juſtice. *Pariſhes* were inſtituted for the eaſe and benefit of the people, and not of the parſon; and if every pariſhioner is obliged to go to his pariſh church, then the gentlemen of *Gray's-Inn* and *Lincoln's-Inn* muſt no longer repair to their reſpective chapels, but to their pariſh churches, otherwiſe they may be compelled ſo to do by *eccleſiaſtical* cenſures.

Powell, Juſtice. The *ſpiritual courts* have always exerciſed this juriſdiction, and after ſo long uſage, it ought not now to be queſtioned; and as for the *gentlemen of Gray's-Inn and Lincoln's Inn*, they have likewiſe uſed to repair to their chapels, and therefore may be exempted from coming to their *pariſh church*, and this by virtue of an uſage againſt an uſage: now the reaſon why pariſhioners muſt come to their pariſh church, is not (as has been obſerved) for the benefit of the *parſon*, or that he may have his offerings, but becauſe he having charged himſelf with the cure of their ſouls, may be enabled to take care of that charge.

Holt, Chief Juſtice, held, that if a man repaired to any other chapel, it would be a good excuſe for his not coming to his pariſh church, but then he muſt plead it; he likewiſe held, that if *Britton* the plaintiff in this *prohibition* was a profeſſed churchman, and his conſcience would permit him ſometimes to go to the meetings of diſſenters, that the act of *toleration* would not excuſe him for not coming to church, for that act was not made to give eaſe to *ſuch people*; ſo a rule was made for a *prohibition*, and that the plaintiff ſhould declare on it, that the matter might come *judicially* before the court. *Vide Salk. vol.* 3. *p.* 89.

Michaelmas, 3 *Ann.* *Parker* v. *Clerk.*

An action was brought in the *ſpiritual* court by a *pariſh clerk* againſt the *churchwardens* for ſo much money, by cuſtom due to him yearly, and leviable by them on the pariſhoners; and now a *prohibition* was moved for on ſuggeſtion of no ſuch cuſtom.

To which it was objected, that if there was no ſuch cuſtom, they ſhould have pleaded it below; and if without receiving that plea they would proceed, then would be the proper time for a *prohibition*, but now they came for a *prohibition* too late, *viz.* after ſentence.

Holt, Chief Juſtice. I know no caſe where a perſon comes too late for a *prohibition* after ſentence, but that of ſuing a parſon out of his dioceſe.

Per curiam. An action on the *caſe* will certainly lie againſt the *churchwardens* on ſuch a cuſtom; as for example, If a *bailiff*, or *Reeve* of a manor be bound by *cuſtom* to collect money, an action on the *caſe* will lie againſt him for not doing it, and for the money received as a debt, after it is received. *Vide Mod. Rep. vol.* 6. *p.* 253.

Michaelmas, 8 *Ann.* *The Queen* v. *Dr. Wall.*

In this caſe *Holt* ſaid, that if a *pariſh prieſt* puts in a *clerk*, he cannot turn him out at pleaſure; for he is then the *clerk* of the *pariſh*, and not the *parſon's clerk* only. *Vide Mod. Rep. vol.* 1. *p.* 261.

Hilary, 5 *Geo.* *Batten* v. *Barwick.*

At a court of delegates, held at *Serjeant's Inn, Fleet-ſtreet*, it was adjudged, that where the cuſtom in chuſing *churchwardens* cannot take place, they muſt reſort to the *canon*, under which the plaintiff being duly elected, a decree was awarded for him, with 60 *l.* coſts. *Vide Stra. vol.* 1. *p.* 145.

Eaſter, 8 *Geo.* *The King* v. *The Inhabitants of Rufford.*

On a *mandamus*, directed to the juſtices of the peace of the county of *Nottingham*, reciting, that within the *vill* of *Rufford*, there are divers ſubſtantial freeholders able to contribute to the maintenance of the poor, and that there are no *churchwardens* or *overſeers* to make a rate, and that there are poor unprovided for, therefore it commands them to appoint *overſeers.*

They returned, that the *vill* of *Rufford* is part of no pariſh, but time out of mind has been *extra-parochial*, without church, chapel, or parochial rights, and that there never have been any *overſeers* of poor, and for that cauſe they cannot appoint.

And there having been only an *obiter* opinion of the court, in the caſe of *Dolting* v. *Brewcomblodge*, *Hilary*, 11 *Ann.* that *overſeers* of the poor might be appointed in an *extra-parochial* place, the court directed an argument, that the point might be ſolemnly determined.

And after argument and conſideration of all the ſtatutes relating to the poor, the court were of opinion, that the powers given by *ſtat.* 43 *Eliz.* to be executed in *pariſhes*, were, by *ſtat.* 13 & 14 *Car* 2. *c.* 12. extended to all townſhips, and villages, whether *parochial*, or *extra-parochial*, and conſequently *overſeers* might be appointed in this caſe; for which purpoſe a peremptory *mandamus* was awarded. *Vide Stra. vol.* 1. *p.* 251.

Michaelmas, 11 *Geo.* *The King* v. *Simpſon.*

A *Mandamus* was directed to the Archdeacon of *Colcheſter*, to ſwear *Rodney Fane* into the office of *churchwarden* He returned, that before the coming of the writ, he received an *inhibition* from the Biſhop of *London*, with a ſignification that he had taken upon himſelf to act in the premiſes.

Per curiam. The return is ill. It does not appear that the town of *Colcheſter* is within the dioceſe of the biſhop who *inhibits*; beſides, the archdeacon is but a *miniſterial* officer, and is obliged to do the act, whether it be of any validity or not. On which a peremptory *mandamus* was granted. *Vide Stra. vol.* 1. *p.* 611.

Hilary, 12 *Geo.* *Anonymous.*

It was moved for a *mandamus* to be directed to the *churchwardens* of St. *Botolph*, *Biſhopſgate*, commanding them to call a veſtry in *Eaſter* week, for the election of *churchwardens*; but the court refuſed it, ſaying, There was no inſtance of ſuch a *mandamus*, and they could not take notice who had a right to call the veſtry, and conſequently did not know to whom it ſhould be directed. *Vide Stra. vol.* 1. *p.* 687.

Trinity, 13 *Geo.* *Townſend* v. *Thorpe.*

See this caſe fully ſtated in page 388 of this work, under the head *Eccleſiaſtical Matters.*

Michaelmas, 13 *Geo.* *Caſtle* v. *Richardſon.*

On a libel in the *eccleſiaſtical* court, for not taking upon him the office of *chapel-warden:* the defendant pleads, that it is a donative, and thereupon moved for a *prohibition.* And on debate, the ſame was denied; the whole court being of opinion, that there was a difference as to the incumbent, yet as to the *pariſh officers* there was none; for they are the *officers* of the *pariſh*, and not of the patron of the donative. *Vide Stra. vol.* 2. *p.* 715.

Michaelmas, 3 *Geo.* 2. *Dent* v. *Prudence and Bond.*

In 1725, during the time *Prudence* and *Bond* were *churchwardens* of *St. Matthews*, in *Ipſwich*, a rate was made for the repairs of the church; and the appellant *Dent*, not paying his ſhare, the *churchwardens*, after their year was out, cited *Dent* to compel a payment; and he appearing, inſiſted to be diſmiſſed, for that the ſuit was not begun in their time. But the judge decreeing him to anſwer, he appealed to the *Arches*; when the judge pronounced againſt the decree to anſwer, before there was a conteſtation of ſuit, but retained the cauſe. From thence *Dent* appealed to the *Delegates*. And on a hearing, 17th *December*, 1729, before the Biſhops of *Norwich* and *Carliſle*, Chief Juſtice *Raymond*, Baron *Carter*, Sir *Henry Penrice*, and other Doctors of *civil law*, it was determined, that *Dent* ſhould be diſmiſſed; and that *Prudence* and *Bond*, who can ſue only in a politic capacity, could not inſtitute any ſuit after that capacity was gone. It was agreed, that if the ſuit had been begun within the year, they might have proceeded in it after their year was out, it being *of neceſſity* to prevent people from delays, in order to wear out the year. So is 1 *Danv. Abr.* 788. *Cro. Eliz.* 145. 179. 1 *Leon.* 177. and Dr. *Prideaux's Directions to Churchwardens*, 60, 61. But in regard this ſuit was not commenced till the year was out, and no precedents were ſhewn to warrant it, the appellant was diſmiſſed. *Vide Stra. vol.* 2. *p.* 852.

Hilary, 4 *Geo.* 2. *Newcomb* v. *Higgs.*

The *pariſh clerk* of the *pariſh* of *A.* where the uſage is, that the *pariſh clerk* is, and always has been, choſe by the *parſon*, and not by the *pariſh*. The preſent *clerk*, the plaintiff, was cited in order to a deprivation in the *ſpiritual court* for drunkenneſs in church, at the time of divine ſervice, and for lewdneſs and other crimes of that ſort, which rendered him unfit for the exerciſe of the ſaid *office*. It was moved for a *prohibition* to the ſaid ſuit, upon this ſuggeſtion, *viz.* that the above crimes are properly puniſhable by indictment, and not cognizable in the *ſpiritual court*; and further, that the *ſpiritual court* cannot determine that the party is guilty of crimes, triable by the courſe of the *common law*, before he is convicted of thoſe crimes at law: to which point were cited *March* 174. *Hob.* 288, 289. 2 *Cro.* 430. 431.

Lord *Raymond*. We have had caſes where the queſtion has been, whether an officer for life might be removed before conviction at law of the crimes charged againſt him.

Hereupon the council in the principal caſe put the court in mind of the caſe of the corporation of *Carliſle*, where this diſtinction was taken: *viz.* where the crime was againſt the duty of the party's office, as *extortion* in a *judicial* officer, he might be proceeded againſt to a deprivation or removal, before conviction of ſuch crime in a due courſe of law; otherwiſe not: which difference was agreed to by the court, and the motion was denied as to the deprivation, that matter having been ſolemnly ſettled in the caſe of *Townſend* v. *Thorpe*. *Vide Fitzgibbons*, p. 189.

Michaelmas, 6 *Geo.* 2. *Peake, or Peate* v. *Bourne, or Birr.*

See this caſe fully ſtated in page 388 of this work, under the head *Eccleſiaſtical Matters*.

Eaſter, 7 *Geo.* 2. *Wainwright* v. *Bagſhaw.*

The *churchwardens* were cited into the Biſhop's court of *Litchfield* to account; they pleaded that they had accounted at the veſtry according to law, which was rejected; and a *prohibition* granted; for the Ordinary is not to take the account, he can only give a judgment *that he accounts*, and to what purpoſe ſhould they be ſent back to thoſe who have taken their account already. The ſame rule was made *in the Exchequer*, *Eaſter*, 2 *Geo.* 2. between *Haughton* and others, *churchwardens* of St. *Alban*, *Woodſtreet*, and *Kenrick* and others; and in the caſe of the *churchwardens* of *Hammerſmith*, *Michaelmas*, 1 *Geo.* 2. *Nutkin* v. *Robinſon*; and *vide Lutw.* 1028, *and Prideaux to Churchwardens*, 103. *Vide Stra. vol.* 2. *p.* 974.

Trinity, 7 *Geo.* 2. *The King* v. *Bartlet, and others.*

An order made at ſeſſions relating to accounts of *overſeers of the poor*, was moved to be quaſhed, becauſe it did not appear that the accounts had been before two juſtices, one of whom was of the *quorum*, and they cannot come irregularly to the ſeſſions, and for which *Salk.* 533 was cited. On the other ſide it was ſaid, that it appeared there was an allowance, for the appeal is ſaid to be againſt the diſburſements and *the allowance thereof*, which the court will preſume was regular, and being in general is not like the caſe in *Salk.* which was ſaid to be by two juſtices, without the words, *one of whom*.

Per curiam. It does not follow, that this was an allowance by two juſtices, for the *pariſh* might do it; and therefore for want of juriſdiction this order muſt be quaſhed. *Vide Stra. vol.* 2. *p.* 983.

Michaelmas, 8 *Geo.* 2. *The King* v. *The Juſtices of Somerſetſhire.*

On a *mandamus* to the juſtices, for levying 30 *l.* 17 *s.* 11 *d.* being the balance of the laſt *overſeers of the poor*'s accounts in their hands, they return; that it is true there was ſuch a balance, but that the veſtry had ordered them to retain it, and employ an attorney to ſue for ſome charity-money, and get it laid out for the benefit of the poor; that one *Young* was ſo employed, and the balance exhauſted in fees; and that the *overſeers* had engaged to pay *Young*, and for that cauſe they had refuſed to grant the warrant.

Per curiam. There muſt go a peremptory *mandamus*; for *ſtat.* 43 *Eliz. c.* 2. ſays, the balance ſhall be paid over to the new *overſeers*, under a penalty, and it is not in the power of the veſtry to diſpenſe with the ſtatute. *Vide Stra. vol.* 2. *p.* 992.

Eaſter, 10 *Geo.* 2. *The Pariſh of Stoke-Prior* v. *The Inhabitants of the Manor of Grafton.*

A poor perſon was removed to *Grafton*, and on appeal it was ſtated to be an *extra-parochial* place, formerly a ſeat of the Earl of *Shrewſbury*, conſiſting of a capital meſſuage, and three lodges in the park, but ſince converted into *five* houſes and farms; and the ſeſſions adjudged it a *vill*, and that it ought to maintain its own poor. This was moved to be quaſhed, upon the authority of the caſe of *Denham* v. *Dalham*, *Hilary*, 8 *Geo.* 2. and a rule was made to ſhew cauſe.

Afterwards, on an *affidavit* of ſervice, the rule was made abſolute, this not appearing to have the reputation of a *vill*. *Vide Stra. vol.* 2. *p.* 1071.

Trinity, 10 & 11 *Geo.* 2. *Dawſon* v. *Wilkinſon.*

On a motion for a *prohibition* after ſentence, in a ſuit in the court of the Archdeacon of ——— in which ſentence was given (upon a citation for the pariſhioners to allow the *churchwardens* accounts) that the ſucceeding *churchwardens* ſhould make a rate to reimburſe the former, for money by them expended for the *pariſh*, and not paid, becauſe the *Eccleſiaſtical* court has no power to decree ſuch a rate, 1 *Roll. Rep.* 73. *Biſhop*'s caſe, and *Wainwright* v. *Bagſhaw*, *Eaſter*, 7 *Geo.* 2. where Lord *Hardwicke* ſaid, that the Ordinary's juriſdiction, in theſe caſes, extends only to compel the *churchwardens* to account before the pariſhioners, and no farther.

It was urged on the other ſide, that the *Eccleſiaſtical* court has juriſdiction as to the *churchwardens* accounts; it has power to do every thing incident to it, *Yelv.* 173. *Starkey* v. *Barton* and *Gore*. And it was likewiſe objected to this motion, that as this is for a *prohibition* after ſentence, the ſuggeſtion ought to be verified by *affidavit*.

Page, Juſtice. The *eccleſiaſtical court* has no power, but to decree an account, and then the account muſt be audited; but they have no power to order a rate to be made to reimburſe: ſo in *Tawney*'s caſe. The *churchwarden* had diſburſed money out of his pocket, upon a ſudden emergency of a great ſickneſs in the town, and yet the court would not help him.

Probyn, Juſtice. As to the want of an affidavit in this caſe, it is not neceſſary, becauſe the want of a juriſdiction appears upon the face of the proceedings below: the *churchwardens* are always ſuppoſed to have raiſed money enough to pay themſelves, and therefore can in no caſe be ordered a reimburſement.

Per curiam. Let the rule for granting a prohibition be made abſolute. *Vide Caſes Temp. Lord Hardwicke, p.* 381.

Hilary, 13 *Geo.* 2. *The King* v. *Sparrow, and others.*

A *mandamus* iſſued, *teſted* 1ſt *June*, to the juſtices of *Ipſwich*, to appoint *overſeers* of the poor; to which they returned, that they had, in obedience to ſuch writ, made an appointment; and that being removed by *certiorari*, appeared to bear date 13th *June*.

It was objected by Mr. Solicitor-General, in order to quaſh the *Mandamus* and appointment, that it appeared the month after *Eaſter* (which is the time given by the ſtatute to make the appointment in) was expired before the writ iſſued, *Eaſter*-day being the 22d *April*, and the court was bound to take notice of that, according to *Salk.* 626. and *Hoyle* v. Lord *Cornwallis*, *Trinity*, 6 *Geo.* The act deſigned the juſtices ſhould do it within a limited time, and therefore puts it in *Eaſter*-week, or within one month after *Eaſter*; now, if it may be done at any time, it will introduce great confuſion, and it will be many years before it comes round to the right time again. There can be no inconvenience in this, becauſe the *churchwardens* are *overſeers*; and there is a penalty upon the juſtices, which goes to their uſe. This is a part of the act, which was never yet thought to be directory only.

Chief Juſtice. The court muſt judicially take notice, that this is made without the month; but then the queſtion is, whether it is void or not? The adding a penalty is an argument, that it is not ſo; for it was foreſeen there would be inconveniencies if it was not done in time, and it might therefore be proper to enforce a ſpeedy execution of the power; and this was the conſtruction as to taking pledges on *ſtat. Weſtm.* 2. *c.* 2. 1 *Roll. Abr.* 259.

Stat. 43 *Eliz. c.* 2. being for the maintenance of the poor, muſt be conſtrued liberally; and ſo ſaid *Pratt*, Chief Juſtice, *Trinity*, 7 *Geo.* in the caſe of *Rufford*; and ſo it was, *Trinity*, 5 *Geo.* 2. in the caſe of *Utoxeter*; and though theſe were caſes on *ſtat.* 13 & 14 *Car.* 2. *c.* 12. yet they muſt derive their authority from the former law. Here are no negative words, as in *ſtat.* 12 *Car.* 2. *c.* 25. *ſect.* 13. as to the price of wines, where the words *and at no other time* are added.

It is worthy of conſideration, that this is a thing which it is not in the power of the *pariſh* to procure; and is therefore a conſtruction of neceſſity. *Vide Stra. vol.* 2. *p.* 1123.

Trinity, 13 *Geo.* 2. *Adams* v. *Ruſh.*

Per curiam. The *Spiritual Court* has no juriſdiction to ſettle a *churchwarden*'s accounts. And a *prohibition* was granted after a ſentence allowing the accounts, and an appeal to the *arches*. *Vide Stra. vol.* 2. *p.* 1133.

Michaelmas, 14 *Geo.* 2. *The King* v. *The Inhabitants of Welbeck in Nottinghamſhire.*

A *mandamus* ſuggeſts, that there are ſeveral houſeholders and farmers inhabiting and reſiding within the village of *Welbeck*, able to provide for the poor; and therefore commands the juſtices to appoint *overſeers* of the poor. To this it is anſwered, that *Welbeck* is *extra-parochial*, and is not, or ever was, reputed to be a village or townſhip, and therefore cannot appoint any perſons to be *overſeers*.

And on argument this was held to be a good return, for though it does not anſwer the ſuppoſal of the writ as to there being ſeveral ſubſtantial houſeholders and farmers, yet it anſwers the point in *ſtat.* 13 & 14. *cap.* 12. by ſaying it is no townſhip or village reputed as ſuch, and it is to ſuch places only that we can ſend a writ. *Vide Stra. vol.* 2. *p.* 1143.

Hilary, 19 *Geo.* 2. *Hubbard* v. *Sir Henry Penrice.*

To a *mandamus* to ſwear in the plaintiff *churchwarden* of *Heſton* in *Middleſex*; the defendant returned, that he was not duly elected. And in the courſe of the trial the queſtion was, where the common right of chuſing *churchwardens* reſts? The plaintiff inſiſted it was in the pariſhioners at large as to both, and would therefore have left it on the defendant to ſhew a cuſtom, or right in the parſon, to name one; and cited *Carth.* 118. *Noy* 139. for that purpoſe; the defendant on the contrary inſiſted, that of common right it was in the parſon and pariſhioners, and therefore it lay on the plaintiff to prove a cuſtom in the pariſhioners to chuſe both; and cited *Cro. Jac.* 532. *Cro. Car.* 551. *Noy* 31. 1 *Vent.* 267. And of this opinion was the Chief Juſtice; who ſaid, that though there were ſome pleadings to the contrary, yet they never had been regarded. The plaintiff therefore went on to prove a cuſtom to chuſe both by the pariſhioners, but failed in it, it appearing, that though the parſon had generally left it to the pariſhioners, yet he had ſometimes interfered.

The Chief Juſtice likewiſe held, that a curate ſtood in the place of the parſon for the purpoſe of nominating one churchwarden; and cited 2 *Vent.* 41. that a curate may make a preſentment. *Vide Stra. vol.* 2. *p.* 1246.

Michaelmas, 20 *Geo.* 2. *The Caſe of the Overſeers of Weobly.*

There were *two* ſets of *overſeers* appointed, and both quaſhed; *one*, becauſe the perſons appointed were deſcribed only as *principal inhabitants*, inſtead of purſuing the words of *ſtat.* 43 *Eliz. cap.* 2. which are *ſubſtantial houſeholders*; and the *other*, becauſe it only called them ſubſtantial houſeholders, without adding *there* or *in the pariſh*; and this too was not in the body of the appointment, as it ought to be. *Vide Stra. vol.* 2. *p.* 1261.

Hilary, 30 *Geo.* 2. *The King* v. *Gayer.*

See this caſe fully ſtated in page 605 of this work, under the head *Juſtices of Peace.*

Trinity, 30 & 31 *Geo.* 2. *Tarrant* v. *Haxby.*

On a motion for a *prohibition* to the conſiſtory court of *York*, to ſtay their proceedings againſt *Tarrant*, the preſent *pariſh clerk* of St. *Oſith* in *York*, in a ſuit there inſtituted to reſtore *Haxby* to the ſaid office, a rule to ſhew cauſe was obtained.

The council who was to ſhew cauſe againſt the *prohibition*, finding the matter too ſtrong againſt him, declined giving the court further trouble; on which the rule for a *prohibition* was made abſolute. *Vide Bur. vol.* 1. *p.* 368.

Hilary, 31 *Geo.* 2. *The King* v. *Loxdale and four others.*

On a motion to quaſh an order of two juſtices, appointing *five overſeers* for the *pariſh* of St. *Chad*, in *Shrewsbury*.

The objection was, that the juſtices have no power to *exceed* the number of *four*, which is founded on *ſtat.* 43 *Eliz. cap.* 2. *ſect.* 1. on which a rule to ſhew cauſe was obtained.

After hearing the arguments of the council on both ſides on this rule, the court gave their opinion:

Lord *Mansfield*, after reading the report, and anſwering the ſeveral objections ſtated by the council, ſaid, the appointment of more than *four overſeers* was not warranted by *ſtat.* 43 *Eliz.* on the true conſtruction of that ſtatute.

Deniſon, *Foſter*, and *Wilmot*, Juſtices, gave their opinions at large, and concurred with the Chief Juſtice.

Per curiam. Let the rule be made abſolute for quaſhing the appointment and order. *Vide Bur. vol.* 1. *p.* 445.

Eaſter, 1 *Geo.* 3. *Stevens* v. *Evans, and others.*

On a ſpecial *caſe* before this court on an action of *trover* for taking cattle, the queſtion was, "whether

“ the diſtraining, taking, and tolling the cattle, which were the goods of *William Veſey*, in the hands of the plaintiff, his adminiſtrator, by virtue of a warrant of diſtreſs for the poor's rate, was lawful or not.”

Deniſon, Juſtice. I never apprehended that the goods of the perſon aſſeſſed to the rate could be charged in the lands of the repreſentative; and therefore (as at preſent adviſed) I ſhould think that this action *will lie* for taking them.

I agree that this is in the nature of an execution; but yet it is *perſonal*, and I do not know that it is a *lien* on the aſſets.

Wilmot, Juſtice, gave his opinion at large, and concurred with Mr. Juſtice *Deniſon*.

Per curiam. Let the *poſtea* be delivered to the plaintiff. *Vide Bur. vol.* 2. *p.* 1152.

Trinity, 1 *Geo.* 3. *The King* v. *Darbyſhire.*

See this caſe fully ſtated in page 251 of this work, under the head *Certificate.*

Trinity, 3 *Geo.* 3. *The King* v. *Showler and Atter.*

On ſhewing cauſe againſt quaſhing an *order* of ſeſſions, which confirmed an *order* of two juſtices of *Lincolnſhire*, nominating and appointing *T. S.* and *J. A.* being ſubſtantial houſeholders of the townſhip or village of *Haugh* in the ſaid parts, to be *overſeers* of the poor of the ſaid townſhip or village of *Haugh* for the year next enſuing, according to the direction of the ſtatute in that caſe made and provided; and alſo againſt quaſhing the ſaid *original order* of the two juſtices.

After hearing the arguments of the council on both ſides on ſhewing cauſe on this rule,

The court were clearly of opinion, “ that both theſe orders ought to be diſcharged,” and they were quaſhed accordingly. *Vide Bur. vol.* 3. *p.* 1391.

Michaelmas, 3 *Geo.* 3. *The King* v. *Whiteear, and others.*

See this caſe fully ſtated in page 606 of this work, under the head *Juſtices of Peace.*

Hilary, 5 *Geo.* 3. *Peart and another*, v. *Weſtgarth and another.*

On ſhewing cauſe againſt a *mandamus*, “ to appoint *four overſeers* for the whole *pariſh* of *Stanhope* in the county palatine of *Durham*,” the queſtion was, whether the ſeveral diſtricts within it were one *entire pariſh*, townſhip, and village, within the intent and meaning of the ſeveral ſtatutes made for the relief of the poor; and for that purpoſe have had, and of right ought to have one *joint* appointment of *overſeers* of the poor, for the *joint* relief and maintenance of the poor in and throughout the *pariſh?* Or, whether the ſaid ſeveral diſtricts, being divided into ſix ſeparate conſtableries, conſtituted *four diſtinct and ſeparate* townſhips or villages, within the intent and meaning of *ſtat.* 13 & 14 *Car.* 2. *cap.* 12.

Lord *Mansfield*. The policy of *ſtat.* 13 & 14 *Car.* 2. was miſtaken; it went on a wrong principle. The diviſions ought rather to be enlarged than diminiſhed.

It ought to appear, “ that there was an inability in the *pariſh* to have the benefit of *ſtat.* 43 *Eliz.*” Now here, no ſuch inability appears, but quite the contrary, for a great number of years: ſo that there is no *foundation* for the diviſion.

The *acquieſcence* under it was on a falſe notion, “ that the ſeſſions had ſuch a power,” which they had not: and there is no inconvenience in ſetting right this wrong uſage, which has obtained for *forty years*. Here the foundation is wanting; therefore judgment muſt be for the plaintiffs.

Per curiam. Let judgment go for the plaintiffs. *Vide Bur. vol.* 3. *p.* 1610.

Eaſter, 6 *Geo.* 3. *The King* v. *Helling, and others.*

On ſhewing cauſe againſt quaſhing an order made on *Eaſter Wedneſday* 1766, by two juſtices, appointing the defendants *overſeers* of the poor of St. *Andrew's, Holborne* above the bars, and St. *George the Martyr.*

After hearing the arguments of the council on both ſides on ſhewing cauſe on this rule, the court gave their opinion.

Lord *Mansfield*. The real objections, I take it for granted, are not before the court.

The only queſtion before us is, “ whether the order is good on the face of it or not.”

Now this order plainly means the *overſeer*'s year: and that year is from *Eaſter* 1765 to *Eaſter* 1766. You would make it bad, by underſtanding it to mean the year of our Lord. But you cannot conſtrue this order to be a bad one, by underſtanding it ſo: for it manifeſtly means *quite another ſort* of year.

Aſton, Juſtice, gave his opinion at large, and concurred with the Chief Juſtice.

Per curiam. Let the rule be diſcharged, and the order affirmed. *Vide Bur. vol.* 3. *p.* 1904.

Payment of Money.

Hilary, 7 *W.* 3. *Burman* v. *Shepherd.*

In an action of *trover* for bill of exchange for 100 *l.* *to the damage* of 150 *l.* the court was moved, that on bringing 50 *l.* into court it might be ſtruck out of the declaration.

Holt, Chief Juſtice. This practice in *aſſumpſit* has been brought in within a few years, and has been only allowed, becauſe *payment* goes to the iſſue; but in *trover* it goes only to the damages. It may be, that the plaintiff has good cauſe of action for part, and a probable cauſe for the reſidue; now, it would be hard to ſtrike out his certain clauſe, and put him to try his probable cauſe at the peril of coſts. *Vide Mod. Rep. vol.* 12. *p.* 90.

Michaelmas, 7 *W.* 3. *St. Leger* v. *Pope.*

Holt, Chief Juſtice. Where *foreign coin* itſelf is demanded, the action is in the *detinet*; but if the value is demanded, it is in the *debet* and *detinet*; and the averment always is, that the defendant has neither tendered the *foreign coin* nor the *value*. *Vide Mod. Rep. vol.* 12. *p.* 81.

Trinity, 8 *W.* 3. *Pawlet* v. *Heatfield.*

In an action of *covenant* on *three* diſtinct *covenants*; ſeveral breaches were aſſigned; *one* was for non-payment of rent; the court was moved, that on bringing 10 *l.* into court, it might be ſtruck out of the declaration.

But the court refuſed to grant the motion, and ſaid, that when it appears that the plaintiff has a juſt cauſe of action for *one* thing, they will not put him to try the reſt at the peril of coſts. *Vide Mod. Rep. vol.* 12. *p.* 95.

Michaelmas, 8 *W.* 3. *Dixon* v. *Willoughs or Willows*

On an action on the *caſe* on *four* ſeveral promiſes, there was a verdict for the plaintiff, and entire damages: it was moved in arreſt of judgment, that *one* of the promiſes was laid, *viz.* that whereas the defendant was indebted to him in 10 *l.* 10 *s.* for *nine guineas*, he promiſed to pay, &c. and did not ſay *nine guineas to the value*, &c. as he ought, the value being not aſcertained by proclamation.

Holt, Chief Juſtice. 1ſt. Any piece of *money* coined at the mint, is of value as it bears a proportion to other *current money*, and that without proclamation. The *unit* was the old piece, which was 20 *s.* In King *James* the firſt's time, the *unit* was by proclamation raiſed 16 *d.* which was the reaſon and occaſion of the *coin* of the *guineas*, and of their being 16 *d.* ſhort of the *unit*.

2dly. There are *guineas* of 40 *s.* a-piece, and ſo we will intend theſe were, and that the plaintiff was ſatiſfied the reſt.

3dly. It is was not neceſſary to ſet forth the number of the *guineas*; for in an *indebitatus aſſumpſit* the conſideration is only ſet forth to ſhew it was not a debt by bond, *Vide Salk. vol. 2. p. 446. Ibid. vol. 3. p. 239. Mod. Rep. vol. 12. p. 100.*

Hilary, 9 *W.* 3. *Meggot, Aſſignee of Watſon a Bankrupt,* v. *Mills and Waine.*

See this caſe fully ſtated in page 192 of this work, under the head *Bankrupts.*

Michaelmas, 9 *W.* 3. *Giles* v. *Hart.*

On an *indebitatus aſſumpſit* and *quantum meruit* for goods ſold, wherein a requeſt was laid, both as to time and place; the defendant pleaded *non aſſumpſit* to all except 13 *l.* and as to that pleaded, that after the time of making the promiſes, *viz.* on the 22d day of *April*, which was before the time of the requeſt alledged, he tendered the ſaid 13 *l.* which the plaintiff then and there refuſed to receive; and that from that day he was always ready to pay the *money*, and bring it into court; whereon the plaintiff demurred; alledging, that ſuppoſing a *tender* might be pleaded in *bar* of an *aſſumpſit*, yet it is not good, without anſwering the ſpecial requeſt alledged, which is not done in this caſe.

Holt, Chief Juſtice. We are all of opinion that the defendant's plea is ill; for *touts temps preſt*, i. e. *always ready*, cannot be pleaded after imparlance: therefore the plaintiff muſt have judgment. *Vide Mod. Rep. vol. 12. p. 152.*

Eaſter, 10 *W.* 3. *Canter* v. *Shepheard.*

On an action of *trover* and converſion for a goldſmith's note of 100 *l.* on the general iſſue pleaded, on evidence at the trial, the caſe appeared to be thus: *Canter* had a note for 100 *l.* of *Shepheard*, which *Canter* carried to *Shepheard*, and delivered it to him to receive the 100 *l.* At the ſame time one Mr. *Dale* brought 80 *l.* to *Shepheard* to pay to him. *Shepheard* prayed *Canter* to count the 80 *l.* and receive it as part of *payment*, while *Shepheard* counted 20 *l.* out of another bag. *Canter* counted 50 *l.* out of the 80 *l.* and drew a bag out of his pocket, and put the 50 *l.* into the bag, and laid the bag with the 50 *l.* in it on the counter by him, and proceeded to count the reſidue; during which *J. S.* took up the bag and ran away with it; upon which *Canter* ſuppoſing that this was not any *payment* to him, becauſe the money was not carried out of the ſhop, and becauſe it was liable to be counted again by *Shepheard*, refuſed to take the other 50 *l.* and brought *trover* for the note of 100 *l.* The matter appearing thus on the evidence, it was reſerved as a point by the Lord Chief Juſtice *Holt*, before whom the cauſe was tried; and it was moved and argued by council. After which all the judges were of opinion, that the plaintiff *Canter* ought to bear the loſs of 50 *l.* becauſe the putting the 50 *l.* into his own bag was an appropriation of the *money* to himſelf; and the defendant might have brought *detinue* for the 50 *l.* in the bag. And therefore the verdict was for the plaintiff for 50 *l.* only, and judgment accordingly. *Vide Raym. vol. 1. p. 330.*

Eaſter, 10 *W.* 3. *Smith* v. *Johnſon.*

On an action on the *caſe* for work done on a *quantum meruit*, and alſo an *indebitatus aſſumpſit*; a motion was made to bring ſo much *money* into court, and to ſtrike it out of the declaration.

The court granted it as to the *indebitatus aſſumpſit*, but refuſed it as to the *quantum meruit*; ſaying, that ſuch motions had been ſometimes obtained where a *quantum meruit* and *indebitatus* were joined together; yet regularly they ought not to be granted on a *quantum meruit*, for who can tell what a man deſerves till it be tried? *Vide Mod. Rep. vol. 12. p. 187.*

Michaelmas, 10 *W.* 3. *Lawley* v. *Dibble.*

It was moved to bring *money* into court in an action of *covenant*, but the motion was denied. *Vide Mod. Rep. vol. 12. p. 241.*

Michaelmas, 10 *W.* 3. *Neſſon* v. *Finch.*

See this caſe fully ſtated in page 241 of this work, under the head *Bonds.*

Hilary, 13 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. It will be hard to let *money* be brought into court on a *quantum meruit*, and thereby to put the plaintiff to carry his ſuit at the peril of coſts; but the way is, to confeſs the employing, and that he deſerved but ſo much, and to plead a tender thereof, for then the plaintiff may reply that he deſerved more, and ſo come to iſſue; but becauſe in moſt declarations there are *quantum meruits*, even in an *indebitatus*, there it may be brought in on the *indebitatus* count, and that will affect the other; which was accordingly done in the preſent caſe. *Vide Mod. Rep. vol. 12. p. 614.*

Hilary, 13 *W.* 3. *Anonymous.*

The court was moved for leave to bring ſo much *money* into court, and to have it ſtruck out of the declaration.

Per curiam. The courſe now is, on bringing *money* into court to pay coſts ſo far, if the plaintiff will take it out; but if it be ſuch an action in which the defendant may plead a tender in bar of coſts, and that the plaintiff, to *ouſt* him of that benefit, would reply a ſpecial *capias*, teſted of a term antecedent to the principal; all this may be opened and ſettled on motion. *Vide Mod. Rep. vol. 12. p. 633.*

Trinity, 13 *W.* 3. *Brown* v. *Gullock.*

In an action of *debt* on a bond for 400 *godies*, *Eaſt India money*, the plaintiff declared for 180 *l.* and it was objected, that they ought to make their declaration according to their *lien.*

Holt, Chief Juſtice. They muſt demand *Engliſh money*, and not *foreign money*, and are to value it according to the value it bears here in *England*; but if a man will bring an action for *foreign money*, it muſt be *detinue*. *Vide Mod. Rep. vol. 12. p. 541.*

Michaelmas, 13 *W.* 3. *Coke* v. *Heathcot.*

The court will never give leave to bring principal and intereſt into court, and ſtay proceedings on a bond, when the ſuit is on a counter-bond, or when there is any pretence of a collateral agreement. *Vide Mod. Rep. vol. 12. p. 598.*

Hilary, 1 *Ann.* *Anonymous.*

Per curiam. 'Till bail is put in, the party is not in court, to move for leave to bring in principal, intereſt, and coſts.

Holt, Chief Juſtice. I never knew *money* to be brought into court, and ſtruck out of the declaration in an action of *debt*, though it has been done on a bond with a condition in an action of *debt* for rent, and in a *mutuatus*; and I have known it done in *replevin*, the diſtreſs being for rent. *Vide Mod. Rep. vol. 7. p. 140.*

Trinity, 1 *Ann.* *Burton* v. *Souter.*

On an action of *aſſumpſit* on ſeveral promiſes, one count was on the cuſtom of merchants, wherein the plaintiff declared on a note ſubſcribed by the defendant, payable to the plaintiff, or order, *&c.* the defendant pleaded a tender, and brought the *money* into court. The plaintiff took the *money* out of court, and then, to have damages, traverſed the tender; and iſſue being joined on it, a verdict was found for the plaintiff, and a penny damage given. On which the court was moved in arreſt of judgment, 1ſt, That ſuch a note was not within the cuſtom of merchants; but that they ought to have declared on a *mutuatus*, and have given the note in evidence.

And of that opinion was the whole court.

2dly, It was argued, that the plaintiff could not proceed for damages, after he had accepted the *money* brought into court.

And of that opinion was *Holt*, Chief Juſtice, ſtrongly, as he had been in the caſe of *Horn* v. *Lewin*, *Hilary*, 12 *W.* 3.

But becauſe the *poſtea* was not in court, it was ſtaid until, *&c.* and afterwards it was ſtaid abſolutely, the plaintiff's council declaring he could not maintain it. *Vide Raym. vol.* 2. *p.* 774.

Michaelmas, 1 *Ann.* *Le Sage* v. *Pere.*

After judgment in an action of *debt* on a bond, the court will not make a rule on a plaintiff to take his principal, intereſt, and coſts; and they held, that in ſuch caſe, the plaintiff ought to have his full coſts out of the penalty. *Vide Mod. Rep. vol.* 7. *p.* 114.

Michaelmas, 1 *Ann.* *Bennet* v. *Verdun.*

On an *indebitatus aſſumpſit*, for that the defendant being indebted to the plaintiff in 28 *l.* of *Spaniſh money*, promiſed to pay it, *&c.* On *non aſſumpſit* pleaded, a verdict was given for the plaintiff. On a motion in arreſt of judgment, it was argued, that the plaintiff ought to have ſaid *to the value*, &c. it being *foreign coin*; for the defendant cannot be indebted in *foreign coin*. And further, there is a verdict here, and therefore the whole court held it good. But afterwards judgment was arreſted, becauſe the plaintiff brought this action for *money* due to himſelf in his own right, and alſo for another ſum in another count, due to him as executor to *J. S.* which *two* actions cannot be joined. *Vide Raym. vol.* 2. *p.* 841.

Hilary, 2 *Ann.* *Ireland's Caſe.*

The court was moved for leave to bring the principal, intereſt, and coſts into court, and to be relieved againſt the penalty of a bond.

It was urged on the other ſide, that in this caſe they would not relieve in *Chancery*, unleſs the obligor would pay a *debt* barrable by the ſtatute of *limitations*, and inſiſted on the like benefit here, this being an equitable motion.

The court refuſed to hear of it, but made the common rule.

Note, The whole penalty muſt be brought into court, becauſe the intereſt and full coſts are to be taxed; and the remainder may be taken out immediately. *Vide Mod. Rep. vol.* 6. *p.* 101.

Hilary, 2 *Ann.* *Ward* v. *Evans.*

See this caſe fully ſtated in page 655 of this work, under the head *Maſters and Servants*.

Trinity, 2 *Ann.* *Anonymous.*

On an action of *debt* on a bond conditioned to perform an award, which was, that the defendant ſhould pay to the plaintiff, or his aſſigns, and thereon the plaintiff ſhould ſign a releaſe to him of all actions and controverſies *touching the premiſes*; the defendant's council excepted, that the award was not mutual; for the 50 *l.* being awarded to be paid generally, and the releaſe, which was all the defendant was to have, being only of all actions *touching the premiſes*, that ſhould be taken only to relate to the 50 *l.* and not to the controverſies ſubmitted.

But the court were of opinion, that it ſhould be underſtood of the controverſies.

Second exception. It is not ſaid; the defendant did not *pay* to the plaintiff's aſſigns, which is naught.

The court held, that *payment* to the plaintiff's aſſigns had been *payment* to the plaintiff himſelf. Judgment was given for the plaintiff. *Vide Raym. vol.* 2. *p.* 898.

Trinity, 2 *Ann.* *Herbert and others* v. *Burſtow.* Error.

On a writ of *error*, brought on a judgment given in *C. B.* in *aſſumpſit*, where the plaintiff declared, that the defendant, in conſideration that the plaintiff *ſold and delivered* to the defendant ſo many pieces of *hammered money*, promiſed to pay, *&c.* On *non aſſumpſit* pleaded, a verdict, and judgment, was given for the plaintiff in the *C. B.*

It was urged for the plaintiff in *error*, that here was no conſideration; becauſe *ſold and delivered* implied no more than a bare giving a poſſeſſion of the pieces, *&c.* but not a transferring of the property.

But the court were of opinion, that it implied a transferring of the property.

The *ſecond* error aſſigned was, that after the entry of the *poſtea*, comes immediately, *therefore it is conſidered*, &c. and does not ſay where, nor by whom, ſo that it muſt be taken to be the judgment of the jury.

But the court ſaid, that this was the conſtant form of entries in the *C. B.* and the diſtinction is between judgments in ſuperior and inferior courts; in the laſt it muſt be ſaid by the ſame court, otherwiſe in the firſt. So the judgment was affirmed. *Vide Raym. vol.* 2. *p.* 895.

Trinity, or Michaelmas, 2 *Ann.* *Squire* v. *Grevell, or Grevett.*

See this caſe fully ſtated in page 101 of this work, under the head *Arbitration and Award.*

Michaelmas, 2 *Ann.* *Butler* v. *Rolfe.*

Per curiam. The proceedings on a bail-bond ought not to be ſtaid on bringing the principal, intereſt, and coſts into court, after notice of trial, without it be brought within ſuch time as the plaintiff may not be delayed of trial. *Vide Mod. Rep. vol.* 6. *p.* 25.

Eaſter, 3 *Ann.* *Anonymous.*

On an action brought in this court on a judgment for damages in the *C. B.* before the defendant pleaded, it was moved to bring ſo much *money* into court, and to have it ſtruck out of the declaration.

Holt, Chief Juſtice. No: you may plead a tender, and that you are *ſtill ready*.

Then the council informed the court, that the plaintiff below was now become a bankrupt; and no commiſſion being out, they durſt not tender him the *money*, but would bring it into court, to remain in truſt for thoſe who ſhould have the right.

Holt, Chief Juſtice. You are in the right to take care how you *pay* it voluntarily; but we cannot be truſtees for you. So the motion was denied. *Vide Mod. Rep. vol.* 6. *p.* 153.

Michaelmas, 4 *Ann.* *Pond* v. *Underwood.*

On an *indebitatus aſſumpſit* brought by the plaintiff as executor of *C. P.* deceaſed, for *money* received by the defendant owing to the teſtator for wages (he being a ſeaman) after the teſtator's death. On *not guilty* pleaded, it appeared on evidence at the trial, that before the will was found, adminiſtration, *&c.* was granted to *A. P.* a ſiſter of *C. P.* and that ſhe made a warrant of attorney to the defendant to receive this *money*, being 21 *l.* by virtue of which warrant he did receive it, and paid it to the ſaid *A.* before any notice given of this will. And by the direction of Chief Juſtice *Holt*, the plaintiff was nonſuited: for he ſaid, though all acts done by an adminiſtrator where there is a will are void, and ſuch an action in this caſe would lie againſt *A. P.* yet it is hard to make the defendant liable, having paid the *money* over before he knew of the will, to the ſaid *A. P.* the adminiſtrator. *Vide Raym. vol.* 2. *p.* 1210.

Trinity, 10 *Ann.* *Player* v. *Bandy.*

See this caſe fully ſtated in page 307 of this work, under the head *Coſts*

Eaſter, 13 *Ann.* *Timber* v. *Gardiner.*

In an action on the *caſe* on ſeveral promiſes, the defendant pleaded, that he gave the plaintiff ſuch a quantity of, *&c.* who accepted it in *full ſatisfaction* of the ſaid promiſes; to which plea the plaintiff demurred, and the defendant joined in demurrer.

It was inſiſted for the plaintiff, that the defendant's plea was naught, becauſe it did not ſay that the defendant *gave* it in *ſatisfaction*.

Per curiam. If the defendant gave it with one intention, and the plaintiff accepted it with another, the intention of the donor muſt prevail; but the queſtion in this caſe is, whether the words, in *full ſatisfaction*, ſhall not as well relate to the verb *give*, as to the verb *accept*; eſpecially becauſe of the conjunction *and*, which ſeems to alter it from 5 *Co.* 117. *Adjourned. Vide Mod. Rep. vol.* 10. *p.* 224.

Trinity, 8 *Geo.* *Abdelard* v. ———

The caſe was as follows: a man by marriage-articles was to pay 50*l.* at 5 *l. per annum*, till the whole 50*l.* ſhould be *paid*; and in failure of *payment* of any 5 *l.* then he was to *pay* the whole.

The queſtion was, whether on failure of *payment* of one 5 *l.* an action could be maintained for what was then due?

It was agreed, that it could not till after the days of *payment* were paſt.

Beſides, the ſtatutes for amending the law gives the judges power, on *payment* of principal, intereſt, and coſts, to diſcharge a man after a judgment obtained againſt him for a penalty; and this ſhall be deemed an equitable penalty.

Per curiam. The power given to the court by the ſtatute is to ſtay proceedings on *payment* of all that is due; and in the principal caſe all the 50 *l.* is due, and no part of it is a penalty, but only the defendant, by the condition of theſe articles, had time for the *payment* of the *money* by parcels, as therein directed, the benefit of which condition is now loſt by his breach thereof: ſo the plaintiff had judgment. *Vide Mod. Rep. vol.* 8. *p.* 57.

Trinity, 9 *Geo.* *Huxſer* v. *Gapan*.

See this caſe fully ſtated in page 335 of this work, under the head *Damages*.

Eaſter, 10 *Geo.* *Boſtock* v. *Boſtock*.

A bond was dated in the year 1706, conditioned for the payment of a certain ſum of *money*; and in 1709, the ſum of 100 *l.* part of the *money*, was paid; and by an indorſement reciting that there was 31 *l.* intereſt then due, it was expreſſed to be paid in diſcharge of the principal. The queſtion was, whether the 31 *l.* intereſt then due ſhould be taken to be part of the 100 *l.* then paid: it was argued, that if it was to be ſo taken, ſo much of the intereſt is diſcharged, and by conſequence ſo much continues part of the principal ſtill, for which intereſt muſt be paid; whereas if the 31 *l.* intereſt was not diſcharged, no intereſt would grow due for it, becauſe it is originally paid.

The court ſeemed to incline, that the 100 *l.* then paid ſhould be in diſcharge of the intereſt then due, and for the reſidue in diſcharge of ſo much of the principal. *Vide Mod. Rep. vol.* 8. *p.* 24.

Eaſter, 10 *Geo.* *Anonymous*.

A motion was made to ſtay proceedings on a judgment, ſuggeſting that part of the *money* was paid, and that the defendant was willing to pay the reſt into court.

Per curiam. Where a debtor owes money to his creditor on ſeveral accounts, he may pay part, and apply it to any debt; but if the creditor denies that he received it in ſatisfaction for that debt, but on ſome other account, then he has his election to apply the *payment* to what debt he will; ſo where it appears that *money* is paid indefinitely, the creditor has his election to declare on what account he received it.

Therefore if the debtor in the principal caſe would have this *payment* applied to the judgment on *equitable* terms, he ſhould likewiſe pay or render all the *money* due to the plaintiff on ſimple contract; or otherwiſe as far as the penalty of the judgment covers ſuch debts; for this court will not compel a creditor by judgment to accept a leſs ſum than is due on the judgment, on the account of any former indefinite *payments*, when there are other accounts between the parties, unleſs the defendant conſent to bring all in that is due to the plaintiff. *Vide Mod. Rep. vol.* 8. *p.* 236.

Trinity, 10 *Geo.* *Serle or Searle*, v. *Barrington*.

See this caſe fully ſtated in page 244 of this work, under the head *Bonds*.

Hilary, 11 *Geo.* *Martin* v. *Pritchard*. Error.

On a *writ of error* brought on a judgment in *C. B.* in an action of *debt* on a bond conditioned to *pay* 100 *l.* with intereſt, on the 5th day of *December*, &c. wherein the defendant pleaded, *that after the making the bond, and before the day of ſuing out the original writ*, to wit, on the 1ſt day of *December*, he paid the *money*, &c. The plaintiff replied, *he did not pay in manner and form*, &c. for that *payment* before the day was no good plea; to which the defendant demurred ſpecially, and the plaintiff joined in demurrer.

It was inſiſted that the replication was ill, having put in iſſue a day which was not material; and the caſe of *Merril* v. *Joceline*, 10 *Mod.* 147. was cited.

Per curiam. In the caſe of *Merril* v. *Joceline*, the defendant ſhould have pleaded *paid to the day*; but having pleaded a *payment* before the day, the point in iſſue only turned on that fact, which made the iſſue material only if found *one* way; therefore in that caſe the plaintiff ſhould have demurred.

In this caſe the day is intirely immaterial; this is a plea on *ſtat.* 4 & 5 *Ann*, *c.* 16. ſo that the queſtion is only, whether the principal and intereſt was paid before the original was ſued out. If an original be produced ſubſequent to the 1ſt day of *December*, the plea will be good; for the day is only form: ſo the judgment of the *C. B.* was affirmed. *Vide Mod. Rep. vol.* 8. *p.* 345.

Hilary, 11 *Geo.* *Phillips* v. *Doelittle*.

See this caſe fully ſtated in page 396 of this work, under the head *Ejectment*.

Trinity, 11 *Geo.* *Anonymous*.

See this caſe fully ſtated in page 336 of this work, under the head *Damages*.

Michaelmas, 11 *Geo.* *Savill* v. *Snell*.

In an action of *covenant* on certain articles of agreement, wherein the defendant covenanted to find diet and lodging for the plaintiff for a year, or to pay him 10 *l.* The defendant, on *affidavit* made, that there was not above 10 *l.* due, moved to bring it into court, and that the plaintiff might proceed at his peril.

The court could not aſcertain what was due for diet and lodging; but becauſe the agreement was in the disjunctive, *viz.* to find diet and lodging, or to pay 10 *l.* a rule was made that the defendant might pay the *money* into court. *Vide Mod. Rep. vol.* 8. *p.* 305.

Michaelmas, 5 *Geo.* 2. *The South-Sea Company* v. *Duncomb*.

On a trial at *bar* in an action for *money* lent, it appeared that 8000 *l.* was advanced to the defendant by the plaintiffs in the year 1720, on a pawn of 2000 *l.* ſtock; and the defendant not having repaid it; the queſtion to be tried was, whether the plaintiffs could proceed againſt the perſon of the defendant, or muſt ſtand to the remedy againſt the ſtock. And after proof of many particulars, to induce a belief that in theſe loans no regard was had to the perſonal ſecurity; the court left it to the jury on this point, that where *money* is generally lent on a pledge, it will not deprive the lender of his remedy againſt the perſon; and that to diſcharge the perſon of the borrower, there muſt be a ſpecial agreement to ſtand to the pledge only: and the jury found for the defendant. *Vide Stra. vol.* 2. *p.* 919.

Trinity, 8 *Geo.* 2. *Hudſon, Executor of Grove,* v. *Stalwood and others, Executors of Stalwood.*

On an action of *debt* on a bond, whereby the defendant's teſtator, together with one *Hicks*, were *jointly and ſeverally* bound to the plaintiff's teſtator; the defendant pleaded, that *Stalwood* the teſtator, in his life-time, and the ſaid *Hicks*, *paid* off the bond: the plaintiff replied, that the ſaid *Stalwood*, and *Hicks*, did not *pay* it *in manner and form*, as pleaded; and thereon iſſue was joined, and a verdict was given for the plaintiff; and it appeared on evidence, that a ſmall part of the bond was *paid* by the ſaid *Stalwood* in his life-time, and the reſt *paid* off by *Hicks*, after *Stalwood*'s death.

The court was moved for a new trial, and the queſtion thereon was, whether the evidence verified the defendant's plea? It was argued that it did ſo; for that *Stalwood* could not *pay* the *money*, but in his life-time; ſo that the words, in his life-time, muſt be thrown out, and then it is a plea of *payment* by *Stalwood* and *Hicks*.

But if they are to recover, that is not a material circumſtance; for the ſubſtance was, whether the principal and intereſt, due on the bond, was *paid*, or not; and therefore if *A.* and *B.* are bound, and *B.* only is ſued, and pleads *payment*, and the evidence is that the *money* was *paid* by *A.* that is evidence of *B.*'s plea.

Per curiam. No doubt of it.

Lord *Hardwicke*, who tried the cauſe, ſaid, it appeared that *Hicks* only entered into this bond as ſecurity for *Stalwood*, but took no counter-bond; ſo that this action was only brought to enable *Hicks*'s executors to recover over; for if it had been only a ſingle queſtion between the plaintiff and defendant, whether the *money* was *paid*, or not, I ſhould be for extending the words of the plea as far as poſſible; but it appeared that this action was only to reimburſe the ſecurity, and *Stalwood*'s executors had taken advantage of the act for the amendment of the law, and pleaded *payment* by the ſecurity to an action, wherein the ſecurity in effect was ſuing for his reimburſement, and that is a defect in the ſtatute; and then the queſtion was, whether the evidence did maintain the iſſue, *viz.* whether there was evidence of *payment* of the whole ſum by *Stalwood*, in his life-time, and *Hicks*.

The defendant might have pleaded to this action two ways, either according to the truth of the fact, that *Stalwood paid* part in his life-time, and *Hicks* the remainder after *Stalwood*'s death, and ſo that the whole *money* was *paid* before the action was brought; or elſe, according to the operation of the law, that *Hicks paid* the whole; but he has taken another method; and I muſt confeſs, I think the words, in his life-time, are of no great conſequence; but ſuppoſing theſe words were not in the plea, the *payment* is ſtill pleaded as an entire fact, when it comes out not to be ſo; for the laſt *payment* was for *Hicks*, and for the executors of *Stalwood*; and therefore I think the plea ſhould not have any ſtrained conſtruction.

Page, Juſtice. Can any one ſay, that *payment* after *Stalwood*'s death was *payment* by *Hicks* and *Stalwood*? For you ought to prove the *payment*, as you plead it; or ſuppoſe *Hicks* had paid the whole after *Stalwood*'s death, would that have maintained the plea? and yet this is the ſame caſe.

So the rule was diſcharged. *Vide Caſes Temp. Lord Hardwicke, p.* 133.

Hilary, 12 *Geo.* 2. *Archer* v. *Snatt.*

The defendant purchaſed the equity of redemption, and had poſſeſſion of the eſtate: the leſſor of the plaintiff was a mortgagee, and had alſo lent *money* on a bond. And the court being moved to ſtay proceedings on *payment* of the *mortgage-money*, with intereſt and coſts, it was referred to the maſter. And the leſſor inſiſting to be paid the bond, before he would re-convey, the matter was ſpecially reported. And the court were of opinion, that this not being an application by an heir, but by the mortgagor, or his aſſignee of the equity of redemption, they could not be allowed the bond-debt to be brought in; but were to act in this caſe according to the rules of a court of *equity*, where a redemption is conſtantly decreed on *payment* of the *mortgage-money* only. And it was ſaid to have been ſo held in *Hilary*, 11 *Geo.* in this court, in the caſe of *Wood on the demiſe of Cowhurſt* v. *Mortimer and others*, and in 325 of *Equity Caſes*. *Vide Stra. vol.* 2. *p.* 1107.

Trinity, 16 *Geo.* 2. *Goddard* v. *Cox.*

One *Samuel Owen* was indebted to the plaintiff for *coals*. He died, and made his wife executrix. She continued to deal with the plaintiff, and received coals on her own account; then ſhe married the defendant, who alſo received coals on his own account, and made ſeveral *payments*, generally on account. Theſe *payments*, if applied to the debt due from the executrix, and her debt whilſt a widow, cleared both theſe accounts, and the preſent action was brought againſt the defendant only for what was delivered in his time. And the queſtion was, who had the right of applying theſe *payments*, there being no direction from the defendant, who it was agreed had the firſt right?

Lee, Chief Juſtice held, that thereby it devolved to the plaintiff. And the defendant being by the marriage equally a debtor for what his wife received *while ſole*, as for what was after; the plaintiff might apply the *money* received to diſcharge the wife's own debt: but as to the demand againſt her as executrix, the validity of which depended on the queſtion of aſſets, and manner of adminiſtering them; he was of opinion, the plaintiff could not apply any of the *money* paid by the defendant to the diſcharge of that demand.

A caſe was mentioned to have been before the Chief Juſtice at *Suffolk* aſſizes, in 1730, *Bloſs* v. *Cutting*, where the defendant owed *money* on two bonds, and paid *money* on account, but gave no directions which he would have it applied to; and on a caſe reſerved, it was determined, that the plaintiff had the election. *Vide Stra. vol.* 2. *p.* 1194.

Hilary, 1 *Geo.* 3. *Hallet, Eſq; and others* v. *The Eaſt-India Company.*

On ſhewing cauſe againſt a rule why the defendants ſhould not have leave to bring 2670*l.* into court, on two of the aſſigned breaches only, and that the ſaid 2670 l. ſhould be ſtruck out of the declaration.

Lord *Mansfield* obſerved, that in motions of this kind, where the defendant applies *to pay money* into court, and to have the demand thereupon ſtruck out of the declaration, the *law* ariſes on the *fact*; and the true diſtinction is, "that where the ſum demanded is "a *ſum certain*, or capable of being *aſcertained by mere* "*computation*, without leaving any other ſort of diſ"cretion to be exerciſed by the jury, it is right and "reaſonable to admit the defendant to *pay* the *money* "into court, and have ſo much of the plaintiff's de"mand on him ſtruck out of the declaration; and "that if the plaintiff will not accept it, he ſhall pro"ceed at his peril." *Vide Bur. vol.* 2. *p.* 1120.

Michaelmas, 3 *Geo.* 3. *Fiſher* v. *Prince.*

Adjudged, That *ſtat.* 4 & 5 *Ann. c.* 16. for *paying money* into court, ought to have a moſt *liberal* conſtruction; and that the courts of *law* and *equity* ought to exerciſe their own authority to extend the ſpirit and reaſon of it. The ſtatute meant, that in caſes of penalties, by way of *ſecurity*, the clear, final juſtice of the caſe ſhould be attained in the courts of law. *Vide Bur. vol.* 3. *p.* 1363.

Penalty.

Hilary, 7 *W.* 3. *Lord Gerard* v. *Lady Gerard.*

See this caſe fully ſtated in page 379 of this work, under the head *Dower*.

Michaelmas, 10 *W.* 3. *The King* v. *Moor.*

The defendant was indicted for ſuffering *bone-lace-makers* to ſet up their goods on ſtalls within his yard, and taking ſo much a piece from them for it. It was ſaid to be ſetting up a market, and that a *quo warranto* would lie, and by conſequence an indictment for the *uſer*; the defendant pleaded *guilty*, and ſubmitted to a *fine*, and hereupon, though he had entered into a recognizance to try it, his recognizance was diſcharged. *Vide Mod. Rep. vol.* 12. *p.* 235.

Michaelmas, 11 *W.* 3. *The King* v. *Patting*.

The defendant was convicted of a riot, and before judgment, or the *poſtea* returned, moved to ſubmit to a *fine*; and having ſhewn by *affidavits*, that the riot was in reſiſting one, who, by pretence of a *proceſs* from the *admiralty*, would ſeize on goods which he had diſtrained for rent, he was diſcharged.

Per curiam. The *poſtea* ought to be returned the next term after the trial. *Vide Mod. Rep. vol.* 12. *p.* 317.

Michaelmas, 11 *W.* 3. *Worley* v. ——

Holt, C. J. A *fine* ought to be abſolute, and not conditional; and therefore a fine, unleſs ſuch a thing be done *in future*, is void. And by the *common law*, a *fine* for non-repairing of a highway was for the default in not repairing the highway, and ought to be abſolute; but by a late ſtatute, the *fine* is to go towards the repair. *Vide Mod. Rep. vol.* 12. *p.* 318.

Michaelmas, 13 *W.* 3. *Anonymous*.

On an action on the *caſe* for money received to the plaintiff's uſe, it appeared on evidence that the defendant had indicted the plaintiff for *regrating wool*; and afterwards compounded the matter with him for a ſum of money, for which money this action was now brought by the plaintiff.

Holt, Chief Juſtice, was ſo angry with the parties for compounding an indictment of a public nature, that he had the plaintiff nonſuited, and *fined* the defendant; and he ſaid, if it was an indictment for a private wrong, they might do it. *Vide Mod. Rep. vol.* 12. *p.* 602.

Michaelmas, 2 *Ann.* *Anonymous*.

Holt, Chief Juſtice. When a ſtatute gives a *penalty* to be recovered before juſtices of peace, and preſcribes no method, it ought to be by bill of indictment. *Vide Salk. vol.* 2. *p.* 606.

Hilary, 2 *Geo.* 2. *Baldwin* v. *Morgan*.

The plaintiff, out of the *penalty* of a recognizance of bail, levied not only the money recovered, but ſome coſts not included in the judgment, but ſuch as he really had been put to; and upon motion it was held, that though *equitable* coſts may be levied out of the *penalty* of a bond, yet it was too hard to ſuffer it to be done againſt the bail: and ſo the overplus money was ordered to be returned. *Vide Stra. vol.* 2. *p.* 826.

Hilary, 2 *Geo.* 2. *The King* v. *Malland*.

On an indictment on *ſtat.* 12 *Geo.* 1. *c.* 35. for burning place-bricks and ſtock-bricks together. On demurrer it was objected, that in this particular inſtance, though a *penalty* of 20 *s. per* thouſand is given, yet there is no appropriation of it, or any method preſcribed in which it ſhall be recovered, though there is as to all the reſt; and upon looking into the act, it appeared this offence was omitted out of the clauſe, which gave the *bricklayers company* power to ſue for the *penalties*: and therefore the court held, that the 20 *s. per* thouſand was in the nature of a debt to the crown, where the unappropriated *penalty* would go, and was ſuable for in a court of revenue, and not by indictment; though 1 *Mod.* 34. and 1 *Ven.* 63. were cited to prove that the 20 *s.* ought to be the meaſure of the fine upon the indictment: judgment was given for the defendant. *Vide Stra. vol.* 2. *p.* 828.

Eaſter, 3 *Geo.* 3. *Bonafous* v. *Rybot*.

See this caſe fully ſtated in page 245 of this work, under the head *Bonds*.

Michaelmas, 3 *Geo.* 3. *Bird* v. *Randall*.

See this caſe fully ſtated in page 50 of this work, under the head *Actions*.

Pleas, Pleadings, &c.

Michaelmas, 1 *W.* 3. *Skinner* v. *Kilby*.

On an action of *covenant*, the plaintiff aſſigned a breach in *non-payment of rent*; the defendant pleads, that *he paid it, and this he is ready to verify*; and on a demurrer to this *plea*, it was adjudged ill, becauſe it was an affirmative to what went before, for that was a negative, *viz.* in *non-payment of rent*, and therefore the defendant ought to have concluded to the country, for otherwiſe, *pleas* would be infinite. *Vide Salk. vol.* 3. *p.* 209.

Michaelmas, 1 *W.* & *M.* *Anonymous*.

If a man be bound by recognizance to appear the *firſt* day of the term, and is charged upon his appearance with an information, in caſe the *information* be laid in *Middleſex*, the party has time to *plead* during all that term, ſo that it cannot come to trial in the term; but in caſe it be laid in any other county, the party ſhall have time to *plead* till the next term, for he is as much concerned to defend himſelf in thoſe caſes as in any civil action; and ſince the law allows him council, the law allows him time likewiſe to conſult with them; for not to allow the means of defence, is to take away the ſubjects defence; it is otherwiſe in capital offences: but *note*, in theſe caſes there is no council. Alſo where the party comes in by *cepi corpus*, or upon an *outlawry*, he ſhall *plead* preſently, for then he has been guilty of a contempt.

Per curiam. Contrary to the caſe of the ſeven biſhops. *Vide Salk. vol.* 2. *p.* 514.

Eaſter, 2 *W.* & *M.* *Woodward* v. *Cliff*.

In *covenant*, the plaintiff declared that he was ſeized in *fee*, and that by an indenture made between the plaintiff and *Elizabeth* his wife *on the one part*, and the defendant of the other part, *It is witneſſed*, that the plaintiff and his wife demiſed. It was objected, that it being ſhewn that the huſband was ſolely ſeiſed, the huſband and wife could not demiſe: but not allowed; for it is not affirmed, but only that by the indenture it is witneſſed, for the *teſtatum* is a rehearſal of that. *Vide Salk. vol.* 2. *p.* 515.

Michaelmas, 2 *W.* & *M.* *Cone* v. *Bowles*. Error.

On a *writ of error* brought on a judgment in *replevin* in the *C. B.* againſt *three* defendants, one of whom was an infant, but all appeared by attorney; judgment was given againſt the plaintiff, who aſſigned this for *error*; but it was held that it was not aſſignable for *error*, becauſe it might have been *pleaded* in abatement. *Vide Mod. Rep. vol.* 12. *p.* 1.

Michaelmas, 2 *W.* 3. *Loder* v. *Loder*.

In an action of *debt* on bond brought againſt an adminiſtrator, *with the will annexed*, the defendant prayed *oyer* of the condition, which was, that *W. R.* ſhould not revoke his will, and *pleaded*, that the ſaid *W. R.* did not revoke his will; the plaintiff replied, that after the ſaid will the ſaid *W. R.* made another will, and thereby did revoke the firſt will, *and this he is ready to verify*; and on a demurrer to this replication it was adjudged, that though this is an affirmative to a precedent negative in the *plea*, yet the plaintiff need not conclude to the country in his replication, but aver it as he had done, becauſe in the replication new matter was ſuggeſted, and therefore he ought to conclude, *and this he is ready to verify. Vide Salk. vol.* 3. *p.* 209.

Michaelmas, 2 *W. & M. Kemp* v. *Andrews.*

On an action of *trover*, the plaintiff declares, that one *N. J. S.* and himſelf were poſſeſſed, that the others died, and the goods came into the defendant's hands, *&c.* The defendant pleads, that they were joint merchants, and no ſurvivor by law amongſt them, and ſo prays, that the plaintiff, as to the joint goods, may be barred. Demurrer, and judgment for the plaintiff For tho' no ſurvivor, 1 *Inſt.* 182. *a.* yet the plaintiff had no right to a *purpart*, and joint-tenancy ought to be *pleaded in abatement*, and not in *bar*. *Vide Mod. Rep. vol.* 12. *p.* 3.

Michaelmas, 3 *W. & M. Anonymous.*

On a writ of *homine replegiando*, one muſt plead *inſtanter* without imparlance, as in an appeal. *Vide Mod. Rep. vol.* 12. *p.* 8.

Hilary, 3 *&* 4 *W. & M. Parker* v. *Harris.* Error.

On *error* brought on a judgment in the *C. B.* in an action of *debt* for rent, wherein the plaintiff declared upon two demiſes, *viz.* of one meſſuage, being in the *Riſe of Hampſtead-hill*, having it for *ſeven years*, paying 18 *l. per annum*; and upon another demiſe at will, paying after the rate of 18 *l. per annum*, during the continuance of that demiſe.

The defendant *pleaded* in bar, that at *the time of the demiſe*, the plaintiff *was not poſſeſſed of the tenements*, &c.

The plaintiff replied, that before the demiſes made by him to the defendant, Lord *Wotton* demiſed to the plaintiff a piece of land, with an old houſe and barn, being a parcel of the premiſes, for *forty years*, the ſaid Lord *Wotton* then and there having full power and title ſo to demiſe it, *&c.* by virtue whereof the plaintiff was poſſeſſed, and made a leaſe to the defendant in manner and form, *&c.*

To this replication the defendant demurred; and an exception was taken to it, that the plaintiff ought to ſet forth what eſtate the Lord *Wotton* had when he leaſed to the plaintiff, and that full power, right and title, was not ſufficient, without ſhewing what eſtate he had; and this ſeemed in the *C. B.* to be a good exception, it being upon a demurrer.

Then it was objected againſt the *plea*, that the defendant had ſet forth, that at *the time of the demiſe*, the plaintiff had no poſſeſſion of the tenements; it ſhould have been *at the times*, becauſe the plaintiff had declared upon two demiſes, and he might have a title when one part was let, though not when the other was demiſed; and this ſeemed to be a good exception to the *bar*, for that the defendant ought to have *pleaded* diſtinctly to each demiſe.

But then an exception was taken to the declaration, that there was no place laid for the premiſes demiſed; for *in and on the riſe*, &c. is only a deſcription of the ſituation; and of this opinion was the Chief Juſtice; but the other three judges held, that the *venue* ſhould come out of *Hampſtead*, which ſhall be taken for the vill, and that as well as if it had been ſaid *at the riſe*; and ſo judgment was given for the plaintiff.

Per curiam. The reſervation to the rate is not good, it being upon a leaſe at will, where the time of payment of the rent ſhould be very certain; for if the tenant holds over a day, he muſt pay the rent of the next quarter.

But Juſtice *Dolben* inclined, that it being uncertain how long the tenant would continue in poſſeſſion, he being only tenant at will, this reſervation may be good.

As to the other objections, it was held not to be material for the plaintiff in his replication to ſhew his title, or what eſtate he had in the houſe, upon the reaſons and authorities alledged at the bar.

And likewiſe the court concurred in opinion with the judges of the *C. B.* about the place whence the *venue* ſhould ariſe, which muſt be from *Hampſtead*, for if it had been near *Hampſtead*, then there could be no objection to it.

But becauſe the reſervation was held to be void, the judgment in the *C. B.* was reverſed in *Michaelmas* term following. *Vide Mod. Rep. vol.* 4. *p.* 76.

Hilary, 4 *W. & M. Lader or Loowder,* v. *Screwdens or Snowden.*

See this caſe fully ſtated in page 74 of this work, under the head *Appeal.*

Eaſter, 4 *W. & M. Ferrer* v. *Miller.*

In *ejectment*, the defendant comes and ſays, that the land is ancient *demeſne*, without making any defence: to this there was a ſpecial demurrer.

Holt, Chief Juſtice. The plaintiff might have refuſed the *plea* for want of a defence: but if he receives the *plea* he admits a defence. If a perſon *pleads outlawry*, he ought to *plead* it *ſub pede ſigilli*; and if he does not ſo *plead* it, the plaintiff may refuſe it: but if he accepts the *plea*, he ſhall not demur for that cauſe; for it is well enough if he allows it. *Vide Salk. vol.* 1. *p.* 217. *Mod. Rep. vol.* 12. *p.* 21.

Trinity, 4 *W. & M. Hele* v. *The Biſhop of Exeter, and others.*

On a writ of *quare impedit*, it was *adjudged*, that *pleas* which go to the diſability of a perſon ought to be very certain. *Vide Mod. Rep. vol.* 4. *p.* 136.

See this caſe fully ſtated in page 381 of this work, under the head *Eccleſiaſtical Matters.*

Michaelmas, 4 *W. & M. Barker and others,* v. *Lade.* Error.

On a *writ of error* brought on a judgment given in the *C. B.* in a ſuit in *replevin*, wherein the defendant made *conuſance*, as bailiff to one *N. M.* &c.

Adjudged, That *pleas* muſt be framed according to the operation of the deeds on which they are grounded, and not according to the words of ſuch deeds: for example, if a deed is *gave and agreed*, ſuch words make a grant at *common law*, and therefore muſt be *pleaded* with an attornment. If a tenant for life of an eſtate grants the ſame to the perſon in reverſion, ſuch grant muſt be *pleaded* as a *ſurrender*: if one *joint-tenant* makes a feoffment to the other, ſuch feoffment will not be deemed good at *common law*, becauſe in this caſe they are jointly ſeiſed, therefore it muſt be *pleaded* as a confirmation. If one of them *pleads* that the other agreed, ſuch *plea* will not be deemed good, becauſe in that caſe a releaſe, and not a grant, is the proper conveyance. *Vide Mod. Rep. vol.* 4. *p.* 149.

Michaelmas, 4 *W. & M. Gilman or Holman,* v. *Hoare.*

In an action of *debt* for rent on an indenture of leaſe for *forty years*: the defendant *pleaded* that a year before the plaintiff made a leaſe for *forty years* to *A. by virtue whereof A.* entered and was poſſeſſed; and that though the defendant did afterwards enter, yet he was accountable to the ſaid *A.* On demurrer it was argued, that the ſecond leaſe was void for the firſt *thirty-nine years*, and ſo was the reſervation, and that here was no *eſtoppel*, becauſe the laſt of the *forty years* paſſed by the leaſe. *Plow.* 453, 422. 1 *Inſt.* 47. Where a tenant *pour auter vie* made a leaſe for years by indenture, and afterwards purchaſed the reverſion, and it was held that the leaſe ended by the death of *ceſtui que vie*, ſo is 3 *Cro.* 707.

Holt, Chief Juſtice. The reaſon of the caſe in 1 *Inſt.* is, becauſe the tenant for life has a freehold, which is a greater eſtate, and the leaſe will need no *eſtoppel*, if the life endure: but in the principal caſe the leaſe muſt neceſſarily be void for *thirty-nine years*, unleſs made good by *eſtoppel*; and that a leaſe for years may operate and take effect as to part by *eſtoppel*, and as to the reſidue, by paſſing a real intereſt, is very plain from the common caſe of concurrent leaſes, which are all of them as to part good by *eſtoppel*, and a rent reſerved thereon. *Vide Salk. vol.* 1. *p.* 275.

Hilary, 5 *W.* & *M.* *Coombs* v. *Talbot.*

See this caſe fully ſtated in page 342 of this work, under the head *Debt.*

Hilary, 5 *W.* & *M.* *Batterſon* v. *Goodwin.*

On an action on the *caſe* brought by an indorſee againſt the firſt drawer of a bill of exchange; the defendant *pleaded* that the indorſor at the time of the indorſement was a bankrupt.

Per curiam. This is a good *plea* in *bar*, for a bankrupt is *diſabled* to aſſign a bill; but then he ought to have *pleaded* a commiſſion taken out: wherefore judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 12. *p.* 50.

Eaſter, 5 *W.* & *M.* *Morley* v. *Vivian.*

And this he is ready to verify, held to be only form; and though it has been held to be ſubſtance, yet ſubſequent opinions have been contrary. *Vide Mod. Rep. vol.* 12. *p.* 38.

Michaelmas, 5 *W.* & *M.* *Anonymous.* Error.

Holt, Chief Juſtice. On an action of *debt* on a judgment, it was held, that a *writ of error* pending in the *Exchequer Chamber*, is no *plea* in *debt* on judgment. *Vide Mod. Rep. vol.* 12. *p.* 48.

Michaelmas, 5 *W.* & *M.* *Harding* v. *Salkill.*

See this caſe fully ſtated in page 470 of this work, under the head *Executors and Adminiſtrators.*

Michaelmas, 5 *W.* & *M.* *Griffith* v. *Harriſon.*

See this caſe fully ſtated in page 320 of this work, under the head *Covenant.*

Hilary, 6 & 7 *W.* & *M.* *The King and Queen* v. *Larwood.*

See this caſe fully ſtated in page 366 of this work, under the head *Departure.*

Eaſter, 6 *W.* & *M.* *Nichols* v. *Pawlet.*

On an action on the *caſe* the defendant *pleaded*, that the plaintiff was an *alien*, born in *France*, under the allegiance of the *French* king. To which *plea* the plaintiff replied, and concluded to the country; and the defendant demurred to the plaintiff's replication.

Adjudged, That the iſſue was not well taken, becauſe the plaintiff ought not to have concluded to the country; for there being new matter ſet forth in the replication, he ſhould have given the defendant an opportunity to rejoin. *Vide Mod. Rep. vol.* 4. *p.* 285.

Eaſter, 6 *W.* 3. *Hole* v. *Burgoigne.*

In an action of *debt* for 10 *l.* ſhewing, that in conſideration he had paid the defendant the rent due to him, *(viz)* 5 *l.* he (the defendant) by his deed did covenant to ſave him (the plaintiff) harmleſs, againſt *W. R.* who claimed the lands, and then ſets forth, that *W. R.* did *implead* him, *among other things*, in the court of *Exchequer*, in an action of *debt* to recover this 5 *l.* and on a demurrer to this declaration, it was held ill, becauſe the words *among other things impleaded*, were too general. *Vide Salk. vol.* 3. *p.* 271.

Trinity, 6 *W.* 3. *Allen* v. *Symms.*

An *Indeb. aſſump.* was brought againſt *Richard Symms*, who *pleaded*, *that he the ſaid* Richard, *againſt whom*, &c. is called *Richard Symonds*, and *traverſed*, that he is called *Richard Symms*, and this, &c. The plaintiff replied, that the defendant was called and known as well by one name as by the other, *and this he is ready to verify*; and on a demurrer to this replication.

Per curiam. The defendant may well enough ſay, that *he the ſaid Richard* is called *Richard Symonds*, for he may own his chiſtian name, and plead a *miſnomer* to his ſurname.

But in this caſe all is diſcontinued by the plaintiff's replication, becauſe he averred his *plea*, when he ought to conclude to the country.

Where one affirmative comes in anſwer to another affirmative, in ſuch caſe it ought to be averred, and not conclude to the country; but it is otherwiſe where an affirmative comes in anſwer to a precedent negative; therefore in this caſe the defendant having added a *traverſe* to his *plea*, the plaintiff ought to have concluded his replication to *iſſue*, viz. to the country; for in his *plea* the *traverſe* is as a negative, and every general negative muſt conclude to the country: ſo that in this caſe the *miſconcluſion of the replication has made a diſcontinuance.* *Vide Salk. vol.* 3. *p.* 209.

Michaelmas, 6 *W.* & *M.* *Waytes* v. *Briggs.*

On an action of *debt* brought for an eſcape, it was ſaid, that the priſoner was brought before Mr. Juſtice *Gregory*, and by him committed, it was objected, becauſe the plaintiff did not conclude, *as appears by the record.*

Holt, Chief Juſtice. The eſcape is the *giſt* of the action, and the commitment is but the judgment to it, though it can be no eſcape without it; but the record is not the matter of the action, but the eſcape was; for then the plaintiff ought to have concluded as appears by the record, but here the omiſſion of it is but matter of form; for it ought to have been given in evidence on *nil debet pleaded*, which is the *plea* for the defendant in this caſe, becauſe the *giſt* of the action is grounded on matter of fact, and not on the record; for if it was, then the plaintiff could not *plead nil debet* to it, but only *nul tiel* record. *Vide Mod. Rep. vol.* 5. *p.* 8.

Michaelmas, 6 *W.* & *M.* *Robinſon* v. *Smith.*

In an action of *treſpaſs* for taking and impounding a cow, the defendant *pleaded* a *juſtification*, viz. that he was ſeized of ſeveral lands, parcel of the manor of *Muſgrave*, and particularly of a cloſe called *Lowhill Meadow*, parcel of the ſaid manor, to him and his heirs, deſcendible from anceſtor to heir, according to the cuſtom of the ſaid manor, and that the plaintiff's cow was in the ſaid cloſe doing damage, &c.

The court were of opinion, that where *ſeiſin in fee* is *pleaded* of a copyhold eſtate, by way of juſtifying of an offence, with which the defendant is charged, he muſt ſet out the commencement of his eſtate. And therefore the court gave judgment for the plaintiff. *Vide Mod. Rep. vol.* 4. *p.* 346.

Eaſter, 7 *W.* & *M.* *Gibbons* v. *Pepper.*

In an action of *aſſault* and *battery*, the defendant *pleaded* a *juſtification*, viz. that he was riding on a horſe in the highway, and that on a ſudden fright the horſe ſtarted and run on the plaintiff, who continued in the way after he was called to to go out, which was the ſame aſſault.

To the defendant's *plea* the plaintiff demurred, on which the defendant's council moved, that what the defendant had *pleaded* might be taken as a ſufficient juſtification for the aſſault and battery, for that it was no neglect in him, and that the miſchief done was inevitable.

Adjudged, That the defendant ſhould have *pleaded* the *general iſſue*; for if the horſe run away againſt his will, he would not have been found *guilty*; for in that caſe it ſhould not be deemed a *battery* in the rider. Therefore judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 4. *p.* 404.

Michaelmas, 7 *W*. 3. *Bowers and Wife* v. *Coke, Executrix of Coke.*

In an action of *debt* on a bond brought againſt the defendant as executrix of her huſband, ſhe *pleads* that he died inteſtate, and that adminiſtration was committed to her, *&c. wherefore ſhe prays judgment whether ſhe ought to be compelled to anſwer.* The exception was, that the defendant did not traverſe *without this*, that ſhe adminiſtred as executrix.

Per curiam. This plea is better without a traverſe, for the defendant ſhews the plaintiff in what manner ſhe is chargeable; ſhe has confeſſed and avoided all the *plea*; has ſhewn that a rightful adminiſtration was committed: it is a foreign intendment that ſhe has adminiſtered any other way; and if ſhe has ſo done, you ſhould have come in and ſhewn it in your replication; but then, *this concluſion is ill in abatement*; *every* plea *ſhould have its proper concluſion*; this ſhould be, *that the bill be quaſhed.*

It is indeed a good *plea* to the juriſdiction of the court, but not in this caſe, and a *reſpondeas ouſter* was awarded. *Vide Mod. Rep. vol.* 12. *p.* 83.

Michaelmas, 7 *W*. 3. *Smith* v. *Sharp*.

Per curiam. There is a difference between doing a thing by a man and his aſſigns, and to them; if a thing be to be done by a man and his aſſigns, you muſt there alledge in the disjunctive, that it was neither done by him nor his aſſigns: but if a thing be to be done to a man and his aſſigns, you need not mention his aſſigns; for if he has aſſigned it over, it muſt be ſhewn of the other ſide. *Vide Mod. Rep. vol.* 12. *p.* 86.

Michaelmas, 7 *W*. 3. *Young* v. *Rudd*.

See this caſe fully ſtated in page 15 of this work, under the head *Acceptance*.

Michaelmas, 7 *W*. 3. *Wigmore* v. *Veal*.

A tender cannot be pleaded after imparlance; it does not bar the action, but only excuſes the penalty; wherefore in *pleading* a tender, you muſt plead *always ready to make ſatisfaction*, and conclude *petit judicium de damnis*. *Vide Mod. Rep. vol.* 12. *p.* 84.

Michaelmas 7, *or Trinity*, 9 *W*. 3. *Bowyer*, *Powers*, *or Bowers* v. *Coot*, *or Cook*.

See this caſe fully ſtated in page 471 of this work, under the head *Executors and Adminiſtrators*.

Hilary, 8 *W*. 3. *Pierce* v. *Blake*.

The defendant *pleaded* a falſe *plea* in *abatement*, viz. That the plaintiff was dead; and the court was moved, that the attorney might be compelled to ſwear it.

Holt, Chief Juſtice. We cannot compel him in any caſe to ſwear his *plea*, but where it is a foreign *plea*; but the attorney, if he puts in a falſe *plea* to delay juſtice, breaks his oath, and may be fined for deceiving the court.

Note, The court will not order a man to *plead* peremptorily till the rules be out. *Vide Salk. vol.* 2. *p.* 516.

Eaſter, 8 *W*. 3. *Armitage* v. *Row*.

On a motion made, that the plaintiff may file his *original*, and enter up the iſſue on record, for he has ſince arreſted the defendant *three times* for the ſame cauſe of action; and the defendant doubted whether he might plead in *bar* another action pending with a *prout patet per recordum* before it was entered.

Per curiam. He may; if they do not enter it, you may, without any motion in court, give a rule to enter it.

Holt, Chief Juſtice. The altering the ancient method of the *C. B.* as to the imparlance-roll, and *plea-roll*, has cauſed great confuſion Formerly a declaration was entered on the roll the ſame day whereon the writ was returnable, with an imparlance over to the next term, which was called the *imparlance-roll*, and then the next term they entered their declaration over again, with another *prout patet* on another roll, which they called the *plea-roll*; but now the prothonotaries have thought fit to alter the courſe, making the *plea*-roll an original roll of the ſubſequent term, without another *pout patet*. There was a ſimilar caſe ſome time ago by *writ of error*, which was ſettled after great argument, viz. *Moyler* v. *Hawkey*, wherein there was an entry, with a continuance to the ſubſequent term, but no entry in the ſubſequent term, with another *pout patet*, or any relation to the precedent term, and yet we affirmed the judgment, becauſe of the new practice now introduced. *Vide Mod. Rep. vol.* 12. *p.* 91.

Eaſter, 8 *W*. 3. *Pleddall* v. *Freak*.

In an action of *debt* on a bond, brought againſt the defendant by the name of *William Freak*; the defendant *pleaded* his name was *Walter*; the plaintiff demurred, ſuppoſing that the defendant was *eſtopped* by the record, to ſay his name was *Walter*; but judgment was given, *that he take nothing by his bill*, for the plaintiff ſhould have *pleaded* it. *Vide Salk. vol.* 3. *p.* 152.

Trinity, 8 *W*. 3. *Jones* v. *Bodinham*.

In an action of *treſpaſs* for ſtealing of cattle, it was *adjudged*, that when iſſue is joined on an ill *plea*, and a verdict for the plaintiff, yet he ſhall have judgment; for the defendant ſhall not take advantage after a verdict of his ill *pleading*. *Vide Mod. Rep. vol.* 5. *p.* 225.

Trinity, 8 *W*. 3. *Beſton* v. *Hayward*.

In an action of *treſpaſs* for breaking his cloſe, and digging therein at *B.* the defendant juſtifies by a way, *&c.* The plaintiff replies, that the treſpaſs whereof he complains was not committed in the way which the defendant claims, but in another part of the cloſe, *and this he is ready to verify*, &c. *and prays judgment and damages*, &c. The defendant demurred, and his council took exception to this new aſſignment, becauſe it did not offer any other matter in *bar*, as the old precedents are, 2 *Co.* 6. *&c.*

Holt, Chief Juſtice. The treſpaſs here being for breaking of the cloſe, and the new aſſignment being in the ſame cloſe, the plaintiff has pleaded better than if he had offerd other matter in *bar*. And therefore judgment was given for the plaintiff. *Vide Raym. vol.* 1. *p.* 91.

Trinity, 8 *W*. 3. *Birt* v. *Strode*. Error.

On *error* of a judgment in *C. B.* in an action on the *caſe*, where the plaintiff declared, he was lawfully poſſeſſed of a tenement, and that he ought to have common of paſture in 1000 acres, in a place called, *&c.* for all commonable beaſts, *levant* and *couchant* on the tenement aforeſaid; that the defendant made conyburrows, whereby the plaintiff could not enjoy his common *in ſo ample and beneficial a manner*, &c. the defendant demurred.

Holt, Chief Juſtice, delivered the opinion of the court, that the judgment ought to be affirmed, and that the declaration was good, without ſetting out a title to the common, either by grant or preſcription.

1ſt, Becauſe the action is brought upon the poſſeſſion, and is founded on a wrong done upon the poſſeſſion, and not to the title.

2dly, It is not neceſſary that it appear whether the defendant be owner of the land, or not, and therefore no need of ſetting forth a title. But if it had appeared by *pleading*, that the defendant is owner of the land, there it is neceſſary to ſet out a title; but here it ſtands indifferent whether he be ſo, or a ſtranger; but when it comes on *ſpecial pleading*, as in *treſpaſs*, for taking and chacing his cattle; if the defendant juſtifies as in his freehold, and that he took them *damage feaſant*, there the plaintiff muſt ſet forth ſome title in his replication, in anſwer to that of the defendant in his *bar*: but in a declaration, where the defendant may be as well ſuppoſed a ſtranger as an owner, there no title is neceſſary to be ſhewn.

3dly, The matter is not traverſable, for all the right of the common muſt be given in evidence upon *not guilty*, or elſe the plaintiff cannot recover; and if ſo, it is to no purpoſe to ſet it forth in the declaration; and he ſaid, the caſe principally to be relied on is that of *St. John* v. *Moody*, *Michaelmas*, 27 *Ch.* 2. The judgment was affirmed. *Vide Mod. Rep. vol.* 12. *p.* 97.

Michaelmas, 8 *W.* 3. *Hackſhaw* v. *Clerke*.

See this caſe fully ſtated in page 226 of this work, under the head *Bills of Exchange*, &c.

Michaelmas, 8 *W.* 3. *Teuxera Demater* v. *Hooper*.

On an action on the *caſe* the defendant *pleaded* in *abatement*, that the plaintiff was an alien enemy, born at, &c. The plaintiff replied, that he was born at *London*, *which he is ready to verify*, &c. The defendant demurs, and exception was taken to the replication that the plaintiff ſhould have tendered an iſſue, and not have concluded with an averment; but not allowed.

Holt, Chief Juſtice. If the defendant pleads in *abatement*, the plaintiff has his election either to reply and tender an iſſue, or to *plead with he is ready to verify*; and the defendant might have rejoined that the plaintiff was not born at *London*, and taken iſſue, if he pleaſed. But when a *plea* in *bar* is *pleaded*, if the plaintiff replies iſſuable matter, he ought to tender iſſue. Judgment for the plaintiff, that the defendant anſwer over. *Vide Raym. vol.* 1. *p.* 101.

Michaelmas, 8 *W.* 3. *Harris* v. *Pitt*.

On *debt* on a bond: the condition thereof was, *to free and keep harmleſs the plaintiff of and from all coſts and damages, which may ariſe by reaſon of a law-ſuit*, &c. The defendant *pleaded non damnificatus* generally; and upon demurrer to the *plea*, the queſtion was, whether the *plea* was good or not.

Per curiam. It is a good *plea*, becauſe the condition was to ſave the plaintiff harmleſs from ſomething that was uncertain at the time of making thereof, *viz.* from the coſts and charges of the ſuit, that no coſts might be recovered againſt him; but if it had been to ſave harmleſs from a particular thing, then ſuch a negative *plea* generally would not have done, becauſe the defendant ought to ſhew how he indemnified the other. Whereon the council moved to have leave to diſcontinue the action. *Vide Mod. Rep. vol.* 5. *p.* 243.

Michaelmas, 8 *W.* 3. *Swinſted or Swinſtead* v. *Smith or Lyddall*.

This caſe is reported in 1 *Salk.* by the name of *Swinſtead* v. *Lydall*. It was an action of *treſpaſs* for an *aſſault*, *battery*, and *falſe impriſonment*, and for keeping and detaining the plaintiff, *until he paid the defendant* 11 *s.* The defendant juſtified under an *order of the court of conſcience*, &c. by virtue whereof he took and impriſoned the plaintiff, and detained him till he paid 10 *s.* 4 *d.* &c. And on a demurrer to this *plea* it was objected, that it did not anſwer the declaration, for that was for detaining the plaintiff, *until he paid* 11 *s.* and the *plea* is, that he detained him, *until he paid* 10 *s.* 4 *d.* ſo where a man declares in an action of *treſpaſs* for taking *eleven ſheep*, it is no anſwer to juſtify the taking *ten of them*; ſo likewiſe if the plaintiff declares for falſely impriſoning him for *three days*, it is no anſwer to juſtify for *two days*: but on the other ſide it was argued, that the *giſt* of this action was for the falſe impriſonment, as in *treſpaſs* for taking his horſe, and *immoderately riding him*; the defendant juſtified the *taking* by the plaintiff's leave, but ſaid nothing to the *riding*; and on a demurrer that was adjudged a good *plea*, becauſe the *giſt* of the action was the *taking* the horſe, and the immoderate riding was only an aggravation of the treſpaſs, and this was *Bringlo* v. *Morris*'s caſe, *Hilary* 27 & 28 *Car.* 2.

Holt, C. J. In the principal caſe, the *until* is only an aggravation, for the action was not brought for *taking the* 11 *s.* but for the *falſe impriſonment, and detaining the plaintiff until*, &c. as in *treſpaſs* for taking *three ſheep*, every ſheep is the cauſe of the action, *viz.* part of the cauſe, and ſo for impriſoning the plaintiff for *three days*, and therefore the taking every ſheep, and impriſoning for every part of the time muſt be anſwered; it is true, if the plaintiff had been to pay 10 *s.* 4 *d.* only, and that after it was paid, the defendant detained him till he had 8 *d.* more, that might have been material, but then the plaintiff ſhould have ſet forth this matter in a replication; ſo this was adjudged a good *plea*. *Vide Salk. vol.* 1. *p.* 408. *Ibid. vol.* 3. *p.* 219.

Michaelmas, 8 *W.* 3. *James* v. *Fowks*.

An action of *aſſumpſit* was brought againſt a *feme*, who *pleaded* coverture *at the time of the promiſe*; the plaintiff demurred, becauſe it amounted to the *general iſſue*.

Per curiam. Where it is matter of *law* that amounts to the *general iſſue*, it may be *pleaded*, and is no cauſe of demurrer; for matter of *law* in that caſe is matter of fact, which avoids the action, and ſo may be *pleaded*, or given in evidence, as the defendant pleaſes. *Vide Mod. Rep. vol.* 12. *p.* 101.

Michaelmas, 8 *W.* 3. *Brent* v. *Sir Henry Edwin*.

The *plea* of *non aſſumpſit within ſix years*, is a ſpecial *iſſue*. *Vide Mod. Rep. vol.* 12. *p.* 103.

Michaelmas, 8 *W.* 3. *Anonymous*.

Before joinder in demurrer, the defendant may waive his ſpecial plea, and *plead* the *general iſſue*.

Per curiam. But if there be a rule to *plead*, ſo as to ſtand by it, and the defendant *pleads* a ſpecial *plea*, as he may, and the plaintiff demurs, the plaintiff ſhall not then waive, and *plead* the general iſſue. *Vide Salk. vol.* 2. *p.* 515.

Michaelmas, 8 *W.* 3. *Anonymous*.

If a declaration be delivered againſt one in cuſtody, he ſhall have the whole term to *plead in abatement*. *Vide Salk. vol.* 2. *p.* 515.

Michaelmas, 8 *W.* 3. *Hall* v. *Engleſtone*.

Upon a *habeas corpus* returnable in *Michaelmas* term, if the declaration be delivered before *the morrow of All Souls*, the defendant muſt *plead* to try; but upon a *cepi corpus* he is only to plead to enter. So in *Eaſter* term, if the declaration be delivered before *a month of Eaſter*, the defendant on a *habeas corpus* muſt *plead* to try; upon a *cepi corpus* to enter only. *Vide Salk. vol.* 2. *p.* 515.

——— 9 *W.* 3. *Yates* v. *Herlakender*.

On an action of *covenant* brought againſt an *apprentice*, the breach aſſigned was, that the defendant left his maſter's ſervice at ſuch a time, and *continued therefrom to ſuch a time*; the defendant *pleaded*, that he did not depart from his ſervice, nor *continue from it, as the plaintiff* had alledged; to this *plea* the plaintiff demurred, becauſe the *whole time* being put in *iſſue*, the defendant ought to have *pleaded*, that he did not continue out of his ſervice for the time alledged in the declaration, nor for any part thereof.

Holt, Chief Juſtice, held, that in a *general iſſue*, as for cutting twenty trees, the defendant muſt *plead* that he did not cut the ſaid twenty trees, *nor any of them*; but it is otherwiſe in a *collateral iſſue*: as for inſtance, in an action of *debt*, on a bond conditioned not to commit waſte, and the breach aſſigned, that he did commit waſte in cutting twenty trees, it is ſufficient for the defendant to *plead* he did not cut twenty trees in manner and form as the plaintiff had alledged, for in ſuch caſe he is only to meet with his adverſary, but on the evidence, if it appear that he cut down one tree, the plaintiff ſhall have a verdict. *Vide Salk. vol.* 3. *p.* 209.

Hilary, 9 *W.* 3. *Britton* v. *Cole.*

See this caſe fully ſtated in page 374 of this work, under the head *Diſtreſs.*

Hilary, 9 *W.* 3. *Taylor* v. *Jones.*

See this caſe fully ſtated in page 274 of this work, under the head *Conſideration.*

Hilary, 9 *W.* 3. *The King and Queen* v. *The Biſhop of Cheſter and others.*

Holt, Chief Juſtice. Though the defendant admits *Charles* the Firſt to have been ſeiſed of this advowſon in *groſs* by deſcent, and conſequently that Q. *Elizabeth* was ſeized in *groſs* of it during ſome time of her reign, yet he does not admit it at the preciſe time of the 14th *February*, in the 12th year of her reign; becauſe the alledging of the time and day when Queen *Elizabeth* was ſeiſed in *groſs* is ſurpluſage and immaterial; for it is ſufficient to alledge *general ſeiſin* in a *quare impedit*, in time of peace in the reign of ſuch a king. Then, though the defendant does not deny a thing, yet he admits by it only things materially alledged, but he does not admit things immaterially alledged. The time of the ſeiſing and preſentation is traverſable, and all the precedents never alledge the day of the *ſeiſin* or of the preſentation. Then, if it is ſo immaterial that one cannot deny it, the not denying it will not amount to an admittance. Beſides, nothing that is *immaterial*, though it be admitted, will amount to an *eſtoppel.*

Adjudged, On the above *writ of quare impedit*, that letters patent to a ſtranger may be *pleaded* without a *profert in curia*; and alſo that letters patent, enrolled in the ſame court, may be *pleaded* without a *profert.* *Vide Raym. vol.* 1. *p.* 296, 299.

Eaſter, 9 *W.* 3. *Brown* v. *Corniſh.*

On an *indebitatus aſſumpſit* and *quantum meruit* for 20 *l.* the defendant *pleaded, he ought not to be charged*, becauſe he paid the money at the time, *&c. and this he is ready to verify*; the plaintiff demurred.

Holt, Chief Juſtice. 1ſt, This *plea* does not amount to the *general iſſue*, becauſe it admits the cauſe of action.

2dly, *He ought not to be charged* is no *plea* here, becauſe he allows the promiſe to be a good promiſe, but avoids it by matter of diſcharge *ex poſt facto*; in this caſe he ſhould have *pleaded no action.* But where the matter of the *plea* ſhews there never was a good cauſe of action, *he ought not to be charged* may be proper. *Vide Salk. vol.* 2. *p.* 516. *Raym. vol.* 1. *p.* 217.

Eaſter, 9 *W.* 3. *Hallet or Holler*, v. *Burch or Buſh.*

This caſe is reported in 1 *Salk.* by the name of *Holler* v. *Buſh*, and in 2 *Salk*, by the name of *Hallet* v. *Burt*; but the caſe was thus:

In *treſpaſs* for taking his cows, *&c.* the defendant *pleads*, and ſets forth a right by *preſcription in the Biſhop of Saliſbury* to grant replevins in ſuch a manor, and that the plaintiff *took and impounded* three cows of another, and that he (the defendant) by virtue of a *replevin*, as *ſteward*, took and drove them away, and traverſed that he was guilty *otherwiſe, or in any other manner*; and on demurrer to this *plea* it was objected, that it amounts to no more than the *general iſſue*; for the effect of it is, that thoſe were the cows of another perſon, and that the plaintiff took and impounded them: now by the impounding the plaintiff had neither title or poſſeſſion, and if ſo, he had no colour to bring an action of *treſpaſs* for taking them out of the pound, for in ſuch caſe *treſpaſs* will not lie, but *parca fracta.*

Per curiam. This *plea* amounts to no more than the *general iſſue*; wherever the defendant's *plea* leaves a cauſe of action in the plaintiff either expreſs or implied, but confeſſes and avoids it, the *plea* is good, and this confeſſion and avoidance is colour, without which the *plea* would amount but to the *general iſſue*: now in the principal caſe the defendant has ſet forth in his *plea*, that theſe were not the plaintiff's cows, but yet, that he took them and *impounded them* only, whereby they became *in cuſtody of the law*, and therefore there was no colour for him to bring an action of *treſpaſs* for taking them out; but if the defendant had pleaded *took and detained*, inſtead of *impounded*, the *plea* might have been good. *Vide Salk. vol.* 3. *p.* 272. *Raym. vol.* 1. *p.* 218.

Eaſter, 9 *W.* 3. *Shepherd* v. *Taylor.*

See this caſe fully ſtated in page 316 of this work, under the head *Courts.*

Eaſter, 9 *W.* 3. *Cholmely* v. *Bloom, or Broom.*

On an action of *debt* brought againſt the defendant in cuſtody of the Marſhal, *&c.* on a bond made at *Cheſter*; the defendant *pleaded* he was, at the time of exhibiting the bill, an inhabitant, and notoriouſly converſant in the county palatine of *Cheſter*, viz. at *Nampwich*; which *plea* the plaintiff apprehending to be a *foreign plea*, ſigned his judgment, becauſe it was not ſworn to; and it was moved to ſet the judgment aſide, becauſe it was not a *foreign plea*; for *pleas* to the juriſdiction of the court are not ſuch; as *pleas* of *antient demeſne, privilege*, &c. and therefore are never ſworn to. But a *foreign plea* is when the defendant carries the action out of the county where the plaintiff had laid it; if the action be *tranſitory*, then, if the defendant carries it into another county, the *plea* is naught, except in ſpecial caſes; but if the action be *local*, the removing it into another county than that where the plaintiff had laid it, is properly a *foreign plea*; which is not done in this caſe; for here the action is laid in *Cheſhire*, and the defendant does not in his *plea* remove it from thence, which the court agreed to, and therefore the judgment was ſet aſide. *Vide Mod. Rep. vol.* 12. *p.* 123. *Ibid. vol.* 5. *p.* 335.

Eaſter, 9 *W.* 3. *Ord* v. *Howard.*

If you *plead alience* in *bar*, you muſt lay a place where the perſon is born; but if in *abatement*, it is triable where the action is brought. *Vide Mod. Rep. vol.* 12. *p.* 125.

Trinity 9 *W.* 3. *Chickham* v. *Dickſon.*

Holt, Chief Juſtice. When you *plead outlawry* in *abatement*, when you put in your *plea* in the office, you muſt have a *capias*, or ſome ſuch matter, as may make the *outlawry* appear, and not conclude only *as appears by the record*, as you do when you plead it in *bar*, and have time to bring in the record. *Vide Mod. Rep. vol.* 12. *p.* 132.

Trinity, 9 *W.* 3. *Leaves* v. *Bernard.* Error.

On an action on the *caſe* on ſeveral promiſes, the defendant comes and defends the force and injury, when, *&c. and prays a judgment of the count, and that the aforeſaid count may be quaſhed.* The plaintiff joined in the demurrer, and had final judgment; the defendant brought a writ of *error*, alledging that final judgment ought not to have been, but only a *reſpondeas ouſter* awarded, this *plea* being only in *abatement*, and not in *bar.*

Per curiam. By the courſe of this court, whereſoever you commence by bill, praying judgment of the court is a *plea* in *bar*; and in that caſe, if you *plead* in *abatement* of the count, you muſt not pray judgment of the count, and that the count may be quaſhed; but you muſt pray judgment of the bill, and that the bill may be quaſhed. Judgment affirmed. *Vide Mod. Rep. vol.* 12. *p.* 133. *Ibid. vol.* 5. *p.* 131.

Trinity, 9 *W*. 3. *Moor* v. *Riſdell.*

On an *indebitatus aſſumpſit* the defendant *pleads* in *abatement*, that the plaintiff is a popiſh recuſant convict, *as appears by the record* of the eſtreat of the *Exchequer*. The plaintiff demurs, and the *firſt exception* was, that in *pleading* the conviction, the defendant ſays, that a proclamation iſſued to ſummon the plaintiff to appear and render himſelf before or at the next ſeſſions; and then ſays, that the plaintiff did not render himſelf at the next ſeſſions, but does not ſay, that he did not render himſelf before.

Per curiam. For this reaſon the *plea* is ill.

Second exception. The defendant does not produce in court the record of the conviction, but only an exemplification of the eſtreat of the *Exchequer*.

Per curiam. That is ill alſo; for the eſtreat in the Exchequer is not a record, but only minutes, to make proceſs on it for the king: and therefore a *reſpondeas ouſter* was awarded. *Vide Raym. vol.* 1. *p.* 243.

Michaelmas, 9 *W*. 3. *Huſſey* v. *Jacob.*

See this caſe fully ſtated in page 500 of this work, under the head *Gaming*.

Michaelmas, 9 *W*. 3. *Sparks* v. *Crofts.*

See this caſe fully ſtated in page 471 of this work, under the head *Executors and Adminiſtrators*.

Michaelmas, 9 *W* 3. *Aſton, or Aſhton*, v. *Sherman.*

See this caſe fully ſtated in page 471 of this work, under the head *Executors and Adminiſtrators*.

Eaſter, 10 *W*. 3. *Bonner* v. *Hall.*

On an *indebitatus aſſumpſit* the defendant *pleads* another action depending *in our court of* C. B. for the ſame cauſe; and he pleads this in *abatement*. The plaintiff replied, that there was not any action depending for the ſame cauſe; and therefore *prays judgment for the debt and damages.* The defendant demurs. The plaintiff joins, and concludes rightly.

Holt, Chief Juſtice. When the plaintiff traverſes the defendant's *plea* in his replication, and offers an iſſue, he may pray judgment for *debt and damages*; becauſe, if it be tried, peremptory judgment ought to be given. But in this caſe the firſt fault is in the defendant, for the *plea* is ill. And therefore judgment was given, *to anſwer over*. *Vide Raym. vol.* 1. *p.* 338.

Eaſter, 10 *W*. 3. *Thomee* v. *Lloyd.*

On an *indebitatus aſſumpſit*, the defendant *comes and ſays*, that he is an officer of the *Exchequer*, and *pleads* his priviledge. The plaintiff demurs, and among other exceptions taken was the following: that it is not ſaid, that the court ought not to have conuſance, in the beginning of the *plea*, but in the end of the *plea*. *But it was not allowed.*

Per curiam. The concluſion makes the *plea*. For if a man begins in *bar*, and concludes in *abatement*, it is a *plea* in *abatement*. *Raſt. Entr.* 178. 472-3. *Old Book of Entr.* 62. *b.* 128. *Thompſ. Entr.* 3. 4. And therefore judgment was given for the defendant. *Vide Raym. vol.* 1. *p.* 336.

Eaſter, 10 *W*. 3. *Brag* v. *Digby.*

On an action on the *caſe* brought on ſeveral promiſes, on an original, the defendant, without craving *oyer* of the writ, *pleaded* a variance between the writ and the count, ſhewing particularly wherein; whereupon the plaintiff demurred; for though the writ be in court, yet it is on a diſtinct roll from the count, and no advantage can be taken of it, without craving *oyer*; *which the court agreed to*, and a *reſpondeas ouſter* was awarded. *Vide Mod. Rep. vol.* 12. *p.* 189.

Eaſter, 10 *W*. 3. *Silly* v. *Dally.*

In replevin the defendant made conuſance as bailiff to *J. T.* and ſaid, that on the 31ſt *July* 1645, *J. T.* grandfather to *J. T.* aforeſaid, was poſſeſſed of and in one meſſuage, *&c. for a certain term of fifty years, to be computed from the* 31*ſt of July in that year*; and that he being ſo poſſeſſed, the ſaid 31ſt day of *July*, made a leaſe of the ſaid meſſuage for the term of 499 years, three quarters of a year, two months, and three weeks, to *J. C.* and *R. C.* their executors and adminiſtrators, rendering rent; that *J. T.* made his will, and *J. N.* his executor, and died; that *J. N.* made his will, and *J. T.* (to whom the defendant is bailiff) executor; and for rent arrear avows the taking of the cattle on the premiſes as a diſtreſs, *&c.* The plaintiff demurs; and his council argued, that the conuſance was ill, becauſe the commencement of this term is not ſhewn, *viz.* out of what eſtate it was derived; for when a particular eſtate is *pleaded* in a *plea*, *avowry*, or *replication*, the commencemenet of it ought to be ſhewn. *Co. Lit.* 303. *b. &c.*

Per curiam. An avowry differs from a declaration; for in *debt* for rent, *&c.* one *plea* will anſwer the whole declaration, *viz. nil debet*; but in *avowry*, no ſingle *plea* will go to the whole, for the *avowry* muſt be traverſed, but no traverſe can be taken to the poſſeſſion of the term. Beſides, it is an eſtabliſhed rule, that the commencement of all particular eſtates ought to be ſhewn in *pleas*, *avowries*, &c. But where the action is brought on privity of contract, there it is not material to ſhew the commencement. *Vide Raym. vol.* 1. *p.* 334. *Mod. Rep. vol.* 12. *p.* 190.

Trinity, 10 *W*. 3. *Brinſby* v. *Gold.*

On an *indebitatus aſſumpſit* for horſe-keeping, the defendant *pleaded* an action depending in the *Sheriff of* London*'s court* for the ſame cauſe, and held no *plea*; becauſe an action pending in an inferior court is no *bar* to an action, in a ſuperior court, for the ſame cauſe. *Vide Mod. Rep. vol.* 12. *p.* 204.

Michaelmas, 10 *W*. 3. *Hartfort* v. *Jones*, *&c.*

On an action of *trover* for goods, the defendants *plead*, that they were in a ſhip, and that the ſhip took fire, and that they hazarded their lives to ſave them; and therefore they are ready to deliver the goods, if the plaintiff will pay them 4 *l.* for ſalvage, *&c.* The plaintiff demurred generally.

Holt, Chief Juſtice, held, that they might retain the goods until payment, as well as a taylor, an hoſtler, or a common carrier. And ſalvage is allowed by all nations, it being reaſonable that a man ſhall be rewarded, who hazards his life in the ſervice of another. And he ſaid, he never knew but one ſpecial *plea* good in *trover*, except a releaſe. And ſee *Yelv.* 198. a man may *plead* that ſpecially, which he might give in evidence upon *not guilty*, if he confeſſes and avoids the fact. For the reaſon why you may *plead* ſpecially is not the doubt in the law; but it is becauſe the matter of the *plea* cannot be given in evidence, on *not guilty*. But this cannot be good, though after a general demurrer, becauſe it does not confeſs a converſion.

A rule was made by conſent, that the defendant ſhould waive the *ſpecial plea*, and *plead* the *general iſſue*. *Vide Raym. vol.* 1. *p.* 393.

Michaelmas, 10 *W*. 3. *Cook* v. *Harris.*

See this caſe fully ſtated in page 128 of this work, under the head *Aſſignments*.

Michaelmas, 10 *W*. 3. *Pullen* v. *Benſon.*

In this caſe, which ſee fully ſtated in page 338 of this work, under the head *Date, Day and Delivery*, it was *adjudged* by *Holt*, Chief Juſtice, that a ſtranger to a deed may *plead non conceſſit*, and not *non eſt factum*; but otherwiſe, of him who is a party to the deed. A ſtranger to a deed may aver delivery of the deed before the date; but a party cannot. *Vide Raym. vol.* 1. *p.* 356.

Michaelmas, 10 *W.* 3. *Pitts* v. *Polehampton.*

On an action on the *caſe* the defendant *pleaded* the act of compoſition.

Holt, Chief Juſtice, made this diſtinction; where the defendant's *plea* confeſſes the duty demanded by the plaintiff, and does not avoid it ſufficiently, if the iſſue be immaterial, and found for the plaintiff, he ſhall have judgment; but if the defendant's *plea* goes in diſcharge of the action, and iſſue is taken immaterially, and a verdict given for the plaintiff, a *repleader* ſhall be granted. *Vide Raym. vol.* 1. *p.* 390.

Michaelmas, 10 *W.* 3. *Robert* v. *John Villars, alias Danvers.*

One *Fielding* arreſted the defendant in *aſſumpſit* and *trover*, who now moved that he might anſwer without putting in bail, becauſe he was a peer, *viz.* Earl of *Buckingham*, Viſcount *Purbeck*, and Baron of *Stoke*, and ſo was free from arreſt: that if he ſhould put in bail, it muſt be by the name whereby he is arreſted, which would *eſtop* him from claiming his peerage.

Per curiam. In all *civil caſes* the bail only enter into the recognizance, and not the party himſelf; and therefore it would be no *eſtoppel* to him: that they could not take notice of his peerage, otherwiſe than by *plea*, which could not be till he was in the cuſtody of the Marſhal; and therefore being by coercion, it would not prejudice him: ſo the court would order nothing, but let the law take its courſe.

Holt ſaid, if this had been a *criminal caſe*, they would diſpenſe with his joining in the recognizance to waive the *eſtoppel*; and that here they would make the plaintiff declare ſpeedily, and not allow the uſual time. *Vide Mod. Rep. vol.* 12. *p.* 217.

Michaelmas, 11 *W.* 3. *Worley* v. ———

Per curiam. When a man *pleads* a record, he ought to ſhew where it is, that the court may have it; as if a record of this court be *pleaded*, to ſhew it is *at Weſtminſter in the county of Middleſex.* *Vide Mod. Rep. vol.* 12. *p.* 318.

Michaelmas, 11 *W.* 3. *Marley* v. *Blunt.*

It was pleaded to an action in this court, that there was another action for the ſame cauſe depending in Common Pleas; *nul tiel record pleaded*; rejoinder, that the defendant had diſcontinued the action in *C. B.* and to that a demurrer, and a *reſpondeas ouſter* was awarded. *Vide Mod. Rep. vol.* 12. *p.* 307.

Michaelmas, 11 *W.* 3. *The King* v. *Chaloner.*

Holt, Chief Juſtice. If in *bar* the defendant fails of giving colour where it is neceſſary to give colour, that omiſſion is remediable by the plaintiff's replication, for he ought to take advantage of the want of colour, before he replies. *Vide Mod. Rep. vol.* 12. *p.* 316.

Hilary, 12 *W.* 3. *Anonymous.*

Per curiam. If a *ſcire facias* be returned ſerved, and the defendant has an act of parliament for his diſcharge, and omits to come and *plead* it, he has for ever loſt the advantage of it. *Vide Mod. Rep. vol.* 12. *p.* 441.

Hilary, 12 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. There is a difference between *pleas* in *bar* and *abatement*, as to time; for if one be to *plead* before the *Eſſoign-day*, ſuppoſe of *Michaelmas* term, if he *pleads* in *bar* any time *before the morrow of All Souls*, it is well; *otherwiſe* in *abatement*. *Vide Mod. Rep. vol.* 12. *p.* 442.

Hilary, 12 *W.* 3. *Horne* v. *Lewin.*

In *replevin*, the defendant avowed the diſtreſs taken for *rent arrear*; the plaintiff replied, *of his own injury, abſque hoc*, that any rent was in arrear: and on a ſpecial demurrer to this replication, becauſe it amounted to no more than the *general iſſue*, it was adjudged, that this was not a proper inducement to the *traverſe*, as if in *treſpaſs* the defendant ſhould plead, *of his own injury, abſque hoc, that he is guilty*, ſo that in the principal caſe the plaintiff ſhould have replied, *nothing in arrear*, and have concluded to the country, that had been the proper iſſue, for it is a negative to what was before affirmed. So *of his own injury, abſque hoc*, that there was ſuch a preſcription, is ill, and *of his own injury, abſque hoc*, that he is a bailiff, is ill; therefore the natural and proper replication to this avowry, had been *nothing in arrear*; it is *as if it* were the general iſſue, ſo that this replication of ſpecial matter, viz. *of his own injury*, amounts only to the general iſſue, and no other evidence can be given but what might as well have been given on the proper iſſue; beſides, this circumlocution muſt be ill, becauſe it prolongs the cauſe, by forcing the avowant to an unneceſſary rejoinder; and though it is only matter of form, becauſe it does not alter the evidence, yet on a ſpecial demurrer, and ſhewing it for cauſe, it is naught. *Vide Salk. vol.* 3. *p.* 274. *Raym. vol.* 1. *page* 639. *Forteſcue, p.* 233.

Hilary, 12 *W.* 3. *Freeman* v. *Blewitt.*

Holt, Chief Juſtice, held in this caſe, to which the court agreed, that in *treſpaſs*, if the ſheriff or other principal officer juſtifies by virtue of a *capias*, or any returnable writ, he muſt ſhew that the writ was returned, but not if he juſtifies under a *replevin* or an *alias replevin*, for theſe are not returnable writs, but a *pluries replevin* is returnable; for the writ commands the ſheriff to replevy the goods, *or ſignify the cauſe to us*, therefore he muſt return the writ, otherwiſe this inconvenience might happen, *viz.* that if the defendant ſhould appear and be nonſuited, (for he is the firſt actor) the court would be at a loſs how to give judgment, whether *pro retorn' habend'.* or a *capias* in *withernam*, or a mere nonſuit. *Vide Salk. vol.* 3. *p.* 220. *Raym. vol.* 1. *p.* 632.

Hilary, 12 *W.* 3. *Gidley* v. *Williams.*

See this caſe fully ſtated in page 472 of this work, under the head *Executors and Adminiſtrators.*

Eaſter, 12 *W.* 3. *Watts or Weſt* v. *Weſt.*

An action was brought againſt the *mayor* of —— for a falſe return, &c. the practice was agreed to be, that where the defendant *pleads* the *general iſſue*, and it is not entered, he may within *four days* of the term waive that *iſſue*, and *plead* ſpecially, and if *Sunday* happen to be one of the *four days*, then *Monday* ſhall be allowed; ſo likewiſe where the defendant *pleads* in *abatement*, he may at any time after waive the ſpecial matter, and *plead* the *general iſſue*, unleſs there is a rule made for him to *plead*, as he will ſtand by it. *Vide Salk. vol.* 3. *p.* 211, 274. *Raym. vol.* 1. *p.* 674.

Eaſter, 12 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. A diſtinction has been made, that if one comes in on a *cepi corpus* in cuſtody, he muſt *plead inſtantly*, otherwiſe where he has been bailed and comes in on the *cepi*; but ſure there is no reaſon for this difference, for the return is the ſame in both caſes; and the party ought not to be more hardly uſed becauſe he could not find bail. *Vide Mod. Rep. vol.* 12. *p.* 372.

Eaſter, 12 *W.* 3. *Paramour* v. *Johnſon.*

On an *aſſumpſit* on ſeveral promiſes; the defendant *pleaded* that he paid ſuch a ſum in ſatisfaction of all promiſes, till ſuch a time, which the plaintiff received in ſatisfaction, *without this*, that he made any promiſe ſince. The plaintiff demurs, for that the *plea* amounted to the *general iſſue.*

Holt, Chief Juſtice. It is no true rule, that where the defendant may plead the *general iſſue*, and give the ſpecial matter in evidence, he ſhall not *plead* ſpecially. Wherever you may *plead* matter in law, which avoids the cauſe of action, you may *plead* generally, and give that matter in evidence, or you may *plead* it ſpecially; and upon all general iſſues you may give ſpecial matter in evidence. If you give colour, you may *plead* it, and give releaſe in evidence. *Vide Byfield*'s caſe 10 *Co.* where, in *treſpaſs* for goods, the defendant confeſſes the taking, but ſays, he bought them in a market *overt*. But it is indulgence to give accord with ſatisfaction in evidence upon *non aſſumpſit pleaded*; but that has crept in, and now is ſettled. But here it appearing the ſums paid were leſs than thoſe declared upon, the plaintiff had judgment; the court holding, if it had been a collateral ſatisfaction, the *plea* had been good. *Vide Mod. Rep. vol.* 12. *p.* 376.

Eaſter, 12 *W.* 3. *Aſhmead* v. *Ranger*.

On an action of *treſpaſs* brought againſt the defendant for the breaking of his cloſe at *B.* and cutting and carrying away of —— oaks and aſhes, *&c.* The council for the defendant took exception to the replication, becauſe it is not *otherwiſe than in bar*, which ought to have been ſaid, ſince the plaintiff varies from the place in the defendant's *plea*.

Holt, Chief Juſtice, held, that was well enough, it being very well conſiſtent, for the place where, *&c.* may be a cloſe called *Horn Cloſe*, containing eight acres, and yet it may be parcel of a copyhold tenement, and twenty acres.

On the other ſide, an exception was taken to the defendant's *plea*, becauſe he had not given colour to the plaintiff.

Holt, Chief Juſtice. If the plaintiff replies, the defect of the colour is waived; but upon a general demurrer, advantage might have been taken of it.

And the whole court were clearly of opinion, that judgment ought to be given for the plaintiff; becauſe it appears, that the plaintiff had not enough to repair without theſe trees. And therefore judgment could not be given for the defendant, without overthrowing the caſe of *Haydon* v. *Smith*. *Vide Raym. vol.* 1. *p.* 551. *Forteſcue*, *p.* 152.

Trinity, 12 *W.* 3. *Medina* v. *Houghton*.

On an action on the *caſe*, the plaintiff declared that the defendant being poſſeſſed of certain *million lottery tickets*, ſold them to the plaintiff, affirming them to be his own, whereas in truth they were the tickets of another man. The defendant *pleaded*, that he bought them *bona fide* before the ſale, and ſo ſold them *bona fide*, *in which caſe*, the plaintiff ought not to have his action; *and prayed judgment of the declaration, and that the ſame might be quaſhed*. The plaintiff demurred.

Holt, Chief Juſtice. The *plea* is ill, and the action well lies.

The council inſiſted, that to *pray judgment of the declaration* is always in *bar* in this court; in *abatement* it is *praying judgment of the bill, and that the bill may be quaſhed*; and judgment *that the bill be quaſhed* cannot be given in this caſe, becauſe it is not prayed.

Holt, Chief Juſtice. That is true in demurrers, but not in *pleas*, becauſe there it is *no action*; for a man may *plead* in *abatement* of the declaration. It was held in this court in the caſe of *Biſſe* v. *Harcourt*, 3 *Mod.* 281. that if the defendant *pleads* matter of fact in *abatement*, which the plaintiff confeſſes and avoids, there in the concluſion of his *plea* he cannot pray damages, but muſt affirm his writ; but if he denies the fact, he may pray judgment of his damages; becauſe if the matter of fact be found for the plaintiff, he ſhall have final judgment. *Vide Raym. vol.* 1. *p.* 593.

Trinity, 12 *W.* 3. *Roſewe* v. *Sawkins*.

See this caſe fully ſtated in page 4 of this work, under the head *Abatement*.

Trinity, 12 *W.* 3. *Rook* v. *The Sheriff of Saliſbury*.

Holt, Chief Juſtice. When you have a good matter in *bar*, and an opportunity to *plead* it, you ſhall not give it in evidence. And though it be ſaid, that the judgment by default was for want of a demurrer, yet that will not alter the caſe. *Vide Mod. Rep. vol.* 12. *p.* 412.

Trinity, 12 *W.* 3. *Levintz* v. *Randolph*.

See this caſe fully ſtated in page 271 of this work, under the head *Condition*.

Trinity, 12 *W.* 3. *Anonymous*.

Holt, Chief Juſtice. If a man is bound to ſave harmleſs againſt a particular thing, the defendant ought to ſhew how he has done it; but if to ſave harmleſs generally, the *plea* of *not damaged* generally will do; and if to ſave harmleſs in ſeveral particulars againſt all perſons, it is *general*. *Vide Mod. Rep. vol.* 12. *p.* 406.

Trinity, 12 *W.* 3. *Birch* v. *Bellamy*.

Per curiam. A tenant for years now cannot aſſign over his term without a writing; but the aſſignment may be *pleaded* without ſaying it was by deed. If a thing might have been done at common law without writing, and an act of parliament comes and ſays it ſhall not be good without writing, that ſhall not alter the manner of *pleading*, but the *pleading* ſhall continue as before; and its being in writing ſhall come in evidence; but if a thing be made good originally by act of parliament, there you muſt *plead* all the circumſtances of the act; as on *ſtat.* 32 *H.* 8. of wills, you muſt ſet out that the will was in writing, and ſo *plead* it. *Vide Mod. Rep. vol.* 12. *p.* 541.

Trinity, 12 *W.* 3. *Marle* v. *Make*.

Payment to a bond with a condition indorſed, is a good *plea* before breach, but not afterwards, no more than to an action of *debt* on a ſingle bill; for the benefit of the condition is loſt when the breach is made. *Vide Salk. vol.* 2. *p.* 507.

Trinity, 12 *W.* 3. *Anonymous*.

Holt, Chief Juſtice. If there be an *ill plea*, and the replication aſſigns an ill breach, the plaintiff ſhall have no judgment; 8 *Co.* Dr. *Bonham*'s caſe. *Vide Mod. Rep. vol.* 12. *p.* 407.

Hilary, 13 *W.* 3. *Staples* v. *Heydon*.

On an action of *treſpaſs*, the defendant juſtified by a term for years, beginning it with a *general poſſeſſion*, &c. The plaintiff replied, and an immaterial iſſue was joined. The council for the defendant now moved for a *repleader*, which was oppoſed by the plaintiff's council, becauſe a *repleader* cannot be granted before verdict. And he cited 3 *Keb.* 664. *Cox* v. *Milliſh*, in point.

Holt, Chief Juſtice, ſeemed to be of a contrary opinion. And a day was given to hear council on both ſides; and afterwards at another day, upon conſideration, *&c.* of this, he delivered the opinon of the court to be, that now a *repleader* ought not to be granted before trial; becauſe by *ſtat.* 16 *&* 17 *Car.* 2. *cap.* 8. of *jeofails*, many defects are aided by verdict, and therefore granting of a *repleader* may be prejudicial to the plaintiff. So a *repleader* was denied. *Vide Raym. vol.* 1. *p.* 707.

Hilary, 13 *W.* 3. *Vaſpor* v. *Edwards*.

In this caſe, (which ſee fully ſtated in page 375 of this work, under the head *Diſtreſs*) it was *adjudged* by *Holt*, Chief Juſtice, that as long as a *diſtreſs* is detained, it is a *bar* in *treſpaſs*, and a *bar* is good to a common intent, becauſe it is to excuſe from a charge; but a *repli-*

a *replication* muſt have a general certainty, becauſe it is to deſtroy the excuſe of the defendant, which is always received favourably. *Vide Mod. Rep. vol.* 12. *p.* 658.

Hilary, 13 *W.* 3. *Vincent* v. *Belſon or Preſton.*

See this caſe fully ſtated in page 369 of this work, under the head *Diſcontinuance.*

Eaſter, 13 *W.* 3. ——— v. *Saunders.*

On an action of *treſpaſs* brought for entering into the plaintiff's houſe, and keeping the poſſeſſion thereof for ſo long, the defendant *pleads*, that *J. S.* was ſeiſed in *fee* thereof, and he being ſo ſeiſed, gave licence to the defendant to enter into and poſſeſs the ſaid houſe, till he gave him notice to leave it, and thereupon he entered and kept the houſe for the time mentioned in the declaration, and had not any notice to leave it during that time; on which there was a ſpecial demurrer, becauſe the *plea* amounted to the *general iſſue.*

Per curiam. He might have given this matter in evidence againſt all people, except *J. S.* but againſt him he muſt *plead* it.

So he ſhould here either have *pleaded* the *general iſſue*, or given colour to the plaintiff; therefore judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 12. *p.* 513.

Trinity, 13 *W.* 3. *Slanney* v. *Slanney.*

See this caſe fully ſtated in page 369 of this work, under the head *Diſcontinuance.*

Trinity, 13 *W.* 3. *Ball* v. *Smith.*

See this caſe fully ſtated in page 242 of this work, under the head *Bonds.*

Michaelmas, 13 *W.* 3. *Roberts* v. *Arthur.*

Per curiam. If on *pleading* a deed a *profert* be made of it, it ſhall remain in court all the term, and no longer, if it be not controverted; but letters of adminiſtration ſhall not be kept in court all the term, becauſe the adminiſtrator may have other actions pending, and it would be a prejudice to him, *ſtat.* 36 *H.* 6. *cap.* 30. and giving of *oyer* is the act of the court, and therefore to be done by the prothonotary in his office, where now the courſe is to do ſuch things as were done in court, when the *pleadings* were by *word of mouth* at the bar, and an attorney ought not to do it. *Vide Mod. Rep.* 12. *page* 598.

Michaelmas, 13 *W.* 3. *Pink* v. *Rudge.*

On an action on the *caſe* on ſeveral promiſes, the defendant *pleaded* the ſtatute of limitations. The plaintiff replied a *clauſum fregit* ſued out, returnable in *C. B.* before the *ſix years*, with an *intention* to declare in this action on the *caſe*; but did not ſhew that the writ was continued down. And on demurrer judgment was given for the defendant. *Vide Raym. vol.* 1. *p.* 701.

Trinity, 13 *W.* 3. *Peirce* v. *Packſton.*

See this caſe fully ſtated in page 369 of this work, under the head *Diſcontinuance.*

——— 1 *Ann.* *Hatton* v. *Morſe.*

There is a ſhort note of this caſe in 1 *Salk.* but the caſe was thus: in *aſſumpſit*, &c. the defendant *pleaded*, that true it is, he did promiſe, but that before the day of ſuing out the bill, he paid the money; and on a demurrer to this *plea* it was objected, that it amounted to the *general iſſue.*

Holt, Chief Juſtice. This does not amount to the *general iſſue*; for though payment may be given in evidence on *non aſſumpſit pleaded*, yet it was long before that obtained; it is like *giving colour*, for he ſays, there was a promiſe, but that he performed it: now there are many things which may be given in evidence on the general iſſue, and yet thoſe things may be *pleaded* ſpecially: as for inſtance, in an action of *debt* the defendant may *plead* a *releaſe*, or he may give it in evidence on *nil debet pleaded*, ſo in *debt* for rent on a *demiſe*, the defendant may *plead* an *entry and eviction*, before any rent became due, or he may give it in evidence on *nil debet pleaded.*

Note. There are two ſorts of *colour*, the one is *expreſs*, the other *implied*

Expreſs, as in treſpaſs *quare clauſum fregit*, the defendant in *pleading* makes a title under *W. R.* ſetting forth, that the plaintiff claims under a *feoffment* from the ſaid *W. R.* by which nothing paſſed, but that he entered by colour thereof: now here the defendant gave *colour of action* to the plaintiff, becauſe by the feoffment he was tenant at will, and entered, and by virtue of his poſſeſſion he may maintain an action againſt every one, but not againſt him who has a right; ſo likewiſe in *treſpaſs quare clauſum fregit*, if the defendant *pleads* that the plaintiff was ſeiſed, *&c.* and made a leaſe to him for years, there is no occaſion to give expreſs *colour*, becauſe the defendant allows that the plaintiff has the reverſion, which is *colour* enough. *Vide Salk. vol.* 3. *p.* 273. *Raym. vol.* 1. *p.* 551.

Hilary, 1 *Ann.* *Parker* v. *Collins.*

See this caſe fully ſtated in page 60 of this work, under the head *Amendment.*

Hilary, 1 *Ann.* *Pierce* v. *Henriques.*

See this caſe fully ſtated in page 370 of this work, under the head *Diſcontinuance.*

Hilary, 1 *Ann.* *Courtney's Caſe.* Error.

On an action of *debt* on a judgment in the *C. B.* pending a writ of *error*, that matter was *pleaded* in *abatement* of the judgment.

Holt, Chief Juſtice. It is hard a writ of *error* ſhould ſuperſede execution on a judgment, and not ſuperſede an action to be brought thereon; for if there be a judgment againſt a teſtator, who is alſo bound on a ſtatute, the executor may bring a writ of *error*, and pray the ſtatute, notwithſtanding the judgment be affirmed. *Yelv.* 29 *Cro. Eliz.* 822.

Holt, Chief Juſtice. Though it be a new original, yet it is no collateral matter, but the judgment on which the writ of *error* is brought is the *giſt* of the action. And as to the caſe in the *Exchequer Chamber*, he ſaid he had ſpoke to *Treby*, Chief Juſtice, about it, and that he had informed him it had gone off on another matter, *viz.* that the concluſion of the *plea* was ill, for it was *prays judgment* if the party anſwered to the debt, till the judgment was affirmed, and not *prays judgment of the bill or writ.* And the caſe of the *King* v. *Tuke* was cited, where it had been held a good *plea* in *abatement*: but here the court gave no opinion. *Vide Mod. Rep. vol.* 7. *p.* 140.

Eaſter, 1 *Ann.* *Atwood* v. *Burr.*

Adjudged, That in *pleading* the ſtatute of limitations, the party muſt *plead* the return, and not the purchaſe of the writ; for it is the return that gives the court cognizance of the ſuit. *Vide Mod. Rep. vol.* 7. *p.* 5.

Eaſter, 1 *Ann.* *Vanhatton* v. *Morſe.*

In an action brought by the plaintiff againſt the defendant for goods ſold him; the defendant *pleaded* payment. The plaintiff demurred ſpecially to the defendant's *plea*, and ſhewed for cauſe, that the *plea* amounted to the *general iſſue*; *but not allowed.*

Per curiam. This *plea* admits at one time a good cauſe of action in the plaintiff, and excuſes it by matter *done after the fact*, and therefore is an honeſt and good *plea*. Therefore let judgment go for the defendant. *Vide Raym. vol.* 1. *p.* 787.

Eaſter, 1 Ann. Weſt v. Sutton.

See this caſe fully ſtated in page 11 of this work, under the head *Abatement*.

Eaſter, or Trinity, 1 Ann. Brookes v. Stroud.

See this caſe fully ſtated in page 3 of this work, under the head *Abatement*.

Trinity, 1 Ann. Molloy v. Lork, or Johns v. Bromfield.

In an action of *debt* on bond, the defendant *pleaded*, that he delivered it as an *eſcrow* to one *J. S.* to be delivered to the plaintiff on conditions to be performed by the plaintiff, which were not performed; *and this he is ready to verify.* The plaintiff demurred ſpecially, and ſhewed for cauſe, that this *plea* ought to conclude to the country. And no perſon appearing for the defendant, the plaintiff had judgment. *Vide Raym. vol. 1. p.* 787.

Michaelmas, 1 Ann. Snow v. The Bail of Firebraſs.

Adjudged, That a *plea* of *no ca. ſa.* ought not to conclude to the country. *Vide Raym. vol. 2. p.* 805.

Michaelmas, 1 Ann. The Queen v. Dr. Thomas Watſon, Biſhop of St. David's.

The court refuſed to take notice of the defendant's *plea* in this caſe, becauſe he *pleaded* he was in cuſtody of the Marſhal of the *Marſhalſea*, when he was not in ſuch cuſtody; and alſo in his *plea* had omitted the uſual and cuſtomary concluſion. *Vide Raym. vol. 2. p.* 817.

Michaelmas, 1 Ann. Ode v. Norcliff.

It was *pleaded* in *abatement*, that the defendant was one of the clerks of the *C. B.* and ought not to be ſued out of that court without his conſent. The plaintiff replied, that he did not conſent, but laid the *venue* where the *plea* was, and therefore held bad. *Vide Mod. Rep. vol. 7. p.* 97.

Michaelmas, 1 Ann. Haywood v. Davis, and others.

On an action of *treſpaſs* againſt *two*, for taking a *pail of water* out of the defendant's well; the defendant *pleaded* in *abatement* that the other defendant and plaintiff were tenants in common of the well; the plaintiff replies, that he was ſolely ſeiſed, *abſque hoc*, that he was tenant in common with any, and concludes to the country. The council ſaid, where an *abſque hoc* takes in the whole matter of the *plea*, there he that takes a *traverſe* may conclude to the country: but where an *abſque hoc* is on a particular fact, which does not comprehend the whole *plea*, then he ſhould not conclude to the country, but aver. And it was agreed by all, that in the caſe of *without ſuch cauſe*, one may conclude to the country.

Holt, Chief Juſtice. In *treſpaſs* it is no *plea* in *abatement* for a defendant to ſay he was tenant in common with the plaintiff, becauſe he may give it in evidence on *not guilty*; but here the defendant that was a ſtranger *pleads* tenancy in common in the plaintiff with the defendant; and that he may well do. And when one *pleads* tenancy in common or joint-tenancy in abatement of the writ, and the plaintiff *pleads* in ſupport of his writ, he ſhall conclude to the country generally; for it is there an *abſque hoc* on a ſpecial occaſion to maintain his writ, and the *abſque hoc* there is merely put in for form: and is no more than that the other who is *ſeiſed* jointly, or *ſeiſed* in common with him, has nothing there. *Dyer* 333. Where you *traverſe* a ſpecial point, you muſt conclude with an *averment*, and not to the country: but this is not a *traverſe* of a *ſpecial point*. The court ordered the defendant to anſwer further. *Vide Mod. Rep. vol. 7. p.* 104.

Michaelmas, 1 Ann. Cliſton v. Swezeland.

The defendant *pleaded* his privilege as an attorney of the *C. B.* in *abatement*, without concluding to the record.

Holt, Chief Juſtice. He need not do it, but he may leave the plaintiff at liberty to reply, and deny his being a perſon privileged there, which the plaintiff cannot do if the defendant concludes to the record; and his not ſaying *prout patet* is no good cauſe of a general demurrer, and on the *as appears by the record*, there ſhall go a *certiorari* to certify the record, and if they produce one and ſhew they have privilege, the plaintiff is *eſtopped*. *Vide Mod. Rep. vol. 7. p.* 106.

Michaelmas, 1 Ann. Marsfield or Blainfield, v. March or Marſh.

See this caſe fully ſtated in page 450 of this work, under the head *Evidence*.

Michaelmas, 1 Ann. Crogate v. Martin.

Per curiam. Not concluding to the country on iſſue completely joined, is a good cauſe of ſpecial demurrer. *Vide Mod. Rep. vol. 7. p.* 105.

Michaelmas, 1 Ann. Wood v. Sutton. Error.

On judgment brought againſt the defendant for an *eſcape*; and he brought a *writ of error*, and put in ſham-bail, and ſo on as often as it was excepted againſt. On affidavit of this, a rule was made peremptorily for his putting in good bail on ſuch a day, or elſe execution to iſſue.

Per curiam. Where there is a ſpecial *iſſue* tendered, and the other ſide joins in it, the book is ſent back to the defendant's attorney, and he has *four days* given, either to join in the *iſſue*, or to waive it, and give the general one; and after the *four days*, he ought to ſend the paper back without any demand of the attorney on the other ſide; and if he fails in it, the other may ſign judgment for want of joining in *iſſue*; but if the attorney will take back the books after the *four days*, and receive money for entering the *iſſue*, or making up the record, he ſhall not afterwards enter his judgment. *Vide Mod. Rep. vol. 7. p.* 50.

Michaelmas, 1 Ann. Newſon v. Bawldry.

See this caſe fully ſtated in page 385 of this work, under the head *Eccleſiaſtical Matters*, &c.

Michaelmas, 1 Ann. Watts v. Roſewell.

This caſe being again moved, and 1 *Vent.* 210. quoted as an authority in point, that the concluſion was bad; for that by the general concluſion he had waived the ſpecial matter of the *plea*: for it is a rule in *pleading*, that when a man *pleads ſpecial matter*, and concludes *generally*, he thereby waives the *ſpecial matter*. And it was agreed on both ſides, that here he might have *pleaded general*, agreeable to 1 *Vent.* 210. *Keb.* 140. was quoted to prove the *contrary*, but there being no judgment in the caſe in *Keb.* the plaintiff had judgment *niſi*, *Holt*, Chief Juſtice, being abſent. *Vide Mod. Rep. vol. 7. p.* 53.

Michaelmas, 1 Ann. Sheild v. Cliff.

Cliff being ſued on a bond by the name of *Peter*, *pleaded* in *abatement*, that he was baptized by the name of *Paul*, and not by the name of *Peter*; and concludes to the country.

Per curiam. Let a *reſpondeas ouſter* be awarded. *Vide Mod. Rep. vol. 7. p.* 104.

Hilary, 2 Ann. Croſſe v. Bilſon.

In *replevin* for taking the plaintiff's mare, *in a certain place called the King's Highway*, the defendant *acknowledged the caption* damage faiſant, *in a certain place called the Queen's Highway*, as bailiff to Lord *L.* whoſe freehold in the place where, *&c. without this*, that he took *the mare aforeſaid, in the place aforeſaid, called the King's Highway, as the plaintiff has declared againſt him, and this he is ready to verify; therefore he prays judgment and a return*, &c. The plaintiff comes and ſays, *that he ought not to acknowledge ſuch taking*, &c. *becauſe he ſays*,

ſays, that at the ſaid time that, &c. *he took the mare aforeſaid, in the place aforeſaid, then called the King's Highway, in manner and form as the ſaid* plaintiff *has alledged*; and *prays that this may be enquired into by the country.* To this replication the defendant demurs, and concludes *wherefore he (as before) prays judgment, and that the aforeſaid count may be quaſhed.* Final judgment was awarded for the plaintiff in *C. B.* which, on *error* brought, was affirmed here.

Holt, Chief Juſtice. The whole point of the caſe, take it in the ſtrongeſt light, is after a *plea* in *bar*, and a replication, the defendant demurs to the replication, and concludes in *abatement*, and ſure then judgment final ought to be given; and the court agreed, that all the matter of conuſance in the *plea* was waived by the *abſque hoc*; and the conuſance in a different place from where the declaration lays the taking, is in truth matter only proper in *abatement*; but the concluſion turning it into an *avowry*, makes it *a plain bar, as all avowries are*, and final judgment is always given upon them, if they go for the avowant. They alſo agreed, that when *matter in abatement* is *pleaded* in *bar*, and concluded in *bar*, judgment final ought to be given. So where the commencement of a demurrer is in *bar*, though the concluſion be in *abatement*, 1 *Lev.* 312.

But it was objected, that the demurrer being ill concluded, *viz.* in *abatement*, and contrary to the *bar*, it was to be looked upon as if there were no concluſion at all, and it would be a diſcontinuance, and the judgment ought to be by *nil dicit*.

To which the court anſwered, that the concluſion to the demurrer was, *wherefore he prays judgment (as before,)* and that is well enough, and according to the concluſion of the *plea* in *bar*; and the ſubſequent words, *and that the count may be quaſhed*, being inconſiſtent, ſhall be rejected.

Per curiam. Let the judgment be affirmed. *Vide Mod. Rep. vol.* 6. *p.* 101.

Hilary, 2 *Ann.* *Anonymous.*

Adjudged, That if a man *pleads* a matter in *abatement*, and concludes in *bar*, the judgment given ought to be final: this doctrine holds only in *abatement*, for the words *prays judgment*, without other words, do not make it a *plea* in *bar*. *Vide Raym. vol.* 2. *p.* 1018.

Eaſter, 2 *Ann.* *Green* v. *Waller.*

7

In an action of *debt* on bond, it was held by *Holt*, Chief Juſtice, that the defendant, by *pleading* that the law has made no determination, confeſſes, that he has not re-delivered the things mentioned in the condition of the bond, and therefore the plaintiff need not aſſign a breach; and this caſe is not like the caſe of an *award*, which is a ſingle caſe, and ſtands by itſelf. *Vide Raym. vol.* 2. *p.* 892.

Trinity, 2 *Ann.* *Staples* v. *Heydon.*

Held by *Holt*, Chief Juſtice, that it was ill to *plead* a term for years, without ſhewing the commencement of ſuch term, and that it was a kind of preſcription which could not be in a tenant for years. *Vide Raym. vol.* 2. *p.* 923.

Michaelmas, 2 *Ann.* *Sea* v. *Taylor.*

In *aſſumpſit*, the defendant *pleaded*, that *he had performed every thing on his part to be performed*; and it was ruled, that this amounted only to the *general iſſue*. *Vide Salk. vol.* 1. *p.* 394.

Michaelmas, 2 *Ann.* *Shepherd and Baily* v. *Orchard.*

Per curiam. If a record of this court be *pleaded*, *nul tiel record*, without more, it is a compleat iſſue. *Vide Mod. Rep. vol.* 6. *p.* 40.

Michaelmas, 2 *Ann.* *Staple* v. *Heydon.*

See this caſe fully ſtated in page 153 of this work, under the head *Averment.*

Hilary, 3 *Ann.* *Markett* v. *Johnſon.*

Held by *Holt*, Chief Juſtice, that in an action of *debt* on bond, the defendant may have ſeveral *pleas* in *bar*, viz. if the plaintiff ſues as executor, the defendant may *plead* the releaſe of the teſtator as to part, and for the reſidue the releaſe of the plaintiff; and ſo a man may *plead* as to part payment, and an acquittance, and then there being no anſwer to the reſidue, the plaintiff may take judgment by *nil dicit* for ſuch reſidue. *Vide Raym. vol.* 2. *p.* 1122.

Eaſter, 3 *Ann.* *Rowſton* v. *Combat.*

On an *indebitatus aſſumpſit*, for goods ſold and delivered, the defendant *pleads*, that he ought not to anſwer the declaration aforeſaid, becauſe there is another action pending on *the ſame account in the C. B.*

Per curiam. This is not a *demurrer* to your declaration, or a *plea* in *bar*, but in *abatement of the declaration*; and the defendant was ordered to anſwer further. *Vide Mod. Rep. vol.* 6. *p.* 157.

Eaſter, 3 *Ann.* *Adams* v. *The Ter-tenants of Savage.*

Per curiam. Where the matter is indifferent to be well or ill, and the party *pleads*, the court will intend it well; otherwiſe where the thing ſhewn is abſolutely void. *Vide Mod. Rep. vol.* 6. *p.* 134.

Trinity, 3 *Ann.* *The Queen* v. *Coteſworth.*

Per curiam. If an *excommunication* of the plaintiff be tendered for a *plea* in *abatement*, tho' it be aſſigned by council, by the courſe of the court it is not to be received, unleſs it be produced under ſeal, though the *plea* need not mention that it is ſo produced; and ſo it is of an *outlawry*. *Vide Mod. Rep. vol.* 6. *p.* 180.

Trinity, 3 *Ann.* *The Queen* v. *Criſp.*

Per curiam. The defendant is not confined to *four days* to *plead* in *abatement*, but has the whole term of which the declaration is delivered; but if he has *four days* in the term of which the declaration is, he ſhall not *plead* in *abatement* the next term. *Vide Mod. Rep. vol.* 6. *p.* 175.

Trinity, 3 *Ann.* *Buſhell* v. *Paſmore.*

On an action of *debt* on a bond: the defendant *pleads*, that the bond was delivered as an *eſcrow* to a *third perſon* to be his deed to the plaintiff on his vacating a certain judgment, which was not done, *and therefore it is not his deed, and of this he puts himſelf on the country*, without adding, *and the aforeſaid plaintiff does ſo likewiſe.* The plaintiff replies, that it was delivered as an *eſcrow* to be delivered to him on his payment of 20 *s.* towards vacating the judgment, and iſſue thereupon; that is upon a traverſe of its being delivered as an *eſcrow* to become his deed on vacating the judgment; and on evidence it was ſworn to have been delivered as an *eſcrow*, to become the defendant's deed on the plaintiff's vacating the judgment.

Holt, Chief Juſtice, held, that there is no difference between delivering a deed as an *eſcrow* to become the party's deed on his doing ſuch a thing; and to be delivered to the party as his deed on his doing ſuch a thing; for in neither caſe it is his deed, till the *ſecond delivery*: and he ſaid, if a man delivers his writing as a deed to a ſtranger, to be delivered by him to a *third perſon* on his doing ſuch a thing, that is a deed *from the beginning* in truſt for the third perſon on a contingency; but on the ſaying in 5 *Co. Periman's* caſe, 84 *b.* he was content to have the matter found *ſpecially*, but the plaintiff was nonſuited on another point. And he ſaid, in all his time he never knew ſuch a *plea* as this; for all theſe ſpecial *non eſt factums*, in caſe of *eſcrow* and *erazure*, &c. are impertinent, for thereby the defendant brings all the proof on himſelf; whereas, if he had *pleaded non eſt factum* generally, he would turn the proof of whatever is neceſſary to make it his deed on the plaintiff; and it was agreed by the court, that the deed cannot be an *eſcrow* to the party himſelf. *Vide Mod. Rep. vol.* 6. *p.* 216.

Michaelmas,

Michaelmas, 3 *Ann.* *Phipps* v. *Jackſon.*

See this caſe fully ſtated in page 153 of this work, under the the head *Averment.*

Michaelmas, 3 *Ann.* *Davenant* v. *Raſter.* Error.

On a writ of *error* brought of a judgment in *C. B.* in *debt* on bond, and *nil dicit pleaded* for want of an *original*, the defendant *pleaded* a releaſe of errors. The plaintiff replied, that there was another judgment between the parties for the ſame ſum, and of the ſame term, and that the releaſe was of that judgment of which the writ of error was not brought, *abſque hoc* that it was of this now in queſtion.

To which the defendant demurs, and his council maintained the demurrer; becauſe by this traverſe the defendant is excluded from ſaying, that there is but one judgment, for it is only made an inducement to the traverſe.

Holt, Chief Juſtice made this diſtinction as to concluſions, that if a dilatory *plea* be *pleaded*, and the plaintiff takes iſſue on it, he may conclude with a *prayer of judgment and damages*, becauſe then final judgment ſhall be; but if a dilatory *plea* be *pleaded*, which the plaintiff does not deny, but confeſſes and avoids, he muſt conclude in maintenance of his writ; as if the defendant *pleaded* attainder in diſability of the plaintiff, and he replies a *pardon*; he muſt not conclude with *a prayer of judgment and damages*, but in maintenance of his writ. *Vide Mod. Rep. vol.* 6. *p.* 235.

Michaelmas, 3 *Ann.* *Trevivan or Treviban*, v. *Lawrence, and others.*

See this caſe fully ſtated in page 476 of this work, under the head *Executors and Adminiſtrators.*

Michaelmas, 3 *Ann.* *Anonymous.*

On an action of *debt* on a bond for payment of 500 *l.* the defendant *pleads* payment of 225 *l.* part of the ſaid 500 *l.* to this *plea* the plaintiff demurs.

Per curiam. It is a diſcontinuance, becauſe he has only anſwered to part of the demand. *Vide Mod. Rep. vol.* 11. *p.* 34.

Hilary, 4 *Ann.* *Dobbins* v. *Burley.*

In *debt* on bond, the defendant *pleads* want of a ſpecification in *bar*. On demurrer, *adjudged* for the plaintiff, that want of ſpecification is *not* a *bar*. *Vide Raym. vol.* 2. *p.* 1243.

Eaſter, 4 *Ann.* *Cockcroft* v. *Smith.*

Holt, Chief Juſtice, ſaid, if a man ſtrikes another, who does not immediately after reſent it, but takes his opportunity, and then ſome time after falls upon him and beats him; in this caſe *ſon aſſault* is no good *plea*: neither ought a man, in caſe of a ſmall aſſault, to give a violent or an unſuitable return; but, in ſuch caſe, *plead* what is neceſſary for a man's defence, and not who ſtruck firſt; though this, he ſaid, had been the common practice, but this he wiſhed was altered; for hitting a man a little blow with a little ſtick on the ſhoulder, is not a reaſon for him to draw a ſword and cut and hew the other, *&c.* In this caſe *Cockcroft* in the ſcuffle ran his finger towards *Smith's* eyes, who bit a joint off from the plaintiff's finger; and if this was a proper defence for the defendant to juſtify in an action of *mayhem*, was the queſtion. *Vide Mod. Rep. vol.* 11. *p.* 43.

Eaſter, 4 *Ann.* *Fanſhaw* v. *Morriſon.*

Held, by *Holt* Chief Juſtice, that if a man *pleads* performance to a bond with a condition, he ought to *plead* it in the very words of the condition; but it is otherwiſe if he *pleads* any other matter by way of excuſe. *Vide Raym. vol.* 2. *p.* 1138.

Eaſter, 4 *Ann.* *Kemp* v. *Goodal.*

In *debt* for rent on an indenture, if the defendant *pleads nil habuit in tenementis*, the plaintiff need not reply an *eſtoppel*, but may demur, becauſe the declaration is on the indenture, and the *eſtoppel* appears on the record; otherwiſe if he had declared *quod cum dimiſiſſet*. So is *Speak*'s caſe, *Hob.* 206. The plaintiff declares on the levy, and therefore no *eſtoppel*, becauſe there no *eſtoppel* is *pleaded*, and relied on: but if he had declared on the return, *as appears on the record*, the defendant could not have *pleaded* payment; if he had, the plaintiff might have demurred without *pleading* the *eſtoppel*. Therefore judgment was given for the plaintiff *niſi*. *Vide Salk. vol.* 1. *p.* 277. *Raym. vol.* 2. *p.* 1154.

Michaelmas, 4 *Ann.* *Bond* v. *Barnes.*

Adjudged, That a *plea* with the words, *prays judgment of the declaration*, in this court is held a *plea* in *bar*. *Vide Raym. vol.* 2. *p.* 1205.

Michaelmas, 4 *Ann.* *Swaine* v. *Stevens.*

In caſe of a *ſcire facias* againſt ſeveral ter-tenants, they cannot join in a *plea*, but ought to *plead* ſeverally. *Query*, if after a *plea* in *abatement*, a ſpecial *non-tenure* may be *pleaded*; for *Holt*, C. J. ſaid, by *pleading* in *abatement* the perſon had admitted himſelf *tenant*. 8 *Ed.* 4. 19. *b.* 2 *Brown.* 1 *Owen* 134, 16. 1 *Inſt.* 121. *Cro. Eliz.* 122, 739, 740. 2 *Roll.* 144. 1 *Lev.* 190. 7 *H.* 6. 25. *b.* 8 *H.* 32. *b.* 2 *Keb.* 46. *Vide Mod. Rep. vol.* 11. *p.* 65.

Eaſter, 5 *Ann.* *Anonymous.*

Holt, C. J. On a bond to ſave harmleſs againſt ſeveral particular things, and after in general; here to a general declaration *no damage* is a good *plea*, and then the plaintiff ſhould ſhew a breach, though perhaps it is better to anſwer to the particular things, and then to ſay *as to* the reſt *no damage*, *Cro. Eliz.* 253. The plaintiff ſhould have aſſigned a *particular breach* before he had demurred. *Vide Mod. Rep. vol.* 11. *p.* 78.

Hilary, 6 *Ann.* *Alton* v. *Jarvis.*

Holt, Chief Juſtice. Diſtraining is levying; if a man diſtrains for rent, and impounds the diſtreſs, and then brings *debt* for the ſame rent, the defendant may *plead levied by diſtreſs*. As to the ſelling by the *levari fac.* it is always alledged in *pleading* to be *according to the cuſtom of the manor*, which is the cuſtom in moſt manors, being ſo general that any *court baron*, *&c.* may *plead* it as a cuſtom. *Adjourned.* *Vide Mod. Rep. vol.* 11. *p.* 144.

Michaelmas, 6 *Ann.* *Lawn* v. *Sawbridge.* Error.

On a writ of *error* out of the *C. B.* the defendant *pleads that there is no error*, it was on a *ſcire facias* againſt bail, and the plaintiff aſſigned for *error* the want of a *ſcire facias* on the roll.

Reſolved by *Holt*, Chief Juſtice, that this *error* might be aſſigned, as well as the want of an *original bill*, and that by *pleading that there is no error*, the plaintiff has confeſſed the *errors*.

Per curiam. Agreed that a *certiorari to inform the court* might be awarded. *Vide Mod. Rep. vol.* 11, *p.* 143.

Hilary, 8 *Ann.* *Leucknar* v. *Plant.*

See this caſe fully ſtated in page 37 of this work, under the head *Actions.*

Hilary, 8 *Ann.* *The Queen* v. *Brown.*

See this caſe fully ſtated in page 516 of this work, under the head *Highways*, &c.

Hilary, 8 *Ann.* *Foſter* v. *Burdett.* Error.

On a writ of *error* out of the *C. B.* the defendant in *error* ſues out a *ſcire facias quare executionem non*, &c. to which to which the plaintiff *pleads* a ſham *plea* in *bar*; and it was moved, that the *plea* might be rejected.

Powell, Juſtice. Though the plaintiff may *plead* falſe *pleas* in *bar*, ſuch *pleas* not being within the ſtatute for the amendment of the law, ſo as to compel the party to make oath of the truth of this; yet ſince this *ſcire facias* is only to compel the plaintiff to aſſign *errors*, the court will not ſuffer ſuch *pleas*, whereby the defendant is delayed of his execution; for if ſuch *pleas* are allowed, the court cannot make a rule to aſſign *errors* till the *plea* is determined. Therefore, if on two *nihils* or a *ſcire faci* returned, if the plaintiff does not come and aſſign *errors*, or *plead* a good *plea* to the *ſcire facias*, the court will give rules to aſſign *errors*, or *non pros* him on the writ of *error*.

This *plea* being rejected, at another day in this term the plaintiff aſſigned his *errors*, which appeared to be *no error*; and ſince it was only for delay, the council for the defendant moved that they might be rejected. But this motion was denied by the court. *Vide Mod. Rep. vol.* 11. *p.* 274.

Eaſter, 8 *Ann.* *Sawyer* v. *Mawgridge.*

On an action of *debt* on a bond, the defendant, according to the late act, *pleads two pleas*, viz. *non eſt factum*, and that he had ſatisfied himſelf by ſale. Iſſue thereon, and verdict for the plaintiff; and for the defendant, a motion was made in arreſt of judgment. On *oyer* of the bond or note, it was in theſe words, *theſe are to authoriſe you* J. S. *to ſell ſo many of my goods as come to* 9 *l. to pay my debts, which I do hereby acknowledge to owe to you*, &c.

Holt, Chief Juſtice, and *Powell*, Juſtice, held, that the action lay for theſe words; for the word *oblige* is not neceſſary to make a bond; for if one under hand and ſeal acknowledge himſelf *indebted*, it is enough to bind him. Therefore the plaintiff had judgment. *Vide Mod. Rep. vol.* 11. *p.* 218.

Eaſter, 8 *Ann.* *The Queen* v. *Jennings.*

See this caſe fully ſtated in page 278 of this work, under the head *Conſtable.*

Eaſter, 8 *Ann.* *Harrington* v. *Buſh.*

On an action of *treſpaſs* for taking cattle, the defendant *pleads that he had poſſeſſion* of the cloſe, and that he took them *damage feaſant.*

The queſtion was, whether in this caſe *his poſſeſſion* was ſufficient? Or whether the defendant ſhould have ſet forth his title?

For the plaintiff was cited *Pell* v. *Garlick*, 2 *Lutw.* 1492.

Holt, Chief Juſtice, ſaid, that he thought the title could not come in queſtion; for the action is brought only for taking his cattle; if he had claimed the land, the action ſhould have been for entering the land; but where the treſpaſs is only for a perſonal act, as beating or taking cattle, *poſſeſſion* is ſufficient: therefore judgment was given for the defendant. *Vide Mod. Rep. vol.* 11. *p.* 219.

Eaſter, 9 *Ann.* *Price* v. *Kenrick.*

In an action of *debt* on bond, brought in *Michaelmas* term, and an *imparlance* to *Hilary* term next, and after that, the plaintiff releaſed the defendant, on which the defendant *pleads* this releaſe in *bar* as an *original plea*, and not as a *plea puis darrein continuance.*

Per curiam. It is a good *plea*; for the diſtinction is, if a releaſe or other bar happen before iſſue, it may be *pleaded*, becauſe it is pending the *writ*; but if after iſſue joined, it is to be *pleaded puis darrein continuance. Vide Forteſcue, p.* 338.

Trinity, 10 *Ann.* *Hern* v. *Scawel.*

Several judgments were *pleaded* by an executor, and the court was moved for leave to reply *double*, viz. *nul tiel record*, and the conſideration, *i. e.* that they were kept on foot by fraud.

Per curiam. They are inconſiſtent, and you cannot *plead* them, as you cannot *plead non eſt factum*, and *ſolvit ad diem*; neither can you *plead* a releaſe, and *not guilty*; nor on an indictment can you *plead* a pardon, and *not guilty*; beſides a replication is not within the act of parliament. So the motion was denied. *Vide Forteſcue, p.* 335.

Trinity, 10 *Ann.* *Fiſher's Caſe.*

The court was moved for leave to *plead not guilty*, and a juſtification for a way to an action of *treſpaſs*, but denied.

Per curiam. Though it be no univerſal rule, that where one *plea* admits the other, they ſhall not be *pleaded*; yet where it is an old bond, *non eſt factum* and *ſolvit ad diem* may be allowed; but here, if you allow it in one caſe, you muſt in all. *Vide Forteſcue, p.* 335.

Michaelmas, 10 *Ann.* *The Caſe of Whitehorn Mayor of Portſmouth.*

See this caſe fully ſtated in page 294 of this work, under the head *Corporations.*

Hilary, 11 *Ann.* *The Caſe of the Univerſity of Cambridge.*

See this caſe fully ſtated in page 294 of this work, under the head *Corporations.*

Hilary, 11 *Ann.* *Merril* v. *Joſſelyn.* Error.

On a writ of *error* out of the court of *C. B.* where the action was in *debt* on a bond conditioned for payment of money on the 25th day of *March*; the defendant *pleads* payment on the 20th day; the plaintiff replies, that he did not pay it on the 20th. On this iſſue was joined, a verdict given for the plaintiff, and judgment accordingly; and on this *error* was brought.

Parker, Chief Juſtice. It is hard that the defendant ſhould take advantage of his own *immaterial pleading*; but we cannot help it. The caſe of *Hill* v. *Manby* in the court of *C. B.* is a caſe in point. Accordingly, the judgment was reverſed. *Vide Mod. Rep. vol.* 10. *page* 148.

Michaelmas, 11 *Ann.* *Alice* v. *Gale.*

A defendant may *plead* in *bar* or *abatement* to a *ſci. fac.* as well as to other actions. It is the concluſion, and not the matter of the *plea*, that makes the diſtinction between a *plea* in *bar* and *abatement.*

To a *ſci. fa.* the concluſion of a *plea* in *bar* is *executio non*, inſtead of *actio non*, as in other caſes. *Vide Mod. Rep. vol.* 10. *p.* 112.

Michaelmas, 11 *Ann.* *Ruſh* v. *Seymour.*

See this caſe fully ſtated in page 65 of this work, under the head *Amendment.*

Hilary, 12 *Ann.* *Johnſon* v. *Altham.*

See this caſe fully ſtated in page 7 of this work, under the head *Abatement.*

Hilary 12 *Ann.* *The Queen* v. *Blagdon.*

See this caſe fully ſtated in page 556 of this work, under the head *Information.*

Eaſter, 12 *Annn.* *The Queen* v. *The Inhabitants of Gruelthorp.*

On an action brought on *ſtat.* of *Weſtminſter* 2. *cap.* 46, an objection was taken to the defendant's *plea*, for this ſtatute not extending to every lord, but ſuch lord only as had right to approve, the defendants to ſhew the lord had no right to approve, *pleaded* a preſcription to *common* thus, that *divers* freeholders had a right to *common*, without confining their preſcription to any certain particular tenements. It was admitted by way of cuſtom this general way of *pleading* had been good, but not by way of preſcription. And to this opinion the court inclined. *Adjourned. Vide Mod. Rep. vol.* 10. *p.* 157.

Trinity, 12 *Ann.* *Weltale* v. *Glover.*

On an action of *debt* on a *bond*, a releaſe was *pleaded*; the plaintiff replied, that the releaſe was not by deed, *and of this he put himſelf on the country.*

The defendant demurs ſpecially, becauſe he ought not to have concluded, *and of this he puts himſelf on the country*, but, *and this he prays may be inquired into by the country*, on which there was a joinder in demurrer. It was argued for the plaintiff, that this way of *pleading* occaſioned no inconvenience or alteration of the law; and that the law does not always tie up men to certain forms, provided they uſe other words as proper.

When the *plea* is in the negative, as the plaintiff's replication here was, *he put himſelf on*, &c. *and of this*, &c. it is a more proper concluſion than, *and this he prays*, &c. for a negative is not to be proved: and the reaſon why moſt commonly the plaintiff concludes one way, and the defendant another, may perhaps be thus accounted for, that moſt of the general *pleas* being in the negative, it were ſomewhat abſurd for a man that concludes his *plea* in the negative, to deſire that his *plea may be inquired of by the country.*

His council confeſſed that the general courſe of entries were againſt him, and that *Co. Lit.* 126. ſays, it is ſo, but not that it muſt be ſo.

Parker, Chief Juſtice. The difference taken by the council between negative and affirmative *pleas*, ſeems to me very reaſonable; and I think it highly probable, that the original reaſon why the entry for the defendant has been, *and of this he puts himſelf on*, &c. and that for the plaintiff, *and this he prays*, &c. might be, that for the moſt part general iſſues are in the negative, and replications in the affirmative.

The queſtion is not which way the ſtream and current of precedents run, for that the council gives up, and he muſt do ſo, but whether it be a form ſo neceſſary that a ſmall variation (and that not in the ſenſe) from it will be erroneous, and on a ſpecial demurrer prevent the plaintiff's having his judgment. And not one authority has been cited to prove this. The court being of the ſame opinion, gave judgment for the plaintiff *niſi. Vide Mod. Rep. vol.* 10. *p.* 167.

Trinity, 12 *Ann.* *The Queen* v. *The Corporation of Buckingham.*

See this caſe fully ſtated in page 295 of this work, under the head *Corporations.*

Michaelmas, 12 *Ann.* *Jackſon* v. *Laveright.*

See this caſe fully ſtated in page 351 of this work, under the head *Declaration.*

Michaelmas, 12 *Ann.* *Turner* v. *Goodwin.*

In this caſe, which ſee fully ſtated in page 129 of this work, under the head *Aſſignments*, it was reſolved, that it is not enough to *plead* a *tender* and *refuſal*, unleſs the defendant *pleads* alſo, that he was always ready; for this is only an excuſe for non-payment. *Vide Forteſcue*, *p.* 145.

Eaſter, 13 *Ann.* *Muſton* v. *Yateman.*

This was an action of *treſpaſs*: the defendant *pleads*, that Sir *Thomas Freke* was ſeiſed of a place called *Ten Acres*, and demiſed the ſame to the defendant for 99 years; and that Sir *Thomas Freke*, and all thoſe whoſe eſtate he had, did, time out of mind, uſe ſuch a way, &c. The plaintiff replied, *of his own injury abſque hoc, that the aforeſaid* Sir Thomas Freke, and all thoſe whoſe eſtate he had, did, time out of mind, &c. On this iſſue was joined, and the jury found, that Sir *Thomas Freke*, and all thoſe whoſe eſtate he had, did, time out of mind, &c.

The court was moved in arreſt of judgment, that the juſtification was ill, becauſe it was *ſeiſed* generally, and the eſtate not ſet forth of which he was ſeiſed, whether *life*, *tail*, or *fee*; and that therefore, ſince every man's *plea* is to be taken in that ſenſe, that is moſt prejudicial to the *pleader* (becauſe in law a man is always preſumed to make the beſt of his own caſe) by the word *ſeiſed*, here muſt be intended a *ſeiſin* for life, which will not ſupport preſcription.

This objection was alſo turned another way, *viz.* that this *plea* was naught for the uncertainty; it might be a *ſeiſin* for *life*, *tail*, or in *fee.*

Parker, Chief Juſtice. The only queſtion is, whether the iſſue be a material iſſue? for if it be, then by the expreſs words of the act, all defects in *pleading* are cured by the verdict. *Adjourned.*

In *Eaſter*, 1 *Geo.* this matter was further argued, but again *adjourned. Vide Mod. Rep. vol.* 10. *p.* 229. 300.

Eaſter, 13 *Ann.* *The African Company* v. *Maſon.*

See this caſe fully ſtated in page 248 of this work, under the head *Breach.*

Hilary, 1 *Geo.* *The King* v. *Weſton.*

See this caſe fully ſtated in page 284 of this work, under the head *Conviction.*

Hilary, 1 *Geo.* *Hammond* v. *Webb.*

See this caſe fully ſtated in page 182 of this work, under the head *Bail in Error.*

Michaelmas, 1 *Geo.* *Weddal* v. *The Bail of Jocar.*

See this caſe fully ſtated in page 382 of this work, under the head *Bail in Error.*

Hilary, 2 *Geo.* *Baldwin* v. *Church.*

See this caſe fully ſtated in page 346 of this work, under the head *Debt.*

Eaſter, 2 *Geo.* *Child* v. *Peirce.*

See this caſe fully ſtated in page 155 of this work, under the head *Averment.*

Eaſter, 2 *Geo.* *Stone* v. *Taverner.*

In an action of *debt* on a bond, on *oyer* thereof, the condition of the bond appeared to be, whereas *Stone* had lent *Taverner* the ſum of 1000 *l.* for the better ſecuring of which, *Taverner* had executed to *Stone* an indenture, purporting a deed of mortgage, &c. the condition of which obligation was ſuch, that if *Taverner* ſhall, from time to time, well and truly pay the intereſt that ſhall become due, according to the *proviſoe* in the indenture, until the principal be paid, then, &c. The defendant *pleaded*, that he had paid *as much* as became due; the plaintiff demurred.

It was argued, that the defendant *pleaded* ill, becauſe he had not ſhewn what was due, nor what he paid; ſo that no iſſue could be taken on it: *ſtat.* 20 *H.* 6. *cap.* 31. 2 *Cro.* 359. *Halſey* v. *Carpenter.*

Parker, Chief Juſtice. I am in doubt in this caſe, whether, though the defendant's *plea* be admitted bad, you can recover, without aſſigning a breach of the bond, as this caſe is circumſtanced.

The indenture need not be ſet forth. This is not a bond for the performance of the indenture, for that is in the nature of a deed of mortgage for a year, and is a ſecurity for the repayment of the principal ſum, with a year's intereſt; whereas the bond is a ſecurity, not for the principal, but the intereſt; nor for a year's intereſt only, but for the intereſt of 1000 *l.* until it be paid, which now appears to be *nine years* more than the deed. As for thoſe words in the condition of the bond, *according to the proviſoe in the indenture*, they muſt neceſſarily, and can relate only to the proportion of the intereſt.

The plaintiff ſeeing the court fluctuating in their opinions, took another objection to the *plea* of the defendant, *viz.*

The condition of the bond was to pay *J. Stone*, his executors, and adminiſtrators; in his *plea* the defendant ſays, that he paid to *R. Stone* the intereſt from time to time, *&c.* and does not ſhew, that *J. Stone* is dead, or that *R. Stone* is his executor.

However, judgment was given for the plaintiff *niſi*. *Vide Mod. Rep. vol.* 10. *p.* 329.

Hilary, 3 *Geo.* *Hawkſhaw* v. *Rawlings.*

On an action of *debt* on a bond; the defendant craved *oyer* of the bond, *and it was read to him*, &c. *he prays alſo the hearing of the condition of the ſaid bond, and it was read to him in theſe words*, viz. which appears to be for the defendant, and *two* other obligors, joined in the bond, to pay money at a future day, *which being read*, he *pleads* payment at the day by the *two* other obligors, and an acceptance by the plaintiff in ſatisfaction. The plaintiff *proteſting* that the *two* others did not pay, for his *plea* ſays he did not receive in ſatisfaction *in manner and form*; and thereon iſſue is joined, and a verdict for the plaintiff.

The court was moved that a *repleader* might be awarded, for that this is an immaterial iſſue, the payment, and not the receipt, being proper to be put in iſſue.

Parker, Chief Juſtice. Altho' payment by a ſtranger be not a legal diſcharge, yet acceptance in ſatisfaction is. Suppoſe a man owes me 100*l.* on bond, and another 100*l.* on another account, and he pays me 100*l.* I may apply it to which I will; and though he paid it in ſatisfaction of the bond, yet if I did not receive it as ſuch, it will be no diſcharge of the bond. And therefore in theſe caſes the acceptance is the clearer iſſue. There are *two* requiſites to work a diſcharge; 1. *Payment*, and, 2. *Acceptance*. And a *traverſe* of the acceptance, is an argumentative denial of the payment: ſo the plaintiff had judgment. *Vide Stra. vol.* 1. *p.* 23.

Hilary, 3 *Geo.* *Cole* v. *Hawkins.*

See this caſe fully ſtated in page 117 of this work, under the head *Arreſt of Judgment.*

Michaelmas, 3 *Geo.* Brett v. *Minter, and others.* Error.

This was a writ of *error coram vobis*, &c. and the *error* aſſigned was, that one of the defendants being an *infant*, appeared by attorney. The plaintiff *pleads* that he was of full age; to which the defendant demurred, and ſhewed for cauſe, that the plaintiff has ſhewn no place where the defendant was of age.

Parker, Chief Juſtice. Full age is not *local*, as the executing a releaſe; the place is no certainty of the fact, as it is in the caſe of a releaſe. What is perſonal attends the perſon every where; if he is of full age any where, he is ſo every where.

The qualities of the perſon are to be tried where the action is brought. *Non-age* muſt be *pleaded* to a releaſe where the releaſe is laid to be made. In this caſe, if there be any fault it is in the plaintiff in *error*, and the defendant had nothing to do but to follow him: ſo judgment was affirmed. *Vide Stra. vol.* 1. *p.* 8.

Trinity, 4 *Geo.* *Antony* v. *Williams.*

In *treſpaſs*, a *plea* of amends was tendered, and a ſpecial juſtification, that the plaintiff's fences were out of repair, *&c.*

Per curiam. This *plea* muſt be rejected, like the *plea* of *not guilty*, and a juſtification for a way. *Vide Forteſcue, p.* 336.

Trinity, 4 *Geo.* *George* v. *Powell.*

See this caſe fully ſtated in page 11 of this work, under the head *Abatement.*

Eaſter, 5 *Geo.* *The King* v. *The Inhabitants of the City of Norwich.*

See this caſe fully ſtated in page 556 of this work, under the head *Information.*

Michaelmas, 5 *Geo.* *The King, qui tam*, v. *Bolton.*

In this caſe it was adjudged, where the firſt *traverſe* is immaterial, that is, where it will not put the proper point in *iſſue*, there may be a *traverſe* on that *traverſe*. *Vide Stra. vol.* 1. *p.* 117.

Michaelmas, 5 *Geo.* *Henderſon* v. *Williamſon.*

On an action of *debt* on a *bond, conditioned* to perform the award of *J. S.* ſo as it be made in writing under his hand and ſeal, by ſuch a day, ready to be delivered to the parties. The defendant after *oyer pleads, no award made.* The plaintiff replies, that the arbitrator before the day made his award in writing, which is ſet out, and a breach aſſigned. And to this replication the defendant demurs generally. And the council objected, that it did not appear to be under the hand and ſeal of the arbitrator, as the ſubmiſſion requires. *Bulſt.* 110. 1 *Roll. Abr.* 145. *Vaugh.* 109. 112. *Palm.* 121. 2 *Cro.* 277. And for this fault it was held ill: but the plaintiff had leave to diſcontinue. *Vide Stra. vol.* 1. *p.* 116.

Eaſter, 6 *Geo.* *Nicholſon* v. *Simpſon.*

See this caſe fully ſtated in page 155 of this work, under the head *Averment.*

Eaſter, 6 *Geo.* *Creed* v. *Lappan.*

A releaſe was *pleaded* to ſeveral promiſes at the time theſe were laid to be made; and *pleaded* to an action of *treſpaſs* and *battery*, but does not *traverſe* that he was *not guilty* at any time after, or before the bringing the action.

Per curiam. This *plea is* naught. *Vide Forteſcue, p.* 359.

Trinity, 6 *Geo.* *Jernegan* v. *Harriſon.*

On an action of *debt* on a bond, the defendant prays *oyer* of the condition, which appears to be for the payment of money on the 23d day of *March*, and then *pleads* payment on the 22d day of *March*, in the condition mentioned.

The plaintiff replies, that he did not pay the money either on the 22d or the 23d, or at any time after making the bond. And the defendant demurs for duplicity.

The council for the defendant would have argued againſt the replication.

Per curiam. You need not labour that, for it is certainly ill; but then ſo is their *plea*, and the declaration muſt ſtand; for if the plaintiff had gone to iſſue on the *plea*, the verdict muſt have been ſet aſide, as in the caſe of *Merril* v. *Jocelyn.*

As to this, the council for the defendant made a diſtinction between this and the common *plea* of payment before the day. He admitted it ought to have been *pleaded* by way of *accord* and *ſatisfaction*. 5 *Co.* 117. But as it was, he ſaid the plaintiff might have taken a ſafe iſſue, by, *he has not payed in manner and form*; ſo the payment is *pleaded* abſolutely, and the time introduced under a *ſcilicet*, i. e. *to wit*, and then *in manner and form* would not make it a parcel of the iſſue: but the plaintiff had judgment. *Vide Stra. vol.* 1. *p.* 317.

Michaelmas, 6 *Geo.* *Hayman* v. *Rogers.*

See this caſe fully ſtated in page 155 of this work, under the head *Averment.*

Michaelmas, 6 *Geo.* *Gyſe* v. *Ellis.*

On an action of *covenant*, for that the defendant, his heirs and aſſigns, ſhall every year, during the term, plant *eight* crab ſtocks; the breach aſſigned was, that the defendant ſuch a year neglected to do it.

It was objected, that the breach ſhould have been in the *diſjunctive*, that neither he nor his aſſigns did it. *Plow* 199. *Cro. Eliz.* 348. *Bridg.* 148. *A.* covenanted, that he, his executors, or adminiſtrators, would do ſuch an act, and the breach was, that the executor did not do it, without taking notice of the teſtator; and held ill. And the diſtinction is between doing a thing *to* a man and his aſſigns, and *by* a man and his aſſigns.

The council on the other ſide argued, that the action is againſt the original leſſee, ſo there can be no aſſignment intended: we knew nothing of any; if there be one, it lies in their privity, and therefore they ſhould defend themſelves by ſhewing one. The caſe in *Cro. Eliz.* is not a caſe in point, for there, the breach was in the *conjunctive*, inſtead of the *diſjunctive*, and that was the reaſon of its being held ill.

Per curiam. We muſt intend the eſtate continues in him, till the contrary appears; and therefore the declaration is well enough, being againſt the *leſſee* himſelf. Now, if the *aſſignees* have done it, the breach that the *leſſee* himſelf has not, is falſe. There is as much neceſſity to ſay an heir did not perform the covenant, when the action is againſt the anceſtor: wherefore the plaintiff had judgment. *Vide Stra. vol.* 1. *p.* 228.

Michaelmas, 6 *Geo.* *South* v. *Jones.*

The plaintiff declares, that he being occupier of certain lands in *Downham*, on the 20th day of *Auguſt* cut down his graſs, and divided it into cocks, and the ſame day gave notice to the defendant, who was *rector*, to come and carry away his tithes, which he has not done, *whereby* he loſt the uſe of that part of the land which was under the cocks, from the ſaid 20th day of *Auguſt* to the 10th of *December* following. The defendant *pleads*, that for all that time the cloſe where, &c. was ſurrounded with ditches; and that the ditches, ways, and paſſages, were ſo filled with water, that he could not carry off his tithes. The plaintiff replies, that the ditches, ways, and paſſages, were not ſo; and the defendant demurs.

It was argued for the defendant, that the declaration is ill, in demanding more damages than the plaintiff ought to go for; he demands from the time of mowing, whereas the parſon is not obliged to carry it away then, but it muſt lie till the pariſhioner has made it into hay. 1 *Roll Abr.* 643. *x.* 1 *Roll Rep.* 420, 172.

2. The replication is ill, in offering to put the whole time in iſſue, and though we *plead* to the whole, as we were obliged, yet the fault is in them.

3. The replication is in the *copulative*, ditches, ways, and paſſages, when it ſhould have been in the *diſjunctive.* 2 *Saund.* 205. 3 *Keb.* 162.

Pratt, Chief Juſtice. The declaration is ill, for it ſhould have been ſhewn when it was made into hay, and dated the wrong from thence: but the replication is well enough in the *copulative*, becauſe the *plea* is one intire matter of excuſe, and the defendant relies on the whole, and not on each particular's being impaſſable. Judgment was given for the plaintiff. *Vide Stra. vol.* 1. *p.* 245.

Eaſter, 7 *Geo.* *Cumber* v. *Wane.*

See this caſe fully ſtated in page 15 of this work, under the head *Accord.*

Eaſter, 7 *Geo.* *Hillier* v. *Plympton.*

See this caſe fully ſtated in page 367 of this work, under the head *Departure.*

Eaſter, 7 *Geo.* *Clare* v. *Froſt.*

On an action of *treſpaſs* for cutting down the plaintiff's tree, on motion the defendant had leave to *plead* double, *viz.* That the defendant was leſſee of an houſe, and the cloſe where the tree ſtood, and having liberty to cut down for repairs, he felled it on that account; and, *ſecondly*, that *J. S.* was owner of an antient Mill, to which there was a water-courſe, through the ground of the plaintiff, and ſo preſcribe for a right to enter and cleanſe the water-courſe; and that the tree hung over, and the root ſpread ſo into the ſtream, that it ſtopped the water, and ſo juſtifies the cutting down. *Vide Stra. vol.* 1. *p.* 425.

Trinity, 7 *Geo.* *Onſlow* v. ——

The defendant's *plea* in this caſe was, that he was a clerk in the *prothonotary*'s office, and did buſineſs there, and the *affidavit* made and annexed thereto was, "that it was a true *plea.*"

Per curiam. The *affidavit* is evaſive, therefore the *plea* muſt be ſet aſide. *Vide Forteſcue*, *p.* 341.

Trinity, 7 *Geo.* *Lance* v. *Theedam.*

The defendant *pleaded*, that he was a clerk to one of the *prothonotaries*, and his *plea* was ſet aſide, becauſe he did not ſwear he was in his actual ſervice. The *plea* was adjudged good, but the *affidavit* was not ſufficient to ſupport the ſame. *Vide Forteſcue*, *p.* 341.

Trinity, 7 *Geo.* *Watkins* v. *Parry.*

On an action of *debt* on a bail-bond, the defendant *traverſed* the arreſt of the principal; and on demurrer, judgment was given for the plaintiff; for otherwiſe this will be a way to avoid all bail-bonds that are civilly taken, without expoſing the party by arreſt. *Vide Stra. vol.* 1. *p.* 444.

Trinity, 7 *Geo.* *Meritt* v. *Rane.*

Per curiam. A defendant being obliged to tranſfer ſtock within *three days* after requeſt, may *plead* that the requeſt was made ſuch a day, and that he tranſferred it the day following, and the plaintiff may reply that he did not transfer it that day. *Vide Stra. vol.* 1. *p.* 460.

Michaelmas, 7 *Geo.* *Mills*, *Aſſignee of the Sheriff*, v. *Bond.*

The condition of the bail-bond was for the defendant to appear on *Saturday next after the octave of the purification of the Bleſſed Virgin Mary*, and the term ended on the *Friday*, which was the day before; all this appeared on the plaintiff's declaration. The defendant *pleaded nil debet* to the bond, to which *plea* the plaintiff demurred.

Per curiam. *Nil debet* is no *plea* to a bond, but a writ to appear out of term is a void writ, and ſo is the condition of this bond; therefore here the plaintiff has no cauſe of action on his own ſhewing. *Vide Forteſcue*, *p.* 363.

Michaelmas, 7 *Geo.* *Gery* v. *Bayly.*

A *plea* of *bankruptcy*, according to *ſtat.* 5 *Geo.* to an action brought againſt the bankrupt, which accrued before his bankruptcy, ought to conclude to the country; becauſe the act ſays, that if the bankrupt be ſued he may *plead* in general, that the cauſe of action accrued before he was a bankrupt, and give the ſpecial matter in evidence; and ſo is the caſe of *Miles* v. *Williams*, and a caſe in *C. B. Trinity* 3 *Geo.* 2. *Fuller* v. *Byng. Vide Forteſcue*, *p.* 334.

Michaelmas, 6 *or* 7 *Geo.* *Coleman* v. *Earle.*

The plaintiff's name being *Walter*, and the defendant's *Aaron*; the plt. in his *pleading* begins, and the *aforeſaid Walter*

Walter ſays that he ought not to be precluded of his action; and in his replication the *aforeſaid William ſays*, (inſtead of *Walter*,) that he the aforeſaid *William*, inſtead of *Walter*, did not receive the ſaid hogſhead of wine in ſatiſfaction.

Per curiam. The replication is good; for the words, *for his plea ſays*, will relate to *Walter* in the beginning of the replication, and the ſecond *William* is unneceſſary; the relative *he* refers to *Walter* too. *Vide Forteſcue, p.* 329. *Stra. vol.* 1. *p.* 228.

Hilary, 8 *Geo.* *Cary* v. *Jenkins.*

In an action of *debt* for rent, the council moved for leave to *plead* a *tender* and *eviction*, which was granted. *Vide Stra. vol.* 1. *p.* 496.

Hilary, 8 *Geo.* *Martin* v. *Wyvill.*

See this caſe fully ſtated in page 371 of this work, under the head *Diſcontinuance.*

Hilary, 8 *Geo.* *Lord* v. *Bernard.*

The court was moved for leave to *plead double*, viz. *non aſſumpſit*, and the ſtatute of *uſury*, but the motion was refuſed. *Vide Forteſcue, p.* 336.

Hilary, 8 *Geo.* *Baxter* v. *Douglas.*

A writ was *pleaded*, and the concluſion of the *plea* was, *and this he is ready to verify.*

Per curiam. This is a good concluſion, becauſe it is matter of fact. *Vide Forteſcue, p.* 334.

Hilary, 8 *Geo.* *Hall* v. *Tullie.*

The court was moved for leave to *plead* a *ſecond plea* after *pleading* a *firſt*.

Per curiam. It cannot be granted; for if you *plead double*, you muſt *plead* it at one and the ſame time. *Vide Forteſcue, p.* 336.

Hilary, 8 *Geo.* *Philips* v. *Biron, and others.*

On an action of *treſpaſs* and falſe impriſonment againſt *two*, who both *pleaded* jointly, that there was a judgment againſt the plaintiff at the ſuit of *Biron*, which was afterwards ſet aſide by the court; but that before it was ſet aſide, a *capias ad faciendum* was proſecuted by the then plaintiff, under which he, and the other defendant, who was the officer, juſtified the impriſonment. And on demurrer it was objected, that though an erroneous judgment is a juſtification, yet an irregular one is not, for that is a matter in the privity of the plaintiff, or his attorney, *Raym.* 73. The officer indeed, if he had juſtified ſeparately, might have made a better caſe than the plaintiff; but having joined with him, he muſt take the ſame fate.

Per curiam. The court were of opinion, that the officer had forfeited his defence by joining in the ſame *plea* with the defendant, who was plaintiff in the firſt cauſe, and cited 1 *Saund.* 28. 2 *Cro.* 27. wherefore the plaintiff had judgment. *Vide Stra. vol.* 1. *p.* 509.

Hilary, 8 *Geo.* *Spiller and Wife* v. *Adams and Andrews.*

See this caſe fully ſtated in page 335 of this work, under the head *Damages.*

Hilary, 8 *Geo.* *Carvell one, &c.* v. *Manly or Manby.* Error.

In an action of *aſſault and falſe impriſonment* for *ſeven months* from the 1ſt day of *October*. "The defendant
" juſtified for the whole time by virtue of a writ of
" *capias utlegatum, which is the ſame tranſgreſſion, cap-*
" *tion, impriſonment, and detention*, &c." and then traverſed *without this*, that he is *guilty* at any time after the return of the writ. The defendant, who ſued out the writ, juſtified under it; and on a ſpecial demurrer to his *plea*, the plaintiff had judgment in the *Common Pleas*, becauſe the juſtification was under a writ taken out *at ſuch a time*, and the defendant did not conclude his *plea* with the words, *as appears by the record*, nor *traverſe* that he did impriſon the plaintiff at *any other time*; and now on a writ of *error* on that judgment, the *error* aſſigned was the want of a *good original*; it is true, there was an *original*, but it was not returned, and therefore it is void.

"The *general errors* were aſſigned; and alſo that no
" bill was filed, but on alledging diminution a bill was
" returned, filed of another term; but no return to
" that bill was certified."

To which it was anſwered, that there are two ſorts of returns, one made on the roll, and the other by the ſheriff; now, though there was no return made by the ſheriff on this original, yet there being one filed on the roll, and certified from thence as returned, that is ſufficient to make it a good original.

As to the objection againſt the *plea*, that the defendant had juſtified under a writ, and did not conclude *prout patet per recordum*, and that he had not *traverſed* the impriſonment at any *other time* than on the writ ſued out at *ſuch a time*, it was argued, that if the action had been brought againſt the ſheriff, and he had juſtified under the writ, he muſt have concluded his *plea* with the words, *prout patet per recordum*, becauſe it would not have been a record, if he had not returned the writ; but though he never returned it, it is ſtill a good juſtification for the defendant in this action.

But it is not abſolutely neceſſary for a defendant to conclude his *plea* with the words, *as appears by the record*, becauſe a writ may be loſt.

As to the other *objection*, that the defendant did not *traverſe* the impriſonment at any *other time*, &c. that is only *ſurpluſage*; for if the juſtification is good, the *traverſe* would be wholly immaterial.

Per curiam. The *original* gives juriſdiction to this court, and by conſequence, if that is not returned, the court has no juriſdiction in this caſe, and the cauſe cannot properly be ſaid to be in court; but if the ſheriff never returned the writ, how could the defendant in this action *plead prout patet per recordum*; therefore his *plea* muſt be good without ſuch concluſion, and if his *plea* is good, then the *traverſe* would be immaterial. So the judgment in the *Common Pleas* was affirmed. *Vide Mod. Rep. vol.* 8. *p.* 31.

Hilary, 9 *Geo.* *Moſſe* v. *Bennet.*

See this caſe fully ſtated in page 458 of this work, under the head *Evidence.*

Eaſter, 9 *Geo.* *Macdonnel* v. *Welder.* Error.

In *replevin* the defendant avows for rent, under a a leaſe, dated the 24th of *June*, *To hold* from the aforeſaid 24th day of *June*, &c. by virtue whereof the plaintiff entered the ſaid 24th of *June*.

On demurrer in *C. B.* it was objected, that the plaintiff was a *diſſeiſor* by entering the 24th, when the leaſe was not to commence till the next day, and conſequently the poſſeſſion was not under the leaſe, but by virtue of a *tortious* fee.

But after conſideration, judgment was given for the avowant; the court being of opinion, there was a great difference between this caſe, and an ejectment, where the plaintiff who claims a term, does at the ſame time ſhew he has gained a *tortious* fee; whereas here, whether the entry be *tortius*, or not, it cannot diſcharge the contract for the payment of rent. *Cro. Eliz.* 169. 2 *Leon.* 99. 1 *Roll. Abr.* 65. therefore the judgment was affirmed. *Vide Stra. vol.* 1. *p.* 550.

Trinity, 9 *Geo.* *Harriſon* v. *Green.*

This was an action on the *caſe* brought againſt a *common carrier* for detaining the plaintiff's goods till they were ſpoiled.

On *non aſſumpſit pleaded*, the plaintiff had a verdict; and it was moved in arreſt of judgment, that the iſſue and *plea* were improper; for *non aſſumpſit* is no *plea* to an action founded on a *tort*.

Per curiam. This action is founded on the general cuſtom of the realm, and on that *aſſumpſit* which is implied by law on the carrier's receiving the goods; for by his receipt of the goods he implicitly undertakes to keep and deliver them ſafe: and *non aſſumpſit* is a proper *plea*, and the iſſue well. And by *Pratt*, Chief Juſtice, and *Eyre*, Juſtice, judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 8. *p.* 178.

Trinity, 9 *Geo.* *Grey* v. *Mendez.*

On an *indebitatus aſſumpſit* brought againſt the defendant by an aſſignee under a commiſſion of bankruptcy,

The defendant *pleaded* the *ſtatute of limitations.*

The plaintiff replied, that the aſſignment by the commiſſioners, *&c.* was made to him on ſuch a day, *&c.*

The defendant demurred to the replication, and it was argued for him that it was ill, becauſe the plaintiff did not ſet forth how the perſon became a bankrupt, *viz*, that he was indebted to any perſon, *&c.* and abſconded, or had done any other act of bankruptcy; but if he had ſet forth this matter, it does not appear by the *pleadings* that the defendant made any promiſe to the bankrupt himſelf within *ſix years*, or that the caſe of bankrupts was within the ſaving of the *ſtatute of limitations*, by which it is enacted, "That actions "in the caſe of *ſlander* muſt be commenced within *two* "*years* after the words are ſpoken, and all actions "of *aſſault*, *battery*, *wounding*, and *falſe impriſonment*, muſt be commenced within *four years* after "the cauſe of ſuit, and all other actions on the *caſe*, "actions for *account*, (other than ſuch as concern "merchandize) actions of *debt*, *detinue*, *treſpaſs*, "*trover* and *replevin*, muſt be brought within *ſix years* "after the cauſe of ſuch actions and ſuits accrued, "and not after."

But the right of action in the caſes aforeſaid is ſaved to *infants*, *feme coverts*, thoſe *non compos mentis*, and to perſons *impriſoned* or *beyond ſea*, ſo as they commence their ſuits within the times above limited reſpectively, after their imperfections are removed; but the right of bankrupts is not mentioned.

This was admitted by the council for the plaintiff, (the aſſignee) but they inſiſted that the right to this action was a new right veſted in him by act of parliament.

To which it was anſwered, and ſo reſolved by the court, that the ſtatute of *bankruptcy* transfers the right to the aſſignee, but it is no more than the old right which the bankrupt had before he had committed any act of bankruptcy, and therefore the aſſignee muſt take it in the ſame plight and condition as the bankrupt himſelf had it; and ſo it has been adjudged in the caſe of *Maſon* v. *Plunkett*, that the aſſignee was in the ſame condition (as to the right) with the bankrupt himſelf, and conſequently if he was barred by the *ſtatute of limitations*, ſo ſhall the aſſignee. 3 *W. Rep.* 144. S. P. *Vide Mod. Rep. vol.* 8. *p.* 171.

Trinity, 9 *Geo.* *Woolley* v. *Briſcoe.*

On an action brought touching money in the funds the defendant *pleaded*, that the contract was not regiſtered before the 1ſt of *November* 1720, *according to the form of the ſtatute in this caſe made and provided.* The plaintiff replied, that it was *regiſtered according to the form of the ſtatute*, on which the parties are at *iſſue*, and it was found for the plaintiff.

It was moved in arreſt of judgment, that this was an *immaterial iſſue*, becauſe the act of parliament does not require ſuch regiſtry till the 1ſt of *November* 1721, and then the *plea* being only to the 1ſt of *November* 1720, on which the iſſue is joined, the jury could not find it to be regiſtered according to the directions of the ſtatute.

Per curiam. The time was impertinently mentioned in the *plea*; the *iſſue* is joined upon that part which is only material, *viz.* the regiſtry *according to the form of the ſtatute*, and therefore the reſt muſt be rejected as ſurpluſage; if not, then the replication is ill, and ſo is the *plea*; and then the declaration muſt ſtand, and the plaintiff have judgment. *Vide Stra. vol.* 1. *p.* 554.

Michaelmas, 9 *Geo.* *Barker* v. *Forreſt.* Error.

In the *C. B.* the defendant, after a ſpecial imparlance, *pleaded* his privilege of an attorney of this court. The plaintiff replied that he was not an attorney, and concluded to the country. And on demurrer, judgment *in chief* was entered for the plaintiff, but reverſed on *error*, becauſe being on demurrer, the moſt the plaintiff could have was a *reſpondeas ouſter*.

Per curiam. So there muſt be in this caſe, becauſe, though the replication is ill in concluding to the country, yet the *plea* is ill too, as coming after an imparlance, though it be a ſpecial one. *Vide Stra. vol.* 1. *p.* 532.

Michaelmas, 9 *Geo.* *Coleborne* v. *Stockdale.*

See this caſe fully ſtated in page 346 of this work, under the head *Debt.*

Michaelmas, 9 *Geo.* *The King* v. *Powell, and others.*

A motion was made in this cauſe for leave to *plead* double; 1ſt. To juſtify under the corporation as a corporation by *preſcription*; and, 2dly, as a corporation by virtue of their charter, granted by *Phillip* and *Mary*.

Per curiam. The *pleas* are inconſiſtent, for after acceptance of a charter the corporation can never be eſteemed a corporation by preſcription. *Vide Mod. Rep. vol.* 8. *p.* 182.

Michaelmas, 9 *Geo.* *Blackwell* v. *Naſh.*

See this caſe fully ſtated in page 272 of this work, under the head *Condition.*

Michaelmas, 9 *Geo.* *Warren* v. *Conſett.* Error.

In an action of *debt* brought by the plaintiff in the court of *C. B.* who declared on an indenture by which he covenanted to transfer *twenty-five ſhares*, *&c.* and the defendant covenanted that he would receive and pay for his transfer, *&c.* and bound himſelf in the penalty of 2800 *l.* to perform the ſame, and for non-performance thereof this action was brought. The defendant *pleaded no debt*, to which *plea* the plaintiff demurred, and had judgment in that court for the inſufficiency of the *plea*, for that the *plea* of *no debt* is an ill *plea* to this action; and thereupon a writ of error was brought in this court, and it was argued that this judgment was erroneous.

Firſt, an objection was made to the form of the declaration, *viz.* that the plaintiff had not ſet forth that he had done all things neceſſary for him to do to entitle him to this action; for he ſhould have alledged, that he had offered to transfer the ſhares *on a certain day, hour, and place*, and that the defendant had refuſed to accept them; he only ſhews, that he was *ready to transfer them in due manner*, but does not ſay at *what time or place*; now where it is ſet forth as it ought to be *at a certain time and place*, and no perſon is there to receive it, the party muſt ſhew at what time of the day he was at the place, and how long he ſtayed there: though a refuſal is ſhewn, yet it is not ſhewn to be at that time.

Second objection. Becauſe *no debt* was adjudged no good *plea*, which is erroneous, it being certainly a very good *plea*; for wherever a matter of fact is mingled with a ſpecialty, or with a record, *no debt* is a good *plea*; as in *debt* before auditors, it is a good *plea*.

But on the other ſide it was argued to maintain this judgment, that *no debt* is no good *plea* in the caſe, and the chief reaſon was, becauſe of the ſolemnity of a deed; now here the debt ariſing merely on the deed, and not on any collateral matter, in ſuch caſe the defendant ſhould have denied the deed, and have *pleaded* ſome other deed to avoid it; for if he once owns the deed, it is then a good debt, and therefore the *plea* of *no debt* is no good *plea* to it; beſides, it is a *plea* which includes ſeveral iſſues, and for that reaſon it is ill.

It is no good *plea* to an action of *annuity*, nor to an action of *debt* on a *bond* brought by an adminiſtrator; it is true, it is a good *plea* to an action of *debt* brought for rent reſerved on a leaſe for years, but the reaſon is, becauſe the demiſe is the foundation of the action, and the deed is only an evidence of the demiſe, and ſo it is a good *plea* to an action of *debt* brought on *penal ſtatutes*, and to actions of *debt* brought on *awards* or to *accounts* before auditors; and the reaſon is, becauſe they are not the deeds of the parties, but here the deed of the party himſelf is the very *lien*, and not any thing in *pais*, and the *giſt* of the action is for payment of money.

It is no good *plea* to an action on a policy of *inſurance*, nor to any action on a *bail bond*, though there is ſomething to be done to charge the inſurers and the bail.

The court were divided in opinion, but afterwards the judgment was affirmed. *Vide Mod. Rep. vol.* 8. *p.* 107.

Trinity, 10 *Geo.* *Springett* v. *Chadwick.*

See this caſe fully ſtated in page 346 of this work, under the head *Debt.*

Trinity, 10 *Geo.* *Oates* v. *Machen.*

On an action of *eſcape*, brought againſt the *Marſhal*, it was alledged, that the priſoner was ſurrendered to him at the Chief Juſtice's chambers in the pariſh of St. *Bride*; whereas it appeared on the evidence, that the chambers were in the pariſh of St. *Dunſtan*. But the judges held it well enough, this being an action of *debt*, and the ſurrender the only thing material; and that it differed from the caſe of *treſpaſs*, where every part of the declaration is deſcriptive. *Vide Stra. vol.* 1. *p.* 594.

Trinity, 10 *Geo.* *Addiſon* v. *Patterſon.*

See this caſe fully ſtated in page 169 of this work, under the head *Bail.*

Trinity, 10 *Geo.* *Seviniack* v. *Marſhal.*

See this caſe fully ſtated in page 126 of this work, under the head *Aſſets.*

Trinity, 10 *Geo.* *Anonymous.*

The defendant had leave to *plead de novo* within *four days*, within which time he ought to have *pleaded in chief*, inſtead of which he *pleaded* an *outlawry* of the plaintiff in diſability, *&c.* and thereupon the plaintiff ſigned judgment for want of a *plea in chief* within the *four days*, and this was held regular; but on payment of coſts, and giving the plaintiff judgment in *debt* for his ſecurity, and bringing 20*l.* into court, and *pleading* to iſſue immediately, the judgment was ſet aſide. *Vide Mod. Rep. vol.* 8. *p.* 289.

Michaelmas, 10 *Geo.* *Robinſon* v. *Green*

The plaintiff declares againſt a carrier on the cuſtom of the realm, and ſets forth, *that he* (the plaintiff) *required* the defendant *to carry the goods aforeſaid* from the pariſh of St. *Sepulchre*'s to *Uttoxeter*, *and that the ſaid* defendant *then and there received the goods aforeſaid to carry*, and afterwards loſt them.

The defendant *pleaded non aſſumpſit*, and after a verdict for the plaintiff it was moved in arreſt of judgment, that this action is founded on the *tort* in not delivering the goods, and therefore the proper *plea* would have been *not guilty*.

On the other ſide it was inſiſted, that though it is a *tort*, yet it ariſes from an agreement, and any general iſſue will be good that will bring the merits of the cauſe in queſtion. As *not guilty in aſſumpſit*. *Cro. Eliz.* 470. 1 *Lev.* 142. Sir *T. Jones*, 184. And it will certainly be aided after a verdict. 1 *Sid.* 340. 1 *Saund.* 103. Sir. *W. Jones*, 140. *Cro. Car.* 78.

Per curiam. It is well enough, the undertaking to carry is the *giſt* of the action; and as in *aſſumpſit* you may *plead not guilty*, as was done in the caſe of *Coggs* v. *Bernard*, *Salk.* 26. as appears by the record at the end of the book, *p.* 733. ſo in the caſe of a *tort*, founded on an agreement, *non aſſumpſit* will be ſufficient, becauſe it tries the merits as much as *not guilty* could have done. The plaintiff had judgment. *Vide Stra. vol.* 1. *p.* 574.

Michaelmas, 10 *Geo.* *Paine* v. *Maſters.*

On an action on the *caſe* on a promiſſory note, the defendant *pleads* the delivery of *twenty hogſheads* of claret in ſatisfaction, and which *he the aforeſaid*, defendant (inſtead of the plaintiff) received in ſatisfaction.

On a general demurrer *the plaintiff's council* objected, that the averring the delivery of the wine to the plaintiff was not ſufficient, without ſhewing his acceptance of it; which was wanting in this caſe, by the defendant's name being put inſtead of the plaintiff's. And cited *Salk.* 629. and the caſe of *Hawkſhaw* v. *Rawlings* in this court, *Hil.* 3 *Geo.* in both which the court held, that the bare *pleading* he gave the thing in ſatisfaction, without ſhewing that the plaintiff received and accepted it as ſuch, would be inſufficient.

Per curiam. Let judgment go for the plaintiff. *Vide Stra. vol.* 1. *p.* 573.

Hilary, 11 *Geo.* *Martin* v. *Pritchard.* Error.

On *error* of a judgment in *C. B.* brought in an action of *debt* on a bond, on *oyer* thereof, the condition appeared to be for the payment of 180 *l.* and intereſt on 5th *December*, 9 *Geo.* And the defendant *pleads*, that before purchaſing the original, *to wit*, on the 1ſt *December*, 9 *Geo.* he paid the principal and intereſt. The plaintiff replied, *he did not pay in manner and form.* And on demurrer, judgment is given for the plaintiff.

The council for the plaintiff in error objected, that the iſſue on payment before the day was immaterial, and cited the caſe of *Merril* v. *Jocelyn*, in this court, *Trinity*, 13 *Ann.* where, on the like iſſue, a verdict was found for the plaintiff, and the judgment reverſed.

But the court made a diſtinction between the two caſes. The preſent caſe being *pleaded* as a payment with intereſt, it muſt be taken as a *plea* on the act for amendment of the law, and then the day is not material, the only point upon that ſtatute being whether it was paid before bringing the action; wherefore the judgment was affirmed. *Vide Stra. vol.* 1. *p.* 622. *Mod. Rep. vol.* 8. *p.* 346.

Hilary, 11 *Geo.* *Amyon* v. *Shore.*

In an action of *aſſault* it was once well laid, but then went on with a *whereas alſo*, and laid another aſſault: there were entire damages; and it was moved in arreſt of judgment, that the laſt aſſault was not poſitively charged, but only by way of recital. The council on the other ſide would have had the court conſtrue the word *cumque* as *moreover*; but they ſaid it had been always taken only as a recital in theſe declarations. So the judgment was arreſted. *Vide Stra. vol.* 1. *p.* 621.

Hilary, 11 *Geo.* *Cotton* v. *Owen.*

In *replevin* for taking his goods, the defendant avowed and juſtified the taking *damage feaſant*; the plaintiff replied, that the goods were there, *&c.* by virtue of a *demiſe* made to him by the avowant himſelf, and that he entered and was poſſeſſed, *&c.* The defendant rejoined, and traverſed the *poſſeſſion*; but gave no anſwer to the *demiſe* ſet forth in the replication to be made by himſelf, for which reaſon the plaintiff demurred, and the defendant joined in demurrer; and it was inſiſted for the plaintiff, that ſince the traverſe of the poſſeſſion was *immaterial*, and nothing ſaid as to the demiſe, the plaintiff ought to have judgment; and accordingly judgment was given for him. *Vide Mod. Rep. vol.* 8. *p.* 343.

Eaſter, 11 Geo. Griffiths's Caſe.

See this caſe fully ſtated in page 273 of this work, under the head *Condition.*

Eaſter, 11 Geo. Phillibrown v. Ryland.

See this caſe fully ſtated in page 40 of this work, under the head *Actions.*

Trinity, 11 Geo. Monſoot v. Chivers, and Wife.

On a *ſcire fieri* inquiry againſt huſband and wife, as ſhe was executrix in her own right, brought by the plaintiff as executrix on a judgment recovered by her on a bond due to her teſtator. The defendants demurred, and ſhewed for cauſe, that it was not alledged in the *ſcire fieri* inquiry, that the teſtator of the plaintiff was dead. And the council for the defendant inſiſted, that though this might perhaps be well enough on a *general demurrer,* yet ſurely it was *informal,* and would be ill on a *ſpecial demurrer,* which was this caſe.

The court at firſt doubted on the point of its being ſhewn for cauſe of demurrer, but ſaid afterwards, there was nothing in the objection, and gave judgment for the plaintiff. *Vide Stra. vol.* 1. *p.* 631.

Michaelmas, 11 Geo. Sparks v. Keeble.

In *treſpaſs,* wherefore with force and arms he broke his cloſe, and entered, *&c.* and took away the plaintiff's *hops,* and *deſtroyed* his *hop-poles,* &c. the defendant, as to the force and arms, *pleaded not guilty,* and juſtified the entry; for that the place where the treſpaſs was ſuppoſed to be done was his (the defendant's) own ground, and that he entered and diſtrained the poles *damage feaſant.*

And upon a demurrer to this *plea* it was inſiſted for the plaintiff, that though the defendant might diſtrain the poles, yet he could not deſtroy them; and in this *plea* he made no anſwer to the deſtroying them as he ought.

Per curiam. No juſtification can be good for *deſtroying a thing diſtrained,* for all diſtreſſes ought to be ſafely kept; ſo the defendant having not anſwered that part of the declaration, judgment muſt be for the plaintiff. *Vide Mod. Rep. vol.* 8. *p.* 330.

Michaelmas, 11 Geo. Anonymous.

An executor moved the court to enlarge the time for *pleading,* the rules being out; which was oppoſed, unleſs he would enter into a rule not to *plead* any judgment obtained againſt him after the rules were out; for otherwiſe he might confeſs judgment in the mean time, and *plead* them in *bar* to the plaintiff's demands.

Thereupon the court ſaid, they would not deprive the plaintiff of any advantage he had by law to recover his debt, unleſs the defendant would enter into ſuch a rule; which he refuſing, the court would not enlarge the time. *Vide Mod. Rep. vol.* 8. *p.* 308.

Michaelmas, 11 Geo. Barnſly v. Shrimpton. Error.

A writ of *error* was brought, and the *general errors* aſſigned, and likewiſe the want of an original, and a warrant of attorney, and after *in nullo eſt erratum pleaded,* a rule of court was obtained to amend the *errors* aſſigned, but it was diſcharged on a motion for that purpoſe; for after ſuch a *plea* it is never admitted to amend *general errors,* it is like *not guilty pleaded* by the defendant, who is never admitted after ſuch a *plea* to juſtify, or to *plead* ſpecially. *Vide Mod. Rep. vol.* 8. *p.* 305.

Michaelmas, 11 Geo. Wyvil v. Stapleton. Error.

See this caſe fully ſtated in page 16 of this work, under the head *Accord.*

Hilary, 12 Geo. Harriſon v. Winchcombe.

The court was moved for leave to *plead non aſſumpſit,* and *non aſſumpſit infra ſex annos,* and the caſe of *Folkes* v. *Smith,* in C. B. *Michaelmas,* 12 *Geo.* was cited, where there was the like rule, and in the principal caſe it was ordered accordingly.

The ſame motion was again granted, *Michaelmas,* 13 *Geo.* in the caſes of *Briſtow* v. *Woodward,* and *Toephen* v. *Elking. Vide Stra. vol.* 1. *p.* 678.

Hilary, 12 Geo. White v. Cleaver.

See this caſe fully ſtated in page 273 of this work, under the head *Condition.*

Hilary, 12 Geo. Haywys v. Savage.

A ſpecial *capias* by original was taken out returnable on *the morrow of All Souls,* and for want of a *plea* to enter before the *Eſſoign*-day of *Hilary* term, judgment was ſigned the 19th of *January,* which was now moved to be ſet aſide. And it was agreed, that if this action had been by bill, the defendant would not have been obliged to *plead* till within *Hilary* term. But the court, out of diſinclination to favour proceedings by original, would not allow there was any difference, but ſet aſide the judgment: ſo that now there is no advantage in taking out a *ſpecial capias. Vide Stra. vol.* 1. *p.* 684.

Eaſter, 12 Geo. Peedle, Aſſignee of the Sheriff, v. Chriſtmas.

See this caſe fully ſtated in page 186 of this work, under the head *Bail-Bond.*

Trinity, 12 Geo. Onſlow v. Booth.

A *plea* of privilege of a clerk to a prothonotary in C. B. was ſet aſide, the affidavit annexed to it being, *that this is a true plea,* and not *that the plea is true;* the ſtatute requiring the affidavit ſhould eſtabliſh the fact, and not the legality of the *plea. Vide Stra. vol.* 1. *p.* 705.

Michaelmas, 12 Geo. The King v. The Mayor of Canterbury.

See this caſe fully ſtated in page 635 of this work, under the head *Mandamus.*

Michaelmas, 12 Geo. Croſs v. Bevan.

On an *indebitatus aſſumpſit,* the defendant *pleads nonage,* and concludes to the country; and it was ſhewn for cauſe of demurrer, that he ought to aver his *plea. Vide Forteſcue, p.* 334.

Michaelmas, 13 Geo. White v. Clever.

See this caſe fully ſtated in page 367 of this work, under the head *Departure.*

Rycraft v. Calcraft.

In an action on the *caſe* brought againſt an officer for an arreſt and falſe impriſonment; he *pleaded* a proceſs of an inferior court, the plaintiff replied, the debt was 5 *l.* and no *affidavit* made to ſupport the debt.

Per curiam. It is no good replication, for the caſe of an affidavit in any inferior court is dropped by *ſtat.* 12 *Geo. Vide Forteſcue, p.* 344.

Eaſter, 1 Geo. 2. The King v. The Archbiſhop of Armagh and Whaley.

See this caſe fully ſtated in page 9 of this work, under the head *Abatement.*

Michaelmas, 1 Geo. 2. Holiday v. Fletcher.

See this caſe fully ſtated in page 156 of this work, under the head *Averment.*

Hilary, 2 *Geo.* 2. *Hunter* v. *Wiſeman.*

The defendant *pleaded* a recovery in this court, and inſtead of replying *nul tiel record*, the plaintiff obtained a rule for the *plea* to be rejected, unleſs *oyer* was given of the judgment according to *Carthew* 453, 175. it being a record of the ſame court. *Trinity* 3 *Geo.* 2. *Gwinnel* v. *Thompſon*, the ſame rule. *Vide Stra. vol.* 2. *p.* 823.

Eaſter, 2 *Geo.* 2. *Taylor* v. *Woollen.*

On an action of *treſpaſs*, there was a *plea* of juſtification for *two times*; the defendant *pleaded one title* by a leaſe for lives, and *one life* living on the 12th day of *July*; and yet as to the 12th day of *July*, another title and *ſeiſin in fee*, which was held repugnant, and therefore ill. *Vide Forteſcue, p.* 380.

Trinity, 2 *Geo.* 2. *Haggard* v. *Collington.*

The *plea* of *non aſſumpſit* and *ne unques executor* allowed without an *affidavit*. *Vide Forteſcue, p.* 336.

Trinity, 2 *Geo.* 2. *Newman* v. *Chandler.*

Bankruptcy and *non aſſumpſit* adjudged to be a contradictory *plea*, and accordingly refuſed. *Vide Forteſcue, p.* 336.

Michaelmas, 2 *Geo.* 2 *Palmer* v. *Ekins.*

On an action of *covenant* brought by the plaintiff as aſſignee of *J. P.* he declares, that on the 27th day of *March* 1716, *J. P.* was ſeiſed in *fee* of the demiſed premiſes, and by indenture between him and the defendant, he the ſame day demiſed to the defendant, to hold from *Lady-day* before for *twelve years*, at 18 *l. per annum*, payable quarterly; that the defendant covenanted to pay the rent, and entered and enjoyed the houſe to the *Lady-day* before bringing the action; that *J. P.* being ſeiſed of the reverſion, 22d and 23d *November*, 10 *Geo.* by indentures of leaſe and releaſe between him and the plaintiff, ſold the reverſion to the plaintiff, and his heirs, of which the defendant had notice; and then aſſigns the breach in non-payment of rent. The defendant *proteſting* that *J. P.* did not demiſe, for his *plea* ſays, that on the 19th *Nov.* 1706, the ſaid *J. P.* was ſeiſed in *fee* of the demiſed premiſes, and by leaſe and releaſe of the 19th and 20th *November* 1706, ſold the ſame to *J. B.* and his heirs; and traverſes, that at any time after the date of the laſt mentioned releaſe *J. P.* was ſeiſed in *fee*, as the plaintiff has alledged. To this *plea* the plaintiff demurred generally, and the defendant joined in demurrer. And after ſeveral arguments at the *bar*, theſe points were reſolved by the court:

1ſt, That the demiſe being by indenture, the defendant could not *plead he had no property in the tenements*; and indeed this point was not diſputed by the council on either ſide, but was taken for granted throughout the argument of the caſe.

2dly, That the defendant's *plea* was a *ſpecial* one, *he had no property in the tenements*, and was therefore no more to be received than a general one.

3dly, That this *eſtoppel* needed not to be replied to, but might be taken advantage of upon a demurrer; and that has been the uſual way of anſwering the *plea* of *he had no property in the tenements*, *Salk.* 277. and ſo is the general rule of *pleading* in *Co. Lit.* 303.

4thly, That though the plaintiff was an aſſignee, he might take advantage of the *eſtoppel*, for it runs with the land. *Co. Lit.* 152. 1 *Roll. Abr.* 868. *l.* 2. *&c.*

5thly, That this was ill on a general demurrer. And,

6thly, That if the *plea* did not amount to, *he had nothing in the tenements*, yet it would be ill on account of the generality of the traverſe, which ties up the plaintiff to prove the eſtate alledged in the declaration, when any other eſtate would do; even a *diſſeiſin* would do in this caſe, when it appears the tenant enjoyed under the leaſe, 2 *Vent.* 67. And it is no anſwer to ſay, that the defendant has *traverſed* in the words of the declaration; for unleſs it be materially alledged, he is not to follow it. And ſo it was determined in this court, in the caſe of *Coleborne* v. *Stockdale*. Therefore the plaintiff had judgment. *Vide Stra. vol.* 2. *p.* 817.

Eaſter, 3 *Geo.* 2. *Whelpdale* v. *Atkinſon.*

The court refuſed to allow the defendant to *plead* the *double plea* of *non aſſumpſit*, and *non aſſumpſit infra ſex annos*. *Vide Forteſcue, p.* 337.

Eaſter, 3 *Geo.* 2. *The Biſhop of Wincheſter* v. *Cook.*

On a writ of *quare impedit*, a *double plea* was allowed, *viz.* that the defendant was ſeiſed in *fee* of the advowſon, and that he had the next turn of preſentation. *Vide Forteſcue, p.* 337.

Trinity, 3 *Geo.* 2. *Hetherington, one* &c. v. *Lowth.*

The defendant *pleaded* the privilege of *C. B.* and the plaintiff moved to ſet it aſide, he ſuing as an attorney of this court, on the foot of privilege, taking away privilege. But the court ſaid, that was a point of law which they would not determine on a motion, but put the plaintiff to demur to it. *Vide Stra. vol.* 2. *page* 837.

Trinity, 3 & 4 *Geo.* 2. *Hyder* v. *Warren.*

See this caſe fully ſtated in page 367 of this work, under the head *Departure*.

Michaelmas, 3 *Geo.* 2. *Enys* v. *Mohun.*

In *covenant*, the plaintiff declares on a leaſe made to *Coſier*, which he lays to have come by aſſignment to the defendant. The defendant *pleads* that *Coſier* did not aſſign to him: and after iſſue joined, a *repleader* was awarded, it being an iſſue joined on what is not alledged in the declaration, for that does not ſay *Croſier* aſſigned to the defendant; but that it came by aſſignment, and there may be many *meſne* aſſignments; and the court held this to be an immaterial, but not barely an *informal iſſue*, becauſe the fact found does not determine the right. *Vide Stra. vol.* 2. *p.* 847.

Hilary, 4 *Geo.* 2. *Da Coſta* v. *Carteret, and others.*

The *C. B.* having laſt term determined, that *non aſſumpſit*, and *non aſſumpſit infra ſex annos* ſhould not be *pleaded*, becauſe the latter puts all in iſſue, and does not imply a promiſe within the *ſix years*; the matter was now ſolemnly debated in this court, the council having moved for leave to *plead not guilty*, and the *ſtatute of limitations*. The court granted it, becauſe thereby the defendant ſecured to himſelf a trial on the merits in all events, whereas if he was to reſt only on the *non aſſumpſit infra ſex annos*, it might come to a demurrer, or the iſſue of *nul tiel record*. *Vide Stra. vol.* 2. *p.* 889.

Eaſter, 4 *Geo.* 2. *Cantillon* v. *Lord Montgomery.*

To an action on ſeveral promiſſory notes and bills of exchange, the defendant *pleaded* the *ſtatute of uſury*; whereon iſſue was joined, and on the defendant's application a trial at *bar* was granted to be bad on a day appointed in this term: and now it was moved in behalf of the defendant, that he may have liberty to withdraw his ſaid *plea*, and *plead* the general iſſue, the ſame to be ſubſtituted in the place of the ſpecial *plea*; and to be as of the ſame term, that the trial at *bar* might not be deferred; and to obviate the objection, that the plaintiff would be hereby put to prove the declaration, which was confeſſed, and avoided by the *ſpecial plea*, it was offered on the part of the defendant, to admit that the ſaid notes and bills of exchange were ſigned by him.

But for the plaintiff it was inſiſted, that this would unavoidably put over the trial to *Michaelmas* term; for if the defendant ſhould prevail, the rule already made at his inſtance for the trial at *bar* is diſcharged of courſe; and then by the rules of the court, a *ſecond* rule cannot be made for a trial at *bar* between the ſame parties in the ſame term, nor could the matter be tried at *bar* next term; for by the practice of the court, a trial at *bar* is not allowed in an iſſuable term. Beſides, the defence will become at large from being confined to the point of *uſury*; and therefore the plaintiff cannot be prepared to anſwer all the evidence which poſſibly the defendant may make uſe of on the general iſſue; and if he be put to an inconvenience, the fault is to be imputed to him alone, becauſe he declined the general iſſue, when he might have *pleaded* it. And for theſe reaſons the court denied the motion. *Vide Fitz-Gibbons, p.* 267.

Eaſter, 4 *Geo.* 2. *Marſhall* v. *Carter*.

In this caſe it was held by Lord *Raymond*, that where the *plea* or demurrer is in *abatement*, if the replication or demurrer thereto be in *bar*, it is a diſcontinuance; and he ſaid he doubted whether the *plea* in *abatement*, though never ſo frivolous, may be otherwiſe anſwered than with a prayer to eſtabliſh the writ, and not for final judgment. *Vide Fitz-Gibbons, p.* 269.

Trinity, 4 *Geo.* 2. *Baynham* v. *Matthews*.

In an action on a promiſſory note, the defendant *pleaded* the ſtatute of *uſury*; to which the plaintiff replied, that the note was given for a juſt debt, *abſque hoc that it was corruptly agreed in manner and form, &c.* and concludes to the country. A demurrer thereon, *and it was ſhewn for cauſe*, that the replication ſhould have been concluded with an averment. And the council for the defendant argued, that the replication was ill, there being no new matter diſcloſed; and though there be a negative and affirmative as to one particular fact, yet the plaintiff may conclude with an averment. 1 *Jones*, 387. *Lutw.* 1435.

On the other ſide, *Ent.* 1305. 1 *Inſt.* 126. *Raym.* 98. were cited, that where there is a negative and affirmative, you muſt not conclude with an averment.

Per curiam. Generally ſpeaking it is ſo, and if the plaintiff here would have been contented to have replied in the common form, *and not that it was corruptly agreed in manner and form*, &c. without a traverſe, he would have been right in concluding to the country. But wherever you add a traverſe, there muſt be an averment. *Raſt.* 689. *Lib. Placit.* 156. *Vide Stra. vol.* 2. *p.* 871.

Trinity, 4 *Geo.* 2. *Atkinſon* v. *Atkinſon*.

Leave was given to *plead, non eſt factum*, and a diſcharge by a commiſſion of bankruptcy. *Vide Stra. vol.* 2. *p.* 871.

Michaelmas, 4 *Geo.* 2. *Palmer* v. *Wadbrooke*.

In an action of *treſpaſs, aſſault* and *battery*, the defendant moved for leave to *plead double*, viz. *not guilty*, and a juſtification in defence of his maſter's barge, which was denied, as being contradictory. *Vide Stra. vol.* 2. *p.* 876.

Michaelmas, 4 *Geo.* 2. *Wright* v. *Penn*.

On an action of *treſpaſs* brought for breaking and entering a houſe, and taking away his goods, and converting and diſpoſing of them to his own uſe; the defendant *pleaded* that he took them *damage feaſant*, and removed them, *&c.* and left them for the uſe of the plaintiff.

Per curiam. It is no good *plea*; for this is no anſwer to the converſion to his own uſe, which he could not juſtify for *damage feaſant*. So judgment was given for the plaintiff. *Vide Forteſcue, p.* 381.

Michaelmas, 4 *Geo.* 2. *Levat* v. *Reſhere*

The court gave leave to *plead non aſſumpſit*, and a *recovery*, and execution executed as to part of the debt. *Vide Forteſcue, p.* 337.

Hilary, 5 *Geo.* 2. *The Biſhop of London* v. *The Mercer's Company*. Error.

On *error* of a judgment in *C. B.* in a *quare impedit*, brought by the Mercer's Company and *Edward Lewin* clerk, for the preſentation to the pariſh-church of St. *Mildred* in the *Poultry*, and St. *Mary-Colechurch*, in the city of *London*.

It was *adjudged*, that though it did not appear on the declaration to be the company's turn, for want of ſhewing that one *Perinchief*, who was in before the fire, died or reſigned; or that the other preſented was the ſame perſon; yet on the *pleading* over it was *helped*, for there are no negative words in the declaration; and ſince the ſtatutes of *jeofails*, there have been caſes that have gone as far as this. *Cro. Car.* 288. *Sir W. Jones* 307. The judgment therefore was affirmed. *Vide Stra. vol.* 2. *p.* 925.

Eaſter, 5 *Geo.* 2. *Pickering* v. *Simonds*.

The *plea* to a bond was, that the *original* was taken out before the day of payment in the condition, without any introduction, but concluded with the words *prays judgment, and that the writ be quaſhed.* The *plea* was held well. *Vide Forteſcue, p.* 334.

Trinity, 5 *Geo.* 2. *Glover* v. *Heathcot*.

Non aſſumpſit and a *releaſe* were refuſed by the court, becauſe they may be given in evidence, and were thought contradictory. *Vide Forteſcue, p.* 337.

Trinity, 5 *Geo.* 2. *Verney* v. *Fox*.

Per curiam. The defendant may *plead treble pleas*, which was allowed in the preſent caſe on a *South-Sea* contract; 1ſt. That he was not poſſeſſed in his own right. 2dly. That the contract was not regiſtered. 3dly. No tender made before the ſuit brought. *Vide Forteſcue, p.* 337.

Trinity, 5 *Geo.* 2. *Meard* v. *Philips*.

On an action of *debt* for the penalty of articles relating to the building of *Putney Bridge*, the defendant *pleaded that he owed nothing*. The plaintiff demurred, and the defendant joined in demurrer. Afterwards he moved, that he might be at liberty to withdraw his *plea*, and *plead double*, viz. that he was not appointed by the commiſſioners, and that he did not agree with them to build the bridge. And it appearing the plaintiff had not been delayed, the court gave leave accordingly. *Vide Stra. vol.* 2. *p.* 906.

Trinity, 5 *Geo.* 2. *Warren* v. *Ivie*.

The court was moved on the act for amendment of the law, that the defendant might be at liberty to rejoin double, but the court held it extended only to the caſe of *pleading* at firſt. *Vide Stra. vol.* 2. *p.* 908.

Trinity, 5 *Geo.* 2. *Dunn* v. *Vacher and Wife*.

On an action of *debt* on a bond entered into by the defendant's wife *while ſole*, conditioned that ſhe ſhould within *ten days* after the plaintiff's return from his voyage marry him if requeſted. On motion the defendant had leave to *plead non eſt factum*, and that the plaintiff did never requeſt her. *Vide Stra. vol.* 2. *p.* 908.

Michaelmas, 5 *Geo.* 2. *Skinner* v. *Rebow*.

On an action brought by the plaintiff as aſſignee of the effects of a bankrupt, he declared that the defendant was indebted to the bankrupt, and being ſo indebted, promiſed the plaintiff to pay. The defendant *pleaded*, that the cauſe of action did not accrue to the bankrupt within *ſix years*. And on demurrer it was held ill, becauſe the *plea* does not anſwer to the promiſe laid in the declaration, and precludes the plaintiff from proving any promiſe to himſelf. 6 *Mod.* 131, 309. *Salk.* 28. So the plaintiff had judgment. *Vide Stra. vol.* 2. *p.* 919.

Michaelmas, 5 *Geo.* 2. *Wood* v. *Ridge and others.*

It was *pleaded* by executors to an action on a promiſe, that the teſtator, at the time of the promiſe, was ready to pay, and that the executors, from the time of the teſtator's death, were ready to pay, and now are; and that the teſtator, in his life-time, on ſuch a day, tendered the money, but the plaintiff refuſed to receive it; this being *pleaded* after an imparlance had by the executors.

Per curiam. The *plea* is naught. *Vide Forteſcue, p.* 376.

5 & 6 *Geo.* 2. *Cooper* v. *Young.*

In an action of *debt* for rent, the defendant *pleaded* that one *J. S.* before the rent became due, entered and turned him out of poſſeſſion, and ſtill keeps him out, and that the ſaid *J. S.* being a ſtranger, was at the time of his entry, and now is, ſeiſed in *fee*.

Per curiam. This is no good *plea*; the defendant muſt ſhew a title of longer ſtanding, and he may be ſeiſed in *fee* by diſſeiſin; ſo the *plea* of having a legal title has been held naught. *Vide Forteſcue, p.* 360.

Eaſter, 6 *Geo.* 2. *Baker* v. *Weſtbrooke.*

It was refuſed to let the defendant *plead non aſſumpſit*, and a tender. *Vide Stra. vol.* 2. *p.* 949.

Hilary, 7 *Geo.* 2. *Law* v. *Law.*

On an action of *debt* on a bond conditioned for payment of money at a future day, the defendant *pleaded* payment at the day; and before the plaintiff replied, moved to withdraw his *plea*, and *plead ſtat.* 5 *E.* 6. *c.* 16. againſt the ſale of offices.

Per curiam. That is never done, but in order to *plead* the *general iſſue*, not to ſubſtitute one ſpecial *plea* in the room of another. So the motion was denied. *Trinity*, 5 *Geo.* in the caſe of *Meard* v. *Phillips*, where the *general iſſue* was waived, and leave given to *plead* double. *Vide Stra. vol.* 2. *p.* 960.

Trinity, 7 *Geo.* 2. *Jaſper* v. *Groſvenor, Executor of Peake.*

The defendant's council moved laſt term for time to *plead* till this term, for that the defendant, ever ſince he had been executor, had been ill of the palſy, that he was not able to ſpeak or write his name, ſo that he could not ſign a renunciation, or give any power to his attorney, and that it was an affair concerning trade, which no one knew but the defendant. The motion was granted, on condition that he would not confeſs any judgment, or give preference to any creditor to the prejudice of the plaintiff. This matter was again moved this term, for time to *plead* till *Michaelmas* term next, the defendant ſtill remaining under the ſame circumſtances.

Lord *Hardwicke.* This inconvenience, ariſing from the *act of God*, entitles the defendant to favour and compaſſion; but this muſt not be carried ſo far as to hinder the plaintiff from recovering his right, which may now be the caſe, as nothing is laid before the court to ſhew that there is any probability of the defendant's recovery. The court at length allowed the defendant further time to *plead*, on his conſenting to be bound in a rule to *plead* time enough to have the iſſue tried in *Michaelmas* term next. *Vide Caſes Temp. Lord Hardw. p.* 52.

Michaelmas, 7 *Geo.* 2. *Cowne* v. *Barry.*

On an action of *debt* on a bond; the defendant *pleaded* payment before the day. And it being found for the plaintiff the court inclined to award a *repleader*, according to the caſe of *Merril* v. *Jocelyn*, *Trinity*, 13 *Ann.* But it being obſerved at another day, that the time of payment was only alledged under a *ſcilicet*, i. e. *to wit*, the court held it a good *plea* on the act for amendment of the law, as a payment before exhibiting the bill, and then the iſſue joined was material; wherefore the plaintiff had judgment. *Vide Stra. vol.* 2. *p.* 954.

Eaſter, 8 *Geo.* 2. *Gordon* v. *Halpen and his Wiſe.*

It was moved that the defendant's wife might have leave to *plead* ſeparately from her huſband. The caſe was, the wife's eſtate was ſettled on her, which ſettlement was confirmed by a decree of the Houſe of Lords to be for her ſeparate maintenance; and her eſtate is only made liable to anſwer all actions brought againſt the huſband on her account. The council ſuggeſted, that this was a fictitious demand in the plaintiff, ſet up by connivance of the huſband, and that he will let judgment go by *default*, and ſo ſhare with the plaintiff in what ſhall be recovered.

Lord *Hardwicke.* We cannot allow you to ſever in *pleading*; your beſt way will be to *plead* in the manner of huſband and wife, and if the huſband ſhould diſavow, and that be contrary to the order of the Houſe of Lords, you will know how to enforce that order; but this court can do nothing in it. *Vide Caſes Temp. Lord Hardw. p.* 101.

Trinity, 8 *Geo.* 2. *Holt* v. *Mabberley.*

In an action of *debt* on bond, the defendant's council moved for leave to *plead* double, *viz. non eſt factum*, and *coverture* in the plaintiff.

Per curiam. This cannot be, becauſe *one* is a *plea* in *bar*, and the *other* is a *plea* in *abatement*. *Vide Caſes Temp. Lord Hardw. p.* 135.

Michaelmas, 8 *Geo.* 2. *Phillips* v. *Wood, and others.*

Leave was given to *plead non aſſumpſit*, and a diſcharge by bankruptcy, though ſaid to be denied in *C. B.* *Vide Stra. vol.* 2. *p.* 1000.

Michaelmas, 8 *Geo.* 2. *Lord Clinton* v. *Morton.*

The defendant inſiſting on his diſcharge many years ago under a commiſſion of bankruptcy, and it being doubtful whether the clauſe that enabled bankrupts to *plead generally* was ſtill in force, his council moved, and had leave to *plead* it both ways, *generally* and *ſpecially*. *Vide Stra. vol.* 2. *p.* 1000.

Michaelmas, 8 *Geo.* 2. *Prior* v. *Lord Ilay.*

In this action the defendant *pleaded* a *double plea*, *viz. non aſſumpſit*, and *non aſſumpſit infra ſex annos.* The plaintiff replied to the *ſecond plea*, an *original*; the defendant rejoined *nul tiel record*; and judgment was for the plaintiff; before the trial of the iſſue of *non aſſumpſit*, the plaintiff makes out a writ of inquiry, and executes it, after which the iſſue of *non aſſumpſit infra ſex annos* was tried, on which the plaintiff was *nonſuited*. The plaintiff moved to ſet aſide his writ of inquiry on the firſt iſſue, becauſe he ſhould have waited the event of the ſecond iſſue of *non aſſumpſit infra ſex annos.*

Per curiam. The writ of inquiry was diſcharged; for if there be twenty iſſues, if one be for the defendant, the plaintiff cannot recover, for they are all to the whole matter in iſſue between the parties. And the plaintiff ſhould have ſtayed till the other iſſues were tried; ſo he was allowed no coſts. *Vide Forteſcue, p.* 338.

Michaelmas, 8 *Geo.* 2. *Smith* v. *Dr. Bouchier and others.*

In an action of *treſpaſs* and falſe impriſonment againſt *five* defendants, who all join in a *plea* of *not guilty*, as to all the impriſonment but *eight days*, to which they juſtify;

Adjudged, That a juſtification under a proceſs of the Univerſity of *Oxon*, as was the preſent caſe, was ill; and it was held, that where thoſe who might juſtify join with thoſe who have not a good juſtification, it is bad as to all. *Vide Stra. vol.* 2. *p.* 993.

Trinity, 9 *Geo.* 2. *Morgan* v. *Luckup.*

On a *qui tam* action brought on the ſtatute againſt *gaming*, it was held that the defendant could not be admitted to *plead double*, the act for the amendment of the law excluding *popular* actions. And it was ſaid to have been ſo held *Trinity*, 13 *Geo.* 1. in the caſe of *Webb* v. *Urlin. Vide Stra. vol.* 2. *p.* 1044.

Trinity, 9 *Geo.* 2. *Humphreys* v. *Churchman.*

On an action of *treſpaſs* for breaking, &c. the plaintiff's ſtable, and cutting aſunder a beam, and throwing down the tiles of the roof; the defendant *pleaded not guilty* as to the force; and as to the reſidue of the treſpaſs, he juſtified as ſervant to Sir *H. G.* and *pleads*, that Sir *H. G.* was ſeiſed of a wall in his *demeſne* as of *fee*; and becauſe the beam was placed in the wall of the ſaid Sir *H. G.*'s freehold without his conſent, the defendant, as his ſervant, in order to remove the nuiſance, did enter the ſtable, and cut the beam as near the wall as he could, doing as little damage as he could, and thereby the tiles were thrown down. The plaintiff replies, and *traverſes* that the wall is not Sir *H. G.*'s whereon iſſue is taken, and he goes on *proteſting* that the wall is not his; he ſays, that the defendant of his own wrong did throw down the tiles for the cutting the beam as aforeſaid. The defendant rejoins, that the wall is Sir *H. G.*'s freehold, and as to the reſt of the replication he demurs, and ſhews for cauſe that the replication is a departure, and immaterial. And the plaintiff joins in demurrer.

Lord *Hardwicke*. In this caſe, if the defendant had taken iſſue on both parts of the replication, and there had been a verdict for the plaintiff on the *firſt* part, that it was not the defendant's freehold; and on the *ſecond* part a verdict for the defendant; the defendant notwithſtanding could never have judgment; for the finding it not his freehold would have cut up his whole defence, and that ſhews that the firſt *traverſe* went to the whole; this is not properly a departure, for that is when the defendant in his *plea* inſiſts on one matter, and then in his rejoinder inſiſts on a different matter; but here the party is in the ſame *plea*; in one part of it, inſiſting on what he does not in another part, which ſeems to me to be duplicity; if ſo, it ſhould have been ſhewn for cauſe of demurrer, and therefore cannot now be taken advantage of; but however, the *traverſe* is not to my ſatisfaction, for the *plea* alledges the breaking the tiles to have been in conſequence of cutting the beam, and the replication *traverſes* its being previous, which is not to the ſame point: if the rule in *Yelv.* is not too ſtrict, yet certainly the *traverſe* muſt be the ſame in effect and ſubſtance, which is not done here; I think the replication is ill in that reſpect, and would be ſo in the other, if that had been ſufficiently aſſigned for cauſe of demurrer.

Page and *Lee*, Juſtices, gave their opinion at large, and concurred with the Chief Juſtice.

Per curiam. Let judgment go for the defendant. *Vide Caſes Temp. Lord Hardw. p.* 289.

Michaelmas, 9 *Geo.* 2. *Marſham* v. *Gibbs.*

On an *aſſumpſit* for ſeveral promiſes, the defendant *pleaded not guilty*, to which the plaintiff demurred, and ſhewed for cauſe that it was not allowable to *plead* ſo.

Lord *Hardwicke*. There are *twenty* caſes where it has been held bad on a demurrer, though it is cured by a verdict. The point of this action is the *debt*. Therefore let judgment go for the plaintiff. *Vide Caſes Temp. Lord Hardw. p.* 173. *Stra. vol.* 2. *p.* 1022.

Michaelmas, 9 *Geo.* 2. *Weſtlen* v. *Eales.*

In a ſpecial action on the *caſe* for a *nuiſance*, the defendant *pleaded* that he did remove the *nuiſance*; the *plea* was held ill, being only matter of fact, not law. *Vide Forteſcue, p.* 333.

Michaelmas, 9 *Geo.* 2. *Jordon* v. *Twells.*

See this caſe fully ſtated in page 67 of this work, under the head *Amendment.*

Michaelmas, 10 *Geo.* 2. *Smith, qui tam* v. *Gibſon.*

On an action on the *caſe* on 2 *ſtat. H.* 4. *c.* 11. for ſuing the plaintiff in the *Admiralty Court*, in a caſe whereof that court has not juriſdiction; wherein the plaintiff declares, &c. to which the defendant *pleaded* in *abatement*, and on judgment of *reſpondeas ouſter*, he *pleads* in *bar*, that in *Hilary* term 8 *Geo.* 2. the plaintiff ſued the defendant by bill in this court, in a *plea* of *treſpaſs* and *contempt*, for proſecuting a *plea* in the court of Admiralty, after his Majeſty's prohibition to the contrary firſt directed and delivered, which he laid to his damage 100 *l.* To which bill the defendant appeared, and confeſſed the action, and proſecuting the *plea* after the prohibition delivered; and did acknowledge, that the plaintiff had ſuſtained damages by reaſon of the premiſes in that behalf unto *two-pence*, beſides coſts: whereon judgment was given, that the ſaid plaintiff ſhould recover againſt the ſaid defendant his damage aforeſaid, to the ſaid *two-pence*, by him the ſaid defendant in form aforeſaid acknowledged, and alſo his coſts, &c. all which proceedings in that ſuit are ſet out verbatim in the *plea*; and the *plea* avers, that the plaintiff, the defendant, and the ſuit in the Admiralty mentioned in the record *pleaded*, and the preſent plaintiff, defendant, and ſuit in the *Admiralty* mentioned in the proceedings in this action, are one and the ſame; and it avers farther, that the *two-pence* damages mentioned to be recovered in the ſaid record, were to be recovered in full ſatisfaction of all damages ſuſtained by the plaintiff, by reaſon of the ſuit in the *Admiralty*, beſides coſts; and that the ſaid judgment is in full force.

To which *plea* the plaintiff demurred, and ſhewed for cauſe, that the concluſion of the *plea* is wrong, in not verifying the *plea* by the record of the judgment therein *pleaded*; but that matter was not mentioned at the bar, the *plea* being adjudged to be bad in ſubſtance. The defendant *pleaded not guilty* likewiſe by leave of the court.

Lord *Hardwicke*. I cannot ſee how a recovery of damages in *prohibition* can be a *bar* for an action on the ſtatute for double damages, and the penalty of 10 *l.* I have always taken it, that the damages recovered on the attachment for a prohibition, were only from the time the prohibition was delivered: we muſt take it as if an original writ of *prohibition* had iſſued out of *Chancery* to the judge below, and the party had ſtill gone on proceeding, which is a contempt; and for that contempt and the damages, the ſtatute gives an action. The procedings on the attachment, are for carrying on the cauſe below, after the prohibition, which are the very words of the writ; and how can he on ſuch a ſuit recover damages incurred before the prohibition was granted? There are ſeveral caſes where a recovery in one action ſhall be a *bar* to another action of the ſame nature; but that is where the firſt recovery is a ſatisfaction for the very thing demanded by the *ſecond* action; ſo in an action of *trover*, the plaintiff recovers damages for the thing, and it is as a ſale of the thing to the defendant, which veſts the property in him; and therefore it is a *bar* to an action of *treſpaſs* for the ſame thing; but that is not this caſe, for the preſent action is not for what was recovered on the prohibition, but for a contempt, and a penalty to the King.

Per curiam. The plaintiff muſt have judgment. *Vide Caſes Temp. Lord Hardw. p.* 317.

Michaelmas, 10 *Geo.* 2. *Street* v. *Hopkinſon.*

See this caſe fully ſtated in page 423 of this work, under the head *Error.*

Trinity, 11 *Geo.* 2. *Webb* v. *Turner.*

The declaration was of *Michaelmas* term, for an aſſault on the 18th of *October*, and an impriſonment from thence for *twenty-five weeks*. And after a verdict for the plaintiff, it was moved in arreſt of judgment, that the action was brought too ſoon; and it appeared damages had been given for an impriſonment long after the action was depending. And 2 *Saund.* 169. *Salk.* 662. 5 *Mod.* 286. *Cro. Jac.* 618. 1 *Ven.* 103. *Hob.* 189. *Carth.* 383. 3 *Lev.* 246. were cited in ſupport of the objection.

But for the plaintiff it was argued, that the *continuance* in this caſe was laid under a *ſcilicet*, and therefore according to *Allw.* 22. *Hardr.* 4. and *Hob.* 171. 284. it will not vitiate what is properly laid in time; and that this differs from all the caſes where the time is affirmatively laid. Beſides, it is laid, that he did impriſon the plaintiff, and therefore reſpects a time paſt, and as to that only the evidence could be applied.

And of this opinion was the court; therefore the plaintiff had judgment. *Vide Stra. vol.* 2. *p.* 1095.

Hilary, 15 *Geo.* 2. *Marſhal* v. *Riggs*.

See this caſe fully ſtated in page 73 of this work, under the head *Amendment*.

Hilary, 15 *Geo.* 2. *The King* v. *Jones*.

A *plea in abatement*, filed to an information in nature of a *quo warranto*, was ſet aſide for want of a title to the annexed affidavit; becauſe the practice in the *Crown-Office* cannot alter the act of parliament. *Vide Stra. vol.* 2. *p.* 1161.

Hilary, 16 *Geo.* 2. *Herbert* v. *Griffiths*.

To an action of *debt* on a bond for performance of covenants, the defendant *pleaded that he owed nothing*, to which there was a demurrer, and joinder in demurrer. And on the defendant conſenting to put the plaintiff into as good a condition as if he had *pleaded* right at firſt, the court permitted him to waive his firſt *plea*, and *plead performance* of covenants. *Vide Stra. vol.* 2. *p.* 1181.

Hilary, 16 *Geo.* 2. *Tomlin* v. *Purlis*. Error.

On an action of *debt* brought in an inferior court at *Rocheſter* on a bond, the defendant *pleaded dureſs* of impriſonment; to which the plaintiff replied, that he was at large, and at his own diſpoſal, and executed the bond of his free-will; and not for fear of impriſonment; and concludes to the country; to this there was a demurrer, and judgment given for the plaintiff.

It was now objected on *error*, that it is not ſaid he was *out of any priſon whatever*, which is the antient way of *pleading*, and that at leaſt the replication ſhould have concluded with an *averment*.

Per curiam. This is ſuch an affirmative as implies a negative; like the caſe of *pleading* in a writ of right, where the demandant counts, that he has more right than the tenant, and the *plea* of the tenant is, that he has more right than the demandant. The antient rule of requiring an affirmative and negative has been long broke into, as in the common caſe of *infancy*, where formerly they not only replied *full age*, but alſo traverſed the *infancy*, which is not now required. Sir *Thomas Jones* 6. It is enough if the *ſecond* affirmative is ſo contrary to the firſt, that the firſt cannot in any degree be true. So the judgment was affirmed. *Vide Stra. vol.* 2. *p.* 1177.

Eaſter, 16 *Geo.* 2. *Dewey* v. *Sepp*.

The defendant obtained time to *plead*, on the terms of *pleading* an iſſuable *plea*, rejoining *gratis*, and taking ſhort notice of trial. The action was on a bond conditioned to ſurrender a copyhold at the requeſt and coſts of the plaintiff, and the *plea* was, that the plaintiff never requeſted; the plaintiff replied a requeſt, and made up the iſſue, with a rejoinder to the country, which the defendant ſtruck out, and demurred ſo near to the *aſſizes*, that the plaintiff expecting a trial, had the record made up, and actually tried the cauſe before he heard of the demurrer. And now on motion the court ſet aſide the verdict, for the conſtruction of theſe terms impoſed on the defendants, when they aſk time to *plead*, is not to oblige them at all events to join iſſue to the country; but only where the replication offers a fair iſſue, and affords no reaſonable cauſe of demurrer: now here the replication not ſhewing any tender of a ſurrender, does give ſuch a colour of objection, as will warrant what the defendant has done. *Vide Stra. vol.* 2. *p.* 1185.

Trinity, 16 *Geo.* 2. *Long* v. *Miller*.

When the rules to *plead* ran for *eight days*, the courſe of the court was to allow the *four firſt* only for *pleas* in *abatement*; but as to *pleas* in *chief*, it was ſufficient if they came in at any time before judgment ſigned. In *Trinity*, 6 *Geo.* 2. the time for *pleading* was ſhortened to *four days*, but no proviſion made for any diſtinction between the two ſorts of *pleas*. In the preſent caſe, the rule was given the 7th of *May*, which expired the 11th, and (no judgment being ſigned) the defendant, on the 16th, put in a *plea* in *abatement*, notwithſtanding which the plaintiff ſigned his judgment.

Per curiam. He had a right ſo to do. Whilſt the *eight day* rule ſtood, the plaintiff was not obliged to regard a *plea* in *abatement*, that did not come in within the *four days*; but might ſign his judgment, as if there was no *plea* at all, *Styles, Pr. Reg.* 369. 1 *Lill.* 2. Now, when we ſhortened the general time of *pleading*, can it be imagined we intended to enlarge it as to *dilatory pleas*? They ſtill ſtand on the ſtrict rules of the court, and muſt come in within the *four days*, and cannot be received after as *pleas* in *chief* may. *Vide Stra. vol.* 2. *page* 1192.

Hilary, 18 *Geo.* 2. *Wilkins* v. *Brown*.

On an action of *covenant* brought by the plaintiff, as executrix of one *Bullock*; the defendant *pleads*, that there was another executor, who proved the will, adminiſtred, and is living; wherefore, as he is not joined, he prays the bill may be abated. The plaintiff replies, that the other executor named in the will is an infant of *ſeven years* of age, and never adminiſtred, and concludes with an averment; to which the defendant demurred generally; and on argument, the court held it an ill replication; the *plea*, they ſaid, contained full matter of *abatement*, if it was true; and the plaintiff ſhould therefore have joined iſſue upon it, and not gone over to a matter of infancy, which would have been properly under conſideration upon the iſſue: a probate granted to one under *ſeventeen* is not therefore void. And if the infant really was not joined in the probate the plaintiff ſhould have ſet it out on *oyer*, and have traverſed the never adminiſtering as executor. 1 *Lev.* 299. 1 *Brownl.* 101. and *Smith* v. *Smith*, in *Yelv.* and Sir *T. Jones's Reports*. The judgment was to abate the bill. *Vide Stra. vol.* 2. *p.* 1220.

Eaſter, 18 *Geo.* 2. *Sargent* v. *Reed*.

In an action of *treſpaſs* for taking *three buſhels* of *barley*; the defendant *pleads*, that *R. D.* being ſeiſed in *fee* of the manor of *Penzance*, of which the pier or key was parcel, he and all thoſe whoſe eſtate he had, at their own coſts, had uſed, and ought to repair it, and had of right taken a reaſonable duty, called *buſhelage*, viz. *three Wincheſter buſhels of barley, out of and for every ſhip's cargo of barley brought on the ſaid key to be exported in any ſhip*; and that he by bargain and ſale *for the conſiderations therein mentioned*, ſold it to the corporation of *Penzance*, *To hold* to them and their ſucceſſors in fee-farm for ever, by virtue whereof they became, and yet are, ſeiſed of the premiſes in their *demeſne* as of fee; then he ſhews, that the plaintiff brought on the key a cargo of barley, conſiſting of 1200 *Wincheſter* buſhels, out of which he, as ſervant of the corporation, and by their command, took the *three buſhels*, as by law he might. The plaintiff, by his replication, denies the preſcription; and iſſue being joined, it went down to trial, and there was a verdict for the defendant.

It was now moved in arreſt of judgment, that the preſcription was unreaſonable and uncertain, the word *cargo* being too general; and three buſhels out of a ſmall parcel, as well as a large one, not being a reaſonable proportion: And 2 *Lev.* 96. *Raym.* 233. were cited.

To this it was anſwered, and reſolved by the court, that the word *cargo*, as referred to a ſhip, was very intelligible, and muſt mean the whole loading. It may as well be ſaid that the word *ſhip* is uncertain, one being much bigger than another; and there are many caſes where words as general have been allowed. 4 *Mod.* 319. *Stil.* 224. 358. 1 *Vent.* 114. 1 *Sid.* 98. *Cro. Jac.* 307. 1 *Bulſt.* 126. 2 *Vent.* 67. 78. 2 *Sid.* 174. *Lutw.* 1519. *Hob.* 85.

Another exception taken, was to the manner of ſetting out the title of the corporation, the bargain and ſale being only ſaid to be for the conſiderations therein mentioned, whereas it ought to appear to have been for *money*, or a *valuable* conſideration, according to 1 *Lev.* 170. *Mo.* 569. 1 *Co. Mildmay's caſe.* 3 *Lev.* 233.

The court ſeemed to think this way of *pleading* it would be ill on a demurrer, but was now cured; it not being a defective title, but a title defectively ſet out, according to *Salk.* 365. Wherefore the rule to ſhew cauſe was diſcharged. *Vide Stra. vol.* 2. *p.* 1228.

Trinity, 18 *Geo.* 2. *Webb.* v. *Holt.*

The defendant *pleading* a *ſham plea*, the plaintiff obtained the common rule, that the defendant ſhould *plead peremptorily* on the morrow ſuch a *plea* as ſhould not be waived; and ſerved a copy of the rule on the defendant's attorney, who taking no notice of it, the plaintiff, after the day was out, ſigned judgment; which the court, on the maſter's report, held to be irregular, the *firſt plea* ſtanding, if the defendant did not lay hold of the opportunity given him of altering it, whereby the plaintiff has the benefit of his motion. *Vide Stra. vol.* 2. *p.* 1234.

Michaelmas, 19 *Geo.* 2. *Cary* v. *Holt*

The plaintiff declared in *treſpaſs* on his poſſeſſion; the defendant makes title, and gives colour to the plaintiff; the plaintiff replies *of his own proper injury*, and traverſes the title ſet out by the defendant: and on demurrer, and on the authority of *Goſlin* v. *Williams, Eaſter,* 5 *Geo.* 1. the court held this a good replication; for it lays the defendant's title out of the caſe, and then it ſtands on the plaintiff's poſſeſſion, which is enough againſt a wrong doer, and the plaintiff need not reply a title. Therefore judgment was given for the plaintiff. *Vide Stra. vol.* 2. *p.* 1238.

Michaelmas, 19 *Geo.* 2. *The Weavers Company, qui tam, &c.* v. *Forreſt and four others, on ſeparate Actions.*

See this caſe fully ſtated in page 300 of this work, under the head *Corporations.*

Eaſter, 20 *Geo.* 2. *Thompſon* v. *Tiller,*

The defendant, by leave of the court, *pleaded non aſſumpſit*,, and the ſtatute of limitations, and delivered it to the plaintiffs attorney, who made up the iſſue, and delivered it, with notice of trial, to the defendant's attorney, who paid for it. The plaintiff's attorney finding afterwards it ſhould have been made up with the *clerk of the papers*, went and paid him his fees for ſo doing, made up the record, and went to trial. And the court refuſed to ſet it aſide, though the defendant made no defence.

Per curiam. He was in the firſt fault, in not leaving his *pleas* in the office. *Vide Stra. vol.* 2. *p.* 1266.

Eaſter, 20 *Geo.* 2. *Blackbourn* v. *Matthias.*

The defendant *pleaded* the *general iſſue*, but forgot to give notice at the ſame time of a ſet off; and on a motion in time, the court gave leave to withdraw the *plea*, in order to deliver the ſame *plea* again, with a proper notice of ſet off, and ſaid it had been done ſo before. *Vide Stra. vol.* 2. *p.* 1267.

Eaſter, 20 *Geo.* 2. *Anderſon* v. *Baddiſlade.*

On a writ and declaration of this term, and an *eight day* rule to *plead* given, the defendant at the end of the *eight days*, put in a *plea* in *abatement*, which the court a motion ſet aſide; for they only gave that time to *plead* in *chief*, and never intended to enlarge the time for a dilatory *plea.* *Vide Stra. vol.* 2. *p.* 1268.

Trinity, 21 *Geo.* 2. *Tarlton* v. *Wragg.*

The court gave leave to withdraw the *general iſſue* in order to bring money into court, and *replead* it; within the reaſon of *Blackbourn* v. *Matthias* not delaying the plaintiff. *Vide Stra. vol.* 2. *p.* 1271.

Trinity, 21 *Geo.* 2. *Symonds* v. *Parmenter.*

On an *aſſumpſit* brought by *original* againſt *two* defendants, the plaintiff ſhewed that he had outlawed *one* of them, and the *other pleaded* in *bar*, that his partner, ſo outlawed, was beyond ſea at the time of the *outlawry.* On demurrer it was objected, that this could not be *pleaded* in *bar*; to which it was anſwered, that it could not be *pleaded* in *abatement*, becauſe the defendant could not give the plaintiff a better writ, and the court would take notice, that it was in the plaintiffs power to prevent its being a *bar* by diſcontinuing.

Per curiam. If this matter is ever to be *pleaded*, there will be an end of ſuing partners whilſt any one is abroad, which is often the caſe; therefore let the plaintiff have judgment. *Vide Stra. vol.* 2. *p.* 1269.

Hilary, 30 *Geo.* 2. *Kilwick* v. *Maidman.*

On a motion on behalf of the plaintiff to ſet aſide the defendant's *plea*, with coſts, as irregular; and for leave to ſign judgment,

The caſe was, the defendant had time to *plead* given him by a judge's order, *viz.* until *two days* before the *Eſſoign*-day of this preſent term, on the uſual terms, "of *pleading iſſuably*, &c." The order was not obtained till after the *four day* rule for *pleading* was expired. Before the term, and *within* the time allowed by the judge's order, the defendant *pleaded* a *plea* of *tender*; which *plea* was *intituled* (as it was allowed it might) as of the *preceding* term.

The defendant's council on ſhewing cauſe againſt ſetting aſide the *plea*, *urged*, that it was a *fair*, *honeſt plea*, in its own nature; and within time, not being after *imparlance*, but as a *plea* of the laſt term; and that it was an *iſſuable plea*, within the meaning of the judge's order. He ſaid, that a *plea in abatement*, (though ſtrictly *iſſuable*) would not be deemed ſo, as tending to delay the plaintiff.

The court concurred entirely, on the whole of this reaſoning, with the defendant's council, and denied the motion. *Vide Bur. vol.* 1. *p.* 59.

Eaſter, 30 *Geo.* 2. *Cooper* v. *Marſhal.*

See this caſe fully ſtated in page 268 of this work, under the head *Common.*

Eaſter, 30 *Geo.* 2. *The King* v. *Roger Philips, Mayor of Carmarthen.*

On a rule to ſhew cauſe, "why there ſhould not be " a *new trial*," on an inſinuation, " that the judge, " who tried the cauſe, had *miſdirected* the jury;" which *miſdirection*, as alledged, was as follows: " The judge had precluded the defendant from giving " any evidence to prove his ſwearing, as ſet forth in " the *ninth iſſue* joined (of which there were *fourteen*) " the judge apprehending, and directing the jury, " that it could be of no kind of ſervice to the defen- " dant to be admitted to prove an iſſue, which if " proved, or even admitted, could not at all tend to "make out his right; for that if this ſwearing, as under a *charter-election*, were to be admitted, yet ſtill it would not appear in any part of the record, that he was regularly ſworn under *a mandamus* election; which was the ſpecies of election under which the defendant claimed."

The council, on ſhewing cauſe, ſaid, that they were prepared to convince the court, "that the direction of the judge was right; and conſequently, that the verdict ought to ſtand."

Lord *Manſfield.* The direction of the judge was certainly right. Therefore, if you ſhould prevail in this application for a *new trial*, it could be of no ſervice: for as the record ſtands, the ſame direction muſt be given again.

On this, the court enlarged the rule to ſhew cauſe, with this addition, *viz.* "why the verdict ſhould not be ſet aſide, and a *repleader* awarded."

After hearing the arguments of the council on both ſides, on the rule being enlarged, the court gave their opinion.

Lord *Manſfield.* If this iſſue, on this ſwearing in, had ſtood alone, this had been an *immaterial* and *void* iſſue; as it tends to *prove nothing*, either for the *crown*, or for the defendant; and from which, no *concluſion* can be drawn, *either* way.

It appears alſo on the record, that this might *have been ſo pleaded*, *as* to have ſhewn whether he had, or had not a right; (if the queſtion had been confined to this ſingle iſſue) what is the rule of law then, as to ſuch an *immaterial iſſue* joined, and a verdict on it? It is, "that when the finding on it does not *determine the right*, the court ought to award a *repleader*, unleſs it appears from the whole record, that no manner of *pleading* the matter could have availed."

Suppoſing the ſwearing-in to be the *only* iſſue; is it not a queſtion totally inconcluſive, "whether he was, or was not, ſworn before theſe perſons? Does it at all conclude to the real queſtion? Is not this manifeſtly a ſlip? Does it not appear that this *plea* could have been mended? certainly it could; *viz.* by *pleading* the ſwearing in to have been agreeable to *ſtat.* 11 *Geo.* 1. *c.* 4. (which directs it to be done before the preſiding officer;) therefore the real *juſtice* of this caſe is, that this *ſlip* ſhould not be *fatal for ever.*"

I agree, "that if it appeared on the whole record, that the defendant was not duly elected," it would be *uſeleſs* to grant a *repleader*; but if the reſt of the iſſues are only *parts* of, and *dependant* on the *whole title*, the ſame reaſon does not then hold. The way to do *compleat* juſtice, is to let in *one* ſide without prejudicing the *other.*"

If a *repleader* was to be granted, (on a ſuppoſition of this being the *only* iſſue) it muſt be without coſts. As this was a *miſtake* of the defendant, (in which the proſecutor was not to blame) we ought to do the moſt complete juſtice in our power between both.

The Lord Chief Baron, who tried the cauſe, was right in his opinion, "that he could not admit proof *different* from the *iſſue joined*;" and alſo, "that this iſſue was *connected* with the others." If ſo, the verdicts were *without evidence*: and it was agreed, "that they were to be *without prejudice.*" Therefore ſuch verdicts ought to be ſet aſide, as without evidence; and not to conclude againſt the defendant, which would be a prejudice. This ſeems to be the true way to come at juſtice, and what we ought to do if we can.

Deniſon, Juſtice. Formerly verdicts were not uſed to be ſet aſide; and then *repleaders* uſed frequently to be granted.

I think we may ſet aſide the whole verdict on one of the iſſues being void. And this is better than granting a *repleader*; on which a writ of *error* may be brought, and may long depend; which will be a much greater delay of juſtice.

Foſter, Juſtice. This caſe is an election under a *mandamus* on *ſtat.* 11 *Geo.* 1. in order to ſettle the peace of the borough. Here are *twelve iſſues* joined, all found for the King, and *without evidence* on any one of them; ſo that none of them have been yet *really* tried. It is agreed, "that in caſe of a ſingle iſſue, which does not determine the right, a *repleader* may be granted.

The *ninth iſſue* in this caſe falls directly within this rule. It is totally immaterial to the queſtion of right.

I think, as this caſe is circumſtanced, the agreement mentioned by the Lord Chief Baron, "that the verdicts were to be without prejudice in any future trial," may, without a ſtrain, be extended to any *future litigation* in the cauſe.

Lord *Manſfield.* I am now fully ſatisfied, by what my brothers have ſaid, that the whole verdict may be ſet aſide, on payment of coſts, and with liberty to amend the *plea*, but that muſt be on a particular motion. It accordingly was afterwards granted in this cauſe. *Vide Bur. vol.* 1. *p.* 292.

Eaſter, 30 *Geo.* 2. *Robinſon* v. *Raley.*

Adjudged, That in an action brought on a bond, the plaintiff has a right in *pleading* thereon to reply, that the bond was given on another account; and to traverſe the corrupt agreement with an *abſque hoc*, i. e. *without this*, or deny the corrupt agreement *directly*, and conclude to the *Country*. *Vide Bur. vol.* 1. *p.* 317.

Michaelmas, 30 *Geo.* 2. *Roades* v. *Barnes*

See this caſe fully ſtated in page 347 of this work, under the head *Debt*.

Hilary, 32 *Geo.* 2. *The King* v. *Roger Philips.*

See this caſe fully ſtated in page 313 of this work, under the head *Coſts*.

Hilary, 32 *Geo.* 2. *Cooke* v. *Sayer.*

See this caſe fully ſtated in page 313 of this work, under the head *Coſts*.

Hilary, 32 *Geo.* 2. *Alder* v. *Chip.*

See this caſe fully ſtated in page 74 of this work, under the head *Amendment*.

Eaſter, 33 *Geo* 2. *Johnſon and others*, *Aſſignees*, *&c.* *of Hargrave, a Bankrupt*, v. *Smith*, *Widow*, *Executrix*, *&c.*

See this caſe fully ſtated in page 9 of this work, under the head *Abatement*.

Eaſter, 33 *Geo.* 2. *Fletcher* v. *Hennington.*

On an action of *debt* on a bond conditioned for payment on or before ſuch a day, the defendant, after praying *oyer* of the condition, *pleaded* payment at a day *before* the particular day ſpecified for payment of it. The plaintiff demurred to this *plea*, as offering an *immaterial iſſue*. The defendant joined in demurrer.

The court ſaid that the proper method, in caſes where the money is made payable "at or before ſuch a day," was to *plead*, as is done here, "that it was paid at ſuch a *precedent* day." And then, if the plaintiff diſputes the reality of any payment at all, he may reply, "that it was not paid at the particular day mentioned in the *plea*, "*nor at any time before or after that day*; and this will bring the point to the material and proper iſſue, "whether it has been ever paid at all or not." In conſequence of the foregoing reaſoning, it was held by the court, that the plaintiff in the preſent caſe ought to have replied, and not to have demurred. On which the plaintiff's council prayed a day or two's time to withdraw his demurrer, and reply to the defendant's *plea*; which was granted. *Vide Bur. vol.* 2. *p.* 944.

Trinity, 33 & 34 *Geo.* 2. *Trapaud* v. *Mercer.*

On arguing a demurrer in this caſe, the queſtion turned on the *pleadings*, viz. the replication concluded to the country; and the defendant's council inſiſted that it ought to have concluded with an *averment*.

Adjudged, "That where there is an *affirmative* and a *negative*, the concluſion of the *plea* ought to

“ be to the country. In the preſent caſe the demurrer was grounded on a ſuppoſition, “ that as theſe *plead-* “ *ings* ſtood, here was not an *affirmative* and a *nega-* “ *tive.*” *Vide Bur. vol.* 2. *p.* 1022.

Trinity, 33 & 34 *Geo.* 2. *Hewſon* v. *Brown.*

See this caſe fully ſtated in page 261 of this work, under the head *Certiorari.*

Trinity, 33 & 34 *Geo.* 2. *Ferguſon & Wife* v. *Corniſh.*

See this caſe fully ſtated in page 610 of this work, under the head *Leaſes.*

Trinity, 33 & 34 *Geo.* 2. *Nedriffe* v. *Hogan.*

On an action on ſeveral promiſes, *viz. indebitatus aſſumpſit* for 40*l.* lent, 40*l.* had and received to the plaintiff's uſe, and 40*l.* laid out and expended for the plaintiff's uſe.

The defendant, by leave of the court, *pleaded* ſeveral *pleas*; one of which was a *plea* of *ſet-off*; namely, of a penalty of 200*l.* incurred by the non-performance of certain *articles of agreement*, relating to the ſale of a ſhip.

The plaintiff demurred, and ſhewed ſeveral cauſes of demurrer; one whereof was, “ that the penalty of “ articles of agreement (which ſounds in damages only, “ and is not a liquidated, certain debt or demand) can- “ not *be ſet off.*”

The defendant put in a joinder in demurrer.

On arguing this demurrer, the plaintiff's council *urged*, that this ſet-off is not within *ſtat.* 2 *Geo.* 2. *cap.* 22. For no penalty at all can be ſet off under that ſtatute; *whereas* the preſent caſe is not the penalty of even a bond conditioned for payment of money only, but a penalty of a bond *conditioned for performance of articles*; which penalty ſounds in damages; and damages cannot be ſet-off. It ought to be a certain demand; a penalty ſounded in damages was never meant or intended by this ſtatute.

Stat. 8 *Geo.* 2. *cap.* 24. is ſtill clearer, that fixes it to the ſum *truly and juſtly due*; even on bonds conditioned for payment of money only: which only proves, “ that the *penalty* of ſuch a bond as this is cannot be ſet “ off.”

Lord *Mansfield* ſtopt the defendant's council, and declared it to be moſt clearly a caſe not within the ſtatute; as it was for the whole penalty. He ſaid, it is moſt clearly unjuſt, and contrary to the intention of the ſtatutes, “ that the *whole penalty* ſhould be admitted “ to be *pleaded* by way of ſet-off, when perhaps a very “ ſmall ſum was really due for ſuch damages as the de- “ fendant had actually ſuſtained.” Therefore the court gave judgment for the plaintiff. *Vide Bur. vol.* 2. *p.* 1024.

Trinity, 1 *Geo.* 3. *Sir John Aſtly Baronet*, v. *Young.*

See this caſe fully ſtated in page 314 of this work, under the head *Coſts.*

Hilary, 3 *Geo.* 3. *Howard and another, Executors, &c.* v. *Jemmet, Executor, &c.*

See this caſe fully ſtated in page 203 of this work, under the head *Bankrupts.*

Trinity, 3 *Geo.* 3. *Combe, Eſq*; v. *Pitt.*

Held, that the defendant's *plea* in *abatement*, ſhewing, “ that another action was brought againſt the de- “ fendant, *in the ſame term*, by another perſon, for “ the ſame offence:” ought to have ſhewn, “ that “ the right of action was attached in ſome other per- “ ſon before the preſent plaintiff's action was com- “ menced.” *Vide Bur. vol.* 3. *p.* 1432.

Trinity, 4 *Geo.* 3. *Baddeley* v. *Leppingwell.*

See this caſe fully ſtated in page 440 of this work, under the head *Eſtates.*

Hilary, 5 *Geo.* 3. *The King* v. *Grainger.*

On a motion to ſet aſide the defendant's *plea* to an indictment, and that judgment might be entered againſt him by default, as the proſecutor had, by reaſon of his *dilatory plea*, loſt the benefit of a trial at the ſittings after term.

The objection taken was, “ that the *plea* is a *dila-* “ *tory* one; and yet is not *verified by affidavit*; nor is “ any probable matter ſhewn to the court to induce “ them to believe that the fact of it is true.”

The council for the motion grounded his objection on *ſtat.* 4 & 5 *Ann, cap.* 16. *ſect.* 11. which ſays, “ that “ *no dilatory plea* ſhall be received in any court of re- “ cord, unleſs the party offering ſuch *plea* do, by *affi-* “ *davit*, prove the truth thereof; or ſhew ſome pro- “ bable matter to the court to induce them to believe “ that the fact of ſuch *dilatory plea* is true.” On which a rule to ſhew cauſe was granted.

The defendant's council cited the *ſeventh ſection* of the foregoing ſtatute; and Mr. Juſtice *Foſter's* book, page 16. *Charles Kinloch's Caſe*, where there was no *affidavit.*

Lord *Mansfield.* That caſe was at *bar*: it is not like the preſent caſe; nor does *ſect.* 7. of the act extend to *ſect.* 11. It is uſual to annex *affidavits* to *pleas* of this ſort in the *Crown Office*; and I do not ſee why they ſhould not be annexed. Therefore the rule was made abſolute to ſet aſide the *plea* for want of an *affidavit. Vide Bur. vol.* 3. *p.* 1617.

Trinity, 5 *Geo.* 3. *Biſſex* v. *Biſſex.*

See this caſe fully ſtated in page 109 of this work, under the head *Arbitration and Award.*

Trinity, 5 *Geo.* 3. *Weſton* v. *Maſon. The ſame* v. *Chapman.*

See this caſe fully ſtated in page 119 of this work, under the head *Arreſt of Judgment.*

Michaelmas, 6 *Geo.* 3. *Zouch, on the Demiſe of Abbott and Hallet*, v. *Parſons.*

On a ſpecial caſe in *ejectment*, it was *adjudged*, that an infant, or they who ſtand in his place, cannot *plead* “ *non eſt factum*,” and give the infancy in evidence; but they muſt *plead* the *infancy ſpecially*, to avoid the deed; and that *plea* avoids it, by relation back to the delivery. The reaſon of this is, becauſe it has an operation from the delivery, and not becauſe it has the form of a *deed.*

The deed of a *feme covert* has the form; but ſhe may *plead non eſt factum*, becauſe it has no operation. *Vide Bur. vol.* 3. *p.* 1805.

Michaelmas, 6 *Geo.* 3. *Harvey* v. *Peake.*

See this caſe fully ſtated in page 583 of this work, under the head *Iſſue.*

Poor.

Michaelmas, 1 *Ann.* *Anonymous.*

Per curiam. If a *pauper* be nonſuited, there ſhall be coſts taxed, and he ſhall not afterwards go on without paying the coſts, or ſhewing, according to the act of parliament, that he was whipped. *Vide Mod. Rep. vol.* 7. *p.* 114.

Michaelmas, 2 *Ann.* *The Pariſh of Cunmer* v. *The Pariſh of Milton.*

A child was born at *Cunmer*; the father, while the child was under *ſeven years* of age, removes to and gains a ſettlement in *Milton*, and this was held a ſettlement for the child; and it was ſaid by the court, that if a father be ſettled in a pariſh, and dies, and afterwards his wife dies in child-bed, the child ſhall be there ſettled. *Vide Mod. Rep. vol.* 6. *p.* 87.

Michaelmas, 2 *Ann. Anonymous.*

A *feme covert* was indicted by her huſband for poiſoning his cows with bruiſed glaſs put in their grains; and ſhe was admitted in *forma pauperis*, though the court ſaid, the huſband could not convict her. *Vide Mod. Rep. vol.* 6. *p.* 88.

Trinity, 3 *Ann. The Inhabitants of the Pariſh of Weſtbury, in the County of Wilts*, v. *The Inhabitants of Coſtham.*

A *poor* woman with child was removed by order of two juſtices from *Weſtbury* to *Coſtham*, and before the ſeſſions ſhe was brought to bed there, and then the order was quaſhed.

Per curiam. The child is legally ſettled in the pariſh of *Weſtbury*, from whence the mother was illegally removed, for they ſhall not take advantage of their own wrong; and ſo it would have been if they had not known of the woman's being with child at the time of the wrongful removal. If a woman with child be travelling without fraud of the pariſh in which ſhe is ſettled, and in ſuch travel be delivered of her baſtard, it ſhall in that caſe be ſettled where it was born; otherwiſe, if there be fraud: and according to this doctrine was quoted the caſe of the pariſh of *Bowham in Eſſex* ſome years ago, 2 *Bulſt.* 349. *Vide Mod. Rep. vol.* 6. *p.* 213.

Michaelmas, 3 *Ann. The Pariſh of St. Clement's* v. *The Pariſh of St. Andrew's.*

See this caſe fully ſtated in page 681 of this work, under the head *Orders, on Removals*, &c.

Trinity, 5 *Ann. Willimot* v. *The Chancellor of Worceſter.*

In this caſe, which ſee fully ſtated in page 64 of this work, under the head *Abatement*, it was *adjudged* a ſingular favour to admit a defendant a *pauper*; but if ſuch defendant will *plead* a *dilatory plea*, the court will *diſpauper* him. *Vide Mod. Rep. vol.* 11. *p.* 83.

Michaelmas, 5 *Ann. St. George's Southwark* v. *St. Margaret's Weſtminſter.*

See this caſe fully ſtated in page 220 of this work, under the head *Baſtards.*

Eaſter, 8 *Ann. The Queen* v. *The Inhabitants of Puttenham.*

See this caſe fully ſtated in page 682 of this work, under the head *Orders on Removals*, &c.

Michaelmas, 8 *Ann. The Queen* v. *The Pariſh of St. Giles.*

See this caſe fully ſtated in page 603 of this work, under the head *Juſtices of Peace.*

Michaelmas, 3 *Geo. The King* v. *The Inhabitants of Hyworth.*

See this caſe fully ſtated in page 684 of this work, under the head *Orders, on Removals*, &c.

Hilary, 4 *Geo. The King* v. *Turner.*

The defendant being aſſeſſed towards the *poor*'s rate for his tithes as *vicar*, appealed to the ſeſſions, where he was abſolutely diſcharged.

Per curiam. As *vicar* he is chargeable by *ſtat.* 43 *Eliz.* and the ſeſſions has only power to moderate, but not to diſcharge. Therefore the order of ſeſſions was quaſhed. *Vide Stra. vol.* 1. *p.* 77.

Trinity, 4 *Geo. The King* v. *Skingle.*

Stat. 43 *Eliz. c.* 2. charges lands, tenements, tithes, *&c.* to the *poor's rate.* By a private ſtatute for erecting workhouſes in *Colcheſter*, the *poor* are provided for in another manner, and the occupiers of lands and tenements are made chargeable; and after a rate an appeal is given to the ſeſſions.

The defendant was *parſon*, and rated for his tithes, and appealed; and becauſe the word *tithes* was not in the act of parliament, which the ſeſſions looked upon as an abſolute repeal of *ſtat.* 43 of *Eliz. reſpecting Colcheſter*, therefore they diſcharged him.

Per curiam. He ought not to be exempted but by expreſs words, he being liable before. Here he is an occupier of a tenement, for tithes are a tenement, 1 *Vent.* 173. 2 *Lev.* 139. *Lutw.* 1563. 1 *Inſt.* 6. *Dy.* 83. *Litt.* 647. 32 *Hen.* 8. *c.* 7. *Co. Litt.* 159. *Cro. Jac.* 301. 2 *Inſt.* 625. wherefore the order of ſeſſions was quaſhed. In the caſe of *Powell* v. *Bull*, in *C. B.* this queſtion was determined in the ſame manner. *Vide Stra. vol.* 1. *p.* 100.

Hilary, 5 *Geo. The King* v. *The Inhabitants of Witham on the Hill.*

Per curiam. It appearing to us, that he is likely to become chargeable, is ſufficient, without ſaying *to the pariſh from whence removed*; for it is not to give a juriſdiction, but only the reaſon of the judgment. *Vide Stra. vol.* 1. *p.* 142.

Trinity, 5 *Geo. The King* v. *Munden.*

An order reciting that the defendant had a good fortune with his wife, and that her mother was *poor*, therefore he is ordered to provide for her; and in maintenance of the order, 1 *Bulſt.*——and 2 *Bulſt.* 345. and *Styles* 284. were cited.

Pratt, Chief Juſtice. On conſideration we are all of opinion, that the ſon-in-law is not bound either within the words or intent of the ſtatute, which provides only for natural parents. By the law of nature, a man was bound to take care of his own father and mother; but there being no temporal obligation to enforce that law of nature, it was found neceſſary to eſtabliſh it by act of parliament; and that can be extended no farther than the law of nature went before; and the law of nature does not reach to this caſe. As to the caſe in 1 *Bulſt.* it is plain the word *not* was left out only by miſtake; for the ſenſe of the clauſe leads you to read it, *not obliged*; and beſides, the judges were divided. The caſe indeed in 2 *Bulſt.* is an authority in point, as far as it will go; but that is no judicial authority, only a caſe at a judge's chambers. The ſame was alſo ſaid by the bye in the caſe of *The Queen* v. *Fane*, *Eaſter*, 10 *Ann*, but it never came judicially before the whole court till now. We are of opinion the order muſt be quaſhed. *Vide Stra. vol.* 1. *p.* 190.

Eaſter, 7, *or Trinity*, 8 *Geo. Noaks, or Nokes*, v. *Watts.*

Per curiam. It is ſettled in the *C. B.* and we *adjudge* it ſo here, that a *pauper* ſhall not pay coſts for not going on to trial, as other plaintiffs do. But if the coſts are taxed, we will prevent his being vexatious, by obliging him to pay them, before he ſhall try the cauſe. *Vide Stra. vol.* 1. *p.* 420. *Forteſcue*, *p.* 319.

Hilary, 11, *or Trinity*, 11 *Geo. Ancell, or Ayncell*, v. *Sloman.*

The plaintiff being admitted *in forma pauperis* by this court, brought an action againſt the defendant, in which he was nonſuited, and was taken in execution for the coſts of this *nonſuit*, having an eſtate fallen to him ſince; and now it was moved that he ſhould be diſcharged, becauſe by the law he who ſues *in forma pauperis* ſhall pay no coſts, but ſhall ſuffer ſuch puniſhment as the court ſhall think fit.

The court were of opinion, that if the plaintiff was a *pauper* when the cauſe was tried, he ſhall not pay coſts, and the deſcent of the lands to him ſhall not have relation to that time; ſo a rule was made to diſcharge him. *Vide Mod. Rep. vol.* 8. *p.* 344. *Forteſcue, p.* 320.

Hilary, 4 *Geo.* 2. *Buttler* v. *Inneys and wife*

The plaintiff ſued as a *pauper*, and was *nonſuited*; after which he brought a ſecond action, and recovered. And council moved on behalf of the defendants, that the coſts in the *firſt* action might be deducted out of a recovery in the *ſecond*, but it was refuſed. *Vide Stra. vol.* 2. *p.* 891.

Michaelmas, 4 *Geo.* 2. *Winter* v. *Slow.*

On a motion to ſtay the proceedings as a *pauper*, till he paid coſts in a former action, wherein he was nonſuited: it appeared that the nonſuit was on a ſlip of the attorney's, and not upon the merits of the cauſe, which the defendant might have gone into notwithſtanding, if he would. The court thought this was not vexatious, and therefore refuſed to ſtay proceedings. *Vide Stra. vol.* 2. *p.* 878.

Michaelmas, 4 *Geo.* 2. *Anonymous.*

A *pauper* having been *noſuited*, and having proceeded in a new action for the ſame cauſe; it was now moved to ſtay the proceedings on the new action, till the *pauper* ſhould pay the coſts of the former ſuit.

Per curiam. The practice of the court is, to *diſpauper* him. *Vide Fitz-Gibbons, p.* 161.

Eaſter, 5 *Geo.* 2. *The King* v. *The Inhabitants of Uttoxeter in the County of Stafford.*

See this caſe fully ſtated in page 259 of this work, under the head *Certiorari.*

Trinity, 5 *Geo.* 2. *Caſe* v. *Stephens.*

On an action of *covenant* in a leaſe for years, to indemnify againſt all charges on land, it was adjudged that the *poor's rate* by *ſtat.* 43 *Eliz.* was not a charge on the land, but a charge in reſpect of the land. *Vide Fitz-Gibbons, p.* 297.

Eaſter, 7 *Geo.* 2. *The King* v. *The Juſtices of Shrewſbury.*

See this caſe fully ſtated in page 259 of this work, under the head *Certiorari.*

Trinity, 7 *Geo.* 2. *Taylor* v. *Lowe.*

It was moved on the authority of *Noaks* v. *Watts*, that the plaintiff, who was a *pauper*, might be reſtrained from going on to trial till he paid coſts for his former *nonſuits*. But the court thought that caſe did not put it on a right foot, and that it was unneceſſary to make any rule about coſts, whilſt the admiſſion ſtood; and therefore ordered the plaintiff to ſhew cauſe why he ſhould not be *diſpaupered.* And on *affidavit* of ſervice, it was made it abſolute. *Vide Stra. vol.* 2. *p.* 983.

Michaelmas, 7 *Geo.* 2. *The King* v. *Dempſon.*

An order made on the father to maintain the ſon's wife after a divorce *a menſa et thoro*, for adultery, was quaſhed on the authority of the *King* v. *Munden*, *Trinity* 5 *Geo.* ſhe not being a natural relation of the father. *Vide Stra. vol.* 2. *p.* 955.

Eaſter, 9 *Geo.* 2. *The King* v. *Wright and Wife.*

The defendants were indicted for a *conſpiracy*, and the queſtion was, whether they could be admitted to defend *in forma pauperis.* And on conſideration and ſearch of precedents, the court was of opinion they might: for though it is not within *ſtat.* 11 *Hen.* 7. *cap.* 12. which relates to *civil ſuits*, yet it might be reaſonable to do it on indictments at common law, where the proſecutor, who can have no coſts, is not prejudiced. And the inſtances offered ſhew it to be the courſe of this court. In the *Exchequer* indeed there was a proviſion by *ſtat.* 2 *Geo.* 2. *cap.* 28. for defendants in cuſtom-houſe cauſes, but that might be thought neceſſary, there being no ſuch practice there. A rule was made on the uſual *affidavit*, for the defendants being admitted *in forma pauperis. Vide Stra. vol.* 2. *p.* 1041. *Caſes Temp. Lord Hardw. p.* 211, 253.

Michaelmas, 10 *Geo.* 2. *The Pariſh of St. Nicholas*, v. *The Pariſh of St. Peter in Ipſwich.*

In this caſe (which ſee fully ſtated in page 92 of this work, under the head *Apprentice*) it was ſaid by the court to be a vulgar error to think *ſtat.* 13 & 14 *Car.* 2. *c.* 12. was the firſt act about ſettlements: for in *Raſtal's* ſtatutes it appears, that ſo long ago as 27 *H.* 8. *c.* 25. and in *Edw.* the 6th's time, there were laws to that purpoſe. *Vide Stra. vol.* 2. *p.* 1067.

Trinity, 12 *Geo.* 2. *The Caſe of the Pariſh of St. Peter and Paul in Marlborough.*

Two juſtices, after reciting the inability of the pariſh of *St. Mary the Virgin* to maintain its own *poor*, ordered the churchwardens and overſeers of *St. Peter and St. Paul* to aſſeſs, raiſe and levy 60 *l.* for the maintenance of the *poor* of the other pariſh. And objection being made to their ordering ſuch a groſs ſum, the court held it well in that reſpect, according to 1 *Vent.* 350. *Salk.* 480. *Comb.* 309. But then the order was quaſhed, becauſe the juſtices had delegated their power of aſſeſſing and rating the pariſhioners to the churchwardens and overſeers; whereas by *ſtat.* 43 *Eliz. c.* 2. the juſtices are to make the rate on all, or particular perſons. *Vide Stra. vol.* 2. *p.* 1114.

Michaelmas, 13 *Geo.* 2. *Brittain* v. *Greenville.*

The defendant in *ejectment* obtained a trial at *bar*, on conſenting to pay bar coſts, and receiving *niſi prius* coſts. After this the leſſor was admitted *in forma pauperis*, and had a verdict againſt him. And now having brought a new *ejectment*, it was moved that the maſter might tax coſts, in order to ground a farther motion to ſtay his proceedings in the *ſecond ejectment.* But the court refuſed to make any rule, ſaying, every man had a right to a *ſecond* trial before *ejectments* were introduced, and might bring a writ of right after a verdict in *aſſize.* And they could not conſtrue the rule as a conſent on his part to pay coſts in all events, but only as terms put on the defendant. That the regular way when a *pauper* is vexatious was to *diſpauper* him; but they could not think he was ſo in the preſent caſe. *Vide Stra. vol.* 2. *p.* 1121.

Eaſter, 31 *Geo.* 2. *Baldwin and Wife* v. *Blackmore.*

This was a caſe reſerved at the *aſſizes*, for the county of *Lancaſter*, in an action for an aſſault on, and *falſe impriſonment* of the plaintiff's wife.

On the trial of the cauſe, there was a verdict for the plaintiff, and 1 *s.* damages, ſubject to the opinion of the court on the two following queſtions, *viz.*

1ſt, Whether there ought not to have been a *previous conviction* of *vagrancy*?

2dly, Whether the wife could be convicted of *vagrancy*, or be liable to be ſent to the houſe of *correction*, for returning without a certificate, as ſhe only accompanied and reſided with her own huſband?

After hearing of the council on both ſides, and taking time to conſider of the caſe, the court gave their opinion.

Lord *Mansfield*. It was manifeſt that the defendant, who was a juſtice of the peace, had *not* acted *intentionally wrong*; and it is plain that the jury were of that opinion, as appears by their giving *only* 1*s*. damages: the court would gladly therefore have leaned towards excuſing this gentleman from ſuffering for what he had honeſtly, and without any bad intention done, if they could have found him juſtifiable by any legal excuſe.

There is one fatal *objection* to his proceeding, which we cannot get over, and which puts all *other points* out of the caſe; and that is, that the *warrant* of commitment is *illegal*.

The *legality* of the warrant depends on *two* acts of parliament, or at leaſt on *one* of them; for there are *two* acts of parliament, on *one* of the *two* this warrant muſt be founded, though it does not appear on *which* of the *two* the juſtice proceeded.

Theſe *two* ſtatutes are 13 & 14 *Car*. 2. *cap*. 12. (a law made before certificates under 8 & 9 *W*. 3. *cap*. 30. exiſted) and 17 *Geo*. 2. *cap*. 5. which relates to perſons returning, *&c*. without bringing ſuch a certificate.

This *warrant* is not within *ſtat*. 13 & 14 *Car*. 2. nor is the caſe itſelf within it. Theſe perſons did not go to any pariſh, *carrying with them* a certificate of their being inhabitants of their proper pariſh; nor is the commitment made "to the houſe of correction, "*there to be puniſhed as a vagabond*," nor "to a pub- "lic workhouſe, there to be employed in work and "labour," as the ſtatute directs. So that the warrant is not at all agreeable to the directions of *that act*, which ſpecifies the particular manner of ſending the offender to the houſe of correction, or to a public workhouſe, for it is only "to remain till diſcharged "by due courſe of law."

This warrant cannot be good on *ſtat*. 17 *Geo*. 2. *cap*. 5. becauſe, though this is indeed a commitment to the houſe of correction, yet it is "to remain there till "diſcharged by due courſe of law;" whereas, by this act, the power given to the juſtice is, "to commit "ſuch offenders to the houſe of correction, there to "be kept to hard labour for any time *not exceeding one* "*month*." But this warrant is quite *general*; it is an indefinite commitment, not for a *preciſe limited time*, as the ſtatute expreſsly directs and requires.

This warrant of commitment is totally illegal, and conſequently the plaintiff is entitled to the damages that he has recovered.

Per curiam. Let the *poſtea* be delivered to the plaintiff. *Vide Bur. vol*. 1. *p*. 596.

Trinity, 33 & 34 *Geo*. 2. *The King* v. *Pearſon*.

On a motion to admit the defendant in *forma pauperis* on the uſual *affidavit*. It appearing to the court that this was on an attachment for a *contempt*, and not on a cauſe in court; and the defendant's council not being able to produce any precedent for ſo doing, the court denied the motion. *Vide Bur. vol*. 2. *p*. 1039.

Hilary, 2 *Geo*. 3. *The King* v. *Clarke and others*.

On a motion to make a rule abſolute (on *affidavit* of the ſervice of ſuch rule) for admitting a proſecutor of an indictment to proſecute in *forma pauperis*.

The court (on being apprized that it was on behalf of a proſecutor) denied the motion; as it was founded only on the common petition and *affidavit* uſually produced by defendants in order to their obtaining ſuch a rule: they held, that proſecutors ought not to be admitted to proſecute in *forma pauperis*, unleſs ſome *ſpecial* ground was laid for the motion.

Wilmot, Juſtice, ſaid, that in *civil* caſes, plaintiffs were not admitted to ſue in *forma pauperis*, unleſs council *certified*, "that there was ſome foundation for "their ſuing." *Vide Bur. vol*. 3. *p*. 1308.

Priſons, Priſoners, &c.

Michaelmas, 7 *W*. 3. *The King* v. *Row and Kendall*.

In this caſe, which ſee fully ſtated in page 263 of this work, under the head *Commitment*, *Holt*, Chief Juſtice ſaid, that the *Tower* was looked on by the law, as a *priſon*, within the *habeas corpus* act. *Vide Raym. vol*. 1. *p*. 66.

Hilary, 8 & 9 *W*. 3. *The Caſe of the Sheriff of Eſſex*.

The old ſheriff quitted the office without having delivered up the *gaol* to his ſucceſſor, and the juſtices of the peace pretending title to keep the cuſtody of it, excluded the new ſheriff. On which the court was moved on behalf of the new ſheriff; and the court held that the cuſtody of the *gaol* could not belong to any perſon but the new ſheriff; on which a rule was made that the old ſheriff ſhould deliver the cuſtody of the *gaol* to the new ſheriff, without taking any notice of the juſtices of peace. And becauſe the old ſheriff was out of poſſeſſion, the court ordered this rule to be ſerved on the *gaoler*, to the end that he ſhould permit the old ſheriff to make delivery of the *gaol* over accordingly.

Rokely, Juſtice. The county *gaol* is the *priſon* for the malefactors, and the ſheriff ought to keep them there; but *priſoners* for debt, *&c*. where an action lies againſt the ſheriff for their eſcape, may be kept where the ſheriff pleaſes. *Vide Raym. vol*. 1. *p*. 136.

Trinity, 9 *W*. 3. *Duncombe* v. *Church*, *Warden of the Fleet*.

The plaintiff obtained a judgment againſt the defendant for 4000 *l*. for an eſcape, and on *affidavit* being made that it was a juſt debt, it was moved that he might have a rule for *ſequeſtration* of the office, according to the late ſtatute. And the queſtion was, how this ſtatute ſhould be put in execution?

Per curiam. A commiſſion of *ſequeſtration* ought to be granted to commiſſioners appointed by the court, under the ſeal of the court. And a commiſſion was granted accordingly. *Vide Raym. vol*. 1. *p*. 233.

Hilary, 10 *W*. 3. *The King* v. *Fell*.

See this caſe fully ſtated in page 264 of this work, under the head *Commitment*.

Summer Aſſizes at Lincoln, 1699. *Wright* v. *Wilſon*.

Ruled by *Holt*, Chief Juſtice, in an action of *falſe impriſonment*, that if *A*. has a chamber adjoining to the chamber of *B*. and has a door that opens into it, by which there is a paſſage to go out; and *A*. has another door, which *C*. ſtops, ſo that *A*. cannot go out by that; this is no impriſonment of *A*. by *C*. becauſe *A*. may go out by the door in the chamber of *B*. though he be a treſpaſſer by doing it; but *A*. may have a ſpecial action on the *caſe* againſt *C*. *Vide Raym. vol*. 1. *p*. 739.

Michaelmas, 10 *W*. 3. *Pullen* v. *Benſon*.

See this caſe fully ſtated in page 338 of this work, under the head *Date, Day, and Delivery*.

Summer Aſſizes at Norwich, 12 *W*. 3. *Maſters* v. *Butcher*.

It was ruled by *Holt*, Chief Juſtice, in an action of *falſe impriſonment*, that an officer cannot juſtify the *impriſonment* of a man for non-payment of taxes under the general printed warrants, which the collectors have ſigned, by two juſtices of the peace; but they ought to have a ſpecial warrant. *Vide Raym. vol*. 1. *p*. 740.

Eaſter, 1 *Ann.* *Anonymous.*

IF a *priſoner* makes a negligent eſcape, and afterwards, on agreement between him and the plaintiff, at whoſe ſuit he is in execution, the plaintiff diſcharges him, the marſhal or *gaoler* cannot take him; for the re-taking of him, and rendering him to the *county gaol* upon the late ſtatute, is only ſhifting the *gaol*, and is founded upon the original proceſs, and only a continuation thereof.

Powell, Juſtice, put this caſe: ſuppoſe the marſhal ſuffers an eſcape, and then by virtue of the late act of parliament, by a judges warrant, the plaintiff retakes him, whether an action of eſcape lies againſt the marſhal? To which the court gave no anſwer. *Mod. Rep. vol.* 11. *p.* 3.

Michaelmas, 1 *Ann.* *Foxworthy's Caſe.*

Foxworthy being attainted of felony, was brought into this court, in order to plead a pardon granted him by the Queen, on condition that he ſhould go beyond ſea within a time limited, and there abide, *&c.* And after the allowance of the pardon his creditors moved the court, that they might have leave to charge him with civil actions, as *in cuſtody of the Marſhal of the Marſhalſea*, &c.

But the motion was denied by the court, becauſe it would defeat the effect of the Queen's pardon, by rendering *Foxworthy* incapable of performing the condition of going beyond ſea; and if he had not been pardoned, the attainder would have continued, and he would have been hanged: and there is no reaſon, why the pardon ſhould put the creditors in a better condition than they would have been without it, to the prejudice of the party for the benefit of whom it was granted. *Vide Raym. vol.* 2. *p.* 848.

Hilary, 2 *Ann.* *Sutton's Caſe.*

The court was moved on behalf of *Sutton*, the late marſhal of this court againſt *Southerne*, the preſent marſhal, who attended the court to reſtore *Sutton* to the poſſeſſion of the *King's Bench priſon*, out of which he pretended to have been turned by force, and it was inſiſted that the court might do it on motion, becauſe it was the *priſon* of this court, and ſo under the more immediate care of the court, who would protect it from all force and violence.

Per curiam. The court cannot hold plea of a forcible entry on motion, but *Sutton* muſt apply to the juſtices of peace of *Surrey*, who, on finding the force may reſtore him, or elſe he may indict the perſons who turned him out forcibly. So the motion was denied. *Vide Raym. vol.* 2. *p.* 1005.

Michaelmas, 2 *Ann.* *Noell* v. *Gray.*

See this caſe fully ſtated in page 163 of this work, under the head *Bail.*

Michaelmas, 3 *Ann.* *Cragger* v. *Glover.*

See this caſe fully ſtated in page 163 of this work, under the head *Bail.*

Trinity, 4 *Ann.* *Gerrard* v. *Delaval.*

In an action of *debt* on a bond of 200*l.* the defendant, without craving *oyer* of the bond or condition, pleaded that he was diſcharged by the act for the relief of *poor priſoners*, 2 & 3 *of the Queen, cap.* 15.

The Chief Juſtice took the exception, that the condition of the bond not appearing, the whole 200*l.* muſt be taken to be a debt, and conſequently the defendant is not within the ſtatute (though in truth the bond was only for the payment of 100*l.*) and for this reaſon judgment was given for the plaintiff by the whole court: for they could not take notice but that the whole 200*l.* was a juſt debt to the plaintiff.

The Chief Juſtice ſaid, there were three ſorts of diſcharges by this ſtatute. 1ſt, The original diſcharge by juſtices of peace at ſeſſions, out of actual cuſtody. 2dly, If a perſon ſo diſcharged was arreſted again, there was a ſecond diſcharge on *common bail.* 3dly, The body of the debtor was exempted from being liable to be taken in execution. But that the *proviſoe* extended to all theſe, that no perſon ſhould have any benefit of any of them, that was indebted above the ſum of 100*l.* principal money, and damages. *Vide Raym. vol.* 2. *p.* 1196.

Eaſter, 5 *Ann.* *The Queen* v. *Bellwood.*

On an indictment the caſe was: a juſtice of peac had power to commit to *ward*, which is the word the ſtatute; the juſtice committed one to the the *gaoler* of the county.

Per curiam. The ſheriff, and conſequently his *gaoler*, is the proper officer; and if he let him go at large, it is ſuch an offence as is proper for an indictment. *Vide Mod. Rep. vol.* 11. *p.* 79.

Michaelmas, 5 *Ann.* *Turner* v. *Beale.*

The plaintiff brought an action on the *caſe* againſt the defendant on an *indebitatus aſſumpſit*, for 100*l.* for goods ſold and delivered by the plaintiff to the defendant the firſt day of *June* 1705, on a *quantum meruit*, and an *inſimul computaſſit*; to the laſt promiſes, and to the whole ſum of 100*l.* in the firſt promiſe mentioned, beſides 37*l.* part thereof, the defendant pleaded *non aſſumpſit*, on which iſſue was joined. As to the 37*l.* he confeſſed the action, but in ſtay of execution as to his perſon, *&c.* he pleaded *ſtat.* 2 *Ann. cap.* 16, for inſolvent debtors, intitled, *an act for the diſcharge out of priſon of ſuch inſolvent debtors as ſhall ſerve or procure a perſon to ſerve in her Majeſty's fleet or army.* That he was in *priſon* on and before the 8th day of *November* 1702, for debt; that at the general quarter ſeſſions of the peace, on the 13th day of *July* 1704, he was diſcharged out of *priſon.* There was a demurrer, and joinder in demurrer.

The plaintiff's council took exceptions to the plea, becauſe the ſeveral facts required by the ſtatute to be done to intitle the juſtices of peace to a juriſdiction, were not averred to have been done; without which the juſtices had no power to make ſuch an order of diſcharge as is ſet forth in the plea, and therefore the defendant ought expreſsly and particularly to have ſhewn that he petitioned, that the creditor had been ſummoned, and that he liſted himſelf a ſoldier, *&c.* as the ſtatute has appointed.

The court were clear of opinion, that the plea was ill, even on a general demurrer, becauſe it did not appear to them, the neceſſary facts not being averred to intitle the juſtices of peace to a juriſdiction, that they had any juriſdiction in this caſe; and judgment was given for the plaintiff.

It was adjudged accordingly in *Hilary* 5 *Ann.* in this court, in the caſe of *Woodrington* v. *Deverill*, that it was naught on a general demurrer, and not aided by the ſtatute for the amendment of the law. *Vide Raym. vol.* 2. *p.* 1262.

Hilary, 7 *Geo.* *The King* v. *Buckland.*

The court was moved to deprive one in cuſtody on an *excommunicato capiendo* of the benefit of the rules, but on conſideration, and ſearch for precedents, they refuſed to do it. *Vide Stra. vol.* 1. *p.* 413.

Michaelmas, 7 *Ann.* *Anonymous.*

A man being excommunicated for non-payment of coſts in a ſuit for tythes in a court chriſtian; the council moved to diſcharge him, he being in cuſtody on an *excom' capiendo*, becauſe he was liſted a ſoldier according to the act of parliament, which ſays, *If any perſon being in cuſtody upon any proceſs*, &c.

The court did not diſcharge him on this motion, but afterwards, it being moved again, *Holt*, C. J. ſaid, ſince the judges of *C. B.* are of opinion, that a man in execution ſhall be diſcharged, being liſted as as ſoldier; that a man in execution on an *excom' capiendo*, is within the ſame reaſon; and therefore by the court he was diſcharged. But he ſaid, he never was of opinion that this act ſhould extend farther than *meſne* proceſs, and not to perſons in execution. *Vide Mod. Rep. vol.* 11. *p.* 191.

Hilary, 8 *Geo.* *Anonymous.*

A *priſoner* taken on an eſcape-warrant, moved to ſuperſede it on producing a day rule for that day. But the court refuſed a *ſuperſedeas*, becauſe it appeared he went out early in the morning, and did not ſign the petition till he was taken up. Though Sir *Thomas Tipping*'s caſe was urged, where he ſigned the petition in the morning, and went out before the court ſat, and they held that being entitled to a rule, that rule would protect him the whole day, and they could make no fraction of a day. *Vide Stra. vol.* 1. *p.* 503.

Michaelmas, 9 *Geo.* *The King* v. *Layer.*

The defendant being committed to the *Tower* for *high-treaſon*, in conſpiring the death of the King, and an indictment having been found againſt him at *Rumford* in *Eſſex*, before ſpecial commiſſioners of *oyer* and *terminer*, and being removed hither by *certiorari*, was afterwards brought up by *habeas corpus* to the bar; and being arraigned on the indictment, his council moved that his irons might be ſtruck off his legs, and inſtanced the caſes of *Gordon*, *King*, and others, where it had been ſo done before they pleaded; and argued, that he was not obliged to plead till his fetters were taken off; *Cranbourn*'s caſe, 3 *Inſt.* 34, 35. *Minor*, *c.* 5. *ſect.* 1. *Keil.* 10. And that it was the opinion of the late Chief Juſtice *Holt*, that it ought to be ſo done; that this perſon was the firſt *Tower priſoner* that ever had irons on his legs; and that there never were no ſuch inſtruments there till now: and the *priſoner* himſelf moved, that the irons might be taken off before he pleaded, becauſe lying in his cloaths all night, and other inconveniencies occaſioned by thoſe irons, were ſo painful to him, that he being deprived of his reſt, had not the free uſe of his reaſon: that he hoped to have a fair trial as allowed by the law, without any undue ſeverities.

Per curiam. As for the irons to be taken from his legs, it is true it was done in thoſe caſes cited by his council, but it was where the *priſoners* had pleaded to their ſeveral indictments, and were to be tried on the ſame day; and that it would be to no purpoſe to inſiſt on this matter for ſo little a time as the *priſoner* had now to ſtand at the bar; and as for taking them off in the *Tower*, the court could make no order, becauſe, if they did, it might be an excuſe to his keeper if he (the *priſoner*) ſhould eſcape; therefore it muſt be left to his (the keeper's) diſcretion how to uſe his *priſoners*, eſpecially ſince he had already attempted to eſcape. *Vide Mod. Rep. vol.* 8. *p.* 83.

Michaelmas, 10 *Geo.* *Groenhouſe* v. *Cleever.*

The defendant being in cuſtody for want of bail, after the *ſecond* term moved for a *ſuperſedeas*, for want of the plaintiff's declaring, which was oppoſed by the council, becauſe, though no declaration had been delivered to the turnkey, according to *ſtat.* 4 & 5 *W.* & *M. c.* 21. yet there had been one left in the office in time, and this he ſaid would be enough to prevent the defendant's diſcharge, though he could not be obliged to plead to it, or let the plaintiff take a regular judgment.

And of this opinion was the *ſecondary*, who informed the court, that a *ſuperſedeas* is never granted till the clerk of the declarations has certified there is no declation againſt him in the office, which certificate would be uſeleſs, if the delivery of a declaration into the office be not ſufficient to prevent a diſcharge on common bail. But the court, on conſideration, granted a *ſuperſedeas*, taking the delivery of a declaration to which the defendant was not obliged to plead, and on which the plaintiff could not ſign a regular judgment, to be no delivery at all. *Vide Stra. vol.* 1. *p.* 474.

Eaſter, 11 *Geo.* *John Mayne* v. *Daniel Harvey.*

On an *indebitatus aſſumpſit*, and *quantum meruit*, for goods ſold and diſcharged by the plaintiff to the defendant; the defendant pleaded that the plaintiff *had no right to recover in this action*, and then ſet out the act of parliament the ninth of the King, intitled, *an act for the more effectual execution of juſtice in a pretended privileged place in the pariſh of St.* George *in the county of* Surrey, *commonly called the* Mint, and then brought himſelf within the benefit of the ſaid act; and on demurrer this term, judgment was given for the plaintiff, becauſe this plea cannot be pleaded in *bar* of the action, but only in *bar* of the execution. *Vide Raym. vol.* 2. *p.* 1383.

Hilary, 12 *Geo.* *The Caſe of the King's Bench Priſon.*

The *priſon* being in a ruinous condition, and the late rains having broke in, there was an order made for the proprietors to attend the court; and on their attendance, the court was moved to enlarge the rules of the *priſon*, ſo as to take in the *Marſhalſea*, that the *priſoners* might be removed thither. But the court would do nothing in it till there was an undertaking by rule of court to put the *priſon* in repair, which they ſaid the proprietors were obliged to do on pain of forfeiting their right. Whereon the proprietors ſubmitted to a rule, and the rules were enlarged accordingly. *Vide Stra. vol.* 1. *p.* 678.

Hililary, 2 *Geo.* 2. *The King* v. *Woodham.*

See this caſe fully ſtated in page 604 of this work, under the head *Juſtices of Peace.*

Michaelmas, 2 *Geo.* 2. *The Caſe of Landen Jones.*

He was committed for a contempt, and moved to have the benefit of the rules, which was denied. And in *Trinity* term following, Captain *Hayes*, who was in execution for a *forgery*, and was to lie a year, according to the ſtatute, made the ſame motion, and had the ſame anſwer. *Vide Stra. vol.* 2. *p.* 817.

Trinity, 3 & 4 *Geo.* 2. *Coppin* v. *Gunner.*

The defendant was convicted of an offence within the *black act*, viz. ſhooting at a perſon, *&c.* and ſentence of death pronounced againſt him. But *Forteſcue*, J. before whom he was tried, reprieved him, in order that a letter of the ſecretary of ſtate might be obtained for his tranſportation, according to *ſtat.* 4 *Geo.* 1. *cap.* 11.

The court was moved on behalf of the plaintiff, to whom the defendant was indebted, that he might have leave to ſerve the defendant in gaol with a copy of a *latitat*, to intitle the plaintiff to file common bail for him, if he did not cauſe an appearance to be entered, it being alledged that the defendant had an eſtate fallen to him, there being a *proviſoe* in *ſtat.* 9 *Geo.* 1. *cap.* 22. that offenders againſt that ſtatute ſhould not incur corruption of blood, nor a forfeiture of lands, tenements, goods, or chattles; and laſt term a rule was made for the *gaoler*, and the defendant to ſhew cauſe. And on hearing council this term, the rule was made abſolute, and leave given to the plaintiff to ſerve the defendant according to the motion; it being no prejudice to the *gaoler*, and there being no reaſon that the defendant ſhould not pay his debts, if the plaintiff could recover and find effects; he undertaking not to ſue out execution againſt the perſon of *Gunner*, and agreeing ſuch conſent ſhould be made a part of the rule. *Vide Raym. vol.* 2. *p.* 1572.

Trinity, 5 *Geo.* 2. *Willing* v. *Goad.*

See this caſe fully ſtated in page 431 of this work, under the head *Eſcape.*

Michaelmas, 6 *Geo.* 2. *Maud* v. *Branthwaite.*

The defendant being in cuſtody, the plaintiff obtained judgment; and inſtead of charging him in execution, whereby he would be entitled to his diſcharge on the *Lords act*, the plaintiff brought an action of debt on the judgment, and charged him in cuſtody. But on application to the court, when he had lain *two terms* after the judgment, the court diſcharged him on common bail, ſaying, It was a trick to deprive the defendant of the benefit of a *merciful* law. *Vide Stra. vol.* 2. *p.* 943.

Michaelmas, 8 *Geo.* 2. *Smith* v. *Boucher and others.*

On an action of *treſpaſs* and *falſe impriſonment* brought againſt the defendant (plaintiff in an action in the Chancellor's court of the univerſity of *Oxford* againſt the preſent plaintiff) and againſt the vice-chancellor, beadles, and *gaoler* of that univerſity; the defendants all joined in their plea, and juſtified under proceſs out of the Chancellor's court of *Oxford*, and then ſet forth the cuſtom of that court.

Per curiam. It was adjudged, after being twice heard, that the defendants had not brought their caſe within the cuſtom. *Vide Caſes Temp. Lord Hardwicke, p.* 71.

Trinity, 12 *Geo.* 2. *The Caſe of Sir Alexander Anſtruther.*

He being a *priſoner* for debt in the *King's Bench priſon* in *Southwark*, applied to the quarter-ſeſſions for *Surry* to be diſcharged on the *inſolvent debtors act*; but being oppoſed by a 500 *l.* creditor, he was ordered to continue in cuſtody, and the creditor to pay him *one penny per* week; and at a ſubſequent ſeſſions, it was refuſed to increaſe the allowance.

On this he was removed by *habeas corpus* to the *Fleet*, and applied to the ſeſſions in *London*, where he was allowed to the extent of the act, *viz.* 3 *s.* 6 *d. per* week; and for non-payment thereof, he was at a ſubſequent ſeſſions abſolutely diſcharged. And all theſe orders being removed by *certiorari*, the court were of opinion, that the *London* orders ought to be quaſhed; for he was the proper ſubject of the *Surry* juriſdiction at the time of making their orders. And it is like the caſe of a ſecond removal of a *pauper*, when it appears there is a former order in force, and no variation of the circumſtances and merits of the caſe; beſides, if all the orders ſtand, the creditor is made to pay more than parliament has appointed by *one penny*. Wherefore the *London* orders were quaſhed. *Vide Stra. vol.* 2. *p.* 1116.

Eaſter, 14 *Geo.* 2. *Filkes* v. *Allen.*

The defendant in *Michaelmas* term was ſurrendered in diſcharge of his bail; and afterwards, without giving any notice to the plaintiff, was removed to the *Fleet*.

The plaintiff, in *Hilary* term, charged him in execution as a *priſoner* in this court, and this term the defendant moved for a *ſuperſedeas*, becauſe the charge in the court where he was not a *priſoner* ſignifyed nothing, and ſo *two terms* were elapſed. The plaintiff inſiſted, that he was in no default, not having notice of his removal; and that theſe removals do not appear on the *committitur* book, when the charge in execution is to be made. But the court granted a *ſuperſedeas*; for the plaintiff, they ſaid, ſhould have demanded to ſee the *priſoner*, and if not produced, ſhould have known where to find him, and bring him back by *habeas corpus*, to charge him; and it would be putting difficulties on *priſoners*, to oblige them to give notice. *Vide Stra. vol.* 2. *p.* 1153.

Michaelmas, 18 *Geo.* 2. *Unwin* v. *Kirchoffe.*

On a motion to ſuperſede the defendant, as not being charged in execution in *two terms*, the court held, that the *committitur* muſt be actually entered on record before the end of the *ſecond term*; and that there is no extenſion of the time to the continuance-day after term, nor was it ſufficient that there was an entry in the *marſhal's* book in time. *Vide Stra. vol.* 2. *p.* 1215.

Hilary, 19 *Geo.* 2. *Watkins* v. *Hanbury.*

See this caſe fully ſtated in page 596 of this work, under the head *Judgment and Execution.*

Eaſter, 32 *Geo* 2. *The King* v. *Barnard Schiever, a Swede.*

See this caſe fully ſtated in page 510 of this work, under the head *Habeas Corpus.*

Trinity, 2 *Geo.* 3. *Hart qui tam, &c.* v. *Hawkins.*

On ſhewing cauſe againſt a rule which was drawn up generally, "to ſhew cauſe why the defendant ſhould not be diſcharged out of cuſtody of the marſhal, *as to the execution with which he ſtands charged in this ſuit*;" but which was intended only to bring in queſtion, "whether he could be diſcharged *as to the informer's moiety*."

The court reſolved, "that defendants in *qui tam actions* are *not* at all included in the 13th clauſe of *ſtat.* 32 *Geo.* 2. *cap.* 28. for diſcharge of debtors in execution for ſums not exceeding 100 *l.* on exhibiting their petition, and aſſigning over all their eſtate and effects for the benefit of ſuch of their creditors as ſhall have charged them in execution:" and they accordingly diſcharged the rule. *Vide Bur. vol.* 3. *p.* 1322.

Hilary, 4 *Geo.* 3. *The King* v. *The Juſtices of the Peace of the City of London.*

Adjudged, That after the 19th *November* 1761, ſo much of *ſtat.* 1 *Geo.* 3. *cap.* 17. as relates to creditors compelling *priſoners* charged in execution to deliver up their eſtates, and to ſuch *priſoners* being thereupon diſcharged was *repealed* by *ſtat.* 2. *Geo.* 3. *cap.* 2. to all intents and purpoſes whatſoever. *Vide Bur. vol.* 3. *p.* 1456.

Hilary, 6 *Geo.* 3. *Fetterel* v. *Philby.*

On ſhewing cauſe againſt the defendant's being diſcharged out of the cuſtody of the marſhal, on the following fact, *viz.*

A *committitur* in execution was entered in the marſhal's book; but no *committitur-piece* was filed, *nor* was the *committitur* entered on record within *two terms*. Therefore the court made the rule abſolute. *Vide Bur. vol.* 3. *p.* 1841.

Michaelmas, 6 *Geo.* 3. *The Caſe of Peter Gander.*

On a motion to diſcharge the ſaid *Gander* under the *inſolvent act*, the queſtion was, "whether a perſon was entitled to be diſcharged under *ſtat.* 1 *Geo.* 3. *cap.* 17. whoſe caſe was as follows:"

The ſaid *Gander* was not in the *actual cuſtody of the gaoler* on the day ſpecified in the act; but was in the cuſtody of an officer, in a ſpunging-houſe. He was not included in the *firſt* part of the goaler's liſt; but he was in the *ſecond* part.

The quarter ſeſſions for *London* had held him not to be entitled to his diſcharge, as an object of this ſtatute.

Lord *Manſfield* inclined, that the ſeſſions were in the right; as this was a *poſitive* law. And the juriſdiction is given to the quarter ſeſſions: ſo that there ſeems no way of coming at it, if they were wrong.

The *Recorder* candidly offered to come into any method that could be thought of, but Lord *Manſfield* ſaid nothing could be done in it *Vide Bur. vol.* 3. *p.* 1809.

Privilege.

Eaſter, 6 *W*. 3. *Edwards* v. *Copland.*

In an action on the *caſe*, the defendant pleaded to the juriſdiction of the court, that he is an attorney of the court of *C. B.* and ought to be ſued there, *&c.* the plaintiff replied, that he (the defendant) is not an attorney of the court of *C. B.* and concludes to the country; and on demurrer to this replication, the rule was for the defendant to anſwer over, for it is a good traverſe and concluſion; and in this caſe it was held, that the defendant might plead this *privilege* by attorney. *Vide Salk. vol.* 3. *p.* 383.

Trinity, 6 *W*. 3. *Willis* v. *Batterſhell.*

In an *aſſault* and *battery* the defendant pleaded to the juriſdiction of the court, that he is one of the clerks of *J. Cook*, *prothonotary* of the court of *C. B.* and all ſuch clerks of the ſame court ought not to be impleaded but in that court: and on a demurrer to this plea the plaintiff had judgment, becauſe the defendant did not alledge himſelf to be a clerk of the *C. B.* to whom this *privilege* (as he intended) did belong, but only that he was clerk to a *prothonotary* of that court, and this court will not intend the *privilege* to be other than as he has pleaded it. *Vide Salk. vol.* 3. *p.* 283.

Michaelmas, 6 *W*. 3. *Kirkham* v. *Wholy* or *Wheely.*

See this caſe fully ſtated in page 21 of this work, under the head *Actions.*

Michaelmas, 6 *W*. 3. *Wheely* v. *Richam.*

Holt, Chief Juſtice. The *privilege* of an attorney is not pleadable to an action *qui tam*, &c. or at the ſuit of the King; for the King may ſue where he pleaſes; if *privilege* be not good againſt *privilege*, as it is not, certainly no *privilege* is good againſt the King. *Vide Forteſcue*, *p.* 342.

Michaelmas, 6 *W*. 3. *The King* v. *Knollys.*

See this caſe fully ſtated in page 149 of this work, under the head *Averment.*

Trinity, 7 *W*. 3. *Stephens* v. *Arthur.*

The defendant pleaded to the juriſdiction of the court thus, *viz. And the ſame* Arthur *in his own proper perſon ſays*, that he is a clerk to a *prothonotary* of the *C. B.* and it was objected, that he did not ſay *comes and ſays.*

Per curiam. The word *comes* is no part of the plea, but the word *ſays* begins the plea; the word *ſays* alone ſhews him to be in court, and here it appears he is *in cuſtody*. *Vide Salk. vol.* 2. *p.* 544.

Hilary, 8 *W*. 3. *Lane* v. *Saltmarſh.*

An attorney of the *C. B.* being ſued by bill in this court, it was moved that he might be diſcharged; but it was denied, and he was ordered to plead his *privilege*. *Vide Salk. vol.* 2. *p.* 544.

Hilary, 8 *W*. 3. *Jones* v. *Bodiner.*

See this caſe fully ſtated in page 1 of this work, under the head *Abatement.*

Michaelmas, 8 *W*. 3. *Duncomb* v *Church.*

Holt, Chief Juſtice. A *privileged* perſon in the *C. B.* may be in cuſtody of the Marſhal; for he may either waive or miſplead his *privilege*; and if he be actually in cuſtody, and it appears ſo by *pleading* he cannot have his *privilege*; and if one pleads an exempt juriſdiction from all the courts of *Weſtminſter*, and not to be ſued but in ſuch particular courts and franchiſes, there you muſt ſhew that they have a juriſdiction of the matter, and that the cauſe ariſes within their juriſdiction. *Vide Mod. Rep. vol.* 12. *p.* 102.

Michaelmas, 8 *W*. 3. *The King* v. *Sir Thomas Culpepper.*

At a trial at *bar*, wherein mention was made of *privilege* of parliament, *Holt*, Chief Juſtice, ſaid, that whereas it is ſaid in our books, that *privilege* of parliament was not allowable in *treaſon*, *felony*, or *breach of the peace*, that it muſt be intended where ſecurity of peace is deſired, that it ſhall not protect a man againſt a writ of *ſupplicavit*; but it holds as well in caſe of indictments, or informations for breach of peace, as in caſe of actions. *Vide Mod. Rep. vol.* 12. *p.* 208.

Michaelmas, 8 *W*. 3. *Duncomb* v. *Church*, *warden of the Fleet.*

See this caſe fully ſtated in page 1 of this work, under the head *Abatement.*

Hilary, 9 *W*. 3. *Brown's Caſe.*

A *philazer* of this court was arreſted, but diſcharged on common bail; for he ought to be ſued by bill, as *preſent in court*. *Vide Salk. vol.* 2. *p.* 544.

Hilary, 9 *W*. 3. *Branthwait* v. *Blackerby and Perkins.*

If a man has a joint cauſe of action againſt two, one an attorney, and the other not, he muſt arreſt both, and declare againſt them as in cuſtody. A bill cannot be filed againſt a perſon *privileged* in *vacation*, for then he is not preſent in court; and as to the vacation, it begins the laſt day of the term, as ſoon as the court riſes. 2 *Lev.* 129. 1 *Vent.* 298.

Note, The bill muſt be filed, though the attorney agrees to appear and diſpenſe with it; but it may in ſuch caſe be filed afterwards. *Eaſter*, 9 *W*. 3. *Robert's* caſe. *Vide Salk. vol.* 2. *p.* 544. *Mod. Rep. vol.* 12. *p.* 163.

Hilary, 9 *W*. 3. *Anonymous.*

Adjudged, That if an officer pleads his *privilege* by writ, you cannot deny his being an officer. *Vide Mod. Rep. vol.* 12. *p.* 181.

Michaelmas, 9 *W*. 3. *Brown* v. *Burlace.*

See this caſe fully ſtated in page 110 of this work, under the head *Arreſt.*

Eaſter, 10 *W*. 3. *Thomee* v. *Lloyd.*

See this caſe fully ſtated in page 721 of this work, under the head *Pleas*, *Pleadings*, *&c.*

Hilary, 11 *W*. 3. *Newton* v. *Rowland.*

See this caſe fully ſtated in page 2 of this work, under the head *Abatement.*

Trinity, 13 *W*. 3. *Wilbraham* v. *Lownds.*

On an action of *treſpaſs*, it was pleaded, that this court ought not to take conuſance of it, for that the defendant at the time of the ſuppoſed *treſpaſs* and bill exhibited was an inhabitant of the county palatine, where the *treſpaſs* was done; and *prays judgment*, if this court will take conuſance; to which there was a demurrer. In maintenance whereof it was ſaid, that the declaration was againſt him *in cuſtody of the marſhal*; that his being in cuſtody of the *marſhal* was not traverſeable no more than being the King's creditor in a *writ of quo minus.*

minus. Beſides, the defendant's not reſiding in the county palatine does not hinder his being an inhabitant of it; for a man may be an inhabitant in ſeveral places at once; and in all appeals and indictments of murder, the party is alledged to be an inhabitant in the place where the murder is committed.

Holt, Chief Juſtice. As to your caſe of a *quo minus*, it is traverſable, if the party comes in due time to do it. And if one be a priſoner here againſt whom one has a cauſe of action ariſing within the county palatine, ſo that his being a priſoner here hinders that perſon from proceeding againſt him below, ſure the cauſe's ariſing within the county palatine ſhall not hinder us from having conuſance of it here, but that is where he is firſt in cuſtody of the marſhal for cauſe, and another or the ſame party, has another cauſe of action ariſing againſt him in the county palatine; and if the truth were ſo, that the defendant was in cuſtody of the marſhal before for a cauſe ariſing within our juriſdiction, the defendant, inſtead of demurring, ought to ſhew it in ſupport of our juriſdiction. But any plea of *privilege* is good to a declaration againſt one *in the cuſtody of the marſhal*, tho' he was brought wrongfully there. As if an attorney of the *C. B.* be arreſted on a *latitat*, and is in cuſtody of the marſhal for want of bail, or ſuppoſe he puts in bail, it ſhall not hinder him of pleading his *privilege*, becauſe he cannot plead till he put in bail, if he be not in actual cuſtody; and if we give judgment, it muſt be for the defendant. *Vide Mod. Rep. vol.* 12. *p.* 535.

Michaelmas, 13 *W.* 3. *Hopkins* v. *Squibb.*

In an action on the *caſe* the defendant pleaded, that by cuſtom, time whereof, *&c.* And then he ſhews, that he, at the time of the filing of the bill, was, and now is, clerk of the *nichels*, &c. and that he attended there *perſonally*, &c. and ſhews the writ, *&c.* the plaintiff demurs ſpecially. And the council urged, that the plea was ill: 1ſt, Becauſe there was not any ſuch word as *reſindentes*; but it ought to be *reſidentes*, *Raſt. entr.* 473. 2dly, The cuſtom extends only to perſons *continually attending*, &c. and the averment is of an attendance perſonally, which is not within the cuſtom; *but not allowed.*

Holt, Chief Juſtice. It is enough to ſay, that the defendant was *clerk* of the *nichels in the Exchequer*, and his reſidence neceſſary there, and then to ſhew the writ; and the other is but recital, and not neceſſary; and therefore judgment was given for the defendant, that the plea ſhould be allowed. *Vide Raym. vol.* 1. *p.* 702.

The Caſe of the Duke of Leeds.

Gumbly, one of his bail, deſired he might render the Duke in his diſcharge, which the court ſaid he might do, though the party came in of himſelf; but the recognizance not being in court, it could not be done. *Vide Forteſcue, p.* 359.

The King v. *The Marquis of Carmarthen.*

The peace being ſworn againſt the Marquis of *Carmarthen* by Mrs. *Hill Moreton*, his pretended wife; and the Lord inſiſted on his peerage, but it was over-ruled, and he gave a recognizance himſelf in 200 *l.* and bail in 100 *l.* each for to appear the *firſt* day of term. *Vide Forteſcue, p.* 359.

Michaelmas, 1 *Ann.* *Cliſton* v. *Swezeland.*

See this caſe fully ſtated in page 725 of this work, under the head *Pleas, Pleadings, &c.*

Hilary, 2 *Ann.* *Anonymous.*

H. came to confeſs an indictment, and the court held, that he had no *privilege* in *going* and *returning*, becauſe there was no proceſs againſt him. *Vide Salk. vol.* 2. *p.* 545.

Hilary, 2 *Ann.* *The Caſe of Sir Samuel Aſtry.*

He being maſter of the *Crown Office*, and having been abſent from the exerciſe of his office for a conſiderable time, and alſo being ſuperannuated, a *ſcire facias* was brought againſt him; and iſſue being joined, the court was moved for a trial at *bar*, which the Attorney General oppoſed as a matter of prerogative, that the Queen might try her cauſes at *niſi prius*, or at *bar*, as ſhe pleaſed.

Per curiam. It is the common right of any gentleman at the *bar* to have a trial at *bar*, and it never has been denied in the caſe of an officer of the court, and though Mr. Attorney General may have any of the Queen's cauſes tried at *bar*, and is not bound to conſent to a *niſi prius*, yet we are not ſatisfied that he ought to have a *niſi prius* where a trial at *bar* is reaſonable, without conſent; for *ſtat. W.* 2. *c.* 30. which was the firſt ſtatute of *niſi prius*, ſays, that if matter require great examination, it ought to be at bar. *Adjourned*, and nothing was ever done in it. *Vide Mod. Rep. vol.* 6. *page* 123.

Eaſter, 2 *Ann.* *Ogle* v. *Norcliffe.*

See this caſe fully ſtated in page 328 of this work, under the head *Cuſtom.*

Trinity, 2 *Ann.* *Dillon* v. *Harper.*

An attorney of *C. B.* being ſued in this court, pleaded his *privilege*; to which it was demurred ſpecially, for not concluding his plea with a *profert* of a writ of *privilege*, teſtifying his being an attorney, *&c.*

Holt, Chief Juſtice. The difference is, if *privilege* of an attorney be pleaded with a writ, the defendant cannot be denied to be an attorney; if without, he may, and then a *certiorari* ſhall be awarded to certify whether he be an attorney, or not. *Vide Salk. vol.* 2. *p.* 545. *Raym. vol.* 2. *p.* 898.

Michaelmas, 2 *Ann.* *The Caſe of Elderton Porter and others.*

See this caſe fully ſtated in page 265 of this work, under the head *Commitment.*

Hilary, 3 *Ann.* *The Queen* v. *Paty and others.*

The defendants having been committed to *Newgate* by order of the Houſe of Commons, were now brought into court by ſeveral writs of *habeas corpus*; and the cauſe of their commitment was returned to be a warrant ſigned *Robert Harley*, Speaker, requiring the keeper of *Newgate* to take into his cuſtody the ſeveral perſons, defendants, for having commenced and proſecuted an action at law againſt the conſtables of *Ayleſbury*, for refuſing their votes in the election of members of parliament, in contempt of the juriſdiction and open breach of the known *privileges* of the Houſe of Commons. The priſoner's council prayed that they might be diſcharged, for the ſeveral objections taken to their commitment, *viz.*

1ſt, Becauſe the warrant was not under ſeal, as it ought to be.

2dly, Becauſe the commitment was to remain during pleaſure.

3dly, Becauſe they had done no unlawful act; for the proſecution of a ſuit is lawful, and no breach of the *privilege* of that houſe.

Powell, *Powys*, and *Gould*, Juſtices, held, 1ſt, That the commitment was well enough in form, becauſe it was according to the law and cuſtom of parliament.

2dly, That the Houſe of Commons were the proper judges of their own *privileges*; and this court was now *eſtopped* to ſay, that this was not a breach of the *privileges* of the Houſe of Commons, or that the Houſe of Commons had no ſuch *privilege*.

Holt, Chief Juſtice ſaid, that this was no breach of *privilege* of the Houſe of Commons; that the commencing and proſecution of an action did not neceſſarily imply a going farther than the bare filing and continuing of an original, which is no breach of *privilege*: he ſaid, the ſuing was no breach of *privilege*, nor can their judgment make it ſo, nor conclude this court from determining contrary; when the Houſe of Commons exceed their legal bounds and authority, their acts are wrongful, and cannot be juſtified, more than the acts of private men: that there was no queſtion but their authority is from the law, and as it is circumſcribed, ſo it may be exceeded: to ſay, they are judges of their own *privileges* and their own authority, and no body elſe, is to make their *privileges* to be as they would have them: if there be a wrongful impriſonment by the Houſe of Commons, what court ſhall deliver the party? Shall we ſay, there is no redreſs, and that we are not able to execute thoſe laws, upon which the liberty of the Queen's people ſubſiſts? To conclude, all courts are ſo far judges of their own *privileges*, and entruſted with a power to vindicate themſelves, that they may puniſh for contempts; but to make them, or any court, final judges of them, to the excluſion of others, is to introduce a ſtate of confuſion, by making every man judge in his own cauſe, and ſubverting all law. *Vide Salk. vol.* 2. *p.* 503. *Raym. vol.* 2. *p.* 1105.

Michaelmas, 3 *Ann.* *Phips* v. *Jackſon.*

See this caſe fully ſtated in page 253 of this work, under the head *Averment*.

Trinity, 4 *Ann.* *Scawen* v. *Garrett.*

The defendant pleaded his *privilege* of an attorney of the *C. B.* to an action brought in this court, and pleaded it without producing any *writ of privilege*. An exception was taken to the plea, that where the defendant laid himſelf to be an attorney, he did not ſay, *as may appear by the record*; and yet attorney or not, muſt be tried by the record. But the bill was abated *niſi*, &c. *Vide Raym. vol.* 2. *p.* 1173.

Eaſter, 5 *Ann.* *The Caſe of Lord Banbury.*

Lord *Banbury* was taken on a *latitat* ſued out againſt him by the name of *Charles Knollys*, Eſq; and it was now moved for a *ſuperſedeas*, offering to ſhew the letters patent of creation, and an *affidavit* that he was the perſon; and it was agreed, that if the *latitat* had been ſued againſt him by the name of Lord, it ſhould have been ſuperſeded; for the law ſuppoſes a peer able to anſwer the demand of any perſonal action, and the body is only liable for want of being reſponſible in ſubſtance: and if he had ſat in parliament by virtue of any writ of ſummons, and had been ſued as *Charles Knollys*, but not having ſat in parliament, they could not take notice of his peerage, and would not proceed to try it on a motion. *Vide Salk. vol.* 2. *p.* 512. *Raym. vol.* 2. *p.* 1247.

Eaſter, 5 *Ann.* *Anonymous.*

Per curiam. When a perſon complains to this court of a miſdemeanor, and it is adjudged his complaint is vexatious, this court will not allow the *privilege* of protecting him returning. *Vide Mod. Rep. vol.* 11. *p.* 79.

Trinity, 8 *Ann.* *The Caſe of Andrew Artemonowitz, Servant to the Ruſſian Ambaſſador.*

See this caſe fully ſtated in page 113 of this work, under the head *Arreſt*.

Michaelmas, 9 *Ann.* *Read* v. *Chambers.*

A plea that he was clerk to one of the prothonotaries, and that he daily attended, and did ingroſs and draw pleas, and do other buſineſs for them in his office, and the affidavit was only that he was a clerk of the office, and was ſo for ſevral years.

Per curiam. Let the plea be ſet aſide, becauſe the affidavit is inſufficient; he ought to ſwear as fully as the plea is. *Vide Forteſcue*, *p.* 342.

Eaſter, 1 *Geo.* *Evans* v. *Hicks.*

A rule was made after hearing council on both ſides to diſcharge the defendant out of execution by virtue of *Stat.* 7 *Ann*, *c.* 12. it being made appear to the court, that he was a domeſtic ſervant of the envoy from the Elector *Palatine*, viz. his ſecretary, and that all the ſteps preſcribed by the ſtatute were purſued. *Vide Raym. vol.* 2. *p.* 1524.

Hilary, 4 *Geo.* *Forſter* v. *Cale.*

On *aſſumpſit* the defendant pleads in abatement, that he is an attorney of this court, and that he ought to be ſued as a *privileged* perſon. The plaintiff replies, that he is not an attorney, and concludes to the country; to which the defendant demurs, for he ought to have concluded to the record. *Raſt. Entr.* 610. 6. *Aſton*. 347. *Thomp.* 4. 2 *Mod. caſ.* 106.

The court enquired of the *ſecondary*, who informed them that antiently there were rolls kept of the attornies; but ſince the ſtamp-act that method had been diſuſed, and a book ſtamped, and the names entered in that; and the council ſaid, that on the trial of the aſſize for the office of chief-clerk the rolls from *Edw.* 3. were produced.

Per curiam. The book which is now kept muſt be taken as minutes in order to make up the record, and it is a proper warrant to the proper officer for that purpoſe; and whenever they are wanted they may be made up. Let that be done regularly for the return. In this caſe the plaintiff ſhould have concluded to the record; for no man can be an attorney but by the act of the court, and that act muſt appear by the record; for we will not go to a jury to enquire into our own acts. So the defendant had judgment. *Vide Stra. vol.* 1. *p.* 76.

Trinity, 5 *Geo.* *Windmil* v. *Cuthing.*

Per curiam. An attorney of *C. B.* who is actually in the cuſtody of the marſhal of this court, ſhall never be ſuffered to plead his *privilege*. 2 *Roll. Abr.* 232. For there is a great difference between actual and ſuppoſed cuſtody. 1 *Salk.* 1.

Forteſcue, Juſtice. As to the plea that a man is clerk to one of the prothonotaries of *C. B.* I have looked into it, and find the old way of pleading was, that they were employed in engroſſing of records, ſitting in court, and the like. *Raſt.* 473. *b.* 34 *H.* 6. 15. And ſo in this court of late years, an *affidavit* has been required to that effect. In the caſe of *Baker* v. *Swinton*, *Michaelmas* 10 *W.* 3 in *C. B. rol.* 360. a clerk pleaded that he ought to be ſued by bill, and not by original; but the court held the contrary, and that attornies only have that *privilege*. *Vide Stra. vol.* 1. *p.* 191.

Michaelmas, 8 *Geo.* *The Caſe of Lord Coningſby.*

The Lord *Coningſby* brought an *ejectment* againſt ſome of his tenants, and moved for a trial at *bar*; thereon the defendants, by their council moved, that the plaintiff being a peer of the realm, and conſequently not to be attacked, if the verdict ſhould be againſt him, might be obliged to make ſome reſponſible perſon to be his leſſee, or otherwiſe that he ſhould waive his *privilege*.

But the court rejected the motion, for if the plaintiff was not worth any thing, he could not be obliged ſo to do; and it would be unreaſonable that his peerage ſhould be a loſs to him, ſince every ſubject has a right by birth to ſue in the ſame King's courts, where no diſtinction is to be made of perſons. *Vide Mod. Rep. vol.* 8. *p.* 21.

Hilary, 9 *Geo.* *Payne* v. *Fry.*

The defendant pleaded in abatement, that he was one of the clerks of Sir *G. Cooke*, prothonotary in *C. B.* and the council moved to ſet it aſide. On a rule to ſhew cauſe, the council on the other ſide produced the *affidavit* annexed to the plea, wherein the defendant ſwore, that he ſerved his clerkſhip with a *C. B.*

attorney, and that he had for many years acted as an attorney, or ſolicitor, and followed no other employment. And after conſideration, the court ſet aſide the plea, being all of opinion, that ſuch clerks had no *privilege* at all, they not being ſworn as attornies are, nor ever acting as clerks in the *prothonotary*'s office. And that it was not ſufficient for the *prothonotary* to enter their names in his book. As to ſuch clerks as were actually employed under him, for ſo long as they continued in that employment, they would be *privileged*, but no longer; as in the caſe of a *judge's clerk*. *Vide Stra. vol.* 1. *p.* 546.

Eaſter, 12 *Geo.* *The Caſe of Mr. Delamotte.*

He was a juſtice of peace for *Kent*, and lived ſometimes at *Blackheath* and ſometimes at *London*; and being appointed conſtable in *London*, the court was moved for a writ of *privilege*, and *Cro. Car.* 585. was cited. But the motion was denied, the court ſaying, the proper method under *ſtat. Car.* 2. *cap.* 12. was to apply to the ſeſſion. *Vide Stra. vol.* 1. *p.* 698.

Michaelmas, 13 *Geo.* *Dawkins* v. *Berridge.* Error.

An action was brought in the *C. B. by bill* againſt the defendant, who was ſet forth in the declaration to be a member of parliament, in this manner, *viz. He, this defendant, having* privilege *of parliament*; the plain- had judgment by *default*, on which the defendant brought a *writ of error*.

The plaintiff in error's council took this exception *viz.* that *ſtat.* 12 *&* 13 *W.* 3. *c.* 3. gives no power to the court of *C. B.* to proceed in ſuch caſes *by bill*.

But on conſidering the words of the ſtatute, the court were unanimouſly of opinion, that the plaintiff might proceed againſt the defendant in the court of *C. B. by bill*, notwithſtanding it was not the uſual proceſs of that court; the court obſerved there was a *proviſoe* in the ſtatute, "that it ſhould not ex-
"tend to give juriſdiction to any court to hold pleas
"in any real or mixed action, in any other manner
"than ſuch court might have done before the making
"of ſuch ſtatute;" which they ſaid implied, that in perſonal actions, ſuch as the preſent was, the plaintiff might, by virtue of the *firſt clauſe* in the ſtatute, proceed either *by bill*, or *by original*. Therefore the judgment was affirmed. *Vide Stra. vol.* 2. *p.* 734.

Hilary, 2 *Geo.* 2. *Borroughs* v. *Willis.*

The plaintiff being a *maſter in Chancery*, brought an action in this court, and laid it in *Middleſex*: now it appearing on motion, that the cauſe of action aroſe in *London*. There was a rule made to ſhew cauſe why the *venue* ſhould not be changed; and on cauſe ſhewn that in reſpect of his attendance in *Weſtminſter-Hall, com. Middleſex*, he has the ſame *privilege* with a *barriſter*, and the court being of that opinion, the rule was diſcharged. *Vide Fitz-Gibbons, p.* 40. *Raym. vol.* 2. *page* 1556.

Eaſter, 3 *Geo.* 2. *Thickboom* v. *Boot.*

A plea of *privilege* was pleaded thus, *that he and every attorney, and all of them who negotiate or proſecute any buſineſs before any juſtice, ſhould not be drawn or compelled*, &c. that is well, being *all and every one*; but if it had been, *that all ſhall not be drawn and compelled*, that would be a negative pregnant; for all may not have anſwered at other courts, and ſome may. 1 *Sid.* 164. *Lutw.* 369. 1 *Keb.* 256. *Vide Forteſcue, p.* 343.

Eaſter, 3 *Geo.* 2. *The Mayor of Baſingſtoke* v. *Bonner.*

See this caſe fully ſtated in page 146 of this work, under the head *Attorney*.

Trinity, 3 *Geo.* 2. *Hetherington, one, &c.* v. *Lowth.*

The defendant pleaded the *privilege* of the *C. B.* and the plaintiff moved to ſet it aſide, he ſuing as an attorney of this court, on the foot of *privilege* taking away *privilege*.

But the court ſaid, that was a point of law which they would not determine on motion, but put the plaintiff to demur to it.

N. B. In *Michaelmas* term following, the matter was moved again, and the declaration being produced, it appeared that the plaintiff had ſued *by original*, which was held a waiver of his *privilege*. *Vide Stra. vol.* 2. *p.* 837.

Hilary, 4 *Geo.* 2. *Wigmore* v. *Alvarez.*

On a motion to ſuperſede a proceſs againſt the defendant on *ſtat.* 7 *Ann*, as being in the ſervice of a foreign ambaſſador; the court held, that to be a *privileged* ſervant within the act, it is not required that the party actually lives in the ambaſſador's houſe: nor is it enough that the party be regiſtered in the ſecretary's office, as a ſervant: but when he comes for the benefit of the act, he muſt ſhew the nature of his ſervice, that the court may judge whether he be a *domeſtic* ſervant within the meaning of the act of parliament. *Vide Fitz-Gibbons, p.* 200.

Michaelmas, 4 *Geo.* 2. *Brown* v. *Sir William Morgan, Baronet.*

This was an action on the *caſe* on a promiſſory note, and it was ſaid in the recital of the writ, that *he was ſummoned*, inſtead of, that *he was attached*, and held well; and it was ſo reſolved on debate in caſe of a member of parliament, *viz. Lockyer* v. *Chetwynd* in *C. B.* *Vide Forteſcue. p.* 341.

Eaſter, 5 *Geo.* 2. *Bareton* v. *Stephenſon.*

The defendant pleaded to a bond his *privilege* of an attorney of the *C. B.* that he ought not to be ſued in the county of *York*, when the ſuit was here, but in the county of *Middleſex*.

Per curiam. Let the defendant anſwer over, there is no ſuch *privilege*, if it be brought in the *C. B.* it is enough. *Vide Forteſcue, p.* 343.

Trinity, 5 *&* 6 *Geo.* 2. *Faulk* v. *Berry.*

The defendant pleaded his *privilege* of an attorney of the *C. B.* and that there was a cuſtom in the *C. B.* that no attorney ſhould be compelled againſt his will to anſwer to any one in perſonal actions *proſecuted by original*, which touch not the King; and held a good plea, though he ſhews not a better writ, for it is matter of law and not matter of fact; he has ſet out what is in his knowlege; and need not except criminal matters, for thoſe concern the King, and it is ſaid in perſonal actions. *Vide Forteſcue, page* 343.

Eaſter, 7 *Geo.* 2. *Holiday and Pitt, and other Plaintiffs in ſeveral Suits againſt the ſame Defendant.*

A motion was made in this court to diſcharge the defendant *John Pitt*, Eſq; out of cuſtody, becauſe he having been member for *Camelford* in *Cornwall* in the late parliament, was arreſted by ſeveral writs of *capias* out of the *C. B.* and *latitats* out of this court within *three days* after the prorogation, and *two days*, after the diſſolution of parliament, before the time of *privilege*, as he alledged, was out. He was likewiſe charged in cuſtody with ſeveral declarations. The defendant removed himſelf into this court by *habeas corpus*. (The return was produced in court to ſhew that he was a member, and an *affidavit* made that he continued ſitting till the end of the parliament.) The Judges of this court having conferred with the reſt of the Judges, it was ordered to be further argued.

Lord *Hardwick*, on the 27th of *May*, delivered in the the unanimous opinion of the *eleven* Judges, who were preſent at the arguments; which was, that the defendant was entitled to the *privilege* of parliament *to his return*; that it was not neceſſary in this caſe to determine to what time it was limited, or ſuppoſing it to be only for a convenient time, the defendant was arreſted within that convenient time, he having been taken within *three days* after the prorogation, and *two days* after the diſſolution of the parliament, and that conſequently his perſon ought to be diſcharged in a proper and legal manner, but that the remaining queſtion is, what is that proper and legal method, whether by writ of *privilege*, under the great ſeal on record, or whether it may be done by motion on *affidavit?* As to this point, the Judges were all of opinion, that a writ of *privilege* is a proper method to be taken for the diſcharge of the defendant's perſon; but there was a great doubt, and ſome variety of opinions amongſt them, whether the court would diſcharge him in the method now taken on motion or not, no caſe having been produced from the books, wherein any perſon entitled to the *privilege* of parliament was diſcharged after this manner. But it being a matter of conſequence, and the ſhort time between the arguments, and the laſt day of the term, being taken up in neceſſary buſineſs, the court was of opinion to enlarge the rule till next term, without prejudice to the defendant's bringing his writ of *privilege*; and if the defendant does not think fit to bring his writ of *privilege* in the mean time, but inſiſts on the method already taken, they will then give their opinion on the matter, after having given it the conſideration it will require, it being altogether a new proceeding.

The Judges afterwards gave their opinion for the defendant's being diſcharged on motion. *Vide Caſes Temp. Lord Hardw. p.* 29.

Michaelmas, 7 *Geo.* 2, *Holmes* v. *Gordon.*

See this caſe fully ſtated in page 113 of this work, under the head *Arreſt.*

Trinity, 9 *Geo.* 2. *Wigley* v. *Morgan, one, &c.*

The queſtion was, whether in an action againſt an attorney he had *privilege* to change the *venue* into *Middleſex*, as well as to lay it there when he is plaintiff. And the court held there was no difference, and the *venue* was accordingly changed. *Vide Stra. vol.* 2. *p.* 1049.

Michaelmas, 10 *Geo.* 2. *Wickham* v. *Hobart.*

The court was moved that the ſheriff ſhould return his writ of *ca. ſa.* and without ſhewing cauſe to that rule, the ſheriff moved that it might be diſcharged on an *affidavit* that he did take the defendant in execution, but has ſince diſcharged him on receiving a letter from Lord *Say* and *Seal*, teſtifying that the defendant is his Lordſhip's *menial* ſervant, and therefore *privileged* by him.

Per curiam. Let the rule be diſcharged, and the ſheriff put to make a return. *Vide Caſes Temp. Lord Hardw. p.* 348.

Hilary, 12 *Geo.* 2. *The Caſe of the Vicar of Dartford.*

The court granted the vicar a *writ of privilege* againſt ſerving the office of *expenditor* to the commiſſioner of ſewers, on the authority of 1 *Mod.* 282. 1 *Vent.* 105. 1 *Lev.* 303. 6 *Mod.* 140. though it was inſiſted that this was an office which might be executed by deputy. *Vide Stra. vol.* 2. *p.* 1107.

Michaelmas, 14 *Geo.* 2. *The Caſe of Jonathan Evingdon, one, &c.*

He being ſummoned to appear on a muſter of the militia in *London*, applied to the court for a *writ of privilege*, to be directed to the commiſſioners of the Lieutenancy; which being oppoſed as not being a perſonal ſervice, but ſuch as might be executed by a deputy, it was argued largely at bar; and the court having taken time to conſider of it, this term gave their opinion, that this writ ought to go; for though by *ſtat.* 13 & 14 *Car. c.* 9. this, in reſpect of counties at large, may be only a charge in reſpect to the property of the inhabitants, yet the *27th ſection* excepting *London*, and referring to the then commiſſion of *array*, we think it was then conſidered as a perſonal ſervice, and there can be no doubt but in that caſe an attorney, who has a ſuperior ſervice, is to be exempted; and though he may have a deputy that has been determined to make no alteration, *Mar.* 30. 1 *Vent.* 16. 29. 1 *Lev.* 265. *Cro. Car.* 11. And theſe writs have often been granted, *Co. Ent.* 436. *Off. Br.* 164. 174. In 4 *Ann. Smith*'s caſe, by *Holt*, Chief Juſtice, and one to Mr *Skynner*, in Lord *Raymond*'s time. The Chief Juſtice alſo declared, that on the like motion in *C. B.* for an attorney of that court, they were of the ſame opinion. *Vide Stra. vol.* 2. *p.* 1143.

Michaelmas, 14 *Geo.* 2. *Ratcliffe, one, &c.* v. *Beſley.*

It was held by the court, that if the plaintiff and defendant are both attornies, the defendant muſt be ſued *by bill*; and that the plaintiff cannot take out an attachment, and hold the defendant to bail, as in the caſe of a common perſon. This caſe therefore is an exception out of the general rule, that *privilege* takes away *privilege*. *Vide Stra. vol.* 2. *p.* 1141.

Trinity, 31 *Geo.* 2. *The King* v. *Earl Ferrers.*

See this caſe fully ſtated in page 510 of this work, under the head *Habeas Corpus.*

Eaſter, 4 *Geo.* 3. *Triquet, and others,* v. *Bath*; *Peach, and another,* v. *Bath.*

On ſhewing cauſe why the bill of *Middleſex*, in each of the two cauſes, ſhould not be ſet aſide, and the bail bond be cancelled.

The rule was made on *affidavits*, "of the defen-
" dant's being a domeſtic *ſervant* of a *foreign miniſter*,
" and having taken all the proper ſteps to entitle him
" to the *privilege* of ſuch domeſtics."

The only queſtion was, "whether the defendant
" (*C. B.*) was *really*, *truly*, and *bona fide*, a do-
" meſtic ſervant of Count *Haſlang*, the *Bavarian* mi-
" niſter; or whether his ſervice was only colourable,
" and a *mere ſham and pretence*, calculated to protect
" him from the juſt demands of his creditors?"

Lord *Mansfield*. The *privilege* of foreign miniſters and their domeſtic ſervants depends on the *law* of nations: *ſtat.* 7 *Ann. cap.* 12. is *declaratory* of it. All that is *new* in this act, is the *clauſe*, *ſect.* 4. which gives a ſummary juriſdiction for the puniſhment of the *infractors* of this law. It is not to be expected that every particular act of the ſervice ſhould be particularly ſpecified; it is enough if an actual *bona fide* ſervice be proved, and if ſuch a ſervice be ſufficiently proved by *affidavit*, we muſt not, on bare ſuſpicion only, ſuppoſe it to have been *merely colourable* and *colluſive*.

As to the latter point, "of his being a trader;" his having been ſo in *Ireland*, (and even that *ſeven years* ago too) will not bring him within the exception of the *fifth clauſe* of this ſtatute, which provides, "that
" no merchant or other trader whatſoever, *within the*
" *deſcription* of any *of the ſtatutes* againſt bankrupts,"
who has or ſhall put himſelf into the ſervice of any ſuch ambaſſador or public miniſter, "ſhall have or
" take any manner of benefit by that act."

Per curiam. Let both rules be made abſolute, but *without coſts*, by reaſon of the *ſuſpicious* circumſtances of this caſe. *Vide Bur. vol.* 3. *p.* 1478.

Michaelmas, 5 *Geo.* 3. *Silk* v. *Rennet, one, &c.*

See this caſe fully ſtated in page 147 of this work, under the head *Attorney.*

Prohibition.

Hilary, 1 *W. & M.* *Shotter* v. *Friend.*

An executor being ſued for a legacy in the *Spiritual Court*, pleaded payment, and offered to prove it by *one* witneſs, which the judge refuſed, and gave judgment againſt him.

Per curiam. 1ſt. Where the *Spiritual Court* proceed in a matter merely *ſpiritual*, if they proceed in their own manner, though that is different from the *common law*, no *prohibition* lies; as in a probate of a will; there if they refuſe *one* witneſs, no *prohibition* lies. *Noy* 12. 2 *Ro.* 300.

2dly. When they have conuſance of the original matter, and an incident happens, which is of *temporal* conuſance, or triable by the *common law*, they ſhall try the incident, but muſt try it as the *common law* would: thus, in a ſuit for *tithes*, or for a *legacy*, if the defendant pleads a releaſe or payment, or in a ſuit to prove a *will*, if the defendant pleads a revocation, 1 *Ro. Rep.* 12. 2 *Ro. Rep.* 42. *Yelv.* 92. So in the caſe at *bar*, they ſhall try matter of payment or no payment, but then payment admits ſuch proof as the *common law* would, or otherwiſe they reject the cauſe themſelves, and ought to be *prohibited*.

3dly. A bare ſuggeſtion, that the defendant has but *one witneſs*, and that they take exceptions to his credit and reputation, is no cauſe of *prohibition*; for if they admit the proof of *one* witneſs, whether he be a creditable witneſs or not, they ſhall judge, and the party has no remedy but an appeal.

4thly. That it is not too late to come for a *prohibition* after ſentence; for the ſentence in this caſe is the grievance. Therefore a conſultation was denied. *Vide Salk vol.* 2. *p.* 547.

Trinity, 3 *W. & M.* *Grimly* v. *Fawlkingham*.

In a *prohibition* to a libel in the *ſpiritual court* for the tithes of a water *corn-mill*, a *modus* was ſuggeſted. The defendant confeſſed the *modus* as to part, but ſaid that there was an addition to the antient mill, *viz.* another pair of mill-ſtones, (your mill antiently had but one pair of ſtones, but of late had two pair) and ſo prayed that the *prohibition* might only go to the tithes of the antient mill. After argument a *prohibition* was granted. *Vide Mod. Rep. vol.* 4. *p.* 45.

Michaelmas, 3 *W. & M.* *Coke* v. *Hawkins*.

On a motion for a *prohibition* to the ſpiritual court for a ſuit for defamation, and it being after ſentence, it was denied; becauſe they had not pleaded to the juriſdiction of the court. *Vide Mod. Rep. vol.* 12. *p* 13.

Trinity, 4 *W. & M.* *Starky* v. *The Churchwardens of Watlington in Suſſex*.

A ſuit was proſecuted in the *Spiritual Court* for taking away *two* bells out of the ſteeple, and a *prohibition* was granted; for the churchwarden is a corporation, and the property is in him, and he may bring *trover* at *common law*, for the recovery of the ſame. *Vide Salk. vol.* 2. *p.* 547.

Trinity, 4 & 5 *W. & M.* *Wharton* v. *Pits*.

A ſuit was proſecuted in the *Admiralty* againſt the maſter and ſhip which lay in the *Thames*, for heedleſsly running over another ſhip, and the defendant there moved for a *prohibition*: the plaintiff informed the court, that the defendant would not appear, ſo that he could have no remedy at law; on which the court refuſed a *prohibition*, unleſs the defendant would appear and give bail. *Vide Salk. vol.* 2. *p.* 548.

Michaelmas, 4 *W. & M.* *Carter* v. *Firman*.

On a motion for a *prohibition*, the plaintiff's caſe was as follows: Mr. *C.* was poſſeſſed of a houſe in *Three-King Court Fenchurch-ſtreet*, and the defendant had a houſe contiguous, there was a party-wall ſet between theſe houſes by the city ſurveyor, and both built *twenty years* ſince.

The council for the *prohibition* urged, that the city had no juriſdiction over this matter; for that theſe buildings were erected *twenty years* ſince, according to the rules preſcribed by *ſtat.* 19 *Car.* 2. *cap.* 8. and that the authority of the Court of Aldermen was limited to the builders of houſes on the foundations of thoſe which were deſtroyed by the fire, and did not extend to thoſe perſons who built on new foundations; and of this opinion was the court.

At another day this matter being ſtirred again, the court ordered that the plaintiff ſhould declare on a *prohibition*, and that the defendant might, if he ſaw cauſe, plead this cuſtom, whereby the court might be judicially appriſed of the matter. *Vide Mod. Rep. vol.* 4. *p.* 151.

Hilary, 5 *W. & M.* *Johnſon* v. *Oxendon*.

See this caſe fully ſtated in page 484 of this work, under the head *Fees*.

Eaſter, 5 *W. & M.* *Hinks* v. *Harris*.

See this caſe fully ſtated in page 652 of this work, under the head *Marriage*.

Eaſter, 5 *W. & M.* *Anonymous*.

The court was moved for a *prohibition* to the *eccleſiaſtical court*, in the caſe of *adultery*, becauſe they obliged the party to anſwer on oath; and a *prohibition* was granted *as to not anſwering on oath*, but to proceed as to the reſt; then it was moved, that there was a *temporal* penalty for providing for baſtard children.

Per curiam. We will not grant it, becauſe the *eccleſiaſtical court* proceed only to the puniſhment of the crime of adultery. *Vide Mod. Rep. vol.* 12. *p.* 40.

Michaelmas, 5 *W. & M.* *Jones* v. *The Biſhop of Landaffe*.

On a *prohibition* granted to the *ſpiritual court*, becauſe the Biſhop articled againſt his chancellor for inſufficiency and other miſdemeanors, and prayed that he might be deprived, which they have no power to do; and they denied *Sutton*'s caſe, 1 *Cro.* 64. to be law. *Vide Mod. Rep. vol.* 12. *p.* 47. *Mod. Rep. vol.* 4. *p.* 27.

Michaelmas, 6 *W. & M.* *Anonymous*

A motion was made for a *prohibition* to the *eccleſiaſtical court* of *London*, for calling of a woman whore, on a ſuggeſtion that the words were actionable there by cuſtom of the place; but the court would not grant a *prohibition*, without oath being made, that if any ſuch words were ſpoken, it was in *London*, and not elſewhere. *Vide Mod. Rep. vol.* 4. *p.* 367.

Hilary, 7 *W.* 3. *Chamberlain* v. *Huetſon*.

See this caſe fully ſtated in page 204 of this work, under the head *Baron and Feme*.

Hilary, 7 *W.* 3. *Haines* v. *Jeſcott*.

See this caſe fully ſtated in page 652 of this work, under the head *Marriage*.

Trinity, 7 *W.* 3. *Swales* v. *Lowther*.

On a motion for a *prohibition*, the caſe was as follows:

A man had a houſe, and a great farm of arable land in the pariſh of *Kippax*, where he dwelt, and he had *five* acres of plowed land, and *forty* acres of paſture, in the pariſh of *Smillington*, on which paſture he fed his cattle, which were employed in huſbandry in the pariſh of *Kippax*. The parſon of *Smillington* libelled for tithes for the agiſtment of cattle there.

The court would not grant a *prohibition* on the firſt motion, but gave the defendant leave to amend his ſuggeſtion, by adding, that he had arable land in *Smillington*, and did exerciſe huſbandry there; which was amended.

Afterwards in *Michaelmas* term it was moved again, and the court were of opinion, that if the cattle depaſtured were not for plowing land in the ſame pariſh where they are fed, he ſhall pay tithes, though they plow in another pariſh, and if he had more cattle than he employed for the plow in the ſame pariſh, he ought to pay tithes for them; but ordered the defendant to make an *affidavit* to aſcertain the fact. *Vide Mod. Rep. vol.* 5. *p.* 96.

Hilary, 8 *W.* 3. *Hawkin's Caſe.*

H. libelled in the *Spiritual Court* againſt a perſon for calling him *a knave, a knave, and a knave indeed*; and a *prohibition* was granted, becauſe nothing was ſaid that could make him liable to *eccleſiaſtical* cenſure. The ſtatute *de circumſpecte agatis* mentions only ſuch defamations as are puniſhable in the *Spiritual Court*; and for ſuch as the *Spiritual Court* cannot puniſh, the party ſhall not be liable there: the reaſon why the laying violent hands on a clergyman was there ſuable, was, becauſe the clerk having *habitum et tonſuram*, which made him known, it was an affront to the whole order. *Vide Salk. vol.* 2. *p.* 548.

Trinity, 8 *W.* 3. *Johnſon* v. *Lee.*

See this caſe fully ſtated in page 382 of this work, under the head *Eccleſiaſtical Matters.*

Trinity, 8 *W.* 3. *Petit* v. *Smith.*

See this caſe fully ſtated in page 378 of this work, under the head *Diſtribution.*

Michaelmas, 8 *W.* 3. *Robinſon* v. *Godſalve.*

The court was moved for a *prohibition* to ſtay a ſuit in the *biſhop*'s court, on ſuggeſtion that the party lived within a peculiar archdeaconry.

Per curiam. Where the archdeacon has a peculiar juriſdiction, he is totally exempt from the power of the biſhops, and the biſhops cannot enter there and hold a court; and in ſuch caſe, if the party who lives within the peculiar juriſdiction, be ſued in the *biſhop's court*, a *prohibition* ſhall be granted; for the ſtatute intends no ſuit ſhall be *by ſurprize.* But if the archdeacon is not a peculiar, then the biſhop and he have concurrent juriſdiction, and the party may commence a ſuit in the Archdeacon's court, or in the Biſhop's, and he has his election to chuſe which he pleaſes. And if he commence his ſuit in the Biſhop's court, no *prohibition* ſhall be granted; for if it ſhould, it would confine the Biſhop's court to determine nothing but appeals, and render it incapable of having any cauſes originally commenced there. *Vide Raym. vol.* 1. *p.* 123.

Michaelmas, 8 *W.* 3. *Brudon qui tam* v. *Gill.*

See this caſe fully ſtated in page 77 of this work, under the head *Appeal.*

Hilary, 9 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. Where an action is commenced in an inferior court of law, which has no juriſdiction of the cauſe; in ſuch caſe a *prohibition* will not lie after ſentence; but it is otherwiſe if the ſuit is commenced in the *Admiralty*, or in the *Spiritual Court*, for their law is different from ours. *Vide Salk. vol.* 3. *p.* 288.

Trinity, 9 *W.* 3. *Chickham* v. *Dickſon.*

Per curiam. If one be ſued in the *ſpiritual court* for an *eccleſiaſtical* matter, out of his dioceſe, it is too late to come after ſentence for a *prohibition*, becauſe the party has affirmed the juriſdiction; ſo if he be ſued for a matter not belonging to *eccleſiaſtical* conuſance: but if it doth appear on the proceeding, that they have meddled with a matter that belongs not to them, a *prohibition* ſhall go after the ſentence, but *otherwiſe* where it does not appear on the face of the proceedings. *Vide Mod. Rep. vol.* 12. *p.* 162.

Michaelmas, 9 *W.* 3. *Trantor*, or *Tranbut*, v. *Duggan.*

On a motion for a *prohibition* to the grand ſeſſions of *Radnor*, becauſe on an *Engliſh* bill in equity there they had granted a ſequeſtration; whereas, by the law of the land, no man ought to be *ſubpœnaed* to anſwer an *Engliſh* bill in thoſe courts, unleſs he lives, and be perſonally ſerved there, that is, within the juriſdiction thereof; and the court were of opinion to grant a *prohibition*, but ordered them to ſhew cauſe the *firſt* day of next term. *Vide Mod. Rep. vol.* 12. *p.* 148.

Hilary, 10 *W.* 3. *Caxeter* v. *Parſons.*

The plaintiff *libelled* in the *ſpiritual court* againſt the defendant, for he having ſaid of him that he had no ſenſe; that he was a blockhead, and he wondered that the Biſhop would lay his hands on ſuch a fellow, and that he had deſerved to have his gown pulled over his ears.

On a motion for a *prohibition*, *Holt*, Chief Juſtice, ſaid, that this was a *temporal* matter, and will carry *temporal* damages; that he might have an action at law for the ſame, but could not ſue in the *ſpiritual court.* Therefore denied the motion. *Vide Raym. vol.* 1. *page* 423.

Hilary, 10 *W.* 3. *The Churchwardens of Market Boſworth* v. *The Rector of Market Boſworth.*

The plaintiffs *libelled* againſt the defendant in the Archdeacon's court of *Leiceſter*, being rector thereof, for repairing the chancel of the chapel there.

On a motion for a *prohibition* againſt ſuch ſuit, *adjudged* by the court, that where the matter is grounded on a cuſtom, and ſuch cuſtom is denied, and it is afterwards determined by the court that there is no ſuch cuſtom, no *prohibition* ſhall be granted. *Vide Raym. vol.* 1. *p.* 435.

Trinity, 10 *W.* 3. *Gardner* v. *Booth.*

A *prohibition* was granted in a ſuit for tithes on a ſuggeſtion of a *modus*; and a conſultation was prayed, becauſe they had not proved their ſuggeſtion.

Per curiam. Suppoſing the plaintiff had declared on a *prohibition*, and the defendant had pleaded thereunto, yet the ſuggeſtion, by force of the ſtatute, muſt be proved within *ſix months*; but then the ſuggeſtion is entered on the roll, and for that reaſon the roll muſt be brought into court, that it may be ſeen whether there be a proof thereon, or no; after which, it appearing no proof had been made, a conſultation was awarded. *Vide Mod. Rep. vol.* 12. *p.* 196.

Trinity, 10 *W.* 3. *Anonymous.*

Adjudged, That where it appears in the libel, or by the proceedings in the cauſe, that the conuſance of the cauſe does not belong to the *Spiritual Court*, a *prohibition* may be moved for and granted after ſentence; and this holds in all caſes but where one is ſued out of his dioceſe; for there, if he does not take advantage of it before ſentence, he ſhall not have a *prohibition* after ſentence; the reaſon is, becauſe the cauſe does belong to the *Spiritual Court*; and though it does not belong to the *Spiritual Court*, it belongs to ſome other, and not to the King's *Temporal Courts.* *Vide Salk. vol.* 1. *p.* 548.

Michaelmas, 10 *W.* 3. *Jacob* v. *Dallow.*

See this caſe fully ſtated in page 383 of this work, under the head *Eccleſiaſtical Matters*, &c.

Michaelmas, 10 *W.* 3. *Anonymous.*

A *libel* was preferred in the *ſpiritual court* againſt a man for ſaying to another, thou art *Beelzebub.* A *prohibition* was moved for, and granted. *Vide Raym. vol.* 1. *p.* 397.

Michaelmas, 10 *W*. 3. *Pool* v. *Gardner*.

On a motion for a *prohibition* it was held, that where it does not appear in the libel, or proceedings, that the conuſance does not belong to the *eccleſiaſtical court*, then no *prohibition* ſhall be granted after ſentence; but where it does appear in the libel, or other proceedings, that the conuſance does belong to the *ſpiritual court*, then, after ſentence, a *prohibition* ſhall be granted in all caſes, except *one*; which is, where a man is ſued out of the dioceſe, then, if he does not take advantage of it before ſentence, he ſhall not have a *prohibition* for that cauſe afterwards; becauſe, though the cauſe for that reaſon does not belong to that *ſpiritual court*, yet it belongs to a court of that nature, and not to one of the King's courts. *Vide Mod. Rep. vol.* 12. *p.* 206.

Michaelmas, 10 *W*. 3. *Anonymous*.

A *libel* was brought in the *ſpiritual court* for calling a woman *whore*, and ſaying *that ſhe kept a bawdy-houſe*; and after ſentence a *prohibition* was moved for; and it was urged on the other ſide, that they ſhould have alledged below that the words were ſpoken at one and the ſame time, and then they might be *prohibited*; but now that they have juriſdiction below for calling a woman *whore*, and that was all, they gave ſentence; but they would not grant a *prohibition*. *Vide Mod. Rep. vol.* 12. *p.* 236.

Hilary, 11 *W*. 3. *Pollard* v. *Awker*.

On a *libel* in the *ſpiritual court* by the clerk of a pariſh for 4 *d. per annum*, due to him by cuſtom from every maſter of a family in the pariſh. The defendant denied the cuſtom, and a *prohibition* was granted, *becauſe cuſtom is not liable there*, except in *caſes of penſion*. *Vide Mod. Rep. vol.* 12. *p* 260.

Hilary, 11 *W*. 3. *Mauchin* v. *Moulton*.

See this caſe fully ſtated in page 383 of this work, under the head *Eccleſiaſtical Matters*, &c.

Eaſter, 11 *W*. 3. *Anonymous*.

A *libel* was preferred in the *eccleſiaſtical court* for ſcandalous words, *viz.* "You are a damned bitch, "whore, a pocky whore, and if you have not the itch "you have the pox."

On a motion for a *prohibition* to ſtay this ſuit, *Holt*, Chief Juſtice, ſaid, the words were actionable, and therefore granted a *prohibition*. *Vide Raym. vol.* 1. *page* 446.

Eaſter, 11 *W*. 3. *Anonymous*.

Holt, Chief Juſtice, denied to grant a *prohibition* to the *Admiralty Court*, on ſuggeſtion that they refuſed to give to the party ſued there a copy of the *libel*, becauſe the ſtatute extends only to *eccleſiaſtical* courts, and not to the *Admiralty* court. *Vide Raym. vol.* 1. *p.* 442.

Trinity, 11 *W*. 3. *Godfrey* v. *Llewellin*.

Holt, Chief Juſtice. Where the matter ſuggeſted for a *prohibition* appears on the face of the *libel*, we never inſiſt on an *affidavit*; but unleſs it appears on the face of the *libel* to be out of their juriſdiction, there ought to be an *affidavit* of the truth of the ſuggeſtion. *Vide Salk. vol.* 2. *p.* 549.

Michaelmas, 11 *W*. 3. ——— v. *Deer*.

A *probibition* was moved for to the conſiſtory court of *Landaff*, where a libel was brought for fraudulently taking away a will that was proved with them, in order to cheat the legatees.

Gould, Juſtice. Here is a will properly lodged, and if any one fraudulently takes it away, what remedy have they? for an indictment, or information, will not reſtore them the will, and *detinue* will not lie for them, becauſe they have no intereſt in it.

Turton, Juſtice, was of the ſame opinion.

Holt, C. J. on the other ſide, it was ſaid, the *prohibition* is authority enough for them to go on, though the will be loſt; and the offence need not go unpuniſhed, for they may have an indictment or information; and this is not like caſes of beating in a church-yard, where the ſtatute gives them power, though it be puniſhable at common law; nor beating in the church itſelf, where they proceed *for reformation of manners* only, and no *prohibition* went. *Vide Mod. Rep. vol.* 12. *p.* 325.

Michaelmas, 11 *W*. 3. *Oldham* v. *Rightſon*.

A *mortuary* was ſued for in the *ſpiritual court* of *Cheſter*, and a *prohibition* was moved for here, on ſuggeſtion that there was no cuſtom to pay a *mortuary* in that pariſh; and it was argued, that they may ſue for *mortuaries* in *ſpiritual courts*, if it be admitted there is any due; but the ſtatute *de circumſpecte agatis* makes no more proviſion for *mortuaries* than it does for tithes, or a *modus* of them, and in a ſuit for a *modus* the cuſtom may be traverſed, *Hob.* 247. If in a ſuit for a *modus*, the *modus* be admitted, they ſhall proceed, *otherwiſe* not. 3 *Cro.* 151. 2 *Cro.* 257. and 1 *W. & M. Brown* v. *White*, it was a controverted point; but then it was a more difficult point to obtain a *prohibition* than it is now: that ſtatute give coſts, and then the court would not grant a *prohibition*, without an oath of the truth of the ſuggeſtion. *Keb.* 835, 867. where it is admitted they may ſue for a *mortuary*, unleſs the cuſtom be denied. And the court was for granting the *prohibition*, it being a doubtful point, to have it ſettled; and that the being of coſts ſeemed to be a notable ingredient in the caſe; and the *ſtat.* 31 *H.* 8. *provides* they ſhall demand no more than they had by cuſtom, which, though it be reſtrictive of their juriſdiction, yet ſhews they have juriſdiction of *mortuaries*.

But the other ſide offering *affidavits* of uninterrupted uſage, *Holt*, Chief Juſtice, ſaid, that might be ſomething; for though there were a good ſuggeſtion made, yet, if it appeared to them to be merely for delay, they would not grant a *prohibition*, and that was the reaſon of the rule of requiring *affidavits* of the truth of the ſuggeſtion. *Vide Mod. Rep. vol.* 12. *p.* 326.

Michaelmas, 11 *W* 3. *Dair* v. *The Earl of Stamford*.

The court was moved for a *prohibition* to the court of *Chancery*, on a *writ of ſequeſtration* out of that court, whereby lands were ſequeſtered; and ſuggeſted that the *Chancery* was only a court of equity, having only a juriſdiction over perſons in caſe of diſobedience to their decrees, and not otherwiſe; and he affirmed, that though it were called the *High Court of Chancery*, yet if it ſhould go againſt law, or exceed its juriſdiction, they were under controul of this court; for they, on *habeas corpus*, will deliver one illegally committed by them. And he ſaid, that at firſt theſe ſort of ſequeſtrations were only granted in caſe of perſonal duty concerning land; but they ought not to ſequeſter lands for a debt ariſing on a perſonal contract, not concerning the land ſequeſtred.

Holt, Chief Juſtice. You move for a ſtranger to the bill, and anſwer proceedings in *Chancery*; and therefore you muſt take your remedy at law: you don't ſay that you have brought treſpaſs againſt this ſequeſtrator, and they ſtop you by injunction out of *Chancery*. And no more was done in this matter. *Vide Mod. Rep. vol.* 12. *p.* 313.

Michaelmas, 11 *W*. 3. *Blank* v. *Newcomb*.

A *libel* was brought in the *ſpiritual court* for not paying a pariſh-rate for the repairs of the church; and ſuggeſted for a *prohibition* that all pariſh rates were to be made by a majority of the pariſhioners; and that every rate, after it is collected, becomes void; and that this was not by a majority, *&c.* and that the ſuit was to pay this in purſuance of an old rate collected many years before.

As to the firſt it was urged, its not being by a majority of the pariſhioners was matter only proper for an appeal, and ſo is the inequality of the rate. 2 *Bulſt.* 289.

As to the ſecond, that this preſent rate had indeed reference to a former one which had been collected, but that was not to give any force or efficacy to the former, but only by way of direction of the latter, according to Sir *Robert Lee's caſe.*

Holt, Chief Juſtice. The right courſe is for a *ſpiritual court* to give ſufficient notice to the pariſh to meet, and make a rate for reparation of the church, which if they do not do, they may be excommunicated; but the *eccleſiaſtical court* cannot make a rate, or appoint commiſſioners to do it; and here the ſuggeſtion recites an antient rate, which they ſay was to be a ſtanding order for all times to come; and that they have confirmed that rate, and that the libel is for want of a new payment according to it. *Noy.* 131. 126. in point for a *prohibition* in this caſe, and all that the *ſpiritual court* can do is, to make an order that the church be repaired, but not to aſſeſs a *quantum* for that purpoſe. And though in the *ſpiritual court* one omits in the libel that which makes againſt him, as here, that the rate was made by commiſſioners of the *eccleſiaſtical court*, yet they of the other ſide may ſuggeſt it; and here a *prohibition* was granted. *Vide Mod. Rep. vol.* 12. *p.* 327.

Michaelmas, 11 *W.* 3. *Anonymous.*

On ſhewing cauſe why a *prohibition* ſhould not go to the *ſpiritual court*: the foundation of the libel was for a rate to repair the church, and there was a ſentence and an appeal on that; and now after all this they would have a *prohibition*, but they came too late.

In the time of the late King *James* 2. there was an act made for building this church, with power to raiſe a ſum not exceeding 50000 *l.* ſo that they ſuggeſt there was money enough raiſed by that act, and that this rate was illegally made; but your Lordſhip will not examine into that now. Therefore we hope, ſince here is nothing contrary to the act, for ought appears againſt law, we pray the rule may be diſcharged.

The council on the other ſide alledged, that they had procured a ſentence *ex parte*, but ſaid that this caſe turned on two points:

Firſt, The act of parliament, which preſcribes a particular manner of raiſing the monies, and therefore an application to the *ſpiritual court* was improper.

Secondly, It is a rate declared to be made by the veſtry, and no veſtry could be called till the church was finiſhed. Therefore we inſiſt that the ſtatute is not followed, which preſcribes a particular way of raiſing the money.

The Chief Juſtice concurred in this opinion; on which the council on the other ſide ſaid, their ſuit was for the repairing the church, and not for building it. And after hearing the further arguments of the council on both ſides, the court granted a *prohibition*, and ordered the plaintiff to declare thereon. *Vide Mod. Rep. vol.* 5. *p.* 448.

Hilary, 12 *W.* 3. *Anonymous.*

In the Biſhop of *Wincheſter*'s caſe, 2 *Co.* 45. it was held, that in a ſuit for tithes in the *Spiritual Court*, *H.* may have a *prohibition*, ſuggeſting a *preſcription* or *modus*, before or without pleading. But this ſeems not to be law; for in *ſtat.* 12 *W.* 3. a *prohibition* was moved for, ſuggeſting a cuſtom, *&c.*

Holt, Chief Juſtice, and the court, refuſed to grant it, unleſs they pleaded it below, becauſe perhaps they might admit the plea. Alſo on *ſtat.* 10 *W.* 3. in this court, it was ſaid by *Holt*, Chief Juſtice, that if a *modus* be pleaded in the *Spiritual Court* and admitted, no *prohibition* ſhall go; but if the queſtion be, whether a *modus* or no *modus*, a *prohibition* ſhall go, and ſo is the law, *viz.* wherever the matter which you ſuggeſt for a *prohibition* is foreign to the libel, you muſt plead it below, before you can have a *prohibition*; otherwiſe where the cauſe of *prohibition* appears on the face of the libel. *Vide Salk. vol.* 2. *p.* 551.

Trinity, 12 *W.* 3. *Smith* v. *Wallet.*

The ſequeſtrator of the tithes of a vicarage ſued the impropriator in the *ſpiritual court* for tithes on the endowment. On which the defendant moved for a *prohibition*, on a ſuggeſtion that it was not a vicarage, and that it ought to be tried at common law.

Adjudged by *Holt*, Chief Juſtice, that if the ſuggeſtion is good in point of law, this court will grant a *prohibition*; but if it appears to them notoriouſly otherwiſe, they will not. *Vide Raym. vol.* 1. *p.* 587.

Trinity, 12 *W.* 3. *Jones* v. *Stone.*

David Jones, the vicar of *N.* was *libelled* againſt in the *Spiritual Court*, for that by cuſtom time out of mind the vicars of *N.* had by themſelves, or others, ſaid and performed divine ſervice in the chapel of *Chawbury*, for which there was ſuch a recompence; and that he neglected. The defendant came for a *prohibition*, and without traverſing this cuſtom, ſuggeſted that all cuſtoms were triable at common law: and the council urged, that it was enough for a *prohibition*, that a cuſtom appeared to charge the vicar with a duty for which he was not liable of common right.

Holt, Chief Juſtice. A perſon may be bound to an *eccleſiaſtical* duty by cuſtom, and when he is bound by cuſtom, the *Spiritual Court* may puniſh him if he neglects that duty; the cuſtom might have a reaſonable commencement by compoſition in the *Spiritual Court*, and begin by an *eccleſiaſtical act*: and a bare preſcription only is not a ſufficient ground for a *prohibition*, unleſs it concerns a layman; whereas here it is an *eccleſiaſtical right*, an *eccleſſaſtical perſon* and an *eccleſiaſtical duty*, and the preſcription not denied; notwithſtanding 2 *Inſt.* 491. I never could get a *prohibition* to ſtay a ſuit in the *Spiritual Court* againſt a parſon for a penſion by preſcription. 1 *Vent.* 3, 120, 265. *Vide Salk. vol.* 2. *p.* 550. *Raym. vol.* 1. *p.* 578.

Michaelmas, 12 *W.* 3. *Johnſon* v. *Oldham.*

On a motion for a *prohibition* to the *ſpiritual court* to ſtay a ſuit there for a *mortuary*, on a ſuggeſtion of *ſtat.* 21 *Hen.* 8. *cap.* 6. that there was no cuſtom for the payment of the ſame.

Adjudged by *Holt*, Chief Juſtice, that a *prohibition* cannot be granted without a denying of the cuſtom in the *ſpiritual court*, which was not done in the preſent caſe: therefore the court denied the motion. *Vide Raym. vol.* 1. *p.* 609.

Michaelmas, 12 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. In *prohibition*, either of the parties contending below may be plaintiff. *Vide Mod. Rep. vol.* 12. *p.* 423.

Michaelmas, 12 *W.* 3. *Anonymous.*

On a motion for a *prohibition* for libelling in the *ſpiritual court* for a pariſh rate, for mending and cleanſing the pariſh organ, the ſame was granted. *Vide Mod. Rep. vol.* 12. *p.* 416.

Michaelmas, 12 *W.* 3. *Blaxton* v. *Henore.*

The council urged, that if it appears on the face of the libel that the *eccleſiaſtical court* has no juriſdiction, they may be *prohibited* without ſuggeſtion.

But the court were of a different opinion, for the ſuggeſtion is a fundamental point, and is the declaration on the writ. *Vide Mod. Rep. vol.* 12. *p.* 435.

Michaelmas, 12 *W.* 3. *Anonymous.*

A woman was *libelled* againſt in the *ſpiritual court* for incontinency with a man ſince dead. Suggeſted for a *prohibition* that the man was her huſband: and now the *ſpiritual court* could not examine whether he had been her huſband or not, becauſe that would tend to baſtardize the children, and diſſolve the marriage after the death of the party.

Holt, Chief Juſtice. If there was a marriage *de facto*, though illegal, yet they ſhall not libel to avoid it after the huſband's death; but if there was none, the death of the man ought not to protect her from a proſecution for her whoredom. *Vide Mod. Rep. vol.* 12. *p.* 419.

Michaelmas, 12 *W.* 3. *Johnſon* v. *Ryſon.*

A *libel* was brought in the *ſpiritual court* for a *mortuary*, alledged due by cuſtom; the ſuggeſtion ſet forth *ſtat.* 21 *H.* 8. *c.* 6. and that there was no cuſtom in that pariſh for payment of *mortuaries*.

Per curiam There is no colour for a *prohibition*, ſince you have not pleaded; for a *mortuary* is a thing within their juriſdiction; and if there were any room for a *prohibition*, it would be for want of a cuſtom; and then that ought to have been pleaded; and he compared it with a *modus decimandi*, for which there is no remedy but in the *ſpiritual court*; and the caſe in *Cro. Car. Hind* v. *The Biſhop of Cheſter*, is not like this, for the ſtatute excepts a *mortuary*, and a *mortuary* is a mere *eccleſiaſtical* right, for which there is no remedy but in the *ſpiritual court*; and though a *writ of annuity* may lie for a penſion by preſcription, and ſo recoverable at *common law*, yet it may be ſued for in the *ſpiritual court* againſt the opinion of *Co.* 2 *Inſt.* 491. which has been frequently exploded ſince: and the rule fora *prohibition* was diſcharged. *Vide Mod. Rep. vol.* 12. *p.* 416.

Michaelmas, 12 *W.* 3. *Earle* v. *Paine.*

One *Paine*, a cuſtom-houſe officer, exhibited an information of ſeizure of a hogſhead of wine belonging to Mr. *Earle*, and ſeized for not paying cuſtom. *Earle* neglected to come in and enter his claim in the *Exchequer*, but in the mean time brought an action of *treſpaſs* in this court againſt *Paine*. On motion, the barons ordered that the proceedings in this court ſhould be ſtayed, and the cauſe there removed into the *Exchequer* in the ſame ſtate it then ſtood. *Earle* was ſerved with the order, but notwithſtanding gave rules for pleading; whereon an *attachment* was iſſued by the *Exchequer* againſt him; on which he moved here for a *prohibition* to the *Court of Exchequer*. And a rule was made to hear council; on the argument ſeveral precedents were cited, one in 19 *Hen.* 7. *Rol.* 16. exactly like this. The court took time to conſider of the precedents, and in the mean time the matter was compounded. *Reg.* 187. 2 *Inſt.* 551. *Vide Salk. vol.* 2. *p.* 551.

Hilary, 13 *W.* 3. *Johnſon* v. *Bewick.*

A rule was made for a *prohibition* to be granted *niſi*, *i. e. unleſs cauſe ſhewn*, directed to the Conſiſtory Court of the Biſhop of *Winton*, to ſtay a ſuit againſt the plaintiff, for having ſpoken of the defendant the following ſcandalous words, "*viz.* Thou art a whore," and alſo for having ſaid to her huſband, "You have "married an old whore, and therefore have no children;" on ſuggeſtion of the cuſtom of *London* to cart whores, and that theſe words were ſpoken in *London*.

Holt, Chief Juſtice. If a *prohibition* was granted, it would encourage all the market people when they were in *London* to defame their neighbours without fear of puniſhment. Therefore the court diſcharged the rule. *Vide Raym. vol.* 1. *p.* 711.

Hilary, 13 *W.* 3. *Fenwick* v. *Lady Groſvenor.*

The plaintiff libelled againſt the defendant in the *ſpiritual court* for cohabitation, claiming a marriage with her; and a *prohibition* was moved for, on ſuggeſtion that the citation was to anſwer out of the dioceſe, it being to the *eccleſiaſtical court* of the peculiar of *Weſtminſter*, whereas ſhe lived in *Cheſter*; but it appearing by *affidavit*, that ſhe dwelled for a conſiderable time in the dioceſe of *London*, and even to the very day of the citation, which was ſerved on her juſt as ſhe was going away; the court would not grant a *prohibition*. *Vide Mod. Rep. vol.* 12. *p.* 610.

Hilary, 13 *W.* 3. *Anonymous.*

A perſon was libelled in the *Spiritual Court* by the huſband and wife, for calling the huſband *cuckold*: ruled by *Holt*, Chief Juſtice, that a *prohibition* ſhall go, becauſe they cannot both ſue in that court for that word. *Vide Salk. vol.* 3. *p.* 288.

Eaſter, 13 *W.* 3. *Turton* v. *Reiner.*

If a declaration in *prohibition* be by him who ſued the *prohibition*, and no plea be put in in due time, the plaintiff may have judgment by *nihil dicit*; but if it be on the other ſide, and no plea, there ſhall be likewiſe a *nihil dicit*, and a conſultation. *Vide Mod. Rep. vol.* 12. *p.* 447.

Michaelmas, 13 *W.* 3. *Pollard* v. *Gerrard.*

See this caſe fully ſtated in page 265 of this work, under the head *Commitment*.

The Caſe of Sir Baſil Firebraſs.

One *H.* was chief ranger of *Enfield Chaſe*, and now a bill was exhibited againſt him in the *Chancery* of the duchy for a diſcovery of what deer he had killed, and what timber, wood, *&c.* he had felled and cut down, and by what warrant; and to ſhew cauſe why his patent ſhould not be repealed. And to this ſuit a *prohibition* was granted *niſi*; for he ſhall not be obliged to anſwer on his oath, what is to make him forfeit his place, but it ought to be proved againſt him. *Vide Salk. vol.* 2. *p.* 550.

Anonymous.

Holt, Chief Juſtice. In caſes of *prohibitions*, where they were granted on a motion, the ancient courſe was, that the party *prohibited* ſued out a *ſcire facias, quare conſultatio non debet concedi poſt prohibitionem*, in which writ the ſuggeſtion was recited, and alſo a *prohibition* granted thereon, to the damage of the party.

Afterwards this practice was altered, and the courſe came to be thus, *viz.* on granting a *prohibition* to the plaintiff, the court bound him in a recognizance to proſecute an *attachment of contempt* againſt the defendant, for ſuing in the *Spiritual Court* after a *prohibition* granted, and then to declare on the *prohibition*; ſo that he who was the defendant in that court is now become actor or plaintiff in the court above. *Vide Salk. vol.* 3. *p.* 289.

Freeman v. *Shotter.*

Ruled, That where a thing incident in the *Spiritual Court* is of a *temporal nature*, they muſt try it in the ſame manner in that court, as it would have been tried at law, otherwiſe a *procedendo* will be granted; but if the matter incident is of a *ſpiritual nature*, or of a *ſpiritual cognizance*, they may try it according to their own law; as for inſtance, if they require *two witneſſes* to the proof of a revocation of a will, a *prohibition* will not be granted, becauſe ſuch proof is required at law; but if they require *two witneſſes* to prove a leaſe, a *prohibition* will be granted. *Vide Salk. vol.* 3. *p.* 288.

Hilary, 1 *Ann.* *Chambers* v. *Jennings.*

See this caſe fully ſtated in page 317 of this work, under the head *Courts*.

Eaſter, 1 *Ann.* *Anonymous.*

All *prohibitions* are to be granted on ſome ſuggeſtion, and not otherwiſe; which ſuggeſtions are to be brought into the office. But it has been doubted as to *prohibitions* to the *Admiralty*; for the court of *Admiralty* does not uſe to ſet forth the ſpecial matter whereon they give ſentence, but only to recite that they have heard both ſides, and ſo proceed to give judgment, and then pretend it is to late too move for a *prohibition*.

Holt, Chief Juſtice. It is never too late to move for a *prohibition* after ſentence in any caſe, but *one*, and that is to the *eccleſiaſtical court*, on *ſtat.* 23 *Hen.* 8. where the ſuit is out of the dioceſe; and the reaſon why a *prohibition* is denied in that caſe is, becauſe you have by pleading owned their juriſdiction. *See Comberb*, 234, 253, 448, 459, 463. *Shower*, 333, 396, 172. *Vide Mod. Rep. vol.* 11. *p.* 5.

Trinity, 1 *Ann. Anonymous.*

A *libel* was brought in the *ſpiritual court*, for that *J. S.* being the parſon of ſuch a church, did make himſelf drunk at the ſacrament, and that he was a whoremaſter; and upon ſuggeſtion, that they would proceed to a deprivation, and that the benefice was a donative. A *prohibition* was granted *as to* the ſuing in order to deprive, but not *as to* the other matter. *Vide Mod. Rep. vol.* 7. *p.* 31.

Michaelmas, 1 *Ann. Partridge's Caſe.*

A *prohibition* was prayed to the *Spiritual Court* to ſtay the probate of a will, which contained a deviſe of lands and ſeveral legacies, ſuggeſting that matter, and that the teſtator was *non compos*; and the Marquis of *Wincheſter*'s caſe, 6 *Co.* 23. was relied on; but the court denied that caſe, and ſaid, that *ſtat. H.* 8. never intended to leſſen the juriſdiction of the *eccleſiaſtical court* as to the probate of wills. And to grant a *prohibition* might be inconvenient, for without probate the executor cannot ſue for debts, which by this means may be loſt, and the will unperformed. As for granting it as to the land, it would be vain, (2 *Ro.* 315. 1 *Sid.* 141. this was the practice heretofore) becauſe it is no evidence either *pro* or *con* in any court of law, but a proceeding *before no judge*; yet it is good as to the goods. *Vide Salk. vol.* 2. *p.* 553.

Michaelmas, 1 *Ann. Galizard* v. *Rigault.*

On an indictment for aſſaulting, beating, wounding, and endeavouring to raviſh the wife of one *B.* on which the party was convicted, and afterwards the huſband brought an action of *treſpaſs* for the ſame cauſe; and now the party being alſo libelled againſt in the *Spiritual Court* for the ſame fact, *viz.* for ſoliciting her chaſtity, moved for a *prohibition* againſt the proceedings in the *Spiritual Court*; and it was urged for the juriſdiction of the *Spiritual Court*, that they may puniſh for the ſolicitation and incontinence, and that this ſuit was *pro ſalute animæ*, the other for fine and damages.

Per curiam. A *prohibition* muſt be granted; for it being an attempt and ſolicitation to incontinence, coupled with force and violence, it does by reaſon of the force, which is *temporal*, become a temporal crime *in the whole*; as if one ſays, *Thou art a whore and a thief*, or *thou keepeſt a bawdy-houſe*, which are temporal matters, the party ſhall not proceed in the *Spiritual Court*; whereas, if it were only, *Thou art a whore*, a *libel* lies in the *Spiritual Court*. So if it be ſaid of a woman that ſhe is a *bawd* only, and not that ſhe keeps a *bawdy-houſe*.

Holt, Chief Juſtice. If one commits adultery, and the huſband bring *aſſault* and *battery*, this ſhall not hinder the *Spiritual Court*, for it is a criminal proceeding there, and no indictment lies at *common law* for adultery. 1 *Roll. Abr.* 295. 2 *Inſt.* 488. *Vide Salk. vol.* 2. *p.* 552.

Michaelmas, 1 *Ann. Harrow's Caſe.*

A *libel* was brought in the *ſpiritual court* for ſubtraction of tithes for agiſtment of cattle: they pleaded below that they were inhabitants of that pariſh, and the other tithes were better for the agiſtment of cattle there; and this matter they alſo ſuggeſted for a *prohibition*, but in their declaration on the *prohibition* they alledged they were occupiers.

Per curiam. The declaration ought not to vary from the ſuggeſtion, and if you do not declare purſuant to the ſuggeſtion, a conſultation ought to go; for if you diſcontinue your *prohibition*, it ſhall go of courſe; and the reaſon why agiſted cattle ſhall not pay tithes, is becauſe the other tithes of the ſame pariſh are the better for the agiſtment there.

Holt, Chief Juſtice, ſaid, if you have a houſe in one pariſh, and live there, you muſt not pay agiſtment for dry cattle; but if you be not a houſe-keeper there, you muſt pay this for agiſtment. And here the court would give them leave to diſcontinue paying coſts, and praying another *prohibition*. And if there be cattle of the plow agiſted in another pariſh, they muſt pay tithes there where they agiſt, becauſe they are not cattle of the plow there. *Vide Mod. Rep. vol.* 7. *p.* 113.

Michaelmas, 1 *Ann. Wenmouth* v. *Collins.*

The council moved to have a *prohibition* granted to the *eccleſiaſtical court*, to ſtay a ſuit there againſt the plaintiff for brawling in the belfrey, and ſtriking a man there, on ſuggeſtion of *ſtat.* 5 & 6 *Ed.* 6. *c* 4. and that all ſtatutes are conſtruable by the common law, and that the plaintiff came there as mayor to ſuppreſs a riot.

The court denied a *prohibition*, becauſe this offence was conuſable in the *eccleſiaſtical court* before this ſtatute, *by reaſon of the place*; and that the ſtatute, tho' it provides a penalty, does not alter the juriſdiction. *Vide Raym. vol.* 2. *p.* 850.

Hilary, 2 *Ann. Anonymous.*

It was argued, that a *prohibition* lay for denying a copy of the libel to any *eccleſiaſtical court*: for the party ought to know whether the matter be within their juriſdiction, and how to anſwer it. 1 *Ro. Rep.* 337. *Dighton*'s caſe, *Mich.* 2 *Ann*, in this court, and it was ſaid by *Holt*, C. J. that it was formerly held by all the judges of *England*, that when there was a proceeding *officially* in the eccleſiaſtical court they were not bound to give the party a copy of the articles; but the law is otherwiſe: for in ſuch caſe, if they refuſe to give a copy of the articles a *prohibition* ſhall go till it be given; and accordingly a *prohibition* was granted by the court. *Eaſter* 11 *W.* 3. in this court it was moved for a *prohibition* to the Admiralty for refuſing a copy of the libel; and it was denied by *Holt*, Chief Juſtice. *Vide Salk. vol.* 2. *page* 552.

Eaſter, 2 *Ann. Brown* v. *Tanner.*

A perſon was *libelled* in the *Spiritual Court for brawling in the church-yard*, and for telling the parſon, *Thou art a pitiful drunken parſon, and a drunken puppy*; and the court was moved for a *prohibition* on the authority of the caſe of *Star* v. *Bucknell*, where for the like words a *prohibition* was granted, and ſo in *Haine*'s caſe; and the reaſon was, becauſe *drunkenneſs* is a *temporal offence*; it is true, the caſes before mentioned were of drunkeneſs in *laymen*, but if it is an offence in a *layman*, it ſhould be ſo in a *clergyman*; it is a crime which does not take its nature from the perſon who commits it, but from the law which is offended thereby; it is true, the *canoniſts* make every thing which is a ſin, and forbidden by the *ten commandments*, to be a *ſpiritual offence*, as *murder*, *perjury*, &c. but by the *common law*, whatever is taken notice of and puniſhable by the *temporal laws*, is a *temporal offence*; and what is not puniſhable by the *temporal law*, but by the *ſpiritual law*, in ſuch caſe, that law is a kind of ſupplanting the *temporal law*, and the offences ſo puniſhable are *ſpiritual offences*, as *fornication*, *adultery*, &c.

Now, as for *drunkenneſs*, it was always accounted a *temporal offence*, for it was indictable at *common law*; and alehouſes were formerly appointed in the *leet*, and before the 24th of *Elizabeth*, there was ſcarce ſuch a crime in *England*; it is true, a *parſon* may be deprived for *drunkenneſs*, and ſo he may for *ſodomy*, but yet he is not puniſhable for that offence in the *Spiritual Court*, becauſe it is a *temporal offence*; afterwards a *prohibition* was granted as to the words, but not as to the *brawling in the church-yard*. *Vide Salk. vol.* 3. *p.* 289.

Trinity, 2 *Ann. Johnſon* v. *Shippen.*

See this caſe fully ſtated in page 647 of this work, under the head *Maritime Affairs*.

Trinity,

Trinity, 2 *Ann.* *Anonymous.*

Holt, Chief Juſtice. It was formerly held by all the judges of *England*, that where there was a proceeding *officially* in the *eccleſiaſtical court*, they were not bound to give the party a copy of the articles; but the law is otherwiſe, for in ſuch caſes, if they refuſe to give a copy of the articles, a *prohibition* ſhall go *until* they deliver it; and accordingly, on motion, a *prohibition* was granted in this caſe. *Vide Raym. vol.* 2. *p.* 991.

Michaelmas, 2 *Ann.* *Trantor* v. *Watſon.*

See this caſe fully ſtated in page 648 of this work, under the head *Maritime Affairs.*

Hilary, 3 *Ann.* *Evans* v. *Brown.*

There was a ſuit in the *eccleſiaſtical court* for theſe words, "You are known by the name of *Bawdy Nell*, "and do lie with another woman's huſband:" and the council moved for a *prohibition*, on a ſuggeſtion that the plaintiff below had brought an action at law for theſe words, grounded on the ſpecial damage ſhe had ſuſtained by the defendant's ſpeaking them. And he compared this to the caſe, where one calls a woman *whore and thief.* 2 *Roll.* 297. *n.* 25. in that caſe ſhe ſhall not have an action in the *eccleſiaſtical court* for theſe words, though ſhe might for the word *whore*, becauſe it being joined with the word *thief*, an action lies at common law for the words. Neither can the words be ſplit, and an action brought at law for the word *thief*, and a ſuit in the *eccleſiaſtical court* for the word *whore.* So here, though the words are properly ſuable for in the *eccleſiaſtical court*, yet a ſpecial damage attending the ſpeaking of them, by which means an action lies at common law, they therefore ſhall not proceed for the ſpeaking them in the *eccleſiaſtical court*; but the court denied to grant a *prohibition*. *Vide Raym. vol.* 2. *p.* 1101.

Eaſter, 3 *Ann.* *Collins* v. *Jeſſot.*

See this caſe fully ſtated in page 653 of this work, under the head *Marriage.*

Michaelmas, 3 *Ann.* *Parker* v. *Clerk.*

See this caſe fully ſtated in page 707 of this work, under the head *Pariſh Officers.*

Eaſter, 4 *Ann.* *Aubery* v. *Barton.*

A woman libelled againſt another in the *ſpiritual court* for theſe words, "You are a brandy-noſed "whore; you ſtink of brandy."

On a motion for a *prohibition*, the council urged that theſe words were words of heat, and did rather charge the defendant with *intemperance*, than *incontinency.*

The court, after hearing the arguments of the council on both ſides, denied the *prohibition*: and *Holt*, Chief Juſtice, ſaid it had been denied *forty times* in the like caſe. *Vide Raym. vol.* 2. *p.* 1136.

Eaſter, 4 *Ann.* *Starkup* v. *Dodderidge.*

Adjudged by *Holt*, Chief Juſtice, That no *prohibition* will lie on old compoſitions for payment of tithes, but that the parties aggrieved muſt plead it below; and that where a *prohibition* is granted on a *modus*, or cuſtom, that in itſelf is void, and a verdict given for the plaintiff, yet a conſultation muſt go. *Vide Raym. vol.* 2. *p.* 1161.

Trinity, 4 *Ann.* *Foy* v. *Liſter.*

On a *modus* ſuggeſted to pay every *tenth day*'s milk, from *April* to *November*, ſkimmed, and then made into cheeſe, in lieu of all tithe of milk, a *prohibition* was granted to try the *modus*, and ſettle the matter; and on ſpeaking to the goodneſs of the *modus*, theſe caſes were cited. 3 *Cro.* 609. *Mod.* 909. *Latch.* 226. 1 *Ro.* 649. *N.* 17. 648, 649. At laſt cauſe was ſhewn, that the *prohibition* was *teſted* on the 29th day of *November*, and that *ſix months*, i. e. *calendar months*, (as they ought to be, *Noy* 30. *Hob.* 179. *Litt. Rep.* 19.) were expired on the 25th day of *May* laſt, and therefore he moved for a *conſultation*, becauſe in all that time they had not proved their ſuggeſtion; and had it on *ſtat.* 2 *Ed.* 6.

The court agreed, that the ſtatute extends to ſuits for ſmall as well as great tithes, and that the *ſix months* are to be computed from the *teſte* of the writ, and the caſe in *Moore* 573. wherein it is ſaid there muſt be *ſix months* in term time, was denied. For proving ſuggeſtions, *Co. Ent.* 462, 463. 4. *Conſultations* for not proving them, *Aſht.* 444. *Theſ. Brev.* 80. *Vide Salk. vol.* 2. *p.* 554.

Michaelmas, 4 *Ann.* *Burdett* v. *Newell.*

A rule was made to ſhew cauſe why a *prohibition* ſhould not be granted to ſtay a ſuit againſt the plaintiff, in the court of the Archdeacon of *Litchfield*, for not going to his pariſh church, nor any other church, on *Sundays* or *holidays*, nor receiving the ſacrament thrice a year, on a ſuggeſtion of ſtatute of *Elizabeth*, and the *toleration act*, and then qualifying himſelf within that act, and alledging that he pleaded it below, and they refuſed to receive this plea. And the council ſhewed for cauſe, that this fact was falſe, and that the plaintiff was not a diſſenter, nor had qualified himſelf as directed by the ſtatute, and therefore hoped the court would not allow the rule to ſtand, unleſs he had an *affidavit* of the fact, for by that means any perſon might come and ſuggeſt a falſe fact, and *ouſt* the *ſpiritual court* of their juriſdiction. The court was of the ſame opinion, therefore the rule was diſcharged; the council for the plaintiff having no *affidavit. Vide Raym. vol.* 2. *p.* 1211.

Eaſter, 6 *Ann.* *Hoſkins* v. *Lee.*

A motion was made for a *prohibition* to the *ſpirituul court* on a libel there for theſe words, "He is a great "rogue, as great a rogue as ever was hanged; and "deſerves to be hanged more than Dr. *Pimes.*" A *prohibition* was granted, becauſe theſe words contained no *ſpiritual* defamation.

Holt, Chief Juſtice, ſaid, if *A.* called *B.* a ſon of a whore, he cannot libel in the *ſpiritual court*, but his mother may, becauſe in this caſe it is no *ſpiritual* defamation to the ſon, but it is to the mother. *Vide Mod. Rep. vol.* 11. *p.* 112.

Trinity, 6 *Ann.* *May* v. *Hodge.*

On a rule to ſhew cauſe why a *prohibition* ſhould not be granted to ſtay a ſuit commenced by *Dionyſia Hodge*, the wife of the defendant, and *John Hodge* her ſon, before the Archdeacon of *Cornwall*, againſt the plaintiff *May*, for ſaying to *John Hodge* theſe words, *viz.* "Thou art a baſtard, and a pepper-queen baſtard." And on a motion, this term, the rule was diſcharged. For as to the ſon, no action at law lies for calling him *baſtard*, without ſpecial damage; and they are not bare words of heat; by the *eccleſiaſtical law* a baſtard cannot be a prieſt. 3 *Lev.* 119. *Vincent* v. *Alpy*, 2 *Roll. Abr.* 295. *pl.* 2. *Linw. p.* 26. 2. As to the mother, it is calling her *whore. Cro. Car.* 399. 2 *Roll. Abr.* 296. *pl.* 18. *Hilary* 6 *W.* 3. in this court, 1694, *Morrel and Wife* v. *Kendall*, the plaintiffs libelled againſt the defendant for calling her huſband *cuckold*, and a *prohibition* was denied; though *Holt*, Chief Juſtice, held then the beſt way was, for the wife to *libel* alone; but in ſuch caſe, if the huſband *libelled* alone, a *prohibition* ſhould be granted. 1 *Sid.* 248. *Knite* v. *Jacob. Vide Raym. vol.* 2. *p.* 1287.

Michaelmas, 6 *Ann.* *Clerk* v. *Price*, *a Parſon.*

A *prohibition* was moved for to the *ſpiritual court* for the following words, *viz.* That the ſaid *Price* "behaved himſelf proudly and inſolently, and that he "was an impudent, ignorant blockhead:" and that he alſo ſaid and declared, "that the advice and ex"hortations, and other ſpiritual directions of him the

" ſaid *Price*, from the pulpit, were not fit to be taken, " and that he was not fit to give the ſacrament." And that he the ſaid *Clerk*, ſpeaking to a third perſon, ſaid, " you would not receive the ſacrament from ſuch a " puppy as the ſaid *Price* was, was you to live ever " ſo long in this pariſh." On which a rule to ſhew cauſe was obtained. On ſhewing cauſe the council urged, that theſe were not words of heat, but of deliberation, and highly touched him in his function; and cited the caſe of *Crandon* v. *Walden*, 3 *Lev.* 17.

Holt, Chief Juſtice, ſaid, that though theſe words did reflect on him in his profeſſion, yet ſeeing they do not charge him with any thing for which he is obnoxious to the *ſpiritual court*, therefore a *prohibition* was granted; and it was ordered to come before this court by *declaration* and *demurrer*. *Vide Mod. Rep. vol.* 11. *p.* 140.

Hilary, 8 *Ann.* *Biſhop* v. *Eagle.*

See this caſe fully ſtated in page 334 of this work, under the head *Damages.*

Eaſter, 8 *Ann.* *Anonymous.*

The court was moved for a *prohibition* to the *ſpiritual court*, to prohibit them proving a will made by a *feme covert* without her huſband's conſent.

Holt, Chief Juſtice, ſaid a *feme covert* cannot deviſe what ſhe has as executrix, without the huſband's conſent; and the motion was granted *niſi* this term, and made abſolute in *Trinity* term following. *Vide Mod. Rep. vol.* 11. *p.* 221.

Michaelmas, 9 *Ann.* *Baniſter* v. *Hopton.*

On a motion for a *prohibition* in this caſe, it was agreed, that though a preſcription, whether a whole pariſh or a ſelect veſtry ſhould chuſe churchwardens, be a matter triable at common law by a jury, yet ſentence is to be given in the *ſpiritual court* according to their verdict; and therefore, though this be a matter triable at common law, yet if the party ſubmit to a trial in the *ſpiritual court*, by not demanding a *prohibition*, it will be too late after ſentence to move for one. *Vide Mod. Rep. vol.* 10. *p.* 12.

Michaelmas, 9 *Ann.* *Forte* v. *Buviere.*

See this caſe fully ſtated in page 386 of this work, under the head *Eccleſiaſtical Matters*, &c.

Eaſter, 10 *Ann.* Sadler v. *Daniel.*

See this caſe fully ſtated in page 478 of this work, under the head *Executors and Adminiſtrators.*

Michaelmas, 10 *Ann.* *D'Aeth* v. *Baux.*

See this caſe fully ſtated in page 212 of this work, under the head *Baron and Feme.*

Michaelmas, 1 *Geo.* Cottingham v. *Lofts.*

On a motion for a *prohibition*, ſuggeſting that where there is a diſpute between a *peculiar* and the *prerogative court*, whether *effects* or not, it muſt be tried by the common law. 1 *Mod.* 211.

Per curiam. This muſt often have happened; and if a *prohibition* lay, there muſt have been frequent inſtances of it.

Where a *prohibition* is granted for *default in trying the cauſe*, it is on ſuppoſition of different rules eſtabliſhed by the *ſpiritual* and *common law*, as in caſe of preſcription; but as to *effects*, the *ſpiritual court* and *common law* are the ſame. *Vide Mod. Rep. vol.* 10, *page* 272.

Michaelmas, 1 *Geo.* *Clerk* v. *Lee.*

See this caſe fully ſtated in page 143 of this work, under the head *Attorney.*

Hilary, 3 *Geo.* *Savil and Wife* v. *Kirby.*

The *ſpiritual court* had proceeded againſt the defendant for theſe words ſpoken againſt the wife, *viz.* " You are a bawd."

On a motion for a *prohibition*, the defendant's council ſuggeſted that theſe words were ſpoken at *Weſtminſter*, and that the city of *Weſtminſter* is an ancient city, and that there is an ancient cuſtom within the ſaid city, that whores ſhould be puniſhed by impriſonment; on which a rule to ſhew cauſe was obtained.

Per curiam. As to the cuſtom in *Weſtminſter*, it was obſerved, that this was only matter of ſuggeſtion in this court, without any *affidavit* to ſupport it, and never laid before the court by plea; beſides, there was nothing more pretended in the cuſtom than what was generally held all over *England*, viz. that ſuch ſort of perſons are generally ſent to the houſe of correction: therefore the rule was diſcharged. *Vide Mod. Rep. vol.* 10. *p.* 385.

Hilary, 4 *Geo.* *Sir H. Houghton* v. *Starkey, Eſq;*

On a *prohibition* concerning a ſeat in the church, the queſtion was, if the plaintiff ſhould have coſts in a *prohibition*, and from what time.

All the judges being met on another occaſion, this caſe was put, and they were all of opinion that the coſts ſhould be taxed, from the time of the motion and ſuggeſtion for a *prohibition*. *Vide Forteſcue, p.* 348.

Eaſter, 4 *Geo.* *Drake* v. *Taylor.*

The vicar libelled in the *ſpiritual court* for tithes of turnips, and laid his title to them by *preſcription* and *endowment.*

The defendant pleaded that there was a rectory impropriate, and that time out of mind the rector has taken tithes of turnips. And laſt term the court was moved for a *prohibition* for defect of trial, and a rule was granted *niſi*, &c.

And now it was ſhewn for cauſe againſt the *prohibition*, that turnips are a late improvement in *Norfolk*, (where the matter aroſe,) 9 *Roll. Abr.* 310. And it was urged, that where the matter is originally of *eccleſiaſtical* conuſance, unconnected with a *temporal* matter, no *prohibition* lies. That the vicar was, *at firſt ſight*, entitled to nothing, unleſs he ſhews a right either by *preſcription* or *endowment*. Theſe *endowments* are of an *eccleſiaſtical* nature, and ſo is the extent of them.

On the other ſide it was urged, that both parties were not *eccleſiaſtics*, the libel being againſt a *pariſhioner*, and that it laid a cuſtom which is denied, and muſt be tried, and that cuſtoms had always been a ground for a *prohibition.*

Pratt, Chief Juſtice. Though both parties are not *eccleſiaſtics*, yet the thing in controverſy belongs either to one *eccleſiaſtic* or another; for either the rector is entitled to the tithes, or the vicar, and what matter is it to the pariſhioner who has them? for he can only pay them to one. This is properly a diſpute which belongs to the vicar on the *endowment*, and that evidence which will entitle him to a ſentence below, will not enable him to recover here. Therefore I am againſt a *prohibition*. To which *Powys* and *Eyre*, Juſtices, agreed, and the *prohibition* was denied. *Vide Stra. vol.* 1. *p.* 87.

Trinity, 5 *Geo.* *Dr. Bentley* v. *The Biſhop of Ely.*

See this caſe fully ſtated in page 503 of this work, under the head *Grants.*

Trinity, 5 *Geo.* *Aſgill* v. *Hunt.*

See this caſe fully ſtated in page 387 of this work, under the head *Eccleſiaſtical Matters*, &c.

Trinity, 5 *Geo.* *Dr. Bows* v. *Jurat.*

See this caſe fully ſtated in page 387 of this work, under the head *Eccleſiaſtical Matters*, &c.

Trinity, 5 *Geo.* *Argyle* v. *Hunt.*

See this caſe fully ſtated in page 620 of this work, under the head *London*, (*its Cuſtoms.*)

Eaſter, 7 *Geo.* *Sanderſon* v. *Clagget.*

On a libel in the *ſpiritual court* by the *Archdeacon* for procurations; the defendant, who was curate, ſuggeſted that they had never been paid, and that the church for which they were demanded was a rectory impropriate, without a vicarage endowed. And having obtained a rule to ſhew cauſe why a *prohibition* ſhould not go, the *Archdeacon*'s council produced an *affidavit* that 6 *s.* 8 *d.* had been conſtantly paid every year, and cited *Davis* 6.

Per curiam. This is a mere *eccleſiaſtical* right, the ſuit is properly inſtituted before the Ordinary. It was never known that an action was brought for theſe procurations, nor in the caſe of tithes are there any inſtances before *ſtat. Ed.* 6.

In this caſe the demand is *ſpiritual*, and ſo are the perſons, who are bound by the *canon law*; which being the rule of theſe payments, we are of opinion the ſuit below is well inſtituted, and therefore there ought to be no *prohibition.* *Vide Stra. vol.* 1. *p.* 421.

Michaelmas, 7 *Geo.* *Owen* v. *Hughes.*

The court was moved to ſet aſide a rule for a *prohibition* to the *ſpiritual court*; the *libel* was for removing of the reading-deſk out of the ancient and uſual place, and the judge of the court was the perſon that read prayers, and the defendant not appearing, ſentence was againſt him by the court.

Per curiam. There can be no *prohibition* after ſentence, though it be not on the merits, for you might have appealed, and if he be judge in his own caſe, and appear ſo, yet in the law that is not allowed, ſo there might be an appeal to a ſuperior court, and they might give relief, and not like the caſe of an inferior court, where we are to judge; and the court ſaid there is no difference between ſentence by default and ſentence after a hearing; and therefore diſcharged the rule for a *prohibition.* *Vide Forteſcue*, *p.* 199.

Michaelmas, 8 *Geo.* *Vicars* v. *Worth.*

The wife *libelled* in the *ſpiritual court* for words which were ſpoken in *London*; the words were, (ſpeaking to the huſband) "You are a cuckoldly old rogue, and was cuckold by a porter:" and againſt a *prohibition*, *Lut.* 139. was urged, that the cuſtom of *London* extends only to the word *whore*, and words that only import a woman to be ſo, are not within the cuſtom; but the whole court were of a different opinion, for *prohibitions* have often been granted where the words are *tantamount.* *Batchelor* v. *Dennis*, *Evans* v. *Jones*, 3 *Ann*, *Eaſter* 1 *Geo.* *Kilburn* v. *Plodger*: and in this caſe a *prohibition* was granted. *Vide Stra. vol.* 1. 471.

Michaelmas, 8 *Geo.* *Strafford* v. *Neal.*

See this caſe fully ſtated in page 418 of this work, under the head *Error.*

Hilary, 9 *Geo.* *Hodgkins and Wife* v. *Corbet and Wife.*

See this caſe fully ſtated in page 621 of this work, under the head *London*, (*its Cuſtoms.*)

Trinity, 9 *Geo.* *Cook* v. *Wingfield.*

The word *ſtrumpet* was held to be within the cuſtom of *London*, but the defendant not coming for a *prohibition* till after ſentence; the court denied a *prohibition* on the authority of *Argyle* v. *Hunt*, though it appeared on the *libel* to be ſpoken in *London.* *Vide Stra. vol.* 1. *p.* 555. *Mod. Rep.* 8. *p.* 176. *Forteſcue*, *p.* 347.

Hilary, 10 *Geo.* *Anonymous.*

See this caſe fully ſtated in page 649 of this work, under the head *Maritime Affairs.*

Hilary, 11 *Geo.* *Archer* v. *Sweetnam*, *or Swetnam* v. *Archer.*

See this caſe fully ſtated in page 387 of this work, under the head *Eccleſiaſtical Matters*, &c.

Eaſter, 11 *Geo.* *The King* v. *Dr. Shippen*, *and others.*

In a *prohibition*, the caſe was, Dr. *Cockman* and Dr. *Denniſon* were candidates for the maſterſhip of the *Univerſity College* in *Oxford*; the firſt was declared maſter, but Dr. *Denniſon* and the diſſenting fellows, appealed to Dr. *Shippon*, the Vice-Chancellor, and others, as viſitors; and thereon it was ſuggeſted by Dr. *Cockman* in *prohibition*, that this college was founded by *Alfred*, *anno* 872. as by ſeveral inſcriptions in the ſaid college it does appear, and that the members thereof always commemorate that King in preaching, and other public acts; and that the Kings of *England* were always viſitors of that college, and that no other perſon had any viſitorial power there.

This cauſe was referred to the Attorney and Solicitor General, who were to report who was the founder of the college; and they reporting that it was too difficult for them to determine after ſo long a time who was the founder; and of greater difficulty to determine whether the Vice-Chancellor was viſitor; a rule was made, that the defendant ſhould ſhew cauſe why a *prohibition* ſhould not iſſue. *Vide Mod. Rep. vol.* 8. *p.* 367.

Trinity, 11 *Geo.* *The Mariners Caſe.*

See this caſe fully ſtated in page 649 of this work, under the head *Maritime Affairs.*

Trinity, 11 *Geo.* *Vaughan* v. *Evans.*

The defendant brought a *bill of foreclosure* in the court of grand-ſeſſions for the county of *Montgomery*, againſt the plaintiff and others, to forecloſe the plaintiff of his equity of redemption, on a mortgage of lands that lay in that county. And laſt term a motion was made for a *prohibition*, on a ſuggeſtion that the plaintiff did not inhabit in the county, but lived in *England*, and that the defendant had ſued out proceſs, in order to get a ſequeſtration of the plaintiff's lands that lay in *Montgomeryſhire.* And after hearing council againſt the *prohibition*, the court made the rule for the *prohibition* abſolute, becauſe the ſuit is in nature of a ſuit in *Chancery*, and the proceſs is perſonal to ſummon the party, which cannot be ſerved in this caſe, the plaintiff living in *England*, out of the juriſdiction of the court of grand ſeſſions; and if he could not be ſerved with the proceſs, he could not be guilty of a contempt in not appearing on it, and then by conſequence no ſequeſtration ought to go againſt his lands, though they lay in that county. And this is the ſame caſe in effect as that in *Comberb.* 468. *Trantor* v. *Duggan*, in Lord Chief Juſtice *Holt*'s time. And though it was objected that the court of *Chancery* of *England* had their proceſs ſerved beyond ſea, and brought parties into contempt, and this of the grand ſeſſions was an original juriſdiction; the court ſaid, this was not to be compared to the *Chancery*, (if they did proceed ſo) becauſe this juriſdiction, though it was an original one, yet it was a limited one, and confined to that county. Therefore the rule for the *prohibition* was made abſolute. *Vide Raym. vol.* 2. *p.* 1408.

Eaſter, 13 *Geo.* *Buck* v. *Atwood.*

See this caſe fully ſtated in page 650 of this work, under the head *Maritime Affairs.*

Trinity, 13 *Geo.* *Townſhend* v. *Thorpe.*

See this caſe fully ſtated in page 388 of this work, under the head *Eccleſiaſtical Matters*, &c.

Ede v. *Jackſon.*

Pratt, C. J. There are *two* things in *prohibition*, 1ſt, Contempt of the crown and diſheriſon of it, in taking on them judicial powers where they have no right; 2d, It is a damage to the party, and a ſuit for this muſt be brought before a *temporal court*, and the party prays a *prohibition*; and whether the defendant proceeded, or not, after the *prohibition*, an attachment goes to bring him into court; if he has proceeded after the writ is delivered, that is a contempt; but ſtill it is a matter examinable, whether the court have or have not, a juriſdiction; if they have not, the court will finally *prohibit*, and give ſatisfaction to the party; the party is not to have damages if they have juriſdiction, but if they have none, they have acted againſt the *prohibition* of law, and done the party wrong. *Vide Forteſcue, p.* 345.

Anonymous.

See this caſe fully ſtated in page 645 of this work, under the head *Maritime Affairs*.

Smith v. *Croſby.*

See this caſe fully ſtated in page 646 of this work, under the head *Maritime Affairs*.

Hilary, 2 *Geo.* 2. *Ferguſon* v. *Cuthbert.*

A *prohibition* was moved for to a ſuit in the *ſpiritual court* for calling a woman "jilt and ſtrumpet," and ſaying, "he would cut his wife's legs off if ſhe was "ſuch a ſtrumpet."

But the motion was denied; for the court ſaid, the words are a charge of incontinence, and the ſignification of them well known. *Vide Stra. vol.* 2. *p.* 823.

Trinity, 2 & 3 *Geo.* 2. *Anonymous.*

The court was moved for a *prohibition* to a ſuit in the conſiſtory court of *Hereford*, upon this ſuggeſtion, that the vicar of *D.* having libelled there for offerings, the defendant there pleaded payment of thoſe offerings; but now he ſuggeſts, that he had but one witneſs to prove the payment, and that according to law, and the uſage of the *ſpiritual court*, they pay no regard to the teſtimony of a ſingle witneſs in a matter of this nature.

Per curiam. You do not ſuggeſt that you offered to prove payment of thoſe offerings by *one* witneſs, and that they rejected ſuch proof? Now we are not bound to take notice, that by their law they will reject a ſingle witneſs, nor are you injured till they have actually done ſo. At this rate we ſhould deprive them of all juriſdiction; for poſſibly they may receive the evidence of your ſole witneſs, and give judgment againſt his teſtimoney on the credibility of the man; according to the caſe of *Shorter* v. *Friend*, 1 *Show.* 158. 172. Though ſentence ſhould be given againſt you, yet on ſuggeſtion of refuſal, you would have a *prohibition* granteed you afterwards. *Vide Fitz-Gibbons, p.* 82.

Hilary, 4 *Geo.* 2. *Stephenſon* v. *Sands.*

It was moved for a *prohibition* to a ſuit for tithes in the *ſpiritual court*, the plaintiff ſuggeſting, that he pleaded there a diſcharge under the *ſtat.* 32 *H.* 8. and likewiſe a *modus*; which plea was rejected. The council on the other ſide ſaid, the *ſpiritual court* did right; for the plea is repugnant, the firſt part importing a diſcharge, of tithes, and the next part a compoſition for tithes; and ſo it muſt be intended they rejected the plea as informal, and not relevant; but not for the matter of it, if it had been well pleaded; and if ſo, they are not to be *prohibited*, for the *temporal* courts will not controul them in their forms of proceeding.

Per curiam. We cannot intend they rejected the plea as informal. Therefore a *prohibition* was granted. *Vide Fitz-Gibbons, p.* 191.

Hilary, 4 *Geo.* 2. *Newcomb* v. *Higgs.*

See this caſe fully ſtated in page 708 of this work, under the head *Pariſh Officers*.

Hilary, 4 *Geo.* 2. *Dimmock* v. *Chandler.*

See this caſe fully ſtated in page 650 of this work, under the head *Maritime Affairs*.

Trinity, 5 *Geo.* 2. *Harriſon and Wife* v. *Mitchell.*

See this caſe fully ſtated in page 481 of this work, under the head *Executors and Adminiſtrators*.

Trinity, 9 *Geo.* 2. *Sharp* v. *Lowther.*

On a *prohibition* granted to the *eccleſiaſtical court* in a ſuit for tithes, on a ſuggeſtion and plea in that court of a *modus*.

After hearing the arguments on both ſides, Lord *Hardwicke* ſaid, that in a *prohibition* the defendant is conſidered as an actor ſuing for a *conſultation*; and if on the whole it appears to the court that there is a *modus*, they cannot grant a *conſultation*; and it has been determined, that if the jury find what amounts to a *modus*, the court cannot award a *conſultation*: therefore I think, in this caſe, the court cannot award a *conſultation*.

Per curiam. Let the *poſtea* be delivered to the plaintiff. *Vide Caſes Temp. Lord Hardw. p.* 292.

Michaelmas, 9 *Geo.* 2. *Tucker* v. *Towell.*

On a *libel* in the *ſpiritual court* for a legacy, the defendant below pleaded that this was a legacy given by the will of *E. T.* to whom *J. T.* was executor; and that this defendant was adminiſtrator of the ſaid *J. T.* and therefore he was not liable for the legacies given by the ſaid *E. T.* and ought not therefore to anſwer the ſaid *libel*; which plea the *ſpiritual court* had refuſed, and therefore the defendant applied here for a *prohibition*, which, on ſhewing cauſe, was granted by the whole court. *Vide Caſes Temp. Lord Hardw. p.* 185.

Hilary, 10 *Geo.* 2. *Smith* v. *Harwood.*

The court was moved for a *prohibition* to ſtay a ſuit in the *conſiſtory court* of *London* for tithes; the *libel* was for tithes due from the occupier of the land, and the ſuggeſtion here on the roll was, that this land belonged to the Abbot of *Weſtminſter*, and was held *tythe-free*, and came into the hands of the Crown, of whom the plaintiff held it as tenant at will: he admitted that he had not pleaded this matter below, but prayed a *prohibition*, becauſe the plea could not be tried there, and becauſe a traverſe that ſuch a plea was refuſed would be a bad traverſe, as was held in the *Biſhop* of *Weſtminſter*'s caſe, 2 *Co.* 250. *a.* and therefore, it was urged, there was no occaſion to plead it below.

Per curiam. This is but the caſe of every *modus*; for though the *ſpiritual court* cannot try the *modus*, yet it muſt be pleaded there before a *prohibition* can be granted; and it is not ſaid in the *Biſhop* of *Weſtminſter*'s caſe that it uſed not to be pleaded. It is the courſe of the court that it muſt be pleaded before a *prohibition* can iſſue. *Vide Caſes Temp. Lord Hardw. p.* 357.

Trinity, 10 & 11 *Geo.* 2. *Dawſon* v. *Wilkinſon.*

See this caſe fully ſtated in page 708 of this work, under the head *Pariſh Officers*.

Michaelmas, 10 *Geo.* 2. *Smith qui tam* v. *Gibſon.*

See this caſe fully ſtated in page 46 of this work, under the head *Actions*.

Michaelmas, 10 *Geo.* 2. *Middleton and Wife* v. *Croft.*

See this caſe fully ſtated in page 8 of this work, under the head *Abatement*.

Michaelmas, 10 *Geb.* 2. *Smith* v. *Langley*.

On a motion for a *prohibition* to the *Court of Admiralty*,

Lord *Hardwicke*. The rule of granting *prohibitions* before and after ſentence is this, that before ſentence you may have a *prohibition* on ſuggeſting a *matter of fact*, not appearing on the face of the proceedings below, but after ſentence you cannot overturn the proceedings by a bare averment of the fact; yet, if there be a want of juriſdiction appearing on the face of the *libel*, or any part of their proceedings, that is ſufficient ground for a *prohibition* after ſentence, whether the cauſe be in the *eccleſiaſtical court* or in the *Admiralty court*. *Vide Caſes Temp. Lord Hardw. p.* 317.

Michaelmas, 12 *Geo.* 2. *Lockey* v. *Dangerfield*.

See this caſe fully ſtated in page 389 of this work, under the head *Eccleſiaſtical Matters*, &c.

Hilary, 14 *Geo.* 2. *Gegge* v. *Jones*.

On ſhewing cauſe againſt a *prohibition*, the court made the rule abſolute, with a direction that the plaintiff ſhould declare in *prohibition*: he tendered a declaration, but the defendant refuſed it, and applied to ſtay proceedings, as being willing to ſubmit. The other inſiſted he had a right to go on, and ſo obtain the coſts of the motion, which he could not otherwiſe have. But the court ſtayed the proceedings without coſts, ſaying the direction to declare was in favour of the defendant, who might waive it. *Vide Stra. vol.* 2. *p.* 1149.

Hilary, 30 *Geo.* 2. *The Maſter and Senior Fellows of John's College, Cambridge*, v. *Todington, Clerk*.

A *prohibition* was moved for by the college, to be directed to the Biſhop of *Ely*, to prohibit him from proceeding on a monition iſſued by him againſt them, on Mr. *T.*'s application and appeal to him, as viſitor of the college; and the college had thereupon obtained a rule to ſhew cauſe why a *prohibition* ſhould not go; which rule to ſhew cauſe was made on a ſuggeſtion, "that the Biſhop was not *viſitor* of the college, as to "*elections* into fellowſhips and other offices;" and alſo, that "admitting him to be ſo, yet the preſent "matter (which related to a *Southwell* fellowſhip) "was not within his *juriſdiction*:" on which a rule to ſhew cauſe was obtained.

Lord *Mansfield*. If the party who applies for a *prohibition* has a right to declare, though the court ſhould ſee *no ground* for the motion, a rule "to ſhew cauſe "why the *prohibition* ſhould not be granted," is to no purpoſe; and hearing council on the ſufficiency of that cauſe, is time miſpent.

When the matter ſeems doubtful to the court, on a queſtion of *fact*, or *law*, the plaintiff has leave to declare; that the parties may have the fact properly tried by a jury, or the law ſolemnly conſidered, as in a cauſe.

When the court is clearly of opinion that there *is* ſufficient ground for the *prohibition*, the defendant has a right to put the plaintiff to declare, that his juriſdiction may not be taken from him, in a ſummary way, where no writ of error will lie; but if the court be clearly of opinion that there is *no ground* for a *prohibition*, it ought to be denied, without putting the defendant to expence, and delaying, in the mean time, the exerciſe of what appears to them a *lawful* juriſdiction.

This denial is *not concluſive* to the plaintiff. If there is *no* juriſdiction, the ſentence will be a nullity; and on any attempt to execute or enforce it, the whole may be tried in an action. The plaintiff may alſo apply to any *other* court in *Weſtminſter Hall* for a *prohibition*, and take their opinion: therefore, in this caſe, the court diſcharged tbe rule for a *prohibition*. *Vide Bur. vol.* 1. *p.* 158.

Hilary, 30 *Geo.* 2. *Wilſon, Clerk*, v. *Greaves*.

On a motion for a *prohibition* to be directed to the Archdeacon of *Nottingham* to ſtay his proceedings in a ſuit againſt Mr. *W. parſon* of *Newark*, for *brawling* in the church, and alſo for *ſmiting* in the church; but the council who made the motion only prayed for a *prohibition*, for the latter charge, *viz. ſmiting* in the church.

Lord *Mansfield*. By *ſtat.* 5 & 6 *Edw.* 6. *cap.* 4. the puniſhment of theſe offences is given to the *eccleſiaſtical court*, and the puniſhment is ſuch only as can be executed by the *ordinary*, viz. for him to excommunicate the party.

Deniſon, Juſtice, gave his opinion at large, and concurred with the Chief Juſtice.

Per curiam. Let the rule for a *prohibition* be diſcharged. *Vide Bur. vol.* 1. *p.* 240.

Eaſter, 30 *Geo.* 2. *Paxton* v. *Knight*.

On a motion for a *prohibition*, a rule to ſhew cauſe was obtained. The queſtion on the motion was,

Whether a *prohibition* ſhould be granted to ſtay proceedings in an *eccleſiaſtical court*, in a ſuit by a Quaker for a ſeat in a church; founding his title on a *preſcriptive* right; in which ſuit the *eccleſiaſtical court had determined* againſt him. And he now came, after ſentence below, for a *prohibition*. *Note*, An *immemorial preſcription*, was alledged on both ſides.

Lord *Mansfield* ſaid, he thought they could not refuſe to grant the *prohibition*.

Per curiam. Let the rule for a *prohibition* be made abſolute. *Vide Bur. vol.* 1. *p.* 307.

Trinity, 30 & 31 *Geo.* 2. *Tarrant* v. *Haxby*.

On a motion for a *prohibition* to the conſiſtory court of *York*, to ſtay their proceedings againſt *Tarrant*, the preſent pariſh clerk of *St. Oſith* in *York*; which proceedings were there inſtituted at the inſtance of *Haxby*, the deprived pariſh clerk, for the reſtoration of the ſaid *Haxby*.

It was ſuggeſted that the ſaid *Haxby* was deprived by the parſon, and the whole pariſh, for druukenneſs during divine ſervice, and other miſdemeanors, whereon the parſon appointed *Tarrant* in his room, againſt whom *Haxby* libelled in the conſiſtory court of *York*, where there was a monition, and they were proceeding to reſtore the ſaid *Haxby*, on which a rule to ſhew cauſe was obtained.

On coming to ſhew cauſe, the council againſt the *prohibition* gave the matter up, on which the court made the rule abſolute for a *prohibition*. *Vide Bur. vol.* 1. *p.* 368.

Michaelmas, 31 *Geo.* 2. *Jenkins* v. *Whitehouſe and another*.

On a motion for a *prohibition* to the Conſiſtory Court of the Biſhop of *Coventry* and *Litchfield*, to ſtay proceedings in a cauſe there relating to the will of a married woman, who was a *midwife* by profeſſion, and had by her marriage ſettlement a power given her to make a will for the diſpoſition of her perſonal gains in that profeſſion.

Lord *Mansfield*. If the queſtion be, "whether the "wife had a power to make an appointment in the "nature of a will, and thereby to deprive the huſband "of any benefit which by law would devolve on him "in conſequence of her death?" that is a queſtion proper to be conſidered in this court; and if ſhe had no ſuch power, this court will grant a *prohibition*.

It ſeems right therefore to grant a rule "to ſhew "cauſe why there ſhould not be a *prohibition*;" and then the caſe will be better underſtood under all its circumſtances: on which the court granted a rule to ſhew cauſe, but the matter never came on again. *Vide Bur. vol.* 1. *p.* 431.

Trinity, 32 & 33 *Geo.* 2. *Symes* v. *Symes*.

See this caſe fully ſtated in page 389 of this work, under the head *Eccleſiaſtical Matters*, &c.

Eaſter, 5 *Geo.* 3. *Butterworth and Barker* v. *Walker and Waterhouſe*.

On ſhewing cauſe againſt a *prohibition* to ſtop the Prerogative Court of *York* from proceeding to grant a faculty for an *organ* in the church of *Halifax*.

Lord *Mansfield* ſaid, the ground on which the court went in this matter was, that a *prohibition* will not be *material*. Therefore the rule to ſhew cauſe was ordered to be diſcharged. *Vide Bur. vol.* 3. *p.* 1689.

Eaſter, 6 *Geo.* 3. *Chave* v. *Peter Calmel, Eſq.*

On ſhewing cauſe againſt a *prohibition* to the *eccleſiaſtical court* of the Biſhop of *Exeter* to ſtay their proceeding in a cauſe inſtituted there for ſubduction of tithes, a rule to ſhew cauſe was obtained.

The caſe was; *P. Calmel*, the impropriator, had employed one *Finnimore* as his agent, to collect and compound for tithes. The plaintiff in *prohibition* (*Chave*, the occupier) had agreed with *Finnimore* after the corn was cut and ready to be houſed, for 5 *l.* whereon he houſed his whole crop, without ſetting out the tithes. *Chave*'s agreement with *Finnimore* was only by *parol*. The impropriator libelled in the *eccleſiaſtical court* againſt *Chave* for not ſetting out his tithes. The defendant below (*Chave*, the occupier) tendered the 5 *l.* and offered a plea, "that he had *purchaſed* the "tithes for 5 *l.*" The *eccleſiaſtical court* rejected this plea.

The only queſtion was, "whether this was matter "of *appeal* or of *prohibition*."

The court were unanimous in the *latter* opinion, and they founded it on this rejection of the plea being an *irreparable damage*; and on an apprehenſion "that "the *eccleſiaſtical court* muſt have grounded their re-"jection on a ſuppoſed difference between their law "and ours;" that is to ſay, they took it for granted, that the *eccleſiaſtical court* were of opinion, agreeable to what is laid down by their favourite writer Dr. *Gibſon*, (who takes it from *Noy* 19. *Spencer*'s caſe) "that an "agreement with the *agent* of a propriator will *not* "bind the proprietor;" whereas by our law, and in common ſenſe and common juſtice, a compoſition by the occupier with the agent of the proprietor does bind, and ought to bind, his principal. Therefore the rule for a *prohibition* was made abſolute. *Vide Bur. vol.* 3. *p.* 1873.

Trinity, 6 *Geo.* 3. *Catchſide, Widow and Adminiſtratrix, &c.* v. *Ovington.*

On a motion for a *prohibition* to an *eccleſiaſtical court*, on behalf of Mrs. *Catchſide*, the adminiſtratrix, a rule to ſhew cauſe was obtained.

The caſe was; Mrs. *Catchſide*, the widow and adminiſtratrix, was cited into an inferior *eccleſiaſtical court*, at the promotion of *Ann Ovington*, a *creditor*, "to exhibit an inventory." She brought one in, and the *creditor* objected to it. There was a *decree* for the *creditor*. The adminiſtratrix appealed to the *ſuperior eccleſiaſtical court*, who affirmed the decree of the *inferior eccleſiaſtical court*. The ſuggeſtion was, their want of juriſdiction.

The council, on ſhewing cauſe, objected, that the party now came too late, for that it was *after ſentence*; and therefore they could not be relieved here, unleſs they could ſhew that the *ſpiritual court* have determined contrary to law.

Lord *Mansfield*. It appears on the face of the proceedings, "that the *ſpiritual court* have *no juriſdiction*," therefore the rule muſt be made abſolute: which was ordered accordingly. *Vide Bur. vol.* 3. *p.* 1922.

Quakers, See Nonconformiſts.

Quit-rents, See Cuſtom of Manor.

Record and Poſtea.

Hilary, 6 & 7 *W. & M.* *Wate* v. *Briggs, Marſhal.*

See this caſe fully ſtated in page 149 of this work, under the head *Averment.*

Hilary, 8 *W.* 3. *The King* v. *North.*

Holt, Chief Juſtice. It is an error in the clerks in *London*, that on a *certiorari* they return only a tranſcript, as if the *record* remained below; for in *C. B.* though they do not return the very *individual record*, yet the tranſcript is returned as if it were the *record*, and ſo it is in judgment of law. *Vide Salk. vol.* 2. *page* 565.

Hilary, 8 *W.* 3. *Crockmere* v. *Wickins.*

In an action brought in this court, the defendant pleaded another action depending between them in the ſame court, and for the ſame cauſe; the plaintiff replied *nul tiel record*, &c. *Adjudged*, that in this caſe the defendant may pray *oyer* of the *record*, and the court may order that it may be inſpected, and on ſuch *oyer* craved, an entry ſhall be made for the court to examine the *record*, and judgment ſhall be given on failure of the *record*; the defendant may likewiſe plead *nul tiel record*, and then alſo the entry and proceedings ſhall be as before mentioned; but he cannot rejoin, neither can he demur, for the *record* is perfect, and the pleading is at an end, and therefore a demurrer in this caſe was on a motion ruled to be irregular, and ſet aſide.

But if the action had been pleaded as depending in another court for the ſame cauſe, and the plaintiff replied *nul tiel record*, the defendant muſt have rejoined *quod habetur aliquod tale recordum*. *Vide Salk. vol.* 3. *p.* 295.

Eaſter, 9 *W.* 3. *Thompſon* v. *Leach.*

Holt, Chief Juſtice. You ought not to move to read a *record*, in order to make a *conſilium*, where the roll is of a *precedent* term, unleſs it be filed; for you ought not to have a looſe roll, unleſs it be a roll of that term of which it ought to be a *record*. *Vide Salk. vol.* 2. *p.* 565.

Michaelmas, 9 *W.* 3. *Dr. Groenvelt* v. *Dr. Burrell, &c.*

See this caſe fully ſtated in page 444 of this work, under the head *Evidence.*

Michaelmas, 9 *W.* 3. *Green* v. *Watts.*

Holt, Chief Juſtice. If the defendant pleads an action depending in another court for the ſame cauſe in *abatement*, and *nul tiel record* is pleaded; if there was ſuch a *record* at the time of the pleading of the plea, though the action was afterwards diſcontinued, yet the plea is good, becauſe it is true at the time of pleading it. But if a man pleads a recovery by judgment in *bar* of an action, and the ſaid judgment is reverſed after the pleading of the plea, then the plea is ill, becauſe then it is no ſuch *record from the beginning*. *Vide Raym. vol.* 1. *p.* 274.

Eaſter, 10 *W.* 3. *Dunbarton* v. *Chancellor.*

See this caſe fully ſtated in page 58 of this work, under the head *Amendment.*

Michaelmas, 10 *W.* 3. *Moor* v. *The Bail of Garrett.*

On *ſcire facias* againſt *Bail*, who pleaded, that there was no *capias* againſt the principal; the plaintiff replied, and ſet out a *capias*, *as appears by the record*. The defendant replied *nul tiel record*. The plaintiff ſurrejoined that there was ſuch a *record*, and prayed a day to bring it in, whereupon the defendant demurred.

Holt, Chief Juſtice. This way of pleading is out of the common courſe. There are *two* ways of pleading of a *record*, either by craving *oyer* of the *record*, and if it is not given, it is a failure; or he may plead *nul tiel record*, and then a day is given to bring it in; but this ſurrejoinder is a *third* way, and a new one; but it was adjudged well enough, and the plaintiff had judgment. *Vide Mod. Rep. vol.* 12. *p.* 214. *Salk. vol.* 2. *p.* 566.

Michaelmas, 10 *W.* 3. *Beckman's Caſe.*

He was perſonated as bail in an action, and the council moved to vacate the *record* on *affidavit*, which did not make the fact clearly out.

Holt, Chief Juſtice. If it had manifeſtly appeared to be a trick, we would relieve you; but the caſe being doubtful, we cannot vacate the *record*, but you may have your action.

The council ſaid, then you will order by rule, that we may plead it to a *ſcire facias* againſt us, according to 2 *Cro.* 256. *But not allowed. Vide Mod. Rep. vol.* 12. *p.* 257.

Hilary, 11 *W.* 3. *Grant* v. *Burton.*

On a *ſcire facias* againſt bail, who pleaded no *capias* iſſued againſt the principal; the plaintiff replied, that there was, *as appears by the record* in this court, and prays that the *record* may be inſpected.

The defendant demurs, becauſe the plaintiff's replication was bad; and it was moved for the plaintiff, that the demurrer might be ſet aſide, becauſe the defendant tendered an iſſue: and the plaintiff joined with him, and the pleadings were at an end, and nothing remained but to inſpect the *record*, to which the court agreed, and the demurrer was ſet aſide. *Vide Mod. Rep. vol.* 12. *p.* 267.

Trinity, 11 *W.* 3. *Anonymous.*

In an action againſt one *H.* the defendant pleaded the *compoſition-act*; the plaintiff replied *nul tiel record*; on the day given to bring in the *record* the defendant brought in the printed act.

Holt, Chief Juſtice. An act printed by the King's printer is always allowed good evidence of the act to a jury; but was never allowed to be a *record* yet: you muſt get an exemplification under the great ſeal, and then plead it exemplified, and then no man can deny it. *Vide Salk. vol.* 2. *p.* 566.

Michaelmas, 11 *W.* 3. *Worley* v. ———.

See this caſe fully ſtated in page 722 of this work, under the head *Pleas, Pleadings, &c.*

Eaſter, 12 *W.* 3. *Cremer* v. *Wickett.*

See this caſe fully ſtated in page 2 of this work, under the head *Abatement.*

Hilary, 1 *Ann.* *Smith* v. *Croſs.*

See this caſe fully ſtated in page 254 of this work, under the head *Certiorari.*

Eaſter, 1 *Ann.* *Anonymous.*

See this caſe fully ſtated in page 115 of this work, under the head *Arreſt of Judgment.*

Trinity, 1 *Ann.* *The Queen* v. *Maſon.*

Holt, Chief Juſtice. When a man is put out of poſſeſſion by virtue of an inquiſition returned for the *Queen*, and another comes and pleads his right, that is a diſtinct *record* from the inquiſition; and ſo if another comes and pleads his right, that is another diſtinct *record*; and if there be a demurrer to all, then it is determined there, or may be ſent into this court to be argued and determined; but if iſſue be joined in it, then the way is to award a *ven. fac.* out of *Chancery*, returnable at a day certain *in this court*; and the *record* is delivered hither by the hand of the *Chancellor*, *&c.* to be here at the day of the return of the *ven. fac.* but the inquiſition is never ſent hither; but the party comes in *Chancery*, and complains of his being aggrieved by the inquiſition, and prays he may be admitted to ſhew his right, and plead againſt the inquiſition, and that is a *ſhewing of his right*; and all the operation of the inquiſition is to make a title for the King, and the party comes in as plaintiff, and either traverſes it, or ſhews his right conſiſtent with it: and if he will traverſe it, he muſt ſhew title in himſelf. The caſe of *Jefferſon* v. *Dawſon* was part on demurrer, and part on iſſue; and if there be a miſpleader, and a repleader awarded, that muſt be in this court, where there is iſſue and demurrer, and if the party will not proceed on the demurrer, the court will give judgment on the demurrer; and though ſome books have a ſaying, that a *record* may be ſent out of *Chancery* hither, even on demurrer, I would fain ſee where it has been done. *Vide Mod. Rep. vol.* 7. *p.* 32.

Trinity, 2 *Ann.* *Turner* v. *Barnaby.*

In *ejectment*, the defendant being called to confeſs leaſe, entry, and ouſter, made default, and that default was *recorded.* Afterwards the plaintiff would have waived it, ſuppoſing the *record* of it to be in the breaſt of the court during the term.

Holt, Chief Juſtice. There is a diſtinction between an act of the court done on *record*, for that is in the breaſt of the court, and may be altered by them during the term, and an act of the party *recorded* by the court, as a *nonſuit* or *default*; for that a thing once *recorded* cannot be altered by the court; for that would be a means of introducing falſity in matter of fact into *records.* *Vide Salk. vol.* 2. *p.* 567.

Trinity, 2 *Ann.* *Hambleton* v. *Lancaſhire.*

A *ſcire facias* was brought againſt the bail in this court, on a recognizance, the defendant pleaded in *abatement* another *ſcire facias* depending in this court, and on the ſame judgment: the plaintiff replied *nul tiel record*, &c. the defendant making default at the day, judgment was given for the plaintiff: and now the defendant's council moved to reverſe the judgment, for that this procedure of the plaintiff's was irregular, and that he ought to have ſtaid for a rejoinder; and he argued, that this was contrary to all the precedents. But the plaintiff's council in reply urged, that the judgment was well given; and to prove it, cited *Dyer* 228. and *Buck*'s caſe in this court, which he ſaid was a caſe in point.

Holt, Chief Juſtice. Where the *record* pleaded is in the ſame court in which the action is brought, there *nul tiel record* is not ſo proper as to crave *oyer* of the *record*, and that not at a day to come, but *inſtantly*; but if the plaintiff replies *nul tiel record*, it is a traverſe of the defendant's plea, and then for the plaintiff to enter the proceeding on *record*, is the proper courſe, and more to the defendant's advantage than craving *oyer*, becauſe he has a day given him to bring in the *record*, and there can be no trial in this caſe, as where the *record* is in another court, and for that reaſon it is improper to rejoin *quod habetur aliquod tale recordum*, as it ought, where the *record* is in another court; for in ſuch caſe this court awards a *certiorari* to that court, and the iſſue is tried by their *certificate*, but we cannot award a *certiorari* to ourſelves; for it would be abſurd to certify ourſelves. *Vide Salk. vol.* 3. *p.* 295.

Michaelmas, 2 *Ann.* *Anonymous.*

In the caſe of *The Queen* v. *The Warden of the Fleet*, the *record* of the iſſue and pleading coming hither in *Hilary*, 11 *W.* 3. was through miſtake put on the file of *Michaelmas* term, but ordered to be put on the right file, the miſtake appearing plain to the court: and *Powel*, Juſtice, quoted two caſes where *venires* were to wrong *records*, but ſet right by the court. *Vide Mod. Rep. vol.* 6. *p.* 18.

Trinity, 3 *Ann*. *The Queen* v. *Wyat*.

An indictment for not returning a warrant of a juſtice of peace to levy a penalty on a conviction for *deer-ſtealing*, was removed hither by *certiorari*. Among ſeveral exceptions taken, was the following:

That after having recited ſeveral *records*, they did not conclude *as appears by the record*.

Powell, Juſtice. There is no need of ſaying *as appears by the record*, where it is only an indictment, as in this caſe, and not the principal point and *giſt* of the caſe: this is only to ſhew the court what ſort of neglecting his duty it was, and on what the neglect was founded; and where it is, the point of the caſe, *nul tiel record* might be pleaded, which here could not, becauſe it was his duty to return the juſtice's warrant, though they had made no *legal record*. *Vide Forteſcue, p.* 127.

Michaelmas, 3 *Ann*. *Anonymous*.

Per curiam. On a writ of *error*, if the clerk below will certify the *record* wrong, an action on the caſe will lie againſt him for it; and if he makes no return, the plaintiff may have a writ of *executione judice* out of *Chancery*. *Vide Mod. Rep. vol.* 6. *p.* 245.

Michaelmas, 6 *Ann*. *Etherington* v. *Reynolds*.

An *indebitatus aſſumpſit*, and *inſimul computaſſet* was brought againſt the defendant. She pleaded in *abatement*, that ſhe was a *feme covert*; the plaintiff replies, that he entered a plaint againſt her when *ſole*, in the Palace Court, which ſhe removed into this court by *habeas corpus cum cauſa*, and put in bail as a *feme ſole*, and the plaintiff delivered her a declaration agreeable to the plaint below; to which replication the defendant demurred.

The council for the defendant ſaid, that ſhe having removed herſelf up by a *habeas corpus*, and having put in bail to anſwer a declaration here, nothing of the proceeding below is removed, as in caſe of a *certiorari* or *recordari* in *Surs* v. *Turner*'s caſe, *Hilary* 3 *Ann*; and the plaintiff ought to have declared againſt her, as ſhe was at the time of the declaration delivered, and not as a *feme ſole*, according to the plaint below.

Holt, Chief Juſtice. If an *indebitatus aſſumpſit* be brought in an inferior court, and the defendant removes it up by *hab. corp.* and to the declaration above pleads *non aſſumpſit infra ſex annos*, the plaintiff may reply that a plaint was delivered in an inferior court within *ſix years*; but to this the plaintiff cannot reply that the defendant was *ſole* when the plaint was levied below.

The court was inclined to give judgment for the defendant, but as an indulgence on account of the equity of the cauſe, it was adjourned. *Vide Mod. Rep. vol.* 11. *p.* 142.

Hilary, 5 *Geo*. *King qui tam* v. *Bolton*. Error.

The defendant having brought a writ of *error* in *parliament*, the *record* was tranſcribed; and as it was carrying to the Houſe of Lords the original was picked out of the officer's pocket. The Houſe of Lords received the tranſcript, without examining it. And now, this court ordered a new entry to be made. And afterwards the judgment of this court was affirmed in *Parliament*.

In *Eaſter* 9 *Geo*. in this court, the like leave was given in the caſe of *Needham* v. *Grano*, on the loſs of the roll by the attorney. *Vide Stra. vol.* 1. *p.* 131.

Hilary, 6 *Geo*. *The King* v. *Phillips*

The coroner's inquiſition taken on *view of the body*, was quaſhed, becauſe the year of our Lord in the caption was in common figures, whereas it ought to have been in words at length, or at leaſt in the *Roman* numerals. *Vide Stra. vol.* 1. *p.* 261.

Michaelmas, 6 *Geo*. *Leighton* v. *Leighton*.

The court was moved that the keeper of the *records* and *fines* in the county of *Monmouth* might attend the trial at *bar* with ſome of the *original records*, to anſwer an objection that had been made on a former trial, that all the *records* were worn out and obliterated.

Per curiam. We never do it. You may have a rule for *copies*: and though the officer cannot be examined as to the matter of *record*, yet he may give evidence of the condition of them in general, without producing them; and that will anſwer the purpoſe as well. *Vide Stra. vol.* 1. *p.* 210.

Eaſter, 8 *Geo*. *The King* v. *Self*.

See this caſe fully ſtated in page 118 of this work, under the head *Arreſt of Judgment*.

Hilary, 10 *Geo*. *The King* v. *Colvin*.

See this caſe fully ſtated in page 136 of this work, under the head *Attachment*.

Eaſter, 2 *Geo*. 2. *Evans* v. *Thomas*.

The roll of the judgment in this caſe was carried in, in *Trinity* term 1720, and docquetted; but before it was filed, it was loſt. And the court was moved for leave to file a new roll, the defendant being dead, and the executrix conſenting; and the caſes of *King qui tam* v. *Bolton* and *Needham* v. *Grano* were cited. And after rule to ſhew cauſe, it was ordered accordingly; for there being a docquet, it could be no deceit on the purchaſers. *Vide Stra. vol.* 2. *p.* 833.

Trinity, 3 *Geo*. 2. *Rutter* v. *Redſtone*.

See this caſe fully ſtated in page 422 of this work, under the head *Error*.

Trinity, 8 *Geo*. 2. *Fiſher* v. *Sowerby*.

On an action on the *caſe* on a promiſſory note; the defendant pleads the *ſtatute of limitations*; the plaintiff replies, that the cauſe of action accrued; and that within *ſix years* before that time, *viz*. *Trinity*, 11 *Geo*. 1. he ſued out a bill of *Middleſex*, and ſhews it duly continued till the death of the late King; and that on *Friday next after the morrow of the Holy Trinity* 1727, another precept was ſued out returnable on *Monday next after three weeks of St. Michael*, then next before which day, *viz*. *June* 11. in the year of our Lord 1727, the ſaid King *George* the Firſt departed this life, to wit at *Weſtminſter* aforeſaid; at which day, to wit, the ſaid *Monday* next after *three weeks of Michaelmas*, he the ſaid plaintiff came, and offered himſelf, &c. to wit, before our Lord *George* the 2d. now King of *Great Britain*: and then ſhews the continuance until the filing the preſent declaration, and prays it may be verified *by the record*. The defendant rejoins that there is not any ſuch *record* of a precept in the ſaid replication of the ſaid *J*. firſt above-mentioned, and proceedings thereon, affiled or now remaining on *record*, in the ſaid preſent Majeſty's court. The plaintiff ſurrejoins that there is ſuch a *record* of the ſaid precept, and proceedings thereon, &c.

Lord *Hardwicke*. There is no variance. The plaintiff has verified his replication. *Vide Caſes Temp. Lord Hardw. p.* 131.

Hilary, 10 *Geo*. 2. *Harris* v. *Bernard*.

The plaintiff in an action againſt the ſheriff deſcribed a *bill of Middleſex*, as a precept of the King; and on *nul tiel record* it was objected, that it ought to be ſet out as the precept of the court, the words being, *The ſheriff is commanded*, as the award of the court.

On the other ſide it was inſiſted, that every *latitat* is ſet out with the words "whereas *we* lately commanded our ſheriff," and in 2 *Saund*. 52, 151. it is ſet out in this manner.

Per curiam. *The record is perfect*. *Vide Stra. vol.* 2. *p.* 1069.

Trinity, 10 *Geo.* 2. *Bean* v. *Bolton.*

A writ of *inquiry* was executed in *Trinity* term 1728, and coſts taxed on it, but no final judgment entered up. And now there being occaſion to prove the debt in *Chancery*, the writ of *inquiry* could not be found; and a rule was made for a new writ of *inquiry* and *inquiſition*, according to the ſheriff's notes, and that the maſter ſhould indorſe the coſts, which by the commitment-book appeared to have been taxed. *Vide Stra. vol.* 2. *p.* 1077.

Eaſter, 12 *Geo.* 2. *Wray* v. *Liſter.*

See this caſe fully ſtated in page 337 of this work, under the head *Damages.*

Replevin and Avowry.

Michaelmas, 3 *W.* & *M.* *Anonymous.*

In a writ of *homine replegiando* the party muſt plead *inſtantly*, without imparlance, as in an appeal. *Vide Mod. Rep. vol.* 12. *p.* 8.

Michaelmas, 4 *W.* 3. *Barker and others*, v. *Lade.*

See this caſe fully ſtated in page 716 of this work, under the head *Pleas, Pleadings*, &c.

Eaſter, 5 *W.* & *M.* *De la Baſtile* v. *Reignald and others.*

Per curiam. In a writ of *homine replegiando*, If the party appears on the day of the return of the proceſs, and pleads *he did not take*, &c. there is no need of bail, and a *ſuperſedeas* ſhall go to the writ of *withernam. Vide Mod. Rep. vol.* 12. *p.* 36.

Hilary, 6 *W.* & *M.* *Hunt* v. *Braines.*

In *replevin* for taking *goods, chattels, and live cattle*, &c. the defendant made cognizance for the taking of the *live cattle* only, for that a rent charge of 100 *l. per annum* was granted out of the lands, &c. payable half-yearly at *Michaelmas* and *Lady-day*; that 33 *l.* parcel of 50 *l.* for half a year's rent, being behind and unpaid, he diſtrained, and ſo juſtified the taking, *therefore prayed judgment, and return of the live cattle, goods, and chattels aforeſaid.*

On a demurrer to this *avowry*, it was held to be inſufficient, becauſe he did not ſhew when the other 17 *l.* was paid to make up the half year's rent. Beſides, the action was brought for taking *goods chattels, and live cattle*, and the defendant *avowed* the taking of *live cattle* only, which is an anſwer only for the live cattle, and not for the whole; and for theſe reaſons the plaintiff had judgment. *Vide Mod. Rep. vol.* 4. *p.* 402.

Michaelmas, 7 *W.* 3. *Johnſon* v. *Baynes.*

On a demurrer to a replication, becauſe the *avowry* was only for part of the rent, without ſhewing how the reſt was ſatisfied.

Holt, Chief Juſtice. If a rent of a quarter be 20 *l.* and you *avow* only for 10 *l.* you muſt ſhew how the reſt is ſatisfied, juſt as in declaration for part of a debt due on a bond; and for this *Holt* v. *Samback*'s caſe is clear. 1 *Cro.* 103, 104. *Vide Mod. Rep. vol.* 12. *page* 84.

Michaelmas, 7 *W.* 3. *Stedman* v. *Bates.*

In a ſuit in *replevin* for taking *brciks*, &c. the defendant made conuſance as bailiff to the counteſs of *Saliſbury*; and ſhewed that *J. B.* was ſeiſed of the place where, &c. in *fee*; and being ſeiſed, demiſed the ſame to *J. G.* for 180 *years*, rendering rent: that *J. B.* died, by which the reverſion deſcended to the Counteſs of *Saliſbury*, and her ſiſter Mrs. *B.* daughters and heirs of the ſaid *J. B.* and as bailiff to the Counteſs, he made conuſance for rent in arrear, &c. The plaintiff demurred.

The defendant's council urged, that although the daughters were one heir to the father, yet they had ſeveral inheritances; and therefore it was not abſolutely neceſſary for them to join in *avowry. Trinity* 4 & 5 *W.* & *M. Roll* 707. *Oſmer* v. *Sheaſe*, in *C. B.*

Rokeby, Juſtice. This point was never moved in that caſe: and *Littleton* himſelf ſays, that *coparceners* ought to join in *avowry*. Therefore judgment muſt be given for the plaintiff. *Vide Raym. vol.* 1. *p.* 64.

Hilary, 8 *W.* 3. *Hallet* v. *Birt.*

In an action of *treſpaſs* for taking, &c. The defendant juſtified that the place *where*, &c. was an *hundred*, and time out of mind had a conuſance of all actions, *replevins*, &c. grantable in or out of court, and that a *replevin* was granted to him by the bailiff out of court, *by virtue*, &c. It was queſtioned, whether a *hundred court* could preſcribe to hold plea of *replevins*, becauſe the *county-court* could not hold plea of them at *common law*, but were enabled by the ſtatute, which extends not to the *hundred court?*

Per curiam. Suppoſing they may grant them in court, yet they cannot preſcribe to grant them out of court. *Vide Salk.* 2. *p.* 58. *Raym. vol.* 1. 218.

Hilary, 9 *W.* 3. *Morris* v. *Gelder*, &c.

In a ſuit in *replevin*, the defendant *avowed* for rent-arrear, and ſo many *hens* for quit rent. A verdict was given for the *avowant* for the rent, and damages for the hens. And now the court was moved in arreſt of judgment, that it appeared on their own *avowry* that they had *avowed* for more hens than were due, and for this reaſon, as was urged, the *avowry* was ill.

On the other ſide it was moved for the *avowants*, that on releaſing the damages for the hens, they might have leave to enter judgment for the rent and coſts; and the caſe of *Buis* v. *Newton, Trinity* 28 *Car.* 2. *Roll.* 728. was cited.

And accordingly, the court gave leave to the *avowant* to enter his judgment as he deſired, *niſi*, &c. *Vide Raym. vol.* 1. *p.* 317.

Eaſter, 9 *W.* 3. *Parker* v. *Meller.*

In *replevin*, if the defendant has the *poſſeſſion*, it is a good *bar* againſt the plaintiff if he has no title, but he cannot give a return, unleſs he ſhew a property in the goods; and it is ſufficient if they were delivered to him, for otherwiſe the judgment muſt be, that the plaintiff take nothing by the bill, but no return. *Vide Salk. vol.* 1. *p.* 54. *Mod. Rep. vol.* 12. *p.* 122.

Hilary, 10 *W.* 3. *Ward* v. *Everard, or Everets.*

In a ſuit in *replevin*, the defendant made cognizance as bailiff to *A.* and *B.* and ſhewed that Sir *R. C.* was ſeiſed in fee of the *place where*, &c. and granted one annuity or yearly rent of 100 *l.* to *A. B. C. D.* and *E.* to be equally divided between them, to have and to receive to them and their reſpective aſſigns, 20 *l.* to each during their lives, and the life of the longeſt liver of them; and that if any one died, his ſhare ſhould be equally divided among the ſurvivors, and that *A.* and *B.* are the ſurvivors. The plaintiff pleaded in *bar* an act of parliament to make void all conveyances made by Sir *R. C.* before ſuch a time: and iſſue being joined, whether this grant was made before ſuch a time, *viz. April* 1630, was tried at *bar*, and found for the *avowant*; and it was moved in arreſt of judgment, that tenants in common could not joint in *avowry*, but muſt *avow* ſeverally. *Litt. ſect.* 317. And that the grantees were tenants in common, and not joint-tenants. The caſes cited on both ſides were, 2 *Ro. Abr.* 90. *Sty.* 211. 2 *Cro.* 656. 1 *Inſt.* 180. *Dy.* 351. 3 *Cro.* 25. 1 *Saund.* 282. 5 *Co.* 55.

Holt, Chief Juſtice. The words, *equally to be divided*, cannot make a tenancy in common in a deed, though they may in a will; and the words, *to have and receive* 20 *l. a-piece*, are an explanation how the money on receipt is to be diſtributed, *viz.* ſo much to one, and ſo much to another; but do not ſever the grant nor the rent; for it is not *ſeveral rents* nor *ſeveral grants*, but one rent and one grant undivided. If they were tenants in common, then each of them muſt *avow for the fifth part* of 100 *l.* and not for 100 *l.* If *one* coparcener grants a rent of 10 *l.* for equality of partition to the other *two*, *viz.* 10 *l.* to one, and 10 *l.* to the other, they have but one rent, and the *viz.* is but explanatory. 1 *Inſt.* 169. *b.* which caſe is not to be diſtinguiſhed. If a man grants two acres to *A.* and *B. to hold* one acre to one, and the other acre to the other, the *habendum* is void and repugnant. *Hob* 172. And ſo here, where the grantor has granted one rent, it is repugnant to the very words of the grant to make it ſeveral grants of ſeveral rents. Therefore judgment was given for the *avowant*. *Vide Salk. vol.* 1. *p.* 360. 390. *Raym. vol.* 1. *p.* 422.

Eaſter, 10 *W.* 3. *Challoner* v. *Clayton.*

On a ſuit in *replevin*, the defendant *avowed* for rent, ſetting forth, that he was *poſſeſſed* of a houſe for ſeveral years yet to come, and being ſo *poſſeſſed*, he demiſed it to the plaintiff for *one year*, rendering rent, &c. The plaintiff replied, that the defendant *had nothing in the tenements*; the defendant rejoined that he had all, &c. and on demurrer to this rejoinder the court was moved to amend it, for that he could not make good his *avowry*, there being no title ſet forth: it is true, in an action of *debt* for rent reſerved on a leaſe, the defendant may plead *he had nothing in the tenements*, and the plaintiff in his replication may ſhew title, becauſe *that, together with a demiſe*, is a ſufficient allegation in a declaration; but in an *avowry* a *title* ſhould be ſhewn, and therefore it is not proper in a rejoinder. *Vide Salk. vol.* 3. *p.* 306. *Mod Rep. vol.* 12. *p.* 188.

Eaſter, 10 *W.* 3. *Silly* v. *Dally.*

See this caſe fully ſtated in page 721 of this work, under the head *Pleas, Pleadings*, &c.

Michaelmas, 11 *W.* 3. *Blake* v. *Weſt and French.*

In a ſuit in *replevin* for *three* cows, the caption was laid in a place called *Downfield*. The defendant *avowed*, that the place where, &c. contained *two* acres called *Marſh acre* in *Downfield*, and *two* acres called *Shetfield* in *Downfield*, and that he was ſeiſed of them in *fee*, and took *two* cows, *viz. one* in *Marſh-acre*, and the *other* in *Shetfield*. And iſſue being joined thereon, a verdict was given for the *avowant*.

The court was moved in arreſt of judgment, that the iſſue was immaterial, becauſe the plaintiff had traverſed the taking in *two* places, which was, as was urged, a plea of *priſel en auter lieu*, but had not taken any notice of the *damage feaſant*; ſo that though the verdict is for the *avowant*, yet he had no title to have a turn, becauſe the *damage feaſant* was not found, &c. *but not allowed.*

Per curiam. It is admitted by the iſſue of the taking, *viz.* if they were taken there, that they were taken there *damage feaſant*. *Vide Raym. vol.* 1. *p.* 504.

Michaelmas, 11 *W.* 3. ——— v. *Goudier.*

Holt, Chief Juſtice. *A. avowed* as a bailiff for rent; his being bailiff is not traverſable. *Vide Mod. Rep. vol.* 12. *p.* 321.

Hilary, 12 *W.* 3. *Moor* v. *Watts.*

See this caſe fully ſtated in page 161 of this work, under the head *Bail.*

Eaſter, 12 *W.* 3. *Horne* v. *Luines.*

See this caſe fully ſtated in page 375 of this work, under the head *Diſtreſs.*

Trinity, 12 *W.* 3. *Freeman* v. *Jugg.*

In a ſuit in *replevin* for taking a *horſe*, the defendant *avowed*, that *he was poſſeſſed* of the cloſe, being the *place where*, &c. for a term of years yet to come, and being ſo poſſeſſed, the horſe was *damage feaſant* there, &c. the plaintiff replied, that the defendant was to keep up his *fences* round the ſaid cloſe, but that the ſame being down, and out of repair, the horſe eſcaped into the cloſe for want of good fences: on which they were at iſſue; and at the trial the plaintiff was *nonſuited*. And now it was moved in arreſt of judgment, that this *avowry* was ill, becauſe in all *avowries* for *damage feaſant*, the *avowant* muſt ſhew where the *fee* is, and how the particular eſtate is derived.

To which the court agreed, ſaying, on there being a demurrer to ſuch an *avowry*; but becauſe the plaintiff by his replication had waived that matter, and confeſſed and admitted a poſſeſſion in the *avowant*, that is ſufficient to juſtify a diſtreſs *damage feaſant*, and has cured this defect in the *avowry*. *Vide Salk. vol.* 3. *p.* 307.

Eaſter, 13 *W.* 3. *Anonymous.*

A ſuit in *replevin* by plaint in an inferior court was removed hither by *certiorari*; and on the removal the plaintiff changed his declaration.

Per curiam. That cannot be, for whatever is below ought to be now here. And if one remove a *replevin* by *recordari* hither, and declares for leſs than he took, the defendant muſt *avow* for them, and alſo for what he has not declared on; and if he has a return, he ſhall have it for all. And if one *replevies* part of the goods taken, the other ſhall *avow* for them and the reſt alſo, and have a return, if his *avowry* go for him for all; and this *certiorari* removes the pledges below, ſo as a *ſcire facias* may go againſt them. And the entry here above, in this caſe of removal of a *replevin* by the plaintiff, ought not to be *was ſummoned*, as upon an *original*, but as of a cauſe removed. *Vide Mod. Rep. vol.* 12. *p.* 453.

Trinity, 13 *W.* 3. *Pratt* v. *Rutleis.*

See this caſe fully ſtated in page 333 of this work, under the head *Damages.*

Hilary, 2 *Ann.* *Croſſe* v. *Bilſon.*

See this caſe fully ſtated in pages 3 and 725 of this work, under the heads *Abatement*, and *Pleas, Pleadings*, &c.

Trinity, 2 *Ann.* *Preſtgrave* v. *Saunders.*

See this caſe fully ſtated in page 3 of this work, under the head *Abatement.*

Michaelmas, 2 *Ann.* *Lord Banbury* v. *Wood.*

See this caſe fully ſtated in page 54 of this work, under the head *Addition.*

Eaſter, 3 *Ann.* *Gilbert* v. *Parker and others.*

In *replevin* for taking the plaintiff's cattle in ſuch a place. The defendant makes conuſance as ſervant to *G. P.* who was ſeiſed of the place where, &c. in *fee*, and juſtifies the taking *damage feaſant*. The plaintiff, in *bar* of the conuſance, alledges that he himſelf was ſeiſed in *fee* of a third part of a moiety of a fifth part of the place where, &c. and juſtifies putting in his cattle; *without this*, that the defendant's maſter was ſole ſeiſed thereof. To which there is a demurrer, of which the council aſſigned for reaſon, 1ſt. That the ſole ſeiſin here is not alledged, and therefore not traverſeable.

2dly. This plea confeſſes and avoids our title, and for that alſo it is not traverſable.

Holt, Chief Juſtice. You ſet out a *ſeiſin in fee*, and nothing more need be traverſed. And here he might have ſaid that *J. S.* was ſeiſed, and derive title under him, *abſque hoc*, that you were ſeiſed; or that he was tenant in common with you, *abſque hoc*, that you were ſeiſed in *manner and form*, and it had been well. 3 *Cro.* 795. *Winch.* 7. 2 *Mod.* 6. And if here he had replied, that *J. S.* was ſeiſed in *fee*, and make title under him, *abſque hoc*, that the defendant was ſeiſed in *manner and form*, and on iſſue the defendant was found ſeiſed of a moiety only, it would be againſt him, for he *avowed* as one ſole ſeiſed, when it ſhould be as tenant in common, there may be between coparceners, joint-tenants, and tenants in common, for the two firſt are ſeiſed *per my and per tout*, but the laſt have ſeveral ſeiſins; and here to introduce his traverſe, he muſt make himſelf ſome title, to enable him to controvert with the defendant. And there is no difference between *avowry* and *juſtification*, as was urged; for in both, if the party ſet forth a falſity, he is bound to maintain it. Therefore judgment was given for the plaintiff, *niſi, &c.* *Vide Mod. Rep. vol.* 6. *p.* 158.

Eaſter, 3 *Ann.* *Leonard* v. *Stacy*.

On an action of *treſpaſs* for entering the plaintiff's houſe, and taking away his goods; the defendant juſtified by virtue of a *replevin* out of the *ſheriff's court* of *London*, and a precept thereon to *J. S.* an officer, and the defendant came in aid of him.

The plaintiff replied, that before the taking away the goods he claimed a property in them, and gave notice thereof to the defendant; and the queſtion on the ſpecial verdict was, whether the taking after the claim of property, and notice thereof, did not make him a *treſpaſſer from the beginning*.

The court held, that he was a *treſpaſſer from the beginning*; for though the claimer ought to be the ſheriff, or officer, and that a claimer to a perſon that comes to give aſſiſtance be not enough to the making the execution illegal, if the officer does not deſiſt; yet if it be notified that he comes to aid that claim before the property is made, he at his peril ought to deſiſt. Therefore judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 6. *p.* 139.

Trinity, 3 *Ann.* *Elmore* v. *Tucker*.

In *replevin*, the defendant made conuſance as bailiff to *J. S.* for rent on a demiſe by the ſaid *J. S.* of the *place where*, &c. and pleaded in *bar*, *&c.* that *J. S.* whoſe *fee* it was, time out of mind uſed and ought to repair and maintain the fences between the *place where*, *&c.* and the plaintiff's land next adjoining, and through want of repair, the plaintiff's cattle eſcaped into the *place where*, &c. and were diſtrained for *damage feaſant*, and on demurrer, the council for the demurrer relied on 2 *Saund.* *Pool* v. *Longville*, as a caſe in point.

Holt, Chief Juſtice. I think it is hard to maintain that judgment, that when the plaintiff's inheritance is charged with the repairs, he ſhould take advantage of his own wrong in not repairing, by making the eſcaping cattle a diſtreſs for *damage feaſant*; and it is not like the caſe of lord and tenant there quoted, for the lord has nothing to do with the land, but the charge of repairs belongs to the tenants. *Vide Mod. Rep. vol.* 6. *p.* 189.

Michaelmas, 3 *Ann.* *Anonymous.*

In a ſuit in *replevin* the *avowant* ſaid, that he was poſſeſſed for years, and made an under-leaſe reſerving rent, *&c.* which rent being in arrear, he diſtrained. The plaintiff was *nonſuited*, and a return *irrepleviſable* awarded; and on the return of the *writ of inquiry*, the exception taken was, that the *avowry* was naught, for that the *avowant* pleaded a particular eſtate, without ſhewing who had the *fee*, and the commencement of the particular eſtate.

Adjudged, That though it was bad, yet being after a *nonſuit*, it was too late; for the interlocutary judgment is ſuch on which a writ of error lies, as in a judgment on a writ of *dower*. *Vide Mod. Rep. vol.* 6. *p.* 223.

Hilary, 7 *Ann.* *Leg* v. *Stradwick*.

See this caſe fully ſtated in page 374 of this work, under the head *Diſtreſs*.

Eaſter, 10 *Ann.* *Templeman* v. *Caſe*.

See this caſe fully ſtated in page 38 of this work, under the head *Actions*.

Hilary, 8 *Geo.* *Johnſon* v. *Wollyer*.

In a ſuit in *replevin* in *London*, the defendant appeared on a *writ of elongata*; the plaintiff declared for taking guns *in a certain place called the* Minories *in* London; the defendant pleaded he did not take *in manner and form*, *&c.* At the trial the plaintiff proved the taking at *Rotherhithe* in *Surrey*; on which it was objected, that the plaintiff had not proved his iſſue, for that the place was material, and therefore part of the iſſue under the *manner and form*, *&c.*

The council for the plaintiff admitted, that it was traverſable; but inſiſted, that by not traverſing it particularly, the place was admitted, and could not be inſiſted on, on the plea of *non cepit*.

Pratt, Chief Juſtice, held, that where the plaintiff *avows* at a different place, in order to have a return, he muſt traverſe the place in the court, becauſe his *avowry* is inconſiſtent with it; but where he does not inſiſt on a return, he may plead *he did not take*, &c. and prove the taking to be at another place, for it is material. Whereupon the plaintiff was *nonſuited*. *Vide Stra. vol.* 1. *p.* 507.

Michaelmas, 10 *Geo.* *The King* v. *Burchet, his Attorney, and the Town-Clerk of Guildford.*

See this caſe fully ſtated in page 137 of this work, under the head *Attachment*.

Trinity, 11 *Geo.* *Anonymous.*

In *replevin*, the defendant juſtified the taking the cattle *damage feaſant*, and now moved to ſtay proceedings on bringing into court what was due with coſts.

Per curiam. If you bring in what is due on the *replevin bond*, proceedings ſhall be ſtayed, but if it is to ſtay proceedings on payment of what is due for damages, it ſhall not be granted, becauſe the court has no rule to guide them in ſuch caſe; but it is otherwiſe for rent, for that is certain. *Vide Mod. Rep. vol.* 8. *p.* 379.

Michaelmas, 11 *Geo.* *Weldon* v. *Buckler.*

See this caſe fully ſtated in page 68 of this work, under the head *Amendment*.

Eaſter, 1 *Geo.* 2. *Reynolds* v. *Thorpe*.

In *replevin* the defendant *avowed* for rent, and ſhewed that *A. having title* demiſed to him, and that he made an under-leaſe to the plaintiff; and on demurrer it was reſolved to be ill, according to the caſe of *Silly* v. *Dally*, 2 *Salk.* 562. 3 *Lev.* 193. 5 *Co.* 1 And judgment was given for the plaintiff. *Vide Stra. vol* 2. *p.* 796.

Michaelmas, 3 *Geo.* 2. *Stephens* v. *Haughton*.

In *replevin* the defendant *avowed*, as bailiff to the Dean and Chapter of *Weſtminſter*, for an *amerciament* in the *court-leet* for making bread ſhort of weight, contrary to *ſtat.* 8 *Ann. c.* 18. which gives the *leet* juriſdiction. And on demurrer it was held to be an ill *avowry*, becauſe it was not averred that the defendant was guilty. And a diſtinction was taken between *replevin* and *treſpaſs*; that in *treſpaſs* the conviction is ſufficient to juſtify the officer, who is only to excuſe himſelf; whereas in *replevin*, the defendant is an actor, and makes title for a return of the goods. *Carth.* 73. *Mo.* 75. *Cro. El.* 885. *Skinner*, 587.

Another objection was taken, and allowed, that it appeared the *amerciament* was made by the jury, and not by the court, as it ought to have been; and that there was no afferment. 3 *Lev.* 19. 206. 8 *Co.* 38.

For theſe reaſons the *avowry* was held ill, and the plaintiff had judgment. *Vide Stra. vol.* 2. *p.* 847.

Replevin Bonds.

Theſe bonds, called *replevin bonds*, are given to ſecure pledges of both ſorts, *viz.* pledges to make a return, and pledges to proſecute, and theſe bonds are now in lieu of pledges: here was a debt on a *replevin bond* brought by the ſheriff, and the condition was to appear at the next county court, and there to proſecute the action with effect, and to make a return of the goods and cattle, if a return ſhould be adjudged by law, and to indemnify the ſheriff for granting the *replevin*, and delivering the cattle.

The defendant pleaded, that the party did appear at the next county court, and proſecuted there, and no return was adjudged.

The plaintiff replied, that there was a *recordari facias loqualem* in this court, but the plaintiff did not proſecute but a return being adjudged, as the goods were not returned.

Per curiam. This plea is naught; for it is not enough to proſecute in the county court, but the party muſt follow it; and if a return be adjudged in any court, it is enough, for the condition is to go to the end of the cauſe. *Nichols* v. *Newman*, *Eaſter*, 3 *Geo.* 2. *Carthew.* 249. *Chapman* v. *Butcher*'s caſe in point, but not mentioned in the caſe above; and it was held by the court to be a lawful bond, and ſuch is the uſual courſe now. *Vide Forteſcue*, *p.* 209.

Eaſter, 8 *Geo.* 2. *Bern and Wife* v. *Mattire.*

See this caſe fully ſtated in page 216 of this work, under the head *Baron and Feme.*

Trinity, 8 *Geo.* 2 *Vaughan* v. *Norris.* Error.

An action of *debt* was brought in the *C. B.* on a *replevin bond*; the condition whereof was, to appear in the county court, and then and there to proſecute with effect; and breach aſſigned, that he did not proſecute with effect; the plaintiff replied, that the preſent defendant removed the cauſe by a *recordari* into the *C. B.* and was there *nonſuited*: the defendant demurred to the replication, and judgment was given for the plaintiff, and thereon a *writ* of *error* was brought into this court.

Page, Juſtice. I think the replication is well enough, for the bond is broken, for the plaintiff was thereby bound to proſecute that cauſe with effect, beſides, he was to indemnify the ſheriff, and the removal of the cauſe and nonſuit thereon is a damnification of the ſheriff, beſides, the words *then and there* relate to his appearing, and he is bound to proſecute with effect afterwards.

Lee, Juſtice. The *then and there* relates to ſo much of the proſecution as ſhould be in the county court, but does not reſtrain it. The judgment was affirmed. *Vide Caſes Temp. Lord Hardw. p.* 137.

Hilary, 10 *Geo.* 2. *Combes* v. *Cole.*

In *replevin* in the county court, removed here by *recordari*, and a verdict for the *avowant*, and an inquiry as to the value, purſuant to *ſtat.* 17 *C.* 2. and after hearing the arguments on both ſides, on a motion to deliver up the *replevin bond*;

Lord *Hardwicke* ſaid, the *avowant* muſt either purſue the remedy given by *ſtat.* 17 *C.* 2. *c.* 7. which is to have judgment and execution for the particular ſum ſettled by the jury, or elſe he muſt take the ancient remedy; but now the *avowant* would have us proceed in a manner not directed by the ſtatute, by obliging the ſheriff to deliver up the bond, that he may bring an action in his name; but I do not remember one inſtance of the kind.

Per curiam. The rule for ſhewing cauſe muſt be diſcharged. *Vide Caſes Temp. Lord Hardw. p.* 352.

Eaſter, 16 *Geo.* 2. *The King* v. *Monkhouſe.*

The court granted an attachment againſt the underſheriff of *Cumberland*, for granting a *replevin* of goods diſtrained on a conviction of *deer-ſtealing*. *Vide Stra. vol.* 2. *p.* 1184.

Hilary, 2 *Geo.* 3. *Ingle* v. *Wordſworth, and others.*

See this caſe fully ſtated in page 314 of this work, under the head *Coſts.*

Trinity, 4 *Geo.* 3. *Francis* v. *Wyatt.*

See this caſe fully ſtated in page 377 of this work, under the head *Diſtreſs.*

Rules of Court.

Michaelmas, 8 *W.* 3. *Sir James Butler's Caſe.*

On a *rule of reference* to arbitrators, they made an award for the plaintiff, and a ſtranger by contrivance defeated the party of the benefit of this award.

Per curiam. It is a contempt to the court, and an *attachment* ſhall be granted; for it ſhall not be in any one's power to defeat the *rules* of this court, or render them ineffectual. *Vide Salk. vol.* 2. *p.* 596.

Michaelmas, 8 *W.* 3. *Anonymous.*

Per curiam. If a man enters into a *rule* in this court not to ſue out execution on a judgment, and brings an action of *debt* on the judgment, it is a breach of the *rule*. *Vide Salk. vol.* 2. *p.* 596.

Michaelmas, 8 *W.* 3. *Downs* v. *Turner.*

In *ejectment* on entry for non-payment of rent, the court ſtaid all proceedings on bringing in all the rent in arrear into court, accepting a new leaſe, and ſealing a counterpart. *Vide Salk. vol.* 2. *p.* 597.

Hilary, 9 *W.* 3. *Anonymous.*

In *debt* on a bond, the defendant muſt bring in the whole penalty, or the court will not ſtay proceedings. If the parties diſpute the *quantum*, then it muſt be referred to the *ſecondary* to aſcertain the ſame. *Vide Salk. vol.* 2. *p.* 597.

Trinity, 9 *W.* 3. *Anonymous.*

Holt, Chief Juſtice, made this *rule* to be obſerved for the future, that if a man ſurrender himſelf on a judgment given againſt him, and he be not charged within *two terms* after the judgment, he ſhall be diſcharged on common bail; but at the ſame time he muſt bring a certificate from the clerk of the errors, that there is no writ of error pending; becauſe otherwiſe he might, by writ of error, cloſe up the hands of the plaintiff, and ſo take advantage of his own wrong. *Vide Mod. Rep. vol.* 12. *p.* 132.

Hilary, 10 *W.* 3.

In *replevin*, the defendant *avowed* for rent, and the plaintiff was admitted to bring it into court. *Vide Salk. vol.* 2. *p.* 597.

Eaſter, 10 *W.* 3. *Anonymous.*

In *debt* for rent, it was moved to bring ſo much money into court; and *Holt*, Chief Juſtice, thought it hard: he ſaid, he remembered the *beginning* of theſe motions; the firſt was to bring in principal and intereſt on a bond; after that it came to an *indebitatus aſſumpſit*: it has been done in *debt* for rent, but not ſo freely; we do it in *ejectment*, on a ſpecial reaſon, *viz.* becauſe that action ſubſiſts entirely on the *rules of the court*. *Vide Salk. vol.* 2. *p.* 597.

Michaelmas, 10 *W.* 3. *Anonymous.*

The court will not grant a *peremptory rule*, without previous notice to ſhew cauſe being given. *Vide Mod. Rep. vol.* 12. *p.* 251.

Michaelmas, 11 *W.* 3. *Anonymous.*

On a diſpute between Mr. *Harcourt*, ſecondary on the *crown ſide*, and Lady *Aſh*, about the due inrolment of a deed, a *rule of court* was made, that all deeds ſhould be inrolled on the *plea ſide*, and acknowledged in the face of the court. *Vide Mod. Rep. vol.* 12. *p.* 321.

Eaſter, 12 *W.* 3. ——— v. *Watts.*

See this caſe fully ſtated in page 160 of this work, under the head *Bail.*

Eaſter, 13 *W.* 3. *Cheeſeby* v. *Baily.*

See this caſe fully ſtated in page 99 of this work, under the head *Arbitration and Award.*

Trinity, 1 *Ann. Anonymous.*

Holt, Chief Juſtice, declared, that all the judges of this court had made *a rule*, that no reference whatſoever of any cauſe depending in this court ſhould ſtay the proceedings of this court, *unleſs* it was expreſſed in the *rule of reference* to be argued, that all proceedings in this court ſhould ſtay. *Vide Raym. vol.* 2. *p.* 789.

Trinity, 2 *Ann. Wilcocks the Attorney's Caſe.*

In *trover* for a horſe, bridle, and ſaddle, it was moved to bring the ſaddle and bridle into court; but denied. *Vide Salk. vol.* 2. *p.* 597.

Eaſter, 5 *Ann. Gregg's Caſe.*

Holt, Chief Juſtice. In an action brought by an adminiſtrator, the defendant cannot bring money into court, becauſe the adminiſtrator is not by law to pay coſts; and *Eaſter*, 5 *Ann.* in this court, in *Gregg's* caſe, an action was brought by an executor for money due to his teſtator for *law-buſineſs* done by him, it was moved to bring ſo much money into court, but denied.

Covenant and *breach* for non-payment of rent, and not repairing, &c. it was moved to bring in ſo much for the rent; and as to the other breach, that the plaintiff might proceed as he thought fit.

Trevor, Juſtice. All the judges have agreed, (for he put the caſe to *Holt*, Chief Juſtice) that it is but reaſonable to allow it; that it does not differ from *debt* for rent; for though it be a covenant, yet it is a covenant for payment of a ſum certain. The ſame diſtinction was taken between *covenant* for a ſum certain, and *choſe* uncertain, by *Holt*, Chief Juſtice, *Hilary*, 9 *W.* 3. in this court, ſaying it did not differ from an *indebitatus aſſumpſit*; and *Trinity*, 12 *W.* 3. the ſame rule was made. *Vide Salk. vol.* 2. *p.* 596.

Michaelmas, 9 *Ann. Elliot* v. *Callow.*

The defendant brought money, *viz.* 10 *l.* into court, and had it ſtruck out of the declaration: afterwards the plaintiff ſuffered a *nonſuit*; and the queſtion was, whether he ſhould be allowed to take out this money?

Per curiam. He ſhall; for ſo much the defendant has admitted to be due, and ſo much he has actually paid him; and if the cauſe had gone on to trial, there muſt have been a verdict for the plaintiff as to ſo much; for this is admitted to be due, and paid down as the plaintiff's money; otherwiſe perhaps of money paid into court by way of tender. If a man pleads a tender & *uncore priſt*, and pays the money into court, and the plaintiff takes iſſue on the tender, and it is found againſt him, the defendant ſhall have the money. *Sty.* 388. *Vide Salk. vol.* 2. *p.* 597.

Michaelmas, 10 *Ann. Harvey* v. *Wright.*

There was this queſtion raiſed concerning underſtanding a *rule of court*: the rule was, "if a cauſe was "not proſecuted in *four terms*, neither party ſhould "revive proceſs without giving the other a term's notice." Now, whether notice at any time within the term, as *e. g.* the laſt day of the term, would ſatisfy the *rule*; or whether the *rule* does not require a whole term's notice?

The *court*, on time taken to conſult the reſt of the Judges, that all the *courts* might be uniform in this practice, delivered their opinion, that by a term's notice was meant, that a whole term ſhould intervene between notice and trial, ſo that either of the parties may have time and opportunity to apply to this *court*. *Vide Mod. Rep. vol.* 10. *p.* 40.

Michaelmas, 11 *Ann. Stennil* v. *Brown.*

See this caſe fully ſtated in page 454 of this work, under the head *Evidence.*

Trinity, 2 *Geo. Clerk* v. *Elwick.*

See this caſe fully ſtated in page 105 of this work, under the head *Arbitration and Award.*

Eaſter, 4 *Geo. Anonymous.*

A writ was returnable on the 30th day of *January*, and the bail-bond aſſigned on the 4th day of *February*, between which and the 30th of *January* a *Sunday* intervened.

Per curiam. It is well aſſigned; for *Sunday* is to be reckoned as one of the *four days*, (there being no more allowed in actions laid in *London* or *Middleſex.*) And ſo it is in *rules* to *plead*, except the *firſt* and *laſt* day happen on a *Sunday*, with this difference, that if the *rule* be given on a *Sunday* it goes for nothing, but if it expires on a *Sunday*, the defendant has all the next day to plead in. *Vide Stra. vol.* 1. *p.* 86.

Michaelmas, 8 *Geo. Elwood* v. *Sir Godfrey Kneller.*

On a reference to the maſter, he informed the *court*, that it was neceſſary one Mr. *H.* ſhould attend him: and on this the *court* was moved for a *rule*, which they were very tender of granting at all, but at laſt they made a *rule* that he ſhould ſhew cauſe why he ſhould not attend the maſter. *Vide Stra. vol.* 1. *p.* 477.

Hilary, 9 *Geo. The King* v. *Sarah Saliſbury.*

See this caſe fully ſtated in page 178 of this work, under the head *Bail.*

Hilary, 12 *Geo. Haywys* v. *Savage.*

See this caſe fully ſtated in page 735 of this work, under the head *Pleas, Pleadings*, &c.

Trinity, 12 *Geo. Powell* v. *Gay.*

It was ſettled, that if the defendant craves *oyer* of any thing whereof he is entitled to have *oyer*, and it is not delivered in time, he ſhall have ſo many days to plead after the *rules* are out, as he demanded *oyer* before the *rules* were out. *Vide Stra. vol.* 1. *p.* 705.

Trinity, 12 *Geo.* *Braceby* v. *Dalton.*

In an action on the *caſe*, the council moved on an *affidavit*, that the defendant did not know the plaintiff, that the attorney for the plaintiff might give an account who his client was, and where he lived. But the court refuſed it, ſaying, it had never been done but in a *qui tam* action. *Vide Stra. vol.* 1. *p.* 705.

Trinity, 9 *Geo.* 2. *The King* v. *Badouin.*

A *rule* was made for the defendant to ſhew cauſe why there ſhould not be an information againſt him. And on an *affidavit* of ſerving the wiſe at his houſe, the council moved to make it abſolute. It was urged, that perſonal ſervice was not neceſſary, and this was *at firſt ſight* a good ſervice. But the wiſe making *affidavit* that he was gone beyond ſea a week before the ſervice, the court held it not to be good, for leaving it at the houſe is only good on a ſuppoſition the party is there, whereas now the contrary appears. *Vide Stra. vol.* 2. *p.* 1044.

Eaſter, 30 *Geo.* 2. *The King* v. *Roger Philips, Mayor of Carmarthen.*

Adjudged, That *general rules* are wiſely eſtabliſhed by courts, for obtaining juſtice with eaſe, certainty, and diſpatch; and the great end of them being, *to do juſtice*, the courts are bound to *ſee* that it be *really* attained. *Vide Bur. vol.* 1. *p.* 301.

Mishaelmas, 30 *Geo.* 2. *A General Rule.*

The court declared, that all *enlarged rules* to ſhew cauſe, which were made in the laſt term, ſhould be moved before the *laſt week* of the preſent term, *unleſs* leave for poſtponing them ſhould be particularly applied for, and granted: and this rule to prevail hereafter, in all future terms, in the ſame manner. *Vide Bur. vol.* 1. *p.* 9.

Rates, See Taxes.

Scire Facias.

Trinity, 1 *W.* & *M.* *Panton* v. *Hall.*

A judgment in *debt* was recovered againſt *A.* and *B.* and a *ſcire facias* was awarded againſt the ter-tenants and the heirs of *B.* The ſheriff returned a *ſcire feci* as to the heir, and as to the reſt, returned ſeveral perſons in his baliwick warned. They appeared, and pleaded in *abatement* that no *ſci. fac.* had been awarded againſt *A.* The plaintiff replied, that he at ſuch a time ſued out a *ſci. fac.* againſt *A.* and ſet it forth. This replication was held naught on demurrer, for a *ſci. fac.* is a *judicial writ*, and muſt purſue the nature of the judgment; therefore, as the judgment is joint, ſo ought the *ſci. fac.* whereas here they are as ſeveral independent ſuits. 2 *Roll.* 276. 20 *H.* 7. 3 *Cro. Car.* 517.

2dly. The return is ill, for it ſhould not be that *A. B.* and *C.* are tenants of land in his *bailiwick*; but that *A. B.* and *C.* are tenants of all the lands in his *bailiwick.* *Vide Salk. vol.* 2. *p.* 598.

Eaſter, 3 *W.* & *M.* *Dr. Needham's Caſe.*

It was moved, that an execution on a *ſcire facias* on the goods of Dr. *Needham* might be ſet aſide, becauſe the writ was ſealed and delivered to the ſheriff after the defendant's death; and *ſtat.* 29 *Car.* 2. *cap.* 3. *provides*, that no writ of *fieri facias*, &c. ſhall bind the property of goods againſt whom ſuch writ is iſſued forth, but from the time that ſuch writ ſhall be delivered to the ſheriff; and ſo provides, that the writ ſhall not bind goods againſt the party, and not as in other caſes againſt the purchaſer only; and ſo the defendant's goods are not bound.

Per curiam. This clauſe is to be underſtood of the goods of a purchaſer, purchaſed by him before delivery of the writ; but as to the party, it ſhall bind as before from the *teſte*, as it was before the ſtatute. *Vide Mod. Rep. vol.* 12. *p.* 5.

Eaſter, 4 *W.* & *M.* *Barſdale* v. *Drew.*

See this caſe fully ſtated in page 252 of this work, under the head *Certiorari.*

Michaelmas, 5 *W.* & *M.* *Dighton* v. *Granvil.*

See this caſe fully ſtated in page 342 of this work, under the head *debt.*

Hilary, 6 *W.* & *M.* *Tully's Caſe.* Error.

Adjudged, That in *error* to reverſe a fine, though in ſtrictneſs of law a *ſcire feci* being returned againſt the conuſees, is ſufficient; yet for fear of purchaſors, and in favour of them, there ſhall be a *ſcire facias* againſt the ter-tenants. *Vide Salk. vol.* 2. *p.* 598.

Michaelmas, 6 *W.* & *M.* *The King and Queen* v. *Armſtrong.* Error.

A motion being made to reverſe an *outlawry* in treaſon, there being a *writ of error* brought, and the error aſſigned, *viz.* That it does not appear where the huſtings were held; for it is at a court of huſtings, &c. omitting the words *for the city of* London.

The court inclining to reverſe it for this error, one of the judges objected, that there ought to be a *ſcire facias* to the Lords, *mediate* and *immediate*, before the *outlawry* ſhould be reverſed.

To which it was anſwered, that it was not neceſſary in treaſon, becauſe the forfeitures do not belong to them, but to the King; whereon the *outlawry* was reverſed. *Vide Mod. Rep. vol.* 4. *p.* 366.

Hilary, 7 *W.* 3. *Hardiſty* v. *Barny.*

Per curiam. If a judgment be above *ten years* ſtanding, the plaintiff cannot ſue out a *ſcire facias* without motion in court; if under *ten*, but above *ſeven*, he cannot have a *ſcire facias* without a motion at *ſide-bar.* *Note*, If after ſuch motion and judgment revived by *ſcire facias*, the defendant dies before execution, the plaintiff muſt ſue out a *new ſci. fac.* but may have it without motion, for the judgment was revived before. *Vide Salk. vol.* 2. *p.* 598.

Hilary, 7 *W.* 3. *King* v. *Sharpe, or Sharp, and others.*

See this caſe fully ſtated in page 158 of this work, under the head *Bail.*

Trinity, 7 *W.* 3. *The King* v. *Kempe, or Kemp.*

See this caſe fully ſtated in page 432 of this work, under the head *Eſtates.*

Michaelmas, 7 *W.* 3. *Plummer* v. *Lea.*

One *A. H.* recovered a judgment, 17 *Car.* 2. againſt the defendant, and had a *teſtatum ſcire facias* to the ter-tenants.

They appeared and pleaded; and there was a verdict againſt them at the aſſizes in *Suffolk*, and judgment thereon.

Afterwards *H.* became a bankrupt, and the commiſſioners aſſigned the original judgment to the plaintiff, who now moved the court, that it might be entered to entitle him to the benefit of the judgment on the *ſcire facias*; which was ruled accordingly, without bringing a new *ſcire facias.* *Vide Mod. Rep. vol.* 5. *p.* 88.

Hilary, 8 *W*. 3. *Conyers* v. *The Bail of Rawlins.*

See this caſe fully ſtated in page 158 of this work, under the head *Bail.*

Trinity, 8 *W*. 3. *Philips* v. *Crab.*

When the attornies on both ſides are to attend the ſtriking a jury on a trial at *bar*, if one will not attend on due notice, the jury ſhall be ſtruck *ex parte*, and the *ſecondary* ſhall ſtrike *twelve* for him that does not attend.

Per curiam. Two *ſcire facias's* ſhall not be taken out both together, for the future the *ſecond* ſhall not be taken out till the day of the return of the *firſt*.

In the *C. B.* they have but one *ſci. fac.* but then there muſt be *fifteen days* between the *teſte* and the return of the writ; and that returnable too on a common day, but each writ it returnable here in *eight days* on a day certain, ſo that leſs time is here neceſſary for both than in the *C. B.* for one. *Vide Mod. Rep. vol.* 12. *p.* 94.

Trinity, 8 *W*. 3. *Anonymous.*

In the *C. B.* there is but *one ſcire facias*, and on *nihil* returned execution iſſues. In this court there are *two ſcire facias*, and *two nihils* returned, and heretofore both were ſued out together, by making the *teſte* of the *ſecond* as if the *firſt* was returned; but now the court made a rule that both ſhould not be ſued out together, but the *firſt* ſhould be duly returned before the *ſecond* ſhould be ſued out, and that the *ſecond* ſhould be *teſted* the day of the return of the *firſt*. *Vide Salk. vol.* 2. *p.* 599.

Michaelmas, 8 *W*. 3. *Hartop* v. *Holt.*

See this caſe fully ſtated in page 408 of this work, under the head *Error.*

Eaſter, 9 *W*. 3. *Guillam* v. *Hardiſty.*

Per curiam. Where a *ſcire facias* is brought in this court on a judgment in an inferior court, it muſt appear in the writ itſelf, how the judgment came into this court, *viz.* whether by *certiorari*, or by *writ of error*, becauſe the execution is different; for if it came in by *certiorari* the *ſci. fac.* muſt ſet forth the limits of the inferior juriſdiction, and pray execution within thoſe particular limits, and alſo that the judgment came in by *certiorari*, but if it came in by *writ of error*, that muſt be ſhewn in the *ſci. fac.* itſelf likewiſe, and pray execution generally: and whereas the *ſcire facias* in the principal caſe recited the judgment in the inferior court, *as by inſpection of the record it appears unto us*, it was for that reaſon ill: for it ought to be *as appears by the record*, becauſe if the defendant ſhould plead *nul tiel record*, it muſt be tried by the *record* itſelf, and not by *inſpection*; ſo this *ſcire facias* was quaſhed. *Vide Salk. vol.* 3. *p.* 321.

Michaelmas, 9 *W*. 3. *Blackett* v. *Criſſop.*

In this caſe, *Holt*, Chief Juſtice, held, that a perſon may have a *ſci. fac.* againſt pledges, where the ſuit is in any court of record; and though in county courts, &c. a *ſci. fac.* will not be againſt pledges, becauſe theſe are not courts of record, and every *ſci. fac.* ought to be grounded on a record; yet there the party may have a precept in nature of a *ſci. fac.* againſt the pledges. *Vide Raym. vol.* 1. *p.* 278.

Michaelmas, 10 *W*. 3. *Lugg.* v. *Godwin.*

On a *ſcire facias* on a judgment againſt the principal defendant.

Holt, Chief Juſtice. On ſearch of precedents, where it is againſt the defendant himſelf, it ſhould be *in hac parte*; where againſt the bail, *in ea parte*, and this will reconcile the precedents. *Vide Salk. vol.* 2. *p.* 599. *Raym. vol.* 1. *p.* 393.

Michaelmas, 10 *W*. 3. *Goodwin* v. *Beakbanc.*

It was adjudged in this caſe, that in a *ſcire facias* it is ſufficient that there be *fifteen days* incluſive between the *teſte* of the writ of the *firſt ſcire facias* and the return of the *ſecond*. *Vide Mod. Rep. vol.* 12. *p.* 215.

Michaelmas, 10 *W*. 3. *Anonymous.*

Holt, Chief Juſtice. On a *ſcire facias quare execution non*, the plaintiff in error may aſſign error; but if he does not, the judgment is only, that execution be awarded, and not that judgment be affirmed. *Vide Mod. Rep. vol.* 12. *p.* 231.

Michaelmas, 10 *W*. 3. *Anonymous.*

On a judgment againſt ſeveral defendants, and a *capias*, and a *cepi corpus* returned as to one; then another of the defendants dies, and he that was in execution eſcaped, and a *ſcire facias* was brought againſt the ſurvivor, the tertenants of the deceaſed, and him that had eſcaped.

Per curiam. It may be well; but *firſt* the *ſcire facias* ought to ſuggeſt that he had eſcaped: and, *ſecondly*, to be *of the lands and tenements* of the tertenants of the deceaſed; and of the *lands and tenements and goods and chattels* of the ſurvivors. *Vide Mod. Rep. vol.* 12. *p.* 255.

Trinity, 11 *W*. 3. *Anonymous.*

When a *capias ad ſatisfaciendum* iſſues againſt the principal in order to charge the bail, it muſt lie *four days* excluſive in the ſheriff's office, but there is no ſet time for a *ſcire facias*: the ſame rule was laid down, *Michaelmas*, 10 *W*. 3. in this court. But a *ſcire facias* againſt bail muſt lie a convenient time, and the firſt *ſcire facias* may be antedated even in term-time.

Holt, Chief Juſtice, it cannot be antedated where it iſſues by rule of court. *Vide Salk. vol.* 2. *p.* 599.

Michaelmas, 11 *W*. 3. *Goodwin* v. *Peek.*

In this caſe the *firſt ſcire facias* was *teſted* the 24th day of *October*, and returnable the 31ſt day of *October*; the *alias* was *teſted* the ſame day, returnable the 7th day of *November*. It was objected, that there ought to be *fifteen days* excluſive between the *teſte* of the *firſt* and the return of the *laſt*.

The court held, that here being *fifteen days* incluſive, it was very well, and the practiſers agreed to it. 2 *Jones*, 228. *Vide Salk. vol.* 2. *p.* 599.

Trinity, 12 *W*. 3. *Dillon* v. *Walcot.*

See this caſe fully ſtated in page 410 of this work, under the head *Error.*

Eaſter, 13 *W*. 3. *How* v. *Acton.*

Holt, Chief Juſtice. If the plaintiff delays the executing of a writ of inquiry till a year after the interlocutory judgment, he cannot do it afterwards without a *ſcire facias*. *Vide Mod. Rep. vol.* 12. *p.* 500.

Eaſter, 13 *W*. 3. *Proctor* v. *Johnſon.* Error.

On a judgment in *ejectment* in *C. B.* a *ſcire facias* was brought againſt the caſual ejector, ſuggeſting, that ſince the judgment *A.* and *B. had entered in the cuſtomary manner.* And on demurrer, judgment was given *that they have execution*; and on this award of execution a *writ of error* was brought in this court, where the objection was, that a *ſcire facias* lay not on a judgment in *ejectment*; for at *common law* it lays only in *real actions*; and the ſtatute gives it only in *perſonal.* 2 *Inſt.* 469.

Holt, Chief Juſtice. 1ſt, At *common law* there was a *ſcire facias* on a judgment in real and mixed actions.

It lay on a judgment in *aſſize*, for the land was bound by the recovery, which was a good title, and there was no other way to execute the judgment on a change of parties, as there was in caſe of judgment for *debt* and *damages*, where an action of *debt* lay on the judgment.

2dly, The *ſcire facias* may either be general againſt all tertenants, or againſt the tertenants, naming them.

3dly, That ſtrangers may falſify, but thoſe that claim under the judgment are *eſtopped*, and bound by the judgment. *Vide Salk. vol.* 2. *p.* 600. *Raym. vol.* 1. *p.* 699.

Hilary, 1 *Ann.* *Auſtin* v. *Criſby.*

Executors brought a *ſcire facias*, *teſted* the 22d of *October*, returnable the 14th of *November*, and a *ſecond ſcire facias*, of the ſame *teſte*, returnable the 23d of *November*; ſo, by rule of court, the defendant had *four days* from the return of the *ſecond ſcire facias* to plead, which indeed was all that remained of the term: they did not plead; the plaintiff takes out a *fieri facias* returnable the ſame laſt day, to warrant a *teſtatum*.

Per curiam. It was well; for though the defendant has *four days* after the return of the *ſecond ſcire facias* to plead, yet that is a favour to him; when he does not plead, the judgment is of the day of the return of the *ſecond ſcire facias*, and he may very well take out a *fieri facias* afterwards, to warrant the *teſtatum*. *Vide Mod. Rep. vol.* 7. *p.* 138.

Eaſter, 1 *Ann.* *The Queen* v. *Ford and others.*

The defendants were convicted of *deer-ſtealing*, under *ſtat.* 5 *Geo.* 1. *cap.* 15. and the convictions being removed into this court by *certiorari*, were confirmed. After confirmation, and before execution awarded, the perſon who was, as well the informer as the owner of the deer, died, and his wife, as adminiſtratrix, ſuggeſted his death on the roll, on which ſhe ſued out a *levari facias* on the ſaid convictions, confirmed as aforeſaid, to levy the penalties, which were levied and diſtributed as the ſtatute directs.

On a motion that execution might be ſet aſide for irregularity, the following exceptions were taken:

1ſt, Becauſe a *levari facias* does not lie.

2dly, Becauſe the execution ought not to have been ſued out by the adminiſtratrix without a *ſcire facias*, &c.

The court held, that a *levari facias* would lie, but held that this execution was irregular; becauſe in no caſe, where the parties to the judgment are changed, ought execution to be ſued by any other without a *ſcire facias*. Whereon the court granted reſtitution of the money levied. *Vide Raym. vol.* 2. *p.* 768.

Eaſter, 1 *Ann.* *The Queen* v. *Ewer.*

See this caſe fully ſtated in page 254 of this work, under the head *Certiorari*.

Eaſter, 1 *Ann.* *Atwood* v. *Burr.*

See this caſe fully ſtated in page 370 of this work, under the head *Diſcontinuance*, &c.

Trinity, 1 *Ann.* *Anonymous.*

Holt, Chief Juſtice. In a *ſcire facias* againſt bail the *ſecond* muſt be *teſted* on the return of the *firſt*, and both cannot be taken away at a time; there ought to be *fifteen days* incluſive between the *teſte* of the *firſt* and return of the *ſecond*. *Vide Mod. Rep. vol.* 7. *p.* 40.

Trinity, 1 *Ann.* *Pentrye* v. *Treppott.*

To a *ſcire facias* on a recognizance of bail, the defendant demurred ſpecially, and ſhewed for cauſe, that neither the term nor the year, when the judgment was given againſt the principal, was ſhewn in the declaration; but judgment was given for the plaintiff, becauſe it is the courſe of this court not to ſhew them: but the practice is the reverſe in *C. B. Vide Raym. vol.* 2. *page* 789.

Michaelmas, 1 *Ann.* *Withers* v. *Harris.*

See this caſe fully ſtated in page 392 of this work, under the head *Ejectment*.

Michaelmas, 1 *Ann.* *Anonymous.*

Holt, Chief Juſtice. There cannot be two *ſcire facias's* taken out together, but the *firſt* muſt at leaſt be *ſeven* or *eight days* out before the return of it, and then the *ſecond* to be purchaſed. *Vide Mod. Rep. vol.* 7. *p.* 96.

Michaelmas, 1 *Ann.* *Anonymous*

On a *ſcire facias* againſt bail, who had rendered their principal before a judge, but he immediately eſcaped, and they moved to file the bail-piece, in order to plead a render of the principal.

Per curiam. We cannot refuſe leave to file the bail-piece, for without it they may plead *nul tiel record* to the *ſcire facias*; for one cannot proceed on the *ſcire facias* without a bail-piece be filed. *Vide Mod. Rep. vol.* 7. *p.* 51.

Michaelmas, 1 *Ann.* *Read* v. *Tregeagle.*

See this caſe fully ſtated in page 589 of this work, under the head *Judgment and Execution*.

Michaelmas, 1 *Ann.* *Snow* v. *The Bail of Firebraſs.*

On a *ſcire facias* againſt the bail; the breach aſſigned in the writ was, that the principal had not rendered himſelf *to the priſon of the Marſhal of the Marſhalſea of our Lord the King*, omitting the words which uſually follow, *viz. before the King himſelf*; and for this omiſſion it was inſiſted, that the writ was not good, for the King has *another Marſhal*, and that is the Marſhal of the houſehold.

Holt, Chief Juſtice, and Powel, Juſtice. The *Earl Marſhal of England*, by his office, is Marſhal of the *King's Bench*, as appears by the book of *H.* 6. and ſo it continued till the reign of King *James* the Firſt, when the office of *The Marſhal of the Marſhalſea*, was derived out of it; ſo that the Marſhal of the King is the Marſhal of the *King's Bench*, and no other perſon can be underſtood by it; the other is *Marſhal of the Houſehold*, and never mentioned without that addition. *Vide Salk. vol.* 3. *p.* 320. *Raym. vol.* 2. *p.* 804.

Michaelmas, 1 *Ann.* *Anonymous.*

After a judgment in *ejectment*, where there are more plaintiffs or defendants than *one*, after the *death* of *one* of them, execution may be taken out by the ſurvivors, without a *ſcire facias*, on making a ſuggeſtion on the roll, that *one* of them is dead; but it may be a queſtion, where there is but *one* defendant, whether execution can be taken after his death, without a *ſcire facias*. *Vide Salk. vol.* 3. *p.* 319.

Michaelmas, 2 *Ann.* *Shuttle* v. *Wood.*

On a recognizance taken in this court the *ſcire facias* muſt be brought in *Middleſex*; for the recognizances there are not obligatory by the caption, but by their being entered on record in the court; ſo it is of *debt*: but on a recognizance in *C. B.* the *ſcire facias* may be laid in the county where the caption was, or in *Middleſex* where it is filed; for it is a record by the caption, and becomes immediately obligatory, and therefore may be brought there; and it is alſo filed at *Weſtminſter* in the *C. B.* and there remains on record. *Al.* 12. 1 *Cro.* 312. *Hob.* 195. *Vide Salk. vol.* 2. *p.* 600.

Michaelmas, 2 *Ann.* *Jevon* v. *Turner.*

Per curiam. Two *ſcire facias* were taken out with the ſame *teſte*, but different returns; the one returnable in *fifteen days* of *Saint Hilary*, and the other on the *Morrow of the Purification*. Though they were different returns, and at convenient diſtance, yet, becauſe they were actually taken out at one time, it was judged wrong; for thus the party would loſe the benefit of the two *ſcire facias's*, which the law gives him.

A *ſcire facias* to revive a judgment againſt an executor, mentioned firſt a day of appearance *before us wherefoever*, &c. but after a day given to the party to appear *on the day aforeſaid at Weſtminſter*, it was now moved to amend it; but the court ſaid, that it being in the writ, they could not do it of grace or favour, but would give a day to ſhew cauſe why it ſhould not be amended *on the juſtice of the merits*; and the plaintiff, for his expedition, moved to quaſh it. *Vide Mod. Rep. vol.* 6. *p.* 86.

Hilary or Trinity, 3 *Ann.* *Fanſhaw* v. *Morriſon.*

See this caſe fully ſtated in pages 306 and 333 of this work, under the heads *Coſts and Damages.*

Michaelmas, 3 *Ann.* *Buckſome* v. *Hoſkins.*

See this caſe fully ſtated in page 63 of this work, under the head *Amendment.*

Michaelmas, 3 *Ann.* *Trevivan or Treviban*, v. *Lawrence and others.*

See this caſe fully ſtated in page 476 of this work, under the head *Executors and Adminiſtrators.*

Michaelmas, 3 *Ann.* *Adams* v. *The Tertenants of Savage.*

An adminiſtrator brought a *ſcire facias* on a judgment recovered by his inteſtate againſt *H.* and the writ was general, againſt ſuch as were tenants of the land of *H.* at the time of the judgment. The ſheriff returned ſeveral tertenants warned; among the reſt one *A.* ſeiſed of a meſſuage and of a manor called *D.* The tenants appeared, and all joined in this plea, *viz.* That *J. S.* is ſeiſed of the freehold of the manor of *D.* *and pray judgment of the writ, and that the ſame may be quaſhed.*

Per curiam. The plea was held ill; and reſolved,

1ſt, That the tertenants cannot join in this plea, becauſe they are ſeverally returned, one for one part, and another for another.

2dly, This is pleading a *non-tenure* by implication as to the manor of *D.* Now in a *ſcire facias* on a judgment in *debt*, or any perſonal action, the defendant cannot plead *non-tenure* generally, becauſe it is contrary to the return of the ſheriff, but he may plead a a ſpecial *non-tenure* in ſuch caſe; and ſo the law is now, after long and great difficulty, ſettled. 3 *Cro.* 872. 8 *E.* 4, 19, 9 *H.* 5, 11. But in a *ſcire facias* for execution in a real action, the defendant may plead a general *non-tenure*; becauſe their freehold, which is much favoured in law, is in queſtion.

3dly, The tertenants in this caſe may plead, that there are other tertenants not named in the ſame county, and pray judgment if they ought to anſwer, *until* the others be ſummoned, but ought not to pray, *that the writ be quaſhed*; for the court ought never to abate the writ, but where the plaintiff can have a better writ; otherwiſe if the writ had been particular in naming the tenants. And they ſeemed to doubt whether the tertenants could plead other tertenants not warned in another county; and the Chief Juſtice cited *Owen*, 104. that a tenant for years may be a good tenant to plead in bar to a *ſcire facias* to a perſonal action where damages are recovered, but not in a real action. *Co. Ent.* 702, 624. 2 *Cro.* 506. *Cro. El.* 740. 2 *Saund.* 8. *Palm.* 241. 2 *Ro. Rep.* 53. *Vide Salk. vol.* 2. *p.* 601. *Ibid. vol.* 3. *p.* 321. *Raym. vol.* 2. *p.* 854.

Trinity, 4 *Ann.* *Ball* v. *The Bail of Ruſſel.*

See this caſe fully ſtated in page 165 of this work, under the head *Bail.*

Hilary, 5 *Ann.* *Colebeck* v. *Peck.*

The plaintiff ſued out a *ſcire facias* againſt the defendant, as executor to *J. S.* on a judgment obtained by him againſt the teſtator, the defendant pleaded in *abatement* that the teſtator died before judgment, *&c.* The plaintiff replied, and ſet out *ſtat.* 17 *Car.* 2. *c.* 8. and that the teſtator died after a verdict obtained againſt him, and after the day of *niſi prius*, and before the day in bank. The defendant demurred, and his council inſiſted, that the plaintiff ought to have ſued out a ſpecial *ſcire facias*, and not a general one; for now the writ ſuppoſes a judgment againſt the teſtator in his life-time, and the replication ſhews it was entered after his death, though well entered by virtue of the ſtatute.

Per curiam. The writ is good, and could not be otherwiſe; for had it been ſpecial, there would have been a variance, the judgment being entered general; and a *reſpondeat ulterius* was awarded. *Vide Raym. vol.* 2. *p.* 1280.

Eaſter, 5 *Ann.* *Anonymous.*

Adjudged, That in the caſe of the King, there need not be a *ſci. fac.* after a year. *Vide Salk. vol.* 2. *p.* 603.

Trinity, 6 *Ann.* *Prime* v. *Maſon.*

A *ſcire facias* was ſued out, returnable on *Monday in three weeks after the Holy Trinity*, to which there was a demurrer.

Per curiam. It is a void writ; for there is no ſuch day, it being on a *Sunday*, and ſo is not a miſcontinuance to be helped by the ſtatute of *jeofails*: and it being a void writ, the court *officially* ought to take notice of it, being pleaded in *bar*, and ought to quaſh it, and ſo there is no writ in being. *Vide Mod. Rep. v.* 11. *p.* 120.

Michaelmas, 11 *Ann.* *Alice* v. *Gale.*

See this caſe fully ſtated in page 728 of this work, under the head *Pleas, Pleadings*, &c.

Michaelmas, 1 *Geo.* *Weddal* v. *The Bail of Jocar.*

See this caſe fully ſtated in page 182 of this work, under the head *Bail in Error.*

Michaelmas, 1 *Geo.* *Shuttleworth* v. *Paterſon.*

See this caſe fully ſtated in page 569 of this work, under the head *Inquiry, Inquiſition.*

Hilary, 3 *Geo.* *The King* v. *Eyre.*

A *ſcire facias* was brought to repeal the grant of a market to the defendant, ſuggeſting that it was to the prejudice of the Duke of *Rutland*, who had a market within *four* miles.

On trial, it was found *for the King*; on the iſſue, whether the grant was to the prejudice of the Duke; and on a motion in arreſt of judgment, it was held to be a good iſſue, though the *grant*, and not the *uſer*, was found to be prejudicial.

Then it was objected, that the *ſcire facias* was brought in the late Queen's time, and by her demiſe the proceedings abated, this not being within *ſtat.* 1 *Ed.* 6. *c.* 7. or 1 *Ann. c.* 8. to which it was anſwered, and reſolved by the court, that this is an original writ, and therefore within the general words. *Regiſt.* 69. *Vide Stra. vol.* 1. *p.* 43.

Trinity, 4 *Geo.* *Mulſo* v. *Shere.*

A *ſcire facias* was brought by *Mulſo* againſt *Shere*, who was plaintiff in *replevin*, and *three* others, who were pledges in the ſuit brought by *Shere* on a diſtreſs for rent made by *Mulſo*.

It was objected, 1ſt, That a *ſcire facias* would not lie againſt a plaintiff in *replevin*, as here, the county court not being a court of *record*; but it would lie on a writ, becauſe it is a *record*.

2dly, That *Shere*, who was the principal, cannot be a pledge for himſelf.

3dly, That the pledges ought to have been ſued till the principal was found guilty, though here was an *elongata* returned.

4thly, That the *writ of inquiry* is of *all and every* the goods, and does not ſay what particularly.

5thly, That there was a *diſcontinuance* in a former ſuit.

Per curiam. The plaintiff muſt have judgment. There is no diſtinction between a *ſcire facias*, writ, or plaint; one may be bail with others for himſelf; the principal appears to be guilty of *elongation*; the writ of inquiry is reducible to a certainty, and diſcontinuance is nothing in this ſuit, unleſs it had been void, or a nullity; and the caſe of *Dorrington* v. *Edwin*, 3 *Mod.* 56. is in point. *Vide Forteſcue, p.* 330.

Eaſter, 8 *Geo.* *Crowther* v. *Wheat.*

A *ſcire facias* was brought againſt the bail, and their attorney demanded *oyer* of the writ, and ſaw many raſures and interlineations in it, and for that reaſon did not make any defence; but now moved the court, that all proceedings thereon might be quaſhed.

The court were of opinion, that this was no ground to quaſh the proceedings; for if any alteration was made in a thing immaterial *after the ſealing of the writ*, there is no harm done; and if in any thing material *before the writ was ſealed*, yet that will not vitiate it: ſo the court refuſed to quaſh it, or any proceedings thereon; but ſaid, if the motion had been made againſt the clerk who had made the eraſement, and it appeared to be done after the writ was ſealed, it is a miſdemeanor, and puniſhable. *Vide Mod. Rep. vol.* 8. *p.* 243.

Hilary, 9 *Geo.* *Atwood* v. *Beach.*

See this caſe fully ſtated in page 7 of this work, under the head *Abatement*.

Eaſter, 9 *Geo.* *Anonymous.*

See this caſe fully ſtated in page 308 of this work, under the head *Coſts*.

Hilary, 10 *Geo.* *Anonymous.*

See this caſe fully ſtated in page 592 of this work, under the head *Judgment and Execution*.

Hilary, 10 *Geo.* *Andrews* v. *Harper.*

In the *C. B.* there is but *one ſcire facias* againſt the bail, and on a *nihil* returned there is execution; but in this court the courſe is to have *two ſcire facias's* againſt the bail, *viz.* a *ſcire facias* and an *alias ſcire facias*; but both muſt not be ſued out together, as formerly; for the *firſt* muſt be duly returned before the *alias ſcire facias* is ſued out, which muſt bear *teſte* on the day of the return of the *firſt*, and there muſt be *fifteen days* incluſive between the *teſte* of the *firſt* and the return of the *alias*: now in the principal caſe the court was moved to ſet aſide a judgment obtained againſt the bail on *two ſcire facias's* brought againſt them, becauſe it did not appear that the judgment was had on the return of *two nihils*; and it was referred to the maſter to examine this matter. *Vide Mod. Rep. vol.* 8. *p.* 227.

Trinity, 10 *Geo.* *Addiſon* v. *Paterſon.*

See this caſe fully ſtated in page 7 of this work, under the head *Abatement*.

Michaelmas, 10 *Geo.* *Clark* v. *Corniſh*, *or Corniſh* v. *Clark and others.*

See this caſe fully ſtated in page 169 of this work, under the head *Bail*.

Eaſter, 11 *Geo.* *Stead* v. *Lateward.*

See this caſe fully ſtate in page 570 of this work, under the head *Inquiry, Inquiſition*.

Michaelmas, 11 *Geo.* *Bond* v. *Turner.*

See this caſe fully ſtated in page 170 of this work, under the head *Bail*.

Eaſter, 12 *Geo.* *Eden* v. *Wills.* Error.

The court was moved to quaſh a *ſcire facias quare executio non, &c.* ſued out by the defendant in *error*, to make the plaintiff aſſign his *errors*, becauſe the original ſuit in the *C. B.* was by bill of privilege; it was urged, that the *ſcire facias* ought to be returnable at a day certain, but this was made returnable on a common return. And of that opinion was the court, becauſe a *ſcire facias* ought to be made returnable according to the nature of the original ſuit below in the *C. B.* and in *Trinity* 11 *Ann*, in the caſe of *Vavaſor* v. *Parker*, it was ſo adjudged in this court. On which they quaſhed the writ of error. *Vide Raym. vol.* 2. *p.* 1417.

Trinity, 2 *Geo.* 2. *Jacob Lopez Henriques and others*, v. *The General Privileged Dutch Company trading to the Weſt Indies.*

See this caſe fully ſtated in page 421 of this work, under the head *Error*.

Trinity, 2 *Geo.* 2. *Wharton* v. *Richardſon, Widow.*

A *ſcire facias* was brought againſt the defendant as adminiſtratrix of her huſband, on a judgment againſt him for 1500 *l.* and after *two nihils* returned a *ſcire fieri inquiry* was taken out, and the defendant attended the execution of it, in order to lay the ſtate of the aſſets before the jury; but the plaintiff inſiſting that the award of execution on the former writs was in point of law an evidence of aſſets, a *devaſtavit* was found to 1117 *l.* 11 *s.* 1 *d.* in *Hilary* 8 *Geo.* 2. She appeared to the *ſcire fieri inquiry*, and pleaded that ſhe had *fully adminiſtered*, and traverſed the *devaſtavit*. And notice of trial being given and countermanded, and nothing further done in it, ſhe in *Michaelmas* 10 *Geo.* 2. moved to have the award of execution ſet aſide, and to be admitted to plead, it being to no purpoſe to expect relief on the trial of the traverſe; and cited *Salk.* 93. 264. to ſhew that where there has been no *ſciri feci*, and only *two nihils*, the court will relieve on motion, and not put the party to an *audita querela*, and the ſtate of the real aſſets was proved to be 130 *l.* which ſhe offered to deliver up, and to be examined on interrogatories, if the plaintiff was diſſatisfied with the account.

The court was greatly inclined to relieve her; but on conſideration of her long acquieſcence, and the ſeveral ſteps taken ſubſequent to the award of execution, they thought ſhe came too late, and for that reaſon only refuſed to interpoſe. *Vide Stra. vol.* 2. *p.* 1075.

Michaelmas, 32 *Geo.* 2. *Mitchell* v. *Cue and Wife.*

See this caſe fully ſtated in page 596 of this work, under the head *Judgment and Execution*.

Trinity, 1 *Geo.* 3. *Campbell, Eſq.* v. *Cumming and another.*

A *ſcire facias* being brought againſt bail, the defendants pleaded thereto, “ that the principal died before “ the return of the *capias ad ſatisfaciendum*.” The return of the *ca. ſa.* being thereon ſet forth in the replication, it appeared to be returnable “ on *Thurſday* “ *next after eight days from the day of the purification*

" *of the Virgin Mary.*" The defendant demurred generally to the replication.

The defendant's council inſiſted that the proceedings were irregular: for the word *from* is excluſive; and conſequently the writ is not returnable till in *vacation* time: and as this was a proceeding by bill, the *ſcire facias* muſt bear *teſte* on the day of the return of the *ca. ſa.* which therefore will be in *vacation* time too. He ſaid the writ ought to have been made returnable " on " *Thurſday next after the octave*, &c. and cited the caſe of *Girdler* v. *White*, in this court, in ſupport of his argument.

The plaintiff's council inſiſted, that the writ was *right* and *regular*, in ſtrict computation: and were it otherwiſe, yet, as this was an *execution* and not *meſne proceſs*, the writ of *ca. ſa.* would not be void, but only liable to be ſet aſide on motion, for irregularity; and cited the caſe of *Shirley* v. *Wright*, 1 *Salk.* 273. where it was holden, " that the ſheriff who had let his pri-" ſoner eſcape, ſhould not take advantage of a want " of a *ſcire facias* to ground the *ca. ſa.* on, which had iſſued *after a year and a day*.

The court were clearly of opinion with the plaintiff's council, and accordingly gave judgment for the plaintiff. *Vide Bur. vol.* 2. *p.* 1187.

Trinity, 5 *Geo.* 3. *Millar* v. *Yerraway*. Error.

On ſhewing cauſe on behalf of the defendant in *error* againſt a rule which had been obtained by the plaintiff in *error* for the defendant in *error* to ſhew cauſe " why the writ of *ſcire facias*, on which the de-" fendant in the *original action*, being the preſent plain-" tiff in *error*, had been ſummoned, ſhould not be ſet " aſide for *irregularity*."

The court made this diſtinction between the writs of *ſci. fac.* in *error*, and writs of *ſci. fac.* againſt bail. It is not neceſſary in the former caſe, " that the *ſci. fac.* " ſhould lie in the office before the return," though it is neceſſary in the latter. And the rules that have been made for the *ſcire facias* lying *four days* in the office, relate only to writs of *ſcire facias* againſt bail. Therefore the court diſcharged the rule. *Vide Bur. vol.* 3. *p.* 1723.

Michaelmas, 6 *Geo.* 3. *Knox Eſq.* v. *Coſtollo*.

See this caſe fully ſtated in page 426 of this work, under the head *Error*.

Settlement of Poor.

The Queen v. *The Inhabitants of Pannington.*

On *ſtat.* 12 *Ann*, for removing *vagabond*, a perſon found wandering, though no *vagabond*, may be ſent to the place of his laſt *ſettlement*, but it muſt be by *two* juſtices, and this being by *one* juſtice only, was for that reaſon quaſhed. *Vide Forteſcue, p.* 323.

The Caſe of the Inhabitants of St. Lawrence in Reading.

A perſon was elected into the office of *warden* for the borough of *Reading*, but exerciſed it in the pariſh.

Per curiam. It is a *good ſettlement*; for though it be not a pariſh office, yet, if it is a public annual office, as in this caſe, which is in the nature of a tithing-man, it gains a *ſettlement*; but in the caſe of a tax, it muſt be a particular tax. The office of a conſtable (though he be choſen by the *leet*) exerciſed in a pariſh, is a *ſettlement*; but if he be a deputy only, it is no *ſettlement*. A rate to the ſurveyor, where it is extended to the ward, is not good to make a *ſettlement*. *Vide Forteſcue, p.* 310.

The Caſe of the Inhabitants of Rudgwick, Chiddingfold, and Dunsfold.

This was an hiring for one half year, and after that a hiring for another half year.

Per curiam. It is no legal hiring within the ſtatute. If this be allowed, where are we to ſtop? they may hire day-labourers. It is not like the caſe of renting 5 *l.* a year, and 5 *l.* a year, that is, 10 *l. per annum*, which is good, for he is tenant to 10 *l.* a year; but hiring for half a year, and then hiring for another half year, are *two* ſeveral contracts, ſo not good; ſervice for a year muſt be on the ſame contract, and one ſervice for a year; but if there ſhould be a hiring for a year, except a *day* or *two*, it would be deemed fraudulent. *Vide Forteſcue, p.* 310.

The Queen v. *The Inhabitants of Harrow and Edgware.*

A perſon who had ſerved as a covenant ſervant in *H.* and afterwards was admitted to a copyhold on the waſte of 25 *l. per annum* for his life, in the pariſh of *E.*

Adjudged, That he was ſettled at *E.* and his children with him there, though ſome were born before admiſſion. If a man had never ſo ſmall a freehold, he cannot be removed; it is the ſame with a copyhold, if for life, and if he cannot be removed, he is ſettled; theſe are *ſynonymous* terms. *Vide Forteſcue, p.* 310.

The Inhabitants of Antony v. *The Inhabitants of Cardenham in Cornwall.*

A widower had a daughter, who was married into another pariſh, and there ſettled, he hired himſelf into a pariſh.

Per curiam. It is a *good ſettlement*, for it is within the meaning, though not the letter, of the ſtatute; if any unmarried perſon, not having a child, and he has none to the purpoſe intended by the ſtatute, *i. e.* that can be chargeable. *Vide Forteſcue, p.* 309.

Saliſbury Lent Aſſizes 1712. *The Caſe of the Inhabitants of Wiſport and Bretford, Wilts.*

A perſon *five days* after *Michaelmas* 1709, who was hired to *B.* from the ſaid *five days after Michaelmas*, to *Michaelmas* 1710, and then departed from his maſter's ſervice, and was paid his wages to that time; and on the next day after his departure he returned, and covenanted with the ſame maſter, to ſerve him there for another year; but a month or *five* weeks before the end of the laſt year, the ſervant departed from that ſervice, and entered on another, and the maſter deducted out of the laſt year's wages 8 *s.* for the month or *five* weeks that was wanting of the year.

This was held by *Powis*, J. who was judge of *aſſize*, to be no *ſettlement*, becauſe there was no hiring for an intire year, nor ſervice for a year in purſuance of the hiring. *Vide Forteſcue, p.* 311.

The Caſe of the Inhabitants of New Elm, Oxford.

Renting a windmill of 10 *l. per annum*, was held by the court to be renting a tenement, and was a *good ſettlement*. *Vide Forteſcue, p.* 309.

Hilary, 4 *Ann.* *The Caſe of the Inhabitants of Cowell and Sillingford.*

Holt, Chief Juſtice. The birth of a legitimate child does not make a *ſettlement*, but the place of the laſt legal *ſettlement* of the father; a child born or dropped in a place where a perſon is a vagrant, gains no *ſettlement* there, but where the father was laſt legally *ſettled*. *Vide Forteſcue, p.* 313.

Michaelmas, 9 *Ann.* *The Pariſh of St. Mary of Reading* v. *The Pariſh of St. Lawrence of Reading*.

One *Joſeph Marlow* was firſt an inhabitant of *St. Mary* in *Reading*, afterwards came into the pariſh of *St. Lawrence* of *Reading*, and during his ſtay there was choſen warden for the borough; after which he removed to *St. Mary's*, and there became chargeable.

The queſtion was, whether his reſiding in the pariſh of *St. Lawrence*, and exerciſing the office of warden in that pariſh (though he did it in others too) was a *ſettlement*, by *ſtat.* 3 & 4 *W.* or no?

The next term the whole court adjudged it a *ſettlement*. *Vide Mod. Rep. vol.* 8. *p.* 15.

Hilary, 10 *Ann. The Queen* v. *Doughton.*

The caſe was this; a man ſettled in a pariſh removes into an *extra parochial* place, where he gains a *ſettlement*, then removes into another pariſh, and there becomes chargeable.

The queſtion was, what this laſt pariſh can do with him? Whether, by virtue of that act of parliament, that enables them to ſend ſuch a one to the laſt pariſh where he was legally ſettled, they may ſend him to the pariſh he lived in before ſuch time as he removed to the *extra parochial* place? for to ſend him to the *extra parochial* place they cannot, for want of officers to receive him.

Powell, Juſtice, took this to be a *caſe omitted* out of the ſtatute, and ſaid it was a matter that ought to be moved in parliament; theſe *extra-parochial* places being many in number, and of great extent. *Vide Mod. Rep. vol.* 10. *p.* 81.

Eaſter, 1 *Geo. The Caſe of the Inhabitants of the Pariſh of Pepper-Harrow and Frencham.*

A perſon was hired on the 3d of *October*, and from that time to *Michaelmas* next, and ſerved out the whole year, and was paid accordingly; at *firſt* the court ſeemed to think it was an apparent fraud, but afterwards held it to be no good hiring.

Parker, Chief Juſtice. Where ſhall we ſtop, if not where the act directs? He may be hired ſo, and we are not to preſume a fraud; the juſtices might have found it ſo; and he quoted a caſe where a perſon was hired *ten days* after *Michaelmas*, and held not well. *Vide Forteſcue, p.* 322.

Eaſter, 3 *Geo. The King* v. *The Inhabitants of St. Olave's, Jury.*

A. was bound to a cobler who kept a ſtall in one pariſh, lay in another, and the boy in a third, and the ſeſſions adjudged the *ſettlement* where the ſtall was, becauſe the ſervice was there.

Per curiam. The boy has gained no *ſettlement* in either of the *three pariſhes*, for the ſtall is not ſufficient to give him one, the maſter laying in another pariſh. Wherefore the judgment was quaſhed. *Vide Stra. vol.* 1. *p.* 51.

Michaelmas, 3 *Geo. The Pariſh of the Holy Trinity* v. *The Pariſh of Shoreditch.*

Parker, Chief Juſtice, delivered the reſolution of the court as follows:

This is an order for the removal of one *F.* from the pariſh of *The Holy Trinity* to *Shoreditch*, by which it appears that *F.* was bound an apprentice to one *T.* with an intent to ſerve *G.* which he did for *three years*, and it has been inſiſted, that he being bound to *T.* who lives in *Trinity* pariſh, his ſettlement is there, and not in *Shoreditch*, where the ſervice was.

But we are of opinion the juſtices have done right in ſending him to *Shoreditch*, where the ſervice actually was: it is the ſame thing as if *T.* had turned him over to *G.* in which caſe there would have been no queſtion but he had gained a *ſettlement* in *G.*'s pariſh. If the maſter removes out of one pariſh into another, the apprentice gains a *ſettlement* if he lives there *forty days*. The turning over an apprentice is like the aſſigning of any deed, in this caſe *T.* was only a truſtee. There is a great deal of difference between apprentices and other ſervants; for apprentices are not preſumed to become chargeable, becauſe the trade and myſtery they learn is their eſtate. Therefore the order muſt be confirmed. *Vide Stra. vol.* 1. *p.* 10.

Hilary, 5 *Geo. The Pariſh of Coombe* v. *The Pariſh of Weſtwoodhay.*

In 1715, *Michaelmas*-day happening to be on a *Thurſday*, a man was hired on the *Saturday* following to ſerve from *the ſaid* Thurſday *after* Michaelmas *day to* Michaelmas-day *following*. All this was ſtated for the opinion of the court. And the firſt queſtion was, whether there was a complete hiring for a year? for if the word *ſaid* be rejected, then there wants a week; but if you keep it in, and refer it to *Michaelmas*-day, then, by rejecting the words *after* Michaelmas-*day*, it will ſtand as a hiring from one *Michaelmas* to another.

Eyre, Juſtice, thought it might well be ſo; *but the reſt of the judges were againſt it*; for it would be to make it *nonſenſe* in contracting to ſerve for a time paſt; whereas, if the word *ſaid* be rejected, the reſt is natural enough. The other queſtion was, whether (admiting the hiring to be complete) there was any ſervice for a year, in purſuance of it, as the ſtatute requires, the contract being made on the *Saturday*? And *Eyre*, Juſtice, ſaid, it might be intended he was then *two days* on trial, and ſo the ſervice would be ſufficient. But the reſt held, that ſuch a ſervice would ſignify nothing, for it is not in purſuance of any hiring; there muſt firſt be a hiring, and then a ſervice, and not *vice verſa*, a ſervice, and then a hiring. *Vide Stra. vol.* 1. *p.* 143.

Hilary, 7 *Geo. Between the Inhabitants of Biſhop and Cookham.*

A perſon was collector of the taxes for *births* and *burials*, which extended to ſeveral other pariſhes.

It was held, that he was ſettled in the pariſh where he lived, and within the words of *ſtat.* 3 & 4 *W.* & *M.* who ſhall on his own account execute any public annual office or charge in the pariſh during a year. *Vide Forteſcue, p.* 304. *Stra. vol.* 1. *p.* 411.

Trinity, 7 *Geo. Between the Pariſhes of Eaſtwoodhay in the County of Hants and Weſtwoodhay in Berks.*

On an appeal from an order of *two* juſtices for the removal of *B. B. E.* his wife, and *T.* their ſon, under *ſeven years* of age, from the pariſh of *W.* to the pariſh of *E.* the matter was ſtated ſpecially for the opinion of the court.

That *forty years* ſince the father of this *B. B.* was ſeiſed in fee of a freehold eſtate in the pariſh of *Hampſtead Marſhall* in the county of *Berks*, where he lived till the year 1697, and that this ſon was at that time *eight years* old; that in 1697 the father and all his family removed to *Chevely*, where he rented a tenement of 20 *l. per annum* for *two years*; that in 1699 he purchaſed a copyhold eſtate of 11 *l. per annum* in the pariſh of *Weſtwoodhay*, whither he removed with his ſon and ſervants, and ſerved churchwarden and other pariſh offices, and paid taxes till 1716, when he purchaſed a cottage of 1 *l.* 12 *s.* 6 *d. per annum* in *Eaſtwoodhay*, and went and lived on it till his death; but that *Robert* the ſon ſtaid behind in *Weſtwoodhay*, where he married a wife, and worked there ever ſince on his own account, and that he was *thirty years* of age. The ſeſſions confirmed the order of the *two* juſtices for his *ſettlement* at *Eaſtwoodhay*.

The court was moved to quaſh the order of ſeſſions, for that the *ſettlement* of *Robert* the ſon was either at *Hampſtead Marſhall* or at *Weſtwoodhay*.

Pratt, Chief Juſtice. The queſtion is not where this man and his family are ſettled, but whether there appears any *ſettlement* of him in *Eaſtwoodhay*. If he had gone there with his father as part of the family, poſſibly it might have been a *ſettlement* of him there, but by ſtaying behind he was divided from his father, and therefore there is no colour to make it a *ſettlement* in *Eaſtwoodhay*. I think his *ſettlement* is in *Weſtwoodhay*, which was the laſt place where he lived as part of his father's family. To which the court agreed, and the order was quaſhed. *Vide Stra. vol.* 1. *p.* 438.

Trinity,

Trinity, 8 *Geo.* *The King* v. *The Inhabitants of St. Peter, in the City of Oxford.*

One *M. N.* having intruded herſelf into the pariſh of *St. Peter*, was, by an order of two juſtices, removed to *Fawley-court*, as the place of her laſt legal *ſettlement*. On an appeal to the ſeſſions, they ſtate the fact ſpecially, that ſhewas hired for a year into *Chriſt-Church*-college in *Oxon*, being an *extra-parochial* place, where ſhe ſerved part of the time; that during the year her miſtreſs went on a viſit to *Fawley-court*, where ſhe ſtaid *three months*, and took her ſervant with her, and afterwards they returned to *Chriſt-Church*; and, on the whole, the ſeſſions diſcharged the order for ſending her to *Fawley-court*.

And now, on debate, it was adjudged a *ſettlement* in *Fawley-court*; and conſequently the laſt order was quaſhed, and the order of *two* juſtices ſet up again. *Vide Stra. vol.* 1. *p.* 524. *Mod. Rep. vol.* 8. *p.* 50.

Trinity, 8 *Geo.* *The Pariſh of Eaſtland* v. *The Pariſh of Weſthorſley.*

The fact was ſtated ſpecially on an order of ſeſſions, that a ſervant was hired for a year, and the day before the year expired the maſter told him, that to prevent his gaining a *ſettlement* in that pariſh, he ſhould go away immediately, which the ſervant refuſed to do, inſiſting to ſerve out the year; whereon the maſter turned him out of doors. And the court held this to be ſuch a fraud in the maſter, as ſhould not prevent the *ſettlement* of the ſervant. *Vide Stra. vol.* 1. *p.* 526.

Michaelmas, 8 *Geo.* *The Caſe of the Inhabitants of Warminſter and Leiceſter.*

A perſon, in King *James* the Second's time, was hired as a ſervant for a *year*, but ſerved *three quarters of a year* only; he was removed by *two* juſtices, ſuppoſing he ſhould give notice, it being before *ſtat.* 3 & 4 *W.* & *M.* which directs ſervice for a year.

Per curiam. It is a good *ſettlement*, though he did not ſerve out the year, and he need not give notice; for a ſervant and apprentice need not give notice, becauſe to no purpoſe; for if they did give notice, they could not be removed from their maſters. *Vide Forteſcue. p.* 326. *Stra. vol.* 1. *p.* 470.

Michaelmas, 8 *Geo.* *The Pariſh of Wookey* v. *The Pariſh of Hinton Blewet.*

A perſon ſettled at *Hinton Blewet* had an eſtate deſcended to him in *Wookey*, whereon the juſtices ſent him thither as to the place of his laſt *ſettlement*.

Per curiam. The order was quaſhed; for it was no *ſettlement*, nor inhabitation, though if he ſhould go thither, he could not be removed: it may be a great injury to ſend him away from a good trade in *Hinton Blewet* to perhaps half an acre of land, wherein he has but a term. *Vide Stra. vol.* 1. *p.* 476.

Trinity, 9 *Geo.* *The King* v. *The Inhabitants of Little Dean.*

It was ſtated, that a man took a leaſe for *ſeven years*, and objected it might only be by *parol*, and then it is void for the whole, and there can be no *ſettlement*.

Per curiam. Then it ſhould have been ſtated to be by *parol*. We muſt take it to be by *deed*, otherwiſe it is no leaſe at all. Therefore the order was confirmed. *Vide Stra. vol.* 1. *p.* 555.

Hilary, 9 *Geo.* *The Pariſh of Burkeſcome* v. *The Pariſh of Sampford Peverell.*

The ſeſſions on a ſpecial order adjudged that executing the office of *tithing-man* would not gain a *ſettlement*.

Per curiam. The order muſt be quaſhed, for this is an *annual office* in the pariſh, within the words and meaning of the ſtatute. *Vide Stra. vol.* 1. *p.* 544.

Michaelmas, 9 *Geo.* *The Pariſh of St. John's in the Town* v. *The Pariſh of Amwell, in the County of Hertford.*

By *ſtat.* 9 & 10 *W.* 3. *c.* 11 *It is provided*, that no certificate-man ſhall gain a *ſettlement* in the pariſh to which he comes with ſuch certificate, unleſs he takes a leaſe of 10 *l. per annum*, or ſhall execute ſome annual office *in ſuch pariſh*. In this caſe the certificate-man took a farm of 10 *l. per annum*, part of which was in *St. John's*, and part in *Amwell*; but the greateſt part, together with the houſe, being ſtated to lie in the pariſh that received the certificate, the court held it a *ſettlement* there. *Vide Stra. vol.* 1. *p.* 529.

Hilary, 10 *Geo.* *The King* v. *The Inhabitants of Cirenceſter.*

It was ſtated, that an apprentice was bound in the pariſh of *A.* and lived there off and on for *three quarters of a year*. It was objected, that this was no *ſettlement*; ſince he might not inhabit *forty days* together.

Per curiam. That is not neceſſary. So the order for making it a *ſettlement* was confirmed. *Vide Stra. vol.* 1. *p.* 579.

Eaſter, 10 *Geo.* *The Pariſhioners of Buckington* v. *The Pariſhioners of Shipton Bechamp.*

On a motion to quaſh an order of ſeſſions, the caſe was thus:

An order of *two* juſtices was made for removing *R. A.* from the pariſh of *Shipton Bechamp* to *Buckington*. On an appeal, the ſeſſions confirmed the order; but ſtated the caſe ſpecially,—That *R. A.* was born at *Shipton Bechamp*, but bound an apprentice at *twelve years* of age to *J. C.* at *Buckington*, where he lived *forty days*; but the maſter becoming a bankrupt, *R. A.* hired himſelf as a ſervant for a year to *J. G.* in *Buckington*, and ſerved accordingly; during which ſervice the apprenticeſhip expired, when *J. C.* delivered up the indentures to *J. G.*

And it was inſiſted, that a hiring *de facto* ſhould gain a *ſettlement*, for a man, as well as a marriage *de facto*, would gain a *dower* for a woman.

To which it was anſwered, that this hiring could not gain any *ſettlement*, becauſe the indenture of apprenticeſhip was ſtill ſubſiſting, and could not be diſcharged but by ſome other deed, or by the ſeſſions; ſo that this was not a *lawful hiring*; and if ſo, then a ſervice for *a year*, in purſuance of ſuch an illegal hiring, cannot gain a *ſettlement*. *Vide Mod. Rep. vol.* 8. *p.* 235.

Trinity, 10 *Geo.* *The King* v. *The Pariſhioners of Wilby.*

On a motion to quaſh an order of *ſettlement* made by *two* juſtices, and which was confirmed on an appeal to the ſeſſions, the caſe appeared to be thus, *viz.* One *H. C.* about *thirty years* laſt paſt, built a cottage in the pariſh of *B.* on the waſte of a manor belonging to the *Earl* of *Pembroke*, but without any licence or order ſo to do; and he enjoyed the ſame during his life, without any other right, and then died leaving iſſue *Elizabeth* his only daughter and heir, who intermarried with *J. D.* who, with his wife *Elizabeth*, being ſeiſed of this cottage, ſold it to *J. W.* for 30 *l.* and now the queſtion was, whether the marriage had gained a *ſettlement* of *J. D.* the huſband?

It was inſiſted that it had not, becauſe the father of *Elizabeth* the wife of this *D.* had no ſettlement there, for his entry was by *diſſeiſin*, which gains no *ſettlement*; and if the father had none, his daughter could not have any *ſettlement* there.

But the court were of another opinion, becauſe *thirty years* poſſeſſion is a good title againſt the Lord of the manor, by virtue of the *ſtatute of limitations*, if he ſhould bring an *ejectment* to recover the poſſeſſion.

Beſides, *Elizabeth* the wife of this *D.* and daughter and heir of *H. C.* was in poſſeſſion by deſcent, which is a good title againſt any *eſcheat* the Lord might have at *common law*; and therefore her huſband gained a *ſettlement* by this marriage. *Vide Mod. Rep. vol.* 8. *p.* 287.

Michaelmas, 10 *Geo. Wrotham Pariſh* v. *The Pariſh of Saint Olave.*

See this caſe fully ſtated in page 137 of this work, under the head *Attachment.*

Eaſter, 11 *Geo. The King* v. *The Inhabitants of St. Mary Maſfelton, alias White Chapel.*

A poor man was hired for *five years* to work at a glaſs houſe in the pariſh of *White Chapel*, from *ſix* in the morning till *eight* at night, and lodged every night in the pariſh of *White Chapel*, only not in his maſter's houſe; this man was removed by an order of *two* juſtices from *White Chapel* to *Ratcliffe*, and on an appeal to the ſeſſions the order was quaſhed, the court being of opinion that he was ſettled in *White Chapel. Vide Mod. Rep. vol.* 8. *p.* 370.

Michaelmas, 11 *Geo. The King* v. *The Hamlet of Spitalfields.*

The caſe on an order of removal, &c. was as follows: The huſband worked at a *ſilk-throwſter*'s in the hamlet of *Spitalfields* for *five years*, but never lay where he worked, but at a lodging elſewhere; the juſtices of the peace being of opinion, that the huſband had gained a *ſettlement* by this means, did, after his death, by an order, remove his widow thither; which order was confirmed on an appeal. But both orders were quaſhed, becauſe the court was of opinion, that the huſband's working there gained no *ſettlement*. And ſo it was reſolved in the caſe of a *cobler*, who worked in a ſtall in the pariſh of *St. Giles*'s, and had an apprentice who worked with him in that ſtall, and both lay in another pariſh; it was adjudged that the working in the ſtall did not gain a ſettlement, for that was in the pariſh where he lay; and that a man cannot be removed from his work, conſequently his working in a certain place ſhall not gain any *ſettlement* there. *Vide Mod. Rep. vol.* 8. *p.* 308.

Michaelmas, 11 *Geo. The King* v. *Edwards and others.*

See this caſe fully ſtated in page 450 of this work, under the head *Indictment.*

Hilary, 12 *Geo. The Pariſh of Kinver* v. *The Pariſh of Stone, in the County of Stafford.*

On a ſpecial order of ſeſſions it was ſtated, that a poor perſon rented a *coney-warren*, and a cottage on it, at 10 *l. per annum*, which the juſtices were of opinion did not gain a *ſettlement* within *ſtat. Car.* 2.

Per curiam. A mill has been held to be a tenement within that ſtatute, and why not this? It is his ability to pay 10 *l. per annum* that is the foundation of the *ſettlement*, and whether he pays it for a houſe for habitation, or for a warren which brings him in a profit, is not material: the order of ſeſſions muſt be quaſhed. *Vide Stra. vol.* 1. *p.* 678.

Hilary, 1 *Geo.* 2. *Between the Pariſhes of Biſhops Hatfield and St. Peter's in St. Albans.*

An order of *two* juſtices was made to remove a man, his wife and daughter, from *Hatfield* to St. *Peter's*. On appeal to the ſeſſions, it was ſtated, that on the 3d day of *Auguſt* 1725, *H. L.* was hired in St. *Peter*'s by one Mr. *A.* (who had no *ſettlement* there) for *one year*, to ſerve as his *huntſman*. That Mr. *A.* had a dog-kennel in St. *Peter's*, where *L.* was dieted, and ſerved the year: but inaſmuch as *A.* himſelf had no *ſettlement*, they vacated the order that ſent him to St. *Peter's*.

Per curiam. The order of ſeſſions muſt be quaſhed, for this is exactly the caſe of a ſervant employed on the road to look after ſtage-horſes belonging to a perſon who lived elſewhere; and yet the *ſettlement* was adjudged to be where the ſervice was. *Vide Stra. vol.* 2. *page* 794.

Eaſter, 2 *Geo.* 2. *The Pariſh of St. Michael Coſlany, in Norwich*, v. *The Pariſh of St. Matthews, in Ipſwich.*

On an order of ſeſſions the caſe was ſpecially ſtated, on a removal of *E. W.* and *A.* his wife, and *E. S.* and *A.* their children, from *St. Michael*'s to *St. Matthew*'s; that *E. W.* the elder, the father of *E. W.* removed, was ſettled at *Shipton Mallet*, and afterwards removed to *Bruton*, where he continued *twenty years*, and had *E.* the ſon born there, whom he bred up in his own trade till *nineteen years* old, when he left his father and came to *Norwich*, and married and had theſe *three* children. That ſince the birth of the children, old *E.* the grandfather gained a *ſettlement* in *Ipſwich*, to which the *two* juſtices removed the family. But the ſeſſions being of opinion their *ſettlement* was not at *Ipſwich*, diſcharged the order.

Per curiam. The order of ſeſſions is right. For there is no colour to ſay the ſon and his family were *ſettled* at *Ipſwich*, where they never were; and this is exactly the ſame caſe as that of *Eaſtwoodhay* v. *Weſtwoodhay. Vide Stra. vol.* 2. *p.* 832.

Michaelmas, 3 *Geo.* 2. *Between the Pariſhes of Elſtead and Holliburne.*

On an *order of ſettlement* it was ſpecially ſtated, that a man rented a houſe and land in *Elſtead*, for which he paid 9 *l.* 10 *s. per annum*, and that he rented 3 *l. per annum* of the ſame perſon, but that he lodged and lived in *Elſtead*. And on conſideration of the caſes of *South Sydenham* v. *Lamerton*, and St. *John's in Hertford.* v. *The Pariſh of Amwell.* This was held to be a *ſettlement* in the pariſh of *Elſtead. Vide Stra. vol.* 2. *p.* 849.

Eaſter, 4 *Geo.* 2. *The Pariſh of Molſworth* v. *The Pariſh of Goring.*

A *poor* man gained a *ſettlement* at *Molſworth*, and was afterwards hired by *two* partners of a boat at *Goring*, for a year, to ſerve in the ſaid boat, which plied between *Goring* and *London* for the year; and whether, by the ſaid ſervice, the party gained a *ſettlement* at *Goring*, was the queſtion.

Per curiam. This is not to be diſtinguiſhed from the caſe of a man taken on board a ſhip, in which he ſerves for a year; and then held, no *ſettlement* was gained thereby: and ſo it was holden in this caſe, in affirmance of an order of ſeſſions. *Vide Fitzgibbons, p.* 255.

Trinity, 4 *Geo.* 2. *The King* v. *The Inhabitants of Minchinhampton.*

Per curiam. Renting a piece of paſture ground of 10 *l. per annum* is a *ſettlement*, but not renting the paſture of a piece of ground. *Vide Stra. vol.* 2. *p.* 874.

Michaelmas, 4 *Geo.* 2. *Between the Pariſhes of Hanmer in Com. Flint and Elſmere in Com. Salop.*

On a ſpecial order of ſeſſions, the caſe ſtated was, that *R. F.* being unmarried, and having no child, was hired in *Hanmer* for a *year*, and ſerved the ſame: that afterwards in 1718 he was ſtill unmarried, and having no child, was hired in *Elſmere* in *Salop*, to ſerve from *Lady-day* to *Chriſtmas* following, which he did, and was then hired again for a year by the ſame maſter, and ſerved to the end of *May*. The ſeſſions adjudged it no *ſettlement*, and ſent him to *Hanmer*.

The court was moved to quaſh the order, there being in the whole a ſervice for a year in *Elſmere*, which, as was urged, was enough to ſatisfy the ſtatute. And the caſes of *Overton* v. *Steventon*, *Hilary* 10 *W.* 3. and *The King* v. *The Inhabitants of Bughtwell in Berks*, were cited.

And on the authority of the above caſes, the court held it a *ſettlement* in *Elſmere*, and quaſhed the order of ſeſſions. *Vide Stra. vol.* 2. *p.* 878.

Hilary, 5 *Geo.* 2. *Between the Pariſhes of St. Margaret's Weſtminſter and St. Martin's Ludgate.*

On a ſpecial order of ſeſſions it was ſtated, that a *Fleet* priſoner took a houſe of 25 *l. per annum* within the rules, and lived in it *eight years*, and paid all taxes; and it was held that he gained a *ſettlement*. *Vide Stra. vol.* 2. *p.* 924.

Trinity, 6 *Geo.* 2. *Between the Pariſhes of Lidney and Stroud in Com. Glouceſter.*

On a ſpecial order of ſeſſions it was ſtated, that a maid-ſervant was hired for a quarter of a year, and if ſhe and her maſter liked one another, ſhe was to continue a whole year, and have 3 *l.* for her wages; that ſhe ſtaid the year out, and received the 3 *l.* and this on debate was held to be a *ſettlement*. *Vide Stra. vol.* 2. *p.* 950.

Michaelmas, 8 *Geo.* 2. *Between the Pariſhes of St. George Hanover-Square and St. James Weſtminſter.*

On an order of ſeſſions the caſe was ſtated ſpecially, that *A. W.* a pariſh girl, was bound by indenture an apprentice to *G. W.* in St. *George*'s pariſh, where ſhe ſerved *forty days*; and her maſter afterwards let her out for hire to a perſon in *Marybone*, where ſhe reſided above *forty days*, but the maſter received her wages, and found her cloaths.

The ſeſſions held that the laſt ſervice gained her no *ſettlement*, and conſequently ſhe was *ſettled* at St. *George*'s. But the court quaſhed the order, being of opinion there was no difference between the maſter's hiring her out, and her own act, and that it was like the caſe of a binding to *A.* and ſerving *B.* where it has been always held a *ſettlement* in *B.*'s pariſh. *Vide Stra. vol.* 2. *p.* 1001.

Michaelmas, 9 *Geo.* 2. *The King* v. *The Inhabitants of Bovindon in Herts.*

It was held that payment to the *poor* does not give a *ſettlement* unleſs the party was rated; for rating is the act of the pariſh, and not the other: and the *ſettlement* ariſes from the pariſhes giving that evidence of their being ſatisfied of his ability. *Vide Stra. vol.* 2. *page* 1023.

Michaelmas, 9 *Geo.* 2. *Between the Pariſhes of Seaford and Caſtle-Church.*

On a ſpecial order of ſeſſions it was ſtated, that the *pauper* was hired for a year, which he ſerved till the laſt *twelve days*, when he went away without his maſter's leave, and ſtaid till after the year was up, when he returned for his cloaths, and was paid the whole year's wages. And on conſideration, that if they once allowed this abſence for *twelve days* at the end of the year, (which differed from an abſence in the middle of the year) they ſhould not know where to ſtop; it was determined that he had gained no *ſettlement*. *Vide Stra. vol.* 2. *page* 1022.

Trinity, 10 *Geo.* 2. *The King* v. *The Inhabitants of Butley in Suffolk.*

The queſtion in this caſe was, whether renting a windmill at 14 *l. per annum* gained a *ſettlement*; it having been determined that a water-mill did. *Salk.* 506. It was urged, that thoſe are always habitable, but the other are often not.

Per curiam. It is the ſame as if he had rented land of that value. And *Hilary* 8 *Geo. The King* v. *St. Mary, Guildford*, it was a mill generally, and held a *ſettlement*; and ſo it was in this caſe. *Vide Stra. vol.* 2. *p.* 1077.

Hilary, 13 *Geo.* 2. *Between the Pariſhes of Southwold and Yoxford in Suffolk.*

On a ſpecial order of ſeſſions it was ſtated, that the *pauper* took an houſe at *Southwold*, at the rent of 10 *l. per annum*; the landlord agreeing to build a ſtable, warehouſe, &c. to it. That the real value was then but 6 *l.* 10 *s. per annum*, and the landlord never made the new erections; but if they had been made, it would have been worth 10 *l. per annum*; and the court held this to be no *ſettlement*. *Vide Stra. vol.* 2. *p.* 1127.

Trinity, 13 *Geo.* 2. *The Pariſh of King's Norton* v. *The Pariſh of Cambden, in Glouceſter.*

One *M. C.* a *pauper*, was removed by *two* juſtices from *King's Norton* to *Cambden*. On an appeal, the ſeſſions reverſed the order, ſtating, that the *pauper* was hired for *one year* to one *E.* of *Cambden*, to ſpin yarn at 18 *d. per* ſtone, and that ſhe was to provide herſelf with victuals and lodging; that ſhe ſpun the *whole year*, and boarded and lodged at her maſter's, allowing 2 *s. per week* for the ſame: but on her examination ſhe ſaid, that ſhe thought herſelf at liberty to be abſent from the work as long as ſhe pleaſed, only that ſhe was not at liberty to work for any other maſter.

Per curiam. The ſeſſions have done wrong in adjudging this no *ſettlement* in *Cambden*, for in fact there was an hiring and a ſervice for a year to the maſter there; and what her apprehenſion was, or whether ſhe was paid by the year, or by the quantity of her work, was immaterial; therefore the order of ſeſſions was quaſhed, and the order of the *two* juſtices confirmed. *Vide Stra. vol.* 2. *p.* 1139.

Hilary, 15 *Geo.* 2. *The Pariſh of Cotleigh* v. *The Pariſh Stockland.*

An acre in *Cotleigh*, wherein *A.* had a leaſe for lives, was mortgaged to a *pauper* for 15 *l.* When the mortgager died there was *two years* intereſt due, and he alſo owed 18 *l.* 10 *s.* to the mortgagee by bond and ſimple contract; and it was agreed between the widow and the mortgagee, that he ſhould adminiſter and take all, but the houſehold-goods, which he did. And the ſeſſions having held, that his taking to this acre, and living on it *eight years*, did not gain a *ſettlement* under *ſtat.* 9 *Geo.* 1. *c.* 7. which requires a *bona fide* payment of 30 *l.*

The court now quaſhed the order, it being to all intents of law and equity the ſame as actual payment of the conſideration-money. *Vide Stra. vol.* 2. *page* 1162.

Eaſter, 15 *Geo* 2. *The Pariſh of Laddock* v. *The Pariſh of Saint Ennſdore.*

A perſon was hired for a year, and ſerved half a year, when the maſter died; the executor, who lived in another pariſh, requeſted the ſervant to ſerve the year out with him. She did ſo; and now, on the authority of the caſe of *Ivinghoe*, the court held it a *ſettlement* in the executor's pariſh; for the laſt ſervice is not to be conſidered as a new agreement, but a continuation of the firſt. *Vide Stra. vol.* 2. *p.* 1164.

Hilary, 16 *Geo.* 2. *The Pariſh of Atherton* v. *The Pariſh of Barton.*

A perſon *ſettled* in *Atherton* hired himſelf into *Barton* for *one year*, at 4 *l.* wages, and either maſter or ſervant to be at liberty to determine the contract at the end of any quarter, on giving a month's notice. And it was ſtated, that he ſerved the year out; but at the time of the hiring the *pauper* declared, he made the agreement in that manner to prevent loſing his former *ſettlement*. And on this the ſeſſions held it to be *no ſettlement* in *Barton*.

But the court, on debate, quaſhed both the orders; for this is the common ſort of hiring for a year, with an intention to ſtay together, as in fact they did; and if this ſhould be determined not to be a *ſettlement*, it would overturn great numbers of *ſettlements* that ſubſiſt on ſuch hirings. *Vide Stra. vol.* 2. *p.* 1182.

Eaſter, 17 *Geo.* 2. *The Pariſh of Beccles* v. *The Pariſh of Leowſtoff, in Suffolk.*

A *pauper* was hired to a *blackſmith* for a year, at 3 *l. per annum*, to be paid when the ſervant ſhould want it. During the year, the maſter gave him leave to work with another ſmith for *three days*, with another for *a week*, and with a third for *a fortnight*, and agreed the ſervant ſhould have the advantage of it; after which he returned and ſtaid out the year, and the maſter, by his conſent, deducted the proportion of the wages for the time he was away: and on this ſtate of the caſe the ſeſſions held that no *ſettlement* was gained, the firſt contract being diſſolved.

Per curiam. The order muſt be quaſhed; for this is not a diſſolution of the contract, but a licence to be abſent; and both parties conſidered it ſo, by continuing together to the end of the year: the accelerating the payment of the wages for the convenience of the ſervant, which is uſually without a particular agreement, makes no alteration. *Vide Stra. vol.* 2. *p.* 1207.

Eaſter, 18 *Geo.* 2. *The Pariſh of Sheepſhead, in Leiceſter*, v. *The Pariſh of Melborne, in Derbyſhire.*

A perſon was certificated from *Sheepſhead* to *Melborne*, and ſtaid there *ten years*; during which time Lady *Elizabeth Haſtings* conveyed lands to truſtees for ſeveral charities out of the profits, and, among other things, the ſum of 10 *l. per annum* to the charity-ſchool at *Melborne*, to be paid to the vicar there for the time being. In the ſpecial order of ſeſſions it was ſtated, that the certificate-man officiated as ſchoolmaſter for *ſeveral years*, and received 10 *l. per annum* from the vicar: and this the ſeſſions held gained him a *ſettlement* at *Melborne*, where they declared he had a freehold eſtate.

Per curiam. The order muſt be quaſhed; for it does not appear how he came into this employment; and the legal right to receive the ſalary is in the vicar, who not caring to officiate himſelf, has therefore paid it over to this man as his deputy, which could not give any perſon a *ſettlement*, much leſs to a *certificate-man. Vide Stra. vol.* 2. *p.* 1225.

Trinity, 18 *Geo.* 2. *The Pariſh of St. Peter, in Sandwick*, v. *The Pariſh of Goolaſton, in Kent.*

A ſervant was hired for a year, during which time he, with his maſter's leave, went to ſea on the *herring-fiſhery*, but hired another to do his work in the mean time: he returned at the end of *three weeks*, after the expiration of the year, ſettled with his maſter, and received his whole year's wages.

This the ſeſſions held was not a ſervice for a year; but the court, on the authority of the caſes of *Iſlip*, and *Beecles* v. *Leoſtoff*, held it a *ſettlement*, ſaying, he was to be conſidered all the time as in the ſervice of his maſter, and the perſon he had employed to do his work was his ſervant, and not the maſter's. Wherefore the order was quaſhed. *Vide Stra. vol.* 2. *p.* 1232.

Michaelmas, 19 *Geo.* 2. *The Pariſh of Croſcombe* v. *The Pariſh of St. Cuthbert, in Wells.*

A ſervant was hired for, and ſerved a year, in *Croſcombe.* He continued to ſerve there, without any new agreement, for a quarter of a year, when the maſter removed into a houſe in *St. Cuthbert*'s, where the ſervant continued for half a year, and then married. The queſtion was, whether this was a *ſettlement* in *St. Cuthbert*'s, within the reaſon of thoſe caſes that have held the *ſettlement* to be gained where the laſt *forty days* ſervice was?

The court held it to be a *ſettlement* there; for it is ſtill a continuing in the ſame ſervice within the meaning of *ſtat.* 8 & 9 *W.* 3. *c.* 30. though there is no new agreement. And on the whole, there has been between this maſter and ſervant an hiring and ſervice for above a year. *Vide Stra. vol.* 2. *p.* 1240.

Eaſter, 33 *Geo.* 2. *The King* v. *The Inhabitants of Kniveton.*

On a motion to quaſh an order of *two* juſtices for removing *J. W.* and *M.* his wife, and *three* children, from *Kniveton* to *Tiſſington*, both in the county of *Derby*, a rule to ſhew cauſe was obtained.

Caſe. J. W. being ſettled at *Tiſſington*, did on *Lady-day* 1749, take and enter on a farm at *Kniveton*, of the yearly value of 8 *l.* of one Mr. *H.* vicar of *Kniveton*, *To hold* from *Lady-day* 1749 to *Lady-day* 1750; and alſo at the ſame time, he, with one *T. H.* jointly took and entered on another farm in the ſame liberty, of one *T. D. To hold* from *Lady-day* 1749 to *Lady-day* 1750, of the yearly value of 3 *l.* 15 *s.* and at the ſame time of taking the ſaid farm of 3 *l.* 15 *s.* it was agreed between the ſaid *J. W.* and *T. H.* "that *T. H.* ſhould have and "take *one half of the corn and hay*, to be cut from the "ſaid farm of 3 *l.* 15 *s.* rent; and that the ſaid *J. W.* "after the ſaid *T. H.* had taken and carried away his "half part of the corn and hay, ſhould be poſſeſſed of "and occupy the *whole* farm of 3 *l.* 15 *s.* rent till "*Lady-day* following; paying to the ſaid *T. H.* 4 *s.* "for the ſaid *H.*'s ſhare of the ſaid farm." And that the ſaid *T. H.* did on or before the *firſt day of October* 1749, take and carry away one half of the ſaid hay and corn; and that the ſaid *J. W.* did thereupon immediately take and continue the poſſeſſion of the whole farm, till *Lady day* 1750.

After the rule to ſhew cauſe was made, the court made a ſubſequent order, whereby it was ordered, "that the orders returned with the *certiorari* in this "cauſe be ſent back to the ſeſſions," which was done accordingly, and the ſeſſions diſcharged the juſtices order of removal.

On the order of ſeſſions being returned into this court, the council on behalf of the pariſh of *Kniveton* moved to diſcharge the order of ſeſſions, and obtained a rule to ſhew cauſe.

The council took *three exceptions* to the order, *viz.*

1ſt. "That it did not appear that the *pauper* reſided "in *Kniveton.*"

2dly. "That the juſtices at ſeſſions had no juriſdic-"tion to make this preſent order of diſcharge, becauſe "the former ſeſſions had not, on the *original appeal*, "adjourned ſuch appeal to a ſubſequent ſeſſions, but "to this court."

3dly. "That this caſe, as ſtated on the orders, ap-"peared to be a tenement, under the yearly value of "10 *l.* within the intent and meaning of *ſtat.* 13 & 14 "*Car.* 2. *cap.* 12."

The council for the pariſh of *Tiſſington* denied this, and alledged, "that it was above the yearly value of "10 *l.*" which they endeavoured to prove thus;

1ſt, That *W.* the *pauper*, was *liable* (as being joint-tenant with *H.*) to anſwer for and pay the whole 3 *l.* 15 *s.* and, moreover, that he was ſole tenant of the farm, for and during the laſt half year.

2dly, It is really and properly a payment of 10 *l.* 1 *s.* 6 *d. per ann.* by *W.* the *pauper*, for he is to pay 8 *l. per annum plus* half 3 *l.* 15 *s.* (which is 1 *l.* 17 *s.* 6 *d.*) *plus* 4 *s.* for the laſt half year; which is, in all, 10 *l.* 1 *s.* 6 *d.*

The court unanimouſly held, "That this tene-"ment, thus rented by the *pauper*, in *Kniveton*, was "under the yearly value of 10 *l.*"

The ſtatute fixes the yearly value at 10 *l.* and the value muſt be eſtimated by the rent; and always is taken to be *according to the rent.* And here, the rent is 8 *l. per annum*, and the half of 3 *l.* 15 *s.* which two rents together, do *not* amount to 10 *l.* He was to pay *H.* 4 *s.* for the advantage he was to have, after the crop was off; but an agreement of this ſort, between the two joint-tenants, cannot be conſidered as a *rent.*

Per curiam. Let the order of ſeſſions be quaſhed, and the order of the two juſtices be confirmed. *Vide Bur. S. C. vol.* 2. *p.* 499.

Hilary, 4 *Geo.* 3. *The King* v. *The Inhabitants of Winterbourn.*

On a motion to quaſh an order of ſeſſions, made for quaſhing an original order of two juſtices, made for removing *W. M.* with *eight* children, from the pariſh of *Winterbourn* to the pariſh of *St. Philip* and *Jacob*, both in the county of *Glouceſter*, a rule to ſhew cauſe was obtained.

Caſe. W. M. the *pauper*, about *thirteen years* before the making the order, took a houſe in the pariſh of *St. Philip* and *Jacob*, for *one* year, at the rent of 12 *l.* by the year; and dwelt in the ſaid houſe for half a year, and paid the half year's rent. That at a *court-leet* of the Lords of the Manor of *Winterbourn* and *Hambrook* in the ſaid county of *Glouceſter*, holden on the 13th of *October* 1761, *R. B.* Eſq; was preſented by the *leet-jury* to be conſtable for the year enſuing, for the tithing of *Hambrook* in the ſaid pariſh of *Winterbourn*, in reſpect of his eſtate in the ſaid tithing; but was never ſworn into, or took on him the ſaid office. That the ſaid *R. B.* having notice of the ſaid appointment, procured the *pauper* to ſerve the ſaid office of conſtable in his ſtead, in order to gain the *pauper* a *ſettlement* at *Winterbourn*. That the *pauper* was accordingly ſworn into the ſaid office, before a juſtice of peace of and for the ſaid county, and ſerved the ſame office for the whole year; during which time, he lived in the ſaid tithing of *Hambrook*, but never was preſented thereto at any *court-leet* as conſtable in his own right. That the cuſtom has been, time out of mind, to preſent all conſtables to ſerve for the ſaid tithing at the ſaid manor *court-leet*.

Per curiam. The caſe expreſsly ſtates, "That the "*pauper* never was preſented to the office at any *court-"leet*, as conſtable in his own right; and that the "cuſtom requires *all* conſtables to ſerve for the ſaid "tithing to be ſo preſented." Therefore the order of ſeſſions was diſcharged, and the original order of the juſtices was affirmed. *Vide Bur. vol.* 2. *p.* 520.

Hilary, 4 *Geo.* 3. *The King* v. *The Inhabitants of Salford.*

On a motion to quaſh an order of ſeſſions made for quaſhing an order of *two* juſtices made for the removing of *P. W.* the younger, and *M.* his wife, from the pariſh of *Salford* in the county of *Oxford*, to the *hamlet* of *Over Norton* in the pariſh of *Chipping Norton*, in the ſame county, a rule to ſhew cauſe was obtained.

Caſe. *P. W.* the father of the *pauper*, being ſettled in *Over Norton* in the year 1726, for the conſideration of 92 *l.* purchaſed a tenement in the pariſh of *Salford* of one *J. L.* whoſe wife was ſeiſed of the inheritance in *fee ſimple* of the ſaid tenement, but never joined with her huſband in conveying it, nor had *L.* her huſband any eſtate in the ſaid tenement, but in right of his ſaid wife; and his ſaid wife ſurvived him, and died about *ten years* after him. *L.* the huſband, died *thirty years* ago, and *P. W.* the *pauper*'s father, has lived in, and poſſeſſed uninterruptedly, the ſaid tenement ever ſince he ſo purchaſed it, and ſtill lives there: and his ſon, the *pauper*, was born there in or about the year 1730, and lived with his father as part of his family in the ſaid purchaſed tenement till within *three years*, when the ſaid *pauper* married, and left his father's family, and lived in a ſeparate tenement in *Salford* aforeſaid, but never gained any *ſettlement* but what he derived from his ſaid father.

After hearing the arguments of the council on both ſides on ſhewing cauſe on this rule, the court gave their opinion.

Lord *Mansfield.* We are of opinion that no *ſettlement* of the father was gained in *Salford* by the purchaſe, but only during the time of his inhabiting the purchaſed premiſes: ſo that the father's *ſettlement* was only *temporary*, and did not extinguiſh his *ſettlement* at *Over Norton*; and the only *ſettlement* which the ſon could derive from his father was at *Over Norton*: for there could be no derivative *ſettlement* from the father at *Salford*; the father himſelf having no *ſettlement* there, but being only *irremovable* from his own eſtate.

Per curiam. Let the order of ſeſſions be quaſhed, and the order of the *two* juſtices be affirmed. *Vide Bur. S. C. vol.* 2. *p.* 516.

Eaſter, 4 *Geo.* 3. *The King* v. *The Inhabitants of Openſhaw.*

On a motion to quaſh an order of ſeſſions, confirming an order of *two* juſtices, made for the removal of *J. B. Martha* his wife, and *five* children, from *Gorton* to *Openſhaw*, both in the county of *Lanceſton*, a rule to ſhew cauſe was obtained.

Caſe. *J. B.* the *pauper*, with his family, being legally *ſettled* in *Openſhaw*, took a houſe and two crofts in *Gorton* in 1758, from one *J. O.* at the rent of 3 *l.* 10 *s.* and the landlord was to pay all leys and taxes, except the window-tax, which was to be paid by the tenant. And accordingly he went with his family to reſide on, and occupied the tenement aforeſaid, until *May-day* 1762; during all which time, except as hereafter-mentioned, *J. O.* the landlord, paid all leys and taxes. But in the laſt year, *O.* having ſome diſputes with the overſeers concerning his leys for his other eſtates in *Gorton*, directed the overſeer to call on his tenant *B.* for a quarter of a year's poor-ley, and a church-ley, and tell him, "that his landlord ordered "him to pay it, and he would allow it out of his "rent." Whereon the overſeer accordingly aſked *B.* for a poor's-ley (being *one ſhilling*) and a church-ley (being *one ſhilling and two-pence halfpenny*) telling him what his landlord had ſaid; and he paid them both (amounting to *two ſhillings and two-pence halfpenny*) declaring, "he paid them for his landlord;" and the overſeers ſaid, "he accepted them accordingly:" but the landlord, not being aſked by the tenant to allow it, did not allow it out of the rent, till long after he left the eſtate, *viz.* 6th *February* 1763 (*ſix days* before the granting of the order for the removal of the *pauper* and his family from *Gorton* to *Openſhaw*) when he repaid the money.

The rate, or aſſeſſment for the relief of the poor of *Gorton*, was ſigned and allowed by *three* of the principal inhabitants, but was not ſigned by the overſeers, or allowed by the juſtices, or publiſhed in the church; but it was the rate by which the officer collected the *poor-ley*, and no other way made or gathered by, but in that method, during all the ſaid years. The *church-ley* was likewiſe ſtiled to be a *church-ley* on the *land-owners*, but was not ſigned by any of the inhabitants; but in both theſe aſſeſſments, the charge, in reſpect of this tenement, was as follows, *viz.* "*Bowdens*," as appears by the aſſeſſments, which appeared to be marked with a croſs, to denote the payment of the ſums charged in the manner ſet forth in theſe aſſeſſments, and that the *pauper*'s name is *Bowden*, not *Bowdens*.

Lord *Mansfield* (without hearing the council for the townſhip of *Openſhaw*) ſaid, it was a clear caſe, tho' perhaps not ſo ſtrong as ſome others may have been.

This was the proper tax on the tenant; and he is aſſeſſed by name "*Bowdens.*" The agreement between his landlord and him, "that the landlord ſhould "pay it," is nothing to the pariſh. So the court quaſhed both orders. *Vide Bur. S. C. vol.* 2. *p.* 522.

Hilary, 6 *Geo.* 3. *The King* v. *The Inhabitants of Staunton under Bardon.*

On a motion to quaſh an order of ſeſſions, made to confirm an order of *two* juſtices, made for removing of *W. H. S.* his wife, and their *two* children, from *Uleſcroft* to *Staunton under Bardon*, in the pariſh of *Thornton*, both in the county of *Leiceſter*, a rule to ſhew cauſe was obtained.

Caſe. Some ſhort time before the 25th *March* 1763, *T. O.* took of *J. P.* a farm in *Uleſcroft*, conſiſting of a dwelling-houſe and ſeveral cloſes and lands, then at the yearly rent of 45 *l.* He entered on the ſame the ſaid 25th *March*, and occupied ſuch premiſes until about the middle of *May* following; during which time he ſtocked the ſame with cattle, and then gave up the poſſeſſion thereof, by conſent of parties, to the ſaid *J. P.* On ſuch giving up the poſſeſſion of the ſaid farm, *M. P.* took the poſſeſſion thereof, ſtocked it with cattle, and occupied the ſame till the 29th of *May*, when he let part of ſuch farm to the *pauper W. H.* until the *Lady-day* following, under payment of the rent or ſum of *twenty-ſix guineas*; *H.* to pay half the poor's levies, do half the repairs, have the manure then in the yard, and leave the ſame quantity at his quitting. *H.* entered on the part of the farm he took as aforeſaid, about the 1ſt or 2d day of *June* following; ſtocked the ſame, brought thither the following crop he was entitled to from the farm he before held at *Staunton under Bardon*; plowed part of the land,

and ſowed it with turnips; held the whole premiſes let him as aforeſaid till *Lady-day* following; paid the *twenty-ſix guineas*, on a diſtreſs taken for it, and then quitted the ſame. His taking the farm at *Uleſcroft* appeared to be a *bona fide* taking, without fraud, or intention of gaining a *ſettlement* in the liberty of *Uleſcroft*.

The council who moved to quaſh the orders ſaid the only queſtion was, "whether *W. H.*'s living on a te-" nement of more than the value of 10 *l.* a year, (*viz.* " *twenty-ſix guineas*) for above *forty days* irremovable, " did thereby gain a *ſettlement*."

The council on moving to ſhew cauſe gave the matter up.

Per curiam. Let the rule be made abſolute to quaſh both orders. *Vide Bur. S. C. vol.* 2. *p.* 558.

Trinity, 6 *Geo.* 3. *The King* v. *The Inhabitants of Ilmington.*

On a motion to quaſh an order of ſeſſions made for confirming an order of *two* juſtices made for removing *E. E.* widow, from *Mickleton* in the county of *Glouceſter*, to *Ilmington* in the county of *Warwick*, a rule to ſhew cauſe was obtained.

Caſe T. E. being legally ſettled in *Ilmington*, about *thirty-three* years ago married the above named *E. E.* his wife, then *E. S.* ſpinſter; who had before, by indenture bearing date the 25th day of *March* 1724, purchaſed a leaſehold tenement, ſituate in the ſaid pariſh of *Mickleton*, for the ſum of 6 *l.* for the remainder of a term of *one hundred years*. The ſaid *E.* reſided in the ſaid tenement for about *nine years* before her intermarriage with the ſaid *T. E.* And after her intermarriage, the ſaid *T. E.* together with the ſaid *E.* his wife, the *pauper*, reſided in the ſaid tenement about *ſixteen years*; when the ſaid *T. E.* died, leaving the ſaid *E.* ſurviving him. The ſaid *E. E.* after her ſaid huſband's death, continued to reſide in the ſaid tenement till about *Chriſtmas* laſt, *viz.* 1765, when ſhe ſold and conveyed the ſame tenement to *J. S.* for the ſum of 6 *l.* and was afterwards removed from the ſaid pariſh of *Mickleton* to the ſaid pariſh of *Ilmington*.

The council for the pariſh of *Ilmington* owned it to be a new caſe, but ſaid it was within the *reaſon* of caſes heretofore determined.

In caſes of *deſcent*, a *ſettlement* is gained, though the original purchaſe be under 30 *l.* value. And there is as much reaſon why a *ſettlement* ſhould be gained in the preſent caſe.

There is no *fraud* in this tranſaction: and here is a reſidence of *forty two years* in the whole.

Stat. 13 & 14 *Car.* 2. *cap.* 12. is the firſt ſtatute that gives power to remove a perſon from their place of reſidence at all: and even after that ſtatute, till *ſtat.* 9 *Geo.* 1. *cap.* 7. *forty days* reſidence on a perſon's own property would gain a *ſettlement*.

This woman had an eſtate veſted in her, when *E.* married her; which, on the marriage, veſted in him. Here the huſband gained a *ſettlement* in *Mickleton* by *forty days* reſidence on his own eſtate; and his *ſettlement* communicated itſelf to the wife; therefore the wife ought not to have been removed from *Mickleton*; and conſequently, both theſe orders ought to be quaſhed. The court concurring in opinion, the rule was made abſolute for quaſhing both orders. *Vide Bur. vol.* 2. *p.* 586.

For further adjudications on this head, ſee the heads, *Apprentice*, *Baſtards*, *Certificate*, *Juſtices of Peace*, *Maſters and Servants*, *Orders of Removals*, and *Poor*.

Sheriff.

Eaſter, 4 *W.* & *M.* *The King and Queen* v. *Warrington and others.*

See this caſe fully ſtated in page 261 of this work, under the head *Challenge*.

Eaſter, 7 *W.* 3. *Williams, Executor of Melliſh*, v. *Cary, Under-Sheriff of Wilts.*

The plaintiff, as executor of *Melliſh*, brought an action on the *caſe* againſt the defendant for a falſe return; ſetting forth, that his teſtator, had recovered a judgment againſt one *Smart* for 140 *l.* and that he ſued out a *teſtatum fieri facias* againſt him, which he delivered to the defendant, who made execution, and delivered goods, &c. to the value of 101 *l.* and returned, that he had levied only 19 *l.* 19 *s.* which he was ready to pay; and that he had more goods in his poſſeſſion, to the value of 40 *l.* which remained *for defect of buyers*, whereas in truth he had levied more.

That afterwards the teſtator died, and for this falſe return the plaintiff brought an action, and had a verdict.

It was now moved in arreſt of judgment, that the plaintiff, as executor, could not maintain this action, becauſe it was a perſonal *tort*, for which the executor could have no remedy after his death.

But judgment was given for the plaintiff *niſi*. *Vide Mod. Rep. vol.* 4. *p.* 403.

Eaſter, 11 *W.* 3. *Stout* v. *Towler.*

See this caſe fully ſtated in page 77 of this work, under the head *Appeal*.

Michaelmas, 11 *W.* 3. *Bignoll* v. *Rogers.*

See this caſe fully ſtated in page 344 of this work, under the head *Debt*.

Michaelmas, 11 *W.* 3. *The King* v. *The Borough of Abington.*

In this caſe *Holt*, Chief Juſtice, ſaid, if a writ comes to a *ſheriff*, and another makes a return to it in his name, the *ſheriff* may come and diſavow it the ſame term, but not at a ſubſequent one. *Vide Mod. Rep. vol.* 12. *p.* 308.

Michaelmas, 11 *W.* 3. *Steward* v. *Floyd.*

On a writ to the *ſheriff*, he firſt made a warrant to the bailiff of the liberty, and afterwards to his own bailiff, who arreſted the party, and ſuffered him to eſcape; and then the *ſheriff* returned *mandavi balivo*: on *affidavit* of the fact, the *ſheriff* was ordered to attend; and it was adjudged, that an action lay againſt the *ſheriff* for a falſe return, as *he was not to be found*, &c. and his amercements were eſtreated. *Vide Mod. Rep. vol.* 12. *p.* 311.

Hilary, 13 *W.* 3. *The King* v. *Dawes.*

See this caſe fully ſtated in page 183 of this work, under the head *Bail Bond*.

Eaſter, 13 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. The way on taking an aſſignment of a bail-bond is to indorſe a promiſe on it, to ſave the *ſheriff* harmleſs againſt *amerciaments*; and yet the bond continues ſtill in the *ſheriff*'s cuſtody. *Vide Mod. Rep. vol.* 12. *p.* 516.

Eaſter, 13 *W.* 3. *Kilderton* v. *Wilkinſon.*

An *under-ſheriff* returned a *fieri feci*, and a *venditioni exponas* ſued out, after *two* or *three* rules on the *ſheriff* to make a return, and failure therein; an *attachment* was granted againſt him; the court declaring they never would grant it againſt the *high-ſheriff* for not returning the writ. And ſuch a rule was made the ſame term, in the like caſe, againſt the *under-ſheriff* of *York*. *Vide Mod. Rep. vol.* 12. *p.* 454.

Eaſter, 13 *W.* 3. *Lane* v. *Sir Robert Cotton.*

In this caſe *Holt*, Chief Juſtice, ſaid, if the *ſheriff* refuſes a writ, an action will lie againſt him; becauſe the law charges him with an employment for the conveniency and good of the public. *Vide Mod. Rep. vol.* 12. *p.* 485.

Eaſter, 13 *W.* 3. *Pickering's Caſe.*

See this caſe fully ſtated in page 183 of this work, under the head *Bail Bond.*

Eaſter, 13 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. An action will lie againſt a *ſheriff* for not returning good iſſues on a *diſtringas*. *Vide Mod. Rep. vol.* 12. *p.* 944.

Trinity, 13 *W.* 3. *Taylor* v. *Bruden.*

In this caſe, which ſee fully ſtated in page 162 of this work, under the head *Bail*,

Holt, Chief Juſtice, ſaid, 1ſt, The *ſheriff* ought not to make a blank warrant for the attorney to fill up with a ſpecial bailiff.

2dly, If the *ſheriff* takes inſufficient bail, and the plaintiff's attorney accepts of an aſſignment of it, he thereby diſcharges the *ſheriff* from *amercements*.

3dly, The *ſheriff*, on an aſſignment, does not part with the poſſeſſion of the bond, becauſe, if the plaintiff be *nonſuited*, the *ſheriff* muſt be indemnified; but he muſt produce it at the trial. *Vide Mod. Rep. vol.* 12. *p.* 527.

Michaelmas, 13 *W.* 3. *The Sheriff of Cumberland's Caſe.*

Per curiam. It is the conſtant practice for *ſheriffs* to take bail-bonds, according to *ſtat.* 23 *H.* 6. from perſons taken up on *attachments*; and there is no remedy againſt him on a *cepi* returned, if he has not the party forth coming at the day, but to *amerce* him. *Vide Mod. Rep. vol.* 12. *p.* 557.

Michaelmas, 13 *W.* 3. *Cole* v. *Acorn.*

In *debt* againſt a *ſheriff*, the plaintiff declared on a judgment obtained againſt *J. S.* and that he had ſued out a *fieri facias*, and delivered it to the defendant, who, by virtue thereof, had levied the money: the defendant pleads *nihil debet*, and adjudged a good plea. And this difference was taken, that where a writ has not been returned the plea is good, becauſe it is a matter of doubt whether he has levied the money or not; *otherwiſe* where the writ is returned *fieri feci*. *Vide Mod. Rep. vol.* 12. *p.* 604.

Michaelmas, 3 *Ann.* *Clerk* v. *Withers.*

See this caſe fully ſtated in page 5 of this work, under the head *Abatement.*

Hilary, 11 *Ann.* *Mitchell* v. *Reynolds.*

Theſe caſes have been compared to bonds taken by *ſheriffs* for their fees, which are void.

Raymond, Chief Juſtice. The *ſheriff*, by the *common law*, was to take no fees at all for doing his office; and therefore, as theſe fees are given by act of parliament, the act muſt be ſtrictly purſued.

And principally theſe bonds are void from the apparent probability, that they will make uſe of them to ſupport their oppreſſion. *Vide Mod. Rep. vol.* 10. *p.* 139.

Hilary, 12 *Ann.* *The Queen* v. *Delme.*

See this caſe fully ſtated in page 262 of this work, under the head *Challenge.*

Hilary, 1 *Geo.* *Kitton* v. *Fagg.*

See this caſe fully ſtated in page 185 of this work, under the head *Bail Bond.*

Eaſter, 2 *Geo.* *Rench* v. *Britton.*

In *debt* on a bond, the condition on *oyer* was, that if the defendant did appear, &c. *to anſwer the aforeſaid* J. R. *of a plea of treſpaſs, and alſo to his bill*, &c. The defendant pleads *ſtat.* 23 *H.* 6. about *ſheriffs* bonds; the plaintiff demurs.

The council for the defendant in demurrer inſiſted, that the condition of the bond varied from the writ. The writ was, *to anſwer the aforeſaid* J. R. *of a plea of treſpaſs*, &c. *and alſo to a bill of him the ſaid* J. R. which words, *of him the ſaid John*, are omitted in the condition of the bond.

It was ſaid, that this ſtatute being made to prevent oppreſſion, was to be taken ſtrictly, and ſeveral caſes were cited to prove that the leaſt variation or addition to the condition of the bond, not warranted by the ſtatute, makes the whole bond void, as *Michaelmas* 37 *Hen.* 6. *fol.* 1. 10 *Co.* 100. *b.* *Plow. com.* 68. *b.* *Hobart* 13.

Parker, Chief Juſtice. The ſtatute only requires, that the *ſheriff* ſhould take a bond conditioned for the appearance of the party ſuch a day, at *Weſtminſter*; not ſaid even to anſwer the plaintiff.

The appearance mentioned is a perſonal appearance.

The words, *And alſo to a bill*, goes only to the matter of bail, whether common or ſpecial is to be required, and came in uſe after the ſtatute.

If the whole writ might be omitted, as certainly it may, ſince the ſtatute does not require it, then any part of it may be ſo likewiſe; nor does this bond vary from the form preſcribed by the ſtatute; if the party appears, he is bound to anſwer any bill that ſhall be filed againſt him. The bill in the condition of the bond cannot be intended of any other than the bill of the plaintiff.

The court being of the ſame opinion, judgment was given for the plaintiff *niſi*. *Vide Mod. Rep. vol.* 10. *p.* 327.

Michaelmas, 9 *Geo.* *Seaſar or Sheather*, v. *Holt, and others.*

See this caſe fully ſtated in page 135 of this work, under the head *Attachment.*

Eaſter, 10 *Geo.* *The King* v. *Burridge.*

See this caſe fully ſtated in page 136 of this work, under the head *Attachment.*

Trinity, 10 *Geo.* *Salter* v. *Groſvenor.*

In this caſe the court held, that if a proceſs ſhould be directed to the *ſheriffs* of *London*, and *one* of them dies, the proceſs is gone, becauſe *one ſheriff* cannot act without the other, for they *both* make but *one ſheriff*. *Vide Mod. Rep. vol.* 8. *p.* 304.

Michaelmas, 10 *Geo.* *Conningſby* v. *Steed.*

See this caſe fully ſtated in page 145 of this work, under the head *Attorney.*

Hilary, 1 *Geo.* *Myer* v. *Yellop and others.*

An *attachment* was granted on *affidavits* made againſt the defendants for a *reſcous*, and this was before the *ſheriff* had returned his writ, which being contrary to the old practice in ſuch caſes, it was ſet aſide. *Vide Mod. Rep. vol.* 8. *p.* 342.

Michaelmas, 11 *Geo.* *Wilſon* v. *Aldridge.*

The plaintiff obtained judgment at law, and afterwards by a *fieri facias* directed to the *ſheriff*, he levied the debt on the goods of the defendant, who exhibited a bill in equity againſt the now plaintiff, ſuggeſting that there was more due to him from the plaintiff than he recovered; and ſo obtained an *injunction* to ſtay the money in the *ſheriff*'s hands.

The plaintiff and his attorney being priſoners in the *Fleet*, moved the court againſt the *ſheriff* to return the writ of *fieri facias*, and that he might be *amerced* till he did; and now the court was moved on behalf of the *ſheriff* for directions what to do; for if he returned the writ he muſt pay the money, and then the *Court of Chancery* would commit him for not obeying their *injunction*; and if he did obey it, then this court would *amerce* him.

The court would not take any notice of the proceedings in *Chancery*, but ordered the *ſheriff* to return the writ, otherwiſe they would commit him; then the court being deſired to help the *ſheriff* to diſcover what attorney or ſolicitor carried on the proſecution againſt him; which was alſo refuſed, becauſe that would be only to enable the *ſheriff* to move the court of *Chancery* for an *attachment*: ſo he had no relief. *Vide Mod. Rep. vol.* 8. *p.* 315.

Anonymous.

On the 27th of *February* 1723, ſeveral judges met at the requeſt of *Pratt*, Chief Juſtice, concerning the death of one of the *ſheriffs* of *London*, *viz.* Sir *Felix Feaſt*, which happened juſt before the ſeſſions at the *Old Bailey*, and the judges not agreeing whether the *under ſheriff* could proceed by the late ſtatute, and it being a difficult queſtion, *Pratt*, Chief Juſtice, moved to have the ſeſſions adjourned, which was accordingly done till another *ſheriff* was choſen.

The Lord Chancellor ſeemed to think that *one ſheriff* might act in the caſe of the death of the other, as the chief clerk in this court had done, where a grant was to *Ventris* and *Holt*; *Holt* died, yet *Ventris* executed the office alone. *Vide Forteſcue*, *p.* 388.

Hayn v. *Bigg.*

A *ſci. fac.* was ſued out againſt the defendant as late *ſheriff*, on the ſtatute of *Weſtminſter* 2. for want of taking pledges in *replevin.*

The *ſheriff* pleaded that he took the goods, but did not ſay the ſame goods as in the declaration, and took ſufficient pledges, *viz.* the plaintiff and *J. S.* who entered into a bond, with condition to proſecute with effect, and make a return of the goods, but did not ſay the ſame goods as in the declaration. To which plea there was a demurrer.

Per curiam. The plaintiff muſt have judgment, becauſe the defendant has not pleaded *to the ſame*; for it appears the goods were different, and not the ſame as in the declaration, and they held that *replevin bonds* were good and legal both to proſecute and make return, and have been held ſo; and they alſo held, that *one* pledge with the plaintiff was ſufficient. *Vide Forteſcue*, *p.* 331.

Hilary, 33 *Geo.* 2. *Stoteſbury* v. *Smith.*

See this caſe fully ſtated in page 276 of this work, under the head *Conſideration.*

Trinity, 5 *Geo.* 3. *Weſton* v. *Maſon.* *The ſame* v. *Chapman.*

See this caſe fully ſtated in page 119 of this work, under the head *Arreſt of Judgment.*

Soldiers, &c.

Michaelmas, 8 *W.* 3. *Beaumont* v. *Pine.*

Holt, Chief Juſtice. An agent of a *regiment* is but a ſervant to the *colonel*; and the receipt of the *agent* charges the *colonel*. There is no privity between the King, the *ſoldier*, and the *agent*. *Vide Raym. vol.* 1. *p.* 101.

Hilary, 9 *W.* 3. *Taylor* v. *Janes.*

See this caſe fully ſtated in page 274 of this work, under the head *Conſideration.*

Hilary, 10 *W.* 3. *Parkhouſe* v. *Forſter.*

See this caſe fully ſtated in page 277 of this work, under the head *Conſtable.*

Michaelmas, 11 *W.* 3. —— v. *Crouch.*

The court was moved to have the defendant diſcharged on the late ſtatute for diſbanding the army, whereby *ſoldiers* are exempt from ſuits for *three years*, on *affidavits.*

Holt, Chief Juſtice. All we can do is, to order common bail, but he muſt diſcharge himſelf of the action by pleading the ſtatute, *&c.* and the plaintiff may traverſe his allegation. And it was ruled accordingly. *Vide Mod. Rep. vol.* 12. *p.* 336.

Eaſter, 5 *Ann.* *The Caſe of the Sheriff of Middleſex.*

See this caſe fully ſtated in page 112 of this work, under the head *Arreſt.*

Michaelmas, 11 *Ann.* *Arne* v. *Johnſon.*

See this caſe fully ſtated in page 166 of this work, under the head *Bail.*

Trinity, 2 *Geo.* *Bayley* v. *Jenners.*

The court was moved that the defendant being a *trooper*, might be diſcharged on common bail; it appeared he was liſted on the 16th day of *May*, and arreſted on the 19th; and the queſtion was, whether he had ever performed duty; and the *affidavit* went no farther than his learning to *ride*. The plaintiff inſiſted that this is not doing duty as the act requires, but only in order to do duty.

Per curiam. It is doing duty; he receives his pay, and muſt be diſcharged on common bail. *Vide Stra. vol.* 1. *p.* 2.

Michaelmas, 3 *Geo.* *Johnſon* v. *Louth.*

See this caſe fully ſtated in page 113 of this work, under the head *Arreſt.*

Hilary, 31 *Geo.* 2. *Turner* v. *Turner.*

The court were unanimous, that a perſon voluntarily inliſting himſelf was not *privileged from arreſts* within *ſtat.* 30 *Geo. cap.* 8. "for the ſpeedy and effectual recruiting of his Majeſty's land-forces and marines:" for that the act was only meant to privilege ſuch perſons from arreſts, as were under that act compelled againſt their wills to ſerve as *ſoldiers.* *Vide Bur. vol.* 1. *p.* 466.

Michaelmas, 31 *Geo.* 2. *Bond* v. *Iſaac.*

See this caſe fully ſtated in page 174 of this work, under the head *Bail.*

Eaſter, 1 *Geo.* 3. *The King* v. *Sir Willoughby Aſton, Bart.* and *John Dodd, Eſq.* and *others.*

Adjudged, That a ſubſtitute muſt, ſince *ſtat.* 33 *Geo.* 2. *cap.* 22. be conſidered as a *militia man* within *ſtat.* 31 *Geo.* 2. *cap.* 26. For though there might have been a doubt on the former act, (at the firſt making of it) "whether a *ſubſtitute* was a *militia-man* for this "purpoſe;" yet this doubt is removed by the latter act, which is a plain *declaratory* legiſlative expoſition of the former: the *preamble* recites this very clauſe, and puts this conſtruction on it, "that *ſubſtitutes* are "*militia-men* within it." *Vide Bur. vol.* 2. *p.* 1151.

Michaelmas, 2 Geo. 3. Medhurſt v. Waite.

See this caſe fully ſtated in page 280 of this work, under the head *Conſtable.*

Subpoena, See Evidence.

Summons, See Attachment.

Superſedeas, See Habeas Corpus.

Taxes and Rates.

Trinity, 6 W. & M. The Count of Arran v. Criſp.

The plaintiff made a leaſe to the defendant in 1675, reſerving ſuch a rent; and the defendant did covenant to pay the ſaid rent, clear of all *taxes* and *aſſeſſments* whatſoever, impoſed or to be impoſed, and gave bond for performance of covenants; and in an action of *debt* on this bond, after *oyer*, the defendant pleads *conditions performed:* the plaintiff replies the leaſe and covenants, and aſſigns for breach the defendant's not paying *two* years rent at *Lady-day* laſt; the defendant rejoins, and ſays, he paid ſo much in money, and ſo much in *taxes*, payable by the act of 4s. aid *per* pound, amounting in all to the rent due. The plaintiff demurs. The queſtion was, if this covenant did extend to charge the defendant with parliamentary *taxes*, becauſe the word *parliament* was not expreſſed in the covenant? and the whole court, except Chief Juſtice *Holt*, were clear of opinion it did.

But *Holt* ſaid, judgment ought to be for the plaintiff for a fault in pleading, though the law, as to the matter, be for the defendant; for the matter of his rejoinder, being by way of excuſe, ought to be ſet forth in the bar; as it is here ſet forth in the rejoinder, it is a departure; for whereas he before ſays he performed the condition, now he ſays he is not obliged to it. Wherefore the plaintiff had judgment. *Vide Mod. Rep. vol. 12. p. 54.*

Hilary, 9 W. 3. Brewſter v. Kitchell, Kidgell or Kitchen.

See this caſe fully ſtated in page 320 of this work, under the head *Covenant.*

Michaelmas, 1 Ann. Butler v. Corbet.

See this caſe fully ſtated in page 631 of this work, under the head *Mandamus.*

Trinity, 5 Ann. Anonymous.

Per curiam. If a man's eſtate is of ſuch a nature as that the commiſſioners cannot aſſeſs a certain *tax* on every man, as in the caſe of common, &c. they ought not to meddle with it. *Vide Mod. Rep. vol. 11. p. 89.*

Hilary, 7 Ann. The Queen v. The Commiſſioners of the Land-Tax for Barnwell.

See this caſe fully ſtated in page 631 of this work, under the head *Mandamus.*

Michaelmas, 7 Geo. The King v. The Juſtices of Dorcheſter.

A *mandamus* iſſued to the juſtices to ſign a *poor's rate* made by the churchwardens and overſeers. Before the return a motion was made to ſuperſede it, for ſeveral objections to the fairneſs of the *rate*; and that this would be ſpeedier and better for the poor than to reſerve the debate of them for a formal return.

Per curiam. The *two* juſtices are neceſſary to ſign the *rate* only by way of form; for it is the churchwardens and overſeers that have the power of making it; and whether it be a fair *rate* or not, is proper for the juriſdiction of the ſeſſions, and was never intended for our examination.

The *ſuperſedeas* being denied, the juſtices returned, that they would not allow the *rate*, it not being a juſt and proper *rate*: and the court having before given their opinion of this on the motion, they reſented this uſage ſo far, that they quaſhed the return, and ordered an *attachment* againſt the juſtices, who thereon ſubmitted and returned, *that they allowed the rate. Vide Stra. vol. 1. p. 393.*

Trinity, 8 Geo. The King v. The Inhabitants of Lambeth.

The perſon let his tithes to farm, the farmer agreed with the tenant of the land, that in conſideration of his paying ſo much he ſhould retain the tythes, and gather in the whole crop without dividing: and the queſtion was, which of the *two* were chargeable to the *poor's rate*, as occupier of the tithes? The ſeſſions diſcharged the leſſee of the parſon, and taxed the tenant of the land.

Per curiam. The order muſt be quaſhed. The farmer of the tithes is at the firſt inſtance liable to the *poor's rate*, and therefore unleſs he can throw that charge on another, the *tax* muſt be made on him. *Vide Stra. vol. 1. p. 525.*

Trinity, 11 Geo. The King v. The Inhabitants of Saint Leonard, Shoreditch.

On a ſpecial order for a *ſcavenger's rate* it was ſtated, that in the pariſh there were three diviſions, and this *rate* was made for *one* only, but that in this diviſion there were no churchwardens or overſeers reſiding, though the pariſh at large had ſuch officers. At the ſeſſions this *rate* was quaſhed, on account that there ought to have been a general *rate* for the whole pariſh: and now, on bringing all orders before the court, it was offered in ſupport of the firſt order, that *ſtat.* 2 & 3 *W. & M. c.* 8. had the word *place* as well as *pariſh*; and therefore a *rate* for the diviſion was good.

Per curiam. Whatever it might have been in caſe the churchwardens and overſeers had reſided in this diviſion, yet this being made for a place that had no ſuch officers, can never be maintained. The ſeſſions therefore did right to quaſh the *rate*, and the order of ſeſſions muſt be confirmed. *Vide Stra. vol. 1. p. 630.*

Michaelmas, 11 Geo. Theed v. Starkey.

See this caſe fully ſtated in page 325 of this work, under the head *Covenant.*

Eaſter, 5 Geo. 2. The King v. The Inhabitants of Uttoxeter in the County of Stafford.

See this caſe fully ſtated in page 259 of this work, under the head *Certiorari.*

Eaſter, 7 Geo. 2. The King v. The Inhabitants of Shrewſbury.

See this caſe fully ſtated in page 259 of this work, under the head *Certiorari.*

Trinity, 16 Geo. 2. Yeo v. Leman.

An *ejectment* being brought on a re-entry for non-payment of rent, the defendant moved to ſtay the proceedings on payment of arrears and coſts. In the account before the maſter, a difficulty aroſe about the proportion of the *land-tax* to be allowed, as to which the caſe was: that the premiſes were let at 120 *l. per annum*, but by improvements were of more value; and ſince thoſe improvements were *taxed* at 150 *l. per annum*, the tenant would have deducted the whole *land-tax*. But the court held, that the landlord ought only to allow the proportion which 120 *l.* bears to 150 *l.* on the whole. *Vide Stra. vol. 2. p. 1191.*

Hilary, 30 *Geo.* 2. *The Royal Exchange Aſſurance* v. *Vaughan.*

In an action of *treſpaſs* brought by the company; the queſtion (on a ſpecial verdict) was, "whether "this company are at all, or how far they are "liable, to be aſſeſſed to the *land-tax?*

On the firſt argument the court ſeemed, all of them, to ſee this matter pretty much in the ſame light: they made *two* queſtions, into which they divided the whole of this caſe, *viz.*

1ſt. Whether the *original* capital that was raiſed under the act of parliament of *ſtat.* 6 *Geo. cap.* 18. and was now become part of the fund of the preſent *charter-corporation*, was exempted from parliamentary *taxes*, by virtue of the exempting clauſe contained in *ſtat.* 6 *Geo. cap.* 17. which ſtatute related only to the original company for inſurance of ſhips, but did not extend to the preſent corporation eſtabliſhed by *charter*; which charter has extended their power, and enlarged their capital.

2dly. Whether this *original* capital was the perſonal eſtate of the company, and liable to be *taxed* as the company's perſonal eſtate, in their *corporate* capacity? Or whether the *tax* ought to have been laid on each individual member of the company, for his reſpective ſhare, in his own proper ward?

As to the *firſt queſtion*, the court were unanimous and clear, that the exemption under *ſtat.* 6 *Geo.* was confined to the *original* fund and company eſtabliſhed by that ſtatute; and could not be extended to the preſent corporation, which was founded on a ſubſequent *charter* of the crown, which neither did, nor could give any ſuch exemption.

As to the *ſecond queſtion*, it ſtood over for further argument and conſideration, when the court delivered their opinion.

Lord *Mansfield*. It is plain they are to be *rated* as a *corporate* body; and to *rate* the *individuals* would be almoſt impoſſible. The argument would prove too much, *viz.* that no corporation could be *taxed.*

Deniſon and *Foſter*, Juſtices, concurred with the Chief Juſtice.

Per curiam. Let judgment go for the defendant. *Vide Bur. vol.* 1. *p.* 155.

Eaſter, 1 *Geo.* 3. *Stevens* v. *Evans and others.*

See this caſe fully ſtated in page 709 of this work, under the head *Pariſh Officers.*

Michaelmas, 3 *Geo.* 3. *The Governors and Company for ſmelting down Lead, &c.* v. *Richardſon, Eſq; and others.*

On an action of *treſpaſs* for taking goods by way of *diſtreſs*, a ſpecial verdict was found for the plaintiff, ſubject to the opinion of the court on the following queſtion:

"Whether the plaintiffs, *leſſees* of certain *lead* "*mines* in the pariſh of *Aldſtone* in the county of "*Cumberland*, rendering as a rent certain part of the "*lead ore* gotten thereout, were liable, in reſpect of "the *lead mines*, to be *rated* to the relief of the poor?"

N. B. A certificate was procured to ſhew the uſage as to *rating* mines, which proved "that "it was not the uſage to *tax lead mines*."

Lord *Mansfield*. The words of *ſtat.* 43 *Eliz. c.* 2. are "*coal mines*," not mentioning any other kind of mines, and that is equal to an exception or excluſion of all other mines.

The fact on certificate (though the certificates do not exactly concur in every particular) appears to be, "that lead mines are not *rated* throughout *England*; "and particularly in *Derbyſhire*, *Somerſetſhire*, and "*Cornwal*." I am now keeping clear of *inhabitancy*, which is no part of this caſe: for theſe perſons are not *rated* as inhabitants, but only as *leſſees*; therefore the *poſtea* muſt be delivered to the plaintiff.

Deniſon and *Wilmot*, Juſtices, concurred with the Chief Juſtice.

Per curiam. Let the *poſtea* be delivered to the plaintiff. *Vide Bur. vol.* 3. *p.* 1341.

Hilary, 4 *Geo.* 3. *The King* v. *The Inhabitants of St. Andrew's Holbourn, and St. George the Martyr.*

See this caſe fully ſtated in page 261 of this work, under the head *Certiorari.*

Tenants, Joint, Common, and in Tail, &c.

Michaelmas, 2 *W. & M.* *Kemp* v. *Andrews.*

In an action of *trover* the plaintiff declares, that *N. J. S.* and himſelf, were poſſeſſed; that the others died, and the goods came to the defendant's hands, *&c.* The defendant pleads that they were *joint merchants*, and no ſurvivor by law amongſt them; and ſo prays that the plaintiff, as to the *joint goods*, may be barred. Demurrer and judgment for the plaintiff. For though no ſurvivor, 1 *Inſt.* 182. *a.* yet the plaintiff having right, a *purpart* and *jointenancy* ought to be pleaded in *abatement*, and not in *bar*. *Vide Mod. Rep. vol.* 12. *p.* 3.

Michaelmas, 4 *W. & M.* *Barker and others* v. *Lade.*

See this caſe fully ſtated in page 716 of this work, under the head *Pleas, Pleadings*, &c.

Michaelmas, 6 *W. & M.* *Anonymous.*

Holt, Chief Juſtice. *Tenants in common* cannot join in one action, tho' they come by feoffment; the amotion of the one, is not the amotion of the other: and it may be for ſeveral faults, one for forfeiture, the other for other reaſons. *Vide Mod. Rep. vol.* 5. *p.* 11.

Michaelmas, 7 *W.* 3. *Stedman* v. *Page.*

See this caſe fully ſtated in page 769 of this work, under the head *Replevin and Avowry.*

Trinity, 8 *W.* 3. *Pullen* v. *Palmer.*

In a ſuit in *replevin* for taking ſeveral cattle, the defendant *avowed* in his own right, for that *W. R.* was ſeized in *fee* of, *&c.* and granted a rent-charge to *A. B.* and *C.* and *ten* more, who granted to the defendant *and to twelve more*, and that *four* of the ſaid *thirteen* are ſince dead, and *nine* alive, of whom he is *one*, and that for *one year*'s rent, due at ſuch a time, he diſtrained. On a demurrer to this plea it was objected, that the defendant ought not only to juſtify in his own right, but that he ought likewiſe to make conuſance as bailiff to the reſt, who were living.

Holt, Chief Juſtice. *One joint-tenant* may diſtrain, but he cannot *avow ſolely*; and therefore this *avowry* muſt *abate*, becauſe it is always on the right, and the right of this rent is in all of them; and therefore the court cannot adjudge the right of the *writ of retorn' habend'* to *one* alone; for which he, the defendant, ought to have made conuſance, as bailiff to the reſt; and this is like a *repleader*, where the defendant may avow *again*. *Tenants in common* may join or ſever in *debt*, but they muſt ſever in *avowry*, for the reaſon before-mentioned, *viz.* becauſe it goes to the *reality*; and therefore, if *three tenants in common* diſtrain *thirty beaſts*, one of them muſt avow for *ten*, the other for *ten*, and the third for *ten more.*

Per curiam. The huſband may diſtrain for rent due to his wife, and avow for it alone, becauſe the right of the rent due is in him alone. *Vide Salk. vol.* 3. *p.* 207. *Raym. vol.* 1. *p.* 499.

Trinity, 8 *W.* 3. *Anonymous.*

Per curiam. The queſtion in this caſe is, whether one *joint-tenant* may not only diſtrain, but alſo avow in his own right, without making any conuſance alſo, as bailiff to the other *joint-tenant*; and the caſe of *Bowles* v. *Poor* was cited: it has been objected, where the *baron* diſtrained for rent due to the *feme* in his own right only, and adjudged good; but that was becauſe the right of the rent was in the *baron* only, but here it is otherwiſe; one *joint-tenant* may diſtrain for the whole, but when he avows it muſt be for part in his own right, and make conuſance as bailiff to his companion for the reſt; and when judgment is given for a return, it muſt be according to the right of both. *Vide Mod. Rep. vol.* 12. *p.* 96.

Michaelmas, 8 *W.* 3. *Lee* v. *Brace.*

A *feoffment* was made to the uſe of the feoffor for life, remainder to *W. R.* his ſon and *his heirs*, and *for want of iſſue of him*, then to the right heirs of the feoffor: It was objected, that though this would have been an *eſtate-tail* in *W. R.* by a *will*, yet the authorities which prove it to be ſo, do likewiſe prove, that it would be otherwiſe in a *deed*, as in this caſe. *But not allowed.*

Holt, Chief Juſtice. This is but *one* entire ſentence of limitation, the intent whereof is very plain, and the rule of law is only, that an eſtate of inheritance cannot paſs without words of inheritance; but there is no rule in law, that words of inheritance may not be abridged by ſubſequent words, as in the preſent caſe. *Vide Salk. vol.* 3. *p.* 337.

Hilary, 9 *W.* 3. *Britton* v. *Cole.*

Holt, C. J. If a *writ of levari facias* iſſue to levy the profits of a moiety, the cattle of another *tenant in common*, there *levant* and *couchant*, cannot be taken. For the *tenant in common* who is outlawed, can only forfeit the *pernancy* of the profits of his moiety. But the matter of the *tenancy in common* muſt be intended to be found on the inquiſition, otherwiſe it is not law. For if *A.* has land in which *B.* has common of paſture for ſheep, and *A.* is outlawed, and *B.*'s title is not found on the inquiſition, his cattle may be taken on a *writ of levari facias*, until he has pleaded his title in the *Exchequer*, and has it allowed; *otherwiſe*, if his title had been found on the inquiſition. *Vide Raym. vol.* 1. *p.* 308.

Hilary, 9 *W.* 3. *The Earl of Suſſex* v. *Temple, &c.*

In this caſe, which ſee fully ſtated in page 443 of this work, under the head *Evidence*, it was urged, 1ſt, That the remainder to the iſſues females being in contingency, the *firſt* daughter that was born the remainder attached in her, and could not be diveſted by the birth of a *ſecond*; and then *A.* having ſuffered a recovery of the whole, her heir at law had a good title.

2dly, It was urged, that they were *tenants in common*, and ſo the plaintiff was barred of this action by the *ſtatute of limitations*, *M.* having been dead *fifty years*; for which *Co. Lit.* 188. *a.* was cited, where a *tenant for life*, remainder to the right heirs of *J. S.* and *J. N.* *J. S.* died firſt, and afterwards *J. N.* died, their heirs are *tenants in common.*

Holt, Chief Juſtice. The eſtate is limited by way of uſe to the iſſues females, and iſſues females comprehend all iſſues females. Then the caſe is, *tenant for life*, remainder to all his iſſues females, *&c.* if the *tenant for life* has but *one* daughter, ſhe ſhall have the whole eſtate tail; if he has more daughters, they ſhall be *joint-tenants* for life, with ſeveral inheritances. If the contingent remainder veſts during the particular eſtate, or *that inſtant* that it determines, it is enough. The caſe in *Co. Lit.* of a *feoffment* to the uſe of himſelf for life, and of ſuch wife as he ſhould afterwards marry, and then he marries, he and his wife are *joint-tenants*; which caſe will rule this caſe in queſtion. For it is a joint claim by the ſame conveyance which makes *joint-tenants*, and not the time of the veſting. And he ſeemed to deny the caſe cited out of *Co. Litt.* 188. But as to the poſſeſſion of *one tenant in common* being the poſſeſſion of the *other*, he ſaid, that did not hold place againſt the *ſtatute of limitations*; and beſides, if *one* of them only takes the profits, it is an *ouſting* of the *other*. *Vide Raym. vol.* 1. *p.* 310.

Eaſter, 10 *W.* 3. *Martin* v. *Crompe.*

Holt, Chief Juſtice, ſaid, in this caſe, that if there are *two tenants in common* of a reverſion *expectant* on a leaſe for years, on which a rent is reſerved, they may join in an action of *debt* for the rent, or ſever; and the *one* of them may have an action for the moiety of 20 *l.* rent, but not for 10 *l.* And ſo it has been adjudged. *Vide Raym. vol.* 1. *p.* 341.

Eaſter, 10 *W.* 3. *Cox* v. *Copping*,

See this caſe fully ſtated in page 444 of this work, under the head *Evidence.*

Michaelmas, 10 *W.* 3. *Ward* v. *Everard, or Everits.*

See this caſe fully ſtated in page 769 of this work, under the head *Replevin and Avowry.*

Hilary, 12 *W.* 3. *Fiſher* v. *Wigg.*

Caſe. The father being ſeiſed of a *copyhold* of inheritance, ſurrendered the ſame to the *uſe* of his *five* children, *equally to be divided, and to their heirs reſpectively*, the queſtion was, whether they were *joint-tenants*, or *tenants in common?*

Gould and *Turton*, Juſtices, held, that they were *tenants in common*, becauſe the laſt diſtributive words, *viz. and to their heirs reſpectively*, ſhew, that it was the intent of the ſurrenderor, it ſhould be ſo, which, in the caſe of a *copyhold* and of an uſe ought to be purſued.

Holt, Chief Juſtice. *They are joint-tenants*; as to this eſtate being *copyhold* that is not to be regarded, for that will no more paſs by improper words than other eſtates, and this is not properly *an uſe*, for there is no *ceſtui que uſe* in this caſe, nor any ſtatute operation, but the ſurrenderees are in from the Lord of the Manor, and the ſurrender to the uſe of ſuch perſons ſhews only the intention of ſerving ſuch eſtates and limitations, ſo that this uſe is no more than a gift to *five* children, *equally to be divided*, and that this is a *joint-tenancy*, and not a *tenancy in common*; and for theſe reaſons following:

1ſt, Becauſe the words, *equally to be divided*, import no more than the precedent words implied, *viz.* that the children ſhould have all alike; which they cannot have if they are not *joint-tenants.*

2dly, The words, *equally to be divided*, does not make them *tenants in common*; becauſe, as *tenants in common*, they muſt be ſeiſed *pro indiviſo*, as to the poſſeſſion; whereas thoſe words, divide their *tenancy* and poſſeſſion, and whenever the eſtate comes to be divided, they ceaſe to be *tenants in common*; therefore it is abſurd to ſay, that theſe words create an *eſtate in common.*

Laſtly, A *joint-tenancy* is favoured in law; but if this was a *tenancy in common*, then the tenements and tenures would be multiplied; for here would be *five copyhold eſtates*, and *five fines* to the Lord of the Manor, inſtead of *one* before. *Vide Salk. vol.* 3. *p.* 206. *Raym. vol.* 1. *p.* 622.

Hilary, 13 *W.* 3. *Johnſon* v. *Allen.*

See this caſe fully ſtated in page 391 of this work, under the head *Ejectment.*

Trinity, 1 *Ann.* *Machil* v. *Clark.*

A *tenant in tail* covenanted to ſtand ſeiſed to the uſe of himſelf for life, remainder to *John* his eldeſt ſon *in tail*, and afterwards ſuffered a common recovery with a ſingle voucher, wherein he was *tenant to the præcipe.* The *firſt* queſtion was, what operation the covenant had? for if it made any alteration in the *eſtate-tail*, the recovery did not bar; and if it did not, the recovery and ſingle voucher did *bar.*

The court held the recovery good, and affirmed the judgment. *Vide Salk. vol.* 2. *p.* 619. *Raym. vol.* 2. *p.* 778.

Trinity,

Trinity, 1 *Ann.* *Anonymous.*

Holt, Chief Chief. In caſe of *tenants in common* there muſt be an actual *ouſter* of *one* by the *other*, or elſe he ſhall not be compelled to confeſs leaſe, entry, and *ouſter*. *Vide Mod. Rep. vol.* 7. *p.* 39.

Trinity, 1 *Ann.* *Machil* v. *Clerk.*

See this caſe fully ſtated in page 435 of this work, under the head *Eſtates*.

Eaſter, 2 *Ann.* *Jacky* v. *Butler.*

Two joint-partners being in trade, a judgment was entered againſt *one* of them; and on a *fieri facias* iſſuing, all the goods, being undivided, were taken in execution. The partner, againſt whom the judgment was not entered, appealed to this court for relief; when it was held, that the ſheriff could not ſell more than a moiety; for the property of the other moiety was not affected by the judgment, nor by the execution. *Vide Raym. vol.* 2. *p.* 871.

Michaelmas, 3 *Ann.* *Clerk* v. *Withers.*

Holt, Chief Juſtice. Suppoſe a *tenant in tail* ſuffers a recovery, and dies, the iſſue may falſify this, though he ſhall not falſify the very point tried; but he ſhall ſay, that his anceſtor might have given ſuch and ſuch evidence in maintenance of his title, and omitted to do it; and if a *writ of entry* in the *poſt* be brought, and the iſſue is, whether *J. S.* died ſeiſed or not, and it is found againſt the *tenant in tail*, his iſſue after him ſhall not come and ſay, that he did not die ſeiſed; but he may come and ſay, that ſuch evidence might have been given in maintenance of the title. *Vide Mod. Rep. vol.* 6. *p.* 296.

Eaſter, 6 *Ann.* *Tuckerman* v. *Jefferies.*

A deviſe of all my eſtate to my *two* nieces, to be equally divided between them during their lives; and from and after their deceaſe, to the right heirs of *one* of them. The opinion of the court ſeemed to be, that this was a *joint-tenancy*, by reaſon of the danger of the contingent remainder, which otherwiſe muſt be loſt. *Adjourned.*

In *Trinity* term following, *Holt*, Chief Juſtice, delivered the opinion of the court, that this was a *joint-tenancy*, by reaſon of the contingent remainder. *Vide Mod. Rep. vol.* 11. *p.* 108.

Michaelmas, 7 *Ann.* *Lord Oſſulſton's Caſe.*

One *F.* being ſeiſed *in fee*, and having iſſue *three* ſons and a daughter, and having likewiſe *one* brother, deviſed his lands to his eldeſt ſon *in tail-male*, and ſo to the *ſecond* and *third* ſon, remainder to his own *right heirs male* for ever; the *three* ſons died without iſſue, and the queſtion was, whether the daughter, as *heir general*, or the brother of the teſtator, as *heir male*, ſhould have the lands?

Per curiam. None ſhall take by theſe words *heirs male*, but he who is *heir male of the body of the teſtator*, for no collateral heir male ſhall take by ſuch a limitation by way of *remainder*; for at *common law*, if land was given by a *common conveyance* to *one* and his *heirs male*, there the word *male* ſhall be rejected, for there was no ſuch thing as an *heir male*, without ſaying of whoſe *body*; and if by letters patent lands were limited to *W. R.* and his *heirs male*, it is void, though it is otherwiſe in a will; and the reaſon is, becauſe in a will the law ſupplies thoſe words, *of his body*, and that makes it a deviſe to him and *the heirs male of his body*, for *heirs* or *heir male* cannot be a name of *purchaſe*, but heirs males of his body may: therefore, if there is no ſuch thing in propriety of ſpeech as an *heir male*, without ſaying of *whoſe body*, for that reaſon heir male of his body, or heirs males of itſelf, where the law will ſupply theſe words, *of his body*, as it will in a deviſe, may be a good name of purchaſe; but yet the party who would take by ſuch a limitation muſt be ſuch a perſon as may be an heir by the *common law*, and would take by that name. *Vide Salk. vol.* 3. *p.* 336.

Hilary, 8 *Ann.* *The Queen* v. *Depuke.*

See this caſe fully ſtated in page 495 of this work, under the head *Forcible Entry*.

Hilary, 11 *Ann.* *Thornby* v. *Fleetwood, otherwiſe the Dutcheſs of Hamilton's Caſe.*

See this caſe fully ſtated in page 437 of this work, under the head *Eſtates*.

Waterman v. *Soper.*

It was ruled by *Holt*, Chief Juſtice, at the *Lent* aſſizes at *Wincheſter*, on a trial at *niſi prius* 1697-8, 1ſt, That if *A.* plants a tree on the extremeſt limits of his land, and the tree growing extends its root into the land of *B.* next adjoining, *A.* and *B.* are *tenants in common* of this tree; but if all the root grows in the land of *A.* though the boughs over-ſhadow the land of *B.* yet the branches follow the root, and the property of the whole is in *A.*

2dly, Two *tenants in common* of a tree, and one cuts down the whole tree; though the other cannot have an action for the tree, yet he may have an action for the ſpecial damage by this cutting; as where one *tenant in common* deſtroys a whole flight of pigeons, *&c.* *Vide Raym. vol.* 1. *p.* 737.

Anonymous.

The eſſential difference between *tenants in common* and *joint-tenants* is, that *tenants in common* hold their lands either by ſeveral titles, or ſeveral rights, but *joint-tenants* hold them by *one title*, and *one right*; but there is no difference between them as to the poſſeſſion, and the manner of taking the profits. *Vide Salk. vol.* 3. *p.* 208.

Anonymous.

Tenants in common were not compellable at *common law*, before the ſtatute, to make *partition*, no more than *joint-tenants*; and by *Holt*, Chief Juſtice, in ſuing out a *writ of Partition*, the party never ſhews whether he is a *tenant in common* or *joint-tenant*. *Vide Salk. vol.* 3. *p.* 208.

Michaelmas, 12 *Geo.* *The Duke of Somerſet* v. *France, and other Tenants in Cumberland.*

See this caſe fully ſtated in page 329 of this work, under the head *Cuſtom*.

Michaelmas, 9 *Geo.* 2. *The King* v. *Marrow.*

Adjudged, That one *joint-tenant* may indict the other for a forcible entry, and have his *writ of reſtitution*. *Vide Caſes Temp. Lord Hardw. p.* 174.

Michaelmas, 1 *Geo.* 3. *Goodtitle on the Demiſe of Bridges and others* v. *The Duke of Chandos.*

On a motion for a new trial on a verdict in *ejectment* for the plaintiff.

Lord *Mansfield*. It is now fully ſettled and eſtabliſhed, that a *tenant in tail* may, if he pleaſes, either turn his *eſtate tail* into a *fee*, or *alienate* it for his own benefit, by duly ſuffering a common recovery.

He muſt have a ſufficient eſtate and power, to qualify him to ſuffer ſuch recovery.

He muſt either be the *tenant in tail in poſſeſſion*, or he muſt have the concurrence of the freeholder, who claims under the ſame ſettlement.

This principle is adhered to by *ſtat.* 14 *Geo.* 2. *c.* 20.

The *tenant for life*, whoſe conſent is neceſſary to the *tenant in tail* in remainder, to enable him to cut off the entail, is not the leſſee of the land under a beneficial leaſe; but the original *tenant for life* claiming under the family ſettlement, and having a life eſtate ſettled on him *prior* (in order of ſucceſſion) to the other's remainder *in tail*. *Vide Bur. vol.* 2. *p.* 1072.

Michaelmas, 5 *Geo.* 3. *Swann* v. *Broome*.

Adjudged, That though common recoveries are now conſidered as common aſſurances, yet they muſt be conducted and compleated according to certain ceremonies and ſolemnities, which bear *analogy* to the proceedings in real actions; and the want of ſuch neceſſary ceremonies and ſolemnities invalidates a common recovery, as much as the want of a *third* witneſs invalidates a will of lands.

A judgment relates to the *eſſoign-day* of the term, unleſs any thing appears on the record to the contrary, ſhewing, "that the judgment cannot have that relation."

If a *tenant in tail* was alive when the judgment was given, or may be ſuppoſed to have been given, ſuch judgment is *good*; if not, then it is a *bad* judgment, becauſe given after the death of the *tenant in tail*. *Vide Bur. vol.* 3. *p.* 1596

Trial, &c.

Trinity, 3 *W.* & *M.* *Chew* v. *Briggs*.

A *trial* was had in *Middleſex* on a traverſe in *Surry*, and this was moved in arreſt of judgment; and *Holt*, Chief Juſtice, was of opinion to ſtay judgment, for that a wrong county is not remedied by the ſtatute, but only a wrong *venue* in a right county; the words of *ſtat.* 16 & 17 *Car.* 2. *cap.* 8. enact, "that no judgment after verdict ſhall be arreſted or reverſed, for that there was no right *venue*, ſo the cauſe be tried by a jury of the proper place or county where the action was laid. Theſe words are reſtrictive. *Dolbin* and *Gregory*, Juſtices, were of a different opinion.

Eyre, J. If it had been a *thing renewed*, I ſhould be of another opinion, but all reſolutions being otherwiſe, I accord. *Sid.* 325. 1 *Saund.* 247, 248. *Vide Mod. Rep. vol.* 12. *p.* 7.

Michaelmas, 3 *W.* & *M.* *The King* v. *Davis*

On an information for a riot a *trial* was had, and a verdict given for the defendant, and a *new trial* prayed for the King. And Sir *John Jackſon*'s caſe was cited; the court ſaid that was proved to be by fraud; and ſince that, in *Hale*'s time, a *new trial* had been granted, the verdict being obtained by fraud; but this verdict being only againſt evidence, but no fraud, a *new trial* was denied. A *new trial* was granted in the caſe of *The Queen* v. *Coke*, the acquittal being by ſurpriſe on the proſecutor for want of notice, it being brought on by the defendant. *Vide Mod. Rep. vol.* 12. *p.* 8.

Eaſter, 5 *W.* & *M.* *Anonymous*.

Adjudged, That a cauſe cannot be *tried* at *bar* where an action is laid in *London*, by reaſon of their charter. *Vide Salk. vol.* 2. *p.* 644.

Michaelmas, 7 *W.* 3. *Smith* v. *Brampſton*, *or Frampton*

In an action on the *caſe* for negligently keeping his fire, a verdict was found for the defendant. Though the verdict was againſt evidence, a *new trial* was denied, becauſe it is a hard action: yet *note*; in an action againſt the hundred for a *robbery*, a verdict was found for the defendant, and a *new trial* granted. 1 *Sid.* 58. *Vide Salk. vol.* 2. *p.* 664.

Hilary, 8 *W.* 3. *Derry*, *or Deerly*. v. *The Ducheſs Mazarine*.

See this caſe fully ſtated in page 205 of this work, under the head *Baron and Feme*.

Hilary, 8 *W.* 3. *Saliſbury* v. *Proctor*.

In an action brought by an adminiſtrator, the court was moved to put off the *trial* till a ſuit pending in the *ſpiritual court* concerning the right of adminiſtration was determined, which was denied by the court, becauſe they could not take notice of ſuits in the *eccleſiaſtical courts*. *Vide Salk. vol.* 2. *p.* 645.

Hilary, 8 *W.* 3. *Thermolin* v. *Cole*.

Adjudged, That if the defendant appears and makes defence, he ſhall never have a *new trial* for want of due notice. *Vide Salk. vol.* 2. *p.* 646.

Hilary, 8 *W.* 3. *The King* v. *Keite*.

Adjudged, That if a verdict is imperfect, no judgmen can be given; but a *venire facias de novo* ought to iſſue. *Vide Raym. vol.* 1. *p.* 141.

Eaſter, 8 *W.* 3. *Anonymous*.

Holt, C. J. The court never, or very rarely, grants *new trials* in actions for words. *Vide Salk. vol.* 2. *page* 644.

Michaelmas, 8 *W.* 3. *Smith* v. *Page*.

In *ejectment* the plaintiff was a mortgagee, and claimed by ſurrender, whereas the land was not copyhold; and the defendant claimed only by a voluntary conveyance. The verdict was for the plaintiff, and the court would not ſet it aſide, and granted a *new trial* againſt the merits of the cauſe. *Vide Salk. vol.* 2. *page* 644.

Michaelmas, 8 *W.* 3. *Hatchell* v. *Griffiths*.

Iſſue was joined in *Trinity* term 1695, and notice then given for *trial* the next *aſſizes*, but no farther nor other proceedings were had till *Trinity* vacation 1696, and then the plaintiff gave a *new notice* of *trial*, viz. *fourteen* days notice for next *aſſizes*, when he accordingly *tried* the cauſe, and had a verdict; but becauſe there was no proceedings within a year after the firſt notice, it was ſet aſide.

Note. Notice within the term had been a proceeding within the year, and made the notice for *fourteen* days good notice of *trial*. *Vide Salk. vol.* 2. *p.* 645.

Michaelmas, 8 *W.* 3. *Anonymous*.

A *new trial* was granted, becauſe the counſel were abſent, not thinking the cauſe would come on, and no defence was made; but a like motion was denied in this court by *Holt*, Chief Juſtice. Alſo in one *Coppin*'s caſe, a cauſe came on at *ſeven* in the morning, and an old witneſs could not riſe to be there time enough; but it was denied, unleſs he would make *affidavit* of what he knew, and would anſwer, ſo that the court might judge of it, and how it was material. *Vide Salk. vol.* 2. *p.* 645.

Michaelmas, 8 *W.* 3. *Dent* v. *The Hundred of Hertford*.

A *new trial* was granted, on *affidavit* that the foreman of the jury declared the plaintiff ſhould never have a verdict, whatever witneſſes he produced. *Vide Salk. vol.* 2. *p.* 645.

Michaelmas, 8 *W.* 3. *The King* v. *Burdett*.

A *new trial* was moved for on *affidavit*, that the jury took an act of common council out with them, and that printed libels were ſpread againſt the defendant; and it was denied: for as to the *firſt* it differs from Lady *Ive*'s caſe, where they took a map of one ſide, which was evidence on neither ſide: and ſo deemed an act of neither ſide, tho' evidence on both; but admitted to be irregular.

Holt, Chief Juſtice. If a jury eat at their own charge, it is fineable, but that verdict ſhall ſtand; otherwiſe if at the charge of one of the parties, and the verdict is found for him. *Vide Salk. vol.* 2. *p.* 645.

Eaſter, 9 *W*. 3. *The King* v. *Bear*.

On an indictment for a *libel*, the defendant was acquitted; the court was moved for a *new trial*, but it was denied: and the court ſaid, that antiently it was never done in *criminal* caſes where defendants had been acquitted; latterly, where a verdict has been obtained by fraud or practice, as ſtealing away witneſſes, *&c.* it has been done, but never yet was done merely on the reaſon that the verdict was againſt evidence. And afterwards in *Michaelmas* 10 *W*. 3. *Holt*, Chief Juſtice ſaid, in indictments for perjury we never do it, becauſe the verdict is againſt evidence; but if you prove a trick, as no notice, *&c.* it is otherwiſe. *Vide Salk. vol.* 2. *p.* 646.

Trinity, 9 *W*. 3. *The King* v. *Melling*.

The defendant was found guilty of perjury at a *trial* at *bar*, and now a motion was made for a *new trial*.

1ſt. Becauſe the verdict was againſt evidence.

2dly. Becauſe it was againſt the opinion of the jury who gave it.

The court held, that when a cauſe is *tried* at *bar* a *new writ* is never granted, for the ſingle reaſon, that the jury went againſt evidence. It is true, it was granted in my Lord *Fitzwalter*'s caſe, for there was a miſbehaviour in the jury in flinging dice to decide whether they ſhould find for the plaintiff or defendant, which would alter the *trial* by verdict of *twelve* to a *trial* by lot; ſo likewiſe for exceſſive damages for words, as for calling the plaintiff *traitor*, and the jury giving 500 *l.* damages. *Vide Mod. Rep. vol.* 5. *p.* 348.

Michaelmas, 9 *W*. 3. *Turbervil* v. *Stamp*.

Adjudged, That a perſon ſhall not move for a *new trial* after motion in arreſt of judgment; but after a motion for a *new trial*, he may move in arreſt of judgment. So it is of a *writ of inquiry*; after motion in arreſt of judgment, the defendant cannot move for a new writ. *Weſt* v. *Cole*, *Michaelmas*, 10 *W*. 3. The ſame point was held in the C. B. *Eaſter*, 8 *W*. 3. *Philips* v. *Crabb*. *Vide Salk. vol.* 2. *p.* 647.

Hilary, 10 *W*. 3. *Sparks* v. *Spicer*.

A perſon was ordered by the judge of *aſſize* to be hanged in chains; the officer hung him *in a private place*; the owner brought *treſpaſs*; and on *not guilty* pleaded, the jury found for the defendant; the court on motion would not grant a *new trial*, it being done for convenience of place, and not to affront the owner. *Vide Salk. vol.* 2. *p.* 648.

Eaſter, 10 *W*. 3. *Starr* v. *Wade*.

The leſſor brought *trover* againſt the leſſee, for trees cut down: yet becauſe the leſſee did it in trenching, and the plaintiff had thereby greater advantages, tho' the jury found for the defendant, yet the court would not grant a *new trial*. *Vide Salk. vol.* 2. *p.* 647.

Michaelmas, 10 *W*. 3. *Wits* v. *Polehampton*.

The court was moved for a *new trial*, becauſe the defendant having pleaded a compoſition, had forgot to carry down witneſſes to prove the ſubſcriber's hands; and the motion was denied, becauſe the debt was juſt.

Holt, Chief Juſtice, remembered where an action of *debt* on a bond was brought againſt an heir, who pleaded *riens per deſcent*, but the verdict went againſt him by omitting to bring the ſettlement to the *trial*; and the court being moved thereon, refuſed to grant a *new trial*, becauſe it was a juſt debt. *Vide Salk. vol.* 2. *p.* 647.

Michaelmas, 10 *W*. 3. *Anonymous*.

In an action of *covenant* to pay a certain ſum, *viz.* 100 *l.* and a grant that on default it ſhould be lawful for the covenantee to enter and take the profits; the defendant pleaded entry and *prizal del profits* in *bar*, and judgment was for the plaintiff on demurrer, and on the *writ of inquiry* the jury gave damages: and on motion a new *writ of inquiry* was awarded; for *debt* might have been brought on this covenant: and this is not like an iſſue where the jury are to give no more damages than are proved; but here the jury are to give the whole, unleſs the defendant proves ſomething in mitigation, which was not done in this caſe; therefore the common rule holds, *viz.* that no *new trial*, or new *writ of inquiry*, ſhall be for too ſmall damages, yet there being a contrivance in this caſe, it differs. *Vide Salk. vol.* 2. *p.* 647.

Michaelmas, 10 *W*. 3. *Anonymous*.

Per curiam. If in a caſe where the King's revenues or rights are concerned, though there be evidence *pro* and *con*, yet, if it be againſt the ſtrength of evidence, it is a fit ground for a *new trial*. *Vide Mod. Rep. vol.* 12. *page* 247.

Michaelmas, 10 *W*. 3. *Spaek* v. *Spicer*.

On *treſpaſs* brought againſt *ten*, *two* of them make *default*, and the reſt were acquitted by a verdict certified to be againſt evidence, and a *writ of inquiry* of damages againſt the *two* men was executed, and a *new trial* moved for, and denied.

Per curiam. Becauſe the plaintiff had damages againſt *two*.

Holt, Chief Juſtice, ſaid the jury ought not to be allowed to ſever the damages; and that in an action againſt *twelve*, and *two* of them make *default*, and the reſt acquitted againſt evidence; yet there ought to be no *new trial*, becauſe there were coſts once recovered. If *treſpaſs* be brought againſt *two*, and *one* of them makes *default*, and the other is found guilty, and damages be againſt him; and then the other comes in, and a declaration is againſt him, with a *ſimul cum*, and damages againſt him too, being found guilty, and the *two poſteas* are returned, here the plaintiff may chuſe the largeſt damages given, but then he ſhould have entered a *non pros* againſt theſe *two*; though even ſo, I durſt not warrant granting him a *new trial*. *Vide Mod. Rep. vol.* 12. *p.* 233.

Hilary, 11 *W*. 3. *Harper* v. *Davys*.

In *aſſumpſit* the plea was entered in *Eaſter* term, the *memorandum* was of a bill entered in *Hilary* term; on iſſue joined, it was tried at *niſi prius*, and the verdict was ſet aſide, and a *new trial* granted, and tried this term in *London*; and in the new *niſi prius* roll the *placita* was of this term; and that the party appeared and pleaded this term, and verdict thereon: and now judgment was arreſted, becauſe the iſſue on the *plea-roll* is of *Eaſter* term, and the *new trial* is but a continuance of the ſame cauſe; and ſo the record of *niſi prius* differs from the *plea-roll*: and ſo adjudged in the caſe of *Dubarteen* v. *Chancellor*. *Vide Mod. Rep. vol.* 12. *p.* 274.

Hilary, 11 *W*. 3. *Anonymous*.

Adjudged, That in *aſſumpſit* for money won at play, the *trial* ſhall not be ſtayed till an indictment pending for the cheat be *tried*. *Vide Salk. vol.* 2. *p.* 649.

Hilary, 11 *W*. 3. *Argent* v. *Sir Marmaduke Darrel*.

In *ejectment* after a *trial* at *bar*, the court was moved for a *new trial*, becauſe the verdict was contrary to evidence; the court thought ſo too.

Rokeby, Juſtice, was for granting it on the caſe in *Style*, but the reſt of the court were againſt it.

Holt, Chief Juſtice. The reaſon of granting *new trials* on verdicts againſt evidence at the *aſſizes* is, becauſe they are ſubordinate *trials* appointed by *ſtat. Weſt.* 2. c. 30.

c. 30. and there have been *new trials* antiently, as appears from this: that it is a good challenge to the juror, 'that he has been a juror before in the ſame cauſe; but we muſt not make ourſelve abſolue judges of *law* and *fact* too; and there never was a *new trial* after a *trial* at *bar* in *ejectment*, but in caſe of ill practice; for the plaintiff may bring a *new ejectment*: on this a *new trial* at *bar* was denied in Sir *Richard Temple*'s caſe, where the jury found a point of law on the ſtatute of bankrupts, againſt the opinion of the court. *Vide Salk. vol.* 2. *p.* 648.

Trinity, 11 *W.* 3. *The Caſe of Lord Sandwich.*

Adjudged, That where there is value or difficulty, the court is bound, of common right, to grant *trials* at the *bar*.

Holt, Chief Juſtice. It has been denied, where the plaintiff was poor, unleſs the defendant would agree to take *niſi prius* coſts.

Note. In *Trinity* 4 *Ann*, in this court, between the truſtees of my Lady *Sandwich* and my Lord *Sandwich*, though the eſtate was 3000 *l. per annum*, a *new trial* at *bar* was denied, becauſe the title of the leſſor of the plaintiff being from the defendant himſelf, there would be nothing to do but to prove the executing of a conveyance. *Vide Salk. vol.* 2. *p.* 648.

Hilary, 11 *W.* 3. *Bond* v. *Spark*, *Coleman and Hunt.*

On an action of *aſſault* and *battery*, iſſue was joined on *ſon aſſault demeſne*, *two* were acquitted, and *Spark* found guilty; and it was certified by the judge to be againſt evidence; a motion was made for a *new trial*; but the court ſaid a *new trial* could not be granted except againſt all; whereon the attorney for the defendants conſented for the *two* defendants, which were acquitted, that they ſhould undergo a *new trial*, and quit the coſts, which they might have from the plaintiff on their acquittal; and *Sparks* conſented to pay the plaintiff coſts; and ſo a *new trial* was granted for all. *Vide Mod. Rep. vol.* 12. *p.* 275.

Michaelmas, 11 *W.* 3. *The King* v. *Thompſon.*

The defendant being of good reputation, and riding in the King's guards, he was taken by the hundred for a *robbery* on the *fortieth* day, and it being feared that he ſhould be too violently proſecuted, that the hundred might diſcharge themſelves by his conviction, a *trial* at *bar* was moved for:

Holt, C. J. It has been cuſtomary to grant *trials* at *bar* in like caſes, but there being no bill found, he ſaid they could make no rule; but if there had been a bill, he ſaid then it might be removed by *certiorari*, *&c.* And he ſaid there was one way to ſhew a ſpecial commiſſion to find a bill, and even ſo there muſt be a proceſs, and *fifteen* days between its *teſte* and return, and the return to be on a common day; and he ſaid he knew one *Holt* an attorney who had narrowly eſcaped being hanged at *Cambridge aſſizes*, becauſe he was like one *Ambroſe Holland*, a highwayman. *Vide Mod. Rep. vol.* 12. *p.* 331.

Michaelmas, 11 *W.* 3. *Sherwin* v. *Sir Walter Clarges.*

See this caſe fully ſtated in page 391 of this work, under the head *Ejectment.*

Michaelmas, 11 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. In granting a *new trial*, we ought not altogether to rely on the certificate of the judge who tried the cauſe, but on the reaſon of the thing; and ſometimes I would grant a *new trial* againſt the certificate of a judge, if in my judgment and conſcience the matter deſerves a re-examination. *Vide Mod. Rep. vol.* 12. *p.* 336.

Michaelmas, 11 *W.* 3. *Richards* v. *Williams.*

See this caſe fully ſtated in page 446 of this work, under the head *Evidence.*

Michaelmas, 11 *W.* 3. *The King* v. *Hoſkins.*

See this caſe fully ſtated in page 526 of this work, under the head *Indictment.*

Michaelmas, 11 *W.* 3. *The King* v. *Kirk and Cage.*

On an indictment for *murder* the culprits fled, but afterwards returned and ſurrendered themſelves.

Hol, Chief Juſtice, ſaid, the *trial* ought to go on, not out of favour, but of right; for, by the law of the land, malefactors ought to be brought to puniſhment in convenient time for public example; and it is *five months* ſince the fact was committed, and it was almoſt in the face of the court; and ſure *five months* is convenient time: then, as to their flight, that ought not to be made an ingredient, for they incurred the penalty of the law for that already, *viz.* The forfeiture of goods and chattels in caſe of conviction. And as to the point of notice, the proſecutor ought to have been in court at the return of *non eſt inventus*, to take out a new proceſs, and to have notice of ſurrender; and the not doing whereof argues his *laches*: 3 *H.* 7. a ſtatute for ſpeedy *trying* of murderers, which is not in favour of offenders, but to bring them to juſtice; and there has been a neglect in the proſecutor even ſince notice given, for that was on the *tenth* inſt. and this is now the *twenty-fourth*: then it was moved they ſhould be bailed; and he ſaid, ſince *trial* is put off for default in them, there is no room for bail without ſome ſpecial cauſe; and he ordered it to be made a rule of court, that the witneſſes be bound over to appear againſt the priſoners the next term. *Vide Mod. Rep. vol.* 12. *p.* 304.

Michaelmas, 11 *W.* 3. *Child* v. *Harvey.*

The day of *niſi prius* was Monday *in one month of Eaſter*, and no ſuch day could be that year; wherefore the *trial* was ſet aſide. 2 *R.* 3. *Cr. El. Webly* v. *Morely*, 9 *Ed.* 4. *Vide Mod. Rep. vol.* 12. *p.* 306.

Hilary, 12 *W.* 3. *Anonymous.*

Per curiam. If there be evidence on both ſides, and a verdict againſt the ſtrength of evidence, if ſuch *trial* be not *peremptory*, there ought not to be a *new trial.* General cauſes of *new trials* are want of *due notice*: *practice* or *miſdemeanor* in the jury in either party, or their agents; the abſence of ſome material witneſs, which they could not then have; verdict againſt evidence, exceſſive damages, *&c.*

Note, In many caſes, on granting of a *new trial*, the former verdict ought to ſtand as a ſecurity, for otherwiſe the party, againſt whom it paſſed, might ſpirit away the evidence, on whoſe teſtimony it was obtained, and ſo without any corroboration of his right, deprive him of the benefit of his verdict. *Vide Mod. Rep. vol.* 12. *p.* 439.

Eaſter, 12. *W.* 3. *Anonymous.*

Per curiam. If a *new trial* be granted for irregularity, there ſhall be no coſts paid for it; but if a defence be made, it may help the irregularity. If a *new trial* be on the merits of the cauſe, there muſt be coſts. *Vide Mod. Rep. vol.* 12. *p.* 370.

Eaſter, 12 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. In a caſe between the Earl of *Peterborough* and *Sadler* his farmer, a *trial* being concerning the value of improvements made by *Sadler*, a jury of farmers having given 200 *l.* damages, which was thought exceſſive, and therefore a *new trial* was granted, and a jury of gentlemen ordered, who only gave 40 *l.* whereon a *new trial* now was moved for, for *Sadler*, becauſe of the ſmallneſs of the damages; and *Holt* ſaid, that one muſt not always conclude, becauſe the court grants a *new trial*, that they are ſatisfied that the firſt verdict was bad; but it is often becauſe the thing may require a re-examination: and a *new trial* was granted. *Vide Mod. Rep. vol.* 12. *p.* 347.

Hilary, 13 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. A *bill of exceptions* is no *ſuperſedeas* of a judgment; but the way is to bring a *writ of error*, and aſſign the exceptions for error. *Vide Mod. Rep. vol.* 12. *p.* 609.

Eaſter, 13 *W.* 3. *The King* v. *Ward.*

The defendant was indicted for *barretry*, in which caſe he ought to have a copy of the articles to be inſiſted on againſt him at *trial* before-hand, that he may have an opportunity of preparing a defence. And here a notice left with the defendant's ſervant was adjudged ill; and a *trial*, without due notice, ought not to ſtand. And when there is a rule to give a copy of articles, and that is not done, the proſecutor ought not to be admitted at the *trial* to give any evidence, and then the defendant is of courſe acquitted. *Vide Mod. Rep. vol.* 12. *p.* 516.

Michaelmas, 13 *W.* 3. *The King* v. *Young.*

Holt, Chief Juſtice. To try the defendant in this court there muſt be a *venire facias* returnable at the common day, and *fifteen days* between the *teſte* and return of it; and though the record of the *outlawry*, and all proceedings againſt him, be in this court, yet by *ſtat.* 6 *H.* 8. *c.* 6. we may ſend them down to the *Old Baily*; but we could not ſend them a record of an indictment before that ſtatute: and ſuch caſes have been ſometimes *tried* at *niſi prius*. And he quoted the caſe of one *Turner*, in Lord *Hales*'s time, who was brought hither from the *Old Baily* to reverſe an *outlawry*; and the court were clear for ſending him back, if the proſecutor had not deſired he ſhould be *tried* here. And in all caſes whatſoever, where the indictment happens to come hither, though it be not by a *certiorari*, we may in our diſcretion ſend it back: and ſo it was ruled here. *Vide Mod. Rep. vol.* 12. *p.* 562.

Michaelmas, 13 *W.* 3. *Anonymous.*

In an action for words a rule was, for the ſheriff to return a ſpecial jury; who, notwithſtanding the rule had been ſerved on him, returned only a common jury; after *trial*, this was moved by the defendant for a *new trial*, which was denied, becauſe he had made a defence; for ſince, if the verdict had gone for him, he would have had the advantage of it, it is fit he ſhould ſubmit to it now it is gone againſt him; *otherwiſe*, if he had not made a defence. *Vide Mod. Rep. vol.* 12. *p.* 567.

Michaelmas, 13 *W.* 3. *Watſon* v. *Sutton.*

In this caſe, which ſee fully ſtated in page 428 of this work, under the head *Eſcape*, it was adjudged, that no *new trial* ſhould be granted where there was full defence, except for matter diſcovered after the *trial*. *Vide Mod. Rep. vol.* 12. *p.* 584.

Anonymous

The *Attorney General* moved for a *new trial* at bar, on an *indictment for perjury*; but it was denied, becauſe the King is not intereſted in the indictment, otherwiſe than in *common juſtice*. *Vide Salk. vol.* 3. *p.* 362.

Ford v. *Tilly.*

An *inquiry* found *four* voluntary eſcapes, for which *Ford*, warden of the *Fleet*, forfeited his office: iſſues hereupon were *tried* in this court at bar. *One* eſcape was proved by a witneſs, who was aſked if he was never burnt in the hand for ſtealing a *tankard?* he anſwered, No. A *new trial* was moved for on producing the record of the conviction, and the court denied the motion, 1ſt, Becauſe it was a *trial at bar*. 2dly, It is no reaſon for a *new trial* that you for the defendant came not prepared; and the Chief Juſtice ſaid, *Soam*'s caſe was a hard caſe. 3 *Keb.* 365, 369. 2 *Lev.* 114. And afterwards, 4 *Ann.* in this court, *Cockcroft* v. *Smith.* That the party's evidence was not ready, was held no reaſon for a *new trial*, though at *niſi prius*; and a *new trial* was denied. *Vide Salk. vol.* 2. *p.* 853.

Anonymous.

In an action of *aſſumpſit* the iſſue was, married or not married, and the ſame point was pending and ready to be determined in the *ſpiritual court*: and it was held no cauſe to put off the *trial*, for the court cannot take notice of that. *Vide Salk. vol.* 2. *p.* 649.

Anonymous.

In an action of *covenant*, after a verdict for the plaintiff, the defendant moved for a *new trial*, ſuggeſting that he was an *alien*, and that the ſheriff had returned *twelve of the jury*, but that there was not an *alien* amongſt them.

Per curiam. The defendant ſhall never have a *trial per medietatem linguæ*, without prayer; and if it is granted, and the ſheriff returns none but *denizens*, the defendant ought to challenge them before the *trial*; and if the challenge is not allowed, then to inſiſt on a *bill of exceptions*; but the ſuggeſtion now made by this defendant is againſt the record; and if it is true, he may have an action againſt the ſheriff for a falſe return. *Vide Salk. vol.* 3. *p.* 362.

Hilary, 1 *Ann.* *Fenwick* v. *Lady Groſvenor.*

In *ejectment* after a *trial* at *bar*, a *new trial* was moved for, on *affidavits* that ſeveral witneſſes abſented themſelves in *Holland*, by reaſon of a report ſpread abroad there, that one of the defendant's witneſſes was confined by impriſonment; but it was denied, becauſe it did not appear that the plaintiff did ſpread it, or occaſioned the ſpreading of it: the court was diſſatisfied with the verdict, but cited *Croſs*'s caſe for a falſe return of a *mandamus* tried at *bar*, and by conſent of all ſides, *one* point was to be found ſpecially; yet the jury found a general verdict, and the court would not grant a *new trial*. It has never been done here but on iſſues out of Chancery, which being only to ſatisfy the conſcience of the Chancellor, are not *of ſtrict right*. So a *new trial* was denied. *Vide Salk. vol.* 2. *p.* 650.

Eaſter, 1 *Ann.* *Anonymous.*

Where a *trial* is had on a view, this court will not eaſily be induced to grant a *new one*: for the view is ſuppoſed to govern the jury more than the evidence at the *trial*; and therefore in ſuch caſes, there ought to be ſome great irregularity in the jury to obtain a *new trial*. *Vide Mod. Rep. vol.* 11. *p.* 1.

Eaſter, 1 *Ann.* *Anonymous.*

When a *trial* has been twice had on the ſame iſſue, and both verdicts agree, it would be unreaſonable to grant a *new trial*: but if a ſheriff returns a jury contrary to the rule of the court, or commits any ſuch irregularity to the prejudice of either party, it may be a good cauſe to ſet aſide the verdict, *&c.* but when no material cauſe can be ſhewn, this court will always have too great an eſteem for a verdict, to grant a *new trial*. And yet, when any unfortunate accident happens, or ſome ſudden impediment, as ſickneſs, *&c.* to a witneſs, and a *trial* is had, and a verdict is given for the plaintiff, which might have been given for the defendant had that witneſs been produced; in ſuch caſes this court will grant a *new trial*, on paying coſts of the former *trial*. *Vide Mod. Rep. vol.* 11. *p.* 1.

Eaſter, 1 *Ann.* *Turner* v. *Barnaby.*

Holt, Chief Juſtice. If *H.* would have a *trial* at *bar* in *Eaſter* term, he ought to move for it in *Hilary* term; if in *Michaelmas* term, he ought to move for it in *Trinity* term, except where lands lie in *Middleſex*; and antiently there was no other notice given of ſuch *trial*, but the rule in the office; but now there muſt be *fifteen* day's notice. *Vide Salk. vol.* 2. *p.* 1649.

Trinity,

Trinity, 1 Ann. Gay v. Craſs.

See this caſe fully ſtated in page 27 of this work, under the head *Actions*.

Michaelmas, 1 Anne. George v. Peirce.

In order to a *new trial*, an *affidavit* was read, that *one* of the witneſſes had declared that he had got a *guinea* to ſtifle the truth.

Gould, Juſtice. An *affidavit* of him who had the *guinea* were ſomething, but his ſaying ſo is nothing. A witneſs laying a wager in the cauſe is no hinderance to his being a witneſs, for the other has intereſt in his evidence which he cannot deprive him of. *Vide Mod. Rep. vol. 7. p. 31.*

Michaelmas, 1 Ann. Tomkins v. Hill.

It was agreed by the court, that if any judge of *niſi prius* allows or over-rules evidence, which he ought not to have done, on application to the court they will grant a *new trial*; for all writs of *niſi prius* are under the controul of the court out of which they iſſue. *Vide Mod. Rep. vol. 7. p. 64.*

Michaelmas, 1 Ann. Anonymous.

A *new trial* was denied after view, there being evidence on both ſides. *Vide Mod. Rep. vol. 7. p. 117.*

Michaelmas, 1 Ann. Anonymous.

Holt, Chief Juſtice. A *new trial* ſhall be granted if the judge of *niſi prius* miſdirect the jury, becauſe thoſe *trials* are ſubject to the inſpection of the court. *Vide Salk. vol. 2. p. 649.*

Michaelmas, 1 Ann. Clerk v. Udall.

On a *trial* at *niſi prius* the jury gave exceſſive damages, and for this cauſe a *new trial* was granted. The *ſecond* jury gave the ſame damages again, and a *ſecond new trial* was moved for, and denied, becauſe there ought to be an end of things; but ſeveral caſes were cited, which the Chief Juſtice allowed, that where on the *ſecond trial* the jury have doubled the damages, a *third trial* had been granted. *Vide Salk. vol. 2. p. 649.*

Michaelmas, 1 Ann. The Caſe of the Mayor and Aldermen of Briſtol.

It was held by the court, that a *new trial* cannot be granted in an inferior court; for they are not like *trials* by *niſi prius*, which are ſubordinate on writs iſſuing out of this court, over which the court have authority and inſpection; but this was a *new trial* after the *firſt*, which the court blamed. *Vide Salk. vol. 2. page 650.*

Michaelmas, 1 Ann. Hill v. Hill.

In an action brought in an *inferior court*, *viz.* in the court at *Briſtol*, the plaintiff had a verdict, and coſts were taxed; and after a *ſecond ſcire facias* againſt the bail, the judge of that court granted a *new trial*, and thereupon this court being moved, made a rule for the judge of the inferior court, to ſhew cauſe why an attachment ſhould not be granted againſt him.

Per curiam. Though a *new trial* ought to be allowed, if immediately obtained, yet it is a miſdemeanor in a judge to grant a *new trial* after the party has reſted ſo long under a former *trial*; and it may be a queſtion whether any court can grant a *new trial* to be had before themſelves; there cannot be a *new trial* at bar as there may at *niſi prius*; for in the laſt caſe it is but reaſonable, that the court ſhould judge how the judge of *niſi prius* has executed his authority. *Vide Salk. vol. 3. p. 363.*

Hilary, 2 Ann. Sir Samuel Aſtrey's Caſe.

See this caſe fully ſtated in page 751 of this work, under the head *Privilege*.

Michaelmas, 2 Ann. Warren v. Fuzz.

Per curiam. A *new trial* ought not to be granted for want of evidence, which the party might have had at the *trial*, and had not; but if it be proved that endeavours had been uſed, but prevented by ſome unforeſeen accident, as ſickneſs of the witneſs, *&c.* it may be a good cauſe for a *new trial*. *Vide Mod. Rep. vol. 6. p. 22.*

Michaelmas, 2 Ann. Aſhwin v. Corbill.

Adjudged, That if a cauſe has lain at iſſue *four terms* and no proceedings had, there muſt be a full term's notice of *trial*, excluding the term wherein iſſue was joined. *Vide Salk. vol. 2. p. 650.*

Michaelmas, 2 Ann. Lazier v. Dyer.

It came to be a queſtion, whether the ſuing out of a *venire* or *diſtringas* after the expiration of *four terms*, was a proceeding within the term; becauſe it bears *teſte* the laſt day of the term, and has relation to the term? And the court held it was not; for though it be legally a proceeding of the term, yet it is not ſo in fact.

Note. Where it is an iſſue out of *Chancery*, notice of *trial* to the ſolicitor in that court is good; for as to this, they are but as one court. *Vide Salk. vol. 2. page 651.*

Trinity, 3 Ann. Way v. Yally.

The leſſor brought an action of *debt* for rent againſt his leſſee, upon a demiſe at *London*, of lands in *Jamaica*. The defendant pleaded to the juriſdiction of the court, that the matter ought to be tried in *Jamaica*; and it was urged that the leſſor cannot bring an action of *debt* here againſt the aſſignee of a term of lands in *Ireland*, and that if entry and *ouſter* were pleaded, it could not be tried here; and in this caſe the right of the plaintiff and defendant depends on foreign laws which cannot be given in evidence here.

Per curiam. Where an action is *local*, it muſt be laid accordingly; therefore if the leſſor declares on the privity of eſtate, and that lies in *Ireland*, the action muſt be brought there, for the eſtate is local; therefore ſuch leſſor cannot maintain an action of *debt* here againſt an aſſignee of a term in *Ireland*; for the action is founded on a privity of eſtate; otherwiſe where it is founded on a privity of contract, which is tranſitory; as *debt* for rent by the leſſor againſt the leſſee; for that may be maintained where the land lies not. Here it is by the leſſor againſt the leſſee on the privity of contract; and if a foreign iſſue, which is local, ſhould happen, it may be tried where the action is laid; for that purpoſe there may be a ſuggeſtion entered on the roll, that ſuch a place in ſuch a county is next adjacent; and it may be tried here by a jury from that place, according to the laws of that country; and upon *nil debet* pleaded, you may give the laws of that country in evidence. *Vide Salk. vol. 2. p. 651.*

Michaelmas, 3 Ann. The Queen v. Sir J. Banks.

See this caſe fully ſtated in page 534 of this work, under the head *Indictment*.

Michaelmas, 3 Ann. The Queen v. The Inhabitants of the County of Wilts.

On debate on a motion for a *new trial*, where the iſſue was, whether the county of *Wilts* at large, or the town of *E.* within the county, were obliged to repair the bridge of *L* in that county; an order of ſeſſion, formerly made on the inhabitants of *L.* to repair it, being offered in evidence for the county at the former *trial*, and rejected for this reaſon, that the juſtices of the peace have no juriſdiction over *highways*, but on a preſentment, and none had been to warrant this order.

Per curiam. It is a good cauſe to grant a *new trial*, that the judge who *tried* the cauſe over-ruled good evidence, or admitted that which was no evidence; though the other party has a remedy by a *bill of exceptions.*

Holt, Chief Juſtice. If it be not obeyed, an attachment may go againſt the inhabitants of the whole county. *Vide Mod. Rep. vol.* 6. *p.* 307.

Trinity, 4 *Ann.* *Scawen* v. *Garrett.*

See this caſe fully ſtated in page 752 of this work, under the head *Privilege.*

Michaelmas, 4 *Ann.* *Highmore* v. *Walker.*

In a cauſe to be tried at the ſittings, the defendant entered a *ne recipiatur*; and the queſtion was, whether the plaintiff could go on at the next ſittings without a new notice? It was agreed, that if a *ne recipiatur* had been entered, there muſt have been *two days* notice. The clerks, on the principal queſtion, thought no notice neceſſary; their reaſon was, becauſe the defendant himſelf had hindered the plaintiff's proceeding, and therefore ought at his peril to attend the next ſittings.

Holt, Chief Juſtice, held, that the notice fell to the ground with the *trial*: on which a rule was made, that where a *ne recipiatur* was entered, the plaintiff ſhall give notice the ſame ſittings, and before they are over, that he will proceed to *trial* the next ſittings: and it was ſaid, that if a cauſe be not entered *two days* before the ſittings, the defendant may enter a *ne recipiatur.* *Vide Salk. vol.* 2. *p.* 653.

Eaſter, 5 *Ann.* *Dunkly* v. *Wade.*

In an action on the *caſe* for negligently keeping his *fire*, a verdict was found for the plaintiff, and a *new trial* granted.

Per curiam. Had a verdict been for the defendant, we would hardly have granted a *new trial*, becauſe it is a hard action. *Vide Salk. vol.* 2. *p.* 653.

Michaelmas, 5 *Ann.* *The Caſe of Sir Charles Berrington and others.*

In an action of *treſpaſs* and falſe impriſonment againſt ſeveral defendants, the plaintiff had a verdict; and afterwards the court was moved for a *new trial*, becauſe as to *one* of the defendants, the verdict was againſt evidence.

Per curiam. This cannot be done, for the court cannot ſet aſide the verdict as to ſome, and not as to others; and to grant a *new trial* as to all would be a prejudice to thoſe who are duly acquitted. *Vide Salk. vol.* 3. *p.* 362.

Michaelmas, 6 *Ann.* *Davis* v. *Daveril.*

On a motion for a *new trial*, on ſuggeſtion, that the defendant did arreſt and impriſon one of the plaintiff's witneſſes till the *trial* was over: it was adjudged to be a good cauſe for granting a *new trial.* *Vide Mod. Rep. vol.* 11. *p.* 141.

Hilary, 7 *Ann.* *Fowbert* v. *Ekins.*

In this cauſe the court was moved for a *new trial*, becauſe the *poſtea* was eaten by rats; but the court denied it, for there was part of it remained, and particularly the coſts and damages, written with the party's own hand. *Vide Mod. Rep. vol.* 11. *p.* 206.

Hilary, 12 *Ann.* *The Queen* v. *The Corporation of Helſton, in Cornwall.*

The queſtion in this caſe was, if on a *trial* a point of law be ſtarted by the judge, and the council do not take it up, but inſiſt on other facts, which are found againſt them; whereas, had the council inſiſted on the matter of law ſtirred by the judge, the verdict muſt have been given for them; whether this is a ſufficient cauſe to move for a *new trial?*

The whole court agreed that there could not be a *new trial* granted; and that though a verdict ſhould leave a party without remedy, yet if the council does not inſiſt, but expreſly waive it, that then there ought not to be a *new trial.* *Vide Mod. Rep. vol.* 10. *p.* 202.

Eaſter, 3 *Geo.* *The King* v. *Foley and Harley.*

On an information for taking 3 *s.* 4 *d.* for regiſtering a warrant of attorney, contrary to the *lottery act*, which ſays, it ſhall be entered without fee or reward; and all perſons offending ſhall be incapable to hold any place, *&c.*

The defendants moved, that they might have a *trial* at bar; for though the queſtion ſeemed very ſhort, *viz.* whether they took the fee or not, yet the conſequence was very conſiderable, the defendants being auditors for life, and that was a freehold of which they would be diveſted by a conviction on this information. *Eaſter*, 9 *Ann.* *The Queen* v. *Harcourt.* A *ſcire facias* to repeal letters patent, and there a *trial* at bar was had. *Sid.* 420.

Powis, *Eyre*, and *Pratt*, Juſtices, were for a *trial* at bar; but the Chief Juſtice ſaid, the defendants ought to pray a *trial at bar* in an iſſuable term. Accordingly a *trial at bar* was granted for the next term. *Vide Stra. vol.* 1. *p.* 52.

Hilary, 4 *Geo.* *Forſter* v. *Cale.*

See this caſe fully ſtated in page 114 of this work, under the head *Attorney.*

Michaelmas, 4 *Geo.* *The King* v. *Wiling*, *Judge of the Sheriff's Court of London.*

On a motion for a *mandamus* to compel the judge of the ſheriff's court of *London* to proceed to judgment there,

Adjudged, That the judge of an inferior court could not grant a *new trial*, nor ſet aſide a judgment regularly obtained, becauſe it was altering the law. *Vide Forteſcue*, *p.* 198.

Michaelmas, 5 *Geo.* *Brooke* v. *Ewers and Wife.*

See this caſe fully ſtated in page 632 of this work, under the head *Mandamus.*

Michaelmas, 6 *Geo.* *Brocas* v. *The City of London.*

Per curiam. It was ſettled in Sir *Peter Delme*'s caſe, and has always been the courſe of the court ſince, that when either party will ſuggeſt any ſpecial matter about awarding the *venire* out of the common courſe, a copy muſt be given to the oppoſite party, and they muſt have a reaſonable time to conſider it, before a *nient dedire* can be entered. *Vide Stra. vol.* 1. *p.* 235.

Hilary, 7 *Geo.* *Leeds* v. *Power.*

See this caſe fully ſtated in page 416 of this work, under the head *Error.*

Michaelmas, 8 *Geo.* *Preſton* v. *Lingen.*

In *ejectment*, on the demiſe of Lord *Coningſby*, the plaintiff moved on the common *affidavit* of value, for a *trial* at bar, which was oppoſed by the defendant on another *affidavit*, that they ſeverally held but ſmall parcels of land by different titles; and that this was putting it in the power of the plaintiff, by joining ſeveral together, to bring the owner of but 5*l.* *per ann.* to the bar.

Per curiam. There muſt be a *trial* at bar; for if the plaintiff makes but one title to the whole, he has a right to join them all together. *Vide Stra. vol.* 1. *p.* 479.

Michaelmas, 8 *Geo.* *King* v. *Walter*.

See this caſe fully ſtated in page 508 of this work, under the head *Habeas Corpus*.

Eaſter, 1722. *Anonymous*.

Ruled, That if the plaintiff would not enter his iſſue, or if it is entered, and he will not carry down the cauſe to *trial*, the defendant may by rule compel him to enter it, and if it is entered, the defendant may carry it down by *proviſo*; and that this is the ſtanding rule of the court; and in this caſe the court was moved, that the plaintiff's evidence depending on certain town-books in the cuſtody of the defendant, and that he having refuſed to give copies thereof, *&c.* that the plaintiff might not be compelled to proceed till the defendant gave him copies, but it was denied.

Holt, Chief Juſtice. The defendant is not bound to help the plaintiff to evidence againſt himſelf. *Vide Salk. vol.* 3. *p.* 363.

Michaelmas, 9 *Geo.* *Flemming* v. *Parker*, *or Langton*.

See this caſe fully ſtated in page 570 of this work, under the head *Inquiry*, *Inquiſition*, &c.

Eaſter, 10 *Geo.* *Sir Chriſtopher Muſgrave* v. *Nevinſon*.

See this caſe fully ſtated in page 296 of this work, under the head *Corporations*.

Trinity, 10 *Geo.* *The King* v. *Smart*.

See this caſe fully ſtated in page 459 of this work, under the head *Evidence*.

Trinity, 10 *Geo.* *The King* v. *Poard*.

The defendant was found guilty, as an acceſſary to the buying and receiving ſtolen goods; and now it was moved to ſet aſide the verdict, and for a *new trial*, becauſe the principal was ſince *tried* for the ſame fact, and acquitted, at the *Old Bailey*; and where the principal is not guilty, the acceſſary cannot be found guilty, eſpecially in this caſe, he being found guilty on the evidence of the principal.

But the court denied a *new trial*, becauſe no precedent could be produced, that it was ever granted in another term after the ſigning the judgment. *Vide Mod. Rep. vol.* 8. *p.* 264.

Michaelmas, 10 *Geo.* *Parker* v. *Thoroton*, *or Thornton*.

See this caſe fully ſtated in page 262 of this work, under the head *Challenge*.

Hilary, 12 *Geo.* *Price* v. *Brown*.

See this caſe fully ſtated in page 460 of this work, under the head *Evidence*.

Hilary, 12 *Geo.* *Chambers* v. *Robinſon*.

See this caſe fully ſtated in page 41 of this work, under the head *Actions*.

Eaſter, 12 *Geo.* *The Caſe of the Borough of Chriſt Church*.

On a motion for a *trial at bar*, which was conſented to on both ſides, it appeared that iſſue was not joined; and the court refuſed to grant it, ſaying, it was below the dignity of the court to do it, till they knew whether the iſſue joined would be a matter of difficulty or not. *Vide Stra. vol.* 1. *p.* 696.

Michaelmas, 12 *Geo.* *The King* v. *Johnſon*.

An information was exhibited by order of this court againſt the defendant for neglects and abuſes in his office of juſtice of the peace in relation to *deer-ſtealers*; and it was moved on behalf of the crown, on *affidavit* of the defendant's having 700*l.* *per annum*, and there being above *thirty* witneſſes for the proſecutor, that it might be tried at the *bar*; and on the authority of the caſes of *The Queen* v. *Wakefield*, and the caſe of Auditor *Harley*, the court granted a *trial at bar* in this caſe. *Vide Stra. vol.* 1. *p.* 644.

Michaelmas, 12 *Geo.* *Hale* v. *Cove*.

The jury having ſat up all night, agreed in the morning to put *two* papers into a hat, marked *P.* and *D.* and to draw lots. *P.* came out, and they found for the plaintiff, which happened to be according to the opinion of the judge.

On a motion for a *new trial*, it was agreed that the verdict muſt be ſet aſide; but the queſtion was, whether the defendant ſhould pay coſts? The court inclined to give the plaintiff coſts, comparing it to the caſe of a verdict againſt evidence; but at laſt it was agreed, that the coſts ſhould wait the event of a *new trial*. *Vide Stra. vol.* 1. *p.* 642.

Michaelmas, 12 *Geo.* *Snell* v. *Timbrell*.

See this caſe fully ſtated in page 599 of this work, under the head *Jurors*.

Eaſter, 13 *Geo.* *Buck* v. *Atwood*.

See this caſe fully ſtated in page 650 of this work, under the head *Maritime Affairs*.

Eaſter, 1 *Geo.* 2. *Wilkinſon* v. *Poole*.

The court made the defendant pay coſts for not going to *trial* by *proviſo*, according to notice. *Vide Stra. vol.* 1. *p.* 797.

Hilary, 2 *Geo.* 2. *The King* v. *Roger Johnſon*.

See this caſe fully ſtated in page 703 of this work, under the head *Outlawry*.

Hilary, 2 *Geo.* 2. *Anonymous*.

On a motion for a *new trial* on behalf of the defendant, he having made a miſtake on the *trial* of the iſſue, in a point of evidence, which would have encountered the evidence given againſt him; and the miſtake was diſcovered ſince the *trial*. But the court diſallowed the motion; for if a *new trial* ſhould be granted on ſuch a pretence as this, the defendant might lie by; and if, on the evidence given, a verdict ſhould be againſt him, he might bring a new point to ſet aſide the *trial*, which may happen in all caſes. *Vide Forteſcue*, *p.* 40.

Trinity, 2 *Geo.* 2. *Wyat* v. *Winkford*.

See this caſe fully ſtated in page 137 of this work, under the head *Attachment*.

Michaelmas, 2 *Geo.* 2. *The King* v. *Robert Hales*.

The council moved for a *trial at bar* on an information filed for *forgery*; but it not being carried on at the expence of the crown, but of a private proſecutor, the court held that he muſt make out the uſual requiſites to bring it to the *bar*. So the motion was denied. And at another day, the council moved on an authority from the King to proſecute, and it was granted as of right to the King in his own cauſe. And in *Hilary* term following it was tried, and the defendant was convicted. And in *Trinity* term following being called down to judgment, he produced a *pardon*, which was allowed; and being only for a miſdemeanor, he was not put to the *bar*, nor did he plead it on his knees. *Vide Stra. vol.* 1. *p.* 816.

Michaelmas, 3 Geo. 2. Caſtel, Widow, v. Bambridge and Corbet.

See this caſe fully ſtated in page 81 of this work, under the head *Appeal*.

Eaſter, 4 Geo. 2. Seymour, Bart. qui tam v. Day.

The action was brought for the penalty in killing a *hare*, not being qualified. And the jury found for the defendant, contrary to the direction of the judge. But the court refuſed a *new trial*, ſaying it had never been carried ſo far on a *penal action*. *Vide Stra. vol. 2. page* 899.

Trinity, 5 & 6 Geo. 2. The King v. Lowfield.

An indictment for *perjury* being removed by *certiorari*, the defendant made up the record, and carried it down to the ſittings with a *diſtringas*. and Mr. Attorney's warrant for a *tales*. There being a ſpecial jury, *eleven* only appeared; and the council for the proſecutor would not pray *tales*, though the warrant was given them, and the council for the defendant not praying one, the cauſe was made, *to remain for default of jurors*. And on motion for coſts, for not going on to *trial*, the court held the defendant ſhould pay none, he having done all that was neceſſary to put the proſecutor in a capacity to try the cauſe if he would. *Vide Stra. vol. 2. p.* 937.

Eaſter, 7 Geo. 2. The King v. Gibſon.

The defendant was convicted of *forgery*, and would have moved for a *new trial* without appearing in court, inſiſting that this differed from a motion in arreſt of judgment. But the court held there was no difference; for the verdict fixes ſuch a preſumption of guilt, that the court will be ſure of him before they intimate any opinion; and even when the verdict was brought in, would have committed him, had he ſtaid in court. And the Chief Juſtice mentioned the caſes of *The Queen v. Ridpath, Eaſter, 12 Ann.* and *The King v. Lant and Wombwell*, for perjury, where the diſtinction now taken was over-ruled. *Vide Stra. vol. 2. p.* 969.

Eaſter, 7 Geo. 2. King v. Poole.

On a motion for a *new trial* on an information in the nature of a *quo warranto* againſt the defendant to ſhew cauſe by what authority he acted as Mayor of *Liverpool*, for that the verdict was found on the matter of law againſt the direction of the Judge: the Judge at laſt ordered the jury to find it ſpecially, but they brought in a general verdict.

Reſolved by the court, that the certificate of the Judge reſpecting the matter of fact as it appeared before him at the *trial* is concluſive, nor can any *affidavit* be received againſt it, for that would be to try the matter again on *affidavit*. *Vide Caſes Temp. Lord Hardw. page* 23.

Trinity, 7 Geo. 2. The King v. Jeffs.

He was indicted for *barratry*; and after ſome ſtrong proof, the proſecutor could not go on for want of a copy of ſeveral proceſſes. Whereon it was inſiſted to withdraw a juror, as it was done in laſt term, on an indictment againſt the ſcavengers of St. *Giles*'s, for not paying money according to a juſtice's order; and the parties not being prepared, the King's council conſented to withdraw a juror.

Lord *Hardwicke* at firſt ſeemed inclined to it; but on conſideration held, that there was a difference between that caſe, which may be compared to caſes of a *civil* nature, and this, where the puniſhment may be infamous, as the pillory; and for that reaſon it has never been done in *perjury* or *forgery*. And therefore he refuſed it in this caſe. *Vide Stra. vol. 2. p.* 984.

Eaſter, 8 Geo. 2. Jennings v. Warne.

On a motion to ſet aſide a verdict, becauſe after the jurors were retired, one of them came out from the reſt and received a bundle of papers from the attorney for the plaintiff, and carried the ſame to the reſt of the jury.

Lord *Hardwicke*. This matter will depend on whether theſe papers were delivered to the jury by conſent of both parties, for if that appeared, it would prevent the parties alledging any thing againſt it; but as no ſuch conſent appears here, the verdict muſt be ſet aſide. *Vide Caſes Temp. Lord Hardw. p.* 116.

Trinity, 8 Geo. 2. Valentine v. Fawcett.

See this caſe fully ſtated in page 337 of this work, under the head *Damages*.

Michaelmas, 8 Geo. 2. The King v. Bell.

The court held, that all *new trials* were diſcretionary: though *Holt*, Chief Juſtice, entertained a notion of their being ancienter than the caſe in *Stile's*, from the challenge we meet with in old books, that the *juror* had before given a verdict in the ſame cauſe; yet it does not from thence follow, that the court granted a *new trial* on the evidence; for it might appear to be a *miſtake* on the record, or there might be other reaſons to award a *venire facias de novo*. *Vide Stra. vol. 2. p.* 995.

Trinity, 9 Geo. 2. Barker v. Sir Wolſon Dixie.

In a caſe for a malicious proſecution of an indictment for *felony*, the jury found for the plaintiff, and gave 5 *s.* damages; and on a motion for a *new trial*, on account of the ſmallneſs of damages, the court held, that there could be no *new trial* on that account, for this was not a falſe verdict, as finding for the defendant would be, and would ſubject them to an *attaint*; whereas, they having found rightly for the plaintiff, no attaint would lie: and *new trials* came in the room only of *attaints*, as a more expeditious and eaſy remedy. *Vide Stra. vol. 2. p.* 1051.

Michaelmas, 10 Geo. 2. Dobſon v. Taylor.

This cauſe was tried by *proviſoe*, and the plaintiff was *nonſuited*, but that nonſuit was ſet aſide for want of a rule being given in the office. And this was agreed to be the old practice, but generally diſcontinued. *Stiles's* and *Lilly's Regiſters* were cited, and the nonſuit ſet aſide. *Vide Stra. vol. 2. p.* 1055.

Michaelmas, 10 Geo. 2. Strut v. Hopkinſon.

See this caſe fully ſtated in page 423 of this work, under the head *Error*.

Hilary, 11 Geo. 2. French qui tam v. Wiltſhire.

After a verdict for the plaintiff for 500 *l.* penalty for keeping a *Pharo-table*, it was moved in arreſt of judgment, that the *venire* was addreſſed *to the body of the county*, whereas actions on *penal ſtatutes* are *excepted* in the act or amendment of the law, but the court held, that ſince the *jury-act*, 3 *Geo.* 2. *c.* 25. the ſheriff could return no other than the general panel, and therefore the *proviſoe* was virtually repealed: or, if not, yet *ſtat.* 5 *Geo. c.* 13. had cured this either as a defect in form or ſubſtance. And actions of *debt* are not within the *proviſoe* in the laſt mentioned act. *Vide Stra. vol. 2. p.* 1085.

Michaelmas, 11 Geo. 2. Hamilton v. Style, and Wilkes v. Eames.

On conſideration of the *jury act*, 3 *Geo.* 2. *c.* 25, *ſec.* 16, which ſays, that the party applying for a ſpecial jury ſhall be at the coſts of ſtriking the ſame; the court held, that if the verdict goes on that ſide which moved ed for the ſpecial jury, the extraordinary allowance to a ſpecial jury, and all the expences, except what attends the actual ſtriking, ſhould be taxed and allowed againſt the loſing party. *Vide Stra. vol.* 2. *p.* 1080.

Hilary, 12 *Geo.* 2. *Jones* v. *Harris*.

See this caſe fully ſtated in page 337 of this work, under the head *Damages*.

Trinity, 12 *Geo.* 2. *Heath* v. *Walker*.

On looking into the record there was no iſſue joined; for it was, *and the ſaid*, the defendant, inſtead of the plaintiff, *ſimiliter*; it was therefore objected, that the Chief Juſtice had no commiſſion to *try* any iſſue. And the doubt was, what to do, for the jury had been ſworn. And on adviſing with the bar, the Chief Juſtice diſmiſſed the jury, for he could not call the plaintiff, or ſuffer the defendant to take a verdict. *Vide Stra. vol.* 2. *p.* 1117.

Hilary, 12 *Geo.* 2. *Smith, on the Demiſe of Dormer*, v. *Parkhurſt and others*.

On a motion made for a *new trial*, three objections were made. 1ſt, That it was after a *trial* at bar; 2dly, That it was in the caſe of a ſpecial verdict; and, 3dly, That it was in *ejectment*.

As to the *firſt*, the court held, that in the caſe of a verdict againſt evidence, it being a *trial at bar*, was no objection to a *new trial*, which had been granted in the caſe of *Bewdly*, and in the caſe of *Sir Chriſtopher Muſgrave* v. *Nevinſon*, *Eaſter*, 10 *Geo.* 1.

As to the *ſecond* objection, they gave no opinion, it not being neceſſary to determine it on the rule they intended to pronounce in this caſe.

As to the *third* objection, they ſtrongly inclined, that the verdict not being final in *ejectment*, a *new trial* ought not to be granted, but on particular circumſtances, where juſtice is no otherwiſe to be attained. And they obſerved, that no caſe had been cited of a *new trial* in *ejectment* after a *trial at bar*.

But the point on which the *new trial* in this caſe was denied was, becauſe they ſaid the evidence was doubtful, and in ſuch a caſe a verdict *at bar* ought to ſtand. *Vide Stra. vol.* 2. *p.* 1105.

Michaelmas, 12 *Geo.* *The King* v. *Armſtrong*.

After a verdict *for the King*, in an information in nature of a *quo warranto*, the proſecutor gave the uſual *four-days* rule in the office, and ſigned an interlocutory judgment. But before the coſts were taxed, or any final judgment ſigned, the defendant came and moved for a *new trial*. And the court held he was too late; for though theſe motions may be received, even in another term, yet that is on a ſuſpicion that nothing has been done ſince the verdict; and ſo it was held, *Trinity*, 10 *Geo.* 1. *The King* v. *Pollard*, and *Michaelmas*, 9 *Geo.* 1. *Gilman* v. *Smith*, where, on the plea ſide, the *four-days* rule was out, the court held the defendant was not too late, there being no judgment ſigned, and that ſigning judgment was the material act. *Vide Stra. vol.* 2. *p.* 1102.

Michaelmas, 14 *Geo.* 2. *Aſhley* v. *Aſhley*.

The judge who tried the cauſe (which was on a promiſſory note for 5000 *l.* which the defendant inſiſted was forged) certified, that the weight of the evidence was with the plaintiff, and he thought the jury would find for the plaintiff; but they found for the defendant.

Per curiam. As there was evidence on the part of the defendant, the jury are the proper judges which ſcale preponderates, it cannot be ſaid to be a verdict againſt evidence, and therefore we will grant no *new trial*. *Vide Stra. vol.* 2. *p.* 1142.

Michaelmas, 19 *Geo.* 2. *Mattiſon qui tam* v. *Allanſon*.

An action was brought on the late ſtatute againſt *horſe-racing* for the penalty, and the jury found a verdict for the defendant, contrary to plain evidence; and the court denied a *new trial*, there being no proof of any miſbehaviour in the plaintiff, or tampering with the jury. And this was within the reaſon of caſes in the *Exchequer*, where verdicts for defendants are never ſet aſide for penalties in the caſe of duties; and this is excepted out of the ſtatute of *jeofails* as much as *indictments*. *Vide Stra. vol.* 2. *p.* 1238.

Eaſter, 30 *Geo.* 2. *Peirſe, Eſq.* v. *Lord Fauconbery*.

This was a *trial at bar*, on the *civil ſide of the court*, by a ſpecial jury of the county of *York*.

The queſtion was concerning a right to tract or tow veſſels, on the banks of the river *Tees*, (which divides *Yorkſhire* from the county Palatine of *Durham*) from *Yarum* bridge up to *Low Warſall*.

There had been a former iſſue tried, "whether the "river *Tees* was *navigable* from *Yarum* bridge to *Low* "*Warſall*:" which iſſue had been found in the affirmative.

The preſent *trial* was a *new trial*, directed by the court of *Chancery*, on an iſſue, "whether the plaintiff "had a right to a track-path on each ſide of the river "alternatively, according to the courſe of its banks, "for the convenience of towing, without let or hin"drance from, or paying any acknowledgement to the "reſpective owners of the ſoil."

The *trial* laſted till about *two o'clock* on *Sunday* morning; at which time the jury (after ſtaying out about a quarter of an hour) brought in a verdict for the plaintiff. *Vide Bur. vol.* 1. *p.* 292.

Eaſter, 30 *Geo.* 2. *Henry Earl of Carliſle* v. *Armſtrong and others*.

This was a *trial at bar* on the *civil ſide* of the court.

Three queſtions were to be hereby tried;

1ſt. Whether, on the death or alienation of the tenants of the barony of *Gilleſland* in the county of *Cumberland*, a reaſonable arbitrary fine at the will of the lord, be payable to the lord or not?

2dly. Whether the tenants have liberty to let for *three years*, or mortgage, without licence of the lord, and without paying any fine at all?

3dly. Whether they had liberty to exchange, *&c.* without licence or fine?

The defendant's council waived the *ſecond queſtion*, and about *ſix o'clock* in the afternoon this *trial* ended in a verdict for the plaintiff, on all *trover* iſſues. *Vide Bur. vol.* 1. *p.* 333.

Hilary, 31 *Geo.* 2. *The King* v. *Martha Gray*.

The defendant ſtood indicted for a *nuiſance* in ſtopping up a foot-way leading through *Richmond Park*.

The preſent queſtion before the court was, whether the *trial* (for which notice had been regularly given by the proſecutors "to *try* it at the next *Surry aſſizes*") ſhould be put off or not?

The cauſe alledged for putting it off by the defendant's council was, that there had been a *libel* publiſhed relative to the queſtion in iſſue, with intention to influence the public, and the jury who ſhould try the cauſe.

Lord *Mansfield*, (who delivered the opinion of the court) ſaid, that the *trial* of theſe informations for publiſhing the libel, was not ſo connected with the merits of the queſtion to be tried on the indictment, (which was a mere queſtion of *civil right*, though in the form of a *criminal* proſecution) as that the *trial* of the *civil right* ought to be ſtayed till the determination of the information againſt theſe publiſhers of the libel. Therefore the court diſcharged the rule made thereon. *Vide Bur vol.* 1. *p.* 510.

Trinity, 32 & 33 *Geo.* 2. *The King* v. *Cowle*.

Adjudged, That where this court has juriſdiction of a matter, if from any cauſe, it cannot be *tried* in the place, it ſhall be *tried* as near as may be. All *local* matters ariſing in *Wales*, *triable* in this court, are, by the *common law*, *tried* by a jury of the next county in *England*. So as to the *Cinque Ports*, the *venire facias* ſhall be awarded of the neighbourhood of the next *vill*, either in the county of *Kent* or the county of *Suſſex*. So it is alſo as to the *Iſle of Ely*: ſo likewiſe as to *Ireland*; a *venire* was directed to the ſheriff of *Salop*, as the next *Engliſh* county. So in parts of *England* itſelf, where an impartial *trial* cannot be had in the proper county, it ſhall be *tried* in the next county. This is the antient and general rule of this court in matters of *trial*, where they have juriſdiction. *Vide Bur. vol.* 2. *p.* 859.

Trinity, 2 *Geo.* 3. *The King* v. *Harris and others.*

On a motion for a *new trial* grounded on an *affidavit* to the purport following a rule to ſhew cauſe was obtained.

Purport of the affidavit, "that they *verily believed* that "there could not be a fair and impartial *trial* had by "a jury of the city of *Glouceſter*;" without giving any particular reaſon or grounds for entertaining ſuch a belief.

After hearing the arguments of the council on both ſides on ſhewing cauſe, the court delivered their opinion.

Lord *Mansfield*. No two things can be more different than changing the *venue*, and continuing it, as it were, with ſuch a ſuggeſtion on the roll as is now propoſed. Notwithſtanding the locality of ſome ſort of actions or of informations for miſdemeanors, if the matter cannot be *tried* at all, or cannot be fairly and impartially *tried* in the proper county, it ſhall be *tried* in the next adjoining county.

Now, in the preſent caſe, this general ſwearing to *apprehenſion and belief only*, is not a *ſufficient ground* for entering ſuch a ſuggeſtion, eſpecially as it is ſworn on "the other ſide, that there is a liſt returned up, con-"ſiſting of above *ſix hundred perſons* qualified to ſerve:" and therefore there is no reaſon for the court's granting what is now prayed.

Deniſon, *Foſter*, and *Wilmot*, Juſtices, gave their opinions at large, and concurred with the Chief Juſtice.

Per curiam. Let the rule be diſcharged. *Vide Bur. vol.* 3. *p.* 1330.

Trinity, 4 *Geo.* 3. *Grant* v. *Vaughan.*

See this caſe fully ſtated in page 240 of this work, under the head *Bills of Exchange*.

Trover.

Michaelmas, 2 *W.* & *M.* *Hook* v. *Galloway.*

In an action of *trover* for *ten weights*.

Per curiam. In *trover*, if the jury can underſtand it, it will be well enough, for damages only are to be recovered therein; but *in detinue*, where the thing itſelf is to be recovered, it is otherwiſe. *Vide Mod. Rep. vol.* 12. *p.* 3.

Hilary, 3 *W.* & *M.* 3. *Benbridge* v. *Day.*

In *trover* for ſeveral things, and amongſt the reſt *pro duobus falcris*; and on a demurrer to the declaration, for that *falcris* was an inſenſible word,

Holt, Chief Juſtice, would not abate the declaration: becauſe he ſaid that the plaintiff might take ſeveral damages as to the other things, and might releaſe them as to this word, and ſo take judgment for the reſt. *Vide Salk. vol.* 2. *p.* 366.

Michaelmas, 4 *W.* & *M.* *Cook* v. *Boſinger.*

In an action of *trover* the plaintiff declared, that he was poſſeſſed *of the goods and chattels following, as of the goods and chattels his property, to wit, one writing obligatory, and one warrant*, &c.

The defendant pleaded in abatement that the bond and warrant were not chattels; and upon a demurrer to this plea it was ſaid, that neither the bond or the value thereof can be demanded by ſuch names *as goods and chattels*, becauſe (as the opinion is in *Yelverton*) a bond will not paſs by ſuch general names.

In *detinue* the thing itſelf muſt be ſpecially named, becauſe it is to be recovered in money: the ſame reaſon may govern this caſe.

But it was anſwered, that by a gift of all his goods and chattels a bond would paſs; and this was the opinion of *Fitzherbert* in the caſe of *Dyer*, and to this opinion the court now inclined. *Vide Mod. Rep. vol.* 4. *p.* 156.

Eaſter, 6 *W.* & *M.* *Anonymous*

A. purchaſed the intereſt of a leaſe for years, and the writings were left in the hands of *B.* an attorney, to draw an aſſignment of it; *B.* drew it, and it was ſealed, but refuſed to deliver it, until *A.* had paid for it; on which *A.* brought an action of *trover* for the deed.

Holt, Chief Juſtice, ruled, that the action well lay; becauſe *B.* might have had an action for as much as he deſerved, but could not detain for it. *Vide Raym. vol.* 1. *p.* 738.

Trinity, 7 *W.* 3. *Dolſton* v. *Tyſon, or Janſon.*

See this caſe fully ſtated in page 581 of this work, under the head *Joinder in Action*.

Eaſter, 8 *W.* 3. *Roberts* v. *Witherall, or Withered.*

By the act of navigation, *viz. ſtat.* 12 *Car.* 2. *c.* 18. certain goods are prohibited to be imported here under pain of forfeiting them, one part to the King, another to him or them that will inform, ſeize, or ſue for the ſame; and it was *adjudged* in this caſe, that the ſubject may bring *detinue* for ſuch goods, and the Lord may replevy for the goods of his villein diſtrained; for the bringing the action veſts a property in the plaintiff. *Vide Salk. vol.* 1. *p.* 223. *Mod. Rep. vol.* 5. *p.* 191.

Michaelmas, 8 *W.* 3. *Fuller* v. *Smith.* Error.

On a writ of *error* in this court on a judgment in *C. B.* in *trover* againſt *ten*, wherein the plaintiff declares of finding by *ten*, and a converſion by *nine*, and judgment againſt all *ten*.

Per curiam. The converſion is the *giſt* of the action; for if a man find goods, it is lawful for him to take them, wherefore it muſt be certainly *error*; but if you get it amended in the *Common Pleas*, we will get it amended here. *Vide Mod. Rep. vol.* 12. *p.* 101.

Michaelmas, 10 *W.* 3. *Hartford* v. *Jones.*

In an action of *trover* and *converſion* the defendant pleaded, that the goods were caſt away, and they ſaved and detained them till they were paid for their trouble. The plaintiff demurred.

Holt, Chief Juſtice, held, that they might retain for payment, as a carrier for his hire; and *ſalvage* is allowed by all nations: he that ſerves another, ought in reaſon to be paid for his ſervice; but the plea is naught; for if the detainer be lawful, he does not confeſs a *converſion*: I never knew but *one ſpecial plea* good in *trover*, *Yelv.* 198. And the rule was in the principal caſe, to waive the plea, and plead *not guilty*. 2 *Cro.* 68, 69. 3 *Cro.* 262. *Vide Raym. vol.* 1. *page* 393.

Michaelmas, 11 *W.* 3. *Anonymous.*

Caſe. A captain contracted with ſeamen to go on a voyage, and after he had got them on board, he would not pay them according to agreement; on which they demanded their goods, which he refuſed to deliver up;

and *Holt*, Chief Juſtice, held this a good evidence of *converſion*.

Holt, Chief Juſtice. In *trover*, the plaintiff ought to prove the property of goods in him, and at leaſt a demand and refuſal; and if there be ſeveral parcels, the uſual way to give evidence is, to make an inventory of them, and prove the property of the goods mentioned in it, and a demand and refuſal of them. *Vide Mod. Rep. vol.* 12. *p.* 344.

Michaelmas, 11 *W*. 3. *Anonymous*.

In an action of *trover* the caſe was this: The King's orders were iſſued, on diſbanding of the army, that each trooper ſhould retain his horſe; and this was an action againſt a captain, who in breach of the ſaid order had taken the trooper's horſe; and the court held, that *trover* lay for the trooper in this caſe; for though, before, the property was in the King, yet by the order it was veſted in the trooper, he having the poſſeſſion at that time. *Vide Mod. Rep. vol.* 12. *p.* 311.

Summer Aſſizes, 12 *W*. 3. *The King* v. *Woodward*.

It was ruled by *Holt*, Chief Juſtice, that if the ſheriff, on an extent for the King againſt *A*. ſeizes the goods of *B*. *B*. cannot have an action of *trover* againſt the ſheriff. *Vide Raym. vol.* 1. *p.* 736.

Eaſter, 1 *Ann*. *Lumly* v. *Quarry*, *Judge of the Admiralty of Penſilvania*.

In an action of *trover* and *converſion* for a ſhip, the action was laid in *London*, and being removed by *habeas corpus* to this court, the queſtion was, whether there ſhould be bail as this caſe ſtood.

Holt, Chief Juſtice. Though this action is brought here by *habeas corpus*, yet this court may enquire into the cauſe of action; and if they ſee occaſion, order ſpecial bail: for otherwiſe the inferior courts might be made uſe of to oppreſs people, by laying great actions on them there; and in this caſe, if the defendant has acted as judge, and the matter was within his cognizance, his ſentence, whether right or wrong, binds till it be reverſed; and if it were in the *Admiralty* of *France* it would be ſo, and the only remedy in ſuch caſe is to appeal. *Vide Mod. Rep. vol.* 7. *p.* 9.

Michaelmas, 1 *Ann*. *Marsfield*, *or Blainfield*, v. *Marſh*.

See this caſe fully ſtated in page 349 of this work, under the head *Declaration*.

Michaelmas, 2 *Ann*. *The Queen* v. *Browne*.

He was indicted at *Hull* for forging a cocket for *five* packs of linen cloth; and this was removed up by *certiorari*, and after trial a motion was made in arreſt of judgment, for that it was too uncertain; but it was urged, that much ſtronger caſes than this had been adjudged good in 2 *Lev*. 125.

Holt, Chief Juſtice. *Detinue* lies for a box of writings, and if any of them concern lands, it will be neceſſary to name it, for that ſhall ouſt the defendant of his wager of law; but it ſuffices that the things which it contains be certain enough; and if any new action be brought, the defendant ſhall ſay, That a former action was brought for the ſame, by the name of ſo many bundles, *&c.* and the Queen had judgment. *Vide Mod. Rep. vol.* 6. *p.* 87.

Trinity, 3 *Ann*. *Baldwin* v. *Cole*.

In an action of *trover* before *Holt*, Chief Juſtice, on evidence the caſe was this: A carpenter ſent his ſervant to work for hire to the Queen's yard, and having been there ſome time, when he would go no more, the ſurveyor of the works would not let him have his tools, pretending a uſage to detain tools to enforce workmen to continue till the Queen's work was done; and a demand and refuſal being proved at one time, and a tender and refuſal after:

Holt, Chief Juſtice. The very denial of goods to him that has a right to demand them, is an actual *converſion*, and not only evidence of it, as has been held; for what is a *converſion*, but an aſſuming on one's ſelf the property and right of diſpoſing another's goods? And he that takes on himſelf to detain another man's goods from him without cauſe, takes on himſelf the right of diſpoſing of them; ſo the taking and carrying away another man's goods, is a *converſion*: ſo if one comes into my cloſe, and takes my horſe and rides him, there it is *converſion*. And here, if the plaintiff had received them on the tender, the action would notwithſtanding have lain on the former *converſion*, and the having of the goods after would go only in mitigation of the damages; and he made no account of the pretended uſe, but compared it to the doctrine among the army, That if a man came into the ſervice, and brought his own horſe, that the property thereof was immediately altered, and veſted in the Queen, which he had already condemned: and here one of the particulars in the declaration being ill laid, the defendant was found not guilty as to that, and guilty as to the reſt. *Vide Mod. Rep. vol.* 6. *p.* 212.

Michaelmas, 4 *Ann*. *Lamine* v. *Dorrell*.

Holt, Chief Juſtice. If an action of *trover* ſhould be brought by the plaintiff for debentures after a judgment in an action on the *caſe* on an *indebitatus aſſumpſit*, the defendant may plead the plaintiff's recovery on ſuch action on the caſe in *bar* of the plaintiff's action of *trover*, in the ſame manner, as it would have been a good plea in *bar* for the defendant to have pleaded to the action of *trover*, that he ſold the debentures, and paid to the plaintiff in ſatisfaction; but it may be a doubt if this recovery can be pleaded before examination. This recovery may be given in evidence on *not guilty* in the action of *trover*, becauſe by this action the plaintiff makes and affirms the act of the defendant in the ſale of the debentures to be lawful, and conſequently the ſale of them is no converſion. *Vide Raym. vol.* 2. *p.* 1217.

Trinity, 3 *Geo*. *Croſſier* v. *Ogleby*.

On *trover* brought by an adminiſtrator for rum taken and converted in the inteſtate's life. On evidence it appeared, that the rum was taken in the inteſtate's life, but not uſed till after his death. And the queſtion was, whether this evidence of not uſing it till the adminiſtrator's time would not overthrow the declaration of a converſion in the inteſtate's life.

Per curiam. The time of uſing the rum lay in the breaſt of the defendant, who ought to have diſcloſed the matter by his plea; and taking it in the life of the inteſtate, and keeping it till his death, is *trover* and *converſion* ſufficient to maintain this declaration. Wherefore the plaintiff had judgment. *Vide Stra. vol.* 1. *p.* 60.

Michaelmas, 5 *Geo*. *Buſhel* v. *Miller*.

On the cuſtom-houſe key there is a *hut*, where particular porters put in ſmall parcels of goods, if the ſhip is not ready to receive them when they are brought on the key. The porters who have a right in this hut, have particular boxes or cupboards, and as ſuch the defendant had one. The plaintiff being one of the porters, put in goods belonging to *A*. and lays them ſo that the defendant could not get to his cheſt without removing ſuch goods. He accordingly removes them about a yard from the place where they lay, towards the door, and without returning them into their place goes away, and the goods are loſt. The plaintiff ſatisfies *A*. of the value of the goods, and brings *trover* againſt the defendant. And, on the trial, *two* points were ruled by the Chief Juſtice:

1ſt. That the plaintiff having made ſatisfaction to *A*. for the goods, had thereby acquired a ſufficient property in them to maintain *trover*.

2dly. That here was no converſion in the defendant. The plaintiff, by laying his goods where they obſtructed ed the defendant from going to his cheſt, was in that reſpect a *wrong-doer*. The defendant had a right to remove the goods, ſo that thus far he was in no fault. Then as to the not returning the goods to the place where he found them, if this was an action of *treſpaſs*, perhaps it might be a doubt; but he was clear it could not amount to a converſion. *Vide Stra. vol.* 1. *p.* 128

Hilary, 5 *Geo.* *Anonymous.*

In *trover* for money, the court gave leave to bring the whole money declared for into court. But ſaid they could do it only in this caſe, and not in *trover* for goods. *Vide Stra. vol.* 1. *p.* 142.

Hilary, 8 *Geo.* *Mead* v. *Hamond.*

The plaintiff, according to the common courſe of dealing, delivered to the defendant's ſervant an ingot of gold to aſſay; and it not being returned, he brought *trover* againſt the maſter. And the Chief Juſtice directed the jury, that the delivery to the ſervant was ſufficient to maintain the action againſt the maſter, on proving a ſubſequent demand and refuſal; ſo the plaintiff had a verdict. *Vide Stra. vol.* 1. *p.* 505.

Trinity, 9 *Geo.* *Huxſer* v. *Gapan.*

See this caſe fully ſtated in page 335 of this work, under the head *Damages*.

Michaelmas, 10 *Geo.* *Richardſon* v. *Atkinſon.*

It was held by *Eyre* and *Forteſcue*, Juſtices, that the drawing out part of a veſſel, and filling it up with water, was a converſion of all the liquor, and the jury gave damages as to the whole. *Vide Stra. vol.* 1. *p.* 576.

Michaelmas, 12 *Geo.* *Stone* v. *Lingwood.*

The plaintiff was captain of a ſhip, and the defendant owner: the plaintiff brought over a ſmall parcel of *elephants teeth* on his own account, and a large parcel for the defendant, who entered the whole at the cuſtom-houſe, paid the duty, and had the whole delivered out to him; and not re-delivering to the captain his parcel, an action of *trover* was brought. And it was inſiſted for the defendant, that the plaintiff ſhould ſhew a tender of the duty, otherwiſe the goods were in the nature of a pledge, and he was not bound to deliver them: but the Chief Juſtice ſaid that would not juſtify the defendant in keeping them, for he had his action for the money; and if he would ſhew what the duty came to, it might be deducted in damages: which was done accordingly. *Vide Stra. vol.* 1. *p.* 651.

Hilary, 13 *Geo.* *Radley* v. *Rudge.*

On a motion in arreſt of judgment, it was held well enough in *trover* to declare *for a piece of tepee*, without ſaying how many yards it contained. *Vide Stra. vol.* 2. *p.* 738.

Hilary, 2 *Geo.* 2. *White* v. *Graham.* Error.

In *error* on a judgment in the *C. B.* in *trover* for a parcel of diamonds. The plaintiff in error's council would have diſtinguiſhed this from the caſe of *Bottomley* v. *Harriſon*, which was *trover* for a parcel of packclothes, wrappers, and cords, becauſe that was taken as a bundle of ſeveral things not eaſily to be ſeparated, whereas each diamond was diſtinct; and it ought to have been brought for ſo many diamonds. But the court thought there was no difference, and affirmed the judgment. And afterwards on error in parliament, it was likewiſe affirmed *ex parte*, the plaintiff in error's council declining to anſwer it. *Vide Stra. vol.* 2. *page* 829.

Trinity, 2 *Geo.* 2. *Bottomley* v. *Harriſon.*

See this caſe fully ſtated in page 355 of this work, under the head *Declaration*.

Michaelmas, 8 *Geo.* 2. *Ruſh and others, Aſſignees of Ryland*, v. *Baker.*

The defendant was plaintiff in an action againſt *Ryland*, and took his goods in execution after an act of bankruptcy committed, but went on and received his money. And now *trover* being brought by the aſſignees, and a verdict in their favour, it was held on a motion for a new trial, that the action was well brought againſt the defendant, who received the money, without joining the officer. *Vide Stra. vol.* 2. *p.* 996.

Trinity, 10 *Geo.* 2. *Adams* v. *Broughton.*

The plaintiff recovered in *trover* againſt the captain, for yarn conſigned to him. The captain obtaining an injunction, on ſhewing the goods were delivered to the defendant; the plaintiff brought an action againſt him, and held him to bail. And the court diſcharged him on common bail; for by the former recovery the property veſted in the captain, the plaintiff having damages in lieu thereof, and therefore in this action he could not ſay the goods were his. *Vide Stra. vol.* 2. *p.* 1078.

Michaelmas, 30 *Geo.* 2. *Cooper and other Aſſignees of William Johns, a Bankrupt*, v. *Chitty and Blackiſton, Sheriffs of London.*

See this caſe fully ſtated in page 199 of this work, under the head *Bankrupts*.

Adjudged, That, in an action of *trover*, *two* things are neceſſary to be proved, to entitle the plaintiff to recover, 1ſt, *Property* in the plaintiff; and, 2dly, A wrongful *converſion* by the defendant. *Vide Bur. vol.* 1. *p.* 31.

Michaelmas, 3 *Geo.* 3. *Fiſher* v. *Prince.*

Adjudged, That where *trover* is brought for a ſpecific chattel, of an aſcertained quantity and quality, and unattended with any circumſtances that can enhance the damages above the real value, but that its real and aſcertained value muſt be the *ſole meaſure* of the damages, there the ſpecific thing demanded *may be* brought into court; where there is an uncertainty either as to the quantity or quality of the things demanded, or that there is any *tort* accompanying it that may enhance the damages above the real value of the thing, and there is no rule whereby to *eſtimate* the additional value, there it ſhall *not* be brought in. *Vide Bur. vol.* 3. *p.* 1364.

Truſts, Uſes, &c.

Michaelmas, 4 *W.* & *M.* *Davis* v. *Speed.*

On a ſpecial verdict in *ejectment* for lands in the county of *Southampton*, the caſe appeared to be thus:

A *feme ſole* being ſeiſed *in fee* of the lands now in queſtion, did afterwards marry *W. H.*

That the ſaid *W. H.* and *A.* his wife, did, by deed indented, covenant to levy a fine thereof to *J.* and *S.* and their heirs, *&c.* to the *uſes* following, *viz.*

To the *uſe* of the heirs of the ſaid *W. H.* lawfully begotten, or to be begotten, on the body of the ſaid *A.* remainder to the right heirs of the huſband.

The fine was levied; they had iſſue *one* ſon, who died in the life time of his father and mother, without iſſue; then *A.* died, and afterwards *W. H.* died without iſſue.

That *F. C.* who was leſſor of the plaintiff, was ſiſter and heir of *W. H.* and that the ſiſters and co-heirs of *A.* had conveyed their intereſt to the defendant *Speed*.

So that the queſtion was, whether the heirs of the wife ſhould have this land?

The objection why the right heirs of the huſband ſhould not have it, was becauſe there was no particular eſtate for life limited in this conveyance to ſupport the contingent remainders, which are therefore void, and the *old uſe* remains to the heirs of the wife.

Per curiam. This is a *future uſe*, and no particular eſtate to ſupport it; and no ſuch eſtate could ariſe until the wife died without iſſue, and ſo the remainder is void.

And afterwards, in *Eaſter* term, judgment was given for the defendant *Speed*, accordingly.

That no eſtate ſhall ariſe by implication to the huſband; ſuch a thing was never thought on in a deed, nor in a will, but of neceſſity.

There was afterwards a *writ of error* brought on this judgment in parliament, where it was affirmed. *Vide Mod. Rep. vol.* 4. *p.* 153.

Michaelmas, 8 *W.* 3. *Leigh, or Lee*, v. *Brace.*

See this caſe fully ſtated in page 433 of this work, under the head *Eſtates.*

Hilary, 9 *W.* 3. *Jones* v. *Morely.*

See this caſe fully ſtated in page 204 of this work, under the head *Baron and Feme.*

Hilary, 8 & 9 *W.* 3. *Tregany* v. *Fletcher.*

Holt, Chief Juſtice. If a *precedent* deed be made, whereby it is agreed, that the recovery which is to be ſuffered ſhall be to ſuch and ſuch *uſes*, and a recovery is afterwards ſuffered accordingly; *one* cannot aver the recovery to be to other *uſes* than thoſe mentioned in the deed, without ſhewing a new agreement; but if the *uſes* are declared by a *ſubſequent* deed, there they ariſe by the recovery, and there may be a *parol* averment that the recovery was to other *uſes*, but a ſubſequent deed is very ſtrong evidence. In caſe of a precedent deed, he muſt confeſs and avoid, but in caſe of a ſubſequent deed, a man may traverſe the *uſes.* And therefore here, the defendant ſhould have pleaded, *that he inhabited ſo much truly recovered*, &c. to ſuch and ſuch *uſes*. *Vide Raym. vol.* 1. *p.* 155.

Eaſter, 1 *Ann.* *Lamplugh* v. *Shotterell.*

Caſe. A *bargain and ſale* was made for a year in conſideration of 5*s.* paid, and thereon a releaſe to the bargainee and his heirs, without expreſſing any conſideration, the queſtion was, whether the *uſe* ſhould reſult to the bargainor: and it was inſiſted, that it ſhould not, becauſe the releaſe does but enlarge the *firſt* eſtate, and that it is to the *uſe* of the bargainee, and both are but as *one conveyance*, and the 5*s.* mentioned in the leaſe, extends to the releaſe, and the *quantum* of the conſideration is not material, for a *penny* is ſufficient; but on the other ſide it was argued, that this conveyance is in nature of a *feoffment*, on which an *uſe* ſhall reſult to the *feoffor* where no conſideration is expreſſed.

Holt, Chief Juſtice. Before the *ſtatute of uſes* there might be a reaſon why an *uſe* ſhould reſult on a *feoffment*, for it put the eſtate out of the feoffor, and he had only a *truſt* left, which could not be forfeited; and to this purpoſe ſuch *feoffments* were made: but this cannot be ſince the ſtatute; for if an *uſe* muſt reſult to the *feoffor*, and the eſtate muſt be executed according to the *uſe*, the *feoffment* is in vain, and the party has made a conveyance to no manner of purpoſe, being poſſeſſed of the ſame eſtate as he was before he made the *feoffment*; and ſo it is of a leaſe and releaſe, but it is otherwiſe on a fine or recovery, for they may have their particular eſtate in other reſpects, as barring on *non-claims* or *remainders.*

So it is, if by *feoffment*, or by leaſe and releaſe, a man conveys any particular eſtate, *mediate* or *immediate*, to another perſon, there the reſidue of the eſtate ſhall, by implication of law, remain in the party himſelf; but where no eſtate is limited to another, there the whole conveyance is to no purpoſe, if the party be conſtrued to have the reſulting *uſe* in him. *Vide Salk. vol.* 3. *p.* 387.

Eaſter, 2 *Ann.* *Adams* v. *Tertenants of Savage.*

In this caſe *Holt*, Chief Juſtice, delivered the opinion of the court, that no *uſe* could reſult to *Savage* during his life, and therefore the remainder to the heirs male was void, and *Savage* ſeiſed *in fee*. And their reaſons were, becauſe the limitations to himſelf for *ninety-nine years*, and to the truſtees for *twenty-five years*, and the heirs male, were *new uſes* and new eſtates. As if a man by leaſe and releaſe, or by covenant to ſtand ſeiſed, limits the *uſe* to himſelf for life, or in tail, theſe are new eſtates, and not parcel of the old eſtate, according to 7 *Co.* 13. *b.* *Englefield*'s caſe. And where in ſuch caſe, on a conveyance ſuch *uſes* are limited as (ſuppoſing the limitations to be good) would paſs the whole eſtate, there no *uſe* will reſult contrary to the expreſs limitations of the party. But if the limitations are void, the conveyance of neceſſity will fail: if a man ſeiſed *in fee*, conveys his eſtate by leaſe and releaſe to the *uſe* of himſelf for life, remainder to *truſtees* for their lives, remainder to the heirs of his body; he has an eſtate tail in himſelf, but he is but tenant for life in poſſeſſion: otherwiſe, if there had been no intermediate eſtate in the *truſtees* for their lives. And in the former caſe, if a man makes a *feoffment*, it is no diſcontinuance, but only diveſts the eſtate. And for the ſame reaſon in this caſe, where the *firſt* limitation is only for years, the remainder to the heirs of the body of the tenant for years, is a contingent remainder, and void. *Vide Raym. vol.* 2. *p.* 854.

Michaelmas, 7 *Ann.* *Buſhel* v. *Burland.*

See this caſe fully ſtated in page 491 of this work, under the head *Fines and Recoveries.*

Michaelmas, 12 *Ann.* *Turner* v. *Goodwin.*

See this caſe fully ſtated in page 129 of this work, under the head *Aſſignments.*

Trinity, 13 *Ann.* *Miles* v. *Williams.*

See this caſe fully ſtated in page 194 of this work, under the head *Bankrupts.*

Michaelmas, 3 *Geo.* *Thruſtout* v. *Peak and others.*

See this caſe fully ſtated in page 491 of this work, under the head *Fines and Recoveries.*

Eaſter, 11 *Geo.* *Shaw* v. *Weigh and others.*

See this caſe fully ſtated in page 438 of this work, under the head *Eſtates.*

Eaſter, 5 *Geo.* 2. *Goodtitle* v. *Petto.*

See this caſe fully ſtated in page 157 of this work, under the head *Averment.*

Eaſter, 6 *Geo.* 3. *Armſtrong on the Demiſe of Tinker and others*, v. *Peirſe and others.*

See this caſe fully ſtated in page 403 of this work, under the head *Ejectment.*

Venue.

Hilary, 5 *W.* & *M.* *Anonymous.*

Holt, Chief Juſtice. The whole hundred where the place is, is deemed the neighbourhood thereof. *Vide Mod. Rep. vol.* 12. *p.* 49.

Trinity, 6 *W. & M. Wilſon* v. *Law*.

See this caſe fully ſtated in page 75 of this work, under the head *Appeal*.

Michaelmas, 6 *W*. 3. *Seaman* v. *Ling*.

Adjudged, That if the defendant be a barriſter, he may have the *venue* changed to *Middleſex*. In *Trinity*, 2 *Ann*. one *Wilcocks*, an attorney, was ſued by *bill of privilege*, and the action was laid in *Suffolk*; and on motion the *venue* was changed into *Middleſex*; and in 2 *Vent*. 47. if an attorney, being plaintiff, lay his action in *Middleſex*, the *venue* ſhall not be changed; otherwiſe if in *London*. *Vide Salk. vol*. 2. *p*. 668.

Eaſter, 8 *W*. 3. *Anonymous*.

Holt, Chief Juſtice. The motion to change a *venue* ought to be within *eight days* after the declaration is delivered; but this rule is not always ſtrictly adhered to. But, *Trinity*, 7 *W*. 3. in this court, it was obſerved, one might move to change the *venue* at any time before judgment ſigned; which *Holt*, Chief Juſtice, denied, ſaying, heretofore it was never granted after the rules for pleading were out. *Vide Salk. vol*. 2. *p*. 668.

Eaſter, 9 *W*. 3. *The Duke of Norfolk* v. *Alderton*.

A motion was made to change the *venue* in an action of *ſcandalum magnatum* on the common *affidavit*, inſiſting on Lord *Shafteſbury*'s caſe, 2 *Jo*. 192, 198. but it was denied; for in Lord *Shafteſbury*'s caſe, it was on an *affidavit* of the vaſt intereſt he had in the city, and the unlikelineſs of an impartial trial; but we will not deprive the plaintiff of that benefit the law gives him, of laying his action where he pleaſes, for the convenience of the defendant. 1 *Lev*. 56. *Vide Mod. Rep. vol*. 12. *p*. 121. *Salk. vol*. 2. *p*. 668.

Note, At *common law*, all actions were laid in the proper county, that there might be a jury *of the neighbourhood*.

Trinity, 9 *W*. 3. *The King* v. *Greep*.

See this caſe fully ſtated in page 551 of this work, under the head *Information*.

Trinity, 9 *W*. 3. *Ellis* v. *Ellis*.

The plaintiff brought an *indebitatus aſſumpſit* againſt the defendant, as executrix of her huſband, for money lent to her in his life-time. The defendant pleaded, that her teſtator was an infant at the time of the money lent. The plaintiff replied, that he lent 40 *l*. part of the ſum in demand, to the teſtator to buy neceſſaries for himſelf, his wife, and family; and ſo they were expended. The defendant demurred.

It was objected, that there was not any *venue* where the 40 *l*. was expended in buying of the neceſſaries: and for want of a *venue* where the neceſſaries were bought, judgment was given for the defendant. *Vide Raym. vol*. 1. *p*. 344.

Eaſter, 10 *W*. 3. *Sir Richard Leving* v. *Lady Calverly*.

Adjudged, That by *ſtat*. 16 & 17 *Car*. 2. *c*. 8. a *venue* is aided by the verdict, though in a wrong county. *Vide Raym. vol*. 1. *p*. 330.

Michaelmas, 10 *W*. 3. *Anonymous*.

An act of compoſition, and a compoſition purſuant thereto, was pleaded in *bar* to an action of *debt* on a bond, without reciting the act, or laying a *venue* for the compoſition; and for theſe faults, judgment was given for the plaintiff. *Vide Mod. Rep. vol*. 12. *p*. 249.

Michaelmas, 10 *W*. 3. *Gilbert* v. *The Inhabitants of Puddleſgate*.

In an action on the ſtatute of *hue and cry*, *not guilty* was pleaded, and a verdict for the plaintiff. It being moved in arreſt of judgment, that no *venue* was laid, where the examination before the juſtice of peace was within *twenty days*, which was traverſable, and not aided by the verdict, it being a *penal law*.

Per curiam. This is a *remedial*, and not a *penal law*; and if *penal*, yet this is well enough, becauſe it is not that which entitles the party to his action, but only the *cauſa ſine qua non*; but perhaps it might be fatal on a demurrer. *Vide Mod. Rep. vol*. 12. *p*. 242.

Michaelmas, 10 *W*. 3. *Anonymous*.

In an action on the *caſe* againſt the drawer of a bill of exchange who lived at *Briſtol*, and drew the bill there, a motion was made to change the *venue*, but it was denied; for the perſon on whom the bill was drawn, lived in *London*, and there was the refuſal, and that muſt be proved to make the firſt drawer liable; for where evidence, neceſſary to ſupport the action, ariſes in *two* counties, the plaintiff may chuſe which he will; and this is the ground of the rule, That if the plaintiff will be bound to give ſome material evidence in the county where the action is laid, the court will never change the *venue*. And in *Eaſter*, 10 *W*. 3. in this court, in an action of *trover* and *converſion*, the defendant had leave to change the *venue*, and the plaintiff moved to ſet that aſide, offering to be bound to give evidence in the county where the action was laid: on inquiry, the court found the plaintiff was aſſignee of commiſſioners of bankrupts, and could prove the aſſignment in that county.

Holt, Chief Juſtice. The whole is tranſitory.

Per curiam. The *converſion* is the cauſe of action, and not the *aſſignment*; and you are in the place of the commiſſioners, and the *venue* was according to the rule. And in *Eaſter*, 12 *W*. 3. in this court, it was held, that where a rule is made to change a *venue*, and afterwards the plaintiff would bring it back again, the rule muſt be, *to give other evidence of the matter in queſtion*, in the county where the action was brought. *Vide Salk. vol*. 2. *p*. 669.

Michaelmas, 11 *W*. 3. *Anonymous*.

An action for words was laid in *London*, and an *affidavit* for changing the *venue* was made, that if any ſuch words were ſpoken by him, they were ſpoken in the county of *Lancaſter*, &c. and becauſe the court could not order a trial there, it being a county palatine, they changed the *venue* into the next county, *viz*. into *York*; though the proof lay all on the plaintiff, who had all his witneſſes in *London*, and that the defendant could not prove a negative, *viz*. that he had not ſpoke the words, otherwiſe than indirectly by producing thoſe that were in the room at the time; and that they did not hear any ſuch words, or that no ſuch diſcourſe was, *&c*. *Vide Mod. Rep. vol*. 12. *p*. 313.

Hilary, 12 *W*. 3. *Anonymous*.

An *affidavit* for changing a *venue* was, that the cauſe or action, if any, did ariſe in the county of *L*. or in ſome other than in that in which the plaintiff had laid his action; and it was inſufficient, for it ought to fix it to a certain county, or at this rate *venues* might be changed almoſt *without end*. *Vide Mod. Rep. vol*. 12. *p*. 442.

Eaſter, 12 *W*. 3. *Anonymous*.

Ruled, That the common *counter affidavit* to hinder the changing of a *venue* is to give material evidence where the action is laid. *Vide Mod. Rep. vol*. 12. *p*. 372.

Eaſter, 12 *W*. 3. *Biſhop of Bath* v. *Bridges*.

The court was moved to change the *venue* in an action of *ſcandalum magnatum*; but the motion was denied.

Per curiam. It is never granted but for extraordinary cauſe, as was that of Lord *Shafteſbury*. *Vide Mod. Rep. vol*. 12. *p*. 401.

Hilary, 13 *W.* 3. *Anonymous.*

The *venue* is never changed in an action of *covenant.* *Vide Mod. Rep. vol.* 12. *p.* 648.

Eaſter, 13 *W.* 3. *Veſey* v. *Smith.*

See this caſe fully ſtated in page 2 of this work, under the head *Abatement.*

Eaſter, 13 *W.* 3. *The King* v. *The Mayor of Oxford.*

In an action on the *caſe* for a falſe return, the action was laid in *Suffolk*, and the defendant moved, that it might be laid in *Middleſex*; and gave as one reaſon, that it would raiſe heats in the county. The court inclined to do it, but the plaintiff would not conſent; and therefore nothing was done, becauſe he had a right to lay it in either county. *Vide Salk. vol.* 2. *p.* 669.

Michaelmas, 13 *W.* 3. *Anonymous.*

The court never changes the *venue* in an action of *debt.* *Vide Mod. Rep. vol.* 12. *p.* 579.

Hilary, 1 *Ann.* *Booth* v. *Johnſon.*

Per curiam. Where the plaintiff in the declaration lays the *venue* in *Gray's Inn*, or *Whitehall*, which are no *vills*, yet after a verdict, or demurrer, they ſhall be intended to be *vills*; and therefore if the defendant will take any advantage, he muſt plead ſuch *vill*; as *Gray's Inn*, &c. *Vide Salk. vol.* 3. *p.* 380.

Hilary, 2 *Ann.* *Carleton* v. *Mortagh.* Error.

On a *writ of error* brought on a judgment in this court, want of an *original* was aſſigned for *error.* The defendant pleaded a releaſe of *errors*, but laid no *venue* where the releaſe was made. To which the plaintiff in *error* demurred. And the plea was adjudged naught for want of the *venue*; and when the plea amounted to a confeſſion of the *error.* But the court made a queſtion, whether they could not award a *certiorari to inform the conſcience of the court*, though the defendant cannot pray it; juſt in the ſame manner as after *in no error pleaded*, for the court ought to examine the *errors*; for if in *error* a releaſe is pleaded, and found for the plaintiff, yet if there is no *error*, the court cannot reverſe the judgment; and if the releaſe was found for the defendant, a different judgment muſt be given, according as the *error* aſſigned is ſufficient or not; for if it is a good *error*, the judgment muſt be, that the plaintiff be barred of his *writ of error*, and not that the judgment be affirmed; if it is not a good *error*, the judgment muſt be, that the firſt judgment be affirmed. And a rule was made for hearing council, whether the court ſhould grant a *certiorari* or not. *Vide Raym. vol.* 1. *p.* 1005.

Trinity, 3 *Ann.* *The Queen* v. *The Inhabitants of Wilts.*

On an information againſt the *county of Wilts*, for not repairing *Laycock Bridge*, the court held, that the Attorney General might take *venire a facias* to any adjacent county; and that it might be *of the body* of the whole, or *of the neighbourhood* of ſome particular place therein next adjoining. *Vide Salk. vol.* 3. *p.* 381.

Trinity, 3 *Ann.* *Crocket's Caſe.*

The plaintiff declared on a promiſe made in *Staffordſhire*, and the declaration was delivered in *Eaſter* term: the court was moved to change the *venue.*

Holt, Chief Juſtice. (The motion being in *Trinity*-term) Unleſs it appears on the face of the declaration, that the plaintiff was not entitled to a plea to enter, we expect an *affidavit* when the declaration was delivered, that thereby the court may be aſcertained. *Vide Salk. vol.* 2. *p.* 669.

Trinity, 3 *Ann.* *The Queen* v. *Wyat.*

Adjudged, That though the *venue* muſt come out of both places, where *two* places are named, and both material to the iſſue; yet where *one* only is material to the iſſue, though the other matter be required to be given in evidence, yet it is enough if the *venue* come out of that *one* place. *Hob.* 305. *Hutt.* 39. *Cro. Jac.* 231. Sir *W. Jones.* *Vide Forteſcue*, *p.* 130.

Trinity, 3 *Ann.* *Way* v. *Gally.*

The leſſor brought an action of *debt* againſt the leſſee for *rent*, on a demiſe of lands in *Jamaica*, and laid his action in *London*; the defendant pleaded, that the lands were in *Jamaica*, and that there are courts there, &c. Adjudged, on demurrer, that this plea was ill; but if in any action laid here, a *local* iſſue ſhould ariſe, (as ſuppoſing in *Ireland*) it may be tried in the county where the action is laid, according to *Dowdale's* caſe, or a ſuggeſtion may be entered on the roll, that ſuch a place in ſuch a county lies next to *Ireland*, and ſo have a jury from thence. *Vide Salk. vol.* 3. *p.* 381.

Michaelmas, 3 *Ann.* *Boiſloe or Purſloe* v. *Baily.*

See this caſe fully ſtated in page 102 of this work, under the head *Arbitration and Award.*

Michaelmas, 3 *Ann.* *Sir Samuel Gerard's Caſe.*

An action of falſe impriſonment againſt the ſheriffs of *London* was laid in *Middleſex*, and, on the common *affidavit*, a rule was made, that the *venue* ſhould be changed to *London*; but then it was ſaid, that the officer of the *Compter* was ſubject to the ſheriffs, and ſo there could be no good trial; for which reaſon it was removed back again to *Middleſex.* *Vide Salk. vol.* 2. *p.* 670.

Hilary, 4 *Ann.* *Pie* v. *Cooper.*

In an action on the *caſe*, the defendant pleaded in abatement, that the plaintiff was an *alien enemy*, and laid no *venue*: and, on demurrer, adjudged, that it was well pleaded, and the plaintiff might have replied, that he was born in *England*, generally. But if ſuch a matter is pleaded in *bar*, it muſt be pleaded with a *venue*, and the plaintiff ſhould reply, that he was born in ſuch a place in *England.* And in the principal caſe judgment was given, that the bill be quaſhed. *Vide Raym. vol.* 2. *p.* 1243.

Eaſter, 4 *Ann.* *Heathcoat's Caſe.*

An action, brought againſt a lighterman for not delivering goods, was laid in *London*, where they were to be carried. The court was moved to change the *venue*, becauſe the damage and neglect was in *Kent*: *but not allowed*; for the neglect is tranſitory, and not material where it was, and the court will never change the *venue* for a carrier, which is the ſame caſe; otherwiſe perhaps in *deceit*, or where there is an actual miſfeaſance. *Michaelmas*, 10 *W.* 3.

Holt, Chief Juſtice, ſaid, that in an action of eſcape, it is not the courſe to change the *venue.* *Vide Salk. vol.* 2. *p.* 670.

Trinity, 4 *Ann.* *Scawen* v. *Garrett.*

Holt, C. J. It is not neceſſary to lay a *venue* where the defendant was an attorney, becauſe, that being a matter concerning the perſon of the defendant, ſhould be tried where the writ was brought. And therefore where *alienee* is pleaded in abatement, the plaintiff may reply generally, that he was born in *England*, without laying a place, becauſe it ſhall be tried where the writ is brought. But if *alienee* be pleaded in *bar*, there the plaintiff muſt reply, that he was born in *England*, viz. at ſuch a place. *Vide Raym. vol.* 2. *page* 1173.

Eaſter, 5 *Ann.* *Knight* v. *Barnaby*, *or Farnaby*, *and others.*

The plaintiff brought an action of *treſpaſs*, *aſſault* and *battery*, againſt the defendant in *Middleſex.* The defendant, on the common *affidavit*, had a rule to change the *venue* into *Kent*, *niſi*, &c. And now the court was moved to ſet aſide that rule, becauſe the plaintiff was clerk of the aſſizes of the *Norfolk* circuit, and by conſequence an officer of this court. the court was of that opinion, becauſe this court frequently makes rules on clerks to return *poſteas*, *&c.* and therefore that rule was diſcharged. *Vide Raym. vol.* 2. *p.* 1253. *Salk. vol.* 2. *p.* 670.

Hilary, 8 *Ann.* *Foſter* v. *Burdon.* Error.

The caſe was on a judgment in *ejectment* on a demiſe for *three years*, the defendant brings a *writ of error* in this court, and the defendant in *error* ſues a *ſci. fac. quare executionem non*; to which the plaintiff in *error* pleads, that he has paid 200*l.* in ſatisfaction of the term and damages; and on iſſue joined, the court was moved to change the *venue* out of *Yorkſhire* into *Middleſex.* But the court denied the motion, becauſe the ejectment is *local*; and the *ſcire facias* being grounded thereon, the *venue* could not be changed. *Vide Mod. Rep. vol.* 11. *p.* 263.

Michaelmas, 6 *Geo.* *Aſplin* v. *Gray.*

Per curiam. If the declaration be delivered ſo early in term, that the defendant has *eight days* in that term, he cannot move to change the *venue* the next term. *Vide Stra. vol.* 1. *p.* 211.

Trinity, 7 *Geo.* *Anonymous.*

In an action of *treſpaſs* and *aſſault*: on the evidence it appeared, that the defendant was a conſtable, and lived at *Dover*; and that being ordered to take the plaintiff and carry him before the mayor, he executed his warrant, and the mayor diſcharged the plaintiff. Soon after which a diſpute happening between the plaintiff and the defendant, the defendant beat the plaintiff, for which this action was brought.

For the defendant they inſiſted, that he being a conſtable, they ſhould have brought the action in the proper county, according to *ſtat.* 21 *Jac.* 1.

Pratt, Chief Juſtice. That is only where it is for a matter relating to the execution of his office; but if after his authority is expired, he abuſes the party, or if he meets a man, and knocks him down, he may be ſued for it, as all other people may. *Vide Stra. vol.* 1. *p.* 446.

Anonymous.

Ruled, that the want of a *venue* is only curable by ſuch a plea which admits the fact for the trial whereof it was neceſſary to lay a *venue*: the plaintiff declared on a bond, and laid *no venue*, the defendant pleads a releaſe, now by this plea the want of a *venue* is cured; otherwiſe if he had demurred. *Vide Salk. vol.* 3. *p.* 381.

Hilary, 10 *Geo.* *Long* v. *Nixon.*

This was an action brought in *London*, and the defendant moved the court to change the *venue*; and a rule was made that it ſhould be changed.

And now the plaintiff moved to diſcharge that rule; and it was inſiſted on, on his behalf, that this was a *tranſitory* action, which the plaintiff might bring where he pleaſed; and that it was by the indulgence of the court, and for the eaſe of the parties, that *venues* are at any time changed; and that it would be very inconvenient for the plaintiff, if this *venue* ſhould be changed, becauſe the action being brought by *ſpecial original*, there would be a variance on changing the *venue*: therefore it is convenient for the plaintiff that the action ſhould be tried in *London.*

The court would not diſcharge the rule for the changing the *venue*; for if they ſhould, then, where an action is laid in *London*, the *venue* would never be changed; and as to the variance, the defendant ſhall take no advantage of it, though the action was brought by *ſpecial original*. *Vide Mod. Rep. vol.* 8. *p.* 229.

Michaelmas, 11 *Geo.* *Townſend* v. *Duppa and others.*

An action of *trover* was laid in *Worceſterſhire*, and the court was moved to change the *venue* to *Middleſex*, becauſe the action againſt ſome of the defendants was there, as they were commiſſioners of bankruptcy, and they had privilege, as being barriſters, or attornies. But the court refuſed it, ſaying, the privilege could not take place where they are joined in an action with unprivileged perſons. *Vide Stra. vol.* 1. *p.* 610.

Trinity, 12 *Geo.* *Godfrey* v. *Philpot.*

It was moved to change the *venue* into *Cheſter*, and it was granted by the court, becauſe this court can ſend down the record by *mittimus.* *Vide Raym. vol.* 2. *p.* 1418.

Trinity, 13 *Geo.* *Blacke* v. *Dodemead and Wife.* Error.

On a *writ* of *error* brought on a judgment given in the *C. B.* on a *ſcire facias* brought by the huſband and wife on a judgment recovered by her while *ſole*, the *ſcire facias* alledges, that after the rendering of the judgment aforeſaid, the aforeſaid *Sarah* took in right of the aforeſaid *John Dodemead.* To which there was a demurrer, and for cauſe, no *venue* where the plaintiffs were married. And it was inſiſted on *error*, that there muſt be a *venue* as to every fact neceſſarily alledged to intitle the plaintiff to recover, and here the marriage is the only foundation for the man's joining in this *ſcire facias.* *Theſ. Br.* 251. 256. *Ow.* 23. 2 *Lev.* 227. *Mo.* 527.

But the court were of opinion, there being precedents this way, that it was well enough without a *venue.* *Vide Stra. vol.* 2. *p.* 775. *Raym. vol.* 2. *p.* 1504.

Trinity, 13 *Geo.* *Paterſon* v. *Scott.*

In *debt* for rent, on indenture laid to be made at *London*, for the demiſe of lands in *Surry.* The action was laid in *London*; and on demurrer it was held, that the plaintiff had his election to bring it in either, againſt the leſſee; otherwiſe had it been againſt an aſſignee, who is chargeable only on the privity of eſtate. Therefore judgment was given for the plaintiff. *Vide Stra. vol.* 2. *p.* 776.

Michaelmas, 13 *Geo.* *Greagſon* v. *Heather.*

In *debt* on a bail-bond, the plaintiff declared, that he took out a writ directed to the ſheriff of *Surry*, *&c.* who took a bail-bond, which he afterwards aſſigned to the plaintiff at *London*, where the action was brought. On demurrer it was objected, that the action was grounded on the bond entered into by the bail, and that being laid to be done in *Surrey*, the action ſhould have been there.

On the other ſide it was inſiſted, that the action is founded on the aſſignment, which is the only thing that impowers the plaintiff to ſue, and that is laid to be where the action is brought. 2 *Roll. Abr.* 602. *pl.* 9. Action for eſcape laid in *Nottinghamſhire*, of one arreſted by the ſheriff of *York.* *Cro. Eliz.* 625. 1 *Sid.* 218. The plaintiff had his election to bring his action for a falſe return, either in *Middleſex*, where the writ is returned, or in the county where the party was arreſted. And if it ſhould be thought that the executing the bond is part of the cauſe, yet 7 *Co. Rulwer's* caſe, is expreſs, that where matter in one county is dependent on matter in another county, the plaintiff may lay his action in either.

Per curiam. The law is certainly ſo. Therefore the plaintiff muſt have judgment. *Vide Stra. vol.* 2. *page* 727. *Raym. vol.* 2. *p.* 1455.

Hilary, 2 *Geo.* 2. *Borroughs* v. *Willis.*

See this caſe fully ſtated in page 753 of this work, under the head *Privilege.*

Trinity, 2 *Geo.* 2. *Lady Falconbridge* v. *Forreſt.*

In an action of *ſcandalum magnatum*, the court refuſed to change the *venue* from *Middleſex* to *Cheſter*, becauſe it was to ſend it into a *county palatine*, and there was no inſtance of doing it in ſuch an action. *Lord Raym.* 1418. *Vide Stra. vol.* 2. *p.* 807.

Hilary, 3 *Geo.* 2. *Dickinſon* v. *Fiſher.*

It was held, that as the defendant muſt move to change the *venue* before a plea pleaded, ſo the plaintiff muſt in like manner move to diſcharge the rule on undertaking to give material evidence before a replication or plea. *Vide Stra. vol.* 2. *p.* 858.

Hilary, 3 *Geo.* 2. *Gifford* v. *Letchmere.*

The *venue* was changed from *London* to *Middleſex* on motion. *Vide Stra. vol.* 2. *p.* 857.

Trinity, 4 *Geo.* 2. *The Mayor of Pool* v. *Bennet.*

The action was laid in the county of *Poole*, for a duty claimed to be due to the corporation; and on motion, the *venue* was changed to *Hampſhire*, it appearing manifeſtly their could be no fair trial in *Poole.* *Vide Stra. vol.* 2. *p.* 874.

Michaelmas, 4 *Geo.* 2. *Dupleſſis* v. *Chalk.*

In an action of *debt* for rent laid in *London*, on a *parol* demiſe of lands in *Kent*; the court refuſed to change the *venue*, ſaying, they never do it in *debt.* *Vide Stra. vol.* 2. *p.* 878.

Trinity, 5 *Geo.* 2. *The King* v. *Clendon.*

An information was laid for an aſſault in *Middleſex*, and the court refuſed to amend it by laying it in *London.* *Vide Stra. vol.* 2. *p.* 911.

Trinity, 8 *Geo.* 2. *Briſtow* v. *Tito.*

This court was moved to change the *venue* from *Wilts* to *Dorſet*, on an *affidavit* that the cauſe of action, if any, aroſe in the town of *Poole*, which is a town and county of itſelf.

Per curiam. We never change a *venue* but into the county where the cauſe of action is ſworn to ariſe, nor even then neither, if it is a place where the judges do not go; ſo you can take nothing by the motion. But however, if you can find an inſtance of its having been done, you may move it again. *Vide Caſes Temp. Lord Hardw. p.* 135.

Hilary, 9 *Geo.* 2. *Dale* v. *Stevenſon.*

The court was moved to change the *venue* from *Middleſex* to *Weſtmorland*, on the *common affidavit*, that the cauſe of action, if any, aroſe in *Weſtmorland*, and not in *Middleſex.*

Lord *Hardwicke.* We cannot do that; for it will delay the plaintiff till the *ſummer aſſizes.*

Then it was prayed that it might be changed to *Yorkſhire*, which is the neareſt county into which the judges go in the *Lent aſſizes.*

Lord *Hardwicke.* We cannot do that neither without conſent; therefore give notice, and move it again. *Vide Caſes Temp. Lord Hardw. p.* 210.

Trinity, 9 *Geo* 2. *Wigly* v. *Morgan*, *one*, *&c.*

See this caſe fully ſtated in page 754 of this work, under the head *Privilege.*

Michaelmas, 9 *Geo.* 2. *Dovey qui tam* v. *Powell.*

In an action *qui tam* on one of the ſtamp acts, the court was moved on the *common affidavit* to change the *venue* from *Middleſex* to *Monmouthſhire.*

It was oppoſed, as being an action of *debt.*

Lord *Hardwicke.* In actions of *debt* on ſpecialty, indeed we refuſe to change the *venue.* But I do not know that this is againſt the courſe of the court; therefore be it ſo. *Vide Caſes Temp. Lord Hardw. p.* 165.

Hilary, 15 *Geo.* 2. *Stroud* v. *Tilly.*

Per curiam. Though a plaintiff cannot regularly move to change the *venue*, yet he may in effect do it by moving to amend. And it was accordingly done in this caſe by ſtriking out *Dorſetſhire*, and inſerting *Middleſex.* *Vide Stra. vol.* 2. *p.* 1162.

Hilary, 16 *Geo.* 2. *Howarth* v. *Willett.*

A declaration on a policy was laid in *Lancaſhire*, and delivered here on the 8th of *February.* It was moved on an *affidavit*, that it was ſigned at *Briſtol*, and that the *common affidavit* to change the *venue* was ſent for, that the parties might have time. And the court inclined to have granted the motion, if it had not appeared to have ariſen in *Briſtol*, where there is no *Lent-aſſizes*; and they could not order it to an adjacent county, without conſent of both ſides, though the defendant offered his conſent to avoid delay. *Vide Stra. vol.* 2, *p.* 1180.

Hilary, 17 *Geo.* 2. *Rivet, and others*, v. *Cholmondley*, *and others.*

On the authority of *Stroud* v. *Tilly*, the court ſuffered the plaintiff to amend the *venue*, after the defendant had changed it on the *common affidavit.* *Vide Stra. vol.* 2. *p.* 1202.

Michaelmas, 18 *Geo.* 2. *Southhouſe* v. *Boak.*

The court refuſed to change the *venue* into *Durham*, the judges not going thither in the *Lent-aſſizes.* Whereon the defendant offered to try it in *Yorkſhire*, but the plaintiff refuſing to conſent, the court ſaid they could do nothing in it. *Vide Stra. vol.* 2. *page* 1216.

Trinity, 19 *Geo.* 2. *Moore* v. *Fernybouth.*

The *venue* was laid in *London*, and it was moved to change it into *Salop*, on an *affidavit* that the cauſe of action aroſe in *Denbighſhire*, and *Salop* was the next adjacent *Engliſh* county. But the court ſaid it could not be done without conſent. And *Deniſon*, Juſtice, ſaid it was denied to him, *Michaelmas* 8 *Geo.* 2. *Lloyd* v. *Williams*, *Lord Raym.* 1418. *Vide Stra. vol.* 2. *p.* 1258.

Trinity, 21 *Geo.* 2. *Tindale* v. *Gwynne.*

Notwithſtanding the caſe of *Moore* v. *Fernybouth*, the court granted a rule to ſhew cauſe why the *venue* ſhould not be changed from *London* to *Carmarthen*; and it was afterwards made abſolute on an *affidavit* of ſervice. *Vide Stra. vol.* 2. *p.* 1270.

Trinity, 2 *Geo.* 3. *The King* v. *Harris*, *and others.*

See this caſe fully ſtated in page 802 of this work, under the head *Trial*, &c.

Trinity, 4 *Geo.* 3. *Mylock* v. *Saladine.*

On ſhewing cauſe why the *venue* ſhould not be changed from the city of *Cheſter* to the county at large.

Per curiam. We are all of opinion, that in *tranſitory* actions, the court ought to change the *venue*, when it appears on circumſtances laid before them, that there is a probable ground to apprehend that a fair, impartial, or at leaſt a *ſatisfactory* trial, cannot be had.

In the preſent caſe, there having been a trial in the city, and a new trial ordered, becauſe the verdict was againſt the weight of the evidence, and the damages exceſſive (if it had been warranted by the evidence;) and there being a ſtrong proof given by *affidavits* of a general prejudice in the city, the court made the rule abſolute. *Vide Bur. vol.* 3. *p.* 1564.

Verdict, Venire, &c.

Trinity, 4 *W. & M.* *Maſon* v. *Hanſon.*

See this caſe fully ſtated in page 470 of this work, under the head *Executors and Adminiſtrators.*

Hilary, 5 *W. & M.* *Cattle and others* v. *Andrews.* Error.

A *writ of error* was brought on a judgment given in the *C. B.* in an action of *treſpaſs*, wherein the plaintiff declared againſt the defendant for ſeveral treſpaſſes, *viz.* for breaking and entering his cloſe, treading down his graſs, and taking and carrying away water; the defendant juſtified as to all, on which they were at iſſue, and the jury found him *not guilty* as to the *treading down*, &c. but gave no *verdict* as to the other matters; this was *adjudged* naught: and for this cauſe the judgment was reverſed. *Vide Salk. vol.* 3. *p.* 372.

Eaſter, 7 *W.* 3. *Milwood* v. *Leech.*

In an action of *treſpaſs*, the words *againſt the peace* were omitted in the declaration, and therefore, after the execution of a writ of inquiry, judgment was arreſted on motion.

Holt, Chief Juſtice, ſeemed to incline, that it would have been good after *verdict*. *Vide Raym. vol.* 1. *page* 38.

Michaelmas, 8 *W.* 3. *Blackhall* v. *Eccles.*

In an action of *treſpaſs* for an aſſault and battery, the plaintiff declares on a battery on the 1ſt *February*, in the 8th of the preſent King, which is not yet come; and this was moved in arreſt of judgment. The council for the plaintiff acknowleged, that if the time in the declaration had been after the bill filed, and before the trial, the judgment muſt be arreſted; becauſe then it would have appeared that the jury gave damages for an action ariſing ſince the ſuit commenced; but in this caſe, the time being after the trial, it is as if there were no time at all, it being impoſſible, and therefore helped by the *verdict*. *Sorrell* v. *Lewin*'s caſe, *Michaelmas*, 26 *Car.* 2. was the ſame with this; where an *aſſumpſit* was laid at a time not come.

Per curiam. The day alledged is no day at all; the time is but a circumſtance, and therefore judgment muſt be given for the plaintiff: as in *Wall* v. *Dukes*, in this term. *Vide Mod. Rep. vol.* 12. *p.* 102.

Michaelmas, 8 *W.* 3. *Wall* v. *Dukes.*

In an action of *treſpaſs*, on a *verdict* for the plaintiff, it was moved in arreſt of judgment, becauſe the treſpaſs was only laid to be at divers days and times, without laying any particular time.

Per curiam. It is well enough after a *verdict*, on the ſame reaſon with *Blackhall* v. *Eccles*'s caſe, this term. *Vide Mod. Rep. vol.* 12. *p.* 105.

Hilary, 9 *W.* 3. *Anonymous.*

In an *aſſumpſit* againſt *two*, there was judgment by *default* againſt *one* of them; the other pleaded payment in ſatisfaction of the whole debt, but at the trial proved only payment of his ſhare.

Holt, Chief Juſtice. If the jury find a diſcharge only as to this defendant, they muſt find for the plaintiff, and ſo they muſt, though they find the payment was for the whole debt, becauſe the other defendant has confeſſed the action, and the finding of the jury cannot diſcharge him; which was done accordingly, and ſmall damages given. *Vide Salk. vol.* 3. *p.* 373.

Michaelmas, 10 *W.* 3. *Anonymous.*

In an action of *debt* on a bond, payable in 1668, payment made in 1689 was pleaded, and iſſue being joined on it, a *verdict* was given for the plaintiff. And the defendant moved for a *repleader*, becauſe the iſſue was immaterial.

Per curiam. The *verdict* being for the plaintiff, it is well enough. For if it had been paid in 1668, it had not been paid in 1689; and it is like *Nichols*'s caſe, 5 *Co.* 43. But there the judges ſeemed to be of opinion, that if the *verdict* had been for the defendant, it had been ill. And *Powell*, Juſtice, obſerved, that if payment be pleaded to a ſingle bill, it is good after *verdict*. *Vide Raym. vol.* 1. *p.* 408.

Michaelmas, 10 *W.* 3. *Roſewell* v. *Prior.*

See this caſe fully ſtated in page 24 of this work, under the head *Actions.*

Michaelmas, 11 *W.* 3. *Harpen* v. *Davy.*

The plea was entered of *Eaſter* term. The *memorandum* was, that the bill was exhibited in *Hilary* term, and an *imparlance* to *Eaſter* term, and then a plea of *Eaſter* term, and iſſue joined, and a *verdict* for the plaintiff. A new trial being granted, the record of *niſi prius* was of an appearance and plea of this preſent *Michaelmas* term, and a *verdict* for the plaintiff. On a motion to ſet aſide the *verdict*, becauſe it was another iſſue than that which was tried, being of a different term, and on a plea of another term; and the caſe of *Doberteen* v. *Chancellor*, was relied on.

Holt, Chief Juſtice. The *verdict* here is on a plea and iſſue of *Michaelmas* term, which is entirely different from the record on which the *firſt verdict* was obtained, and ſo not the ſame iſſue that was directed to be tried again, and therefore ought to be ſet aſide. For though a new trial was granted, yet it ought to be on the old plea. And the *verdict* was accordingly ſet aſide. *Vide Raym. vol.* 1. *p.* 510.

Michaelmas, 11 *W.* 3. *Turner* v. *Main.*

In an action on the *caſe* brought by the aſſignee of commiſſioners of a bankrupt, ſetting forth, that the bankrupt had recovered ſuch a ſum againſt the defendant's teſtator, and that execution remained to be done, and the *debt* was aſſigned to the plaintiff; and that goods to ſuch a value of the teſtator came to the defendant's hands, which he converted to his own uſe. After *verdict* it was moved in arreſt of judgment, *firſt*, That it was not laid where the goods came to his hands, or where the converſion was; *but not allowed*, becauſe, though the execution would have been good on demurrer, yet now it was not material after *verdict*. *Vide Mod. Rep. vol.* 12. *p.* 306.

Michaelmas, 12 *W.* 3. *Snow* v. *Firebraſſe.*

On a *quantum meruit* on a ſpecial promiſe, for that whereas the plaintiff, at the requeſt of the defendant, did find the defendant with meat, drink, and lodging, for ſeveral months, he promiſed to pay him what it was worth. After *verdict*, it was moved in arreſt of judgment, that the declaration was too uncertain for the time; but being after *verdict*, it was held well, as would any *indebitatus aſſumpſit for divers goods*, eſpecially being executed. Therefore judgment was given for the plaintiff. *Vide Mod. Rep. vol.* 12. *p.* 434.

Eaſter, 13 *W.* 3. *Palmer* v. *Stavely.*

On an *indebitatus aſſumpſit* for money had and received by the defendant for the plaintiff, to the uſe of the defendant, on *non aſſumpſit* pleaded, a *verdict* was found for the plaintiff. And now the court was moved in arreſt of judgment, that the plaintiff had no cauſe of action, the money being received for the uſe of the defendant. This was compared to the caſe of *Noſworthy* v. *Wildman*, 1 *Mod.* 42. 2 *Heb.* 615. and ſaid, that being for money received, it ſhall be intended that the defendant ought to uſe it, but that nevertheleſs he ſhould be anſwerable to the plaintiff for it. 1 *Sid.* 306. where the plaintiff aſſumed to pay inſtead of the defendant, and held good. That the words, *to the uſe of the defendant*, ſhould be rejected after *verdict*, being inconſiſtent with the finding of the jury.

Holt, C. J. We muſt reject the words that are inſenſible, and retain thoſe that are ſenſible. Money received by the defendant for the plaintiff, is good; and then the words, *to the uſe of the defendant*, muſt be rejected. And judgment was given for the plaintiff, *niſi*, *&c.* *Vide Raym. vol.* 1. *p.* 669.

Michaelmas, 13 *W.* 3. *Holden* v. *Sutton*.

In an action of *debt* brought by an executor for an eſcape of *one* in execution on a judgment of the teſtator, where the plaintiff declared in the *debet* and *detinet*; after *verdict* it was moved in arreſt of judgment. And it being doubted whether it was helped by the general words, *of matters of like nature*, in *ſtat.* 16 *&* 17 *Car.* 2. to maintain it at another day, were quoted 1 *Sid.* 379. 341. 2 *Keb.* 407. that is, that it was helped after *verdict*; but *Holt*, C. J. ſaid, that *debet* always is where the action is in the party's own right. *Adjourned.* *Vide Mod. Rep. vol.* 12. *p.* 565.

Eaſter, 1 *Ann.* *Anonymous.*

If a jury give a *verdict* on their own knowledge, they ought to tell the court ſo; but the fair way had been for ſuch of the jury as had knowledge of the matter, before they are ſworn, to tell the thing to the court, and be ſworn as witneſſes. *Vide Mod. Rep. vol.* 7. *p.* 2.

Michaelmas, 1 *Ann.* *Eaſt* v. *Eſſington*.

See this caſe fully ſtated in page 230 of this work, under the head *Bills of Exchange*.

Michaelmas, 3 *Ann.* *Anonymous.*

In an action on the *caſe*, wherein the plaintiff declared, that in conſideration the plaintiff had promiſed the defendant to buy up for him all the plums he could, and deliver them to him, the defendant promiſed to pay the plaintiff ſo much *per* hundred for the black and blue plums, and ſo much for the white; and avers that he bought and tendered the defendant ſo many black and blue plums, and he refuſed to accept them, to his damage, *&c.* After *verdict* for the plaintiff, the court was moved in arreſt of judgment. *Firſt*, That it did not appear how many blue plums, and how many black plums there were; that is, how many of each ſort. But to that it was anſwered, and reſolved, that the black and blue ones being to be both of the ſame price, it was not material; otherwiſe, if the white and black had been put together without difference. *Secondly*, That the plaintiff did not aver, that the plums he tendered were all he had bought, or could buy; and unleſs he had done ſo, he had not performed his part, and was not entitled to his action. But to that it was anſwered, and reſolved, that it was now cured by the *verdict*; for unleſs the plaintiff had proved, that thoſe were all he had bought, or could buy, it would have been againſt him, for want of proving the performance of the conſideration. *Vide Raym. vol.* 2. *p.* 1060.

Trinity, 4 *Ann.* *Smartle* v. *Penhallow*.

On an *ejectment* on the demiſe of *Jonathan*, biſhop of *Exeter*, the jury found, that the lands in queſtion were cuſtomary tenements, parcel of the manor of *Tregoar* in the county of *Cornwall*, and by the cuſtom of the manor are demiſeable by copy of court-roll to *two* or *three* perſons for the term of their lives, and of the longeſt liver of them, *To hold ſucceſſively as named in the charter*, &c. and that by the cuſtom of the manor, the perſon *firſt* named in the grant enjoys the tenements, to him alone during his life; and ſo the *ſecond* and *third*: that by the cuſtom of the manor, the Lord is to have an *heriot* of every ſuch perſon ſucceſſively dying ſeiſed; that one *E. N.* being Lord of the manor, by virtue of a demiſe made thereof to him by *Thomas* late Biſhop of *Exeter*, immediate predeceſſor to the leſſor of the plaintiff, did, by copy of court-roll, grant the tenements in queſtion to one *T. N.* and his aſſigns, to hold to him, and his aſſigns, for the lives of *J. P.* *W. W.* and of the ſaid *T. N.* and of the longeſt liver of them ſucceſſively, *&c.*

Holt, Chief Juſtice, ſaid, that this matter might have been better found; but though it be not found, that *T. N.* is living, yet when the jury find a grant to him for his life, we muſt intend, in a *ſpecial verdict*, that he ſtill continues alive, eſpecially when the plaintiff is to make out a title to avoid the grant; but it would be otherwiſe on a plea. Which was agreed to by *Powell*, Juſtice, who ſaid, We cannot preſume that he is dead; for he being once found alive, we muſt take him ſo to continue, unleſs it were expreſsly found, that he is ſince dead. *Vide Raym. vol.* 2. *p.* 999.

Michaelmas, 4 *Ann.* *Anonymous.*

Adjudged, That when a jury brings in a *verdict*, and there is ſurpluſage, the court will reject the ſurpluſage. 3 *Lev.* 80. 7 *H.* 6. 20. 1 *Lev.* 323. *Vide Mod. Rep. vol.* 11. *p.* 64.

Trinity, 5 *Ann.* *Anonymous.*

The court were of opinion that the entry of a *ſpecial verdict*, though on a criminal proſecution, may be amended, if it was not entered acccording to the notes taken; and the roll may be amended.

Gould, Juſtice, cited *Raymond* 460. and ſaid the court frequently amended informations.

Per curiam. If a *jury* find for the Queen, and the *verdict* is entered for the defendant, yet at *common law* it is amendable; and ſo it was agreed in Dr. *Drake*'s caſe. If in a *ſpecial verdict* the clerk takes the minutes right, and the *verdict* is entered up wrong, the court will amend the roll according to the minutes, tho' in a criminal proſecution. *Vide Mod. Rep. vol.* 11. *p.* 84.

Hilary, 11 *Ann.* *Parker* v. *Langly*.

See this caſe fully ſtated in page 38 of this work, under the head *Actions*.

Michaelmas, 12 *Ann.* *Jackſon* v. *Laveright*.

See this caſe fully ſtated in page 351 of this work, under the head *Declaration*.

Eaſter, 13 *Ann.* *Muſton* v. *Yateman*.

See this caſe fully ſtated in page 729 of this work, under the head *Pleas*, *Pleadings*, &c.

Trinity, 8 *Geo.* *Mayhoe* v. *Archer*.

See this caſe fully ſtated in page 195 of this work, under the head *Bankrupts*.

Trinity, 9 *Geo.* *The King* v. *Alexander John*.

On a motion, a rule was made for the defendant to ſhew cauſe why an information in nature of a *quo warranto* ſhould not be granted againſt him, to ſhew by what authority he claimed to be Mayor of *L.* in the county of *Cornwall*.

Afterwards a trial was had on this information, and a *verdict* was found for the plaintiff. And now the court was moved to ſet it aſide, for an attachment againſt one *J. J.* for not producing the corporation-books at the trial, according to a rule of court made for that purpoſe, with which he was ſerved.

Per curiam. There is no room for an attachment, becauſe this perſon has not diſobeyed the rule; and a new trial ſhall not be granted, becauſe that would be againſt the report of the Judge before whom this trial was had, who was ſatisfied that this *verdict* was not againſt evidence; ſo that nothing is offered for a new trial, but only that the long continuance of this mayoralty ſuppoſes, that the defendant had a right to be Mayor, and the inconveniency, if he was not Mayor, would be, to avoid all the corporate acts done by him as Mayor for many years paſt.

The queſtion only was, whether he was duly elected into that office? That is a queſtion concerning the right, and in ſuch caſe the long poſſeſſion of the mayoralty, or the many inconveniences that would follow, if he was not duly elected, ought not to be regarded.

So that this *verdict* being given on good evidence, and ſo certified by the Judge who tried the cauſe, ſhall not be ſet aſide for any of the reaſons before-mentioned, and therefore the rule was diſcharged. *Vide Mod. Rep. vol.* 8. *p.* 132.

Michaelmas, 9 *Geo.* *The King* v. *Jones and Powell.*

On an information in nature of a *quo warranto* againſt the defendant and one *Powell*, for pretending to be burgeſſes of *Brecknock* in *Wales*, there being evidence given, that the uſage had been againſt the charter, the jury gave a *general verdict* on the uſage, *viz.* that the defendants were *not guilty*.

The court was moved to ſet aſide this *verdict*, for *two* reaſons; *firſt*, becauſe it was againſt evidence; and, *ſecondly*, becauſe the jury refuſed to find a *ſpecial verdict*, which they ought to have done when it was required.

The queſtion was, whether a *verdict* of acquittal, on an information in nature of a *quo warranto*, may be ſet aſide?

This queſtion being found difficult, was referred to all the judges of *England*, who were equally divided in their opinions.

But afterwards, on the laſt day of *Hilary* term following, the Chief Juſtice declared, that it was the opinion of the whole court to grant a new trial, if it could be granted by law; but it being a point wherein the Judges had ſo much differed, it ought to be well conſidered, becauſe it affected all the corporations in *England*; and that it was never yet known that a *verdict* was ſet aſide, by which the defendant was acquitted, in any caſe whatever on a *criminal* proſecution. *Vide Mod. Rep. vol.* 8. *p.* 201.

Hilary, 10 *Geo.* *The King* v. *Calvin.*

See this caſe fully ſtated in page 136 of this work, under the head *Attachment.*

Eaſter, 10 *Geo.* *Burges* v. *Bracher.*

See this caſe fully ſtated in page 353 of this work, under the head *Declaration.*

Michaelmas, 12 *Geo.* *Hall* v. *Cove.*

See this caſe fully ſtated in page 799 of this work, under the head *Trial, &c.*

Michaelmas, 2 *Geo.* 2. *The King* v. *Upton.*

After a *verdict* for the King on an indictment for uſury, the court was moved in arreſt of judgment, that they had only laid a corrupt agreement, without any loan, or taking exceſſive intereſt in purſuance of it. And the judgment was accordingly arreſted. *Vide Stra. vol.* 2. *p.* 816.

Trinity, 3 *Geo.* 2. *The King* v. *Hayes.*

See this caſe fully ſtated in page 70 of this work, under the head *Amendment.*

Eaſter, 4 *Geo.* 2. *Ball* v. *Knight.* Error.

In an action on a *policy of inſurance* in the Mayor's court of *Briſtol*, where the plaintiff had a *verdict*, on which the defendant brought a *writ of error* in this court.

Adjudged by *Raymond*, Chief Juſtice, that if the loſs on the policy had been before the adventure was to have begun, the plaintiff could not have had a *verdict*, and the rule is general, that a *verdict* will ſupply the omiſſion of a thing that was neceſſary to be proved at the trial; and therefore, in the caſe of *Hudſon* v. *Jones* the want of an *attornment* in the declaration was helped by the *verdict*. *Vide Fitz-Gibbons, p.* 274.

Eaſter, 7 *Geo.* 2. *Cary* v. *Hinton.*

In an action of *treſpaſs* for breaking and entering his cloſe, and treading down the graſs. The defendant pleads that the *place in which* was his proper lands. To which the plaintiff replies, that it was the eſtate of inheritance, and the proper lands of the plaintiff, and not the proper lands of the defendant; on which iſſue is joined, and a *verdict* for the plaintiff.

The court was moved in arreſt of judgment, that this was an immaterial iſſue, for this is a poſſeſſory action, and the plaintiff may have the inheritance in him, and yet not be in poſſeſſion.

Per curiam. It being found to be the plaintiff's eſtate of inheritance, we muſt take it he had the *fee*, which is the whole intereſt, and that the defendant had no intereſt at all. We are not to preſume a poſſeſſion diſtinct from the *fee*; and here is enough for us to ſee where the right of the caſe is, and to warrant our judgment for the plaintiff. *Vide Stra. vol.* 2. *p.* 973.

Eaſter, 8 *Geo.* 2. *The King* v. *Francis and others.*

Lord *Hardwicke*. In this caſe there is a plain charge of *grand larceny* on this *verdict*; the priſoners cannot be diſcharged, but muſt be remanded, and then they may be removed by *habeas corpus* to be tried for this *grand larceny*; and this makes this caſe different from *The King* v. *Burridge*, 3 *W.* 3. *Keb.* 439. becauſe here is a *felony* apparent on the *verdict*, but there no *felony* appeared. *Vide Caſes Temp. Lord Hardw. p.* 115.

Hilary, 11 *Geo.* 2. *Hooper* v. *Shepherd.* Error.

In *error* on a judgment in *C. B.* in an action of *debt* on a *charter-party*, whereby the defendant was to pay *fifty guineas per* month; the plaintiff ſtates, that 652 *l.* 10 *s.* was due for the whole, 152 *l.* 10 *s.* which he had received, and the remainder was 500 *l.* for which the action was brought. The defendant pleaded, that he had paid at the rate of *fifty guineas per* mouth for all the time the ſhip was in his ſervice: and iſſue being taken, that he did not, the jury find, that 357 *l.* 11 *s.* remained unpaid, but ſay nothing as to the reſt of the 500 *l.*

It was firſt objected, that *covenant*, and not *debt*, was the proper action: but this was got over, it being founded on a deed, in which caſe *debt* will lie, according to 1 *Roll. Abr.* 591. *Cro. Eliz.* 561. 758. 1 *Roll. Abr.* 597. *Sti.* 31. 3 *Lev.* 429.

But then it was objected, that this was an imperfect *verdict*, the jury not having anſwered to all they were charged with, according to *Co. Litt.* 227. *a.* 1 *Roll. Abr.* 802. *pl.* 5. *Cro. Jac.* 31. 113. 3 *Lev.* 55.

But the court held this caſe was not thereby diſtinguiſhed from the general rule, and therefore reverſed the judgment. *Vide Stra. vol.* 2. *p.* 1089.

Michaelmas, 14 *Geo.* 2. *Marton* v. *Jenkin.*

On a *mandamus* to ſwear the plaintiff into the office of Mayor of *Wincheſter*, it appeared by a *ſpecial verdict* that the Mayor muſt be choſen out of the *jurats*, and that the plaintiff on the 1ſt day of *May* 1739 was choſen a jurat, and ſworn in, and continued ſo till the 7th day of *April* 1740, when he was choſen Mayor: that he had received the ſacrament within a year before his election to be Mayor, but not within a year before he was choſen a *jurat*. And the queſtion was, whether *ſtat.* 5 *Geo. c.* 6. *ſect.* 3. could operate ſo as to give him the benefit of the non-proſecution in *ſix months*, with regard to the previous qualification. And the court held it did, or elſe he would be under ſome degree of diſability or incapacity, when the act ſays none ſhall be incurred.

But then a doubt was made, whether, as the *verdict* was ſilent as to any proſecution, it was ſufficient for the court to give judgment on; and whether it ſhould not have been found *negatively*, there was none. But the court held it well enough, for the plaintiff had nothing more to do than to find his election; what is to avoid it, ſhould come from the other ſide; and that as it is not found, there was a proſecution, which it lay on the defendant to ſhew; they could not be warranted in ſaying the plaintiff's election was void: and therefore they gave judgment for the plaintiff. *Vide Stra. vol.* 2. 1445.

Eaſter, 16 *Geo.* 2. *Lewis, on the Demiſe of the Earl of Derby*, v. *Withams.*

On a *ſpecial verdict in ejectment*, the defendant claimed under a common recovery, whereby it was inſiſted that the leſſor of the plaintiff was barred. But an exception being taken, that no writ of *ſeiſin* or execution is found, the court was of opinion that the defendant could not take any advantage of the recovery. It was then moved, that a *venire facias de novo* might go, this being an old recovery an hundred years ago, on which execution would be preſumed; and in fact there was a *writ of ſeiſin*, and a return; and ſo this recovery is compleatly found in a cauſe now depending on the demiſe of the *Duke of Athol*; it was likewiſe inſiſted, that the minutes find this recovery as, *&c.* and therefore warrant the inſerting this.

Per curiam. A *venire facias de novo* can only be granted on what appears to the court on this record; and unleſs the record warrants it, it will be *error* to grant it. 8 *Co. Loveday*'s caſe. It is not the *verdict*, but the defendant's title that is imperfect: how can we ſuggeſt, that the jury have miſbehaved themſelves? And yet that muſt be an introduction of a *venire facias de novo.*

It was then prayed, that an entry might be made of its being aſked and denied; but as to that, the court ſaid, that as it was to iſſue on the record, it would be grantable by the court where *error* was brought: as was done in the Houſe of Lords lately in the caſe of the *Wine-licence office*.

This judgment was afterwards affirmed in the Houſe of Lords on the queſtions put to the Judges in both reſpects. *Vide Stra. vol.* 2. *p.* 1185.

Michaelmas, 17 *Geo.* 2. *Newcomb* v. *Green.*

In an action of *covenant* the breach was aſſigned in non-payment of 270 *l.* mortgage-money. And on the trial the jury gave a *verdict* for 274 *l.* 11 *s.* damages; and *Burnet*, Juſtice, entered it ſo in his minutes, but the clerk of *niſi prius* had only marked 1 *s.* damages on the *writ of diſtringas*.

The court was now moved to alter the indorſement, by making it agreeable to the judge's notes. And *Deniſon*, Juſtice, having conferred with the judge who tried the cauſe, and reporting the matter to be as above ſtated, the court ordered it to be amended accordingly. *Vide Stra. vol.* 2. *p.* 1197.

Eaſter, 18 *Geo.* 2. *The King* v. *Elizabeth Nicolls.*

See this caſe fully ſtated in page 260 of this work, under the head *Certiorari.*

Eaſter, 30 *Geo.* 2. *Anderſon* v. *George.*

On a rule for the plaintiff to ſhew cauſe "why a "*verdict* obtained by him for 16 *l.* ſhould not be ſet "aſide, and a new trial ordered on payment of coſts." The caſe was as follows: the plaintiff had ſold goods to the defendant, who paid for them by a promiſory note of one *H.* which the defendant indorſed. The plaintiff demanded the money of *H.* but indulged him with a further day of payment ſeveral times, till *H.* broke.

The court thought the plaintiff had taken an unfair advantage, *contrary to juſtice and good conſcience*, and not only ſet aſide the *verdict*, but ſet it aſide *without payment of coſts*: and declared, "the next time that a "party ſhould obtain a *verdict* in like manner, by an "*unfair unconſcionable* advantage, without trying the "real queſtion, they would ſet aſide the *verdict*, and "make him pay the coſts." On which a new trial was ordered, and the defendant had a *verdict* on the merits. *Vide Bur. vol.* 1. *p.* 353.

Trinity, 30 & 31 *Geo.* 2. *Bright, Executor of Hannah Criſp, Widow*, v. *Eynon.*

See this caſe fully ſtated in page 498 of this work, under the head *Fraud.*

Trinity, 30 & 31 *Geo.* 2. *Cogan* v. *Ebden, and another.*

On a motion to ſet aſide a *verdict*, as being given in by the foreman, contrary to the opinion and intention of *eight* of the jury: the court made a rule to ſhew cauſe why on reading the *affidavits* of theſe *eight* jurymen the *verdict* ſhould not be *amended* and *ſet right*, according to the truth of the *finding*, but the matter never came before the court again. It appearing that the court, on deliberation among themſelves, had come to an opinion, "that in this ſhape the *verdict* might "be ſet right. *Vide Bur. vol.* 1. *p.* 383.

Eaſter, 31 *Geo.* 2. *The King* v. *Peters and others, or Cavil* v. *Burnaford and others.*

See this caſe fully ſtated in page 596 of this work, under the head *Judgment and Execution.*

Trinity, 31 *Geo.* 2. *Wilford* v. *Berkeley.*

See this caſe fully ſtated in page 599 of this work, under the head *Jurors.*

Michaelmas, 32 *Geo.* 2. *Hawks* v. *Crofton.* Error.

On a *writ of error* brought on a judgment of the *K. B.* in *Ireland*, in an action of *treſpaſs vi et armis*, for an *aſſault* and *battery* brought there about *fifteen years* ago.

The queſtion on the *writ of error* was, "whether "this *verdict* is ſo uncertain, that the court cannot "give judgment on it, but muſt award a *venire facias* "*de novo?*"

Lord *Mansfield.* I think that where the intention of the jury is manifeſt, and beyond a doubt, the court will ſet right matters of form, and the mere act of the clerk.

The preſent caſe is ſo clear, that the court may give judgment on the ſubſtantial finding, though the clerk may have been irregular and faulty in point of form. It is very clear what the jury *meant*.

Deniſon, *Foſter*, and *Wilmot*, Juſtices, gave their opinions at large, and concurred with the Chief Juſtice.

Per curiam. Let the Judgment be affirmed. *Vide Bur. vol.* 2. *p.* 698.

Trinity, 1 *Geo.* 3. *Edie and another*, v. *The Eaſt India Company.*

See this caſe fully ſtated in page 239 of this work, under the head *Bills of Exchange.*

Eaſter, 4 *Geo.* 3. *Hodſon* v. *Richardſon.*

See this caſe fully ſtated in page 577 of this work, under the head *Inſurance.*

Hilary, 6 *Geo.* 3. *Benſon* v. *Sir Thomas Frederick, Baronet.*

Lord *Mansfield* reported the evidence given on a *writ of inquiry*, which had been executed before him, and on which 150 *l.* damages had been given.

It was an action brought againſt the defendant, who was Colonel of the *Middleſex* militia, for ordering the plaintiff, who was a common man therein, and had a *furlough* from the Major, to be ſtripped, and to receive *twenty* laſhes from *two* drummers.

On a motion to ſet aſide this *verdict* for exceſſive damages, a rule to ſhew cauſe was obtained; and on the ſhewing cauſe, the court gave their opinion.

Lord *Mansfield*. I am not diſſatisfied with the *verdict*, for Sir *Thomas* has manifeſtly acted *arbitrarily*, *unjuſtifiably*, and *unreaſonably*, and therefore, though the damages are beyond the proportion of what the man has ſuffered, I do not think a new trial ought to be granted.

Wilmot and *Aſton*, Juſtices, gave their opinions at large, and concurred with the Chief Juſtice.

Per curiam. Let the rule be diſcharged. *Vide Bur. vol.* 3. *p.* 1845.

View.

Trinity, 10 *W.* 3. *Anonymous.*

It was ordered, that when in order to a *view*, the laſt juror is withdrawn, the plaintiff ſhall take out a new *diſtringas*, *taking away* the laſt man of the panel, to diſtrain the other *twenty-three*, with an *apponas etiam decem tales* At the trial of this cauſe for want of a full jury upon the principal panel, ſome *tales-men* were ſworn and had the *view*, but the *diſtringas* was returnable as an original *diſtringas*, and ſo many of the principal panel left out, who were not at the *view*; of which the defendant complained, and would have ſet aſide the trial for irregularity: but becauſe no *venire* appeared to the court, and the matter ſtood on record as an original trial, and the want of a *venire* was helped by verdict; and becauſe the cauſe was tried by thoſe that were fitteſt, *viz.* thoſe who had the *view*; the court would do nothing in it, but ordered the other courſe to be followed for the future. *Vide Salk. vol.* 2. *p.* 665.

Trinity, 3 *Ann. Anonymous.*

Per curiam. Where a *view* is proper, there, on motion before trial, we will grant it, in like manner as we uſed at the *aſſizes*, and that is after the jury are ſworn, and then it muſt be by conſent, and a juror withdrawn.

Holt, Chief Juſtice. I think we may award a *view* without conſent; and notwithſtanding this *view*, a juror may be challenged when he comes to be ſworn. *Vide Mod. Rep. vol.* 6. *p.* 211.

Michaelmas, 4 *Ann. Anonymous.*

Holt, Chief Juſtice. Before we make a rule for a *view*, the *venire facias* muſt be returned, and then we may make a rule, that ſo many of the panel ſhall *view* the premiſes. *Vide Salk. vol.* 2. *p.* 665.

Hilary, 30 *Geo.* 2.

The granting of Rules for Views *in Civil Cauſes, ſtands now ſettled on the following Ground:*

After *ſtat.* 4 & 5 *Ann. cap.* 16. *ſect.* 8. *views* were granted on motion of courſe. On that *ſtat.* and 3 *Geo.* 2. *cap.* 25. *ſect.* 14. a notion prevailed, "that *ſix of the first twelve* on the panel muſt *view* and appear at the trial: if they did not, there could be no trial, and the cauſe muſt go off."

By *ſtat.* 4 & 5 *Ann. cap.* 16. *ſect.* 8. there could be no *view* till after the cauſe had been brought on to trial. If the court ſaw the queſtion involved in obſcurity, which might be cleared up by a *view*, the cauſe was put off, that the jurors might have a *view* before it came on to be tried again. The rule for a *view* proceeded on the previous opinion of the court or judge at the trial, "that the nature of the queſtion made a *view* not only proper, but neceſſary:" for the judges at the *aſſizes* were not to give way to delay and expence of a *view*, unleſs they ſaw that the cauſe could not be underſtood without one.

The court being unanimouſly of opinion, that the act of parliament meant a *view* ſhould not be granted, unleſs the court was ſatisfied that it was *proper* and *neceſſary*.

The rule that was made in the firſt inſtance that happened after the expedient, was propoſed by the court, and was received with general approbation. It was drawn up in the following words:

Saturday next after fifteen days of St. Hilary, in the 30th year of King George the Second.

Pierce Eſq; v. *Earl Falconberg and others.*

By conſent of council on both ſides, "*It is ordered*, that there iſſue a *writ of diſtringas juratores*, to be directed to the ſheriff of the county of *York*, in which ſhall be contained a clauſe, commanding the ſheriff to have *ſix* or more of the *firſt twelve* of the jurors to be impanelled and returned to try the iſſue between the parties at the place in queſtion, before the time of the trial of the ſaid iſſue, to wit, on &c, and that *B. R.* on the part of the plaintiff, and *T. W.* on the part of the defendants, ſhall attend on the ſame day, and ſhew the matters in queſtion to the ſaid *ſix* or more of the ſaid *twelve* of the ſaid jurors; and that the expences of taking the ſaid *view* ſhall be equally borne by both parties: and no evidence ſhall be given on either ſide at the time of taking thereof."

And by the like conſent, "*It is further ordered*, that in caſe no *view* ſhall be had; or if a *view* ſhall be had by any of the ſaid jurors, (whether they ſhall happen to be any of the *twelve* jurors, who ſhall be *firſt named* in the ſaid writ or not) yet the ſaid trial ſhall proceed; and no objection ſhall be made on either ſide, either for want of a *view*, or that a *view* was not had by any of the *twelve* jurors firſt named, or for that it was not had by any particular number of the jurors named in the ſaid writ, or for want of a proper return to the ſaid writ."

Now, if the trial is to be by a *ſpecial jury*, the rule runs thus:

It is ordered, that there iſſue a *writ of diſtringas juratores*, &c. "taking thereof," in the words of the *firſt clauſe* of the above recited rule between *Pierce* and Lord *Falconberg* and others) the additional clauſe is expreſſed in theſe terms. The plaintiff (or the defendant, *viz.* the party who prays the *view*) conſenting, that in caſe no *view* ſhall be had; or if a *view* ſhall be had by any of the jurors, whether they ſhall happen to be any of the *twelve* jurors who ſhall be firſt named in the ſaid writ or not; yet the ſaid trial ſhall proceed; and no objection ſhall be made on either ſide on account thereof, or for want of a proper return to the ſaid writ.

The rule for a *view*, when the cauſe is to be tried by a *common jury*, could not continue the ſame ſince the *ballotting act*, (*viz. ſtat.* 3 *Geo.* 2. *cap.* 25.) as it was before, nor could it be exactly like to that for *views* by ſpecial juries, (by reaſon of the particular directions given by *ſect.* 14. of the *ballotting act.*) The preſent form (ſince that ſtatute) is this:

"*It is ordered*, that there iſſue a *writ of diſtringas juratores* to be directed to the ſheriff of the county of *York*, in which ſhall be contained a clauſe, commanding the ſaid ſheriff to have *ſix*, or ſome greater number of the jurors, to be impanelled and returned to try the iſſue between the parties, who ſhall be mutually conſented to by the ſaid parties or their agents, at the place in queſtion, before the time of the trial of the ſaid iſſue, to wit, on, &c. and that *B. R.* on the part of the plaintiff, and *T. W.* on the part of the defendant, ſhall attend on the ſame day, and ſhew the matters in queſtion to the ſaid *ſix*, or "ſome greater number of the ſaid jurors, who ſhall be "mutually conſented to as aforeſaid; and that the expences of taking the ſaid *view* ſhall be equally borne "by both parties: and no evidence ſhall be given on "either ſide at the time of taking thereof."

The additional clauſe, now added to this rule, is in theſe words, "the plaintiff or the defendant," (the party at whoſe inſtance the rule is prayed) "conſenting that in caſe no *view* ſhall be had; or if a *view* "ſhall be had by any of the jurors, whether they ſhall "happen to be *ſix*, or any *particular number of the jurors, who ſhall be ſo mutually conſented to as aforeſaid*, "yet the ſaid trial ſhall proceed, and no objection "ſhall be made on either ſide on account thereof, or "for *want of a proper return* to the ſaid writ." *Vide Bur. vol.* 1. *p.* 252.

Vill, Pariſh, &c.

Michaelmas, 6 *W.* & *M.* *Wilſon* v. *Law.*

On an appeal for *murder*, it was adjudged that the count for the *pariſh* ſhall be intended at *firſt view*, a *vill*. 1 *Inſt.* 134. *b.* and if it comprehends more *vills* than one, the party muſt ſhew it. *Vide Raym. vol.* 1. *p.* 22.

Hilary, 12 *W.* 3. *The King* v. *Sir Hugh Everard.*

A rule was obtained by ſurpriſe, for leave to file an information againſt the defendant, and ſeveral other *pariſhioners* in the *pariſh* of ——in *Eſſex*, for laying a tax on themſelves for carrying on a ſuit againſt their vicar in the *ſpiritual court*, for *incontinency*. And the court held they might lawfully tax themſelves by conſent, to carry on a ſuit for the public good of the *pariſh*; but in that caſe the majority could not bind the reſt without their conſent, as in the caſe of other rates. But the information being filed, it was referred to the maſter. *Vide Mod. Rep. vol.* 12. *p.* 440.

Eaſter, 13 *W.* 3. *Anonymous.*

An indictment, concluding to the damage, *&c.* of the inhabitants of a certain *vill*, was quaſhed for the ſpecial concluſion.

Per curiam. A chapel's having ſacramentals only does not make it independent of the *pariſh*, but it muſt have all other *badges*, as *ſepultures*, *&c.* *Vide Mod. Rep. vol.* 12. *p.* 504.

Trinity, 13 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. A *vill* and a *village* are the ſame, and a *hamlet* is a diviſion of a *vill*. 18 *Edw.* 1. The *whole vill* is a *conſtabulary*, and a *hamlet* is commonly a *tything*. *Vide Mod. Rep. vol.* 12. *p.* 546.

Michaelmas, 1 *Ann.* *Lord Wharton* v. *Sir John Robinſon.*

On a trial at *bar* concerning boundaries of lands; the parſon of the one *pariſh*, the land lying in *two pariſhes*, was refuſed as evidence, becauſe he might enlarge his own *pariſh*, and conſequently the tythes. But one who about *ſeven* years before had taken the profits under the title of one of the parties, was received as a witneſs, becauſe he now might plead the *ſtatute of limitations*. *Vide Mod. Rep. vol.* 7. *p.* 63.

Eaſter, 8 *Ann.* *Kid* v. *Dr. Watkinſon.*

See this caſe fully ſtated in page 631 of this work, under the head *Mandamus.*

Trinity, 6 *Ann.* *Love* v. *Dr. Bentley.*

The Solicitor General moved for a *mandamus* to the *pariſh* of St. *Clement's* in *Cambridge*, to let the defendant have the ſight of the *pariſh* books, (it was an action brought for a falſe return to a *mandamus* for Dr. *Bentley* to ſwear the plaintiff in churchwarden.)

Holt, C. J. They ought to have a ſight of the books. In the caſe of a copyhold, every copyholder has an intereſt in the rolls; ſo here, every pariſhioner has a right to the *pariſh* books. And the court ordered copies of the books to be given, which *Powell*, Juſtice, ſaid would be good evidence, *i. e.* againſt the plaintiff, but not for him, becauſe in this caſe he has the cuſtody of the books themſelves, and may produce them in evidence, if he pleaſes. *Vide Mod. Rep. vol.* 11. *p.* 134.

Hilary, 8 *Geo.* 2. *The Pariſh of Denham* v. *The Pariſh Dalham in Suffolk.*

On a ſpecial order it was ſtated, that one *Walker* hired a farm in *Denham* above 10*l.* *per annum*, and lived on it from 1725 to 1730, and paid *pariſh rates*; that then he went and lived for ſeveral years on an eſtate 150*l.* *per ann.* in *Southwold*, which is an *extra-parochial* place, conſiſting of *two* houſes, and *three* hundred acres of land belonging to, and in the occupation of different perſons. But it not appearing that there had been any overſeers of thep oor, the ſeſſions confirmed the order of the *two* juſtices for ſending him to *Denham.*

It was moved to quaſh both the orders, it having been determined, *Salk.* 486. and in the caſe of *Rufford*, that a ſettlement may be gained in an *extra-parochial* place, containing more houſes than *one*, ſo as to come under the denomination of a *vill* or *townſhip*; the power in *ſtat.* 43 *Eliz.* *c.* 2. in pariſhes, being by the ſtatute 13 & 14 *Car.* 2. *c.* 12. extended to all *townſhips* and *villages.*

Per curiam. That was a pretty liberal conſtruction on the ſtatute, which plainly related to a townſhip in large *pariſhes*, but *two* houſes are not enough to bring it within the denomination of a *vill* or *townſhip*. 1 *Inſt.* 115. it muſt conſiſt of a neighbourhood and ſeveral houſes, and ſhould have a petty conſtable. 1 *Mod.* 78. this does not appear to have the reputation of a *vill*: ſo the orders muſt be affirmed. *Vide Stra. vol.* 2. *p.* 1004.

Trinity, 3 *Geo.* 3. *The King* v. *Showler and Atter.*

See this caſe fully ſtated in page 710 of this work, under the head *Pariſh Officers.*

1 *Inſt.* 115. defines a *village* as conſiſting of *many houſes and many families.* *Vide Bur. vol.* 3. *p.* 1893.

Uſury and Extortion.

Trinity, 1 *W.* & *M.* *Maſon* v. *Abdy.*

The obligor was bound in a bond of 300*l.* conditioned to pay 22*l.* 10*s.* *premium*, at the end of the firſt *three months* after the date, *&c.* and *ſixpence in the pound* at the end of *ſix months*, as a farther *premium*, together with the principal itſelf, in caſe the obligor was then living, but if he died within that time, then the principal was to be loſt.

Adjudged, That this was an *uſurious contract*, becauſe there was a poſſibility that the obligor *might live* ſo long; and there is an expreſs proviſion to have the principal again. *Vide Salk. vol.* 3. *p.* 390.

Hilary, 8 & 9 *W.* 3. *The King* v. *Burdett.*

It was ſaid by *Holt*, Chief Juſtice, at the trial at *Guildhall*, that if a man be indicted for taking *extorſively twenty ſhillings*, and there is but proof of one *ſhilling*, yet the defendant is *guilty*. And the *extorſive* or *uſurious agreement* is not the offence, but the taking ; for a pardon after the agreement, and before the taking, does notpardon the *extortion*, or *uſury*. *Vide Raym. vol.* 1. *p.* 148.

Eaſter, 12 *W.* 3. *Crow* v. *Brown.*

An *uſurious contract* was pleaded in *bar* of a *debt* on a bond, but not ſaid that the defendant was indebted to the plaintiff at the time of the bond given, or that there was an agreement to lend money on the *uſurious contract* ; and for that reaſon judgment was given for the plaintiff *niſi*, &c. *Vide Mod. vol.* 12. *p.* 385.

Eaſter, 13 *W.* 3. *The King* v. *Ward.*

Holt, C. J. On an *uſurious contract* pleaded, the proof lies all on the defendant ; for by his plea he confeſſed the debt. *Vide Mod. Rep. vol.* 12. *p.* 516.

Eaſter, 13 *W.* 3. *Anonymous.*

Holt, Chief Juſtice. The bail to the action may plead an *uſurious contract*, though he be not privy to it. And a *ſpecial plea* is no *plea* till it be paid for ; but if the party accept it, without inſiſting on that, it will be well. *Vide Mod. Rep.* 12. *p.* 493.

Michaelmas, 1 *Ann.* *The Queen* v. *Sewell, alias Beaux.*

See this caſe fully ſtated in page 450 of this work, under the head *Evidence.*

Eaſter, 7 *Ann.* *The Queen* v. *Dy.*

Adjudged, That no indictment will lie on the *ſtatute of uſury* : for the method the act preſcribes muſt be followed : therefore an indictment in this caſe was quaſhed. *Vide Mod. Rep.* 11. *p.* 174.

Hilary, 4 *Geo.* *The King* v. *Loggen and Froome.*

See this caſe fully ſtated in page 573 of this work, under the head *Indictment.*

Hilary, 8 *Geo.* *Lord Bernard* v. *Saul.*

On a motion for leave to plead double, the court declared, that on *non aſſumpſit*, the defendant might give in evidence an *uſurious contract*, becauſe that *makes it a void promiſe* ; *but in the caſe of a ſpecialty*, it muſt be pleaded. And on the trial the defendant was admitted to give that evidence on the *general iſſue*, and the plaintiff was *nonſuited.* *Vide Stra. vol.* 1. *p.* 498.

Trinity, 11 *Geo.* *In Middleſex, before Raymond, Chief Juſtice.*

In an action *qui tam* on the ſtatute of *uſury*, the Chief Juſtice refuſed to let the party to the contract be a witneſs to prove the re-payment of the money, becauſe till that was proved, he was no witneſs at all. *Vide Stra. vol.* 1. *p.* 633.

Michaelmas, 2 *Geo.* 2. *The King* v. *Upton.*

See this caſe fully ſtated in page 812 of this work, under the head *Verdict, Venire*, &c.

Eaſter, 9 *Geo.* 2. *Buſh and others, Aſſignees of Jones*, v. *Gower.*

To a *ſcire facias* on a judgment by confeſſion, the defendant pleaded, that the warrant of attorney was given on an *uſurious contract*. And on demurrer it was held, that this was not within *ſtat.* 12 *Ann. ſect.* 2. *c.* 16. or to be got at this way ; for this is no contract of aſſurance.

The court however inclined, that it might be got at on a motion to vacate the judgment, as was done in the *C. B. Trinity*, 3 *Geo.* in the caſe of *Jackſon* v. *Moſley*, where a warrant was obtained from an infant. On the ſtatute *de religioſis*, who are reſtrained from obtaining lands by art or cunning, yet a *precipe* being brought, and judgment had, there was a neceſſity for the aid of parliament to inquire into the colluſion. *Vide Stra. vol.* 2. *p.* 1043.

Trinity, 9 *Geo.* 2. *Cock* v. *Ratcliffe.*

In an action on the *caſe* brought againſt the defendant on a promiſſory note made to the plaintiff's teſtator, the defendant pleads in *bar*, that it was *corruptly* agreed between them, that the teſtator ſhould be paid in hand *ten ſhillings* on giving the note, which exceeds the rate of *five pound per cent.* and therefore inſiſts that the note is void : the plaintiff replied, that the note was given for a juſt debt ; *without this*, that it was agreed in manner and form, as the defendant pleads : to which replication the defendant demurs, and ſhews for cauſe, that the replication does not traverſe the *corrupt agreement.*

Lord *Hardwicke.* This is a good replication, and is a fairer way of pleading than to ſay it was *corruptly agreed*, becauſe that is but the conſequence of law on the facts as they ſhall appear, though I agree it is more uſual to plead in that manner : the old way was to traverſe all the circumſtances of the agreement; and if that were good, this muſt be ſo.

It was objected at the trial, that no evidence is given of the corruptneſs, but the facts themſelves. But judgment was given for the plaintiff. *Vide Caſes Temp. Lord Hardwicke, p.* 287.

Michaelmas, 19 *Geo.* 2. *Maſſa* v. *Dauling.* *At Guildhall.*

On *uſury* pleaded to an action againſt the defendant as indorſer of a note for 200 *l.* The caſe was, that the plaintiff took the note on advancing 197 *l.* when the note had *three months* to run ; and at the *three months* end took another note for 200 *l.* on advancing 3 *l.* for other *three months.* It was inſiſted, that this was not *uſury*, being a purchaſe out and out of the notes : and both parties becoming bankrupt, and the commiſſioners refuſing to let the notes be proved, a petition was preferred to the Lord *Chancellor*, who directed an iſſue on them.

Lee, Chief Juſtice, held, that this was *uſury* within the meaning of *ſtat.* 12 *Ann. c.* 16. which prohibits taking more than 5 *l. per cent.* on any contract directly or indirectly : however, he left it to the jury on the queſtion, whether this was to be deemed a purchaſe or a loan ; who found it to be the latter, and the defendant had a *verdict.* *Vide Stra. vol.* 2. *p.* 1243.

Hilary, 32 *Geo.* 2. *Lamego* v. *Gould.*

On an action on the *caſe* brought on a ſpecial promiſe, “ to pay the plaintiff *twenty guineas* on the death “ of the wife ;” in conſideration of *two guineas* in hand paid by the plaintiff to the defendant. The note was in the following words :

“ *Memorandum.* In conſideration of *two guineas* re“ceived of *Aaron Lamego*, Eſq; &c. I promiſe to pay “ him *twenty guineas* on the deceaſe of my preſent “ wife, *Anne Gould.*”

The queſtion before the court was, “ whether this “ contract was *uſurious* ?” (the woman, at the time of making it, being then *ſeventy years* of age.)

The plaintiff's council argued, that *ſtat.* 12 *Ann, cap.* 16. only ſays, “ no perſon ſhall take above the “ value of 5 *l.* for the *forbearance* of 100 *l.* for a year; “ and ſo, after that rate, for a greater or leſſer ſum, “ or for a ſhorter or longer time ;” on pain that all bonds and contracts ſhall be void.

Now here is *no forbearance*, nor any *certainty* of receiving either principal or intereſt : it is a *mere contingency* ; and is like the caſe put in *Cro. Eliz.* 643. in the caſe of *Button* v. *Downham*, of a “ wager between “ two, to have 40 *l.* for 20 *l.* if one be alive at ſuch a “ day :” which, as there held, is not *uſury.*

Lord *Mansfield* ſtopped the plaintiff's council, being under a doubt how it is poſſible to *come* at this queſtion

abont

about *uſury*. For here is nothing at all ſtated about the loan of money: it might, for aught that appears to the contrary, be a *voluntary gift*, to be made to him upon this event. The matter of *uſury* was never thought of at the trial.

Deniſon, *Foſter*, and *Wilmot*, Juſtices, concurred with the Chief Juſtice; and *Wilmot*, Juſtice, obſerved, that the true *diſtinction* was laid down in *Cro. Eliz.* 643. between a *real bona fide* wager, not intended as a loan, and a tranſaction which is really an *uſurious loan*, but *diſguiſed* as a wager, with intent to have a ſhift.

Per curiam. Let the *poſtea* be delivered to the plaintiff. *Vide Bur. vol.* 2. *p.* 714.

Michaelmas, 33 *Geo.* 2. *Moriſſot* v. *King*.

In an action of *debt* on bond, in the penalty of 200*l.* conditioned for the performance of certain articles; which articles recited, that *M. Moriſſot* had lent *D. King* the ſum of 100*l.* to be repaid to her at the end of *four years*, without intereſt, but in conſideration that the ſaid *D. K.* his executors and adminiſtrators, ſhould find and provide for *M. Dubois*, daughter of the ſaid *M. Moriſſet*, (the obligee) meat and drink in the houſe where he dwelt, or ſhould dwell, for *fourteen years*, if the ſaid *M. D.* ſhould ſo long live; and that ſhe ſhould, during the ſaid term, board with him, and that ſhe ſhould be copartner with *M. K.* wife of the ſaid *D. K.* in the buſineſs of a milliner; and ſhould, all that time, bear one moiety of the loſſes, charges, (except houſe-keeping) ſhop-rent, and materials neceſſary for carrying on the trade, (which the ſaid *D. K.* did agree to provide;) and they ſhould be partners, and each do their utmoſt to carry on the trade; and ſhould divide the profits; and alſo, that the ſaid *D. K.* ſhould lodge the ſaid *M. D.* ſhe paying him 10*l.* a year; and at the end of the *four years*, *D. K.* was to repay the 100*l.* and in caſe of the death of the ſaid *M. D.* to pay the price, together with lawful intereſt for the 100*l.* to the ſaid *M. M.*

The defendant, after having obtained *oyer* of the bond, and of the articles therein recited, pleads, "that "this was a *corrupt agreement*," with an averment, "that the board of *M. M.* (the mother) was worth "20*l.* a year, and the board of *M. D.* (the daughter) "was worth 10*l.* a year."

To this plea the plaintiff demurs. And the only queſtion for the opinion of the court was, whether this was an *uſurious contract*, within *ſtat.* 12 *Ann*, *ſtat.* 2. *cap.* 16. which makes void all bonds, contracts, and *aſſurances*, where more than 5*l.* *per cent. per annum* is directly or indirectly taken for any loan.

The court were extremely clear that this caſe could not be within the *ſtatute of uſury*, and therefore gave judgment for the plaintiff. *Vide Bur. vol.* 2. *p.* 831.

Warrants of Attorney, Powers, &c.

Michaelmas, 9 *W.* 3. *Winter* v. *Loredore*, *Lovedurr*, *or Loveden*; *or Loveday* v. *Winter*.

See this caſe fully ſtated in page 606 of this work, under the head *Leaſes*.

Hilary, 10 *W.* 3. ——— v. *Norman and others*.

It was ruled by *Holt*, Chief Juſtice, that a conſtable may execute the *warrant of a juſtice of peace*, &c. out of his liberty, but he is not compellable to execute it there. *Vide Raym. vol.* 1. *p.* 736.

Hilary, 11 *W.* 3. *The King* v. *Chandler*.

See this caſe fully ſtated in page 264 of this work, under the head *Commitment*.

Trinity, 12 *W.* 3. *Anonymous*.

Holt, Chief Juſtice. If *A.* gives a *letter of attorney* to *B.* to receive money for him of *C.* and afterwards brings an action for the money againſt *C.* who afterwards pays the money to *B.* the *attorney*, it ſhall not abate the action; becauſe the commencing the action was a revocation of the *letter of attorney*. *Vide Mod. Rep. vol.* 12. *p.* 409.

Trinity, 12 *W.* 3. *The King* v. *Chipp*.

See this caſe fully ſtated in page 499 of this work, under the head *Game*.

Summer Aſſizes, 12 *W.* 3. *Maſters* v. *Butcher*.

It was ruled by *Holt*, Chief Juſtice, at *Norwich*, that an officer cannot juſtify the impriſonment of a man for non-payment of taxes under the *general printed warrant*, which the collectors uſually procure to be ſigned by *two* juſtices of peace, but they ought to have a *ſpecial warrant*. *Vide Raym. vol.* 1. *p.* 740.

Eaſter, 13 *W.* 3. *Parker* v. *Kett*.

See this caſe fully ſtated in page 435 of this work, under the head *Eſtates*.

Hilary, 1 *Ann.* *Oades*, *or Odes*, v. *Woodward*.

See this caſe fully ſtated in page 141 of this work, under the head *Attorney*.

Hilary, 1 *Ann.* *Gidden* v. *Drury*.

The defendant being under an arreſt for a juſt debt, to get his liberty, conſented to give a *warrant of attorney* to confeſs judgment to the plaintiff; and there being no attorney by, the plaintiff did really diſcharge (as he pretended) the bailiffs before the *warrant* was executed. On examination of the matter, *Holt*, Chief Juſtice, declared, he would be very well ſatisfied by *affidavits*, that the bailiffs were ſo diſcharged: ſo as if the defendant had refuſed to execute the *warrant*, they would not come again and ſeize on him, and that he would have reaſon ſo to believe before he would let the judgment ſtand; and though this was *debt* for money due on a mortgage, yet he ſaid there ought to be bail. *Vide Mod. Rep. vol.* 7. *p.* 139.

Trinity, 1 *Ann.* *Sands and Taſh* v. *Ledger*.

In an action of *debt* for rent the plaintiffs declared, that *R. H.* being ſeiſed *in fee* of the lands out of which, *&c.* the 28th of *October* 1684, by indenture between himſelf of the *firſt part*, *W. L.* Eſq; of the *ſecond part*, the plaintiffs *S.* and *T.* of the *third part*, and *M.* ſiſter of *L.* the intended wife of *H.* of the *fourth part*, wherein he covenanted for himſelf, *&c.* that he, the ſame *Michaelmas* term, ſhould levy a fine of the lands out of which, *&c.* to the uſe of himſelf for life, and after his death, to the uſe of *S.* and *T.* for *twenty-one years*, remainder to *T. H.* in tail, *&c.* with *power* therein reſerved to *R. H.* at any time during his life to make leaſes of the lands out of which, *&c.* for *twenty years*, *&c.* that the fine was levied accordingly; and that afterwards, *viz.* 1700. *R. H.* made a leaſe to the defendant by indenture, rendering a rent of 15*l.* *per annum*; that *R. H.* was dead, and ſo the rent belonged to the plaintiffs; and for the arrears of *one year* this action was brought. On *nil debet* pleaded, and iſſue being joined, the plaintiffs, at the trial, gave in evidence this deed of ſettlement and fine. And on reading the deed, the *power* appeared to be to make leaſes for *twenty-one years* in poſſeſſion, not in reverſion, rendering the ancient rent, and not diſpuniſhable of waſte.

Holt, Chief Juſtice, ſeemed to be clear of opinion, that this was a material variance. For it was neceſſary to ſhew the *power* to entitle the plaintiffs to this rent; otherwiſe the rent reſerved by the tenant for life could not come to them in remainder; and this *power* ſhewn in evidence is not that on which they have declared; becauſe this is a *ſpecial power*, the other *general*. But he ſaid he would ſee the nature of the defence.

fence. On which the defendant gave in evidence a leaſe of the ſame lands made by *R. H.* in 1693 to *T.* and *L.* for *twenty-one years*, if he and *J. S.* ſhould ſo long live.

Holt, Chief Juſtice, held, that by this leaſe the *power* was ſuſpended for the time of the leaſe; but that being expired, he inclined, that the ſecond leaſe was good. *Note*, *J. S.* was alſo dead. And for the variance, *viz.* the declaration was of a leaſe rendering 15 *l. per annum*, and the leaſe produced in evidence was rendering 15 *l. per annum*, and *three fowls*; the plaintiffs were *nonſuited*. *Vide Raym. vol.* 2. *p.* 792.

Michaelmas, 1 *Ann.* *Anonymous.*

Holt, Chief Juſtice. If a man be arreſted at the ſuit of *A.* and while he is under confinement of the bailiff, he gives a *warrant of attorney* to confeſs a judgment; if there be no *attorney* by, it is always taken to be by *dureſs*. But when one is in gaol a good while, and then another that is his creditor, or ſuppoſed to be ſo, comes to him, and he voluntarily, without any compulſion, does confeſs a judgment to him, that judgment ſhall ſtand, though there be no *atttorney*. And if one be impriſoned in this court, and confeſs judgment on an action brought by another, it ſhall be good; as where the declaration be delivered to one in cuſtody of the Marſhal, and he confeſſes the action, and gives judgment, though there be no *attorney* by, it ſhall ſtand. *Vide Mod. Rep. vol.* 7. *p.* 115.

Michaelmas, 2 *Ann.* *Inman* v. *Crew.*

The queſtion in this caſe was, whether it be neceſſary that an *attorney* ſhould be preſent at the executing a *warrant of attorney* to confeſs judgment by one under an arreſt, by a proceſs out of an inferior court?

It was held by the court, 1ſt. That if one under an arreſt confeſs judgment in this court, in the preſence of a ſworn *attorney* of the *C. B.* it will be well, and ſo *vice verſa*.

2dly. That though an *attorney* be preſent, yet if there be bad practice in obtaining it, it will be ſet aſide.

3dly. If one under an arreſt, by the proceſs of an inferior court, gives a *warrant* for the purpoſe of confeſſing a judgment in that court, this court will not ſet it aſide, though an *attorney* be not preſent.

4thly. If one under an arreſt by ſuch proceſs gives a *warrant* to confeſs a judgment in this court, if an *attorney* be not by, it will be ill.

5thly. If a man be under an arreſt, and ſeemingly diſcharged by the bailiffs, with deſign that he ſhould give a *warrant of attorney* to confeſs a judgment, to ſtand, though no *attorney* was by, and to retake him in caſe he did not, it will be ſet aſide.

6thly. Though ſuch perſon be really diſcharged, yet if he has probable reaſon to believe himſelf not to be diſcharged, and under ſuch apprehenſions, he gives a *warrant* for confeſſing a judgment, it will be ſet aſide: the ſame if he is under the terror of an arreſt. *Vide Mod. Rep. vol.* 6. *p.* 85.

Michaelmas, 2 *Ann.* *Anonymous.*

Per curiam. If a man gives a *warrant of attorney* to confeſs a judgment the *firſt day* of term, and dies, it may be well entered any time that term, according to *Shelley*'s caſe, the Dean of *Saliſbury*'s caſe, and many others. *Vide Mod. Rep. vol.* 6. *p.* 86.

Eaſter, 4 *Ann.* *The Queen* v. *Wiatt*, *or Wyatt.*

See this caſe fully ſtated in page 278 of this work, under the head *Conſtable.*

Trinity, 4 *Ann.* *The Queen* v. *Weſton.*

In this caſe *Powell*, Juſtice, ſaid, that if a man had a *power* to make leaſes, reſerving the ancient yearly rent annually, yet if it was reſerved on a day before the year was up, as if the year ended at *Chriſtmas*, and it was reſerved at *Michaelmas*, it would be well purſuant to the *power*; to which *Holt*, Chief Juſtice, agreed. *Vide Raym. vol.* 2. *p.* 1198.

Trinity, 10 *Ann.* *Tomlinſon* v. *Dighton.* Error.

See this caſe fully ſtated in page 360 of this work, under the head *Deed.*

Trinity, 10 *Ann.* *The Queen* v. *Derby.*

See this caſe fully ſtated in page 177 of this work, under the head *Bail.*

Trinity, 2 *Geo.* *Harvey of Comb's Caſe.*

See this caſe fully ſtated in page 178 of this work, under the head *Bail.*

Hilary, 4 *Geo.* *Brook* v. *Manning.* Error.

On *error* on a judgment by default in the *C. B.* the *error* inſiſted on was, the want of a *warrant of attorney* from the defendant in the action: on diminution alledged, a *certiorari* iſſued, whereon a *warrant of attorney* was returned, filed in *Trinity* term, whereas the interlocutory judgment was entered in the *Eaſter* term before, though the final judgment on the return of the writ of inquiry was not before *Trinity* term: and it was inſiſted the *warrant* returned is as no *warrant* in that cauſe, becauſe it was given at a time when the defendant was out of court, whereas it ſhould be pending the plea, 2 *Rol. Rep.* 186. *Noy* 128. *Michaelmas* 7 *Geo.* in this court. *Rot.* 357. And though *error* will not lie before the final judgment entered, yet the plea is determined by the interlocutory judgment; for the reaſon why *error* will not lie before the final judgment is, becauſe the courts above will not examine a judgment by parcels.

The court on the ſecond argument affirmed the judgment, and ſaid, that the plea is depending till final judgment be given; and if the *warrant* be entered and filed any time before that, it is enough.

Page, Juſtice. The *warrant* is to be intended previous to the appearance, though not filed.

Lee, Juſtice. Cited a caſe, *Noke* v. *Cotligate*, where this point was determined. *Vide Fitz-Gibbons*, *p.* 191.

Hilary, 5 *Geo.* *Anonymous.*

See this caſe fully ſtated in page 266 of this work, under the head *Commitment.*

Trinity, 8 *Geo.* *Noke* v. *Caldecot.* Error.

On a *writ of error* brought on a judgment given in the *C. B.* the court held, that if there be a *warrant of attorney* of any term *pending the ſuit*, it is enough to warrant the proceedings, and there is no neceſſity it ſhould be of the term mentioned in the *placita*. *Vide Stra. vol.* 1. *p.* 526.

Michaelmas, 8 *Geo.* *Rattle* v. *Popham.*

In *ejectment*, it appeared, that on a marriage ſettlement a *power* was given to every tenant for life, when in poſſeſſion, to limit the premiſes to any woman he ſhould marry for her life by way of jointure, and in bar of *dower*. The tenant for life made a leaſe for *ninety-nine years*, determinable on the death of his wife.

The court held, that however ſhe might be entitled to relief in a *court of equity*, yet at law it could never be ſaid to be an execution of the *power*; for the eſtates are very different, one being a freehold, and the other a chattel; the freehold in her being a qualification to any after-taken huſband to be a member of parliament, kill game, &c. And 8 *Co.* 69. *Lay* 74. *Co. Litt.* 45. were cited, where the *power* in *biſhops* or *tenants in tail* to make leaſes have been held to be ſtrictly purſued. *Vide Stra. vol.* 2. *p.* 992.

Eaſter, 9 *Geo.* *Coke* v. *Allen.*

See this caſe fully ſtated in page 144 of this work, under the head *Attorney.*

Michaelmas, 9 *Geo.* *The King* v. *Skelley.*

The defendant, having been formerly bound over, appeared the *firſt day* of term on his recognizance, when the Attorney-General acquainted the court, that there was a *new warrant* againſt him for treaſonable practices committed ſince the laſt term, which the officer had not been able to execute; and therefore deſired leave that it might be executed in court, which was granted accordingly. *Vide Stra. vol.* 2. *p.* 530.

Eaſter, 10 *Geo.* *Baggot* v. *Oughton.*

See this caſe fully ſtated in page 609 of this work, under the head *Leaſes.*

Hilary, 1 *Geo.* 2. *Carter* v. *Jewell.*

The defendant was taken on an *eſcape warrant* made by *Forteſcue*, Juſtice, and the court was moved to diſcharge him and the *warrant*, becauſe he was took on it the 6th of *January* inſtant; and *Forteſcue*, Juſtice, was removed from his office of judge of this court in *October* before, his patent being determined on the demiſe of the late King. And accordingly the perſon was diſcharged, and the *warrant* alſo. *Vide Raym. vol.* 2. *p.* 1513.

Trinity, 2 *Geo.* 2. *Jacob Lopes, Henriques, and others,* v. *The general privileged Dutch Company trading to the Weſt Indies.*

See this caſe fully ſtated in page 421 of this work, under the head *Error.*

Michaelmas, 4 *Geo.* 2. *Peters* v. *Morehead.*

The caſe was. *A.* deviſed to his ſon for life; after his death, then the ſame and ſuch parts thereof to the uſe of ſuch woman as ſhall be his wife, for her natural life, as he ſhall, by deed or writing under hand and ſeal, in the preſence of three witneſſes, direct, limit, or appoint for that purpoſe, and then to the uſe of the heirs of his body; the ſon, by deed, in the preſence of three witneſſes, grants and aſſigns to truſtees, *To hold* to them and their executors, in truſt, to permit himſelf for life to receive the profits, and after his deceaſe for the uſe of his wife *Dinah* for her natural life, and immediately after her deceaſe for the uſe of the heirs of her body lawfully begotten.

It was objected: Here is an eſtate limited to the wife in tail, and the *power* is for life.

To which it was anſwered, and reſolved by the court, that it was a good appointment; though nothing paſſes by the deed, which is void to raiſe any uſe, but ſhall enure as an appointment.

The Chief Juſtice held, that the eſtate was appointed by the will, and the ſon is only to name and appoint the lands, and not the eſtate, which was appointed before. *Vide Forteſcue, p.* 339.

Eaſter, 16 *Geo.* 2. *The King* v. *The Inhabitants of Upmerden.*

On a motion to quaſh an order of ſeſſions confirming an order of two juſtices for the removal of *A. B.* and three children from *Illsfield* to *Upmerden*, both in the county of *Suſſex*, on which a rule to ſhew cauſe was obtained.

Caſe. The children were laſt legally ſettled at *Upmerden*; but that they were found wandering and begging, and were apprehended in *St. Andrew's*, *Chicheſter*; and were carried before the Mayor, who, in purſuance of *ſtat.* 13 *Geo.* 2. *cap.* 24. made a *paſs* under *his* hand and ſeal.

After hearing the arguments of the council on both ſides on ſhewing cauſe, the court confirmed the two orders.

Lee, Chief Juſtice. The whole caſe appears on the order of ſeſſions which, ſtates the *paſs* in the very words and figures of it. The main queſtion will require conſideration. The manner of removal to the laſt legal ſettlement, by a *paſs*, is *new*. And it is material, as to coſts, "whether this *may* be done." It is not material, "whether the coſts were given by *ſtat.* 13 & 14 *Car.* 2 or by a ſubſequent act." Be that as it may, coſts are given on orders of removal, but not on theſe *paſſes*.

Theſe *paſſes* were not conſidered as orders, before this act; nor were perhaps removable by *certiorari*: but *now* they are orders, and are removable. The right way would be, to have a *certiorari* to remove the *paſs*, for we cannot quaſh it, if it be not here. It is, at preſent, a *ſubſiſting paſs*.

Chapple, *Wright*, and *Deniſon*, Juſtices, agreed that the *paſs* was bad; but that it could not be quaſhed, unleſs brought hither by *certiorari*.

The council, in ſupport of the *two* orders, moved for the opinion of the court.

Lee, Chief Juſtice. We can take no notice of the *paſs*, unleſs it appears to the court; if it did, yet it would not ſtand in the way of our affirming the orders: becauſe the *paſs* is *only* intended to prevent the *vagrancy*; and the place of the laſt legal ſettlement remains to be determined afterwards; conſequently the orders muſt be affirmed.

Per curiam. Let both orders be affirmed. *Vide Bur. S. C. vol.* 2. *p.* 214.

Wills, Deviſes, &c.

1 *W.* & *M.* *Lea* v. *Libb.*

The teſtator made his *will in writing*, ſubſcribed by *two witneſſes*, and *deviſed* all his lands to *W. R.* afterwards he made a *codicil*, in which his *will* was recited; and this alſo was atteſted by *two witneſſes*, one of which witneſſes was a witneſs to the *will*, but the other was a *new witneſs*; the queſtion was, whether the *new witneſs* ſhould make a *third to the will*, the ſtatute requiring that there ſhould be *three*.

Adjudged, That he ſhould not; it is true, here are *three witneſſes* to the intent and *will* of the teſtator, but there is but *two* to his *will in writing*; it is true likewiſe, that there are *two witneſſes* to the *codicil*, but thoſe are not witneſſes to the *written will*, ſo that there wants *one witneſs* to the *will in writing*. *Vide Salk. vol* 3. *p.* 395.

Trinity, 4 *W.* & *M.* *Smith* v. *Milford*, or *Milford* v. *Smith.*

On a ſpecial verdict in *ejectment* the caſe was:

J. D. being ſeized *in fee* of the lands in queſtion, did by indenture, bearing date the 5th of *June*, 17 *Car.* 1. and made between him of the one part, and *J. P.* and *J. C.* of the other part, in conſideration of a marriage then intended to be had between *G.* his *ſecond* ſon with *M. P.* and in conſideration of a portion of 200*l.* &c. and for the ſettling of his lands on the *truſts* therein declared, did covenant with the ſaid truſtees to levy a fine of the ſaid eſtate before *Michaelmas* term next following, to the uſe of himſelf and *E.* his wife, and to the ſurvivor of them for life; then to *G.* his ſon for life; then to *M.* his intended wife for life; *and afterwards to the heirs of the body of the ſaid G. to be begotten on the body of the ſaid* M. *remainder to his own right heirs.*

There was no fine levied; but *three years* after the ſealing of this deed *J. D.* made his *will*, in which (among other things) there was this clauſe, *viz.*

"*Item*, I ratify and make good all thoſe my eſtates made or granted in marriage to *G.* my ſon, according to the writing made by me in truſt."

The jury found that there was no writing made by him in truſt to any other perſon or perſons whatſoever, other than the deed of the 5th of *June*, which they found to be the very deed of *J. D.*

They found, that *J. D.* had iſſue *J.* his eldeſt ſon and heir, who entered, and died, leaving iſſue *M.* his only daughter and heir.

They found, that *G.* his *ſecond* ſon, and *M.* died, leaving iſſue a ſon, who was leſſor of the plaintiff, *&c.*

The queſtion was, whether the *will* did ſupply the defect in the deed, which, without a fine, would not operate to create an eſtate-tail in *G.* the *ſecond* ſon.

Per curiam. The intention of the teſtator is very certain, from the nature of the thing *deviſed*, *viz.* "I "do ratify all thoſe my eſtates granted to *G.* in marri-"age:" by which words he takes notice that *G.* was married; that he granted an eſtate to him, which is a complete deſcription of the deed, eſpecially ſince it is found that there is no other writing. So without further argument, the plaintiff had judgment. *Vide Mod. Rep. vol.* 4. *p.* 131. *Salk. vol.* 1. *p.* 225.

Trinity, or Michaelmas, 4 *W. & M.* *Thomas* v. *Howell.*

See this caſe fully ſtated in page 270 of this work, under the head *Condition.*

Eaſter, 5 *W. & M.* *Davy and Nicholas* v. *Ann Smith.*

On a trial at *bar*, the queſtion was, whether the *witneſſes* to a *will* had purſued the directions of the ſtatute of *frauds*, *&c.* in *ſubſcribing* their names; and it was reſolved, that where the teſtator lay in a bed in one room, and the witneſſes went through a ſmall paſſage into another room, and there ſet their names at a table in the middle of the room, and oppoſite to the door, and both that and the door of the room where the teſtator lay were open, ſo that he might ſee them tranſcribe their names, if he would; and though there was no poſitive proof that he did ſee them ſubſcribe, yet that was a ſufficient ſubſcribing within the meaning of the ſtatute, becauſe it was poſſible that the teſtator might ſee them ſubſcribe.

Per curiam. If the witneſſes ſubſcribe their names in the ſame room where the teſtator lies, though the curtains of the bed are drawn cloſe, it is a good ſubſcribing within this ſtatute; becauſe, if it is in his power to ſee them, and if that is done, it ſhall be conſtrued to be in his preſence. *Vide Salk. vol.* 3. *p.* 395.

Trinity, 5 *W. & M.* *Hitchins* v. *Baſſet.* Error.

In a ſuit in *ejectment* the jury found a ſpecial verdict: that Sir *H. K.* being ſeiſed *in fee*, made his *will*, and *deviſed* his lands to *B.* for life, remainder to *C. in fee*; they find likewiſe that Sir *H. K.* made *another will* in writing; but what were the contents of that *will*, they do not know: the queſtion was, if the *firſt will* was revoked? It was argued, that every *later will* is not a *revocation*; for a man by *one will* may diſpoſe of *one* acre, and by *another will* of *another* acre: ſo if a man purchaſe lands after he has made his *will*, he need not make his *will* over again, but make another *will* as to theſe. *Cro. Car.* 293. Therefore this other *will* might be of other lands, and no *revocation*; and the words *other will* might be no *revocation*, but might be conſiſtent. *Cro. Eliz.* 721. *Cro. Car.* 24.

The court were of opinion, that it was no *revocation*, and the words *other will* might concern other lands, or no lands at all, or be a confirmation of the former: and the judgment was afterwards, on *error* brought, affirmed in the Houſe of Lords. *Vide Salk. vol.* 2. *p.* 592.

5 *W. & M.* *Lamb* v. *Archer.*

In *ejectment* a ſpecial verdict was found, and the caſe was as follows; one *H.* being poſſeſſed of a term for years, deviſes his lands to *A.* and to the heirs of his body, and if *A.* die without iſſue, if *B.* is living, then to *B.* The council argued, that the court would allow a limitation in remainder not only to a perſon *in eſſe*, but to the firſt ſon of the perſon *in eſſe*. 1 *Sid.* 451. 1 *Cro.* 230. 1 *Ro.* 612. And the court held this was a good limitation to *B.* the contingency ariſing within the compaſs of a life; and they denied the caſe of *Child* v. *Bayly*, 2 *Cro.* 460. The council on the other ſide ſaid, if one makes a feoffment to the right heirs of *B.* that this was a good ſpringing uſe: *but not allowed*; becauſe it is by way of preſent limitation; *otherwiſe* where it is in future, as to the right heirs of *B.* after his death. *Vide Salk. vol.* 1. *p.* 225.

Hilary, 6 *W. & M.* *Goodright* v. *Corniſh.*

In a ſuit in *ejectment*, a ſpecial verdict was found that *J. K.* being ſeiſed of the lands in which, *&c.* had iſſue *J.* and *R.* his ſons, and *deviſed* the lands to *J.* for *fifty years*, if he ſhould ſo long live, remainder to the heirs-male of the body of *J.* and for default of ſuch iſſue, remainder to *R.* in *tail-male*, remainder to the right heirs of the *deviſor*: the *deviſor* died. *J.* the ſon ſuffered a common recovery to the uſe of himſelf for life, and after to the defendant *in fee*: the plaintiff under *R.* *viz.* *leſſee* of the eldeſt ſon of *R.* And it was adjudged,

1ſt, That this limitation to the heirs-male of *J.* was not any *executory deviſe*, but a plain contingent remainder.

2dly, That it was ill, becauſe there was no freehold to ſupport it, and therefore that the remainder over to *R.* well took effect. And judgment was given for the plaintiff. 2 *Leon.* 70. *Challoner* v. *Bowyer.* *Vide Raym. vol.* 1. *p.* 3. *Mod. Rep. vol.* 12. *p.* 53. *Ibid. vol.* 4. *p.* 255. *Salk. vol.* 1. *p.* 226.

Eaſter, 6 *W. & M.* *Reeve* v. *Long.* Error.

On a *writ of error* brought on a judgment in the *C. B.* in *ejectment*, wherein a ſpecial verdict was found; the caſe was; one *J. L.* being ſeiſed in fee, *deviſed* the lands to his nephew *H. L.* for life, remainder to the *firſt* ſon in tail male, and ſo on to the *ſecond, third, &c.* And for default of ſuch iſſue, remainder to his nephew *R. L.* leſſor of the plaintiff, for life, remainder to the *firſt* ſon in tail, and ſo on to the *ſecond, third, &c.* with divers remainders over. The *deviſor* died, *H.* married, and died without iſſue, leaving his wife *enſient* with a ſon; *R.* entered as on his remainder, and afterwards the *poſthumous* ſon (the defendant) was born, and his guardian entered on the leſſor; whereon he brought this ejectment; and judgment was given for the plaintiff in the *C. B.* by the whole court: and now that judgment was affirmed by this court; and reſolved, 1ſt. That the remainder to the *firſt* ſon of *A.* is a contingent remainder, and muſt take effect during the particular eſtate of *A.* or *to him the inſtant* that it determines; that by conſequence this remainder to the ſon became void by the death of the tenant for life before *A.* had a *firſt* ſon. 2dly. That this was ſuch a default of iſſue, or a dying without iſſue, that inſtantly the remainder limited over to *B.* veſted in him, and he became ſeiſed in poſſeſſion; and this cannot be defeated, nor the eſtate fetched back again, though *A.* has a ſon born afterwards.

Note. This judgment was afterwards reverſed in the Houſe of Lords againſt the opinion of all the Judges, who were much diſſatisfied with the reverſal, and blamed the Judge who tried the cauſe, for ſuffering a ſpecial verdict to be found. *Vide Salk. vol.* 1. *p.* 228. *Mod. Rep. vol.* 4. 282.

Trinity, 7 *W.* 3. *South or Buſh,* v. *Alleine or Allen.*

In *ejectment* on a ſpecial verdict, the caſe was, that one *J. S.* being ſeiſed of lands in fee, 29 *Car.* 2. *deviſed* all the rents and profits of ſuch lands to *S. B.* wife of *W. B.* during her natural life, to be paid by his executors into her own hands, without the intermeddling of her huſband; and after her deceaſe, he *deviſed* them unto and amongſt *J. B.* and *R. B.* *&c.* The queſtion before the court was, whether by this *deviſe* *S. B.* had the lands? And the council argued ſhe had; for by theſe words, *rents and profits*, the land itſelf would paſs, which the court granted; then the queſtion was, whether theſe laſt words, *to be paid by his executors*, &c. did not alter and reſtrain the *firſt* words? And the council ſaid, they did not; for which he cited *Yel.* 73. *Carpenter* v. *Collins*. 3 *Cro.* 674. 724. *Pigott* v. *Garniſh*. 1 *Cro.* 368. *Spirt* v. *Bence*. 2 *Leon.* 221. *pl.* 208. and 3 *Leon* 78.

Holt, Chief Juſtice. I am not ſatisfied with it. And he ſeemed ſtrongly to incline that the executors were truſtees for the wife; but the defendant had judgment by the opinion of *Rokeby* and *Eyre*, Juſtices, againſt the opinion of *Holt*, C. J. *Vide Salk. vol.* 1. *p.* 228. *Mod. Rep. vol.* 5. *p.* 63.

Michaelmas, 8 *W.* 3. *Pyke* v. *Crouch*.

See this caſe fully ſtated in page 443 of this work, under the head *Evidence*.

Michaelmas, 8 *W.* 3. *Leigh or Lee*, v. *Brace*.

See this caſe fully ſtated in page 433 of this work, under the head *Eſtates*.

Michaelmas, 8 *W.* 3. *Anonymous*.

Per curiam. If a term for years of lands be *deviſed* to executors in truſt for payment of debts, if all the executors renounce, *&c.* and will not convey over to others, to the end that they may execute the truſt; the truſt and term for years are both loſt. *Raym. vol.* 1. *p.* 740.

Michaelmas, 9 *W.* 3. *The Caſe of Sir Richard Raines*.

See this caſe fully ſtated in page 626 of this work, under the head *Mandamus*.

Lent Aſſizes, 1693.

It was ruled by *Holt*, Chief Juſtice, at *Cambridge*, in a diſpute between the lord of the manor and the *deviſee* of a copyhold of the ſame manor, that the recital of the *will* in the copy of the admittance was good evidence of the *deviſe* againſt the lord, or any other ſtranger. But if the ſuit had been between the heir of the copyholder and the *deviſee*; the *will* itſelf ought to have been produced. And he likewiſe held, that the foul draught of the admittance drawn by the ſteward of the manor, was good evidence. *Vide Raym. vol.* 1. *p.* 735.

Lent Aſſizes, 10 *W.* 3. *Haſtead* v. *Serle*.

A. made his *will* in theſe words, *viz.* "I *deviſe* to *J.* "*S.* all thoſe my lands in *Bramſtead* in the county of "*Surry*, in the poſſeſſion of *J. A.*" whereas in fact *A.* had not any lands in *Surry*, but had lands at *Bramſtead* in *Hampſhire*, in the poſſeſſion of *J. A.* And in an *ejectment* brought by the heir of *A* for theſe lands in *Hampſhire* againſt the *deviſee*, it was ruled by *Holt*, C. J. that theſe lands in *Hampſhire* would paſs by this *deviſe*. And the plaintiff was nonſuited. *Vide Raym. vol.* 1. *p.* 728.

Summer Aſſizes, 10 *W.* 3.

It was ruled by *Holt*, Chief Juſtice, at *Rygate* in *Surrey*, on the evidence, that becauſe in the *ſpiritual court*, after *probate* of a *will*, *ſix months* are allowed to regiſter it, and when it is regiſtered, it is regiſtered by the original, but the *probate* is ſigned by the regiſter only, on the atteſtation of the proctor, and the examination of him; therefore a *will* proved in 1666 in the *archdeacon's court of London*, where the office was burnt in the *fire of London* ſoon after, and the *probate* was produced in evidence to prove the *will*; with all theſe circumſtances, it was denied to be good evidence to prove the ſaid *will*. *Vide Raym. vol.* 1. *p.* 732.

10 *W.* 3. *St. Legar* v. *Adams*.

See this caſe fully ſtated in page 445 of this work, under the head *Evidence*.

Hilary, 11 *W.* 3. *Hilliard* v. *Gennings*.

This was an iſſue directed out of *Chancery* to be tried in a feigned action, whether *T. G.* the younger, by any late *will* in writing, *deviſed* to *W. H.* the plaintiff; and on a ſpecial verdict it was found, that *T. G.* huſband of the defendant, was ſeiſed *in fee* of the lands in queſtion, and had iſſue by the defendant *T. G.* junior, his only ſon, and *two* daughters, *M.* and *E.* who are now living; that *T.* the father made a *will* on the 27th day of *December* 1679, in theſe words: "I *deviſe* "to my ſon *T. G.* and his heirs for ever, all that my "manor of *E.* which I lately purchaſed of *H. W.* but "if it ſhall happen that my ſaid ſon ſhall die before he "attains the age of *twenty-one years*, or without iſſue "of his body lawfully begotten, then my ſaid land "ſhall be divided between my ſaid daughters, *M.* and "*E.* and their heirs for ever:" that the father died ſeiſed as aforeſaid, and that *T. G.* the ſon, entered, and became ſeiſed *as the law directs*, and being above the age of *twenty-one years*, made his *laſt will* on the 7th day of *April* 1695, in the preſence of *A. B.* and *W. H.* the plaintiff, and they ſubſcribed their hands as witneſſes, in the preſence of the teſtator, whereby he *deviſed* the ſaid lands to the plaintiff *W. H.* and his heirs; that *T. G.* junior was alſo heir to his father; that on the 18th day of *May* 1695, he died ſeiſed, without iſſue of his body.

The queſtion before the court was, whether this was a *good will* within the *ſtatute of frauds and perjuries*, 29 *Car.* 2. the *deviſee* being one of the *three* witneſſes; and the court were of opinion, that for this reaſon the *deviſe* was void; for every day's experience ſhews that the *deviſee* cannot be a witneſs to prove the *will*, and the intent of the act was to prevent people from ſetting up *forged wills*, which would be fruſtrated if *deviſees* ſhould be allowed as witneſſes of their own *will*. Therefore judgment was given for the defendant *niſi*, *&c.* and in *Hilary* term following the rule was made abſolute. *Vide Mod. Rep. vol.* 12, *p.* 276.

Hilary, 12 *W.* 3. *Fiſher* v. *Nicholls*.

In this caſe it was ſaid by *Holt*, Chief Juſtice, That in *wills* the conſtruction is more favourable to fulfil the intent of the teſtator, than it is in deeds, or other conveyances, executed by him in his life-time; therefore, where there is a gift by the *will* to *W R.* and *his aſſigns* for ever, this is an eſtate *in fee*; but if by deed, it is no more than eſtate *for life*; ſo if a gift be made to *W. R.* and *his heirs male*, by *will*, it is an *eſtate-tail*, but by *a deed*, it is a *fee-ſimple*; ſo a *deviſe* to his *eldeſt ſon* and *his heirs*, after the death of the wife of the teſtator, is *an eſtate for life to the wife by implication*, but it is not ſo in a *deed:* the reaſon of this difference is, not becauſe the teſtator is *wanting of council*, but becauſe a *will* is not a *common law* conveyance; though, it is true, there were *wills* before *ſtat. Hen.* 7. but thoſe were not by *common law*, but by cuſtom, as in the caſe of *burgage-lands:* now as cuſtom enabled men to diſpoſe of their lands in this manner by their *wills*, and not according to the rules and forms in *common law* conveyances, ſo it exempted this kind of conveyance from the regularity and propriety requiſite in thoſe conveyances; and by this means it came to paſs, that *wills* by the ſtatute, in imitation of thoſe by cuſtom, gained ſuch favourable conſtructions.

By *ſtat.* 29 *Car.* 2. *c.* 3. there is a conſiderable alteration made in the law relating to *wills* in writing; for by that ſtatute it is enacted, "That the *will* muſt "be written in the life-time of the teſtator, *and ſigned* "by him, or ſome other perſon in his preſence, "and by his direction; and that the witneſſes ſhall "ſubſcribe their names in his preſence. *Vide Salk. vol.* 3. *p.* 394. *Ibid. vol.* 1. *p.* 234. *Raym. vol.* 2. *p.* 831.

Trinity, 12 *W.* 3. *Nottingham* v. *Jennings*.

In *ejectment* the following caſe was made on trial, *viz.* one *H.* had three ſons, *A. B.* and *C.* and *deviſed* his lands to *B.* his *ſecond* ſon, after the death of his wife, to hold to him and his heirs for ever; and for want of ſuch heirs, then to his own right heirs. *H.* died, and *B.* entered, and died without iſſue, living the eldeſt ſon.

Per curiam. The *ſecond* ſon had only an eſtate-tail, and the eldeſt ſhall take by *deſcent*, and not by the *will*; and ſo the *deviſe* over is void in point of limitation; for his intent was, that the land ſhould deſcend from himſelf, and not from his ſon *B.* If the *deviſe* over had been to a ſtranger, it had been void, and *B.* had taken *a fee*; but here is only an eſtate-tail, and the word *heirs* can import nothing more than iſſue, for *B* could not die without heirs, living heirs of the father: and therefore the court made a rule, that the *poſtea* ſhould be delivered to the plaintiff, and judgment ſhould be entered for him. *Vide Salk. vol.* 1. *p.* 234. *Raym. vol.* 1. *p.* 508.

Trinity, 13 *W.* 3. *Emerſon* v. *Inchbird.*

See this caſe fully ſtated in page 123 of this work, under the head *Aſſets.*

Lent Aſſizes, 13 *W.* 3. *Dike* v. *Polhill.*

See this caſe fully ſtated in page 448 of this work, under the head *Evidence.*

Hilary, 1 *Ann.* *Cole* v. *Rawlinſon.*

In *ejectment* a ſpecial verdict was found, as follows, *viz.* That one *B.* being ſeiſed *in fee* of the *Bell-Tavern*, made a ſettlement to the uſe of himſelf for life, remainder to his wife for life, remainder to his ſon in tail, remainder to his wife *in fee*; or to the like effect. The huſband died, and the wife being ſo ſeiſed of the ſaid *Bell-Tavern*, and poſſeſſed of other leaſehold eſtates, made her *will*, and thereby *deviſed* the ſame in manner following: “ I give, ratify and confirm all “ my eſtate, right, title and intereſt, which I now “ have, and all the term or terms of years which I “ now have, or may have in my power to diſpoſe of “ after my death, in whatever I hold by leaſe from “ Sir *J. F. and alſo* the houſe called the *Bell-Tavern*, “ to *J. B.*” This *J. B.* was the ſon and heir of him that made the ſettlement, and alſo had the remainder in tail in the *Bell-Tavern*, but was not the heir of the wife: the queſtion was, what eſtate the ſaid *J. B.* took in the *Bell-Tavern*, by this *deviſe*?.

Powell, *Powys*, and *Gould*, Juſtices, held, that he took an eſtate *in fee*:

1ſt, Becauſe it is but one ſentence coupled by the words *And alſo*, and governed by one verb, whereby the prepoſition *in* is carried unto the *Bell-Tavern*, ſo that it is, a *deviſe* of all her eſtate and intereſt in her leaſehold eſtate, and alſo in the *Bell-Tavern. Dy.* 19. 2 *Saund.* 165. And the words ought to have this conſtruction, ſince they are capable of it; becauſe this was certainly the intent of the teſtator, who could not deſign ſo vain and uſeleſs an eſtate to the *deviſee*, as an eſtate for life after an eſtate-tail; and for this purpoſe was urged the caſe in *Moor* 873. *Hob.* 3. *Mo.* 52. 1 *Ro.* 844.

2dly, Becauſe the words of the *will* are rather a deſcription of the teſtator's eſtate than of his lands; and the prepoſition *in ſubintelligitur*, and put it into *Latin*, is, *And alſo the houſe, called*, &c. And ſuppoſe a tranſpoſition of the words, which is allowable to ſerve the intent of a *will*, and then the matter is plain; for then it is, “ I give my term of years, and all the “ eſtate, right and title I have in my term, And alſo “ in the *Bell-Tavern*;” and *Powys* ſaid it was an honeſt conſtruction, and brought back the *fee* of the reverſion to the right heir of the huſband, who created the reverſion.

Holt, Chief Juſtice, obſerved, that the intent of a teſtator will not do, unleſs there be ſufficient words in the *will* to manifeſt that intent; neither is his intent to be collected from the circumſtances of his eſtate and other matters collateral and foreign to the *will*, but from the words and tenor of the *will* itſelf: and if we once go into the affairs of the teſtator, and leave the *will*, we ſhall not know the mind of the teſtator by his words, but by his circumſtances; ſo that if you go to a lawyer, he ſhall not know how to expound it. On the *will* it is ſo, but with the matter found in a ſpecial verdict it is otherwiſe; and what if more accidental circumſtances be diſcovered, and be made the matter of another verdict? Men's rights will be very precarious on ſuch conſtruction. And as for the honeſty of the conſtruction, What if the woman paid a good portion, and was a purchaſer of this reverſion, is it not as honeſt then to conſtrue it in favour of her heir, as to expound it in favour of the right heir of the huſband? But we muſt not depart from the *will* to find the meaning of it in things out of it. It is then a certain rule, that to *deviſe* lands to *H.* without farther words, will paſs but an eſtate for life, unleſs there be other words to ſhew his intent, as *for ever*; or unleſs he *deviſe* for ſome ſpecial purpoſe which cannot be accompliſhed without a larger eſtate: and as this is a ſure rule, ſo it holds good, as well where the *deviſe* is of a reverſion, as where it is of lands in poſſeſſion, unleſs he *deviſe* it as a reverſion, or take notice of a particular eſtate; for then his intent may appear upon the face of the *will* itſelf: but if the words be general, and without regard to the nature of the thing, it is otherwiſe; for it ſhall not be conſtrued from the nature of the thing, which is extrinſical, but from the words of the *will*. Aſk a lawyer what paſſes, he ſays an eſtate for live, for he knew not that it was a reverſion; and though it be a fruitleſs eſtate, and will ſignify nothing, yet that does not appear till it be found, and therefore when found it is not to be regarded. The caſe in *Moor* and *Hob.* differs, for there the teſtator takes notice of a *precedent* term, and the words are, “ his lands of inheritance,” ſo that the ſpecial intent of the teſtator is apparent from the words of the *will*. If I give *Black-Acre* to *A.* and his heirs, *And alſo White-Acre*, the *fee-ſimple* of *White-Acre* ſhall paſs, as well as the *fee* of *Black-Acre*; becauſe it follows the limitation, and compriſes it by the words, *And alſo*: but if I give all my right, title, and intereſt in my *term*, *And alſo* my houſe called the *Bell*, in the grammatical conſtruction it is no more than, “ And alſo I give my houſe called the *Bell*;” for the ſubject-matter *of his right*, *title*, and *intereſt*, is the *term*, and the prepoſition *in* terminates and reſts there. So is the caſe at *bar*; but ſay they, turn it into *Latin*, and then it is, *I give my right and title*, *and intereſt in the term*, *And alſo in the houſe called* the *Bell-Tavern.* I anſwer, the prepoſition *in* may be neceſſarily underſtood in *Latin*, but not in *Engliſh*; and the conjunction is not ſo far a copulative as to take in the prepoſition *in*, tho' it takes in the verb. My brother *Powell* would tranſpoſe the words, ſo it ſhall be, “ all the right, title, “ and intereſt in the *Bell-Tavern*; And alſo all the “ term I have and hold of Sir *J. F.*” But I do not know how we can tranſpoſe words that are good ſenſe. If the *will* was nonſenſe, then we might tranſpoſe to make it bear a meaning; but to diſplace the words of the *will* when they are intelligible, is to alter the *will* and the ſenſe of it. For theſe reaſons, and alſo becauſe the heir at law was to be favoured, he concluded for the plaintiff. He cited 3 *Cro.* 330. *Hob.* 2. 1 *Cro. Wilkinſon* v. *Merrilan*; but notwithſtanding, judgment was given for the defendant. *Vide Salk. vol.* 1. *p.* 234. *Raym. vol.* 2. *p.* 83.

Hilary, 1 *Ann.* *Reading* v. *Royſton.*

See this caſe fully ſtated in page 512 of this work, under the head *Heir.*

Hilary, 2 *Ann.* *Counteſs of Bridgewater* v. *The Duke of Bolton.*

A ſpecial verdict was found on a feigned iſſue, directed out of *Chancery* to try whether the late Duke of *B* did, by his *will*, *deviſe* certain fee-farm rents to *J.* Earl of *B. in fee.* The *deviſe* was in theſe words, *viz.* “ I give certain lands to *A.* and I give to *J.* Earl “ of *B.* my ſon-in-law, 5000 *l.* and all my mines; “ all which I give to my ſaid ſon-in-law, his executors and aſſigns, together with all my plate and “ jewels, and *all other my eſtate real and perſonal*, not “ otherwiſe diſpoſed of by this my *will*, for to be

" given by him to his children as he ſhall think convenient. I ſolely truſting to his honour and diſcretion, that he will give them ſuch proviſion as will " be neceſſary." And another clauſe was, " Whereas I have contracted for the ſale of my fee-farm " rents, my *will* is, that if my debts ſhall not be ſatisfied out of my other eſtate, my executors (whereof the Earl was one) ſhall or may ſell ſome part or " all of them for payment of them, notwithſtanding " the rents are not *deviſed* by this my laſt will." And the queſtion was, whether his fee-farm rents ſhould paſs to the Earl of *B.* and for what eſtate?

Holt, C. J. (who delivered the reſolution of the court) obſerved, that the rents paſs by theſe words, " all " my real and perſonal eſtate;" for the word *eſtate* is *genus generaliſſimum*, and includes all things real and perſonal, and the fee of the rents paſſes at leaſt the whole eſtate of the *deviſor*; for *all his eſtate* is a deſcription of his fee: in a *will* the teſtator is not tied up to form; it is enough that he expreſſes and ſignifies his meaning by any words. Before the ſtatute *Hen.* 8. if one had *deviſed* his land by virtue of a cuſtom, the *common law* accepted his intent without requiring particular words of limitation, as in caſes of conveyances at *common law*; and as it was ſo in *deviſes* before the ſtatute, there is the ſame reaſon why it ſhould be ſo in *deviſes* ſince the ſtatute: and he held, that *deviſing* all his eſtate, and all his eſtate in ſuch a houſe, was the ſame, and that all his eſtate in the thing paſſed in either caſe. *Hob.* 177. *Moor* 480. 880. 2 *Vent.* 285. *Allen* 28. Therefore judgment was given for the plaintiff. *Vide Salk. vol.* 1. *p.* 237. *Mod. Rep. vol.* 6. *p.* 106. *Raym. vol.* 2. *p.* 968.

Trinity, 2 *Ann.* *Ewer* v. *Jones.*

In this caſe, *Holt*, Chief Juſtice, ſaid, that a *deviſee* may maintain an action at *common law* againſt a *terre-tenant* for a *legacy deviſed* out of lands. *Vide Raym. vol.* 2. 937.

Trinity, 2 *Ann.* *Lord Bridgewater* v. *The Duke of Bolton.*

The council for the plaintiff in this caſe obſerved, that it had been adjudged in *Chancery*, and is now become a ſettled rule, that if a man is ſeiſed in *fee* of lands, and makes his *will* thereof, and *deviſes* the ſame to another in *fee*, and after that makes a mortgage of the ſame lands in *fee* to a *third* perſon, and afterwards dies without having paid the money due on the mortgage; that this mortgage does not amount to a total *revocation*, but only *as to*, &c. and the equity of redemption ſhall go to the *deviſee*. To which the council on the other ſide agreed. *Vide Raym. vol.* 2. *p.* 968.

Eaſter, 3 *Ann.* *Anonymous.*

Per curiam. A *will*, when clear, and the intent of the parties fully appears, is as much to be favoured in law as any heir at law. *Vide Mod. Rep. vol.* 6. *p.* 133.

Michaelmas, 3 *Ann.* *Anonymous.*

Holt, Chief Juſtice. If a *deviſe* be to the heir at law, paying ſuch and ſuch legacies, &c. and for default thereof, remainder over, the heir, till default, is in by *deſcent*, and the other's intereſt is by way of *executory deviſe*. And ſo it was held in *Pell* v. *Brown*'s caſe, in 1 *Cro.* where the *fee* was *deviſed* to one who was not heir, the remainder to him who was heir, there the heir was in by *deſcent*; and it is hard to maintain either by *uſe*, or *deviſe*, a remainder to a ſtranger, after a preſent fee to one who is not heir at law. *Vide Mod. Rep. vol.* 6. *p.* 241.

Michaelmas, 5 *Ann.* *Smith* v. *Tindal.*

See this caſe fully ſtated in page 491 of this work, under the head *Fines and Recoveries.*

Eaſter, 6 *Ann.* *Tuckerman* v. *Jefferies.*

See this caſe fully ſtated in page 792 of this work, under the head *Tenants, Common, Joint, and Tail.*

Michaelmas, 6 *Ann.* *Bunter* v. *Coke.*

One *H. deviſed* to his wife all ſuch ſums of money, lands, tenements and eſtate whatſoever, whereof at the time of his deceaſe he ſhould be poſſeſſed. After the making of the *will H.* purchaſed lands of the cuſtom *Gavelkind.* And the queſtion was, whether theſe lands paſſed by the *deviſe?* It was urged, that if a *diſſeiſee deviſes*, and afterwards re-enters, the *deviſee* is good: *and this was allowed*, becauſe by the entry he was ſeiſed from the beginning, ſo as he might bring *treſpaſs*: ſo if one have a remainder *in fee expectant* on an eſtate for life, and *deviſe* it, and the tenant for life dies, the eſtate in poſſeſſion paſſes; and this was granted, becauſe the *deviſor* was ſeiſed at the time of the *will*; and his intent was to paſs all.

Per curiam 1ſt, A *deviſe* of things perſonal is good, though the teſtator has them not at the time of his *will*, becauſe they go to the executors; and the legacy paſſes not by the *will*, but by the aſſent of executors to whom the *will* is only directory; ſo that the legatee is in by the executors: but the court doubted as to a chattel real, as a leaſe for years. *Gouldſb.* 93. That it does not paſs.

2dly, A *deviſe* of lands is not good if the teſtator had nothing in them at the time of the making his *will*; for a man cannot give that which he has not, and the ſtatute only impowers men *having* lands to *deviſe* them; ſo that if the *deviſor* has not the lends, he is out of the ſtatute; *Co. Lit.* 392. and that which was void in its original can never become good. If an *infant* makes a *will*, it is void, though he comes of full age before he dies; but a republication after full age paſſes the land; ſo of a *feme covert*: and in theſe caſes there was only a perſonal diſability, *viz. infancy* and *coverture*; ſo here there is a real diſability by wanting the thing; and the conſtant form of pleading is, that the teſtator was ſeized, and being ſo ſeized, made his *will*. *Co. Ent.* 364. *Raſ.* 274. And there is no difference between a *deviſe* of lands, in *ſocage* and *gavelkind* by cuſtom. 34 *H.* 6. *F. N. Br.* 199.

3dly, Had there been a republication, it was admitted theſe lands would have paſſed; for a republication is as making a new *will*, and the intent is manifeſt.

4thly, It was admitted, that if one *deviſe* to *two* and and their heirs, and *one* dies *in the life of the teſtator*, the ſurvivor has all; and that if one has a manor and *deviſes* it, and after tenancy *eſcheat*, that ſhall paſs by the *deviſe* as being part of the manor. *Vide Salk. vol.* 1. *p.* 237.

Hilary, 7 *Ann.* *Grumble* v. *Jones.*

A ſpecial verdict was found in this caſe, *viz.* that grandfather was ſeiſed *in fee*, and by *will deviſed* as follows: *I give to my daughter A. for life, remainder to A. L. and his heirs; and for default of ſuch heirs, remainders over.* And the queſtion was, whether this was an eſtate *in fee*, or *in tail?*

Holt, Chief Juſtice. You will find it a hard point to make this an eſtate-tail. And the court gave judgment that this was a *fee*; but made the rule *niſi*, &c. *Vide Mod. Rep. vol.* 11. *p.* 207.

Eaſter, 8 *Ann.* *Anonymous.*

See this caſe fully ſtated in page 762 of this work, under the head *Prohibition.*

Eaſter, 10 *Ann.* *Thomlinſon* v. *Dighton.* Error.

See this caſe fully ſtated in page 360 of this work, under the head *Deed.*

Michaelmas, 11 *Ann.* *Ongly* v. *Peed.* Error.

This was a *writ of error* brought on a judgment in the *C. B.* The caſe was: A man *deviſed* his land to *A.* and his brothers *ſucceſſively*; but not to be entered on or enjoyed by any of them, till after marriage. *A.* was found by the verdiſt to be the eldeſt brother; and whether this *will* was void, by reaſon of the uncertainty *who ſhould take*, was the queſtion.

The court were of opinion, that the *will* was a *good will*, and certain enough; for being in the caſe of brothers, the *common law* was a guide to the expoſition of the word *ſucceſſively, viz.* that the eldeſt ſhould, after his marriage, enjoy it *firſt* for his life; *then* the *ſecond*, and *then* the *third*; eſpecially when *he* who was named in the *will*, is by the verdict found to be the eldeſt brother. Had the *deviſe* been to *A. B.* and *C.* to take *ſucceſſively*, it would have been void for the uncertainty. *Vide Mod. Rep. vol.* 10. *p.* 103.

Michaelmas, 11 *Ann.* *The Caſe of Lord Lanſdown.*

This was an *ejectment* brought by *three* coheirs againſt Lord *Lanſdown*. The caſe was, the Earl of *Bath*, the common anceſtor, made his *will*, dated the 24th day of *October* 1684, under which Lord *Lanſdown* claimed: this *will* afterwards in 1696 ſtood revoked, by an act in law, as to all the real eſtate *deviſed* by it, but not the *perſonal*.

Some years afterwards he told one Mr. *N.* then in the ſame coach with him, that he deſigned to republiſh his *will*: the next day, in the preſence of ſeveral people, he brought with him his *will* in one hand, and *two codicils* of the ſame import in the other, and ſaid, *This is my will, by which I have ſettled my eſtate, and this I deſign as a codicil to my will, to be taken as part and parcel thereof.* Then the *codicils* were duly executed, according to the *ſtatute of frauds and perjuries*; and the *will* and one *codicil* were ſealed up in one paper, with the *Earl of Bath*'s ſeal, and the other *codicil* in another paper, with the ſame ſeal; and theſe papers were, after his death, produced by thoſe with whom they were depoſited.

Neither *will* nor *codicils* were read at the time of republication.

On the *codicil* he took notice of his *will* in the following manner: *Whereas I made my will in* 1684, *which I do not intend wholly to revoke; but in reſpect of many alterations ſince happening*, &c.

The queſtion was, whether this amounted to a republication of his *will*, the *will* not being ſealed and ſubſcribed, as the ſtatute for preventing frauds, *&c.* directs.

The *ſecond* point was, that ſuppoſing the *will* republiſhed, yet it could convey no title to the defendant, becauſe he claims as iſſue male to the *deviſee* in tail, *Bernard Granville*, who died, leaving the teſtator, and therefore it was a lapſed legacy.

And of this opinion was the court. *Vide Mod. Rep. vol.* 10. *p.* 96.

Michaelmas, 12 *Ann.* *Backhouſe* v. *Wells*

This caſe was brought on an *ejectment*; and the queſtion aroſe on the conſtruction of a *will*, whether the words of it made the *deviſee* only tenant for *life*, or tenant *in tail*.

The *deviſor* being ſeiſed *in fee* of the lands in queſtion, makes his *will* as follows:

“ To the intent that all my lands ſhould remain in
“ my name and blood, I *deviſe* to *J. S.* my near
“ kinſman, ſuch and ſuch lands, *&c. To have and to*
“ *hold for the term of his natural life only, without im-*
“ *peachment of waſte; then to the iſſue male of his body*
“ *lawfully to be begotten, if God ſhall bleſs him with ſuch*
“ *iſſue; remainder to the heirs male of the body of that*
“ *iſſue.*”

The next term *Parker*, Chief Juſtice, delivered the opinion of the court, that by the *deviſe* the *deviſee* was made tenant for life, remainder to the iſſue *in tail*. The words of the *will*, he ſaid, were ſo expreſs to this purpoſe, that neither any words that could have been uſed, or any arguments could make it plainer. This, he ſaid, was both the obvious and legal import of the words, and what they would have imported in a conveyance. *Vide Mod. Rep. vol.* 10. *p.* 181.

Hilary, 3 *Geo.* *Woodright or Goodright* v. *Wright.*

See this caſe fully ſtated in page 513 of this work, under the head *Heir*.

Michaelmas, 4 *Geo.* *Young* v. *Holmes.*

On a trial in *ejectment*, the defendant pleaded *not guilty*; the caſe was, the *leſſee* for years *deviſed* the term to the executor for life, paying 50 *l.* to *J. S.* remainder to the *leſſors* of the plaintiff. The executor died, and his executrix entered on the reſidue of the term, and poſſeſſed herſelf of the leaſe.

1ſt. It being proved, the defendant had the leaſe in her cuſtody, and refuſing to produce it, an attorney, who had read it, was allowed to give evidence of the contents. And the Chief Juſtice ſaid, he would intend it made againſt the defendant, it being in her power, if it was otherwiſe, to ſhew the contrary.

2dly. For the defendant it was inſiſted and agreed to by the Chief Juſtice, that *J. H.* took the term as executor, and not as *legatee*, and then the remainder over was not executed, and that it was incumbent on the remainder-men to prove a ſpecial aſſent thereto as to a legacy. On this they called a witneſs to prove payment of the 50 *l.* charged on the term in the hands of the legatee; and this was held a ſufficient aſſent, and the plaintiff obtained a verdict. *Plow.* 544. *a.* 8 *Co.* 95. *a.* *Vide Stra. vol.* 1. *p.* 70.

Eaſter, 7 *Geo.* *Right* v. *Hamond.*

In a ſuit in *ejectment*, a caſe was made at the *Kent* aſſizes, that *T. C.* being tenant for life of the lands in queſtion, remainder to his wife for life, remainder to his own right heirs, 29th *October* 1673, made his *will* in theſe words:

“ *Item*, My lands, by *Woolwich*, my wife is to en-
“ joy for her life, after her deceaſe of right it goes
“ to my daughter *E.* for ever, provided ſhe has heirs;
“ if my ſaid daughter *E.* ſhould die before her mother,
“ or without heirs, and my ſaid wife *M.* ſhould mar-
“ ry again, and have an heir-male, I bequeath him
“ all my right to that eſtate, not thinking I can ſuf-
“ ficiently reward her love; if my ſaid wife marries
“ again, and fails of an heir-male, after her deceaſe
“ and my daughter, ſhe failing of heirs, I bequeath
“ 50 *l. per annum* of that eſtate to my brother *J. C.* and
“ to his heirs for ever.” And then diſtributed the reſt to other perſons.

The *deviſor* died, and the wife married again, and had iſſue *J. H.* the defendant, and died. Then *E.* the daughter died without iſſue; and on her death the leſſors of the plaintiff claimed the eſtate as right heirs of the *deviſor*, and the defendant claims under the *deviſe* to the heir male of the *deviſor*'s wife by a ſecond huſband.

It was objected, that the *deviſe* to the defendant was void, being of a *fee* on a *fee*.

Then it was objected, that the words, *ſhe failing of heirs*, ſhews what heirs were meant; and there is a limitation to the uncle, who may be heir to the daughter.

The matter was adjourned, and afterwards *Pratt*, Chief Juſtice, delivered the reſolution of the court.

We are of opinion, that the *firſt* part of the *will* is no *deviſe*, the *teſtator* only taking notice how the eſtate was ſettled before, that if he made no *will* his wife would have it for her life, and after her deceaſe, of right it would go to his daughter *E.* for ever. The *deviſe* therefore to the defendant can be only conſidered as a contingent remainder, or an *executory deviſe*: as an *executory deviſe* it cannot be good, for the contingency is too remote; and it is not like the caſe of *Lloyd* v. *Cary*, where the contingency was ſo very near the compaſs of a life; whereas here it is limited on the wife's having no *iſſue-male* by a *ſecond* huſband, and the daughter failing of heirs.

As a contingent remainder, it will not do, for want of a particular eſtate, taking the *firſt* part of the *will* to be only a declaration how his eſtate was ſettled, and not as a *deviſe* to the daughter.

Beſides, it appears the contingency never happened, for the daughter did not die before the mother, conſequently the *leſſors* of the plaintiff, who are both heirs to the daughter and heirs to the *deviſor*, muſt enter, and therefore the plaintiff muſt have judgment. *Vide Stra. vol.* 1. *p.* 429.

Trinity, 7 *Geo.* *Buſby* v. *Greenſlate.*

In a ſuit in *ejectment*, the Chief Juſtice held, that if *A.* ſurrendered a copyhold eſtate to the uſe of his *will*, and then *demiſed* the ſame to *B.* for life, and after his deceaſe to the heirs of his body; if *B.* died after making the *will*, that his heir could take nothing, for it is a *deviſe in tail* to *B.* and his heirs are words in limitation; and then *B.* dying in the life of the *deviſor*, it is the ſame caſe with *Fuller* v. *Fuller*, in *Cro. Eliz.* and *Goodright* v. *Right.* And the Chief Juſtice ſaid, it made no difference that theſe caſes were of freehold lands, and this of copyhold, where the *deviſee* was living at the time of the ſurrender. *Vide Stra. vol.* 1. *p.* 445.

Michaelmas, 8 *Geo.* *Smith* v. *Trigg.*

See this caſe fully ſtated in page 438 of this work, under the head *Eſtates.*

Michaelmas, 8 *Geo.* *The King* v. *Vincent and others.*

The defendants were indicted for forging a *will* relating to a perſonal eſtate, and on the trial a forgery was proved; but the defendants producing a *probate*, it was held to be concluſive evidence in ſupport of the *will.* *Vide Stra. vol.* 1. *p.* 481.

Michaelmas, 9 *Geo.* *Burr* v. *Davall.*

In a ſuit in *ejectment* the caſe was: Sir *Thomas Davall* had *two* ſons, and being taken ill he made his *will*, and *deviſed* his eſtate in *Eſſex*, being almoſt 1600 *l. per annum*, to his eldeſt ſon, and the heirs of his body, and his *Middleſex* eſtate, being about 1700 *l. per annum*, to his youngeſt ſon, and to the heirs of his body; and if either of his ſons died without iſſue, then the eſtate of him ſo dying ſhould remain and go to the ſurvivor; and if both of his ſaid ſons ſhould die without iſſue, then he *deviſed* the whole to *D. Burr*, the leſſor of the plaintiff, and his heirs.

Both the ſons died without iſſue, and Lady *Davall*, the widow of the teſtator, and who was his heir at law, endeavoured to ſet aſide this *will.*

The queſtion that came before the court was, if the teſtator was *compos mentis* at the time he made this *will?* And to ſhew that he was not, it was argued, that a father in his ſenſes would not have left a younger ſon a larger eſtate than he had left his eldeſt, who had only his *Eſſex* eſtate; and by articles on the marriage he was bound to leave his younger children 10,000 *l.* out of that very eſtate, and his lady 600 *l.* jointure out of the ſame eſtate.

Beſides, if the teſtator had been in his ſenſes, the words in the *will* would not have carried an eſtate to the leſſor of the plaintiff; for the *deviſe* was to his ſons, *&c.* and that if both die *with iſſue*, inſtead of *without iſſue*, then to *D. Burr*; ſo that this being a *condition precedent*, the plaintiff can have no eſtate by this *will.*

It was urged on the other ſide, that whether the words in the *will* were dying *with iſſue*, or *without iſſue*, it ought to be taken in that ſenſe which makes the *will* conſiſtent with reaſon and common ſenſe: and accordingly the jury found for the plaintiff. *Vide Mod. Rep. vol.* 8. *p.* 60.

Michaelmas, 10 *Geo.* *Turner* v. *Turner.*

This was a trial at *bar* on a feigned iſſue out of *Chancery*, wherein the only queſtion was, whether *D. T.* the grandfather both of the plaintiff and defendant, had cancelled a *will* made by him in the year 1716, or not?

The caſe was: *D. T.* being ſeiſed of *gavel-kind lands* in *Kent*, to the value of 400 *l.* had iſſue *G. T.* his eldeſt ſon, by one *venter*; and *D. T.* his youngeſt ſon, by another *venter*, both of which ſons died in the life-time of their father *D. T.* the teſtator.

G. the eldeſt ſon by the *firſt venter*, left iſſue the now plaintiff; and *D.* the youngeſt ſon by the *ſecond venter*, left iſſue the defendant; and *D. T.* the grandfather, *anno* 1716, made a *will* in favour of *G.* his eldeſt ſon by the *firſt venter*, which, as was inſiſted on by the plaintiff, was not cancelled by the teſtator in his life-time, but by the now defendant after the death of the ſaid teſtator, that the eſtate might equally deſcend between them.

But on full proof, that the teſtator cancelled his *will* in his life-time, and ſaid, that he intended his eſtate ſhould equally deſcend and come to both his grand-children, the defendant had a verdict. *Vide Mod. Rep. vol.* 8. *p.* 208.

Hilary, 11 *Geo.* *Parſons* v. *Peacock.*

In *replevin*, the defendant avowed for a *rent-charge deviſed* by his grandfather to his uncle, and his heirs, which was now deſcended to him this avowant; the plaintiff, in his replication, confeſſed the *deviſe*, but ſet forth a clauſe in the ſame *will* by which the rent-charge was to ceaſe.

The caſe was: *A* being ſeiſed *in fee*, and having *three* ſons, *deviſed Black-acre* to *G.* his eldeſt ſon, and his heirs; *White-acre* to *E.* his *ſecond* ſon, and his heirs; and a rent-charge of *fifty pounds per annum*, iſſuing out of *White-acre*, to *R.* his youngeſt ſon, and his heirs; *proviſoe*, that if either of his ſons ſhould die without iſſue, living the other *two*, *ſo as his eſtate in lands ſhould come to the other two ſons*, then the rent ſhould ceaſe.

G. died leaving iſſue *J. P.* the defendant; and *R.* without iſſue: ſo that this contingency could never happen, becauſe *G.* had iſſue, and he being dead, and *R.* likewiſe without iſſue, their eſtate in lands could never *come to two*, where *E.* alone was ſurviving; therefore the rent-charge muſt deſcend to the defendant as heir at law, being the ſon of *G.* the eldeſt ſon of the teſtator; for this is an *executory deviſe* to *two* on the contingency of one dying *in the life-time of the other two*, which contingency muſt ariſe within the compaſs of one life, otherwiſe it is void; for it is plain that the teſtator intended this benefit of ſurvivorſhip during his ſons lives only.

And the court being of that opinion, judgment was given for the defendant. *Vide Mod. Rep. vol.* 8. *page* 346.

Eaſter, 11 *Geo.* *Shaw* v. *Weigh and others*

See this caſe fully ſtated in page 438 of this work, under the head *Eſtates.*

Trinity, 12 *Geo.* *The King* v. *Rhodes.*

The defendant exhibited a *will* in *Doctors Commons* as executor, and demanded a *probate:* after a long conteſt there, it was determined in favour of the *will*; and on appeal to the *Delegates*, the ſentence was confirmed.

Afterwards the parties, who had been concerned in cooking up the *will*, fell out among themſelves about the diviſion of the eſtate, and thereon it came out that the *will* was forged; and on full *affidavits* of the forgery, a *commiſſion of review* (which it was agreed was the only method to bring the matter over again) was granted by the Lords Juſtices; and an indictment was alſo found for the forgery, and ſtood ready for trial in this court.

On a motion for an *habeas corpus ad teſtificandum*, the Chief Juſtice declared he would not try the cauſe. For there being yet a ſentence ſubſiſting in favour of the *will*, and the validity of that being now put under a proper examination; he did not think it fitting to determine the property by an indictment which would come on more properly after the ſentence was reviewed. *Vide Stra. vol.* 1. *p.* 703.

Eaſter, 13 *Geo.* *Warneford* v. *Warneford.*

On an *iſſue* directed out of *Chancery*, the queſtion was, *deviſed* or not? The Chief Juſtice ruled, that ſealing a *will* is a ſigning within the *ſtatute of frauds and perjuries.* 3 *Lev.* 1. *Vide Stra. vol.* 2. *p.* 764.

Michaelmas, 13 *Geo.* *Goodright, on the Demiſe of Liſle,* v. *Pullin and others.*

On a ſpecial verdict in *ejectment* on a *deviſe* by *Nicholas Liſle*, which was in this manner: "I *N. L.* "give and bequeath unto my wife all that my meſ-"ſuage or tenement, called *Hattersfield*, *To hold* for "the term of her natural life; and after her deceaſe, "then to my kinſman *N. L.* for and during the term "of his natural life; and after his deceaſe, unto the "heirs male of the body of the ſaid *N.* lawfully to be "begotten, and his heirs for ever: but in caſe the ſaid "*N.* ſhall die without ſuch heir male, then I give and "bequeath the ſaid premiſes unto my kinſman *E. L.* "for and during his natural life; and after his deceaſe "to the heirs males of his body, lawfully begotten, "and his heirs for ever; and for default of ſuch heir "male, remainder over." The jury find, that on the teſtator's death, the widow entered and died ſeiſed, and that *N. L.* (the *deviſee*) and the widow, in her life-time, ſuffered a common recovery to the ſaid *N. in fee*, and that the ſaid *N.* entered on the death of the widow, and died ſeiſed, leaving no iſſue.

E. L. the leſſor of the plaintiff, claims as heir male to *E. L.* (the remainder-man in the *will*) ſuppoſing this to be only an eſtate for life to *N.* and therefore that the recovery ſuffered by him and *M.* (the widow) could not bar the remainders. The defendant claims as heir *in fee* to *N.* The ſingle queſtion therefore is, whether *N.* the *deviſee* took on eſtate-tail, or only an eſtate for life, by this *will?*

Raymond, Chief Juſtice. It will be a difficult thing to make this an eſtate for life; and the caſe of *King* v. *Melling* anſwers all the objections, as to the limitations to *N.* for life.

The word *iſſue* is a proper word of purchaſe, but the *heirs* is always a word of limitation; and the word *heirs* being uſed in this caſe, the words *after his deceaſe* are of no force.

The words *heirs* and *heir-male* are collective names, and include all the heirs of the *deviſee*; and in *Archer*'s caſe it was the word *next* which confined it to *one* particular perſon; for without that word, it would have been a *limitation*, and not a *purchaſe.*

The word *his*, is the word which makes the difficulty in this caſe; but I think it may very properly be referred to *N.* himſelf. Suppoſe *N.* had ſeveral ſons; if the eldeſt had been made a purchaſer by this *will*, the other ſons could not have taken, and there muſt be ſtronger words than theſe to controul the words *heir male*, and make them words of purchaſe. I therefore think this clearly to be an *eſtate-tail* in *N.* *Vide Stra. vol.* 2. *p.* 729.

Trinity, 2 *Geo.* 2. *Andrews* v. *Fulham.*

In *ejectment* on the demiſe of *E. J.* Eſq; a caſe was made for the opinion of the court as follows:

That *R. W.* being poſſeſſed of leaſehold meſſuages in *London*, by his *will* in 1686, *deviſed* the ſame to his wife for life, and after her deceaſe to ſuch child as ſhe is now ſuppoſed to be *enſient* of, and to the heirs of ſuch child for ever; *provided* that if ſuch child as ſhall happen to be born ſhall die before *twenty-one*, having no iſſue, the reverſion of *one third* part ſhall go to my wife and her heirs, *one third* to my ſiſter *E.* and her heirs, and the remaining *third* to my ſiſter *A.* and her heirs. And of this *will* he made his wife executrix, and ſoon afterwards died, his wife not being *enſient*. That ſhe aſſented to the *will*, and married the father of the *leſſor*, who adminiſtered to her. And the defendants claim *one third* part under *A.* the ſiſter of the *deviſor*.

After *two* arguments, the Chief Juſtice delivered the opinion of the court. That though formerly it was doubted, whether a *deviſe* to an infant *ex ventre ſa mere* was good; yet it is now clear, that where it is by *words of the future*, it will take effect. *Salk.* 229. *Godolph.* 326. The words therefore would have been ſufficient, had any perſon come in being capable of taking. But the objection is, that no ſuch perſon ever exiſted, and conſequently thoſe who claim no remainder on the dying of ſuch perſon under *twenty-one*, and without iſſue, can never enjoy the eſtate.

Now, in anſwer to this, it is obſervable, that it is no unuſual thing for words of *condition* to be taken as words of *limitation*. 1 *Ven.* 202. *Salk.* 570. where there is a remainder over. Taking it therefore as a limitation, it muſt either happen or become impoſſible. It never did happen; and therefore the queſtion is, whether the limitation over of the term be ſo remote as not to be allowed? And we are all of opinion it is not too remote.

For this purpoſe the caſe of *Maſſenburgh* v. *Aſh* is ſtrongly in point, and ſo is *Martin* v. *Long*, 2 *Vern.* 131. *Abr. E.* 192. And this is agreeable to the caſe of *Scatterwood* v. *Edge*, where the remainder over on refuſing to take the name of *Edge*, was held a limitation, and not a condition. The *deviſe* to the expected ſon of *C.* is void, as if no ſuch clauſe in the *will*, according to *Mo.* 487. And we are the more confirmed in this opinion by Lord *Harcourt*'s direction in the caſe of *Weſtcombe* v. *Jones*, where on the very clauſe now in queſtion he determined that the *deviſe* over in *thirds* was good.

The defendant therefore muſt have the *poſtea*, and the plaintiff pay the coſts of a *nonſuit*. *Vide Stra. vol.* 2. *p.* 1092.

Michaelmas, 3 *Geo.* 2. *Edgworth* v. *Smallridge.*

See this caſe fully ſtated in page 388 of this work, under the head *Eccleſiaſtical Matters*, &c.

Michaelmas, 3 *Geo.* 2. *Law* v. *Davis.*

On a ſpecial verdict in *ejectment*, the queſtion was on the following words, whether the ſon of the *deviſor* took an *eſtate for life*, or an *eſtate-tail*? "*Item*, I give "and *deviſe* my lands in *A.* to my wife *A.* for her life, "and after her deceaſe to my ſon *B.* and his heirs "lawfully begotten, *viz.* the *firſt*, *ſecond*, *third*, *fourth*, "and every other ſon and ſons ſucceſſively, lawfully "to be begotten of the body of my ſaid ſon *B.* and the "heirs of the body of ſuch *firſt*, *ſecond*, *third*, *fourth*, "and every other ſon and ſons according to ſeniority; "and in default of ſuch iſſue, to my right heirs for "ever." And it was held by all the court, that tho' the *firſt* words, if you ſtop at the *viz.* muſt be taken in to explain the former words, and by the laſt it appears he intended his ſon ſhould not have it in his power to prevent the eſtate's being enjoyed by his children; or if he had none, *from* reverting to the right heirs of the *deviſor*; and they ſaid it was no new thing in conſtruction of *wills* to let ſubſequent words intirely deſtroy the force of the preceding ones, as in the common caſe of a *deviſe* to *A.* and his heirs, and if he dies without iſſue, remainder over: the *firſt*, if alone, would certainly carry a *fee*, but the latter qualify the former, and make it an *eſtate-tail*. So if a *deviſe* be to *A.* and his heirs, and for want of heirs then to *B.* the brother of *A.* theſe *laſt* words reſtrain the word *heirs* then to mean only *heirs of the body*, becauſe it is impoſſible that *A.* can want an *heir-general* whilſt he has a brother. *Vide Stra. vol.* 2. *p.* 849.

Hilary, 7 *Geo.* 2. *Forſter* v. *Graham.* Error.

On a writ of *error* brought on a judgment given in the *K. B.* in *Ireland* in *an ejectment* there brought on the demiſe of *Arthur* Earl of *Angleſey* for lands in the county of *Meath*, and on *not guilty* pleaded, a trial at bar was had, and the jury found this *ſpecial verdict*.

That on the 13th of *May* 1701, *James* late Earl of *Angleſey* was ſeiſed *in fee* of the premiſſes in queſtion, and being ſo ſeiſed, he, on the 4th of *May* 1701, made his *will* in writing, whereby he *deviſed* all his lands in *Ireland* to *John* Lord *Haverſham*, *Arthur Anneſley* his brother, and Mr. *J. Coote*, and their heirs, in truſt for payment of his debts, and after payment thereof, then in truſt for *Arthur Anneſley* for life; and after his deceaſe, in truſt for and to the uſe of his firſt and every other ſons in *tail male*; and for want of ſuch iſſue, then in truſt for *Richard* Lord *Altham* his uncle for life, remainder to his firſt and every other ſons in *tail male*; and for want of ſuch iſſue, then in truſt for and to the uſe of *Charles Anneſley* his uncle for life, remainder to his firſt and other ſons in *tail male*; remainder to his own right heirs. Then he appoints the truſtees towards raiſing money to pay debts, to let the premiſes for *thirty-one years* in poſſeſſion and reverſion, reſerving the laſt yearly rent; and that after payment of his debts, whoever ſhould become ſeiſed of the premiſes by virtue of his will, might make a *thirty-one years* leaſe, reſerving the beſt yearly rent. Then they find, that *Richard* Lord *Altham* died in the life-time of the *deviſor*, who, on the 23d of *November* 1701, made a *codicil*, wherein he recites his *will*, and a deſign to alter ſome parts thereof, and that the *codicil* ſhall be taken as part of his *will*; and declares he does not intend to alter his *will*, except in the particulars expreſſed, but that the ſame ſhould remain in all other reſpects. Then he *deviſes* his lands in *England* and *Wales* to the former *truſtees*, for payment of debts, and afterwards to the uſe of *Arthur Anneſley* for life, remainder to his firſt and other ſons *in tail-male*, the remainder to go to ſuch perſons, and with ſuch *powers*, as by the *will* are *deviſed*, &c.

Per curiam. We muſt take the *will* and *codicil* together; and on both, it is plain, he only intended to alter the order of taking, and to exonerate this eſtate from the debts to which it was ſubjected by the *will*. There is no neceſſity to confine this *power* to the *laſt remainder-men*, eſpecially as the word *under* is uſed with regard to theſe lands, and no other.

On the final hearing, nobody appearing on the part of the plaintiff in *error* to argue it, the judgment was affirmed without further debate. *Vide Stra. vol.* 2. *p.* 960.

Eaſter, 7 *Geo.* 2. *Comber* v. *Hill*.

On a ſpecial verdict in *ejectment* for the opinion of the court, the ſtate of the caſe was as follows:

R. H. died ſeized *in fee* of the lands in queſtion, having *one* ſon, and *three* daughters; and after the death of his ſon without iſſue, he *deviſed* his lands in the following manner, *viz.* to his grand-daughters, *C.* and *E. to be equally divided between them, and the heirs of their bodies reſpectively*; and for default of ſuch iſſue, to his other grand-daughter *A.* *E.* died without iſſue.

The queſtion was, whether *E.*'s moiety veſted in *R.* the ſon of *C.* the other tenant in common.

Lord *Hardwicke* declared it to be the opinion of the whole court, that on the conſtruction of theſe words, there were no croſs remainders, but that on the death of *E.* her moiety went over to *A.* And accordingly judgment was given for the defendant. *Vide Caſes Temp. Lord Hardw. p.* 22. *Stra. vol.* 2. *p.* 969.

Michaelmas, 7 *Geo.* 2. *Gore* v. *Gore*.

A *caſe* was ſent from the court of *Chancery* to this court, wherein it was ſtated, that *W. G.* being ſeiſed *in fee*, *deviſed* to truſtees and their heirs, to the uſe of the truſtees for *five hundred years*, to raiſe younger children's fortunes, and pay debts, and after the determination of that eſtate, then to the *firſt* and every other ſon of *T. G.* the *deviſor's eldeſt ſon in tail male*, remainder to *T. G.* his *ſecond* ſon (in being) *in tail male*, with remainders over. That at the death of the *deviſor*, *T. G.* had no ſon, but ſince his deceaſe the defendant was born. And on this the queſtion was, whether the *firſt* ſon of *T. G.* could take this eſtate by way of *executory deviſe*; for it was agreed it could not *enure* to him by way of contingent remainder, there being no eſtate of freehold to ſupport it.

This caſe was argued in Chief Juſtice *Pratt*'s time, at his chamber, before him, and three Judges. And they certified their opinions to Lord *Macclesfield*, that it was not a good *executory deviſe*, becauſe it might ſubſiſt *forty weeks* after the death of *T. G.* and they were not for going a day further than a life in being.

The Chancellor not being ſatisfied with this opinion, refuſed to decree accordingly. And he being ſucceeded by Lord *King*, the caſe was ſent back to this court. And now they were unanimouſly of opinion, that it was a good *executory deviſe*, and that a convenient time after the life was to be allowed, according to the caſe of *Lloyd* v. *Cary* in *Show. Parl. Caſes*: and this neceſſarily being to ariſe within *nine months* after the death of *T.* there was no danger of a perpetuity. And this being certified, the cauſe was ſet down before Lord *Talbot* after *Trinity* term 1734, who declared his agreeing in opinion with the laſt certificate, and made his decree accordingly. *Vide Stra. vol.* 2. *p.* 958.

Trinity, 8 *Geo.* 2. *Maundy* v. *Maundy*.

On a ſpecial verdict in *ejectment* for houſes in *Red-lion-Square*, it was found, that *Ventris Maundy* being ſeiſed of the reverſion *in fee* of the houſes, which were of the value of 260 *l. per annum*, but then let out on leaſe for *ſixty years* at 22 *l. per annum*, called a *ground rent*, and having ſeveral ſons and daughters, made his *will* in *April* 1696, in this manner: "In reſpect to my "wordly eſtate, wherewith it has pleaſed God to "bleſs me, I diſpoſe of it as follows: to my ſon *D.* I "give 5 *l. per annum* of my ground rent: and in like manner he parcelled out the whole 22 *l.* to his children (except the eldeſt), "his, her, and their heirs "and aſſigns for ever; but as to *Ventris*, my eldeſt "and undutiful ſon, I give him, in hopes he may re-"form, 5 *l. per annum due in blank tickets in the million* "*lottery*. And if any of my children die, their legacy "to go to the ſurvivor, my ſaid undutiful ſon except-"ed, who is to have no ſhare or part thereof, nor no "more ſhare or portion than I have before left him."

The building leaſes being expired, the heir of *Ventris* the eldeſt ſon brought an *ejectment*, inſiſting the reverſion was undiſpoſed of; and that however ſtrong the intention to diſinherit the eldeſt ſon appeared, yet if it is undiſpoſed of, he muſt have it. But on argument in the *C. B.* judgment was given in favour of the *deviſee*, and now that judgment was affirmed in this court.

1ſt. Becauſe the intention to paſs all his eſtate was plain from the introductory part, where he declares his *will* was in reſpect of all his worldly eſtate, and that part where he ſays that his eldeſt ſon ſhall have ſo much, and no more.

2dly. The limitation is to the younger children and their heirs, which cannot take effect, if their intereſt is only during the continuance of the rent. And nothing is more common than for people to ſpeak of their ground rents, when they mean the houſes and lands out of which they iſſue.

3dly. The caſe of *Kerry* v. *Dethick* in *Mo.* 640. is expreſs in point; and though in that caſe it is ſaid, the defendant was adviſed to bring a writ of *error*, yet that does not impeach its authority. *Vide Stra. vol.* 2. *p.* 1020.

Michaelmas, 8 *Geo.* 2. *William* v. *Browne*.

The queſtion in this caſe was, whether *croſs* remainders were created by implication from the words of a *will*. And the arguments of the council, and the reſolution of the court, being the ſame as in the caſe of *Comber* v. *Hill*, which was held not to differ materially from this; it will be only neceſſary to ſet down the words of this *will*, which for the reaſons given in that caſe were held not to create any *croſs* remainder.

The *demiſe* was to *M.* for life, remainder to the uſe of all and every the child and children both male and female, born and to be born of the body of the ſaid *M.* equally to be divided between them, and of the heirs of their reſpective bodies lawfully to be begotten, and for want of ſuch heirs, the remainder over to another daughter and her iſſue, in the ſame words. *Vide Stra. vol.* 2. *p.* 996.

Michaelmas, 9 *Geo.* 2. *Dubber* v. *Trollos.*

See this caſe fully ſtated in page 439 of this work, under the head *Eſtates.*

Eaſter, 12 *Geo.* 2. *Croft* v. *Pawlet.*

On a trial at *bar* in *ejectment*, the defendant made out his title under a *will*, the atteſtation of which was in theſe words, “ ſigned, ſealed, publiſhed and declared as and for his laſt *will*, in the preſence of us *A. B.* and *C.*” The *will* was made in 1723, and the witneſſes all dead, and their hands proved in the common form: but then it was objected, that this was not an execution according to the *ſtatute of frauds*; and the hands of the witneſſes could only ſtand as to the facts they had ſubſcribed to, and ſigning in the preſence of the teſtator was not one. But the court, on the authority of a caſe in the *C. B.* ſaid, it was evidence to be left to a jury of a compliance with all circumſtances. And a verdict was given for the *will*. *Vide Stra. vol.* 2. *p.* 1109.

Hilary, 13 *Geo.* 2. *Coulſon* v. *Coulſon.*

A *caſe* was ſent from the *rolls*, wherein the queſtion was, whether an *eſtate-tail*, or only an *eſtate for life*, paſſed by a *will*; and it was this.

R. B. deviſes to his grandſon *R. C.* and his aſſigns for his natural life, the reverſion of lands expectant on the death of the *deviſor*'s ſiſter, and from and after the determination of the eſtate for life of his ſaid grandſon, then to truſtees during the life of his grandſon, to preſerve contingent remainders, and from and after the death of his grandſon, unto the heirs of his body lawfully begotten, and to be begotten, with divers remainders over.

On the firſt argument the court were clear in opinion, that this was an *eſtate-tail* in the grandſon; the caſes cited to prove it an *eſtate-tail* were, 1 *Co. Shelly*'s caſe. *Co. Litt.* 22. *b.* 319. *b.* 6 *Cro. Eliz.* 525. 1 *Vent.* 214. *Trinity* 11 *Ann, roll.* 220. *Backhouſe* v. *Wells. Abr. Ca. Eq.* 184. *Michaelmas* 13 *Geo. Goodright* v. *Dullen*; and a caſe of the council board of *Wood* v. *Morris.*

The council on the other ſide cited *Carter* 170. 1 *Sid.* 81. *Salk.* 568. 224. 3 *Lev.* 437. *Carth.* 172. *Abr. Eq. Caſ.* 105. 390. 1 *Vent.* 231. *Vide Stra. vol.* 2. *p.* 1125.

Michaelmas, 16 *Geo.* 2. *Barker* v. *Suretees.* Error.

On a ſpecial verdict in *ejectment*, the queſtion turned on theſe words in a *will*, *viz.* “ I give the ſaid premiſes to my grandſon, his heirs and aſſigns, but in caſe he dies before he obtains the age of *twenty-one years* or marriage, and without iſſue, then and in ſuch caſe he *deviſes* the ſame to the defendant.” The fact was, that the grandſon attained the age of *twenty-one years*, and died, having never been married. And it was inſiſted, that the obtaining the age of *twenty-one years* was a performance of the condition, and veſted the eſtate abſolutely in the grandſon, under whom the leſſor of the plaintiff claimed. And judgment was accordingly given in the county palatine of *Durham*, whereon error was brought in this court.

After ſeveral arguments, the court affirmed the judgment, on the authority of *Price* v. *Hunt*, in *Pollexf.* 645. where the word *or* was conſtrued *conjunctively*. And they ſaid they would read this without the word *or*, as if it run, “ and if he dies before *twenty-one*, unmarried and without iſſue;” which he did not do, for *one* of the circumſtances failed. And all put together are but in the nature of one contingency: and it was conſiderable, that this was not a *condition precedent*, but to deſtroy an eſtate *deviſed* by the former word in *fee*. *Vide Stra. vol.* 2. *p.* 1175.

Michaelmas, 16 *Geo.* 2. *Oates on the Demiſe of Elizabeth Hatterley* v. *Jackſon.*

On a *caſe* made at the *aſſizes*, it was ſtated, that *R. C.* being ſeiſed in *fee* of an eſtate called *Woolf's Park*, *deviſed* the ſame in theſe words, “ As to *Woolf's Park*, I give it to my wife *A.* for her life, and after her death to my daughter *J. A.* and her children, on her body begotten, or to be begotten by *W. A.* her huſband, and their heirs for ever.” That the wife is dead, and *J.* at the time of making the *will* had one daughter, *E.* and afterwards two ſons and one daughter, who are all dead without iſſue: that *E.* had iſſue the *leſſor* of the plaintiff: that *J.* ſurvived *W. A.* and married *J.* by whom he had a ſon, the preſent defendant, who entered on her death.

The queſtion was, what eſtate paſſed to *J.* and her children by *W. A.* the plaintiff inſiſting, that *J.* was only tenant for life, and the children of that marriage had the reverſion in *fee*: the defendant inſiſting that *J.* was jointly ſeiſed in *fee* with the children, and having ſurvived them all, and left him her ſon and heir, he is entitled.

After ſeveral arguments, the Chief Juſtice delivered the opinion of the court, that *J.* took as *joint-tenant*. It being ſtated, that at the time of making the *will* ſhe had a child, which has been conſtrued to be equal to children. 2 *Vern.* 106. *Co. Lit.* 9. is expreſs, that to *A.* and his children and their heirs, is a joint *fee* to all. And it is no objection that by this means the ſeveral eſtates may commence at different times. *Co. Lit.* 188. *Pollexf.* 373. *Mo.* 220.

As *A.* therefore ſurvived all the children ſhe had by *W. A.* the whole *fee* veſted in her, and deſcended to her ſon the defendant. Who had judgment accordingly. *Vide Stra. vol.* 2. *p.* 1172.

Eaſter, 19 *Geo.* 2. *Holdfaſt, on the Demiſe of Anſtey,* v. *Dowſing.*

In a ſuit in *ejectment* brought for lands in *Cambridgeſhire*, on the demiſe of *D. D.* and *M.* his wife. And on a trial at *bar* the jury found this ſpecial verdict:

That *J. T.* Eſq; being ſeiſed *in fee* of the premiſes in queſtion, and of ſound mind, ſigned, ſealed, and publiſhed a paper-writing, purporting to be his *laſt will*, dated the 10th of *February* 1742, and which is found in theſe words: That he *deviſes* to the defendant the lands in queſtion for life, remainder to his *firſt* and every other ſon and ſons *in tail-male*, remainder to his daughters as *tenants in common*, with the reverſion *in fee* to the right heirs of the *deviſors*; then he charges all his real and perſonal eſtates with particular annuities and *legaties*, and particularly an annuity of 20 *l. per annum* to *E.* the wife of *T. H.* for her life, and to her ſeparate uſe; and he alſo gives a *legacy* of 10 *l.* each to *J. H.* and his wife, for mourning. That to this *will* there are *three* perſons who ſubſcribe their names as witneſſes, whereof *J. H.* is one; and that in their preſence, and of no body elſe, he ſigned, ſealed, and publiſhed the paper-writing, as and for his *laſt will*; and they *three* atteſted the ſame in his preſence, and are all *three* living. They find the identity of *J. H.* the *legatee*, and *witneſs*, and that *E.* his wife is ſtill living. That the *deviſor* died the 28th of *May* 1743 without iſſue, and ſeiſed as aforeſaid; and that Mrs. *A.* (*one* of the leſſors) is his aunt, and heir at law. They find that before, and at the time of the trial, the defendant made a tender to *J. H.* of 20 *l.* for his and his wife's *legacies*, which he refuſed to accept; and that thoſe *legacies* are not diſcharged. Then they find the entry and demiſe by the leſſors, *&c.*

The queſtion on this ſpecial verdict was, whether, in the light *H.* now ſtood, he was to be conſidered as a *credible witneſs* within the intent of the *ſtatute of frauds?* And we are all of opinion he is not.

The right to *deviſe* in this caſe is not a *common law* right, it being inconſiſtent with the notion of a *feudal tenure* (*Wright's Tenure*, 174;) but it depends on powers given by ſtatutes, which muſt all be conſidered together, as creating *one* general *parliamentary rule*; the particulars of which are, that it muſt be in writing, ſigned, and on atteſtation of *three* credible witneſſes, in the preſence of the *deviſor*. Theſe were checks introduced to prevent men from being impoſed on; and certainly meant, that the witneſſes (who are required to be credible) ſhould not be ſuch as claim a benefit by the *will*. Though a *will* may be read, on proof of all the circumſtances, by *one* witneſs, yet that is on a ſuppoſition there are *two* others, who could be allowed to give the ſame teſtimony.

It was objected, that nothing veſts till the death of the *deviſor*; and therefore, at the time of the atteſtation, he had no intereſt. But the anſwer was, that he was then under a temptation to commit a fraud, and that is what the parliament intended to guard againſt.

It was agreed, that this man could not be examined, how then is he ſuch a credible witneſs as the ſtatute requires?

The true time for his credibility is, the time of atteſtation; otherwiſe a ſubſequent infamy, which the teſtator knows nothing of, would avoid his *will*.

And as to what is ſaid in *Swinb.* 296. it relates only to *wills* of perſonal eſtate, and cannot affect the conſtruction of the ſtatute. *Vide Stra. vol.* 2. *p.* 1253.

Michaelmas, 20 *Geo.* 2. *Lowfield* v. *Stoneham, Executrix.*

On *plene adminiſtravit* pleaded, the queſtion was, whether 1000 *l.* received by the defendant was due to her in her own right, or as executrix of her huſband, and conſequently *aſſets*. And it aroſe on the following *deviſe*, "I give to my loving brother *J. S.* 1000 *l.* and in caſe of his death, to his wiſe *Suſanna*," (who was the defendant.) It appeared that *J. S.* ſurvived the *teſtator*; and therefore the plaintiff inſiſted this legacy (which the defendant admitted to have received) veſted abſolutely in him, and was aſſets in her hands.

On the part of the defendant it was offered to be given in evidence, that the *teſtator* in his laſt illneſs declared he meant only to give his brother the intereſt of the 1000 *l.* and that the defendant ſhould have the principal in caſe ſhe ſurvived him.

This *parol* evidence was oppoſed by the plaintiff's council, as being contradictory to the plain words of the *will*. And the Chief Juſtice ſaid, it could not be allowed; and that in the caſe of *Selwin* v. *Brown*, the Houſe of Lords had refuſed it, even where it was to ſupport the legal interpretation of the *will*; and Lord *Hardwicke* about *two years* ago held it in the ſame manner in the caſe of the Earl of *Inchquin* v. *Obrian*. *Vide Stra. vol.* 2. *p.* 1261.

Hilary, 30 *Geo.* 2. *Goodtitle, on the Demiſe of Hayward,* v. *Whelby.*

This was a caſe from *Lancaſter aſſizes* on an *ejectment*. *R. P.* being ſeiſed, *&c. deviſed all* his meſſuages lands, tenements and hereditaments, whatſoever and whereſoever ſituate, to the Rev. Mr. *T. H.* and *J. B.* and the ſurvivor of them, and the heirs of ſuch ſurvivor: "*In truſt*, that they and the ſurvivor of them, his "heirs and aſſigns, ſhould lay out, employ and be"ſtow, the rents and profits of the *deviſed* premiſes, "for the maintenance, education, bringing up, and "putting forth into the world, of *T.* and *J. H.* ſons "of the teſtator's ſiſter *E. H.* during their minorities; "and when, and as they ſhould reſpectively attain "their ages of *twenty-one*, then to the uſe and behoof "of the ſaid ſons of his ſiſter *H.* the ſaid *T.* and *J.* "*H.* and their heirs *equally*."

The teſtator made the ſaid *two* truſtees, the Reverend *T. H.* and *J. B.* his executors.

The queſtion before the court was, "whether the "remainder veſted in *T.* and *J. H.* or whether it re"mained in *contingency*, till their reſpective coming "of age?

Per curiam. The teſtator, by his *will*, made an *immediate* gift to his *two* nephews, *T.* and *J. H.* with a truſt to be executed for their benefit, during their minority. Therefore the *poſtea* muſt be delivered to the plaintiff. *Vide Bur. vol.* 1. *p.* 228.

Eaſter, 30 *Geo.* 2. *Hope, on the Demiſe of Brown and Wife,* v. *Taylor.*

On a caſe ſtated to the court on a trial in *ejectment* as follows: *R. J.* being ſeiſed in *fee* (*inter al'*) of a *copyhold* of inheritance, and having firſt ſurrendered the ſame to the uſe of his *will*, *deviſed* to *J. W.* his ſiſter's eldeſt ſon, his houſe in the *Brook*, with the out-buildings, and 30 *l.* to be paid within *twelve months* after his deceaſe; to his nephew *R. T.* 50 *l.* to be paid within *twelve months* after his deceaſe; to his nephews *C. T. R. T.* and *W. T.* his ſiſter's *three* ſons, *twenty-nine* acres of arable and meadow land, bought of *B.* not to be parted, but to part the rent equally between them; then to *W. T.* his ſiſter's ſon, the houſe in queſtion, by the deſcription of "his houſe on the *Green*, with the ground and "out-houſes thereto belonging;" and gives him alſo 10 *l.* and to his brother-in-law *G. T.* 5 *l.* and he directs the ſaid *legacies* to be paid within *twelve months* after his deceaſe; and declares his will and meaning to be, "that if either of the perſons before named die "without iſſue, lawfully begotten, then the ſaid *le*"*gacy* ſhall be divided equally between them that are "left alive."

On this ſtate of the caſe, *two* queſtions were made, but the court only gave their opinion on *one*, viz.

What eſtate *W. T.* the *deviſee* took by the *will*, viz. whether an *eſtate-tail*, or for *life* only?

Lord *Mansfield*. The word *legacies* does extend to lands, as well as to monies. Common perſons would not think of uſing the word *deviſe*. Therefore on the *firſt* queſtion, I think it is an *eſtate-tail*.

Deniſon, Juſtice. The word *legacies* extends to *real* eſtates, conſequently it is an *eſtate-tail*.

Foſter, Juſtice, ſaid, the teſtator intended the land to go over, and then it was an *eſtate-tail*.

Per curiam. Let the plaintiff be *nonſuited*, and judgment go for the defendant. *Vide Bur. vol.* 1. *p.* 268.

Michaelmas, 30 *Geo.* 2. *Robinſon* v. *Robinſon.*

On a caſe from the court of *Chancery* on a *will*, the caſe ſtated was as follows: On the 27th of *July*, 1727, *G. R.* of *Bochym*, in the county of *Cornwall*, Eſq; duly made his *will*, and after giving his wife *one guinea*, and his father-in-law a *groat*, he *deviſed* as follows: "I bequeath all my real eſtate (excepting my eſtate "in the pariſh of *Endellyon*, late Mr. *Newman*'s, and "all my preſentations in the ſaid county) to *L. H.* "of *P.* in the county of *Devon*, Gent. for and dur"ing the term of his natural life, *and no longer*: pro"vided that he alter his name, and take that of *Ro*"*binſon*, and lives at my houſe of *Bochym*. And after "his deceaſe, to ſuch ſon as he ſhall have, lawfully "begotten, taking the name of *Robinſon*. And for "default of ſuch iſſue, then I bequeath the ſame to "my couſin *W. R.* Rector of *Landewedneck*, and his "heirs for ever."

"*Item.* My *will* is, that the ſaid *W. R.* have li"berty to preſent whom he pleaſes to any vacancy that "ſhall happen in any of my preſentations, during his "life; and in caſe any of his children ſhall take or "be deſigned for *holy orders*, then it is my deſire, that "in caſe of any vacancy in either of my preſenta"tions, that bonds of reſignation be taken, to ſuch "child or children, if the vacancy happen before "he or they attain ſuch orders: and after the "ſame ſhall be diſpoſed of as aforeſaid, then I give "the *perpetuity* of the ſaid preſentations to the ſaid "Mr. *L. H.* in the ſame manner, and to the ſame "uſes, as I have given my eſtate."

The teſtator, after bequeathing ſome legacies, gave the reſt of his chattels, with his eſtate at *Endellyon*, to his kinſman *W. R.* and made him ſole executor.

Per curiam. "We are of opinion, that, on the true "conſtruction of the ſaid *will* of the teſtator, *G. R.* "the ſaid *L. H.* muſt, by neceſſary implication, to "effectuate the manifeſt general intent of the teſ"tator, be conſtrued to take an eſtate in *tail-male*, "he, and the heirs of his body, taking the name of "*Robinſon*, notwithſtanding the expreſs eſtate *deviſed* "to the ſaid *L. H. for his life, and no longer*."

The certificate was confirmed in *Chancery* by a decree, from which there was an appeal to the Houſe of Lords, where the decree was affirmed. *Vide Bur. vol.* 1. *p.* 38.

Eaſter, 31 *Geo.* 2. *Carleton on the Demiſe of Griffin* v. *Griffin.*

On a ſpecial caſe in *ejectment*, the ſame was ſtated as follows: *J. G.* the teſtator, being ſeiſed, *&c.* and being, *&c.* on the 2d day of *May* 1752, wrote on a ſheet of paper with his own hand as follows, *viz.* "*Know all men* by theſe preſents, that I, *J. G. &c.* make the after-mentioned, my laſt *will* and teſtament: and when it pleaſe God to call me, I pray God direct my relict. I make my preſent wife, my whole and ſole executrix of what it has pleaſed God to bleſs me with. I order my ſon *J. G.* my ſon by my firſt wife, 600 *l.* I have 600 *l.* in the *three per cent. annuities*, which I order not to be ſold, but I order my wife to leave the intereſt thereof to help to bring up my daughter *Laviner*: I likewiſe have *two freehold* houſes, *&c.* (the premiſes in queſtion) which are to be for the ſame uſe, to help to bring up my daughter *Laviner*, and her heirs for ever. My daughter to take poſſeſſion of the annuities at her age of *twenty-five*. And if it pleaſe God, my daughter die before her mother, and unmarried, and without a lawful heir, then the ſaid two houſes to go to my ſon *J.* and his heirs for ever."

The teſtator ſubſcribed his *will* at the ſame time when he wrote it; but there was no ſeal, nor witneſs to it.

The teſtator ſubſcribed this paper in the preſence of *three* witneſſes, and then he took it in his hand, and declared it to be his laſt *will* and teſtament, in the preſence of the ſaid *three* witneſſes; and then delivered it to them, and deſired they would atteſt and ſubſcribe it in his preſence, and in the preſence of each other, which they did.

N. B. The teſtator afterwards made a *codicil* on the ſame ſheet of paper.

On this ſpecial caſe, *two* queſtions were reſerved for the opinion of the court, *viz.*

1ſt. Whether the *republication* of the ſaid firſt *will* (made as above) be a *publication* or *republication* of his firſt *will* within the *ſtatute of frauds*.

2dly. Whether any eſtate paſſed by the firſt *will* either to the daughter or mother.

Lord *Mansfield.* The teſtator did not mean a part, but the whole of his *will* ſhould paſs by the manner of his publiſhing the ſame. There is no doubt of the *deviſe* to the daughter, whatever may be the doubt of the intereſt bequeathed to the mother till the daughter comes of age for her maintenance. It is ſufficient to *bar* the plaintiff, that an intereſt is given to one of them.

Deniſon and *Wilmot*, Juſtices, gave their opinions at large, and concurred with the Chief Juſtice.

Per curiam. Let the *poſtea* be delivered to the defendant. *Vide Bur. vol.* 1. *p.* 549.

Michaelmas, 31 *Geo.* 2. *Windham, Eſq;* v. *Chetwynd, Eſq.*

On a ſpecial verdict on a *will* of lands, dated the 14th of *May* 1750, and a codicil of the ſame date, made by *Walter Chetwynd* of *Grendon*, Eſq;

The principal objection inſiſted on by the defendant's council on arguing this matter was, "that the ſubſcribing *witneſſes* to the *will* were not, at the time of their atteſtation, credible witneſſes:" and conſequently this was not a *will* of lands, within *ſtat.* 29 *Car.* 2. *c.* 3. for prevention of frauds and perjuries, as not being atteſted by three credible witneſſes.

Lord *Mansfield.* The preſumption of fraud in this caſe would be againſt juſtice and truth; and the public inconvenience ſo great, that hardly a *will* would ſtand; therefore on the whole, we are all of opinion that this *will* is duly atteſted by three witneſſes, and the plaintiff muſt have judgment. *Vide Bur. vol.* 1. *p.* 414.

Michaelmas, 31 *Geo.* 2. *Jenkin* v. *Whitehouſe and another.*

See this caſe fully ſtated in page 218 of this work, under the head *Baron and Feme.*

Eaſter, 32 *Geo.* 2. *Strong on the Demiſe of Cummin* v. *Cummin, and another.*

On a ſpecial caſe reſerved for the opinion of the court in an *ejectment* cauſe on the following *will.*

The words of the *will* are as follows: *Whereas* by the power and authority in me veſted, according to the cuſtom of the manor of *Eaſt-Woodhay* aforeſaid, by ſeveral ſurrenders by me made of my copyhold lands in the ſaid manor, I can diſpoſe of them to the uſe of my laſt *will*; I do hereby give and bequeath ſingular my copyhold lands and tenements in *Eaſt-Woodhay* aforeſaid, held by ſeven copies of court, be the ſame more or leſs, to my eldeſt ſon *Robert* and his heirs, according to the cuſtom, after his mother's deceaſe. *Item.* I give to my ſon *John*, all that belong to *Smart* and *Picked* lands, and to his heirs, after his mother's deceaſe; and alſo that my ſon *Robert* ſhall pay to my eldeſt daughter *Mary*, the ſum of 100 *l.* of lawful money, when ſhe ſhall attain the age of *twenty-one years*; as alſo the like ſum of 100 *l.* to my daughter *Eſter*, as ſoon as ſhe ſhall attain the age of *twenty-one* years; and the like ſum of 100 *l.* to my daughter *Ann* when ſhe ſhall attain the age of *twenty-one* years; and alſo to my ſon *Willem* the ſum of 100 *l.* to be paid unto hem when he attain the age of *twenty one* years. *Provided* alway, that if my ſaid daughter *Mary*, or any of my other children, dy before he, ſhe, or they are one and twenty years old, that in that caſe he ſhall divide amongſt the ſurviving younger children the ſum of 100 *l.* and in caſe that your ſon *Robert* or *John* dy, then your ſon *William* is to have all that belong to *Smart* and *Picked* lands, and to his heirs: and in caſe that your ſon *Willem* engoye *Smart* and *Picked* land, then to pay to his ſiſter the ſum of 100 *l.* *Item.* As to my worldly goods, I give and ſtock, I give to the uſe of my wife during her natural life, and liberty to diſpoſe of them at her death, as ſhe ſhall think fit, *Provided* it be amongſt my children and their iſſus. And his wife to have the freehold during her life. *Item.* I do hereby make and appoint my dear wife *Mary*, and my ſon *Robert*, to be exators of this my laſt *will* and teſtament.

The general queſtion was, whether on the event of *John* the ſecond ſon's dying without iſſue, in the lifetime of his mother, the teſtator's third ſon, *William*, became entitled to the premiſes in queſton by force of the words in the *will*, "in caſe that your ſon *Robert or John dy*, then your ſon *Willem* is to have all that belong to *Smart and Picked lands*?" Or whether the eldeſt ſon *Robert* is, on *John*'s death, to take the ſame, as heir at law to the teſtator?

Lord *Mansfield.* It is very plain, from the *ſpelling* and *phraſeology* of this *will*, that it was the teſtator's own making or dictating, without aſſiſtance.

The teſtator's meaning muſt be collected from the *will* itſelf, by attending to the ſeveral parts of it, and comparing and conſidering them together.

In the preſent caſe, it is not difficult to diſcover what the teſtator intended. He certainly did not mean *mere* eſtates for lives to his eldeſt ſons; and if he did not mean to give them *mere* eſtates for their lives, it neceſſarily follows, "that he muſt mean a *deviſing on ſome contingency*." The only queſtion is, what *contingency?* for he has not expreſſed it. He only expreſſes himſelf, "that in caſe *Robert or John dy*, then *William* is to have all that belong to *Smart and Picked lands*, and to his heirs." *One* part of the contingency plainly is, "that if they die without iſſue." As the teſtator provides for his other children, he certainly meant that in either event, *Smart and Picked lands* ſhould go to *William* his third ſon, who, in caſe of the death of the eldeſt ſon, would become the ſecond.

We are all clear for the defendant, and therefore the *poſtea* muſt be declared to him. *Vide Bur. vol.* 2. *page* 767.

Eaſter, 33 *Geo.* 2. *Martin on the Demiſe of Henry Weſton* v. *Mowlin.*

See this caſe fully ſtated in page 439 of this work, under the head *Eſtates.*

Trinity, 33 & 34 *Geo.* *Lancaſter* v. *Thornton.*

On a caſe out of *Chancery* for the opinion of this court on the *will* of one *G. L.*

The queſtion ſtated by the court of *Chancery* to this court was, whether by virtue of theſe words, *viz.* “ In caſe the money ariſing from the ſale of the leaſehold eſtate ſhall not be ſufficient to pay and diſcharge all the teſtator's debts, legacies, and funeral “ expences, that then he *deviſes* that his *two* ſons, “ and his daughter, ſhall and may abſolutely ſell, “ mortgage, or otherwiſe diſpoſe of his freehold eſtate, “ for the payment of ſuch of his debts, legacies, and “ funeral expences, as his ſaid leaſehold eſtate ſhould “ not be ſufficient to pay and diſcharge;” any eſtate “ paſſed to *E. G.* and *D.* the children, or only a power to ſell?

Per curiam. We are of opinion, that no eſtate paſſed to the ſaid *E. G.* and *D.* but *only* a power to ſell, demiſe, mortgage, or otherwiſe diſpoſe of the premiſes. *Vide Bur. vol.* 2. *p.* 1027.

Michaelmas, 33 *Geo.* 2. *Goodman and others* v. *Goodwright, Leſſee of Richard Williams and Annabella his Wife.* Error.

On a *writ of error* on judgment in *ejectment* from the Grand Seſſions in *Wales* for the recovery of lands in *Denbighſhire*, the plaintiff claimed title under the following *will*.

“ *Now* I do hereby give and *deviſe* the meſſuages, “ lands, tenements and hereditaments, and the *abſolute inheritance* thereof, to the uſe and behoof of “ the heirs of the body of my niece *Ann Lloyd*, by “ any other huſband lawfully to be begotten; and for “ want of ſuch iſſue, to the uſe and behoof of my “ nephew *Charles Lloyd* of *Drenewith*, in the county “ of *Salop*, Eſq; and of the heirs of his body lawfully “ iſſuing; and for want of ſuch iſſue, to the uſe and “ behoof of my niece *Catherine Longford* widow, and “ the heirs of her body lawfully iſſuing; and for want “ of ſuch iſſue, to the uſe and behoof of *Elizabeth*, “ now wife of *G. B.* and the heirs of her body lawfully iſſuing; and for want of ſuch iſſue, to the uſe “ and behoof of *Catherine Longford* ſpinſter, youngeſt “ daughter of the ſaid *C. L.* widow, and the heirs of “ her body lawfully iſſuing; and for want of ſuch “ iſſue, to the uſe and behoof of the right heirs of me “ *Suſannah Moſtyn* for ever.”

Richard Williams, and *Annabella* his wife, after the ſeveral deceaſes of the ſaid *E. W.* and *Anne* his wife, made an entry, *&c.* and demiſed, *&c.* to *Goodright*, who entered, *&c.* And the defendants below (claiming under the heir at law of *Anne Wynn*) entered on *Goodright*, and ejected him.

Lord *Mansfield.* The whole of the caſe comes ſingly to this queſtion, “ Whether Mrs. *Moſtyn*, the “ teſtatrix, intended to give her nephew *C. L.* and “ the heirs of his body, the remainder, or reverſion, “ after the death of herſelf and of Dr. *E. W.* and “ *Ann* his wife, and of the heirs of their *two* bodies, “ and alſo of the heirs of *Ann*'s body by any *ſecond* “ huſband; or whether ſhe meant to give him an “ eſtate in poſſeſſion?”

It can never be imagined to be the intention of the teſtatrix to exclude all the iſſue of her favourite niece *Ann Wynn*, in order to prefer *Charles Lloyd* and his iſſue: indeed, the direct contrary plainly appears. Therefore the judgment muſt be reverſed. *Vide Bur. vol.* 2. *p.* 874.

Michaelmas, 33 *Geo.* 2. *Hurſt, and another*, v. *The Earl of Winchelſea, and others.*

On a ſpecial caſe out of the court of *Chancery*:

Thomas Herbert, Eſq; being ſeiſed in *fee* of the premiſes in queſtion, made his *will* in theſe words: “ I “ give and bequeath to my dear and beloved wife “ *Elizabeth Herbert* (after payment of my juſt debts) “ *All* my money, plate, jewels, houſehold goods and “ furniture whatſoever, and all my goods, chattels, “ and perſonal eſtate, real or perſonal, whatſoever and “ whereſoever, that ſhall be in my poſſeſſion, or I ſhall “ be any ways entitled to at the time of my deceaſe. “ And I further give, *deviſe* and bequeath to my ſaid “ dear wife, and her heirs, ſuch part of all my real “ eſtate that I have any power to diſpoſe of by this “ my *will.* And I further give, *deviſe* and bequeath “ to my ſaid wife, out of the remaining part of my “ ſaid real eſtate, for her better ſupport and maintenance, till my ſon *Thomas* attain the age of *twenty-one years*, the ſum of 400 *l.* a year; and my will is, “ that the ſeveral *bequeſts* and *deviſes* to my ſaid wife “ as aforeſaid, ſhall not, nor are intended to prejudice my ſaid wife in her *thirds* or *dower* out of my “ ſaid *real* eſtate.”

Note, He appointed his wife ſole executrix.

The following queſtions were ſtated for the opinion of the court, *viz.*

1ſt, Whether by the *will* of *T. H.* the father (huſband of *E. H.* afterwards *Powell*) the eſtate in queſtion (the real eſtate of the ſaid *T. H.*) paſſed to the ſaid *Elizabeth* in *fee*?

2dly, Whether it deſcended, on the death of *T. H.* the ſon, to his heirs on the part of the father, or to his heirs on the part of the mother?

On the 27th of *November* 1759, the judges certified their opinion as follows:

We are of opinion, that the eſtate in queſtion in this cauſe paſſed by the *will* of *T. H.* the father, to the ſaid *Elizabeth* in *fee.* We are alſo of opinion, that *T. H.* the ſon, did not take the ſaid eſtate from his mother by *purchaſe*, but by *deſcent*; conſequently, on his death, it deſcended to his heir on the part of the mother.

The court of *Chancery* decreed according to the above opinion. The defendants appealed to the Lords, but the matter was accommodated without any hearing. *Vide Bur. vol.* 2. *p.* 880.

Hilary, 1 *Geo.* 3. *Selwyn, Eſq*; v. *Selwyn, Widow, and others.*

On a caſe from the court of *Chancery* for the opinion of this court.

On the 8th of *June* 1751, *John Selwyn* the younger made his *will* in the words, or to the effect following, *viz.* “ this is the laſt *will* and teſtament of me *J. S.* “ the younger, which I now make and publiſh, in order to ſettle my real eſtate in ſuch prudent manner “ as to continue the ſame in my own family. And “ for that purpoſe, I do hereby give and deviſe unto “ my honoured father, *John Selwyn*, Eſq; *All* that my “ manor or lordſhip of *Luggerſhall* in the county of “ *Wilts*, and all my manor of *Matſon* in the county of “ *Glouceſter*, with the rights, members, and appurtenances thereunto belonging, and all other my manors, meſſuages, farms, lands, tenements, rectories, advowſons, rents, and hereditaments whatſoever, and all the freehold and other eſtate of inheritance whereof the ſaid *J. S.* the younger, or any “ perſon or perſons whatſoever, in truſt for, or to my “ uſe, are or is ſeiſed or poſſeſſed, either in poſſeſſion, “ reverſion, remainder, or expectancy; and all my “ eſtate, right title and intereſt therein, *To hold* the “ ſame unto and to the uſe of my ſaid father, his “ heirs and aſſigns for ever.”

The queſtion ſtated to the court was, whether the ſeveral lands, tenements, and hereditaments, compriſed in the bargain and ſale of the 20th of *April* 1757, (for the ſuffering of a common recovery) paſſed by the *will* of *John Selwyn* the ſon. And this turned on *two* points.

1ſt. Whether *John Selwyn* the younger, at the date of his *will*, had any uſe, eſtate, or intereſt in the premiſes, to *deviſe*?

2dly. If he had, whether the ſubſequent recovery was a revocation?

The certificate returned to the court of *Chancery* was dated on the 2d of *March* 1761, and was in the following words, *viz.*

“ Having heard council, and conſidering this caſe, “ (which the parties, by agreement between themſelves, delayed arguing) we are of opinion that the “ ſeveral lands, tenements, and hereditaments compriſed in the deed of the 20th of *April* 1751, paſſed “ by the *will* of *J. S.* the ſon.”

Trinity, 3 Geo. 3. Lade, Baronet, v. Holford, Eſq; and Wife, and others.

On a caſe from the court of *Chancery* for the opinion of this court, Sir *John Lade*, Baronet, by *will* of the 17th of *Auguſt* 1739, *deviſed* his manors, *&c.* to *four* truſtees, and their heirs; and likewiſe all his houſeholds and copyholds, and perſonal eſtate, to be laid out in the purchaſe of lands, on truſt, and to the uſe of his couſin *John Inſkip* in ſtrict ſettlement, with divers remainders over in ſtrict ſettlement.

In the ſaid *will* there was a *proviſoe*, "that ſo often as, and during ſuch time as the perſon who for the time being (in caſe the teſtator had not otherwiſe directed) would have been entitled in poſſeſſion as tenant for life, or tenant in tail, ſhould be under the age of *twenty-ſix years*. Then the truſtees were to enter and receive all the rents and profits of the real, and all the intereſt and produce of the perſonal eſtate, out of which they were to allow, for the maintenance of ſuch tenant for life, or tenant in tail, ſums particularly ſpecified, and all the reſt was to accumulate and be laid out in the purchaſe of lands, and ſettled to and on the ſame truſts and uſes."

The queſtion for the opinion of the court was, "whether the defendant *R. F.* the heir at law of the ſurvivor of *Ann Lade*, *J. F.* the elder, *H. O.* and *J. F* the younger, the truſtees named in the *will* of of Sir *John Lade* the teſtator, did, on the birth of the preſent plaintiff, Sir *John Lade*, (the infant) take any, and what eſtate in the premiſes *deviſed* by virtue of the *proviſoe* in the ſaid teſtator's *will*."

Per curiam. We are of opinion that *R. F.* the heir at law of the ſurviving truſtee in the *will* of Sir *John Lade*, did not take any eſtate in the premiſes *deviſed* by virtue of the *proviſoe* in the *will* of the ſaid teſtator. *Vide Bur. vol.* 3. *p.* 1416.

Trinity, 4 Geo. 3. Baddeley v. Leppingwell.

See this caſe fully ſtated in page 440 of this work, under the head *Eſtates*.

Hilary, 5 Geo. 3. Frogmorton, on the Demiſe of Bramſtone, v. Holyday and others.

M. H. by *will*, among other things, *deviſed* as follows: "As for my worldly affairs and eſtate, *&c.* I do diſpoſe thereof in manner following: *Imprimis*, I give, *deviſe* and bequeath, unto my ſaid ſon *D. H.* and his heirs for ever, my malt-kiln, ſtanding and being in *Black Friar-gate*. *Item.* I give, *deviſe* and bequeath, unto my ſon *J. H.* *All* that houſe and garden, now in the tenure and occupation of *E. G.* mariner, charged and chargeable nevertheleſs with the payment of the ſum of 50 *l.* of lawful *Britiſh* money; which ſaid ſum of 50 *l.* I give, *deviſe* and bequeath, unto my daughter, *M. H.* payable and to be paid to her out of the yearly rents, iſſues and profits of the ſaid houſe, to paid unto and received by my ſaid daughter *M. H.* yearly, and every year, until the ſaid ſum of 50 *l.* be fully paid and ſatisfied. And if the ſaid *J. H.* ſhall happen to die in his minority, or before he comes to age, then I give, *deviſe* and bequeath, the ſaid houſe and garden, unto my *three* daughters *E. L.* *M. H.* and *H. H.* equally ſhare and ſhare alike." Then ſhe gives ſmall ſpecific perſonal legacies of money, ſilver-ſalvers, *&c.* and concludes thus: "*All* the reſt and reſidue of my goods, chattels, rights and credits (not mentioning her real eſtate) I give, *deviſe* and bequeath unto Mr. *G. H.* and *E. L.*

On the trial of this cauſe, a verdict was found for the plaintiff, *ſubject* to the opinion of this court on the following queſtion;

"Whether an eſtate for *life*, or in *fee*, in the premiſes paſſed to the above-named *J. H.* by the ſaid *will* of *Margaret* his mother?"

Lord *Mansfield*. It ſufficiently appears on the face of the *will* to ſhew, that the intention of the maker of it was, "that *John* ſhould have the eſtate, *unleſs* he ſhould die in his *minority*."

Wilmot, Juſtice, gave his opinion at large, and concurred with the Chief Juſtice.

Per curiam. Let the plaintiff be *nonſuited*, and the *poſtea* be delivered to the defendant. *Vide Bur. vol.* 3. *p.* 1618.

Eaſter, 6 Geo. 3. Roſe, on the Demiſe of Vere and others, v. Hill.

Thomas Hill, the defendant's father, by *will*, dated the 9th *July* 1754, *deviſed* as follows, *viz.* "I *will* that my juſt debts, and funeral charges and expences, which I ſhall juſtly owe at the time of my deceaſe, be in the firſt place paid by my executors herein after named; and as to my eſtate, both real and perſonal, I diſpoſe thereof as follows: *Firſt*, I give and *deviſe All* that my meſſuage, *&c.* (the premiſes in queſtion, being his whole eſtate;) *alſo all* other my meſſuages, lands, tenements and hereditaments, in the city of *Coventry* or elſewhere, unto which I am in any wiſe entitled, unto my dear wife *Mary*, for and during the term of her natural life; and from and after her deceaſe, I give and *deviſe* the ſame premiſes, every or any part thereof, to and to the uſe of *A. T. M. W.* and *N.* my ſons and daughters, and the *ſurvivors and ſurvivor of them*, and the executors and adminiſtrators of ſuch ſurvivor, ſhare and ſhare alike, as *tenants in common*, and not as *joint-tenants*, chargeable with the mortgage or incumbrance already made by me of the ſame premiſes, or ſome part thereof, to Mrs. *Y.* for the ſum of 100 *l.* and intereſt. And as to, for and concerning all the reſt and reſidue of my goods, chattels, *&c.* I give and bequeath the ſame, and every part thereof, unto *A. T. M. W.* and *N.* my ſons and daughters, and the *ſurvivors and ſurvivor* of them, and the executors and adminiſtrators of ſuch ſurvivor, ſhare and ſhare alike, as *tenants in common*, and not as *joint-tenants*. And I conſtitute my ſaid dear wiſe, my daughter *A.* my ſon *T.* and my daughter *M.* executors of this my laſt *will* and teſtament."

This came before the court on a ſpecial verdict in *ejectment*, on the following queſtion, *viz.*

"What eſtate paſſed from the ſaid *T. H.* the eldeſt ſon and heir of the ſaid teſtator, *T. H.* to the ſaid *G. L.* by the indentures of the 8th and 9th of *February* 1765, in any, and what part of the premiſes in queſtion, and whether the plaintiff is entitled to recover any, and what part thereof, in this *ejectment*."

Lord *Mansfield*. As againſt the defendant it is enough to ſay, "that it cannot come to him by *ſurvivorſhip*."

Wilmot and *Yates*, Juſtices, gave their opinions at large, and concurred with the Chief Juſtice.

The court were unanimous, that it was a tenancy in common in *fee*; and that the words "*ſurvivors and ſurvivor*," relate to the death of the teſtator.

Per curiam. Let the *poſtea* be delivered to the plaintiff. *Vide Bur. vol.* 3. *p.* 1881.

Writs, &c.

Eaſter, 5 W. & M. De la Baſtide v. Reynell and Wife.

On a *writ* of *homine replegiando*, the ſheriff returned an *elongavit*; thereon a *capias in withernam* iſſued; then the defendants entered an appearance with the *philazer*, and a motion was made for a *ſuperſedeas* to the *writ of withernam*, and that they would plead *they did not take*, for they are not to be concluded by the *return* of the ſheriff, which was traverſable.

This was oppoſed, unleſs they would give bail to deliver the perſon, if the iſſue ſhould be found againſt them.

Per curiam. There is no difference between a common *replevin* and an *homine replegiando* as to this matter; neither is there any other return to this *writ* than *elongavit*, which is, that the party cannot be found.

If the defendants had claimed any property, then they are to *gage deliverance* to this *writ*, but that is not done, for they ſay they have not the perſon, therefore let them plead That *they did not take*, and put in bail to appear *from day to day*. *Vide Mod. Rep. vol.* 4. *p.* 183.

Michaelmas, 6 *W. & M.* *Wilſon* v. *Law*.

Wilſon brought an appeal of *murder* againſt *John Law* for killing his brother *Robert Wilſon*, and declared againſt him: the defendant prayed *oyer* of the *writ and return*; and having *oyer*, demurred to the *writ and return*, and to the felony, pleaded over, *not guilty*: exception was taken, 1ſt. That the *writ* commanded the ſheriff, that he attach *John Law*, *&c.* And the ſheriff had returned *attachiari feci*: this they pretended was no anſwer to the *writ*, the injunction whereof is perſonal; but the court held it well enough, for the ſheriff was not bound to execute it in perſon, but might do it by his bailiffs. *Dyer* 241. 2 *Ro*. 457. And what the bailiffs do by the ſheriff's warrant, is done by the ſheriff. If he had returned *attachiatus eſt*, it had been good: *captus eſt* is a good return to a *capias*. *Kitch*. 258. For if there is the ſubſtance, it is no matter for form, as 1 *H.* 6. 6. a *ſcire facias* was returned, *ſcire feci A. B.* without adding *infra nominat.* Yet becauſe it was ſaid to be *virtute brevis prædict. prout mihi præcipitur*, it was adjudged good.

2dly. The ſheriff returned, *ita quod corpus ejus paratum habeo ubicunque*; and it was objected that this was nonſenſe, and alſo impoſſible.

Per curiam. The *return* is good without it; it is therefore but *ſurpluſage*, which will not vitiate a *writ* or an indictment, much leſs a *return*, which requires not ſuch preciſeneſs in form. 3 *Cro*. 893. 2 *Ro*. 460. *Vide Salk. vol.* 2. *p.* 589. *Raym. vol.* 1. *p.* 20.

Michaelmas, 7 *W.* 3. *Palmet* v. *Price*.

An action was laid in *Staffordſhire*, and judgment for the plaintiff; whereon he ſued out a *fieri facias* with a *teſtatum* into *Worceſterſhire*; and now it was moved that this was irregular, and ought to be ſet aſide, becauſe no *fieri facias* had ever gone into *Staffordſhire*; and the ſheriff of *Staffordſhire* made *affidavit* that he never returned any *fieri facias* in the cauſe: *but not allowed*; for the *fieri facias* on which the *teſtatum* is founded, is *returned* of courſe by the attornies themſelves, as originals; if you ſearch the file you may find one, and that is ſufficient. *Vide Salk. vol.* 2. *p.* 590.

Hilary, 8 *W.* 3. *The King* v. *The Biſhop of Cheſter, and others*.

See this caſe fully ſtated in page 53 of this work, under the head *Addition*.

Michaelmas, 10 *W.* 3. *Witty* v. *Polehampton*.

One *W. R.* gave a warrant of attorney to confeſs a judgment to *W. W.* as of *Trinity* term, and afterwards to hang up that judgment, he brought a *writ of error*, *teſted* the 27th day of *June*, and *returnable* on the 12th day of *July* following; *W. W.* the judgment-creditor having notice of this matter, entered up the judgment as of the laſt day of that *Trinity* term, ſo that the *writ of error* was *returnable* before the judgment was ſigned; and on a complaint to the court of this matter, they would do nothing in it, for if it was a trick, it was an honeſt one, and to obtain a juſt debt.

Per curiam. This judgment is not ſuſpended by this *writ of error*; otherwiſe if the *return* had been afterwards. *Vide Salk. vol.* 3. *p.* 398.

Michaelmas, 10 *W.* 3. *Odes* v. *Clark, or Clerk*.

See this caſe fully ſtated in page 428 of this work, under the head *Eſcape*.

Trinity, 11 *W.* 3. *Pullen* v. *Palmer*.

In an action on the *caſe* for a *falſe return* to a *mandamus*, the return was ſet out to be made in *manner and form following*, *&c.* And after a verdict for the plaintiff, the court was moved in arreſt of judgment, that this was not certainly enough ſhewn to be the *very return* that the defendant had made; and therefore the declaration was ill. *But not allowed.*

Per curiam. It is well enough. And the plaintiff had judgment. *Vide Raym. vol.* 1. *p.* 496.

Michaelmas, 11 *W.* 3. *Philips* v. *The Biſhop of Sarum*.

Two joint-tenants of an advowſon, by deed, made a partition to preſent by turns; and afterwards, one of them granted over his ſhare; the grantee preſented in his turn, and the biſhop refuſed to admit his clerk; whereon the grantee alone brought a *writ of quare impedit*.

It was objected, that the inheritance of an advowſon was in its nature undiviſible, and as intire as that of a villien; and that if *two* joint-tenants agreed to preſent, by deed, in their turns, ſuch agreement would work no ſeverance in their jointure. It was further urged, that *one* joint-tenant, or tenant in common of an advowſon might make a voluntary partition of the right; after which they ſhall have ſeveral *writs of right* for their ſeveral moieties. *F. N. B.* 62. If there be *two* or more coparceners of a manor, they may make a partition to have *one* part of the *demeſnes* and ſervice to one, and another part to the other; and the advowſon by the ſame agreement to be by turns, it will be appendant to their reſpective ſhares. 6 *Co.* 12. 2 *Roll. Abr.* 255. *Fitz. tit. quare impedit, pl.* 170. *Co. Ent.* 496. And accordingly, at another day, it was adjudged for the plaintiff by the whole court. *Vide Mod. Rep. vol.* 12. *p.* 321.

Michaelmas, 11 *W.* 3. *The King* v. *The Mayor of Hertford*.

On an information in nature of a *quo warranto*; a *venire* iſſued, *returnable* in *Eaſter* term, and a *diſtringas* in *Trinity*, and an *alias diſtringas* fifteen days from the *teſte* the ſame *Trinity* term; it was objected, that this was irregular, for that all proceſſes on the crown ſide are returnable *de termino in terminum*, and not in *fifteen days*, and the precedents are ſo: it was anſwered, that a proceſs of *outlawry* was the only proceſs returnable *de termino in terminum*. 2 *Inſt.* 550. 1 *Inſt.* 134. 9 *Co.* 119. *b.*

Holt, Chief Juſtice, ſaid, there was no queſtion but the proceſs might be ſued out *returnable in fifteen days*; and Sir *Samuel Aſtry* reported the practice according to this diſtinction. *Vide Salk. vol.* 2. *p.* 699.

Eaſter, 12 *W.* 3. *Thomkin* v. *Crocker*.

See this caſe fully ſtated in page 59 of this work, under the head *Amendment*.

Hilary, 12 *W.* 3. *Freeman* v. *Blewitt*.

See this caſe fully ſtated in page 722 of this work, under the head *Pleas*, *Pleadings*, *&c.*

Trinity, 12 *W.* 3. *Anonymous*.

The court was moved to quaſh the *return* of a *reſcue*, which was, "by virtue of a writ to me directed, I iſſued "my warrant to *J. S.* and *J. N.* my bailiffs, who by "virtue thereof took and arreſted the defendant, and "him in my cuſtody had until *A.* and *B.* reſcued the "defendant out of the cuſtody of *J. S.* and *J. N.* my "bailiffs."

Holt, Chief Juſtice. The ſheriff ſhould either have *returned*, that the defendant was in his cuſtody, and reſcued out of his cuſtody, or that he was in the cuſtody of the bailiffs, and reſcued out of their cuſtody, either of which *returns* had been good. But this return is repugnant, *viz.* "that the defendant was in the "cuſtody of the ſheriff, and reſcued out of the cuſtody of the bailiffs." Wherefore the *return* was quaſhed. *Vide Raym. vol.* 1. *p.* 589.

Michaelmas, 12 *W.* 3. *Moor* v. *Watts.*

See this caſe fully ſtated in pages 83 and 161 of this work, under the heads *Appearance* and *Bail.*

Michaelmas, 12 *W.* 3. *Rock* v. *Leighton or Layton, Sheriff of Salop.*

See this caſe fully ſtated in page 472 of this work, under the head *Executors and Adminiſtrators.*

Michaelmas, 12 *W.* 3. *Touchin's Caſe.*

Adjudged, That in all *continued writs* the *alias* muſt be *teſted* the day on which the former was *returnable. Vide Salk. vol.* 2. *p.* 699.

Eaſter, 13 *W.* 3. *Wilmot* v. *Taylor.*

See this caſe fully ſtated in page 78 of this work, under the head *Appeal.*

Hilary, 1 *Ann.* *The Caſe of the Mayor of Thetford.*

See this caſe fully ſtated in page 293 of this work, under the head *Corporations*

Eaſter, 1 *Ann.* *Green* v. *Revett.*

See this caſe fully ſtated in page 615 of this work, under the head *Limitations. (Statutes of)*

Eaſter, 1 *Ann.* *Atwood* v. *Burr.*

See this caſe fully ſtated in page 370 of this work, under the head *Diſcontinuance.*

Eaſter, 1 *Ann.* *Anonymous.*

When the ſuit is by original *writ*, the *ſtatute of jeofails* will not help a bad original *writ*; otherwiſe, where the ſuit is by *meſne proceſs*, as a *bill of Middleſex, latitat, &c. Hob.* 180. 2 *Cro.* 542. *Vide Mod. Rep. vol.* 11. *p.* 2.

Eaſter, 1 *Ann.* *Anonymous.*

A motion to quaſh a *writ* taken out by the party himſelf, is not grantable of courſe, but ſome ſufficient cauſe ought to be ſhewn to the court. *Vide Mod. Rep. vol.* 11. *p.* 3.

Eaſter, 1 *Ann.* *Adam's Caſe.*

A *capias in withernam* was *teſted the firſt day of May, and returnable on Thurſday next after three weeks in Trinity term*; and the court ordered the attorney and *filazer* to attend; for they looked on it to be a great oppreſſion to make ſuch a long *return* in order to deprive a perſon of his liberty ſo long. And here he gave bail, body for body, to appear at the *return* of the *writ*, and the *withernam* was *ſuperſeded. Vide Mod. Rep. vol.* 7. *p.* 17.

Eaſter, 1 *Ann.* *Anonymous.*

Holt, Chief Juſtice. The *writ of ne exeat regnum* ought not to be granted but on great reaſon and examination; otherwiſe a *writ of homine replegiando* may lie. *Vide Mod. Rep. vol.* 7. *p.* 9.

Trinity, 1 *Ann.* *Gay* v. *Croſs.*

See this caſe fully ſtated in page 27 of this work, under the head *Actions.*

Trinity, 1 *Ann.* *Shirley* v. *Wright.*

In an action of *debt* for an eſcape of one taken on a *ca. ſa.* which appeared to be *returnable* the term next but one after the *teſte*, ſo that a term intervened: after a verdict for the plaintiff, it was moved in arreſt of judgment, that the *writ* was merely void, and conſequently there could be no eſcape, and the ſheriff did well to let him go; and 3 *Cro.* 468. was cited as a caſe in point. On the other ſide, to ſhew that a *writ* may be faulty, and yet not void, were cited *Poph.* 271. *Dy.* 67. 175. 21 *H.* 7. 16. *Sty.* 339. 1 *Ro.* 242. 3 *Cro.* 188. *Mo.* 274. 1 *Cro.* 271. 2 *Bulſt.* 256. 2 *Ro. Rep.* 432.

Holt, Chief Juſtice. *Eſcape* lies againſt the ſheriff; and there is a difference between a *capias* in *meſne* proceſs, and a *capias* in execution: in *meſne* proceſs, if a term be omitted the *writ* is void in all perſonal actions, and the ſheriff ſhall not be charged; for the cauſe is diſcontinued, and out of court by the intermiſſion; and by not having a day in court by the *return* of the *writ*, as he ought, the party may be greatly prejudiced by reaſon of the impriſonment in the mean time.

But in executions a *ca. ſa.* omitting a term is not void; for the party is not to have a day in court; his cauſe is at an end, and he muſt be in priſon, whether the *writ* be *returned* or not; nor is it neceſſary it ſhould be *returned.*

Per curiam. The plaintiff had judgment, *niſi, &c.*

And in the ſame caſe, *Holt*, Chief Juſtice, ſaid, if a *writ of execution* bear *teſte* out of term, the ſheriff is juſtifiable, and yet ſhall not be liable to an action of *eſcape*, for it is a *void writ. Vide Salk. vol.* 2. *p.* 700.

Michaelmas, 1 *Ann.* *Lucy* v. *The Biſhop of St. David's.*

The defendant was taken up on a *writ of excommunicato capiendo*, and ſent to *Newgate*; and the *writ* not being *returned*, he removed himſelf up by *habeas corpus.*

Per curiam. He has no day in court till the *writ* of *excommunicato capiendo* be actually *returned*, for the command of the *writ* was *to take and keep him*; and to *return* the *writ* how he had executed it. But on ſuch *return* the party has no day in court, but muſt bring himſelf in by *habeas corpus*; and before he can plead to the *writ*, it muſt be *returned* here on record, for the *writ* is to be adjudged good, or quaſhed; as it is good or bad on their plea, and the enrolling the *writ* on the record, at its iſſuing out, is not enough to give a day in court, or to appear to and plead.

The council on the other ſide inſiſted on it, and obtained leave to examine the *habeas corpus* which recited the *writ of excommunicato capiendo.* And it was complained of that a *double writ of excommunicato capiendo* was taken out, with a *double return*, to the end, that if he was taken by one and diſcharged, he might be taken up again by the other, and ſo vexed; which practice the court very much diſapproved of, though it was agreed there might be *two*, if there were *two* excommunications for the ſame cauſe. So he was remanded; but the *writs* were afterwards quaſhed for uncertainty, and the defendant diſcharged. *Vide Mod. Rep. vol.* 7. 56.

Eaſter, 2 *Ann.* *Andrews* v. *Lynton or Linton.*

See this caſe fully ſtated in page 412 of this work, under the head *Error.*

Trinity, 2 *Ann.* *Brough or Borrough*, v. *Parkins.* Error.

In this caſe (which ſee fully ſtated in page 230 of this work, under the head *Bills of Exchange*) an exception was taken to the execution of the *writ of inquiry, viz.* that the *writ* was *returnable* on ſuch a day *in fifteen days of St. Martin*, and the *inquiſition* is, by *virtue of the writ, &c. returned in fifteen days of St. Martin laſt paſt*, which muſt be a year before, *viz. Martinmaſs* twelvemonth; and St. *Martin* is a fixed feaſt, and always on the 11th of *November.*

Holt, Chief Juſtice. The *return* is made on the 28th day of *November*, which is the laſt day in full term.

It was then urged, that the court could not take notice of the day of the month.

Holt, Chief Juſtice. We take notice of all feaſts, and the *Almanack* is part of the *common law*, the Kalendar being eſtabliſhed by act of parliament, and it was publiſhed before the common Prayer-Book. Let the judgment be affirmed. *Vide Raym. vol.* 2. *p.* 999.

Trinity, 2 *Ann.* *Berwick* v. *Andrews.*

Holt, Chief Juſtice, ſaid, in this caſe, that a *writ of quare impedit* for a diſturbance in the life of the teſtator is given to the executor by the equity of *ſtat. Ed.* 3. *de bonis aſportatis in vita teſtatoris. Vide Raym. vol.* 2. *p.* 973.

Trinity, 2 *Ann.* *The Counteſs of Banbury* v. *Knolls and Wood.*

See this caſe fully ſtated in page 3 of this work, under the head *Abatement.*

Michaelmas, 2 *Ann.* *Lamb* v. *William.* Error.

An action was brought in the *C. B.* on ſeveral damages. The attorney entered a *remittit damna* as to ſome, and on a *writ of error* it was held the attorney could well do it, though he could not enter a *retraxit*, for that muſt be done in perſon. *Vide Mod. Rep. vol.* 6. *p.* 82.

Eaſter, 3 *Ann.* *Harvey* v. *Broad.*

See this caſe fully ſtated in page 340 of this work, under the head *Date, Day, and Delivery.*

Eaſter, 3 *Ann.* *Williams* v. *Jackſon.*

On a point what notice there ſhould be given to defendants of *trials*, and executing of *writs of inquiry*, theſe points were agreed to by the court.

1ſt, That convenient notice was as much neceſſary and fit to be given of the executing of a *writ of inquiry*, as of a trial.

2dly, That by a late rule of court, if a *writ of inquiry*, or *iſſue*, be to be tried in *London*, or *Middleſex*, and the defendant lives not above *forty* miles off, *eight days* notice will ſuffice; but if it be above *forty* miles off, there ought to be *fourteen days* notice in either caſe.

3dly, That the reaſon is the ſame in all other caſes, where the parties are above *forty* miles diſtant from the place where the trial is to be, though they be country cauſes; yet becauſe it is an ancient rule, that *eight days* notice ſhould be ſufficient in all country cauſes, and that had been in the caſe now in queſtion, it being a country cauſe, the execution of the *writ of inquiry* ſtood; and the court ſaid, they would conſider of altering the rule.

Per curiam. The reaſon why, by *common law*, there are *fifteen days* between the *teſte* and *return* of a proceſs is, becauſe that was thought a ſufficient time to come from any part of the kingdom to another; for at *twenty miles a day*, a man *in fifteen days* will go all over the land. *Vide Mod. Rep. vol.* 6. *p.* 146.

Trinity, 3 *Ann.* *Herring* v. *Crocker.*

A judgment was obtained by confeſſion *three* terms before, and before any entry was made on the roll of the judgment, a *fieri facias* was taken out, and the ſheriff taking ſecurity for his indemnification from the plaintiff in that judgment, levied goods to the value. And now another *fieri facias*, on another judgment, being brought to him, he returned *no goods*, the goods being ſold on the *firſt writ*; and the money paid by the ſheriff, and ſatisfaction entered on the judgment, but the roll was not filed. The plaintiff, in the *ſecond fieri facias*, brought an action for a *falſe return* againſt the ſheriff, and now it was moved for the plaintiff in the *firſt fieri facias*, to have leave to file his roll.

Per curiam. How can an action on *falſe return* be maintained againſt the ſheriff if there be no fraud in him? And if there be, you have your remedy, notwithſtanding the filing of this roll, as well as if it was not filed. The ſheriff would not be liable to the defendant in the *firſt* judgment in *treſpaſs*, for the *writ* is enough to juſtify him, and he is not bound to examine any farther.

By the ancient rules of the court, the judgment of *one* term ought to be entered on the roll before the *Eſſoign*-day of the next term, and the late ſtatute for docqueting of judgments was only in imitation of the ancient courſe, and in aid of it.

Holt. Chief Juſtice. The *common law* is, that all things done in the *vacation* ſhall refer to the *precedent* term; and though no inconvenience appears to us if this judgment be now filed as of the due term, yet we cannot foreſee how far ſuch retroſpect may affect others. And if this firſt debt be a juſt debt, and the party, without any compulſion, had paid it before your *writ* came to the ſheriff, it had been good againſt you; ſo here, if the debt was juſt, and a *writ* had come to the ſheriff, and he had levied the money, and had paid it before the *ſecond writ* had come to him; it had been good againſt the *ſecond* plaintiff, though the *firſt* had no judgment.

Therefore he adviſed the *ſecond* plaintiff's council to conſider of it again before he proceeded with the action againſt the ſheriff. And the court refuſed to grant the motion. *Vide Mod. Rep. vol.* 6. *p.* 184.

Michaelmas, 3 *Ann.* *Anonymous.*

Holt, Chief Juſtice. It is illegal to fill up a *writ* after it is ſealed; and whoever is arreſted by virtue of ſuch *writ*, has an advantage. *Vide Mod. Rep. vol.* 6. *p.* 310.

Michaelmas, 3 *Ann.* *Davies, or Davy*, v. *Salter.* Error.

See this caſe fully ſtated in page 340 of this work, under the head *Date, Day, and Delivery.*

Michaelmas, 3 *Ann.* *The Queen* v. *Tutchin.*

See this caſe fully ſtated in page 62 of this work, under the head *Amendment.*

Hilary, 4 *Ann.* *Anonymous.*

It was urged, that a *writ of error* is a *ſuperſedeas* to all procedings on that judgment. *Debt* on a judgment will not lie here till the record be brought into court.

Powell, Juſtice. An action of *debt* will lie pending a *writ of error.*

Holt, Chief Juſtice. If an *eſcape* be againſt a ſheriff, and judgment thereon, and a *writ of error* is brought, and the *firſt* judgment is reverſed, the party ſhall have a *writ of audita querela. Vide Mod. Rep. vol.* 11. *p.* 70.

Eaſter, 4 *Ann.* *The Earl of Yarmouth* v. *Ruſſell.* Error.

A *writ of error* was brought on a judgment obtained by default in the *C. B.* on an *indeb. aſſump.* and a *writ of inquiry* awarded, and ſeveral damages, and a *remiſſion of damages* entered on all the counts but one. And *two* exceptions were taken; 1ſt, That the inquiſition was taken on a *ſecond writ of inquiry*, and that was awarded without *returning* the *firſt*, but on pleading that *the ſheriff had not ſent the writ* only to the *firſt*; and that, as was urged, was held ill in the caſe of *Atwood* v. *Burr*. 2dly, That the *remiſſion of damages* was not entered in his proper perſon.

Holt, Chief Juſtice, admitted the caſe of *Atwood* v. *Burr*, but ſaid this was only a *ſicut prius*. And as to the *ſecond*, he ſaid, it was not neceſſary it ſhould be ſo. Wherefore the judgment was affirmed *Vide Raym. vol.* 2. *p.* 1142.

Eaſter, 5 *Ann.* *Anonymous.* Error.

The court doubted if debt would lie on a judgment pending a *writ of error.* 1 *Lev.* 153. 1 *Sid.* 2 *Vent.* 261.

Holt, C. J. ſaid, *Vaughan*, J. was of a different opinion from *Hale* in this matter; *and he adjourned.* But the law ſeems now fixed, that a *writ of error* ſtays all proceedings whatſoever. *Vide Mod. Rep. vol.* 11. *page* 78.

Michaelmas, 5 *Ann.* *Anonymous.*

Per curiam. A *writ of error* allowed by the Chief Juſtice, or clerk of the errors, is a *ſuperſedeas*, tho' the attorney on the other ſide has no notice, and the notice is only to bring him into *contempt* 6 *H.* 4. *c.* 14 or 15. *Godbolt*, 439. *Vide Mod. Rep. vol.* 11. *p.* 107.

Eaſter, 7 *Ann.* *Queen* v. *Blower.*

The court was moved to quaſh a *writ of excom' cap'*; for that it only recited it to be for a matter of tithes, or other things of *eccleſiaſtical* juriſdiction, and did not ſet forth what things particularly. And the *writ* was quaſhed for the ſaid *uncertainty*; and for that it being laid *disjunctively, viz. or other things*, ſhewed that it might be for ſomething elſe of *eccleſiaſtical* conuſance beſides tithes; and what that is, does not appear. *Vide Mod. Rep. vol.* 11. *p.* 173.

Eaſter, 7 *Ann.* *The Queen* v. *Digg.*

The court was moved to quaſh a *writ de excommunicato Capiendo.* The *firſt* exception was to the *ſignificavit* on the *excommunicato capiendo.* That it did not therein appear, that the perſon was *commorant* in the *dioceſe. Moor*, 466, 467. 2dly, That it does not appear there were *forty days* between the *excommunicato* and the *ſignificavit*; and ſo the party may reconcile himſelf to the church before the *excommunicato capiendo* iſſues. *Cro. Car.* 82. The *ſignificavit* is recited in the *excommunicato capiendo.* This *writ* is *returnable* here, and after it is ſo *returned*, this court may well quaſh it, if it be a bad *writ*; but before it is *returned* here, the *Chancery*, on motion, if it be a bad *writ*, is to grant a *ſuperſedeas* to it. As to which the court ordered precedents to be ſearched. A *third* exception was, that it did not appear that the *excommunication* was ſince the laſt *general pardon.* Which exception the court ſeemed to allow. *Vide Mod. Rep. vol.* 11. *p.* 172.

Eaſter, 7 *Ann.* *The Queen* v. *Haynes.*

The court was moved to quaſh a writ of *excommunicato capiendo*; for that it did appear in the *writ*, that the crime alledged was of *eccleſiaſtical* conuſance. On the other ſide it was urged. Though that matter does not appear in the *writ*, yet it appears throughout the proceedings, that this was a cauſe before the *delegates*, and therefore it ſhall be intended of *eccleſiaſtical* conuſance: but the court held it ought to have ſo appeared in the *writ*; and therefore held the *writ* naught, and quaſhed it. *Stat.* 5 *Eliz. c.* *Vide Mod. Rep. vol.* 11. *p.* 173.

Michaelmas, 7 *Ann.* *Langthorn* v. *Taylor.* Error.

A *writ of error* was brought on a judgment in the *C. B.* in *debt* on the *return* of *an elegit.* The declaration was, that *M. C.* by indenture demiſed a houſe, and certain goods mentioned in a *ſchedule*, for *twenty-one years*, if the ſaid lives ſo long live. That the plaintiff recovered a *debt of* 300*l.* againſt her, and execution thereon.

It was excepted, that the execution was taken out pending a *writ of error*; and that all the precedents are, that it ought to appear to be with an *affirmetur* 1 *Sand.* 182, 233. 2 *Sand.* 238 or 233, 317. And that it not appearing here that the judgment was affirmed, it is erroneous.

Holt, Chief Juſtice. It muſt either be a *non proſs*, or an *affirmance.* You have indeed ſhewn, that the execution was ſuſpended by the *writ of error*, and therefore they ought to have ſhewn a declaration before they took out an execution. *Vide Mod. Rep. vol.* 11. *page* 197.

Michaelmas, 7 *Ann.* *Anonymous.*

A man being excommunicated for non-payment of coſts, in a ſuit for tithes in the *court Chriſtian.* The court was moved to diſcharge him, he being in cuſtody on a *writ of excommunicato capiendo*, becauſe he was liſted as a ſoldier according to the act of parliament, which ſays, *If any perſon being in cuſtody on any proceſs*, &c.

The court did not diſcharge him on this motion; but afterwards, it being moved again, *Holt*, C. J. ſaid, ſince the judges of the *C. B.* are of opinion, that a man in execution ſhall be diſcharged, being liſted as a ſoldier; that a man in execution on an *excommunicato capiendo* is within the ſame reaſon; and therefore by the court he was diſcharged. But he ſaid, he never was of opinion that this act ſhould extend farther than a *meſne proceſs*, and not to perſons in execution. *Vide Mod. Rep. vol.* 11. *p.* 191.

Hilary, 8 *Ann.* *Anonymous.* Error.

A motion was made to ſet aſide an execution, executed after a *writ of error allowed*; the court held, that though there was no notice given to the plaintiff's attorney of the allowance of the *writ of error*, yet it was a *ſuperſedeas* to the execution; but to bring the attorney into *contempt*, he muſt have had notice. Therefore the motion was granted. *Vide Mod. Rep. vol.* 11. *page* 272.

Trinity, 8 *Ann.* *Simms* v. *Peters.* Error.

The court was moved to quaſh a *writ of error* for a variance in ſetting out the *record*; the *writ* mentioned only *three* defendants, whereas in the *record* in the *C. B.* there were *five.*

Holt, Chief Juſtice, thought it well; becauſe the reſt being acquitted, there was no need to name them in the *writ of error.* But *Powell*, J. being of a contrary opinion; the matter was *adjourned.* But afterwards, *Holt*, C. J. *being abſent*, the *writ* was quaſhed. *Vide Mod. Rep. vol.* 11. *p.* 240.

Michaelmas, 8 *Ann.* *Booth* v. *The Marquis of Lindſey, and others.*

See this caſe fully ſtated in page 379 of this work, under the head *Dower.*

Michaelmas, 10 *Ann.* *Anonymous.*

See this caſe fully ſtated in page 387 of this work, under the head *Eccleſiaſtical Matters*, &c.

Michaelmas, 10 *Ann.* *Stafford* v. *Beneath.*

See this caſe fully ſtated in page 340 of this work, under the head *Debt.*

Eaſter, 11 *Ann.* *Widdrington* v. *Charleton.*

See this caſe fully ſtated in page 80 of this work, under the head *Appeal.*

Hilary, 12 *Ann.* *Johnſon* v. *Altham.*

See this caſe fully ſtated in page 351 of this work, under the head *Declaration.*

Hilary, 1 *Geo.* *Nutton* v. *Crow.*

See this caſe fully ſtated in page 54 of this work, under the head *Addition.*

Michaelmas, 1 *Geo.* *Weddall* v. *The Bail of Jocar.*

See this caſe fully ſtated in page 182 of this work, under the head *Bail in Error.*

Trinity,

Trinity, 2 *Geo. Clark* v. *Elwick.*

In this caſe, (which ſee fully ſtated in page 105 of this work, under the head *Arbitration and Award)* it was held, that if a *writ* iſſues out of another court, *returnable* here, this court may compel the proper officer to make a *return. Vide Mod. Rep. vol.* 10. *p.* 333.

Hilary, 3 *Geo. The King* v. *Theed.*

The *writ de excommunicato capiendo* was brought in a ſuit for the *correction of manners* generally, and held to be ill, on the authority of the caſe of *The King* v. *Gapp, Eaſter*, 1 *Geo.*

After the *writ* had been opened, and entered on record, it was delivered out in order to take up the defendant; and before the *return*, the defendant moved, and had it ſuperſeded: for the court ſaid, they could judge of it from the entry; and ſince it appeared that the defendant could not be legally detained on it if he was taken, it was proper to ſuperſede it to prevent the man's being reſtrained of his liberty contrary to law: that the intent of *ſtat.* 5 *Eliz. c.* 53. which directs the *writ* to be delivered in open court, was to apprize the court of the nature of the cauſe; that this is now to be conſidered as a *writ* that irregularly iſſued, and they were not to wait till the return, till all the inconveniences, which they ſhould have prevented by not iſſuing the *writ* had happened. *Vide Stra. vol.* 1. *p.* 43.

Hilary, 4 *Geo. The King* v. *Munnery.*

A *writ de excommunicato capiendo* was quaſhed, being only for not appearing to anſwer *certain articles concerning his life, and for correction of manners. Vide Stra. vol.* 1. *p.* 76.

Eaſter, 4 *Geo. Lanquit* v. *Jones.*

The ſheriff *returned* to a *fieri facias*, that the defendant is a *beneficed clerk, and has no lay fees* within his bailiwick, whereon a *fieri facias de bonis eccleſiaſticis* iſſued, directed to the late Biſhop of *Sarum* in one cauſe, and in another, between the ſame parties, directed to the preſent Biſhop. And on an *affidavit* that the debts were levied thereon, the court made a rule on the executors of the *firſt* biſhop to *return* the *firſt writ*, and on the new biſhop to *return* the *ſecond. Vide Stra. vol.* 1. *p.* 87.

Michaelmas, 6 *Geo. The King* v. *Tucker.*

The court was moved to quaſh the *return* of a *writ of reſcous* of *two* perſons, becauſe it is only ſaid, that they could not afterwards be found, without ſaying *nor either of them. Cro. Jac.* 419. 3 *Bulſt.* 200. 1 *Roll. Abr.* 802. *Michaelmas*, 11 *Ann. Davis* v. *Fuller*, where the *return* to a *ſcire facias* againſt *three* was, *they were not to be found* generally, and held ill. 3 *Cro.* 50.

Per curiam. The difference lies between the affirmative and the negative, and ſo this *return* is ill; *and the matter was adjourned.* And afterwards, in this term, the return was quaſhed. *Vide Stra. vol.* 1. *p.* 225.

Hilary, 7 *Geo. The King* v. *Buckland.*

The court was moved to deprive a perſon in cuſtody on an *excommunicato capiendo* of the benefit of the rules; but on conſideration, and ſearch for precedents, they refuſed to do it. *Vide Stra. vol.* 1. *p.* 413.

Michaelmas, 7 *Geo. The King* v. *The Mayor and Jurats of Dover.*

See this caſe fully ſtated in page 632 of this work, under the head *Mandamus*.

Hilary, 8 *Geo. Glynn* v. *Yates.*

See this caſe fully ſtated in page 166 of this work, under the head *Bail.*

Hilary, 10 *Geo. Parr* v. *Niblet.*

See this caſe fully ſtated in page 335 of this work, under the head *Damages.*

Eaſter, 10 *Geo. Hutchinſon* v. *Smith.*

See this caſe fully ſtated in page 168 of this work, under the head *Bail.*

Eaſter, 10 *Geo. Wilkinſon* v. *Meyer.*

See this caſe fully ſtated in page 68 of this work, under the head *Amendment.*

Trinity, 10 *Geo. Stamper* v. *Hodſon.*

The plaintiff having obtained a judgment in *debt* againſt the defendant, ſued out a *fieri facias*, and likewiſe a *capias ad ſatisfaciendum* at the ſame time, and thereon the defendant was taken in execution; it was now moved to quaſh the *fieri facias.*

The court were of opinion, that the plaintiff might, for his own ſecurity, take out *two writs*, but he could execute but *one*; therefore the *writ of fieri facias* was quaſhed. *Vide Mod. Rep. vol.* 8. *p.* 302.

Trinity, 10 *Geo. Paterſon* v. *Dyer.*

A declaration was delivered of *Michaelmas* term, and rules given for pleading according to the courſe of the court; but the defendant making default, the plaintiff's attorney ſigned the judgment, and gave due notice of executing a *writ* of *inquiry*; the defendant appeared at the time and place, and made a defence, and ſome time afterwards he would have impeached the judgment, but it was not allowed, becauſe he had made a defence at the executing the *writ* of *inquiry. Vide Mod. Rep. vol.* 8. *p.* 289.

Trinity, 10 *Geo. Goddard* v. *Gilman.*

The plaintiff brought an action of *debt* in *London*, and had judgment, and ſued out a *fieri facias* directed to the ſheriff, without a *teſtatum fieri facias* into *London*, by virtue whereof the defendant's goods were taken in execution in *Middleſex*; and becauſe this was done by an *original fieri facias*, without a *teſtatum*, the execution was ſet aſide as irregular.

And now the plaintiff moved, that he having a judgment, with a releaſe of errors, that the goods might remain in the ſheriff's hands, and not be delivered to the defendant, who was a poor man, for by that means the plaintiff would loſe his debt.

Per curiam. When the execution is ſet aſide, as it was in this caſe, the goods taken muſt be returned, becauſe there can be no colour for the ſheriff to detain them.

The like rule was made in *Michaelmas* term following, in the caſe of *White* v. *Cornwall*, where an action was laid in one county, and the plaintiff had judgment, and took out a *fieri facias* directed to the ſheriff of another county, without a *teſtatum*, &c. afterwards the plaintiff's attorney, perceiving his miſtake, ſued out a *teſtatum fieri facias* into that county, but before it came to the ſheriff he had executed the *firſt writ*, and afterwards he executed the *other writ*; but the execution was ſet aſide, becauſe the *firſt writ* having been executed, the ſheriff could not regularly execute the other. *Vide Mod. Rep. vol.* 8. *p.* 282.

Michaelmas, 10 *Geo. Crofts, Executor of Curtis,* v. *Butel, the Bail of Harris.*

See this caſe fully ſtated in page 169 of this work, under the head *Bail.*

Hilary, 11 *Geo.* *Perry* v. *Kirk.*

In an action brought againſt the defendant for goods ſold and delivered, the plaintiff declared on an *aſſumpſit*, and in his declaration laid ſeveral counts, and alſo declared on a promiſſory note.

On *non aſſumpſit* pleaded the parties were at iſſue, and at the trial of the cauſe the defendant's council inſiſted on a ſpecial agreement, and that the defendant did not owe the plaintiff any thing at the time of the arreſt; and for that purpoſe he inſiſted, that the plaintiff might produce this note, for he only proved the ſale and delivery of the goods, whereas he ought to proceed on that count, and no other.

Thereon the note was produced, dated the 18th of *April* 1724, which was for the payment of 60*l.* and then the defendant's council produced a receipt, under the plaintiff's hand, by which it appeared, that he, the defendant, was to have *ſix weeks* time, from the date of the note, to pay this money; therefore the plaintiff cannot maintain this action, becauſe the *proceſs* againſt the defendant bears *teſte* the 18th of *May*, ſo the *ſix weeks* were not yet expired.

To this it was anſwered, that the declaration was of *Trinity* term, which was above *ſix weeks* after the date of the note, and that is the only thing of which the court ought to take notice; for the original proceſs was only to bring the defendant into the cuſtody of *Marſhal*, which may well be before the cauſe of action

The court held that to be the conſtant diſtinction; for the plaintiff may ſue out a *latitat* before the cauſe of action, but he cannot declare before the cauſe of action does ariſe. *Vide Mod. Rep. vol.* 8. *p.* 344.

Eaſter, 11 *Geo.* *The King* v. *Wilkins.*

Per curiam. Attachments for a *reſcue* muſt be made *returnable* at a general *return*, though the original proceſs was at a day certain. *Vide Stra. val.* 1. *p.* 625.

Eaſter, 11 *Geo.* *The King* v. *Weſtbury.*

See this caſe fully ſtated in page 540 of this work, under the head *Indictment.*

Michaelmas, 11 *Geo.* *Wilſon* v. *Aldridge.*

See this caſe fully ſtated in page 787 of this work, under the head *Sheriff.*

Michaelmas, 12 *Geo.* *Powell* v. *Herd.*

See this caſe fully ſtated in page 336 of this work, under the head *Damages.*

Michaelmas, 12 *Geo.* *Obrian* v. *Frazier.*

The court was moved to ſtay proceedings on a *ſcire facias*, becauſe it was not ſerved till the day before the *return.*

Per curiam. If it lay *four days* in the office, that is all which is required: the ſummons may be made any time before the court is up, on the day of the *return.*

Note, In *Trinity* term, 4 *Geo.* 2. in the caſe of *Bland* v. *Perry*, it was ſo ruled again; and in *Michaelmas* term, 4 *Geo.* 2. in the caſe of *Williams* v. *Maſon*, it was ruled, that it muſt lie *four days* in the office, as well where a *ſcire feci* is returned, as a *nihil.* *Vide Stra. vol.* 1. *page* 644.

Trinity, 13 *Geo.* *Hicks* v. *Jones.*

A *ſcire facias* was *teſted* the 15th day of *May*, *returnable* on the 29th, which is making both the *teſte* and *return* incluſive of the *fifteen days.* And on conſideration it was held well, and that there was no difference whether the proceeding was by *bill* or *original.* *Sir T. Jones*, 228. *Vide Stra. vol.* 2. *p.* 765.

Eaſter, 2 *Geo.* 2. *Eaſtwick* v. *Coke.*

In an action of *debt* brought on a bail-bond an exception was taken that the *proceſs*, on which the principal was taken, was ſued out in the vacation, when there was no court, which being therefore a mere *nullity*, and the preſent action having no other foundation, all the proceedings therefore muſt fall.

The council on the other ſide cited Sir *Thomas Jones* 149, 150. where it was found ſpecially, that the action was taken out in the vacation, and *teſted* in term, as in the preſent caſe, on which there the plaintiff had judgment.

The court wondered at this, and ſaid they would look into the caſe cited: and afterwards it being moved at another day, the court held clearly that the caſe in *Jones* was not law; for the jury did not only get over an *eſtoppel*, but what they found was manifeſtly an impoſſibility; for the effect of their finding was, that a *proceſs* was taken out of court at a time when there was no court; and therefore that verdict could be no foundation for the judgment: but then admitting it, ſtill in the preſent caſe there is no fact appearing to be a foundation for the court to judge according to the operation of law. And on this the plaintiff diſcontinued. *Vide Fitz-Gibbons, p.* 66. *Raym. vol.* 2. *p.* 1557.

Trinity, 2 *Geo.* 2. *The King* v. *Gumley, and others.*

The *diſtringas* was *returnable on Monday next after fifteen days of the Holy Trinity.* And it was moved in arreſt of judgment, that it ſhould have been in *fifteen days*, and the *Monday next after* is a week after the trial. But on conſideration and inquiry into the practice, both on the *crown* and *plea-ſide*, it was held to be right; and that the *return-day* is of the *Sunday*, though the buſineſs is done on the next day: and ſo is *Salk.* 626. 6 *Mod.* 250. 1 *Show.* 60. So there was judgment for the King. *Vide Stra. vol.* 2. *p.* 811. *Raym. vol.* 2. *p.* 1528.

Michaelmas, 2 *Geo.* 2. *Barr* v. *Satchwell.*

A *ſcire facias* was *returnable* on the *general return day*, (which was *Sunday*) and not ſerved till the *Monday.* On *affidavit* thereof the court was moved to ſet it aſide, the ſheriff having *returned* a *ſcire feci.*

Per curiam. If that be a *falſe return*, the defendant will have his action againſt the ſheriff. But we will not try the truth of the *return* on a motion to ſet aſide the proceedings. *Vide Stra. vol.* 2. *p.* 813.

Eaſter, 3 *Geo.* 2. *Stewart* v. *Smith.*

See this caſe fully ſtated in page 171 of this work, under the head *Bail.*

Michaelmas, 3 *Geo.* 2. *Caſtel, Widow* v. *Bambridge and Corbet.*

See this caſe fully ſtated in page 81 of this work, under the head *Appeal.*

Michaelmas, 4 *Geo.* 2. *Worley* v. *Glover.*

Per curiam. On the late ſtatute, *viz.* 12 *Geo. c.* 29. which requires the *proceſs* to be ſerved, it is not neceſſary to ſhew the party the *original writ*, as is done on the ſervice of rules. The act only requires him to be *ſerved* with a *copy*, which is the ſame as if it had ſaid, *deliver a copy.* *Vide Stra. vol.* 2. *p.* 877.

Michaelmas, 4 *Geo.* 2. *Andrews* v. *Dingley.*

The court was moved to quaſh a ſpecial *copias* that was *teſted* the 17th of *June* laſt, the cauſe of action appearing on the face of it to ariſe on the 21ſt of *September* after. But the court ſaid, quaſhing was not a *matter of juſtice*, and therefore they would give the plaintiff an opportunity to ſet it right if he could, by filing a bill as of this term. *Vide Stra. vol.* 2. *p.* 877.

Eaſter, 5 *Geo.* 2. *Selleck* v. *The Biſhop of Exon.*

The court was moved that the defendant might have a *writ* to the Archbiſhop *in the firſt inſtance*, though no default in the plaintiff; and the practice in the court of *C.B.* is, that in *writs of quare impedit*, both are actors, ſo that the defendant may carry it down by *proviſoe the firſt aſſizes*, and here the plea was *inſufficient in words*, and iſſue taken thereon. *Vide Forteſcue, p.* 352.

Michaelmas, 5 *Geo.* 2. *Loving* v. *Avery.*

On motion it was held, that there is no certain *number of days* neceſſary to be between the *teſte* and *return* of a *ſpecial latitat*, and that even *one day* is ſufficient, if it can be ſerved. *Vide Stra. vol.* 2. *p.* 917.

Hilary, 6 *Geo.* 2. *The King* v. *Smith.*

An *excommunicato capiendo* was quaſhed for uncertainty, being for *defamation or reproach*, which laſt is too looſe a word. *Vide Stra. vol.* 2. *p.* 946.

Eaſter, 8 *Geo.* 2. *Moore* v. *Anderſon.* Error.

Lord *Hardwicke.* I am ſatisfied that it is impoſſible to bring a *ſcire facias*, which was the proceſs executed in this caſe, within the meaning of the word *extent*; and this being a private ſtatute, we can take no other notice of it than as it is here pleaded. An *extent* is a known term, it may iſſue at the ſuit of the crown, or of a ſubject on a *ſtatute merchant*, but it has a different effect from a *fieri facias*; for on the *fieri facias* the ſheriff cannot deliver the goods, but muſt ſell them. And the word *levy*, which is in this ſtatute, muſt mean to levy in the uſual manner; ſo that here is an action brought for a *fee*, when the ſtatute pleaded gives no ſuch fee, and we can take no other notice of it than as it appears on this record. Therefore the judgment muſt be reverſed. *Vide Caſes Temp. Lord Hardw. p.* 103.

Eaſter, 10 *Geo.* 2. *Caſwall* v. *Martin.*

In the *latitat* was left out the words *of a plea of treſpaſs.* Common bail was filed by the plaintiff; a declaration was left in the office, which the defendant took out, and then moved to ſtay proceedings. And on ſhewing cauſe, the plaintiff's council inſiſted, that the error in the *proceſs* was cured by the appearance; and cited *Salk.* 59. and the caſe of *Widdrington* v. *Charlton*, where in an appeal for *murder* it was ſo held. So in *Eaſter* 9 *Geo.* 2. *Morgan* v. *Lockup*, there was no *Engliſh* notice under the *proceſs*, and yet taking the declaration out of the office was held to cure it. Whereon the rule to ſtay proceedings was diſcharged. *Vide Stra. vol.* 2. *p.* 1072.

Trinity, 16 *Geo.* 2. *The King* v. *Eyre, Clerk.*

A *writ de excommunicato capiendo*, iſſued out of *Chancery*, which was opened and inrolled in this court, but on exceptions taken to it, the court made a rule on the proſecutor to ſhew cauſe why the delivery out of the *writ* to the ſheriff ſhould not be ſtaid. Before an opportunity of ſhewing cauſe came, the *return* of the *writ* was out; and the proſecutor ſued out a *ſecond writ* out of *Chancery*; and to prevent the loſs of that, deſired the defendant might at once take his exceptions by motion to quaſh it.

The *firſt exception* was, that the *former writ* being inrolled in this court, the court of *Chancery* could not iſſue a *ſecond writ*, but by *ſtat.* 5 *Eliz. cap.* 23. ſuch *ſecond writ* was to iſſue from this court.

To this it was anſwered, that the act related only to the caſe where the *firſt writ* had actually iſſued, and the ſheriff had returned *he was not to be found*; where the court can fine him if they ſee occaſion, and iſſue a *capias*, *alias* and *pluries*.

Per curiam. The anſwer is right; if the *firſt writ* had been actually quaſhed, they muſt have gone to the *Chancery* for another.

The *ſecond exception* was, that it is ſaid to be on an appeal and complaint of *nullity*: now from a *nullity*, there lies no appeal.

To this it was anſwered, that this was their form, which in *Trinity* 3 *Geo.* in the caſe of *The King* v. *Elderton*, it was held we muſt have regard to; they lay the words with, *or words to the like effect*, which is allowed.

The *third exception* was, that the judge is made a party, and is condemned in coſts. *Mo.* 540. 1 *Vent.* 86.

To this it was anſwered, that in this caſe there could be no other, he *officially* excommunicates a man; that man appeals, and muſt make ſomebody a party; there is no promoter, and therefore he cites the judge; the ſuperior juriſdiction is of opinion he has done the man an injury, and why then ſhould he not pay the coſts? Lord *Talbot* in his time, and Lord *Hardwicke* ſince, on exceptions to the *ſignificavit*, held it was proper to make him a party, and that he was liable to coſts.

The court (after time taken to conſider) diſcharged the rule for quaſhing, and ordered it to be inrolled, and delivered out to the ſheriff. *Vide Stra. vol.* 2. *p.* 1189.

Hilary, 18 *Geo.* 2. *The King* v. *White, and others.*

The condition of their recognizance was, to appear in this court the laſt day of *Michaelmas* term: on which day *articles of the peace* were exhibited, and the defendant *White* forbore to have his appearance recorded, (though he was there) and went to get bail. The proſecutor on this, took out a *ſcire facias*, *teſted* the 28th of *November.*

And partly for the ſharpneſs of the proceeding, and becauſe the *ſcire facias* ſhould have been *teſted* in term time, and he had to the laſt moment of it to appear in, the court ſet aſide the proceedings. *Vide Stra. vol.* 2. *p.* 1220.

Trinity, 18 *Geo.* 2. *The Weavers Company, qui tam,* v. *Forreſt.*

A *bill of Middleſex* was, to anſwer the weaver's company; and the declaration was in the name of the company, *qui tam* for themſelves, and the poor of the pariſh where the offence was committed: it was moved therefore to ſtay proceedings, becauſe the declaration differed from the proceſs: but the court held it right, it not being uſual to inſert in the *bill of Middleſex* on what account, or in what right the party ſues, as in the caſe of executors and adminiſtrators, the caſe of an aſſignee of a bail bond, and the like, where the proceſs is only to anſwer to *A. B.*

Then an exception was taken to the notice at the bottom of the proceſs, which was only to appear at the return thereof, being the 14th of *June*, without ſaying *this inſtant*, or expreſſing the year of our Lord, or of *the King.*

But the court ſaid, it muſt be underſtood to be the next *fourteenth of June*, and held it right. *Vide Stra. vol.* 2. *p.* 1232.

Trinity, 32 & 33 *Geo.* 2. *The King* v. *Cowle.*

See this caſe fully ſtated in page 260 of this work, under the head *Certiorari.*

Eaſter, 33 *Geo.* 2. *Johnſon and another, Aſſignees of Hargrave, a Bankrupt,* v. *Smith, Widow, Executrix, &c.*

See this caſe fully ſtated in pages 9 and 157 of this work, under the heads *Abatement* and *Averment.*

For further Deciſions on this Subject, ſee the Heads **Attachment**, **Certiorari**, **Error**, **Habeas Corpus**, **Mandamus**, **Inquiry and Inquiſition**, **Prohibition**, and **Scire Facias.**

A TABLE

A TABLE CONTAINING The NAMES of the CASES in this Work.

A.

Page.

ABATEMENT by Demiſe of the Crown and Death of Parties, 12
Abrahat v. Brandon 105
Aberyſtwith Corporation, Caſe of, 639
Abdelard v. ——— 713
Acheſon v. Fountain 234
Acceptance, Adjudications of the Court on ſeveral Points relative thereto, 14
Acourt v. Swift 409
Acceptance of Rent, or any other Thing in Satisfaction, 12
Adams v. Tapling 15
——— v. Cox 159
——— v. the Tertenants of Savage 4
Addingſon v. Oakley 58
Addiſon v. Paterſon 7
——— v. ——— 169
Adams v. Tertenants of Savage 385
——— v. Hincloe 437
——— v. Arnold 447
——— v. Tertenants of Savage 476
——— v. Cox 619
——— v. Ruſh
——— v. Tertenants of Savage 726
Addiſon v. Paterſon 734
Adams v. Tertenants of Savage 777
Addiſon v. Paterſon 778
Adams v. Broughton 804
——— v. Tertenants of Savage 805
Adams's Caſe 834
——— v. Ruſh 709
African Company v. Maſon 248
——— v. ——— 729
Aires v. Hardreſs 591
Almonſbury, Inhabitants of, v. the Inhabitants of Hodsfield, in Yorkſhire, 81
Alder v. Chip 74
Allam v. Heber 127
Almanſon v. Davila 162
Aldridge v. Snowden 167

Page.

Aleberry v. Walby 213
Aliſon v. Spence 219
Aleberry v. Walby 249
——— v. ——— 324
Alton v. Jarvis 328
Allen, or Allanſon, v. Brookbank 338
Alice v. Gale 371
Allen, or Allanſon, v. Brookbank 383
Alcock v. Carter 419
Altham, Lord, v. Lord Angleſea 453
Alcock v. Carter 458
Altham, Lord, v. Lord Angleſea 491
Aldridge v. Snowden 592
Alinſon v. Spence 601
Alleyne and Wife v. Grey 652
Allington v. Vavaſar 660
All Saints Pariſh v. the Pariſh of St. Giles in Northampton 679
Almonſbury, Inhabitants of, v. Inhabitants of Hodsfield in Yorkſhire 685
Allrighton, Pariſh of, v. the Pariſh of Shipton 686
Allhallows on the Wall, Pariſh of, v. the Pariſh of St. Olave in Surrey 688
Allen v. Symms 717
Alton v. Jarvis 727
Alice v. Gale 728
Alder v. Chip 742
Alice v. Gale 777
Aland, Sir John Forteſcue, v. Maſon 549
Alban's, St. Pariſh of, v. the Pariſh of St. Botolph, Biſhopſgate 90
Aland, Sir John Forteſcue, v. Maſon 421
Ambroſe et al'. Aſſignees of the Eſtate of Ambroſe, a Bankrupt, v. Clendon 198
——— v. ——— 237
Amies v. Stevens 250
Ambroſe et al'. Aſſignees of Ambroſe, a Bankrupt, v. Clendon 347
Amner Pariſh, Caſe of 671
Amyon v. Shore 734
Angleſea, Lord's Caſe 84

Page.

Anderſon v. Coxeter 105
Andrews v. Franklin 232
——— v. Paradiſe 249
——— v. Strowd 306
Anderſon v. Buckton 307
Andrews v. Paradiſe 325
——— v. Lynton 412
——— v. ——— 615
——— v. Strowd 653
Ancell v. Slowman 661
Antony v. Williams 730
Anderſon v. Baddiſlade 741
Ancell, or Ayncell, v. Slowman 744
Anſtruther, Sir Alexander's Caſe 749
Andrews v. Harper 778
Antony, St. Inhabitants of, v. the Inhabitants of Cardenham, in Cornwall 779
Andrews v. Lynton, or Linton 834
——— v. Fulham 826
——— v. Dingley 838
Andrew, St. Pariſh of, v. the Pariſh of St. Bride 221
Ann, St. Weſtminſter, Lecturer's Caſe 639
Andrew, St. Underſhaft, in London, Pariſh of, v. Jacob Mender de Breta 678
——— St. Pariſh of, Holborn, v. the Pariſh of St. Clement's Danes 681
——— St. Pariſh of, Caſe 706
Anderſon v. George 813
Anonymous 3
——— 12
——— 14
——— 17
——— Ibid.
——— Ibid.
——— 18
——— 22
——— 24
——— 26
——— 30

Page.
Anonymous — 35
—— 36
—— 37
—— 55
—— 59
—— 60
—— 61
—— 81
—— 84
—— 87
—— Ibid.
—— Ibid.
—— 98
—— 99
—— Ibid.
—— 100
—— 101
—— 110
—— Ibid.
—— 115
—— Ibid.
—— 116
—— 117
—— 118
—— 120
—— 121
—— 123
—— 131
—— Ibid.
—— 134
—— 139
—— 140
—— Ibid.
—— Ibid.
—— Ibid.
—— 141
—— Ibid.
—— 142
—— 159
—— Ibid.
—— Ibid.
—— Ibid.
—— Ibid.
—— Ibid.
—— Ibid.
—— 160
—— Ibid.
—— Ibid.
—— 162
—— Ibid.
—— Ibid.
—— 163
—— 165
—— Ibid.
—— Ibid.
—— Ibid.
—— 166
—— 167
—— 169
—— 169
—— 170
—— 176
—— 177
—— 181
—— 192
—— Ibid:
—— 205
—— 207
—— Ibid.
—— 208
—— Ibid.
—— 210
—— 211
—— Ibid.
—— 212
—— Ibid.
—— 214
—— 221
—— 227
—— Ibid.
—— 228
—— 229
—— 230
—— 243

Page.
Anonymous — 248
—— 252
—— 253
—— 254
—— 255
—— 256
—— 257
—— 261
—— 264
—— 266
—— Ibid.
—— 267
—— 268
—— 275
—— 278
—— 280
—— 288
—— 289
—— Ibid.
—— 291
—— 293
—— Ibid.
—— 294
—— 304
—— Ibid.
—— 305
—— Ibid.
—— 308
—— 316
—— 317
—— Ibid.
—— 321
—— 323
—— Ibid.
—— 327
—— 328
—— 334
—— 336
—— 339
—— 345
—— Ibid.
—— Ibid.
—— 348
—— 349
—— 350
—— 351
—— Ibid.
—— 359
—— Ibid.
—— Ibid.
—— 363
—— Ibid.
—— 364
—— 367
—— 368
—— Ibid.
—— 369
—— 375
—— 378
—— 381
—— 384
—— Ibid.
—— 386
—— Ibid.
—— 387
—— 390
—— Ibid.
—— 391
—— Ibid.
—— Ibid.
—— Ibid.
—— Ibid.
—— 393
—— Ibid.
—— 394
—— Ibid.
—— Ibid.
—— Ibid.
—— 397
—— 409
—— 410
—— Ibid.
—— Ibid.
—— 411

Page.
Anonymous — 411
—— Ibid.
—— Ibid.
—— 413
—— 414
—— 419
—— 421
—— 429
—— Ibid.
—— 431
—— 434
—— 436
—— Ibid.
—— 437
—— 440
—— 441
—— Ibid.
—— Ibid.
—— Ibid.
—— 442
—— 443
—— 444
—— Ibid.
—— 445
—— Ibid.
—— 446
—— Ibid.
—— 447
—— Ibid.
—— 148
—— Ibid.
—— Ibid.
—— 449
—— Ibid.
—— Ibid.
—— 452
—— 453
—— Ibid.
—— 455
—— 458
—— 460
—— 469
—— Ibid.
—— 472
—— Ibid.
—— 475
—— Ibid.
—— 480
—— Ibid.
—— 483
—— Ibid.
—— 484
—— 486
—— Ibid.
—— 487
—— 489
—— 490
—— 494
—— Ibid.
—— 500
—— Ibid.
—— 501
—— 503
—— Ibid.
—— Ibid.
—— 504
—— Ibid.
—— Ibid.
—— Ibid.
—— 505
—— Ibid.
—— Ibid.
—— Ibid.
—— 506
—— Ibid.
—— 507
—— Ibid.
—— 511
—— Ibid.
—— Ibid.
—— 512
—— 514
—— 515
—— 518

A TABLE OF THE NAMES OF THE CASES.

Page.
Anonymous — 519
———— — 521
———— — Ibid.
———— — Ibid.
———— — Ibid.
———— — 522
———— — 524
———— — 527
———— — 528
———— — Ibid.
———— — 529
———— — Ibid.
———— — 530
———— — 531
———— — Ibid.
———— — 532
———— — Ibid.
———— — Ibid.
———— — 533
———— — Ibid.
———— — 535
———— — Ibid.
———— — 549
———— — 551
———— — 552
———— — Ibid.
———— — 553
———— — 554
———— — Ibid.
———— — Ibid.
———— — Ibid.
———— — Ibid.
———— — Ibid.
———— — 558
———— — 566
———— — 568
———— — 569
———— — Ibid.
———— — Ibid.
———— — 570
———— — 571
———— — Ibid.
———— — 584
———— — 585
———— — Ibid.
———— — Ibid.
———— — 586
———— — Ibid.
———— — Ibid.
———— — Ibid.
———— — Ibid.
———— — Ibid.
———— — Ibid.
———— — 587
———— — Ibid.
———— — 588
———— — Ibid.
———— — Ibid.
———— — Ibid.
———— — Ibid.
———— — Ibid.
———— — 589
———— — Ibid.
———— — Ibid.
———— — Ibid.
———— — 590
———— — Ibid.
———— — Ibid.
———— — Ibid.
———— — 591
———— — 592
———— — 593
———— — Ibid.
———— — 597
———— — Ibid.
———— — 598
———— — 601
———— — Ibid.
———— — Ibid.
———— — Ibid.
———— — 602
———— — Ibid.
———— — Ibid.
———— — 604

Page.
Anonymous — 607
———— — Ibid.
———— — 612
———— — 614
———— — 617
———— — 619
———— — Ibid.
———— — Ibid.
———— — Ibid.
———— — Ibid.
———— — 622
———— — 625
———— — 626
———— — Ibid.
———— — 628
———— — Ibid.
———— — Ibid.
———— — 629
———— — 630
———— — 631
———— — 632
———— — 633
———— — 635
———— — Ibid.
———— — 644
———— — 645
———— — 646
———— — 647
———— — Ibid.
———— — 648
———— — 649
———— — 654
———— — 655
———— — Ibid.
———— — 656
———— — 657
———— — Ibid.
———— — Ibid.
———— — Ibid.
———— — 658
———— — 661
———— — Ibid.
———— — Ibid.
———— — 662
———— — Ibid.
———— — 663
———— — 665
———— — Ibid.
———— — 667
———— — 668
———— — Ibid.
———— — Ibid.
———— — 669
———— — Ibid.
———— — 671
———— — 672
———— — 673
———— — Ibid.
———— — Ibid.
———— — 674
———— — 675
———— — Ibid.
———— — 676
———— — 677
———— — 678
———— — 683
———— — Ibid.
———— — 701
———— — Ibid.
———— — 702
———— — 704
———— — 705
———— — 706
———— — 707
———— — 711
———— — Ibid.
———— — Ibid.
———— — 712
———— — Ibid.
———— — 713
———— — Ibid.
———— — 715
———— — Ibid.
———— — Ibid.

Page.
Anonymous — 717
———— — 719
———— — Ibid.
———— — 722
———— — Ibid.
———— — Ibid.
———— — 723
———— — Ibid.
———— — 726
———— — 727
———— — Ibid.
———— — 734
———— — 735
———— — 743
———— — 744
———— — 745
———— — 747
———— — Ibid.
———— — 748
———— — 750
———— — 751
———— — 752
———— — 755
———— — Ibid.
———— — 756
———— — Ibid.
———— — Ibid.
———— — 757
———— — Ibid.
———— — Ibid.
———— — 758
———— — Ibid.
———— — Ibid.
———— — Ibid.
———— — Ibid.
———— — 759
———— — Ibid.
———— — Ibid.
———— — 760
———— — Ibid.
———— — 761
———— — 762
———— — 763
———— — 764
———— — Ibid.
———— — 767
———— — Ibid.
———— — Ibid.
———— — 768
———— — 769
———— — 770
———— — 771
———— — Ibid.
———— — 772
———— — Ibid.
———— — Ibid.
———— — Ibid.
———— — Ibid.
———— — 773
———— — Ibid.
———— — Ibid.
———— — Ibid.
———— — Ibid.
———— — 755
———— — Ibid.
———— — Ibid.
———— — Ibid.
———— — 766.
———— — Ibid.
———— — Ibid.
———— — Ibid.
———— — 777
———— — 778
———— — Ibid.
———— — 786
———— — 787
———— — 788
———— — 789
———— — 790
———— — Ibid.
———— — 792
———— — Ibid.
———— — Ibid.
———— — 793

Page.
Anonymous 793
———— Ibid.
———— 794
———— Ibid.
———— Ibid.
———— 795
———— Ibid.
———— Ibid.
———— Ibid.
———— 796
———— Ibid.
———— Ibid.
———— Ibid.
———— Ibid.
———— Ibid.
———— 797
———— Ibid.
———— 179
———— 802
———— Ibid.
———— 803
———— 804
———— 805
———— 806
———— Ibid.
———— Ibid.
———— Ibid.
———— Ibid.
———— Ibid.
———— 807
———— Ibid.
———— 808
———— Ibid.
———— 810
———— Ibid.
———— 811
———— Ibid.
———— Ibid.
———— Ibid.
———— 814
———— Ibid.
———— Ibid.
———— Ibid.
———— 815
———— Ibid.
———— 816
———— Ibid.
———— 817
———— 818
———— Ibid.
———— 821
———— Ibid.
———— Ibid.
———— 823
———— Ibid.
———— Ibid.
———— 833
———— 834
———— Ibid.
———— Ibid.
———— 835
———— Ibid.
———— Ibid.
———— 836
———— Ibid.
———— Ibid.
———— Ibid.
Appleton v. Smith 314
Arne v. Johnſon 788
Arran, Count of, v. Criſpe 789
Armſtrong, on the Demiſe of Tinker, et al'. v. Pierſe and others, 805
Artemonowitz, Andrew, Servant to the Ruſſian Ambaſſador, Caſe of 752
Armſtrong v. L'Iſle 79
———— v. ———— 175
———— v. ———— 176
Arnote, or Armit, v. Breame 103
———— v. ———— 248
———— v. ———— 323
Arnote v. Breame 350
———— v. Brown 327

Page.
Arglis v. Heaſeman 92
Arne v. Johnſon 166
Armery v. Delamirie 335
Arran, Counteſs of, v. Criſpe 366
Archer v. Sweetnam, or Sweetnam v. Archer 387
Armſtrong, on the Demiſe of Tinker and others, v. Pierſe and others 403
Archer's, Caſe 505
———— ———— 548
———— v. Frowde 549
Arnote, or Armit, v. Breame 580
Arnot v. Brown 619
Argyle v. Hunt 620
Arnold v. Johnſon 661
———— v. Jefferſon 665
Arthur's Caſe 701
Armit v. Breame 705
Archer v. Snatt 714
Armitage v. Row 718
Argyle v. Hunt 763
Archer v. Sweetnam, or Sweetnam v. Archer 763
Aſhby v. White et al'. 29
Aſtley, Bart. v. Young, Eſq; 50
Aſher v. Wallis 211
Aſmead v. Ranger 327
Aſtley, Sir John, Bart. v. Young 314
Aſmole v. Goodwin 338
Aſhby v. White 293
Aſgil v. Hunt, or Hunt v. Hargil 387
Aſlin v. Parkin 402
Aſhley v. Kell 199
Aſhby v. White and others 403
Aſhmond v. Ranger 434
Aſton, or Aſhton, v. Sherman 471
Aſſievedo v. Cambridge 571
Aſtley, Bart. v. Young, Eſq. 613
Aſſievedo v. Cambridge 649
Aſhley, Elizabeth's, Caſe 672
Aſhbrittle, Pariſh of, v. the Pariſh of Wyley 688
Aſton, or Aſhton, v. Sherman 721
Aſmead v. Ranger 722
Aſtley, Bart. v. Young 743
Aſtrey, Sir Samuel's, Caſe 751
Aſgil v. Hunt 762
Aſtrey, Sir Samuel's, Caſe 797
Aſhwin v. Corbell 797
Aſhley v. Aſhley 801
Aſplin v. Grey 808
Aſſignments, a Determination thereon under Stat. 32. H. 2. c. 34. 127
Atwood v. Beach 7
———— v. Burr 111
Atkin v. Barwick, or Berwick 190
———— v. ———— 195
Atkinſon, Executrix, v. Coatſworth 353
———— v. Coatſworth 360
———— v. Morrice 271
Atwood v. Burr 370
———— v. Duell 181
———— v. Burr 411
———— v. Dent 458
Atkinſon v. Corniſh 471
Atwood v. Burr 589
———— v. ———— 615
Attorney-General v. Baden 700
Atwood v. Burr 724
Atkinſon v. Atkinſon 737
Atwood v. Burr 776
———— v. Beach 778
———— v. Burr 834
Atherton Pariſh v. the Pariſh of Barton 783
Atwood v. Burr 834
Avery v. White 270
Auſtin v. Baker 274
Auſten v. Baker 598
Auſtin v. Bennet 643
Aubery v. Barton 761
Auſtin v. Criſby 776
Aylworth v. Woolley 7

B.

Page.
BANBURY, Earl of, v. Wood 3
———— Counteſs of, v. Wood Ibid.
———— Lord, v. Wood 4
Batterſby v. Marſh 4
Baugh v. Killingworth 19
———— v. ———— Ibid.
———— v. ———— Ibid.
Baker v. Price 30
Banbury, Lord, v. Wood 54
Bank of England v. Morrice 72
Banſon v. Offley 75
Barber v. Dennis 88
Baxter, Widow, Executrix, v. Barfield 93
Bacon v. Debarry 98
Barnardiſton v. Fowler 105
Bank of England v. Morrice 126
Barker v. Damer 127
Baſket v. Rayner 138
Baſingſtoke, the Mayor of, v. Bonner 146
Ball v. the Bail of Ruſſell 165
Bail of Boiſe and Sellers's Caſe 170
Baldwin v. Morgan 171
Bail of Peter Vergen's Caſe 173
Bailey v. Dillon 174
Barney's Caſe 176
Baker, James's Caſe 199
Bailey v. Dillon 200
Ballard v. Gerrard 207
Barker v. Sir Woolſton Dixie, Bart. 216
Bank of England v. Newman 227
Banbury v. Liſſet et. al'. 239
Ball v. Smith 242
Baſs v. Firmen Ibid.
Barſdate v. Drew 252
Barnardiſton v. Fowler 256
Banbury, Corporation of, Caſe 295
Barber v. Boulton Ibid.
Ballard v. Gerard 305
Baſs v. Firmen Ibid.
Baldwin v. Morgan 309
Baynham v. Matthews Ibid.
Barton and others v. Miles and others 310
Badger v Floyd 322
Ball v. Squarry 325
Baker v. Bache 336
Baldwin v. Church 346
Barnes v. Geering 348
Banneaux v. Plaſtead 353
Baldwin v. Church 365
Barber v. Palmer 369
Ball v. Croſs 380
Baniſter v. Hopton 386
Badger v. Floyd 391
Baſs v. Bradford 397
Barnes v. Peterſon 398
Badger v. Lloyd, or Floyd 412
Ballard and another, Chamberlains of Worceſter, v. Bennet: The ſame v. Clement 426
Ball v. Briggs 427
Backhouſe v. Wells 437
Bath, Earl of, v. Abney, Spinſter 439
Baddeley v. Leppingwell 440
Bath, Earl of, v. Batterſea 441
Baker v. Lord Fairfax 456
Batſon et al'. v. Sayer 461
Baynham v. Matthews 461
Baldwin v. Church 479
Baynham v. Matthews 481
Bank of England v. Morrice Ibid.
Bath, Earl of, v. Abney, Spinſter 487
Barjeau v. Walmſley 501
Bath, Earl of, v. Abney, Spinſter 504
Ball v. the Hundred of Wemerſley in the County of Northampton 518
Baddeley v. Leppingwell 832
Baggot v. Oughton 819
Banbury, Counteſs of, v. Knolls and Wood 835
Barr v. Satchwell 838

Page.
Bartholomew, St. Churchwarden's Caſe 382
Barker v. Suretees 828
Backhouſe v Wells 824
Bath, Biſhop of, v. Bridges 806
Ball v. Knight 812
Ball qui tam v. Cobus 561
Ball v. the Bail of Ruſſell 580
Bayly v. Raby et al. 581
Banbury's Caſe 584
Baldwin v. Church 591
Baggot v. Oughton 609
Barber v. Dennis 619
Ballard and another, Chamberlains of Worceſter, v. Bennet; The ſame v. Clement 622
Bayly v. Grant, or Grant v. Bailey 647
Barber and Philpot v. Wharton 650
Baggot v. Oughton 653
Barfoot v. Reynolds and others 656
Bates v. Grabham and others 657
Bates v. Pettipher 664
Bayly's Caſe 673
Batterſea Pariſh v. the Pariſh of Weſtham 673
Barleycroft Pariſh v. Coleoverton, in the County of Rutland 686
Ball v. the Bail of Ruſſell 705
Bartholomew, St. Churchwarden's Caſe 706
Batton v. Barwick 707
Baldwin v. Morgan 715
Barker and others v. Lade 716
Batterſon v. Goodwin 717
Baker v. Kent 716
Ball v. Smith 724
Baldwin v. Church 729
Baxter v. Douglas 732
Barker v. Forreſt 733
Barnſby v. Shrimpton 735
Barnardiſton v. Fowler 105
Baynham v. Matthews 737
Baker v. Weſtbrooke 738
Baddeley v. Leppingwell 743
Baldwin and Wife v. Blackmore 745
Banbury, Lord's Caſe 752
Baſingſtoke, Mayor of, v. Bonner 753
Bareton v. Stephenſon 753
Baniſter v. Hopton 769
Barker and others v. Lade 769
Banbury, Lord, v. Wood. 770
Barſdale v. Drew 774
Ball v. the Bail of Ruſſell 777
Bayley v. Jenners 788
Barker and others v. Lade 790
Barker v. Sir Woolſton Dixie 800
Baldwin v. Cole 803
Bennet v. Purcell 54
Bern v. Bern 72
Bean v. Elton Ibid.
Bennet v. Preſton 74
Benſon v. Offley 75
Bedam v. Clerkſon 97
Bell v. Gipps 104
Berkenhead v. Fanſhaw 139
Berty v. Dormer 151
Berchere et al'. v. Colſon 171
Belifante v. Levy 173
Bernardiſton v. the Sheriff of Middleſex 184
Belgardine v. Preſton 186
Bern and Wife v. Mattaire 216
Bevis v. Lindſell 238
Beardeſſey v. Baldwin 238
Bellaſis v. Burbriche 304
Bellew v. Aylmer 307
Berry v. Moſes 309
Bellamont, Lord's Caſe 339
Bennet v. Talbot, or Talboys 348
Bedam v. Clerkſon 348
Beach v. Hobbs 354
Bendover v. Sindercombe 355
Bern and Wife v. Mattaire 356
Benns v. Parre 359

Page.
Benbridge v. Day 362
Bennington v. Goodtitle 398
Berrington v. Parhurſt et al'. Ibid.
Bennoyer, or Pennoire, v. Brace 408
Bellew v. Aylmer 416
—— v. Scott Ibid.
Belt v. Collins 419
Berkley v. Howard 422
Bertie v. Clutterbuck 424
Bewdley Corporation, Caſe 454
Bernard, Lord, v. Saul 458
Beak v. Kent 469
Berwick v. Andrews 475
Belts, Executor of —— v. Mitchell 478
Bellew v. Scott 480
Berrington v. Parhurſt 491
Bennet v. Talbot, or Talboys 499
Bentley, Dr. v. the Biſhop of Ely 503
Betteſworth, Dr. v. Hugh Parker Bell, Eſq; 510
Bennet v. Preſton 523
—— qui tam v. Smith 562
—— v. Verdim 581
Bennoyer v. Brace 585
Beacon v. Peck 592
Bellew v. Scott 592
Bern v. Bern 594
Benzen v. Jeffries 645
Betts v. Hancock 647
Benns v. Parre 648
Berry Pariſh v. the Pariſh of Arundel 672
Beckenham Pariſh v. the Pariſh of Camberwell 674
Bennet v. Verdim 712
Beſton v. Hayward 718
Bentley, Dr. v. the Biſhop of Ely 762
Beckman's Caſe 767
Bean v. Bolton 769
Bern and Wife v. Mattaire 772
Beccles Pariſh v. the Pariſh of Leowſtoff, in Suffolk 783
Beaumont v. Pine 788
Berrington, Sir Charles, and others, Caſe 798
Benſon v. Sir Thomas Frederick, Bart. 813
Benbridge v. Day 802
Berwick v. Andrews 835
Bernard, Lord, v. Saul 816
Bezaliel Knight's Caſe 370
Bendiſh v. Lindſey 403
Benſon v. Scott 432
Beddenham v. the Pariſh of Kingſton and Bowſey 674
Biſhop v. Eagle 11
—— v. —— 17
Brickmyr v. Darnell 33
Bird v. Randal 59
Biſhop of Worceſter's Caſe 56
—— v. Stacy 71
Birn v. Birn 72
Bird v. Bird 161
Biſſex v. Biſſex 109
Biggs, or Brigs, v. Greinfield et al' 118
Bignoll v. Rogers 132
Bignall v. Deveniſh 163
Bidleſon, Eſq; Adminiſtrator, &c. v. Whytel, Eſq; 183
Biſhop et al'. v. Eagle 188
Bird v. Major 193
Billingſworth v. Spearman, &c. 211
Biſhop v. Chitty 238
—— v. Morgan 243
Bigland v. Robinſon 304
Biſhop v. Eagle 334
Bignoll v. Rogers 344
Billingſworth v. Spearman 345
Biſſe v. Harcourt 368
Biſhop v. Eagle 386
Biron v. Philips 395
Bircham v. Noright 398
Bidgood v. Hawes Ibid.
Bidolph v. Veal 410
Bidleſon, Eſq; Adminiſtrator, &c. v. Whytel, Eſq; 426

Page.
Bidolph v. Bruce 428
Bignoll v. Rogers 446
Billingſworth, or Billinghurſt, v. Shewman 477
Bidolph v. Veal 496
Birkmyr, or Burkmyre, v. Darnell 498
Biron v. Phillips 569
Bidolph v. Bruce 586
Biggs, or Brigs, v. Greinfield 593
Bird v. Randall 715
Birt v. Strode 718
Birch v. Bellamy 723
Biſſex v. Biſſex 743
Biſhop v. Eagle 762
—— Inhabitants of, and Cookham 780
Biſhops Hatfield v. St. Peters, in St. Albans 782
Bignoll v. Rogers 786
Bird v. Sedgwick 191
Biſhopſgate v. Alderman Beecher 633
Blakey v. Birmingham 73
Blenkinſon and Waite v. Iles 86
Blewitt v. Bainard 262
Blackwell v. Naſh 272
Blackly v. Fry 304
Blenkinſon and Wait v. Francis Iles 319
Blackwell v. Naſh 325
Blackborough v. Davis, or Davies 378
Blackwood v. the South-Sea Company 423
Backman's Caſe 453
Bliedſtyn v. Sedgwick 463
Blank v. Newcombe 472
Blackborough v. Davis, or Davies 473
Bland v. Pakenham 592
Blackmore v. Tidderley 615
Blackett v. Anſley 645
Bloxom Pariſh v. the Pariſh of Kingſton 675
Blackwell v. Naſh 733
Blackbourn v. Matthias 741
Blaxton v. Honore 758
Blank v. Newcombe 757
Blake v. Weſt and French 770
Blakett v. Criſſop 775
Blacke v. Dodemead and Wife 808
Blackhall v. Eccles 810
Bowyer v. Cooke 1
Bonner v. Hall 2
Bourden v. Alloway 37
Boldo's Caſe 64
Bonfield qui tam v. Milner 74
Boiſloe, or Purſloe, v. Baily 102
Booth v. Garnett 108
Bowles v. Markwith 156
Bond v. Turner 170
—— v. Iſaac 174
—— v. —— Ibid.
Borough of Warwick, Caſe 259
Bolton v. Prentice 217
Bowyer v. Bampton 238
Bowden v. Shaw 240
Bonafous v. Rybot 245
Bowers v. Mann 258
Boſſiney, alias Tintagel, borough of, in Cornwall, Caſe 298
Boſworth v. Hearne 300
Boiture v. Woolreck 305
Bovey v. Caſtleman 342
Bottomly v. Harriſon 355
Booth v. the Marquis of Lindſey and others 379
Bows, Dr. v. Jurat 387
Boner v. Juner 391
Booth v. the Marquis of Lindſey et al'. 394
Boiſe v. Bruerton 410
Bottomly v. Harriſon 421
Bowers v. Mann 421
Bourne v. Turner 460
Bowyer v. Bampton 501
Bond v. Iſaac 510
Borough's Caſe 548

Page.
Boſon v. Sandford 580
Boyfield v. Brown 572
Booth v. Booth 590
Boſworth v. Hearne 622
Boucher v. Lawſon 650
Boſon v. Sandford and others 653
Boulton v. Areſden 654
Bolton v. Hillerſden Ibid.
Bond v. Gonſales 657
Bogg v. Roſe 664
Bodington, Inhabitants of, v. the Inhabitants of Barwell 685
Borough-Fern, Inhabitant's Caſe 689
Boſtock v. Boſtock 713
Bonafous v. Rybot 715
Bowyers and Wife v. Coke, Executrix of Coke 718
Bowyer, Powers or Bowyers, v. Coot, or Cook Ibid.
Bonner v. Hall 721
Bond v. Barnes 727
—— v. —— 721
Borroughs v. Willis 753
Bows, Dr. v. Jurat 762
Beaumont v. Pine 788
Bond v. Turner 778
—— v. Iſaac 788
—— v. Spark, Coleman and Hunt 795
Bottomley v. Harriſon 804
Booth v. Johnſon 807
Boiſloe, or Purſloe, v. Baily Ibid.
Borroughs v. Willis 809
Bonfield qui tam v. Milner 357
Booth v. the Marquis of Lindſey and others 836
Brampton v. Crabb 362
Brookes v. Stroud 3
Broom v. Holford 59
Breedon v. Gill 77
Brown v. Dyer 80
Brown v. Burlace 110
Brook v. Biſhops 115
Brown v. Coombs 145
Bringar v. Allanſon 150
Brown v. Combs 170
—.— v. Chapman 203
Bridge v. the Pariſh of, St. Mary-le-Bone 220
Brough, or Borough, v. Perkins 230
Bromley v. Frazier 233
Bracey v. Harris 263
Bruges v. Leer 267
Bromfield v. Kirber 268
Brown and Wife v. Gibbons 305
Brinſby v. Gold 316
Brewſter v. Kitchell, Kidgel, or Kitchen 320
Braſfield v. Lee 332
Brown and Wife v. Gibbons 333
Brook v. Biſhop Ibid.
Bruce, Lord's Caſe 373
Britton v. Cole 374
Browning v. Dann and others 376
Brown v Mugg 385
Britton v. Standiſh Ibid.
Brewer v. Turner 416
Brown v. Dyer 413
——.- v. —— 436
—.— v. —— 437
Brooke v. Smith 441
Breedon v. Gill 443
Bridgman, Sir John, v. Jennings 446
Broughton v. Harpur 449
Brown and Wife v. Gibbons 450
Brown v. Hodges 453
Brocas v. the Mayor, &c. of London 456
Brownſon v. Avery 457
Brook v. Stroud 475
Brockwell v. Locke 484
Brook v. Huſtler 486
Bright, Executor of Hannah Criſp Widow, v. Eynon 498
Brown v. Dyer 512
Brook v. Ellis 519

Page.
Brigs v. Greinfield and Benger 582
Brockwell v. Lock 584
Brook v. Biſhop 587
Bright, Executor of Hannah Crip, Widow, v. Eynon 599
Breedon qui tam v. Gill, &c. 600
Brown v. Babbington 615
Brooke v. Ewers and Wife 632
Bridgenorth, Bailiff's of, Caſe 636
Brown and others v. Benn and others 649
Bridewell Pariſh v. the Pariſh of Clerkenwell 674
Brightwell Pariſh v. the Pariſh of Henley 683
Britton v. Standiſh 706
Burton v. Souter 711
Brown v. Gulloch Ibid.
Brent v. Sir Henry Edwin 719
Britton v. Cole 720
Brown v. Corniſh Ibid.
Brag v. Digby 721
Brinſby v. Gold Ibid.
Brookes v. Stroud 725
Brett v. Minter and others 730
Brittain v. Greenville 745
—— v. Cole 791
Brown's Caſe 750
Branthwait v. Blackerby and Perkins 750
Brown v. Burlace Ibid.
—— v. Sir William Morgan, Bart. 753
Brudon qui tam v. Gill 756
Brown v. Tanner 760
Braceby v. Dalton 774
Britton v. Cole 791
Briſtol Mayor and Aldermen, Caſe 797
Brooke v. Ewers and Wife 798
Brocas v. City of London Ibid.
Briſtow v. Tito 809
Bray, Cuſtom of the Manor of 441
Bridgewater, Counteſs of, v. the Duke of Bolton 822
Brough, or Borough, v. Parkins 834
Booth v. the Marquis of Lindſey and others 836
Bride, St. Pariſh of v. the Pariſh of St. Saviours 681
Bright, Executor of Hannah Criſp, Widow, v. Eynon 813
Brook v. Manning 818
Bridgewater, Counteſs of, v. the Duke of Bolton 822
——.— Lord, v. the Duke of Bolton 823
Butler v. Lewin 25
Butcher v Andrews 26
Buckſome v. Hoſkin 63
Bullock v. Parſons Ibid.
Buckington, or Puckington, Inhabitants of, v. the Inhabitants of St. Michael, Sibbington, in Somerſetſhire 91
Burland v. Tyler and Wife 125
Buckley v. Pirk Ibid.
Burr v. Atwood 142
Bull v. Clifton 181
Butler v. Rolls 184
Buſhell v. Haynes 185
Buckley v. Collier 204
Budworth, Pariſh of, v. the Townſhip of Dumply, in Lancaſhire 220
Buller v. Crips 230
Buckley v. Campbell Ibid.
Butler v. Malliſy 232
Burchell, Adminiſtrator of William Burchell, v. Oliver Slocock 236
Bull v. Clifton 244
Burhill v. the Archbiſhop of York, Biſhop of Carliſle, and Univerſity of Cambridge 290
Bully, or Butler, v. Palmer 291
Boſhell v. Haynes 307
Butler v. Cozens Ibid.
Burry, Moſes, v. Jeffery Perry 309

Page.
Buſh v. Cole 319
Bulkley v. Cambden 328
Butler v. Heathby 331
— — v. Corbet 621
Bullock v. Lincoln 341
Burland v. Tyler 346
Bulkley v. Cambden 351
Burges v. Bracher 353
Burland v. Tyler 354
—— v. —— 365
Buſhell v. Haynes 371
Burdon v. Burdon 379
Burridge v. the Earl of Suſſex and others 394
Burr and Drue v. Atwood 409
Budger v. Lloyd, or Floyd 412
Burdett v. Wheatly Ibid.
Burnaby v. Sawnderſon 413
Bull v. Clifton 414
Buller v. Luſitano de Prima 422
Burleigh v. Harris Ibid.
Burridge v. the Earl of Suſſex and others 454
Buſby v. Greenſlate 457
Burr v. Davall 459
Burſton v. Ridley 475
Buckley v. Pirk 478
Burland v. Tyler 480
Burch v. Scory 483
Burdett's Caſe Ibid.
Burdeaux v. Dr. Lancaſter, Vicar of St. Martin's, and R. Greſdale, Pariſh-Clerk there 484
Buſhell v. Burland 491
Burland v. Tyler 420
Budd v. Borkenhead 613
Buckly v. Palmer 627
Buttler v. Rews 628
Butler v. Cobbet 631
Buck v. Atwood 650
Burton v. Fitzgerald 651
Buller v. Crips 657
Bulbrook v. Sir Robert Goodere and others 666
Burcleas Pariſh v. the Pariſh of Eaſtwood Hay 685
Buckington, or Puckington, Inhabitants of, v. the Inhabitants of St. Michael Sebbington, in Somerſetſhire 688
Burman v. Shepherd 710
Burton v. Souter 711
Butler v. Rolfe 712
Buſhell v. Paſmore 726
Butler v. Inneys and Wife 745
Burdett v. Newell 761
Buck v. Atwood 763
Butterworth and Barker v. Walker and Waterhouſe 765
Butler, Sir James's Caſe 772
Buckſome v. Hoſkins 777
Bulſome Pariſh v. the Pariſh of Sampford Peverel 781
Buckington Pariſhioners v. the Pariſhioners of Shipton Bechamp Ibid.
Butler v. Corbet 789
Buck v. Atwood 799
Buſhel v. Miller 803
—.— v. Burland 805
Burges v. Bracher 812
Buſby v. Greenſlate 825
Burr v. Davall Ibid.
Buſh and others, Aſſignees of Jones, v. Gower 816
Bunter v. Coke 823
Byron v. Philips 663

C.

CAmbridge, Univerſity of, v. the Lord Biſhop of York 6
Carpenter v. Terrant 47
Caſs, Lady, v. Title 68
Canning v. Wright 70

A TABLE OF THE NAMES OF THE CASES.

	Page.
Caſtel, Widow, v. Bambridge and Corbet	81
Caiſter Pariſh v. the Pariſh of Eccles	128
Carleton v. Mortagh	141
Carril v. Cockran	160
Capron v. Archer	173
Campbell v. Daley	175
Caſtell v. Bambridge and Corbet	179
Cary v. Criſp	191
Cane v. Coleman	Ibid.
Carpenter v. Fauſtin	205
Cage v. Acton	206
Car v. King	207
Carter v. Palmer	228
Cage v. Acton	241
Canterbury, Archbiſhop of, v. Willis	272
Caweth v. Phillips	242
Carleton v. Mortagh	255
Cambridge Univerſity, Caſe	294
Canterbury, Archbiſhop of, v. Fuller	305
Carter v Fiſh	309
Caſwell v. Norman	310
Camphill v. St. John	348
Carter v. Davies	362
Campbell v. St. John	368
Carter v. Davies	Ibid.
Canterbury, Archbiſhop of, v. Willis	378
Caſtle v. Richardſon	388
Carleton v. Mortagh	413
Canning v. Wright	421
Capron v. Archer	425
Car v. King	447
Cambridge Univerſity, Caſe	454
Caſe of the Corporation of Bewley	Ibid.
Caſtel, Widow, v. Bambridge and Corbet	461
Cary v. King	463
Cage v. Acton	472
Canterbury, Archbiſhop of, v. Willis	477
Carrington v. Warren	479
Carter, Leſſee of, v. Taſh	511
Carrington v. Warren	513
Cambridge v. Lea	520
Caſwall v. Martin	521
Cambridge Univerſity, Caſe	522
Carter v. Boehm	579
Cary and Wife v. Stephenſon	613
Calne in Wilts, Borough, Caſe	637
Campion v. Nicholas	649
Cary v. Webſter	656
Caſtell, Widow, v. Bambridge and Corbet	659
Capel, Inhabitants of, and Weſt-Peckham	689
Campbell v. Daley	704
Caſtle v. Richardſon	707
Canter v. Shepherd	711
Cambridge Univerſity, Caſe of	728
Cary v. Jenkins	732
Carvell, one, &c. v. Manly, or Manby	Ibid.
Cantillon v. Lord Montgomery	736
Cary v. Holt	741
Caſe v. Stevens	745
Carter v. Firman	755
Catchſide, Widow, Adminiſtratrix, &c. v. Ovington	766
Campbell, Eſq; v. Cumming and another	778
Caiſter Pariſh v. the Pariſh of Eccles	242
Caſwall v. Martin	839
Carliſle, Henry Earl of, v. Armſtrong and others	801
Caſtel, Widow, v. Bambridge and Corbet	800
Carlton v. Mortagh	807
Cattle and others v. Andrews	810
Cary v. Hinton	812
Carter v. Jewell	819
Cambridge Univerſity, Caſe	728
Carleton, on the Demiſe of Griffin, v. Griffin	829
Caſtel, Widow, v. Bambridge and Corbet	838
Cecil, and others of the Town of Nottingham, Caſe	132
Cæſar, or Sheather, v. Holt and others	135
Cecil and others, of the Town of Notttingham, Caſe	339
Cæſar, or Sheather, v. Holt and others	431
Chamberlaine, or Chamberlain, v. Huetſon, or Hewſon	381
Chambers v. Robinſon	41
Chettle v. Lees	55
Child, Sir William, Lacon, v. Harvey	59
Chew v. Briggs	96
Chandler v. Driver	98
Cheeſely v. Baily	99
Chandler v. Driver	132
Chancey v. Win and others	140
Child v. Pierce	155
Cholmley v. Veal	164
Chriſty v. the Bail of Anſtruther	168
Chambers v. Robinſon	170
Cheſterſon v. Middlehurſt	188
Chamberlaine, or Chamberlain, v. Huetſon, or Hewſon	204
Child et al'. v. Hardyman	215
Chadwick v. Allen	235
Cheeſeman, or Cheeſman and Wife, v. Rainby, or Raimby	245
Charnock s Caſe	261
Cheeſeman, or Cheſman and Wife, v. Rainby, or Raimby	273
Chriſtchurch, Borough of, Caſe	297
Charitable Corporation v. Woodcroft	299
Chamberlain v. Huetſon, or Hewſon	304
Chambers v. Jennings	317
Chaplain v. Southgate	324
Child v. Pierce	353
Chew v. Briggs	368
Chettle v. Pound	392
Charters v. Cuſack	415
Chriſty v. the Bail of Anſtruther	419
Chanvet and another v. Alfray	425
Chattle v. Pound	448
Charnock's Caſe	452
Chambers v. Robinſon	460
Chapman v. Pointon	466
Chace v. Chace	482
Chew v. Briggs	519
Churchey v. Roſſe	584
Chancey v. Needham	595
Chievly v. Bond	615
Child, Sir Joſeph, v. Sands, or Sands v. Child and others	644
Chamberlain v. Harvey	653
Chiddingfield, Inhabitants of, v. the Inhabitants of Penhurſt	600
Chambers v. Jennings	668
Chiddingfold, or Chittinſton, Pariſh of, v. the Pariſh of Penſhurſt, or Penhurſt	671
Chalbury, Pariſh of, v. the Pariſh of Chipping Farringdon	676
Chewton, Pariſh of, v. the Pariſh of Compton Martin	687
Cheſham in Bucks, Inhabitants of, v. the Pariſh of Stepney in Middleſex	690
Child v. Harvey	795
Cholmely v. Bloom, or Broom	720
Child v. Pierce	729
Chriſt's Hoſpital, Caſe	674
Chickham v. Dickſon	720
——— v. ———	756
Chamberlain v. Hewetſon	755
Chave v. Peter Calmel, Eſq;	766
Cheeſeby v. Baily	773
Challoner v. Clayton	770
Chew v. Briggs	793
Chriſtchurch Borough, Caſe	779
Chambers v. Jennings	759
Chambers v. Robinſon	799
Clarke v. Butler	2
Clerk v. Withers	5
Clerke v. Comer	43
Clapcott v. Davy	99
Clark v. Elwick	105
Clerk v. Andrews	131
——— v. Lee	143
Clapham v. Wray	161
Clark v. Corniſh, or Corniſh v. Clark et al'.	169
Clerk v. Lee	213
Clark v. Mundal	225
Clerk v. Pigot	226
——— v. Martin	229
Cloud v. Nicholſon	244
Clark's Caſe	263
Clarkſon v. Buſſey	269
Claxton v. Baſty	270
Clerk v. How	Ibid.
Claxton, Elizabeth's Caſe	277
Clark, or Clark's Caſe	290
Clapham v. Wray	292
Clerk v. Lee	307
Clark v. Othery	368
Clarkſon v. Buſſey	359
Cloud v. Nicholſon	360
Clerk v. Lee	387
Clews v. Bathurſt	389
Claxmore v. Searle and others	392
Clerk v. How	434
Clerges, Sir Walter, v. Sherwin	446
Clark v. Elwick	455
Clerk v. Dealy	475
——— v. Withers	476
Clements v. Langham	490
Clark's Caſe	504
Clements v. Scudamore	512
Clerk v. Martin	519
Clows v. Brook	550
Clerk v. Rowland	584
Cloud v. Nicholſon	592
Clark v. Corniſh, or Corniſh v. Clark et al'.	593
Claxon, Elizabeth's Caſe	601
Clerk v. Withers	590
Clark v. the Biſhop of Saliſbury	609
Clarke v. the Biſhop of Saliſbury	639
Clay v. Snelgrave, Snalgrave, or Sudgrave	647
Clerk v. Lee	649
Clement v. Beard	652
Clayton v. Kynaſton	662
Clifton v. Swezland	725
Clare v. Froſt	731
Clifton v. Swezeland	751
Clerk v. Price,	761
——— v. Lee	762
——— v. Withers	792
——— v. Udall	797
Clement's, St. Pariſh of, v. the Pariſh of St. Andrew's	602
Clerk v. Elwick	773
Clinton, Lord, v. Morton	738
Clerk v. Elwick	837
Clement's, St. Pariſh of, v. the Pariſh of St. Andrew's	744
Clerk v. Corniſh, or Corniſh v. Clerk	778
Clerk v. Withers	787
——— v. ———	792
Cowper v. Ginger	8
Combe v. Pitt	10
Coggs v. Bernard	29
Cook v. Champneſs	43
Cortiſos v. Munoz	55
Coke v. Heathcot	60
Cowper v. Spencer	68
Colt v. Wiſt	78
Colethirſt v. Wiſeman	
Colechurch v. Ratcliff	
Cooper v. Pierce	83
Cole v. Hawkins	100
Cole v. Turner	[illegible]
Cook v. Harris	1

1

C

Page.
Cook v. Licence 131
Coke v. Allen 144
Conningſby, Lord, v. Steed 145
Collins v. Gibbs 158
Combe v. Pitt Ibid.
Conyers v. the Bail of Rawlins Ibid.
Corps v. Kitchen Hall 160
Corniſh v. Marks 162
Combes v. Blackall 167
Cole v. Buckland 171
Collet v. Jennis 172
Colebrooke v. Diggs 182
Cook v. Brockhurſt 187
Coggs v. Bernard 189
Cole v. Davis et al'. Aſſignees of Maul a Bankrupt 192
Cooper and another, Aſſignees of William Johns a Bankrupt, v. Chitty and Blackiſton, Sheriffs of London 199
Cockrell's Aſſignees v. Owſton 200
Coppendale v. Bridgen and another 201
Cole v. Hawkins 232
Coleman v. Sayer 236
Cooper v. Le Blanc 237
Collins v. Butler 238
Cooke v. Colehan 239
Coloman v. Sherwin 246
Coggs v. Bernard 250
Cockcroft v. Smith 266
Conningſby, Lord, v. Steed 267
Cooper v. Marſhall 268
Cope v. Marſhall 269
Collins v. Gibbs 274
Coggs v. Bernard 275
Cork v. Baker 281
Cox v. Phillips 282
Cole v. Hawkins Ibid.
Cotton, Sir Robert, Saliſbury v. Davies 295
Colcheſter, Mayor and Commonalty, v. Seaber Executor of Seaber 303
Cone v. Bowles 303
Coot v. Lynch 304
Cowper v. Ginger 309
Cooke v. Peter Sayer 313
Cook v. Licence 316
Cooke v. Harris 321
Cone v. Bowles 331
Cornwallis, Lord, v. Hoyle, or Hoyle v. Lord Cornwallis 341
Coombs v. Talbot 342
Courtnay and others, Caſe 344
Coleborne v. Stockdale 346
Coxeter v. Farſon 349
Cole v. Hawkins 352
Combe v. Talbot 363
Cole v. Hawkins 365
Courtney v. Satchwell Ibid.
Cole v. Hawkins 367
Coux v. Lowther 369
Coot v. Berty 379
Colefatt v. Newcomb 386
Conningſby, Lord's Caſe 395
Cooper v. Beale 395
Cotton, Sir Rob. Saliſbbury, v. Davies 404
Combe, Eſq v. Pitt 406
Cone v. Bowles Ibid.
Coot v. Lynch, or Linch 409
Coux v. Lowther 410
Cutting v. Wilkins, or Williams v. Cutting 411
Cole v. Henry 412
Cook v. the Dutcheſs of Hamilton 415
Colebrook v. Diggs 419
Collins v. Muxworthy 423
Cottingham v. King 425
Cotton v. Martin 428
Cornwallis, Lord, v. Hoyle 430
Cook qui tam v. Champneys 431
Cox v. Copping 444
Collet v. Jennis 462
Combe, Eſq; v. Pitt 463

Page.
Coatſworth and Wife, Adminſtrator of W. S. v. Shaftoe 480
Courtney v. Collet 486
Cockcroft v. Smith Ibid.
——— v. ——— 496
Cotton v. Johnſon Ibid.
Cole v. Davies et al'. Aſſignees of Maul a Bankrupt 497
Coleborne v. Stockdale 501
Cox v. Hart 510
Cooper v. the Hundred of Baſingſtoke 518
Courtney v. Strong 520
Cooper v. Spencer Ibid.
Cornwallis, Joſhua's Caſe 542
Conden v Coulter and others 570
Coleby v. Mawby et al'. Ibid.
Cooper v. Spencer 583
Cooke v Cooke 585
Cole v. Davis et al'. Aſſignees of Maul a Bankrupt Ibid.
Coote v. Lynch Ibid.
Cooper v. Beale 592
Cotton v. Owen 593
Cowper v. Oſborne 594
Cooke v. Peter Sayer 596
Cooke v. Wingfield 597
Cockcroft v. Smith 602
Copley v. Hepworth 606
Coventry v. Apſley 613
Collins v. Denning, or Benning 614
Cooke v. Wingfield 621
Coventry, Mayor of, Caſe 626
Colefat v. Newcomb 630
Cooke v. Foſter, or Foſter's Caſe 661
Cooper v. Marſhall 666
Cookes v. Champneſs, or Champneys 703
Cook v. Remmington 705
Cooke v. Heathcot 711
Coombs v. Talbot 717
Cone v. Bowles 715
Cook v. Harris 721
Courtney's Caſe 724
Cockcroft v. Smith 727
Cole v. Hawkins 730
Coleman v. Earle 731
Cotten v. Owen 734
Coleborne v. Stockdale 733
Cooper v. Young 738
Cowne v. Barry Ibid.
Cooper v. Marſhall 741
Cook v. Sayer 742
Combe, Eſq; v. Pitt 743
Coppin v. Gunner 748
Conningſby, Lord's Caſe 752
Coke v. Hawkins 755
Coxeter v. Parſons 756
Collins v. Jeſſot 761
Cottingham v. Lofts 762
Cook v. Wingfield 763
Combes v. Cole 772
Colebeck v. Peck 777
Coombe, Pariſh of, v. the Pariſh of Weſtwoodhay 780
Comber v. Hill 827
Coulſon v. Coulſon 828
Coke v. Allen 818
Cogan v. Ebden and another 813
Cooper and others, Aſſignees of William Jones a Bankrupt, v. Chitty and Blackiſton, Sheriffs of London 804
Cotleigh, Pariſh of, v. the Pariſh of Stockland 783
Coleborne v. Stockdale 733
Coxwell and Sillingford, Inhabitants of, Caſe 779
Cole v. Acorn 787
Cook v. Boſinger 802
Cock v. Ratcliffe 816
Cole v. Rawlinſon 822
Coulſon v. Coulſon 828

Page.
Collins, ſenior, v. Collins, junior 347
Collier v. Morris 459
Cooper v. the Hnndred of Baſingſtoke 580
Collins v. the Bail of Rawlins 775
Conningſby v. Steed 787
Cremer v. Wicket 2
——— v. ——— Ibid.
Croſs v. Bilſon 3
Crowther v. Oldfield 28
——— v. ——— 30
——— v. ——— Ibid.
Crifford v. Berry 38
Cradock v. Radford 56
Crocket v. Jones 69
Crofts v. Hannis 96
Croſſe v. Talbot 113
Craddoc v. Glin 140
Croſſe v. Smith 161
Cragger v. Glover 163
Croſſe v. Talbot 168
Crofts, Executor of Curtis, v. Butel, the Bail of Harris 169
Cracroft v. Gledowe 174
Criminal Caſes 175
Croſby's Caſe Ibid.
Crookſhank v. Thompſon 199
Cromwell, or Crumwell, v. Grumſdale, or Grunſdale 241
Crofts, Executor of Curtis, v. Butel, the Bail of Harris 245
Crowder v. Oldfield 268
Crow v. Rogers 276
Crundell v. Bodily 308
Croſſe v. Smith 317
Creſſy v. Webb and others 337
Cromwell, or Crumwell, v. Grumſdale, or Grunſdale 348
Croſſe v. Bilſon 412
Crompton v. Ward 430
Crowther, or Crowder, v. Oldfield 436
Crow v. Brown 447
Crew qui tam v. Saunders 462
Croſſe v Smith 496
Crackall v. Thompſon 507
Crowther v. Oldfield 519
Crockat v. Jones 583
Cromer v. Wicket 586
Crofts, Executor of Curtis, v. Butel the Bail of Harris 593
Crump v. Halford 599
Cropp v. Tilney 611
Crockat v. Jones 617
Crawford v. Powell 640
Creed v. Mallet 649
Crawley v. Blewett and Wolfe, Sheriff of Middleſex 660
Crump v. Halford 667
Chickham v Dickſon 756
Crogate v. Martin 725
Cracraft v. Gledowe 704
Croſſe v. Bilſon 725
Cragger v. Glover 747
Creed v. Lappan 730
Crockmore v. Weekins 766
Crowther v. Wheat 778
Croſſier v. Ogleby 803
Crocket's Caſe 807
Crow v. Brown 816
Croſs v. Bevan 735
Crouch v. ——— 788
Crown v. the Inhabitants of Glamorganſhire 675
Crofts, Executor of Curtis, v. Butel, the Bail of Harris 837
Crown v. the Inhabitants of Glamorganſhire 253
Cromer v. Wicket 767
Croſſe v. Smith 253
——— v. Bilſon 770
Cromwell, or Crumwell, v. Grumſdale, or Grunſdale 338
Croaſdale v. Gardiner 357

Page.
Croſſe v. Bilſon 364
Crow v. Maſon 369
Croſcombe, Pariſh of, v. the Pariſh of Cuthbert in Wells 784
Croft v. Paulet 828
Curvin, or Coulin, v. Fletcher 12
Cumber v. Wane 15
Cudlip v. Randall 18
Cutting v. Williams 26
Culliford's Caſe 80
Currenden Pariſh and the Pariſh of Laland in Lancaſhire 92
Cuddon v. Eaſtwick 293
Cutlers' Company, Maſter and Warden, in Highamſhire, v. Buſkin 303
Cutler v. Goodwin 308
Cudmore v Tripe 315
Cutting v. Wilkins 327
Cudding v. Eaſtwick 328
Cutting v. Wilkins 333
——— v. ——— 349
Curluis, or Curlewis, v. Fadley, or Dudley 447
Cunningham v. Houſton 416
Culliford v. Blandford 551
Cumber v. Wane 592
Cudlip v. Randall 598
——— v. ——— 606
Cuddor v. Eaſtwick 619
Curwin, or Colvin, v. Fletcher 659
Cuckfield, Pariſh of, v. Boxſtead 670
Cumber v. Wane 731
Cunmer, Pariſh of, v. the Pariſh of Milton 743
——— v. ——— 679
Cutting v. Wilkins, or Williams v. Cutting 411
Curvin, or Colvin, v. Fletcher 705

D.

DAVILA v. Dalmanſer 133
Dalſton v. Janſon 21
Davila v. Almanzar 100
Davenport v. Rafter 153
D'Aeth v. Baux 212
Dalſton v. Janſon 249
Davila v. Herring 308
Davenish v. Mertins 310
Davila v. Dalmanſer 332
Davies, or Davy, v. Salter 340
David s, St. the Biſhop of, v. Lucy 383
——— v. ——— 409
Daſhwood's Caſe 408
Davenant v. Rafter 413
Daniel v. Morewood 428
Dale v. Johnſon 458
D Ayrolles, Eſq; v. Howard 468
David s, St. Biſhop of, v. Lucy 485
Davis v. Hoyle 486
——— v. Speed 487
Dalſon v. Janſon 581
Davenport, or Davenant, v. Rafter 590
Dalſton v. Janton 58
Day et al'. v. Searle 650
Dalbury, Pariſh of, v. the Pariſh of Foiſton 662
David's, St. Biſhop of, v. Lucy 627
Dawſon v. Wilkinſon 708
Davenant v. Rafter 727
Da Coſta v. Carteret and others 736
Dawkins v. Berridge 753
Dartford, Vicar of, Caſe 754
Dair v. the Earl of Stamford 757
D'Aeth v. Baux 762
Drake v. Taylor Ibid.
Dawſon v. Wilkinſon 764
Davis v. Daveril 798
Dalſton, v. Tyſon, or Janſon 802
Davis v. Speed 804
Dale v. Stephenſon 809

Page.
Davy and Nicholas v. Ann Smith 820
Dawſon v. Howard 598
D aeth v. Baux 611
Davies, or Davy, v. Salter 835
D Oyley v. Burton 98
Deering v. Torrington 125
De Balf v. Mackenſie 173
Derby v. Roſe 187
Derby v. Hamond Ibid.
Derry v. the Dutcheſs of Mazarine 205
Denn, on the Demiſe of Lucas, v. Fulford 314
D'Eath v. Ball 378
——— v. Baux 387
Denn, on the Demiſe of Burgeſs Widow, v. Purvis and others 400
Denn, on the Demiſe of Lucas, v. Fulford 402
Deſborough v. Kelby 409
Deſbordes v. Horſey 422
Dent v. Lingood 424
Denniſon v Spurling 457
Denham v. Stevenſon 476
D'aeth v. Baux 478
Denham v. Stevenſon 516
Dean v. Dicker 573
De Caſtro's Caſe 504
Denn v. Lord Cadogan and others 599
Degrave v. Hedges 649
Deddington, Pariſh of, v. the Pariſh of Dunfrew 691
Dent v. Prudence and Bond 708
Dewey v. Sopp 740
——— v. Deer 757
De la Baſtile v. Reignald and others 769
Delamotte, Mrs. Caſe 753
Derry, or Deerly, v. the Dutcheſs Mazarine 793
Dent v. the Hundred of Hertford 793
Denham, Pariſh of, v. the Pariſh of Dalham in Suffolk 815
De la Baſtide v. Reynell and Wife 832
Deveniſh v. Mertins 310
Dillingham v. Gately 6
Dighton v. Granvil 55
Dillon's Caſe 87
Dilley v. Polhill 107
Dix v. Brookes 213
Dibben v. Cooke 310
Dighton v. Granvil 342
——— v. Granville 407
Dillon v. Watcot 410
Dike v. Polhill 448
Dillon v. Crawly Ibid.
Dick v. Barrel 573
Dillon v. Brown 590
Dimmock v. Chandler 650
Dimchurch, Pariſh of, v. the Pariſh of Eaſtchurch 672
Dixon v. Willoughs, or Willows 710
Dillon v. Harper 751
Dimmock v. Chandler 764
Dighton v. Granvil 774
Dillon v. Walcot 775
Dickinſon v. Fiſher 809
Dike v Polhill 822
Docmany v. Davenant 5
Dodd v. Adcock 138
Dottin's, Mrs. Caſe 144
Dodd v. Beckman and Carman 160
Doldern v. Feaſt 171
Dobſon v. Dobſon, et al'. 215
Doe on the Demiſe of Long v. Laming 319
Dove v. Smith 350
Dobbs v. Edmunds 354
Dockminique, or Dockmanny, v. Davenant 365
Doe, on the Demiſe of Odiarne, v. Whitehead 372
Dod v. Monger 376
Dobſon v. Dobſon and others 380
Douglas v. ——— 396

Page.
Dobbs v. Paſſer 398
Doe, on the Demiſe of the Dutcheſs of Hamilton, v. Robinſon and others 399
——— on the Demiſe of the Dutcheſs of Hamilton, v. Hatherly and others Ibid.
——— on the Demiſe of Hitchings and another, v. Lewis, Eſq; 401
Donford v. Ellys 408
Dorſet v. Chaplin 415
Dove v. Smith 451
Dowler v. Keite 506
Dounci v. Keach Ibid.
Dorne v. Caſhford 519
Dorſet v. Chaplin 520
Dorſet v. Chaplin 668
Downhead, Pariſh of, v. the Pariſh of Broadchalk in Wilts 671
Dobbins v. Burley 727
Downs v. Turner 772
Dobſon v. Taylor 800
Dovey qui tam v. Powell 809
Drake, Sir William, v. ——— 165
Draper v. Glaſſop 614
Dryer v. Mills 486
Drake v. Taylor 762
Duthy v. Tito et al'. and Tito v. Duthy 302
Dutch v. Warren 276
Dutchett v. Martin 172
Duncombe v. Church, Warden of the Fleet 1
Dubartine v. Chancellor 58
Dundee v. Petty 162
——— v. ——— 411
Duckett v. Martin 422
Dubber v. Trollop 439
Dupays v. Shepherd 445
Dunſley v. Weſtbrown 457
Duel v. Harding 459
Dubois v. Trant 473
Dummer v ——— 569
Dumbleton, Pariſh of, v. the Pariſh of Beckford 669
Dunsfold v. the Pariſh of Ridgwick 682
Ducket v. Martin 703
Dunn v. Vacher and Wife 737
Duncombe v. Church, Warden of the Fleet 746
Duncomb v. Church 750
Duncomb v. Church, Warden of the Fleet Ibid.
Dunbarton v. Chancellor 766
Dunkly v. Wade 798
Dupleſſis v. Chalk 809
Dubber v. Trolles 828
Dublin, Archbiſhop of, v. the Dean of Dublin 308
Dyke and others v. Blackſton 86
Dyſon v. Iremonger and his Wife 282
Dyer v. Mills et al' 455

E.

EAST India Company v. Chitty 238
——— ——— ——— v. Glover; Eadem v. Lutman et al'. 362
Earle v. Plummer 485
——— v. Feale 549
Eaſt India Company v. Ellis 570
Eaton-Bridge, Pariſh of, v. the Pariſh of Weſtram in Kent 674
Earle v. Paine 759
Eaſtwoodhay, Pariſh of, in the County of Hants, and Weſtwoodhay in Berks 780
Eaſtland, Pariſh of, v. the Pariſh of Weſthotſley 781
Eaſtwick v. Coke 838
Eaſt v. Effington 230
Eaſt India Company v. Pullen 250
——— ——— Caſe 293

Page.
Eaſt v. Eſtington 568
—— v. Eſſington 811
Edwards v. Blunt 118
Edie and another v. the Eaſt India Company 239
Edward v. Dickenſon 20
Edgworth v. Smalldridge 388
Eden v. Wills 421
Edwards v. Blunt 592
Edmonton v. Francklyn 649
Edie v. Jackſon 764
Edwards v. Copland 750
Edie and another v. the Eaſt India Company 813
Edgworth v. Smallridge 826
Eden v. Wills 778
Edie and another v. the Eaſt-India Company 314
Edwards v. Carter et al'. 581
Eggleton v. Lewin 500
Elkins v. Paine 73
Elderton's Caſe 265
Elliot v. Couper 155
—— v. Smith 172
—— v. Danby 191
—— v. Danby 249
Elverton's Caſe 281
Ellis v. Thomas 409
Elwes, or Eaves, Executrix of Elwes, v. Morcata, or Morcato 475
Elletſon v. Cummins 482
Elkin v. Heart 498
Elwell v. Quaſh and others 479
Ellis v. Thomas 521
—— v. Ellis 548
Elſtead, Pariſh of, v. Hollîburne 782
Elton v. Broaden 574
Elwell v. Quaſh et al'. 591
Elmore v. Tucker 771
Elliot v. Callow 773
Elwood v. Sir Godfrey Kneller Ibid.
Elliot v. Cowper 235
Elwes, Executrix of Elwes, v. Mocata 306
Elwis v. Lombe 364
Elſted and Holliburne, between the Pariſhes of 782
Ellis v. Ellis 806
Emerton v. Selby 268
Emery v. Bartlett 318
Emerſon v. Inchbird 512
—— v. —— 822
—— v. —— 123
Enys, John, Eſq; Executor of Samuel Enys, Eſq; v. Iſaac Donathorne, Executor of Nicholas Donathorne 326
—— John, Eſq; v. Iſaac Donnithorne, Executor of Nicholas Donithorne 610
Enys v. Mohun 736
Ereſkine, Sir John, v. Murray 236
Ethericke v. Cooper 159
Etherington v. Parrot 208
—— v. Reynolds 768
Evans v. Thomas 69
Everet v. Gery 167
Evans v. Roberts 328
Eveſham, Borough of, Caſe 406
Evans v. Roberts 413
Everall v. Smalley 430
Everett v. Gary 417
Evelyn, Bart. Executor of Sir John Evelyn, Bart. v. Chiceſter, Eſq; 487
Evelyn, Bart. Executor of Sir John Evelyn, Bart. v. Chiceſter, Eſq; 551
Evans v. Martell 657
—— v. Hicks 752
Evingdon, Jonathan, one, &c, Caſe 754
Evans v. Brown 761
—— v. Thomas 768
Eveſham, Borough of, Caſe 637
Ewer v. Jones 610

Page.
Ewers v. Jones 615
Ewer v. Jones 828
Ewers v. Jones 648
Exeter, City of, v. Glide 372
—— Dean and Chapter of, Caſe 485
—— City of, v. Glide 623
—— v. Glide 666
Executors of the Duke of Marlborough v. Widmore 71

F.

FARQUIRE v. Kynaſton 5
Falmouth v. Strode 12
Fanſhaw v. Morriſon 84
Farrow v. Chevalier 247
Fanſhaw v. Morriſon 306
—— v. —— 333
Farrow v. Chevalier 349
Falmouth v. Strode 371
Fanſhaw v. Harris 338
—— v. Farrell 375
Fair-claim, on the Demiſe of Fowler and others, v. Sham-title 402
Far, Spinſter, v. Denn 425
Fawtry v. Fawtry 469
Fazacharly v. Baldo 491
Far, Spinſter, v. Denn 493
Fazacharly v. Baldo 506
Fanſhaw v. Harris 571
Fazacharly v. Baldo 619
Fazerakerſley v. Wiltſhire 620
Farringdon Pariſh, in Berks, v. the Pariſh of Wilcot, or Witty, in Oxfordſhire 679
Fanſhaw v. Morriſon 727
Faulk v. Berry 753
Fanſhaw v. Morriſon 777
Falconbridge, Lady, v. Forreſt 809
—— Earl, and others 814
Fenwick v. Gravenor 208
Feltham v. Cudworth 269
—— v. —— 271
Ferguſon qui tam v. Rawlinſon 312
Fenwick v. Lady Groſvenor 317
Fetter v. Beal 332
Fenwick v. Lady Groſvenor 332
Feltham v. Cudworth 359
Fenwick v. Lady Groſvenor 375
Ferguſon v. Cuthburt 388
Fenwick's Caſe 392
Fenwick v. Groſvenor 393
Fenn, on the Demiſe of Tyrrell and another, v. Denn 402
Ferrers, Lord, v. Shirley 461
Feltham v. Cudworth 580
Fenwick, Sir John's Caſe 591
Ferguſon and Wife v. Corniſh 610
Ferrer v. Miller 716
Fotteril v. Philby 749
Fenwick v. Lady Groſvenor 759
Ferguſon v. Cuthburt 764
Fenwick v. Lady Groſvenor 796
Ferguſon and Wife 743
Feild v. Curtis 196
Fiſh v. Horner 3
Fiſher v. Emerton 167
Fitz-Patrick's Caſe 175
Fiſh v. Horner 184
Finch and Wife v. Duddin and Wife 217
Fitz-Hugh v. Dennington 243
—— v. —— 271
Fitchet v. Adams 273
Fiſher v. Baſton 315
Fitzgerrard v. Trant. 324
Fiſh v. Horner 344
Fitch v. Wills 359
Finch v. Harris 384
Fiſher v. Hughes 397
Fitchet v. Adams 399
Finch v. Ranow, or Renew 410
Fiſher v. Nicholls 434
—— v. Wigg Ibid.

Page.
Field v. Curtis 461
Fiſh v. Horner 589
Fitzgerald v. Plunket 596
Fiſh v. Horner 589
Finn v. Hutchinſon 588
Fiſher v. Prince 714
Fiſher's Caſe 728
Filkes v. Allen 749
Firebraſs, Sir Baſil's Caſe 759
Fiſher v. Sowerby 768
Fiſher v. Wegg 791
Fiſher v. Prince 804
—— v. Nicholls 821
Fletcher v. Sandys 239
—— v. Richardſon 273
—— v. Ingram 276
—— v. —— 315
—— v. —— 327
—— v. —— 485
Flemming v. Parker 570
Fletcher v. Ingram 580
Flower, Lord, v. Bolingbroke 594
Fletcher v. Ingram 662
—— v. Hennington 742
Flemming v. Parker, or Langton 799
Forteſcue Aland, Sir John, v. Maſon 7
Foreland, or Furlong, v. Thornigold, Hornigold, or Marygold 100
Foſter v. Brunetti 131
Foſter v. Cale 144
Fowles v. Sir John Dinely 217
Follet v. Freake et al'. 268
Foxton v. Moſeley 322
Fox v. Wilbraham 339
Forte v. Buviere 386
Forty v. —— Ibid.
Ford v. Lord Gray 393
Foſter v. Burden 394
Fox v. Tilly 429
Ford v. Hopkins 447
—— v. Grey 450
—— v. Lord Grey 451
Fotheringham v. Greenwood 456
Fooler v. Cooke 470
Folkes v. Docminique 482
Ford v. Lord Grey 490
Foxcroft and another, Aſſignees of Satterthwaite, a Bankrupt, v. Devonſhire and others 498
Foſter v. Wilmer 573
Forbes v. Lord Middleton 596
Foot v. Prowſe, Mayor of Truro 635
Foxcroft and another, Aſſignees of Satterthwaite, a Bankrupt, v. Devonſhire and others 658
Foſter, or Foſter's Caſe 661
Forreſt of Dean, Inhabitants of, v. the Pariſh of Linton 675
Foſton Pariſh v. the Pariſh ef Carlton 687
Foſter v. Burdett 727
Foxworthy's Caſe 747
Foſter v. Cole 752
Foy v. Liſter 761
Forte v. Buviere 762
Ford v. Tilly 796
Fowbert v. Elkins 798
Forſter v. Cale 798
Foſter v. Burdon 808
Forſter v. Graham 826
Foxcroft and another, Aſſignees of Satterthwaite, a Bankrupt, v. Devonſhire and others 202
Foxham Tithing, in Wilts, Caſe 680
Froth, or Frith, v. Tarin 87
Freeman v. Bernard 97
Frazier's Caſe 146
Frontin v. Small 146
French's Caſe 164
Fromanteel v. Williams 187
Freſhwater v. Eaton 272
Framework-Knitter's Company v. Green 291

Page.
French, Executor of Squire, v. Trewin 320
Frontin v. Small 322
Franklyn v. Reeve 356
Frontin v. Small 360
Francis v. Wyatt 377
Freſcobaldi v. Kinaſton 421
Franklyn v. Reeve 423
Freke, or Beck, v. Thomas 473
French's Caſe 506
Francis v. Wyatt 568
——— v. ——— 772
——— v. ——— 777
——— v. Naſh 594
Frontin v. Small 610
Freeport, Pariſh of, Caſe 685
Frankland, Lady, v. Shanim 701
Freeman v. Blewitt 722
——— v. Shotter 759
——— v. Jugg 770
French qui tam v. Wiltſhire 800
Frogmorton, on the Demiſe of Bramſton, v. Holiday and others 832
Freeman v. Blewitt 833
Fuller's Caſe 589
——— v. Jocelyn 594
——— v. Johnſon Ibid.
——— v. Smith 802

G.

GATELY v. Gillingham 6
Gatehouſe v. Row 22
Gay v. Croſs 27
Graves v. Blanchett 31
Garnet v. Clarke 37
Garner v. Anderſon 65
——— v. Merrott 71
Gardinor v. Merrott 71
Garibaldo, or Genbaldo, v. Cagnoni, or Cognoni 164
Gammage v. Watkin 172
Garbrand v. Allen 205
Gale v. Till 303
Garland v. Extend, or Exton 306
Garden v. Exon Ibid.
Gardiner v. Croaſdale 337
Gardner v. Merrott 422
Galloway v. Suſach 447
Gale v. Till 470
Garland qui tam v. Burton 560
Gardiner v. Croaſdale 575
Gainſborough, Executor of Gainſborough v. Follyard 595
Gay v. Croſs 629
Gatton Pariſh v. the Pariſh of Milwich 595
Gander, Peter's Caſe 749
Gardner v. Booth 756
Galizard v. Rigault 760
Gay v. Croſs 797
Gardiner v. Croaſdale 337
Gay v. Croſs 834
Garibaldo v. Cagnoni 111
Gardner v. Claxton 417
Gambier v. Wright 431
Gardinor v. Holt 550
Gatton Pariſh v. the Pariſh of Milwich 682
George v. Powell 11
Genner v. Sparks 112
George v. Pierce 133
George, St. Southwark, v. St. Margaret's Weſtminſter 220
Gerard, Lord, v. the Lady Gerard 379
George, St. Hanover-Square, the Rector, &c. v. Stewart 389
George, on the Demiſe of Bradley, and others, v. Wiſdom 401
Gerrard v. Arnold 409
George, on the Demiſe of Bradley, and others, v. Wiſdom 426
Geery v. Hopkins 449
George v. Pierce Ibid.

Page.
Gery v. Bayly 730
Gerrard, Sir Samuel's Caſe 807
George v. Pierce 475
Gerard, Lord, v. Lady Gerard 485
Germain, or Germin, and Wife, v. Orchard 502
Geery v. Hopkins 505
George, St. Southwark, v. St. Margaret's, Weſtminſter 681
Gerard, Lord, v. Lady Gerard 714
George v. Powell 730
George's, St. Southwark, v. St. Margaret's, Weſtminſter 744
Gerrard v. Delaval 747
Gegge v. Jones 765
George, St. Hanover-Square, v. St. James, Weſtminſter 783
George v. Pierce 797
George, St. Hanover Square, Rector of, v. Stewart 389
George, St. Pariſh of, v. the Pariſh of St. Olave Southwark 683
Gery v. Bayly 731
Gerrard, Sir Samuel's Caſe 807
Gilbert v. Bath 7
Gill qui tim, &c. v. Breedon 77
Gibbons v. Dove 181
Gidden v. Drury 193
Giles, St. Pariſh of, in Reading, v. the Pariſh of Everſhy and Blackwater 224
Gimbart v. Pelah 377
Giggeer's Caſe 411
Gibbons v. Roberts 412
Gibbons v. Dove 414
Ginger v. Cowper, or Cowper v. Ginger 420
Gibſon v. M'Carty 463
Gidly v. Williams 472
Gifford's Caſe 485
Gilbert v. Bath 581
Gidden v. Drury 629
Giles, St. in the Fields, Pariſh of, v. the Pariſh of Weybridge in the County of Surry 682
Giles, St. in Reading, Pariſh of, v. the Pariſh of Everſhy and Blackwater 688
Giles v. Hart 711
Gilman, or Holman, v. Hoare 716
Gibbons v. Pepper 717
Gidley v. Williams 722
Gilbert v. Parker and others 770
Gilbert v. the Inhabitants of Puddle's Gate 806
Gifford v. Letchmere 809
Gidden v. Drury 817
Giles, St. in the Fields, Pariſh of, v. the Pariſh of Weybridge, in the County of Surry 89
Gibbs v. Walkley 410
Giles, John's Caſe 637
——— St. Cripplegate, Pariſh of, v. the Pariſh of Hackney 672
Glynn v. Yates 166
Glover v. Cope 319
——— v. Cape 432
——— v. Black 576
——— v. Heathcot 737
Glynn v. Yates 837
Goodtitle v. Petto 157
Goodwin v. Godwin 6
Goſwell v. Dunkley 18
Gould v. Johnſon 27
Goddard v. Smith 34
Goring v. Biſhop 140
Goodchild v. Chaworth 171
Goodwin v. Godwin 181
Gordon v. Halken and Wife 215
Gould v. Johnſon 275
Gordon v. Martin 276
Goodwin v. Hilton 306
Goodwin v. Godwin 351
Godolphin and Wife v. Tudor 365

Page.
Gooche, Dr. v. the Biſhop of London 388
Goodright v. Shuffill 397
——— v. Hart and others Ibid.
Goodtitle v. Holdfaſt Ibid.
——— v. Meymott 400
——— on the Demiſe of Cheſter,
——— v. Alker and Elmes Ibid.
Gould v. Couldthurſt 416
Goodright v. Hugoſon 423
Goring v. Evelin 445
Godfrey v. Norris 455
Goater v. Nunnely 466
Goodwin v. Hilton 475
Goſlin v. Elliſon 484
Goodburn v. Marley 501
Goodtitle v. Meymott 73
Goodright v. Opie 513
Goodtitle, on the Demiſe of Cheſter, v. Alker and Elmes 517
Goddard v. Smith 534
Gordon v. Morley. Campbell v. Bordieu 574
Godin and others v. the London Inſurance Company Ibid.
Goſs and another v. Withers; Idem v. Eundem 575
Goodtitle v. Thruſtout 599
Goodright v. Opie 611
Goſs v. Nelſon Ibid.
Gould v. Johnſon 615
Godin and others v. the London Inſurance Company 658
Goddard v. Smith 661
Godolphin v. Tudor 667
Godſton, Pariſh of, v. the Pariſh of Eaſt Grinſtead 677
Goddard v. Cox 714
Gordon v. Halpen and his Wife 738
Godfrey v. Llewellin 757
——— v. Goudier 770
Goodwin v. Beckham 775
——— v. Peck Ibid.
Goodtitle v. Petto 805
Godfrey v. Philpot 808
Goodright v. Corniſh 820
Governors and Company for ſmelting down Lead, &c. v. Richardſon, Eſq; 790
Goodright, on the Demiſe of Liſle, v. Pullen and others 826
Gore v. Gore 827
Goodtitle, on the Demiſe of Hayward v. Welby 829
Godman and others v. Goodright, Leſſee of Richard Williams and Annabella his Wife 831
Goddard v. Gilman 837
Goodtitle, on the Demiſe of Bridges, v. the Duke of Chandois 792
Grovenor v. Stephens 6
Gray v. Mendez 7
Grabborn v. Railer 60
Grant v. Baily 140
Gregg's Caſe 142
Gregſon v. Heather 186
Greenway v. Freeman 193
Grey v. Mendez 195
Grace v. Heyham 197
Grayham v. Benton 199
Groenvelt v. Dr. Burwell, Cenſor of the College of Phyſicians and others 219
Grant v. Vaughan 240
Grenville, or Groenvelt, Dr. v. the College of Phyſicians 253
Groenvelt, Dr.'s Caſe 264
Gregory's Caſe Ibid.
Green v. the Mayor of Durham 300
Grant v. Baily 305
Granville v. Vincent 309
Groenville, or Greenvelt, Dr. v. the College of Phyſicians 316

Page.
Griffith v. Harriſon 320
Green v. Home Ibid.
Greſcot v. Green 321
Groenvelt, Dr. v. the College of Phyſicians 349
Green, Executor of —— v. Crane 350
Griffith's Caſe 365
Graves v. Blanchett 31
Grey v. Jefferſon 172
Grovenor v. Soame 184
Greenway v Freeman 269
Griffith's Caſe 273
Grant v. Vaughan 358
Gray v. Aſhton 366
Green v. Waller 371
Griffin v. Scot et al'. 376
Gree v. Rolle and Newell 392
Grumble v. Bodilly 395
Groenvelt v. Burwell and others 409
Groſvenor, or Gravenor, v. Stephens 415
Gravenor v. Salter 419
Grant v. Southers 429
Groenvelt, Dr. v. Dr. Burrel, &c. 444
Green v. Waller 450
—— v. Brown 467
Grant v. Baily 472
Gradell v. Tyſon 480
Greetham, Widow, v. the Inhabitants of Theale 518
Gradell v. Tyſon 520
Green v. Young 571
—— v. Brown 572
Griffith's Caſe 593
Graves v. King Ibid.
Groenvelt v. Dr. Burwell et al'. 597
Great Chate and Kenning, between the Pariſhes of 605
Green v. Rivett 615
—— or Dean, v. Crane Ibid.
Grey v. Mendez 616
Green v. the Mayor of Durham 639
Graham, or Garnham, v. Bennet 6,0
Green v. Young 657
Gree v. Rolle and Newell 660
Green v. Gauntlett 663
Green v. Giffard 664
Grindon, in Northamptonſhire, Pariſh of, v. the Pariſh of Overcatt in Warwick; or the Pariſh of Overcott v. the Pariſh of Grindon 675
Green v. Mooer 700
—— v. Walter 704
Griffith v. Harriſon 717
Green v. Waller 726
Grey v. Mendez 733
Griffith's Caſe 735
Greenhouſe v. Clewer 748
Grimly v. Faulkingham 755
Groenvelt, Dr. v. Dr. Burrell, &c. 766
Green v. Watts Ibid.
Grant v. Burton 767
Gregg's Caſe 773
Greagſon v. Heather 808
Green v. Revett 834
Gravener v. Salter 366
Grant v. Vaughan 802
Grumble v. Jones 824
Guilliam v. Hardy 147
—— v. —— 252
Guy and Wife v. Kitchiner et al'. 341
Guiliford, or Culliford, v. De Cardonell, or Cardonmy 667
Guilliam v. Hardy 315
—— v. Hardiſty 775
Gwam and Ward v. Roe 147
Gwin v. Thornborough 317
Gwynn v. Pie 390
Gynn v. Kirby 144
Gyſe v. Ellis 731

Page.
H.

HAYWARD v. Davies et al'. 3
Hackett v. Tilly 5
Hard's Caſe 22
Harriſon, or Harris, v. Cage and Wife 23
Haſſer v. Wallis 36
Harman v. Delany 42
Harris v. Huntback 49
Harner v. Davys 59
Hansford v. Mead 60
Hatton v. Walker 71
Hales v. Taylor 106
Harriſon v. Grundy 108
Hawkins v. Coleclough 109
Harriſon v. Thornborough 116
—— v. —— 122
Hannam v. Woodford 127
Hall v. Miſter 131
—— v. Hill and others 133
Habin's Caſe 139
Hawker v. Hinton 145
Harman v. Owden 151
Hayman v. Rogers 155
Hall v. Howes 171
Harvey of Comb's Caſe 178
Hammond v. Webb 182
Hange, Aſſignee of Caſewell and Billers, v, Manning 186
Hartop, Sir John, v. Alderman Hoare, et al'. 191
Harvey v. Williams 192
Hare v. White 204
Harriſon v. —— 207
Harwood v. Parrot 208
Hall v. the Wife of William Yates, Executrix to her Huſband 212
Harriſon v. Bearcliffe and Wife 217
Hackſhaw v. Clerke 226
Hawkins v. Gardner Ibid.
—— v. Cardy Ibid.
Hart v. King 227
Harriſon v. —— 228
Harvey v. Perrit 231
Hayward v. the Bank of England 234
Harris v. Benſon 237
Hamilton v. Mackrell 238
Haydock, Henry, v. Roger Lynch 237
Hacket v. Tilly 243
Hamley v. Hendon 247
Harman v. Owden Ibid.
Hacket v. Glover 248
Hardwicke v. Gamball 272
Harriſon v. Cage and Wife 274
Harman v. Owden 275
Hayes v. Warren 276
Hammond v. Stewart 281
Hand v. Lady Dinely 282
Harris and Wife v. Hanna 310
Harris, Executor, v. Jones 314
Haws, Executrix, v. Saunders 315
Hannan v. Redman 321
Hacket v. Glover 324
Hampſtead-Water Farmer's Caſe 333
Hales, Sir Chriſtopher, v. Owen 340
Harvey v. Broad Ibid.
—— v. Porter 341
Haſtrop v. Haſtings 348
Hartford v. Jones 349
Hart v. Langfitt, or Longfield Ibid.
Harris v. Huntback 357
Hart v. Langfitt, or Longfield 364
Haiton et al'. v. Jeffreys 365
Hayward v. Kinſey 370
Hawker v. Hinton 372
Hatton v. Hatton 397
Hartop v. Holt 408
Hale v. Clare, or Claro 413
Hammond v. Webb 415
Hacket v. Marſhall 416
Hamilton, Dutcheſs of, v. Incledon Ibid.
Hawker v. Hinton 419

Page.
Hall and Wife v Woodcock 425
Hawks v. Crofton 426
Hatton, Sir William, v. Haſſel 439
Haines, Barley's Caſe 443
Hawkins v. Perkins 457
Hammond v. Stewart 458
Hall v. Hill and Wife, Adminiſtratrix 465
Harris v. Huntback 568
Harding v. Salkill 470
Hall v. Bond 473
Harriſon v. Wildon 481
—— and Wife v. Mitchell Ibid.
Harris, Executor, v. Jones 482
Hartop v. Hoare and others 483
Hamilton, Dutcheſs of, v. Incledon 486
Hains, Barclay's Caſe 488
Hardeſty v. Goodenough 494
Harcourt v. Fox 502
Hardwicke v. Gamball 512
Haſſel's Caſe 516
Hallet v. Byrt 518
Hays v. Warren 521
Hackett v. Tilly 522
Hall v. Stone 569
Harvey v. Broad Ibid.
Hamilton v. Mendes 576
Hall v. Stick 582
Harvey v. Peake 583
Harker and others v. Birkbeck and others 610
Harman v. Delany 613
Hall v. Wybourn Ibid.
Hatcher v. Fineaux 614
Hardwicke v. Gamball 616
Hartop, Sir John, v. Alderman Hoare 622
Hard's Caſe Ibid.
Haſſel's Caſe 632
Hartford v. Jones and others 646
Haines, or Hains, v. Jeffell, or Jeſcott 652
Harriſon, or Harris, v. Cage and Wife Ibid.
Hazard v. Treadwell 656
Harriſon v. —— 662
Harvey v. Porter 663
Hampſtead-Water Farmer's Caſe 665
Harcourt v. Fox 667
Hatton's Caſe 670
Hampton v. Lammas 673
Halſtead, Pariſh of, v. the Pariſh of Melford 677
Harriſon v. Lewis 678
Hasfield, Pariſh of, v. the Pariſh of Furley in Glouceſterſhire 691
Harman v. Renew 706
Harding v. Salkill 717
Hackſhaw v. Clerke 719
Harris v. Pitt Ibid.
Hall v. Engleſtone Ibid.
Haller, or Holler, v. Burch, or Buſh 720
Hartford v. Jones, &c. 721
Hatton v. Morſe 724
Hayward v. Davis and others 725
Harrington v. Buſh 728
Hammond v. Webb 729
Hawkſhaw v. Rawlings 730
Hayman v. Rogers 731
Hall v. Tullie 732
Harriſon v. Green Ibid.
—— v. Winchcombe 735
Haywys v. Savage Ibid.
Haggard v. Collington 736
Harvey v. Peake 743
Hart qui tam, &c. v. Hawkins 749
Hains v. Jeſcott 755
Hawkins's Caſe 756
Harrow's Caſe 760
Harriſon and Wife v. Mitchell 764
Hambleton v. Lancaſhire 767

Page
Harris v. Bernard 768
Hayn v. Bigg 788
Hatchell v. Griffiths 793
Haywis v. Savage 773
Harvey v. Wright Ibid.
Hallet v. Birt 769
Harper v. Davys 794
Hale v. Cove 799
Hamilton v. Style, and Wilkes v. Eames 800
Hartford v. Jones 802
Harper v. Davy 810
Hall v. Cove 812
Hawks v. Crofton 813
Harvey of Comb's Caſe 818
Haſtead v. Searle 821
Hallet, Eſq; and others v. the Eaſt India Company 714
Hardiſty v. Barny 774
Hartop v. Holt 775
Hanmer, in Com. Flint. and Elſmere in Com. of Salop, between the Pariſh of 782
Harvey v. Broad 835
Herbert v. Morgan 118
Herring v. Crocker 835
Hetherington v. Reynolds 6
Heyling v. Haſtings 23
Herbert v. Borſtow 29
Henley v. Roſſe 113
Heavyſide v. Davis 170
Heathcote v. Goſlin 172
Hen. Muffin, alias Peters, and others v. Sir William Morgan 187
Haſſelgrave, or Haſlegrave, v. Thomſon 356
Hellard v. ——— 188
Heavyſide v. Davis 196
Heſketh v. Braddock 330
Heylyn and others v. Adamſon 239
Hewſon v. Brown 261
Heſketh v. Braddock 263
Henchcliffe v. Payne 281
Henriques, Jacob Lopes, et al'. v. the General Privileged Dutch Company trading to the Weſt Indies 298
Heron v. Treyne 322
Herbert v. Waters 331
——— v. Morgan 336
Henly v. Roſſe 354
Heylyn and others v. Adamſon 357
Hele v. the Biſhop of Exeter 381
Herman, or Harman, v. Denne Renew Ibid.
Herbert v. the Dean and Chapter of Weſtminſter 387
Helbut v. Held 420
Henriques, Jacob Lopes, and others v. the General Privileged Dutch Company, trading to the Weſt Indies 421
Head and Tyler 433
Hern v. Nichols 452
Heſcot's Caſe 484
Hetherington v. Reynolds 506
Herbet v. Morgan 593
Herbert v. Waters 568
Heſketh v. Braddock 599
Hewet v. Bainard 598
Hermitage v. Tomkins 607
Heyling v. Haſtings 614
Heyward, or Hayward, v. Kinſey 614
Hernaman v. Bawden and others, Executors of Ford 664
Henbury v. Roſe 664
Heptonſtall Pariſh, v. the Pariſh of Evingdon in Yorkſhire 690
Herbert and others v. Burſtow 712
Hele v. the Biſhop of Exeter and others 716
Henderſon v. Williamſon 730
Hethoungton one, &c. v. Lowth 736
Herbert v. Griffiths 740

Page.
Hewſon v. Brown 743
Hern v. Scawel 728
Hetherington, one, &c. v. Lowth 753
Henriques, Jacob Lopez, and others v. the General Privileged Dutch Company, trading to the Weſt Indies 778
Heath v. Walker 801
Heathcoat's Caſe 807
Henriques, Jacob Lopes, and others, v. the General Privileged Dutch Company trading to the Weſt Indies 819
Heavyſide v. Davis 593
Herring v. Crocker 835
Highamſhire, Maſter, Warden and Company of Cutlers, v. Buſkin 303
Hibbord v. Coulthrop 20
Hicks v. Downling 21
Hillerſdon v. Skildroy 73
Hill et al'. v. Lewis 230
Higgins v. Jennings 309
Hickman v. Colley 312
Hicks v. Woodeſon 326
Hicks v. Jones 341
Hill v. Ayland 359
—— v. Gallop 362
Hillier v. Plympton 367
Higgs v. Evans 422
Hinchliffe v. Payne 430
Hiliard v. Phaly 458
Hill v. Bateman et al'. 460
—— v. Fleming 462
—— v. Mills 469
—— v. Mills Ibid.
Hilliard, or Siliard, v. Cox 472
Hicks v. Harris 496
Hinton v. Hern Ibid.
Hide v. Browning 507
Hicks v. Woodeſon 518
Hide, Bridget's Caſe 548
Hicks's Caſe 552
Hill v. Fleming and others 583
—— v. Bateman et al'. 603
Hicks v. Dowling, alias Smith v. Baker 606
Hinton v. Parker 611
Hide v. Partridge 615
——— v. ——— 648
Hinks v. Harris 652
Hilton v. Byron 658
Hill v. Wilks 701
Hillier v. Plympton 731
Hinks v. Harris 755
Hill v. Hill 797
Highmore v Walker 798
Hitchins v. Baſſet 820
Hilliard v Gennings 821
Hicks v. Jones 838
Hillier v. Froſt 67
Holm v. Hunter 25
Holmes v. Hall 33
Hoare v Dickinſon 43
Horton v. Kilmore 44
Hoyle v. Pitt 55
Hooper v. Pierce 97
Holmes v. Gordon 113
Howe v. Acton 133
Holderſtaffe v. Saunders 141
Holoway v. Thurſton 155
Holidy v. Fletcher 156
Holland v. Serjeant 159
Hoare v. Mingay one, &c. 172
How v. Granville 184
Hopkins v. Ellis 193
Howard v. Poole 198
Hockrell, or Hockley, v. Merry Ibid.
Howard and another, Executors, v. Jemmet, Executor, &c 203
Hodges v. Steward 225
Hoar v. Dacoſta 237
Holmes v. Barneham 242
Hotherſhell v. Bows Ibid.
Hollingſhead's Caſe 265

Page.
Hockley v. Lamb. At Wincheſter Lent Aſſizes 267
Hockley v. Lamb 267
How v. Acton 333
Holroi v. Ebizſon 334
Horton v. Kilmore 337
Holman v. Burrow 340
Holroi v. Ebizſon 345
Horton v. Kilmore 356
Howard, or Hoard, v. Tenniſon, or Jenniſon 367
Horn, or Horne, v. Lewin, or Luines 375
Hooker v. Hooker 380
Holt v. the biſhop of Winton 384
Hooper v. Dale 396
Holdfaſt v. Freeman and others 398
Howard v. Pitt 407
Hodgeſon v. Segrave 408
Holroi v. Ebizſon 415
Horne v. Buſhell 422
Horton v. Kilmore 423
Hotherſhell v. Bows 429
Howard v. Tremaine, or Tremain 441
Hoe v. Nelthorpe, or Nathrop 442
Hockley v. Lamb 444
How v. Acton 448
Holden v. Sutton 449
Hopkins v. Neale and another 462
Holdfaſt, on the Demiſe of Anſtey, v. Dowſing 467
Hodge v. Clare 468
Holdin v. Sutton 474
Holiday v. Fletcher 480
Hookin v. Quilter 482
Howard, Widow, and another, Executors, v. Jemmit, Executor 482
Holloway v. Smith 483
Hopman v. Barber 485
Hooker v. Wilks 500
Hollingſhead's Caſe 505
Hopman v. Barber 509
Holderſtaffe v. Saunders 532
Holt v. Ward 550
Holroi v. Ebizſon 569
Hodſon v. Richardſon 577
Horne v. Hunter 587
How v. Acton Ibid.
Holme v. Hunter Ibid.
Hodges v. Templer 590
Horton v. Kilmore 594
Hope, on the Demiſe of Brown and Wife, v. Taylor 611
Holleſter v. Coulſon 616
Holoway v. Thurſton Ibid.
Hodgkins and Wife v. Corbet and Wife 621
Hook v. Moreton 646
Honiton Pariſh v. the Pariſh of St. Mary-Axe 682
Horton Pariſh v. ——— 684
Horncaſtle v. the Inhabitants of Boſton 685
Hobey Pariſh v. Kingſbury 687
Hole v. Burgoigne 717
Horne v. Lewin 722
Horn v. Scawel 728
Holiday v. Fletcher 735
Holt v. Mabberley 738
Hopkins v. Squibb 751
Holiday and Pitt, and other Plaintiffs in ſeveral Suits, v. the ſame Defendant 753
Holmes v. Gordon 754
Hoſkins v. Lee 761
Houghton, Sir H. v. Starkey, Eſq; 762
Hodgkins and Wife v. Corbet and Wife 763
Horne v. Luines 770
Hook v. Galloway 802
How v. Acton 775
Howarth v. Willett 809
Holden v. Sutton 811
Hooper v. Shepherd 812

Page.
Hodſon v Richardſon 813
Holy Trinity Pariſh v. the Pariſh of Shoreditch 780
Holdfaſt, on the Demiſe of Anſtey, v. Dowſing 828
Howard and another, Executors, &c. v. Jemmet, Executor, &c. 743
Hope, on the Demiſe of Brown and Wife, v. Taylor 829
Hurd's Caſe 22
Hughes v. Alvarez 8
Hutchinſon v. Thomas 10
Hughes v. Burgeſs 18
Hutton v. Manſelle 31
Hunſton v. Howard 145
Hudſon v. Jones 147
Hutchinſon v. Smith 168
Hunter v. Sampſon et al'. Bail of Yardly 170
Hunt v. Coxe 174
Huſſey v. Fiddal 192
Hull v. Holliday 194
Hutton v. Manſell 210
Huggins v. Durham and Wife 2 4
Hubbert v. Watts and Wife 270
Hudſon and Wife v. Aſh 279
———— v. —— 207
Hunt v. Hargill 329
Huxfer v. Gapan 335
Hutton v. Stroubridge 341
Hutchins v. Chambers and others 377
Hunt v. Lawſon 409
Hunſton v. Howard 420
Huggins v. Durham and Wife 431
Hutchinſon v. Savage 477
Hubbert v. Watts and Wife 488
Hunt v. Bourne 490
Huſſey v. Jacob 500
Hudſon and Wife v. Aſh 508
Hutchins v. Chambers and others 605
Hunt v. Bourne 607
—— v. Burn 614
Huxfer v. Gapan 713
Hudſon, Executor of Grove, v. Stalwood and others, Executors of Stalwood 714
Huſſey v. Jacob 721
Huncer v. Wiſeman 736
Humphreys v. Churchman 739
Huxfer v. Gapan 804
Hutchins, Serjeant's Caſe 667
Hunt v Braines 769
Hurſt and another v. the Earl of Winchelſea 831
Hutchinſon v. Smith 837
Hubbard v. Sir Henry Penrice 709
Hyon v. Ballard 184
Hyder v. Warren 367
Hyleing v. Haſtings 548
Hyder v. Warren 736

I.

JACKSON qui tam, v. Giſling 10
Jacob v. Dallow 163
Jackſon v. Pigot 227
James v. Parſons 340
Jayſon v. Raſh 345
Jackſon v. Laveright 351
Jacob v. Dallow 383
Jackſon v. Humphry 429
Jarvis v. Hayes 465
Jackſon v. Bridge 473
Jarvis v. Hayes 656
James v. Fowks 719
Jackſon v. Laveright 729
Jaſper v. Groſvenor, Executor of Peake 738
Jacob v. Dallow 756
Jacky v. Butler 792
Jackſon v. Laveright 811
Jarnegan v. Harriſon 730
Ibbotſon's Caſe 497
Ibbotſon's Caſe 559

Page.
Idle v. Cook 436
Jefferies v. John Legendra 19
Jennings v Martin 175
Jenyns v. Gooultrey 187
Jenkins and Wife v. Plombe 208
———— v. Whitehouſe and another 218
Jenney and others v. Herle 234
Jenys v. Fawler et al'. 237
Jenkyns and Wife v. Plombe 333
Jefferies v. Dyſon 398
Jenniſon v. Ellis 409
Jeffry v. Wood 417
Jenkins and Wife v. Plombe 476
Jennings v. Rogers 490
Jeffry v. Barrow 512
—— v —— 520
Jefferies v. John Legendra 571
Jeſſon v. Collins, or Collins v. Jeſſat 658
Jefferies v. Legendra 656
Jenkins and Wife v. Plombe 661
Jenkins's Caſe 681
Jernegan v. Harriſon 730
Jevon v. Turner 777
Jennings v. Warne 800
Jenkins v. Whitehouſe and another 830
—— v. ———— 765
Iles v. Pitt 420
Ingram v. Foot 183
—— v. —— 122
—— v. Bernard 132
—— v. —— 133
Ingledew v. Cripps, or Gripps v. Ingledew 152
———— v. Crips, or Grips v. Ingledew 344
———— v. ———— 349
Ingram v. Foot 473
Ingle v. Wordſworth and others 772
Inman v. Crew 818
Ingle v. Wordſworth and others 314
Ingledew v. Cripps, or Grips v. Ingledew 85
Jones v. Bodeenor 1
Johnſon v. Altham 7
———— et al'. Aſſignees, &c. of H. a Bankrupt, v. Smith, Widow, Executrix, &c. 9
Johnſon and Wife v. Browning 32
Jones v. Wilſon 38
—— v. Gwynn 39
Johnſon v. Naylor 59
Jordan v. Twells 67
Johnſon v. Gardiner 125
———— v. Louth 113
———— v. Naylor 131
Jones v. the Earl of Bath 139
—— v. Bodiner 140
Johnſon v. Naylor Ibid.
———— v. Gardiner 155
———— and another, Aſſignees, &c. v. Smith, Widow, Executrix, &c. 157
Jordan v. Thomkins 163
Johnſon, Gabriel, v. James Laſerre 183
Jones v. Morley 204
Joſſelyn, or Joſceline, v. Lacier, or Laſcerre 232
Toms, or Thomas, v. Lloyd 304
Jones v. Wilſon 307
Jordan v. Harper 308
Jones v. Gwynn 334
—— v. Harris 337
—— v. Hammond 349
Joddrell v. Heathcot 351
Johnſon v. Altham Ibid.
———— v. Gardiner 352
Joddrell v. Heathcot 371
Johnſon v. Lee 382
———— v. Allen 391
Jordan v. Harper 395
Jones v. Edwards 400
—— v. Sweetapple 410
Johnſon v. Altham 415

Page.
Johnſon v. Jobb 426
———— and Wife v. Browning 451
Jones v. White 456
—— v. Maſon 461
Jordan v. Lewis 466
Jones v. Wilſon 478
Johnſon v. Gardiner Ibid.
———— v. Oxendon 484
———— v. Lee Ibid.
Jones v. Morley 488
—— v. Gwynn 536
—— v. Thurloe 567
—— v. Bodeenor 584
Johnſon v. Naylor 585
Jones v. Morley 614
Joſſelyn, or Joſceline, v. Lacier, or Laſcerre 616
Johnſon et al'. Aſſignees, &c. of Hargreaves, a Bankrupt, v. Smith, Widow, Executrix, &c. 618
Johnſon, or Jonſon, v. Shippin, or Shepney 647
Jones v Hart 654
Johnſon v. Long 665
Jones v. Pugh, or Beau 667
Johnſon, Sylvanus's Caſe 676
Joyford, Inhabitants of, and Solebury 685
Jones v. Bodenham 718
Johnſon v. Altham 728
Jordon v. Twells 739
Jones, Landen's Caſe 748
—— v. Bodiner 750
Johnſon v. Oxendon 755
Jones v. the Biſhop of Landaffe Ibid.
Johnſon v. Lee 756
Johns v. Oldham 758
Jones v. Stone Ibid.
Johnſon v. Ryſon 759
———— v. Bewick Ibid.
———— v. Shippen 760
John's College, Cambridge, Maſter and Senior Fellows of, v. Todington, Clerk 765
Johnſon v. Baynes 769
———— v. Wollyer 771
John, St. in the Town, Pariſh of, v. the Pariſh of Amwell, in the County of Hertford 781
Johnſon v. South 788
———— v. Allen 791
Jones v. Harris 801
—— v. Morley 805
Johnſon and another, Aſſignees of Hargrave, a Bankrupt, v. Smith, Widow, Executrix, &c. 839
Johnſon v. Altham 836
Jordan v. Barloe 228
Jodderel v. Cowell 325
Johnſon and others, Aſſignees, &c. of Hargrave, a Bankrupt, v. Smith, Widow, Executrix, &c. 742
Ireland's Caſe 712
Iſon v. Fowen 664
Judges, Reſolutions of 194
Juſtin v. Ballam 647
Ivinghoe Pariſh v. the Pariſh of Stonebridge 685
Iveſſon v. Moore 24
Iveſon v. More 586
Ivinghoe Pariſh, v. the Pariſh of Stonebridge 686

K.

KENDAL, or Coundell, v. John 36
Keeble v. Kickringill Ibid.
Keit's Caſe 120
Kieling v. Morrice 322
Kent, Earl of, v. Walters 332
—— v. Kent 336
—— v. Kerry 354
Keat v. Barker 368

Page.
Kent v. Kerry 380
—— v. Kent Ibid.
Kendall, or Coundell, v. John 403
Kent v. Kent 416
—— v. Wright 445
Keen, on the Demiſe of the Earl of Portſmouth, et al'. v. the Earl of Effingham 493
Keniſton, or Kynaſton, v. Freſcobaldi 549
Kent v. Barker 660
Kemp v. Andrews 716
—— v. Goodall 727
—— v. Andrews 790
Kent v. Blank 230
Kendall v. John 307
Key v. Gordon 448
Kendall, or Coundell, v John 597
Kentis Beer v. the Pariſh of Alberton 678
King and Wife v. Jones 8
—— v. the Archbiſhop of Armagh, and Nathaniel Whaley, Clerk 9
—— v. Powell 12
Kirkham v. Wheeley 21
King v. the Town of Andover 25
—— v. Biſhop of Cheſter et al'. 53
—— v. Robert Fielding Ibid.
—— v. Sir Henry Bond, Bart, Ibid.
—— v. Harris and others 56
—— v. Knolles Ibid.
—— v. Keat Ibid.
—— v. Lewis 59
—— v. Nixon 66
—— v. Seaward 69
—— v. Betts and others Ibid.
—— v. Hayes 70
—— v. Charleſworth 71
—— v. Clendon Ibid.
—— v. Ellames Ibid.
—— v. the Biſhop of Landaff 71
—— v. Putreſs et al'. 72
—— v. the Inhabitants of Great Bedwin 73
—— v. Roberts Ibid.
—— v. the Inhabitants of the Pariſh of Aicles 80
—— v. the Inhabitants of St George 81
—— v. the Inhabitants of Norton, Com. Salop Ibid.
—— v. the Inhabitants of Hedingham-Sible 82
—— v. the Inhabitants of Llanrhydd Ibid.
—— and Queen v. the Inhabitants of Glamorganſhire 83
—— v. the Inhabitants of Kirby-Stephen Ibid.
—— v. Foſter Ibid.
—— v. —— 84
—— v. Johnſon 85
—— v. Simpſon Ibid.
—— and Queen v. Prat 86
—— v. Gately 87
—— v. Fox Ibid.
—— v. Slaughter Ibid.
—— v. Margaſon 88
—— v. Hayes Ibid.
—— v. Johnſon Ibid.
—— v. the Inhabitants of Aicles Ibid.
—— v. Barnes 90
—— v. the Inhabitants of Hales Owen Ibid.
—— v. Vandeleer Ibid.
—— v. Gill 91
—— v. the Inhabitants of St. John the Baptiſt, within the Borough of the Devizes, Com. Wilts Ibid.
—— v. Davie 92
—— v. Collingbourn Ibid.
—— v. the Inhabitants of Woolſtanton 93

Page.
King v. the Inhabitants of Eaſt-Bridgeford 39
—— v. George Trevillion, Eſq; Ibid.
—— v the Inhabitants of Mawnan Ibid.
—— v. the Inhabitants of St. Helen's in Abingdon Ibid.
—— v. the Inhabitants of Eakring 94
—— v. the Inhabitants of Sudbury Ibid.
—— v. the Inhabitants of High and Low Biſhopſide Ibid.
—— v. the Inhabitants of St. Peter's in Nottingham 95
—— v. the Inhabitants of Auſtrey Ibid
—— v. the Inhabitants of Weſtbury Ibid.
—— v. the Inhabitants of St. Luke's in Middleſex Ibid.
—— v. the Inhabitants of Ecleſal-Bierlow in Sheffield Ibid.
—— v. the Inhabitants of St. Mathew's, Bethnal Green 96
—— v. the Inhabitants of Caſtleton Ibid.
—— v. Croſs 99
—— v. Kendall and Roe 110
—— v. Fowler Ibid.
—— v Selfe 118
—— v. Hayes Ibid.
—— v. Robinſon, Clerk 119
—— v. Fooley 132
—— v. Sims 133
—— v. Raw Ibid.
—— v. the Inhabitants of Mile-End Ibid.
—— v. Jones 135
—— v Barber Ibid.
—— v. Wiatt Ibid.
—— v. Ackworth and others Ibid.
—— v. Seymour Richmond Ibid.
—— v. Colvin 136
—— v. Dunbarr Ibid.
—— v. Burridge Ibid.
—— v. Burchet and his Attorney, and againſt the Town-Clerk of Guildford 137
—— v. Robinſon Ibid.
—— v. Hoſkins 138
—— v. Holland Ibid.
—— v. Beardmore 139
—— v. Plunket Ibid.
—— v. Wheeler Ibid.
Kilby v. Weybery 140
King v. the Town of Andover Ibid.
—— v. Brown Ibid.
—— v. Pepper 145
—— v. Fielding, Eſq; 146
—— v. Dixon 147
—— and Queen v. Portington et al' 149
—— v. Hebberd Ibid.
—— and Queen v. Knollys Ibid.
—— v. Franklin 156
—— v. Lady Lawley 157
—— v. Boyall Ibid.
—— v. Pemberton 158
—— v. Sharpe Ibid.
—— v. Purſey 161
—— v. Pepper 168
—— v. the Earl of Aileſbury 175
—— v. Keat 176
Kirk, Captain's Caſe Ibid.
King v. Daviſon 177
—— v. Purſey Ibid.
—— v. Stukely Ibid.
—— v. Windham 178
—— v. Biſhop Ibid.
—— v. Sarah Saliſbury Ibid.
—— v. Earbery 179
—— v. Reader Ibid.
—— v. the Bail of Strudwick Ibid.
—— v. Kimberly Ibid.
—— v. Acton Ibid.
—— v. Dalton 180
—— v. Grenwood Ibid.
—— v. Sidney Ibid.

Page.
King v. White and others 180
—— v. Chetwynd Ibid.
—— v. W. Clark, Eſq; Ibid.
—— v. Baptiſt Rebord Ibid.
—— v. Sharp Ibid.
—— v. Dawes 183
Kitton v. Fag 185
King v. Cole 192
Kirney v. Smith et al'. Ibid.
Kiggil v. Player 194
King v. Soloman Nathan 197
—— v. John Perrot 202
—— and Wife v. Baſingham 214
—— v. Azire Ibid.
—— and Wife v. Jones 215
—— v. Brotherton 216
—— v. Frederick and Tracy 217
—— v. Dr. Bettefworth Ibid.
—— v. Crofts Ibid.
—— v. Mead 218
—— v. Ellen Taylor, late Bent Ibid.
—— v. Barebaker Ibid.
—— v. the Inhabitants of Liſley Ibid.
—— v. the Inhabitants of Rillip, Hendon and Harrow 219
—— v. Albert Alberton Ibid.
—— v. Miles 221
—— v. England 222
—— v. Godfrey Ibid.
—— v. William Chandler Ibid.
—— v. Warne Ibid.
—— v. Tenant Ibid.
—— v. Street Ibid.
—— v. Browne Ibid.
—— v. Helop 223
—— v. the Inhabitants of St. Peter's in Worceſterſhire Ibid.
—— v. Reading Ibid.
—— v. Jenkin, or Jenkins 224
—— v. the Inhabitants of Bedall in Yorkſhire Ibid.
—— v. Cornforth et al' 224
—— v. Moravia Ibid.
—— v. the Inhabitants of Hilton Ibid.
—— v. the Inhabitants of Wyke 225
—— v. Ellen Taylor, late Bent Ibid.
—— v. the Inhabitants of St. Nicholas in Harwich 250
—— v. the Inhabitants of Hilperton Ibid.
—— v. the Inhabitants of St. George's, Southwark; and the King v. the Inhabitants St. Olave's Southwark 251
—— v. the Inhabitants of High and Low Biſhopſide Ibid.
—— v. the Inhabitants of Taunton, St. Mary Magdalen Ibid.
—— v. Derbyſhire Ibid.
—— v. the Inhabitants of Wooton, St. Lawrence 251
—— v. the Inhabitants of Ipſley 252
—— v. North Ibid.
—— v. Haggard Ibid.
—— v. James Ibid.
—— v. Dutton and others Ibid.
—— v. Patting Ibid.
—— v. Levermore 253
—— v. Lamb Ibid.
—— v. Browne Ibid.
—— v. Worſenholm and Weeks Ibid.
—— v. Tomb 256
—— v. the Inhabitants of Warminiter 257
—— v. Wells Ibid.
—— v. Atho, Father and Son Ibid.
—— v. Gunſton 258
—— v. Puſey Ibid.
—— v. Fawle Ibid.
—— v. Sir Edmund Elwell Ibid.
—— v. Hayes Ibid.
—— v. Greenſhaw Ibid.
—— v. the Inhabitants of Hamworth in the County of Stafford Ibid.

Page.
King v. Elford 259
—— v. the Inhabitants of Uttoxeter, in the County of Stafford Ibid.
—— v. the Inhabitants of Eckerſhall Ibid.
—— v. the Juſtices of Shrewſbury Ibid.
—— v. Morgan Ibid.
—— v. Barnaby Ibid.
—— v. Welb Ibid.
—— v. Ferguſon Ibid.
—— v. Lewis Ibid.
—— v. Beſtland 260
—— v. Farewell Ibid.
—— v. the Inhabitants of Madley, in the County of Stafford Ibid
—— v. Elizabeth Nicolls Ibid.
—— v. Wakefield et al' Ibid.
—— v. Gwynne et al' Ibid.
—— v. Cowle Ibid.
—— v. Moreley and others Ibid.
—— v. the Inhabitants of St. Andrew's, Holborn, and St. George the Martyr 261
—— v. Midlam. Idem v. Eundem Ibid.
—— and Queen v. Warrington et al' Ibid.
—— v. the Warden of the Fleet Ibid.
—— v. Johnſon et al' 262
—— v. Burridge Ibid.
—— v. Bythel, or Bythell 263
—— v. Row and Kendall Ibid.
—— v. Fell 264
—— v. Chandler Ibid.
—— v. Symonds 265
—— v. Wyndham 266
—— v. Whitlock Ibid.
—— v. the Bail of Strudwick Ibid.
—— v. Catteral 267
—— v. Smith 267
—— v. Barns Ibid.
—— v. Joſeph Hall Ibid.
—— v. Ellen Taylor, late Bent Ibid.
—— v Fox Ibid.
—— v. Whitlock 272
—— v. Bernard 277
—— v. Hewſon, or the Caſe of the Village of Charley, or Chorley Ibid.
—— v. Beechcroft Ibid.
—— v Chalmer Ibid.
—— v. Hunt et al' 279
—— v. Lone 280
—— v. Davis and Goſling Ibid.
—— v. Dr. Franchard Ibid.
—— v. Goudge Ibid.
—— v. Bootie Ibid.
—— v. Derbyſhire Ibid.
—— v. Uritt 281
—— v. Burridge Ibid.
—— v. Burchett, his Attorney and the Town Clerk of Guildford Ibid.
—— v. Johnſon 282
—— v. Chandler, or Chalmer Ibid.
—— v. Weſton 284
—— v. Ford Ibid.
—— v. Aſhton 285
—— v. Beck 284
—— v. Johnſon Ibid.
—— v. Baker Ibid.
—— v. Tilly Ibid.
—— v. Landen Ibid.
—— v. Selfe Ibid.
—— v. Gage Ibid
—— v. Watſon Ibid.
—— v. Thorngood 285
—— v. Gibbs Ibid.
—— v. the Mayor and Aldermen of Carliſle Ibid.
—— v. Sparling Ibid.
—— v. Burchet, his Attorney, and the Town Clerk of Guildford Ibid.
—— v. Tuck, or Tucke Ibid.
—— v. Chaveney 286
—— v. Roberts Ibid.

Page
King v. Thead, or Theed 286
—— v. Popplewell Ibid.
—— v. Philip Wyatt Ibid.
—— v. Sir Edmund Elwell et al' Ibid.
—— v. Thomas Stone Ibid.
—— v. Kent Ibid.
—— v. Hawks Ibid.
—— v Catherall Ibid.
—— v. Heber Ibid.
—— v. Roberts Ibid.
—— v. Bryan Ibid.
—— v Sergiſon, Eſq; 287
—— v. Monkhouſe Ibid.
—— v. Baker Ibid.
—— v. Maurice Jarvis Ibid
—— v. Little Ibid.
—— v. Mullinſon Ibid.
—— v. Bell 288
—— v. Vipont and others Ibid.
—— v. Robotham Ibid.
—— v. Smith Ibid.
—— v. Hann and Price Ibid.
—— and Queen v. Bunney Ibid.
—— Stukely Ibid.
—— v. Atkinſon 289
—— v. Bond Ibid.
—— v. Wakefield Ibid.
—— v. Saunders Ibid.
—— v. Solgord Ibid.
—— v. Killinghall Ibid.
—— v. the Mayor and Aldermen of Hertford 291
—— v. the Mayor, &c. of Coventry 292
—— v. the Inhabitants of Shipping Farrington 305
—— v. the Corporation of Andover 293
—— v. the Borough of Abington 292
—— v the Mayor of Taunton, in the County of Somerſet 295
—— v the Mayor and Aldermen of the City of Carliſle 296
King v. the Mayor and Common Council of Bedford 296
—— v the Mayor, &c. of Tregory Ibid.
—— v. the Mayor and Aldermen of Carliſle Ibid.
—— v. the Mayor of Kingſton upon Hull Ibid.
—— v. the Mayor of Tiverton 297
—— v. Hearle or Serle Ibid.
—— v. Poole 298
—— v. White Ibid.
—— v. the Mayor, &c. of Derby Ibid.
—— v. Ellis 299
—— v. Tordan Ibid.
—— v. Holliſter Ibid.
—— v. Tomlyn and others 300
—— v. Richardſon 301
—— v. the Mayor, Bailiffs, and Common Council of the Town of Liverpoole Ibid.
—— v. the Maſter and Wardens of the Company of Surgeons in London Ibid.
—— v. Sir Thomas Harriſon, Chamberlain of London 302
—— v. the Vice Chancellor, &c. of Cambridge Ibid.
—— v. Spencer, Common Councilman of Maidſtone Ibid.
—— v. Edwards 304
—— v. Poland 307
—— v. Powell Ibid.
—— v. Earl 309
—— v. Moore 310
—— v. Howell 311
—— v. Carpenter Ibid.
—— v. James Ibid.
—— v. the Inhabitants of Glaſſonby in Cumberland Ibid.
—— v. Woodfall 312

Page.
King v. Sidney 312
—— v. Gibſon 315
—— v. Roger Philips 313
—— v. William Lewis, Capital Burgeſs of, and Alderman of New Radnor Ibid.
—— v. Palmer and Baine, Eſq; and others Ibid.
—— v. Toler 316
—— v Gilbert Ibid.
—— v. Plunket, Eſq; 314
—— v. Elliot 318
—— v. Heydon, Head, and Roper 314
—— v. Morely and others 319
—— v. Roger Phillips, Mayor of Carmarthen Ibid.
—— and Wife v. Baſingham 336
Kinſay v. Hayward 338
King v. Dixon 314
—— v. Everard 338
—— v. Righton, Eſq: 315
—— and Queen v. Hicks 342
—— v. Colvin 333
—— and Queen v. Baſingham 354
—— v Beck 361
—— v Grove 363
—— v. Midlam. Idem v. Eundem 315
—— v. Layer 365
—— and Queen v. Larwood 366
—— v. Chalke 372
—— v. the Mayor of Coventry 373
—— v, the Mayor, &c. of Doncaſter Ibid.
—— v. Richardſon Ibid.
—— v. the Mayor, Bailiffs, and Common Council of the Town of Liverpool Ibid.
—— v. the Biſhop of Cheſter et al' 381
—— v. Sanchee 383
—— v. White 387
—— v. the Biſhop of Durham 389
—— v. the Archbiſhop of Armagh, and Nathaniel Whaley Ibid.
Kildare, Lord, v. Fiſher 395
King v. Unitt Ibid.
—— v. the Mayor and Common Council of Bedford 404
—— v. the Mayor and Aldermen of Carliſle Ibid.
—— v. the Mayor of Whitechurch, &c. Ibid.
—— v. the Mayor of Tiverton 405
—— v. Plympton 406
—— v. Davis Ibid.
—— v. Pitt Ibid.
—— v. Heydon Ibid.
—— v. the Rector of St. Ann's Soho Ibid.
—— and Queen v. Knollys, or Knolles 407
—— v. Sir Henry Bond, Bart. 409
—— v. the Dean and Chapter of Trinity Chapel, Durham 417
—— v the Archbiſhop of Armagh and Jackſon 418
—— v. Earbery 419
—— and Wife v. Jones 421
—— v. the Inhabitants of All Saints in Derby, and others 424
—— v. the Archbiſhop of Armagh, and Nathaniel Whaley, Clerk Ibid.
—— v. Fell 427
—— v. —— 428
—— v. Croſſe Ibid.
—— v. Dunbar 431
—— v. Kempe, or Kemp 432
—— and Queen v Feras 440
—— v. the Inhabitants of Hornſey Ibid.
—— v. Lord Preſton 441
—— v. Paine Ibid.
—— v Croſby 442
—— v. Davis and Carter Ibid.
Kingſtone v. Grey 443

King

Page.
King v. Sir Richard Raines, Judge of the Prerogative Court 444
—— v. Whiting Ibid.
—— v. the Warden of the Fleet 445
—— v. Kirk and Cage 446
King v. Sims 448
King v. Croſs Ibid.
King v. Daws 449
—— v. Worſenham and others Ibid.
Kinſman v. Crooke 452
King v. Motherſill 455
—— v. Arnold Ibid.
—— v. Smith 457
—— v. Tilly Ibid.
—— v. Hall Ibid.
—— v. Gwynn, Mayor of Chriſt-Church Ibid.
—— v. Reaſon and Tranter Ibid.
—— v. Layer 459
—— v. Smart Ibid.
—— v. Moiſe Ibid.
—— v. Purſell Ibid.
—— v. the Biſhop of Cheſter Ibid.
—— v. Fletcher 460
—— v. Azire Ibid.
—— v. Travers Ibid.
—— v. Fox 461
—— v. Reeks Ibid.
—— v. Rhodes Ibid.
—— v. Morice Ibid.
—— v. Reading 462
—— v. Nunez Ibid.
—— v. Sherman and Idle 463
—— v. Robins 464
—— v. Bray Ibid.
—— v. Frederick and Tracy 465
—— v. Hebden Ibid.
—— v. Ellis Ibid.
—— v. Watkinſon 466
—— v. Bridgman Ibid.
—— v. Cornelius et al' Ibid.
—— v. the Fraternity of Hoſtmen in Newcaſtle upon Tyne 467
King v. Ayloff 468
—— v. Richard Raynes 471
—— v. Earle 479
—— v. Betteſworth 480
—— v. ———— Ibid.
—— v. ———— 481
—— v. ———— 482
—— v Sir Edward Simpſon Ibid.
—— and Queen v. Waite 494
—— v. Harris Ibid.
—— v. Bengough Ibid.
—— v. Dorny Ibid.
—— v. Brown Ibid.
—— v. Jones 495
—— v. Sir Edmund Elwell and others Ibid.
—— v. Storr Ibid.
—— v. Bake, and fifteen others Ibid.
—— v. Wilſon 498
—— v. Yaites 499
—— v. Tiler Ibid.
—— v. Gage Ibid.
—— v. Burchet, his Attorney, and the Town-Clerk of Guildford Ibid.
—— v. John Hill Ibid.
—— v. Buck Ibid.
—— v. Chipp 499
—— v. Gardner 500
—— v. Luckup 501
—— v. Dixon and Wife Ibid.
—— v. Kempe, or Kemp 503
—— v. Hornby Ibid.
—— v. the Biſhop of Cheſter et al' Ibid.
—— v. Bethel, or Bythell 504
—— v. Leaſon and Edwards Ibid.
—— v. Row and Kendall Ibid.
—— v. Margaſon Ibid.
—— v. Fowler Ibid.
—— v. Daviſon 505
—— v. Mary Hill Morton 507
King v. Gibſon 507
—— v. Hawkins 508
—— v. Leonard Ibid.
—— v. Mackintoſh Ibid.
—— v. Clarkſon et al' Ibid.
—— v. Walter Ibid.
—— v. the Biſhop of Rocheſter, Mr. Shelly, and Mr. Cockran Ibid.
—— v. Layer 509
—— v. Colvin Ibid.
—— v. Johnſon Ibid.
—— v. Kimberley Ibid.
—— v. Catterall Ibid.
—— v. Wright Ibid.
—— v. Smith Ibid.
—— v. Dr. Shebbeare 510
—— v. Mead Ibid.
—— v. Davis Ibid
—— v. Earl Ferrers Ibid.
—— v. Barnard Schiever, a Swede Ibid
—— v. Burbage Ibid.
—— v. Clarke Ibid.
Killow v. Rowden 511
King v. the Inhabitants of Hornſey 414
—— and Queen v. Buckeridge et al' Ibid.
—— v. the Inhabitants of Newington Ibid.
—— v. Dixon and Hollis Ibid.
—— v. the Pariſh of Ragley Ibid.
—— v. Hammond 516
—— v. the Inhabitants of Hamworth, in the County of Stafford Ibid.
—— v. Correck Ibid.
—— v. the Inhabitants of Stroud Ibid.
—— v. the Inhabitants of the County of Surry 517
—— v. Hindſon Ibid.
—— v. the Inhabitants of Eckerſhall Ibid.
—— v. Farewell Ibid.
—— v. the Inhabitants of Flecknow Idid.
—— v. Boyall Ibid.
—— v. the Juſtices of Peace for Wiltſhire Ibid.
—— William v. the Inhabitants of the Hundred of Biſhops Sutton, in Hants 518
—— v. the Biſhop of Meath in Ireland 520
—— v the Biſhop of Landaff 521
—— v. Fitzgerald 522
—— and Queen v. Fezas Ibid.
———— v. Alſop Ibid.
———— v. Marriot Ibid.
———— v. Tucker 523
———— v. Clerk Ibid.
———— v. Ball Ibid.
———— v. Harwood Ibid.
———— v. Whitehead Ibid.
———— v. Buggs Ibid.
—— v. Wood Ibid.
—— and Queen v. Trobridge Ibid.
———— v. Wadſworth Ibid.
—— v. Hall Ibid.
—— v. Holliday 524
—— v. Harper Ibid.
—— v. Hemmings, or Commings, and Ghent Ibid.
—— v. Stocker Ibid.
—— v. Walcot Ibid.
—— v. Hill Ibid.
—— v. the Inhabitants of Belton Ibid.
—— v. Tumock Ibid.
—— v. Keate Ibid.
—— v. Bakeſtraw Ibid.
—— v. Cooper Ibid.
—— v. Cranfield 525
—— v. Stonehouſe Ibid.
—— v. Savill Ibid.
—— v. Atkinſon Ibid.
—— v. Gorge Ibid.
—— v. Brown Ibid.
Page
King v. Bradford 525
—— v. Bracy Ibid.
—— v. Gluff, or Clough Ibid.
—— v. Penn Ibid.
—— v. Holroy Ibid.
—— v. Cook, Snatt, and Collier Ibid.
—— v. Fell 526
—— v. Kitchner Ibid.
—— v. Stainford Ibid.
—— v. Savage et al' Ibid.
—— v. Sir Henry Bond, Bart. Ibid.
—— v. Robert Ibid.
—— v. Dixon and Hollis Ibid.
—— v. Beechcroft Ibid.
—— v. Pheaſant Ibid.
—— v. Fox Ibid.
—— v. Hoſkins Ibid.
—— v. Slaughter Ibid.
—— v. Llueilin Ibid.
—— v. Everard Ibid.
—— v. Newman 527
—— v. Bell Ibid.
—— v. Harris Ibid.
—— v. Sellinger Ibid.
—— v. Walden Ibid.
—— v. Brown, or Browne Ibid.
—— v. Goat Ibid.
—— v. Purſey Ibid.
—— v. Morgan et al' Ibid.
—— v. Cranmer Ibid.
—— v. Croſs Ibid.
—— v. Pigot 528
—— v. Orbevill Ibid.
—— v. ———— Ibid.
—— v. Sir Polycarp Wharton et al' Ibid.
—— v. Eller Ibid.
—— v. Fuller Ibid.
—— v. Marks Ibid.
—— v. Summers Ibid.
—— v. Winteringham 537
—— v. Dixon and Wife Ibid.
—— v. Powell Ibid.
—— v. Dawſon Ibid.
—— v. Corrock Ibid.
—— v. Loggen and Froome Ibid.
—— v. Turner et al' 537
—— v. Carter Ibid.
—— v. Selfe 538
—— v. the Journeymen Taylors of Cambridge Ibid.
—— v. Gray Ibid.
—— v. Sprigg and Oakley Ibid.
—— v. Maſon 539
—— v. Atho, Father and Son Ibid.
—— v. Hotch Ibid.
—— v. Gibbs Ibid.
—— v. Layer Ibid.
—— v. Crowhurſt Ibid.
—— v. Reeves Ibid.
—— v. Weſton et al' Ibid.
—— v. Weſtbury 540
—— v. Chandler Ibid.
—— v. Roberts Ibid.
—— v. Edwards et al' Ibid.
—— v. Polland, or Pollard, and Taylor Ibid.
—— v. Buck Ibid.
—— v. How Ibid.
—— v. Travers Ibid.
—— v. Warre et al' 541
—— v. Edwards Ibid.
—— v. Rhodes Ibid.
—— v. Channell Ibid.
—— v. Malland Ibid.
—— v. Myne and others Ibid.
—— v. Wynd et al' Ibid.
—— v. Upton Ibid.
—— v. Martham Bryan Ibid.
—— v. Fiſher and Saunders Ibid.
—— v. Taylor Ibid.
—— v. Clendon Ibid.
—— v. Lady Lawley 542
—— v. Stoughton Ibid.

King

Page.
King v. Japhet Crooke 542
—— v. Lowe Ibid.
—— v. Philips et al' Ibid.
—— v. Moore Ibid.
—— v. Francis et al' Ibid.
—— v. the Inhabitants of All Saints and St. Mary's 543
—— v. Pewteras Ibid.
—— v. Layer Ibid.
—— v. Sutton Ibid.
—— v. Weſtbeer Ibid.
—— v. Jones 544
—— v. Obrian Ibid.
—— v. Bailey Ibid.
—— v. Margaret Cooper Ibid.
—— v. George Trivilian, Eſq; Ibid.
—— v. King et al' Ibid.
—— v. Strong Ibid.
—— v. White and Ward Ibid.
—— v. Goddard Williams 545
—— v. Elizabeth Sarmon Ibid.
—— v. Wright, Clerk Ibid.
—— v. Robert Robertſon, Clerk. 546
—— v. Bootie Ibid.
—— v. Boyall Ibid.
—— v. Spragg and another Ibid.
—— v. Pemberton Ibid.
—— v. Wheatly Ibid.
—— v. Dunnage Ibid.
—— v. Higginſon 547
—— v. Riſpal Ibid.
—— v. Philip Carteret Webb, Eſq;
The ſame v. the ſame Ibid.
—— v. Felix M'Donogh Ibid.
—— v. Gillet Ibid.
—— v. Atkins Ibid.
—— v. Storr Ibid.
—— v. Oſborn Ibid.
—— v. Bake and fifteen others Ibid.
—— v. Crookes Ibid.
—— v. Lookup Ibid.
—— v. Dilliſon 548
—— v. Cole Ibid.
—— v. the Mayor of Taunton, in the County of Somerſet 557
—— v. Clackſton 549
—— v. Johnſton 549
—— v. Travers Ibid.
—— v. Dr. Betteſworth 550
—— v. Smith Ibid.
—— v. White Ibid.
—— v. Hicks 551
—— v. Roberts Ibid.
—— v. Hill Ibid.
—— v. Gregory Ibid.
—— v. Thorpe and others Ibid.
—— v. Greep Ibid.
—— v. Lambert 552
—— v. Gaul, or Gall Ibid.
—— v. Knight and Burton Ibid.
—— v. the Borough of Abington 553
—— v. Dummer Ibid.
—— v. Lawrence Ibid.
—— v. Taylor Ibid.
—— v. Warburton Ibid.
—— v. Clerk Ibid.
—— v. the Mayor and Aldermen of Hertford 554
—— v. Hathaway Ibid.
—— v. Lewis 556
—— v. the Inhabitants of the City Norwich Ibid.
—— v. Nixon 557
—— v. Drew Ibid.
—— v. Bickerton Ibid.
—— v. Okey Ibid.
—— v. the Mayor and Burgeſſes of Malmſbury Ibid.
—— v. the Inhabirants of Surry Ibid.
—— v. Green. Idem v Rooper Ibid.
—— v. Sir Charles Holloway Ibid.
—— v. the Mayor of Tiverton 558
—— v. Butler Ibid.

Page.
King v. Tuck, or Tucke 558
—— v. Nicholls Ibid.
—— v. Edwards Ibid.
—— v. the Mayor of Monmouth Ibid.
—— v. Lady Lawley 559
—— v. Clendon Ibid
—— v. Baxter Ibid.
—— v. Jocamb Ibid.
—— v. Neal Ibid.
—— v. Angell Ibid.
—— v. Robe Ibid.
—— v. Green Ibid.
—— v. Morgan Ibid.
—— v. Howell 560
—— v. Con. Philips and others Ibid.
—— v. the Overſeers of the Poor of the Town of Sportland Ibid.
—— v. James Ibid.
—— v. Lord Offulſton et al' Ibid.
—— v. Woodfall Ibid.
—— v. Ford Ibid.
—— v. Thomas Sergiſon, Eſq; Ibid.
—— v. Groſvenor 561
—— v. Hendricks Ibid.
—— v. Joſeph Chaplin Hankey, Eſq; Ibid.
—— v. Goddard Williams Ibid.
—— v. Collingwood Foſter, Edward Gallon, Geo. Selby, and Thomas Mills Ibid.
—— v. Peach and others Ibid.
—— v. Young and Pitts, Eſq; Ibid.
—— v. Stephens 562
—— v. Williams Ibid.
—— v. Robert Chappel Ibid.
—— v. Fielding Ibid.
—— v. William Lewis, Capital Burgeſs and Alderman of New Radnor 563
—— v. Athay, Eſq; Ibid.
—— v. Fielding, Eſq; Ibid.
—— v. Benfield and Saunders Ibid.
—— v. the Corporation of Caermarthen 563
—— v. Palmer and Baine, Eſqrs. and others 564
—— v. Heydon and four others Ibid.
—— v. Heydon, Head and Roper Ibid.
—— v. Williams. Idem v. Davis Ibid.
—— v. Bayles and others, Juſtices of the City of Glouceſter Ibid.
—— v. Pitt. Idem v. Mead Ibid.
—— v. Latham and others, ſix of the Burgeſſes of Wigan Ibid.
—— v. Phillips, Lucas and others Ibid.
—— v. Sir William Trelawney, Steward and Capital Burgeſs of Weſt-Loe 565
—— v. Wroughton, Eſq; and others Ibid.
—— v. Robert Hann and John Price, Juſtices of the Peace for the Borough of Corfe-Caſtle Ibid.
—— v. Marſden and others Ibid.
—— v. Edwards 566
—— v. Randall Ibid.
—— v. Ford 567
—— v. Gibbs Ibid.
—— v. Venables Ibid.
—— v. Auſtin Ibid.
—— v. Ingram 568
—— v. Atkinſon Ibid.
—— v. Cambridge 570
Kinaſton v. the Mayor, Aldermen and Aſſiſtants of the Town of Shrewſbury Ibid.
King v. Roberts 571
—— v. Killinghall Ibid.
—— and Queen v. Tucker 580
—— v. Cooper Ibid.
—— and Queen v. the Biſhop of Cheſter Ibid.
—— v. the City of Cheſter 581
—— v. Clendon 582

Page.
King v. Philips et al'. 582
—— v. Eyre 583
Kirle v. Clifton Ibid.
King and Queen v. Knollys 584
—— v. Harris, or Harriſon and Duke 585
—— v. Harris 586
Kingſdale v. Mann 589
King v. Selfe 592
—— v. Colvin Ibid.
—— v. Burridge Ibid.
—— v. Hayes 594
Kent v. Kent Ibid.
King v. Poole Ibid.
—— v. Luckup Ibid.
—— v. Harwood 595
—— v. Peters and others, or Cavil v. Burnaford and others 596
—— v. Robinſon, Clerk Ibid.
—— v. Spragg and another Ibid.
—— v. Higginſon Ibid.
—— v. Goddard Williams 598
—— v. Hartſhorn and others Ibid.
—— v. Moreley and others Ibid.
—— v. Duncomb Ibid.
—— v. Kirk and Cage Ibid.
—— v Smith Ibid.
—— v. Burridge, Mayor of Tiverton 599
—— v. Burridge Ibid.
—— v. Duffin Ibid.
—— and Queen v. Alſop Ibid.
—————— v Buggs Ibid.
—— v. the Inhabitants of Wooton-Rivers Ibid.
—— v. Paine 600
—— v. Clough et al'. Ibid.
—— v. Hall Ibid.
—— v. Kendall and Roe Ibid.
—— v. the Inhabitants of Haſwell, or the Pariſh of Oſwell, Haſwell, or Horſewell; v. the Pariſh of Woking, or Oking Ibid.
—— v. the Inhabitants of Liſley Ibid.
—— v. the Inhabitants of Boughton in Kent 601
—— v Harniſſe, or Harris Ibid.
King's Langly, Inhabitants of, v. the Pariſh of St. Peter's, in St. Alban's Ibid.
—— v. Ruſſel Ibid.
—— v. the Inhabitants of Mile-End Ibid.
—— v. Cowper, a Juſtice of Peace 602
—— v. Miles 603
—— v. Fox Ibid.
—— v. Helling Ibid.
—— v. Carter Ibid.
—— v. Okey Ibid.
—— v. Venables Ibid.
—— v. Nicholls Ibid.
—— v. Allington, Recorder of Hertford Ibid.
—— v. Woodham 604
—— v. Kimberly Ibid.
—— v. Coningſby et al'. 605
—— v. James et al'. Ibid.
—— v. the Inhabitants of Polſted Ibid.
—— v. Gayer, Eſq; Ibid.
—— v. Young and Pitts, Eſqrs. Ibid.
—— v. Benjamin Cox, Eſq; Ibid.
—— v. Palmer and Baine, Eſqrs. 606
—— v. Williams Ibid.
—— v. Whitear and others Ibid.
—— v. the Inhabitants of St. Andrew's, Holborn, and St. George the Martyr Ibid.
—— v. the Juſtices of the Peace for the City of London Ibid.
—— v. Fairclough and others, Inhabitants of Lambeth Pariſh 608
—— v. Pain 611
—— v. Bear, or Beere Ibid.

Page.
King v. Alme and Nott 611
—— v. Orme and Nutt 612
—— v. the Mayor, &c. of Abingdon 628
—— v. Salisbury 612
—— v. Bickerton Ibid.
—— v. Wiatt Ibid.
—— v. the Borough of Abington 628
—— v. Earberry 612
—— v. Middleton Ibid.
—— v. Brereton 613
—— v. the Bailiff's and Burgeſſes of Malden 627
—— v. Curl 613
—— v. Elizabeth Nutt Ibid.
—— v. Woolſton Ibid.
—— v. Butcheler 613
—— v. the Town of Andover 628
—— v. the Pariſhioners of Wilby 616
—— v. Stephens 618
—— v. Sir G. Heathcoate, Lord of London 620
—— v. Ludlam, Chamberlain of London 621
—— v. the Town of Andover 628
—— v. Collingbourn 622
—— v. Sir Tho. Harriſon, Chamberlain of London Ibid.
—— v. Wright 623
—— v. Roberts Ibid.
—— v. Clarke Ibid.
—— v. the Mayor, &c. of Rippon 628
—— and Queen v. Lambert 623
———————— v. Gower Ibid.
—— v. the Inhabitants of Glamorganſhire 628
—— v. Taylor 624
—— and Queen v. St. John's College, Cambridge Ibid.
———————— v. St. John's College, Oxford Ibid.
—— v. Blythe 627
—— and Queen v. the Mayor of Cheſter 625
—— v. Shaw Ibid.
—— v. Owen Ibid
—— v. the Mayor, &c. of Norwich 627
—— v. Cary 625
—— v. the Mayor, &c. of Exeter 627
—— v. the Mayor and Burgeſſes of Wilton 625
—— v. the Mayor, &c. of Coventry 627
—— v. the Mayor, &c. of Oxford 625
—— v. the Mayor of Andover 626
Kid v. Dr. Watkinſon 631
King v. Sir Richard Raine 627
—— v. Hunt et al'. 632
—— v. the Bailiffs of Morpeth Ibid.
—— v. the Mayor, &c. of Norwich Ibid.
—— v. the Churchwardens of Thame in the County of Oxford Ibid.
—— v. the Mayor and Jurats of Dover Ibid.
—— v. the Borough of Boſſiney, alias Tintagel, in Cornwall 633
—— v. the Dean and Chapter of Trinity Chapel, Durham Ibid.
—— v. the Inhabitants of Rufford and Dunnington, in the County of Nottingham Ibid.
—— v. the Univerſity of Cambridge Ibid.
—— v. Robbiſon, the Mayor of Helſtoun Ibid.
—— v. the Mayor and Aldermen of Carliſle Ibid.
—— and Morris v. the Mayor of Lincoln, or the King v. Morris 626
—— v. Tod and others 633
—— v. the Mayor and Burgeſſes of Tregony Ibid
—— v. the Dean and Chapter of Dublin 634

Page.
King v. Street and Stroud 634
—— v. the Mayor of Kingſton upon Hull Ibid.
—— v. Pindar Ibid.
—— v. Ludlam, Chamberlain of London Ibid.
—— v. Hearle, or Serle Ibid.
—— v. Harwood Ibid.
—— v. ——— Ibid.
—— v. Beecher and others Ibid.
—— v. the Churchwardens of Rotherhithe, in Surry 635
—— v. Simpſon Ibid.
—— v. Robinſon Ibid.
—— v. the Mayor of Canterbury Ibid.
—— v. White Ibid.
—— v. the Commiſſioners of Sewers for the Levels of Tendring, Lexden, and Winſhee, in the County of Eſſex 636
—— v. the Biſhop of Cheſter Ibid.
—— or Dacoſta, v. the Ruſſia Company Ibid.
—— v. Betteſworth Ibid.
—— v. Lewis Ibid.
—— v. Ward 637
—— v. Wildman Ibid.
—— v. Wheeler Ibid.
—— v. Dr. Henchman Ibid.
—— v. Everett 638
—— v. the Corporation of Oxford Ibid.
—— v. the Overſeers of the Poor of Spotland Ibid.
—— v. Whaley 639
—— v. Sir Henry Penrice Ibid.
—— v. the Churchwardens of Weobly Ibid.
—— v. the Biſhop of Durham Ibid.
—— v. the Mayor, Bailiffs, and Common Council of the Town of Liverpool Ibid.
—— v. the Corporation of Wigan, or the King v. Curghey, Eſq; and others Ibid.
—— v. the Mayor and Jurats of Rye 640
—— v. Marſh, Deputy Governor of the Turkey Company Ibid.
—— v. Blooer Ibid.
—— v. Walter Erle, Gent. 641
—— v. Barker and others Ibid.
—— v. the Corporation of Weſt-Loe Ibid.
—— v. Dr Harris 642
—— v. Banks, Eſq; and others Ibid.
—— v. the Juſtices of Peace for Wilts 642
—— v. Holmes, Mayor of Wigan Ibid.
—— v. the Vice Chancellor, &c. of Cambridge 643
—— v the Rector of St. Ann's Soho Ibid.
—— v. Vandewall, Eſq; 644
—— v. Perry Ibid.
—— v. Brown 645
—— v. the Inhabitants of Preſton, near Feverſham 653
—— v. Larwood 658
—— v. Hill Ibid.
—— v. Sanchee Ibid.
—— and Morrice v. the Mayor, &c. of Lincoln, or the King v. Morrice Ibid.
—— v. Green 659
—— v. the Inhabitants of St. Thomas's, Southwark Ibid.
—— v. Wych Ibid.
—— v. Luckup Ibid.
—— v. Groſvenor Ibid.
—— v. Turner and others 660
—— v. Wakefield and others Ibid.

Page.
King v. Marſh, Deputy Governor of the Turkey Company 660
—— v. John Gardener, Eſq; Ibid.
—— v. Wroughton, Eſq; and others Ibid.
—— v. Cranmer Ibid.
—— v. Killinghall 664
—— v. Theed 661
—— v. Pain 662
—— v. Harper Ibid.
—— v. the Chancellor, &c. of the Univerſity of Cambridge 663
—— v. Richardſon 664
—— v. the Mayor, Bailiffs, and Common Council of the Town of Liverpool Ibid.
—— and Queen v. Wilcox Ibid.
—— v. Webb 665
—— v. Clark Ibid.
—— v. Sir Polycarp Wharton and others Ibid.
—— v. Pappineaux 666
—— v. Smith Ibid.
—— v. Taylor Ibid.
—— v. White and Ward Ibid.
—— v. Evans Ibid.
—— v. Kemp, or Kempe 667
—— v. Dr. Burrel 668
—— v. the Mayor, &c. of Rippon Ibid.
Kitton v. Fagg Ibid.
King v. Alexander Ibid.
—— v. the Mayor and Aldermen of Carliſle 669
—— v. Williams, Mayor of Helſtone Ibid.
—— v. the Mayor of Canterbury Ibid.
—— v. Roberts Ibid.
—— v. ——— Ibid.
—— v. Barebaker Ibid.
—— v. the Pariſh of Wotten-Rivers Ibid.
—— v. Gately Ibid.
—— v. Randal 670
—— v. Turner, or Purnall Ibid.
—— v. Matthews Ibid.
—— v. the Pariſh of Broughton, in Kent Ibid.
—— v. the Pariſh of Haſwell, or the Pariſh of Oſwell; or Haſwell, or Horewell v. the Pariſh of Woking, or Oking Ibid.
—— v. Dobbyn 671
—— v. Turnock Ibid.
—— v. Harding Ibid.
—— v. Beard Ibid.
King's Norton, in Wigorn Pariſh, v. the Pariſh of Swothill, in Warwick 672
—— v. the Pariſh of Cheſterfield Ibid.
—— v. Brown Ibid.
—— v. Shaw 673
—— v. the Inhabitants of Wangford, in Suffolk Ibid.
—— v. Albert, Alberton, or Albertſon Ibid.
—— v. Pope Ibid.
—— v. Ricelip, or Riſlip, Henden and Harrow 674
King's Langley Inhabitants of, v. the Inhabitants of St. Peter's in St. Alban's Ibid.
—— v. the Inhabitants of Chertſey 675
—— v. Somerton Ibid.
King v. the Inhabitants of Kirkford Ibid.
—— v. the Inhabitants of Marlborough Ibid.
—— v. the Inhabitants of Long-Critchell, or Long-Crickhill 676
—— v. the Pariſh of Bakewell, in Derbyſhire Ibid.
—— v. Saxmundham Ibid.
—— v. Gregory Ibid.
—— v. the Inhabitants of Audly Ibid.
—— v. Dillon, or Ditton 677

Page.
King v. Johnſon, or Jonſon 677
—— v. the Inhabitants of Bury Pomroi 683
—— v. Gully 684
—— v. Miles Ibid.
—— v. the Inhabitants of Hyworth Ibid.
—— v. the Inhabitants of South-Marſton 685
—— v. Munday Ibid.
—— v. Furneſs 686
—— v. the Inhabitants of Talſcombe Ibid.
—— v. the Inhabitants of Iſlip Ibid.
—— v. Butcher Ibid.
—— v. the Inhabitants of Brickhill 687
King v. Fairclough and others, Inhabitants of Lambeth Ibid.
—— v. Cleg Ibid.
—— v. the Inhabitants of St. Peter's in Oxon and Wycomb 688
—— v. Sheringbrook Ibid.
—— v. the Inhabitants of St. John the Baptiſt, within the Borough of the Deviſes, Com. Wilts Ibid.
—— v. the Inhabitants of St. Leonard, Shoreditch Ibid.
—— v. Auſtin Ibid.
—— v. the Inhabitants of St. John's, Clerkenwell Ibid.
—— v. Venables Ibid
—— v. Trinity Pariſh, in Cheſter Ibid.
—— v. Davie 689
—— v. the Inhabitants of Leafield Ibid.
—— v. the Inhabitants of St. Mary the Virgin, in Marlborough Ibid.
—— v. the Inhabitants of St. George Ibid.
—— v. Reed Ibid.
—— v. the Inhabitants of Portſmouth Ibid
—— v. Benoier Ibid.
—— v. Tenant Ibid.
—— v. the Inhabitants of Aynhoe Ibid.
—— v. Lloyd 690
—— v. the Inhabitants of Oulton Ibid.
—— v. Wykes and others 691
Kirton, Pariſh of, v. the Pariſh of Weſton, in Northamptonſhire Ibid.
King v. the the Inhabitants of Great Bedwin Ibid.
—— v. the Inhabitants of Petham Ibid.
—— v. the Inhabitants of Sherborne Ibid.
—— v. the Inhabitants of Chidingfold 692
—— v. the Inhabitants of Madley, in the County of Stafford Ibid.
—— v. Gayer, Eſq; Ibid.
—— v. the Inhabitants of Alton Ibid.
—— v. the Inhabitants of Fremington Ibid.
—— v. the Inhabitants of Bently 993
—— v. the Inhabitants of Uffculme Ibid.
—— v. the Inhabitants of Great-Torrington Ibid.
—— v. the Inhabitants of Milwich Ibid.
—— v. the Inhabitants of Aythrop-Rooding 694
—— v. the Inhabitants of Biſhop's-Hatfield Ibid.
—— v. the Inhabitants of Auſtrey Ibid.
—— v. the Inhabitants of Mayfield Ibid.
—— v. the Inhabitants of Cold-Aſhton Ibid.
—— v. the Inhabitants of Caverſwall 695
—— v. the Inhabitants of Painſwick Ibid.
—— v. the Inhabitants of the Tything of Milland 696
—— v. the Inhabitants of Weſtbury Ibid.
—— v. the Inhabitants of Shenſton Ibid.
—— v. the Inhabitants of Neither-Heyford Ibid.
—— v. the Inhabitants of Weyhill 697

Page.
King v. the Inhabitants of Chriſtchurch 697
—— v. the Inhabitants of St. John, Berwick Ibid
—— v. the Inhabitants of Fulham 698
—— v. the Inhabitants of Preſton near Feverſham Ibid.
—— v. the Inhabitants of St. Matthew, Bethnal Green Ibid.
—— v. the Inhabitants of Devereux Ibid.
—— v. the Inhabitants of Stockland Ibid.
—— v. the Inhabitants of Titchfield Ibid.
—— v. the Inhabitants of St. Peter's in Dorcheſter Ibid.
—— v. the Inhabitants of Burton-Bradſtock Ibid
—— v. the Inhabitants of St. Luke's in Middleſex 700
—— v. the Inhabitants of St. Silcheſter Ibid.
—— v. the Inhabitants of Eccleſal Burlow, in Sheffield Ibid.
—— v. the Inhabitants of Frome-Selwood Ibid.
—— v. the Inhabitants of Llanrhydd Ibid.
—— v. the Inhabitants of Merwall Ibid
—— v. the Inhabitants of Honiton Ibid
—— v. Tippin Ibid.
—— v. Hornby 701
—— v Hill Ibid.
—— v Harriſon and Duke Ibid.
—— v. Yates 702
—— v. the Marquis of Powis 703
—— v. Erbury, or Earbury Ibid
—— v. Roger Johnſon Ibid.
—— v. Davis Ibid.
—— v. the Mayor of Canterbury 705
—— v. Hemmings, or Commings, and Ghent 706
—— v. Price Ibid.
—— v. the Juſtices of the Peace and Overſeers of Shipton Mallet Ibid.
—— v. the Inhabitants of Rufford 707
—— v. Simpſon Ibid.
—— v. Bartlet and others 708
—— v. the Juſtices of Somerſetſhire Ibid.
—— v. Sparrow and others 709
—— v. the Inhabitants of Welbeck, in Northamptonſhire Ibid.
—— v. Gayer Ibid.
—— v. Loxdale and four others Ibid.
—— v. Darbyſhire 710
—— v. Showler and Atter Ibid.
—— v. Whiteear and others Ibid.
—— v. Helling and others Ibid.
—— v. Moor 714
—— v. Patting 715
—— v. Malland Ibid.
—— and Queen v. Larwood 717
—————— v. the Biſhop of Cheſter and others 720
—— v. Chaloner 722
—— v. Weſton 729
—— v. the Inhabitants of the City of Norwich 730
—— qui tam v. Bolton Ibid.
—— v. Powell and others 733
—— v. the Mayor of Canterbury 735
—— v. the Archbiſhop of Armagh and Whaley Ibid.
—— v. Jones 740
Kilwick v. Maidman 741
King v. Roger Philips, Mayor of Carmarthen Ibid.
—— v. Roger Philips 742
—— v. Grainger 743
—— v. the Inhabitants of Hyworth 744
—— v. Turner Ibid.
—— v. Skingle Ibid.
—— v. the Inhabitants of Witham on the Hill Ibid.
—— v. Munden Ibid.
—— v. the Inhabitants of Uttoxeter, in the County of Stafford 745

Page.
King v. the Juſtices of Shrewſbury 745
—— v. Dempſon Ibid.
—— v. Wright and Wife Ibid.
—— v. Pearſon. 746
—— v. Clarke and others Ibid.
—— v. Row and Kendall Ibid.
—— v. Fell Ibid.
—— v. Buckland 747
—— v. Layer 748
King's Bench Priſoners Caſe Ibid.
—— v. Woodham Ibid.
—— v. Barnard Schiever, a Swede 749
—— v. the Juſtices of the Peace of the City of London Ibid.
Kirkham v. Whaly, or Wheely 750
King v. Knollys Ibid.
—— v. Sir Thomas Culpepper Ibid.
—— v. Earl Ferrers 754
—— v. Dr. Shippen and others 763
—— v. the Marquis of Carmarthen 751
—— v North 766
—— qui tam v. Bolton 768
—— v Phillips Ibid.
—— v. Selfe Ibid.
—— v. Colvin Ibid.
—— v. Burchet, his Attorney, and the Town Clerk of Guildford 771
—— v. Monkhouſe 772
—— v Sarah Saliſbury 773
—— v. Badovir 774
—— v. Roger Philips, Mayor of Carmarthen Ibid.
—— and Queen v. Armſtrong Ibid.
—— v. Sharpe, or Sharp, and others Ibid.
—— v Kempe, or Kemp Ibid.
—— v. the Inhabitants of St. Olave's, Jury 780
—— v. Eyre 777
—— v. the Inhabitants of St Peter, in the City of Oxford 781
—— v. the Inhabitants of Little-Dean Ibid.
—— v. the Inhabitants of Cirenceſter Ibid.
—— v. the Pariſhioners of Wilby Ibid.
—— v. the Inhabitants of St. Mary Matfellon, alias White Chapel 782
—— v. the Hamlet of Spittalfields Ibid.
—— v. Edwards and others Ibid.
Kinver Pariſh v. the Pariſh of Stone, in the County of Stafford Ibid.
King v. the Inhabitants of Minchinampton Ibid.
—— v. the Inhabitants of Butley in Suffolk 783
—— v. the Inhabitants of Bovingdon in Herts Ibid.
King's Norton Pariſh v. the Pariſh of Cambden, in Glouceſter Ibid.
—— v. the Inhabitants of Kniveton 784
—— v. the Inhabitants of Winterbourn Ibid.
—— v. the Inhabitants of Salford 785
—— v. the Inhabitants of Openſhaw Ibid.
—— v. the Inhabitants of Staunton under Bardon Ibid.
—— v. the Inhabitants of Ilmington 786
—— and Queen v. Warrington and others Ibid.
—— v, the Borough of Abington Ibid.
—— v. Dawes Ibid.
Kilderton v. Wilkinſon Ibid.
Kitton v. Fagg 787
King v. Burridge Ibid.
—— v. Sir Willoughby Aſton, Bart. and John Dodd, Eſq; and others 788
—— v. the Juſtices of Dorcheſter 789
—— v. the Inhabitants of Lambeth 789
—— v. the Inhabitants of St. Leonard, Shoreditch Ibid.
—— v. the Inhabitants of Uttoxeter, in the County of Stafford Ibid.

Page.
King v. the Inhabitants of Shrewsbury 789
—— v. the Inhabitants of St. Andrew's and St. George the Martyr 790
—— v. Marrow 792
—— v. Davis 793
—— v. Keite Ibid.
—— v. Burdett Ibid.
—— v. Bear 794
—— v. Melling Ibid.
—— v. Thompſon 795
—— v. Hoſkins Ibid.
—— v. Kirk and Cage Ibid.
—— v. Ward 796
—— v. Young Ibid.
—— v. Foley and Harley 798
—— v. Wiling, Judge of the Sheriff's Court of London Ibid.
—— v. Walter 799
—— v. Smart Ibid.
—— v. Poare Ibid.
—— v. Johnſon Ibid.
—— v. Roger Johnſon Ibid.
—— v. Robert Hales Ibid.
—— v. Lowfield 800
—— v. Gibſon Ibid.
—— v. Poole Ibid.
—— v. Jeffs Ibid.
—— v. Bell Ibid.
—— v. Armſtrong 801
—— v. Martha Gray Ibid
—— v. Cowle Ibid.
—— v. Harris and others 802
—— v. Woodward 803
—— v. Greep 806
—— v. the Mayor of Oxford 807
—— v. Clendon 809
—— v. Harris and others Ibid.
—— v. Alexander John 811
—— v. Jones and Powell 812
—— v. Colvin Ibid.
—— v. Upton Ibid.
—— v. Hayes Ibid.
—— v. Francis and others Ibid.
—— v. Elizabeth Nicolls 813
—— v. Peters and others, or Cavil v. Burnaford and others Ibid.
—— v. Ward 816
—— v. Vincent and others 825
—— v. Upton 816
—— v. Rhodes 825
—— v. Loggen and Froom 816
—— v. the Biſhop of Cheſter and others 833
—— v. Chandler 817
—— v. the Mayor of Hertford 833
—— v. Chipp 817
—— v. Theed 837
—— v. Munnery Ibid.
—— v. Skelley 819
—— v. Tucker 837
—— v. the Inhabitants of Upmerdon 819
—— v. Buckland 837
—— v. the Mayor and Jurats of Dover Ibid.
—— v. Wilkins 838
—— v. Weſtbury Ibid.
—— v. Gumley and others Ibid.
—— v. Smith 839
—— v. Eyre, Clerk Ibid.
—— v. White and others Ibid.
—— v. Cowle Ibid.
—— v. Sir Hugh Everard 815
—— v. Showler and Atter Ibid.
—— v. Burdett Ibid.
—— v. Watkinſon Ibid.
Knight v. Barker 35
—— v. Burton 103
—— v. Keech 246
—— v. Cambrid 249
—— v. Barker 351

Page.
Knight v. Syms, or Symms 390
Knox, Eſq; v. Coſtollo 426
Knipe v. Edwin 624
Knox, Eſq; v. Coſtollo 779
Kneller, Sir Godfrey's Caſe 256
Knight and his Wife v. the Mayor, Maſters and Burgeſſes of Wells 290
—— v. Cambridge 570
—— v. Barnaby, or Farnaby and others 808
Kynaſton v. the Mayor, &c. of Shrewſbury 299
—— v. —— 638

L.

LACY v. Williams 2
Lawrence v. Martin 5
Lane v. Cotton, Poſtmaſter-General 24
Lapeyre v. Sir John Germain, Knt. and Bart. and the Dutcheſs of Norfolk 54
—— v. —— 61
Lacy v. Kynaſton 88
Latuch v. Paſherante 140
Lamb v. Williams 141
Lawſon v. Dickenſon 144
Layton, Colonel's Caſe 165
Lane v. Sir R. Cotton and Sir T. Frankland, Poſtmaſter General 189
Lavie and another, Aſſignees of Jane Cox, a Bankrupt, v. Phillips and others, Aſſignees of John Cox a Bankrupt 203
Langford v. the Adminiſtratrix of Tyler 210
Lane v. Sir R. Cotton and Sir T. Frankland, Poſtmaſters-General 249
Lavie and another, Aſſignees of Jane Cox, a Bankrupt, v. Phillips and others, Aſſignees of John Cox, a Bankrupt 218
Lambert v. Pack, or Oakes 227
Lawrence v. Jacob 234
Lane v. Sir R. Cotton and Sir T. Frankland, Poſtmaſters-General 249
Laiton, or Layten's Caſe 265
Lawſon, Sir Wilfred, v. Story 304
Lacy v. Kynaſton 322
Lant, Eſq; v. Norris 325
Lawſon v. Storie 331
Lane v. Green 339
Lawrence v. Jacob 353
Lawſon v. Dickenſon 360
Ladd v. Widdows 385
Lampton v. Collingwood 407
Langthorn v. Taylor 414
Lawrence v. Jacobs 418
Lambell v. Pretty John 420
Lampen v. Hatch 422
Landon v. Pickering 424
Lake v. Billers and others 445
—— v. Layfield et al' 454
Lanſdown, Lord's Caſe Ibid.
Lamme v. Dorrell 477
Lacy v. Williams 489
Lamb v. Jenſon 496
Lade, Sir John, v. Shepherd 517
Lampton v. Collingwood 584
Langthorn v. Taylor 591
Lancaſter v. Fielder 594
Landon v. Pickering 596
Llandaff, Biſhop of, Caſe 597
Lavie and another, Aſſignees of Jane Cox, a Bankrupt, v. Phillips and others, Aſſignees of John Cox, a Bankrupt 622
Lambert v. Aeretree 645
Lane v. Sir Robert Cotton and Sir Thomas Frankland, 647
Lazier, or Leſauld, v. Dyer 662
Lawley v. Dibble 711

Page.
Lawn v. Sawbridge 727
Lance v. Theedam 731
Law v. Law 738
Landen Jones, Caſe of 748
Lane v. Saltmarſh 750
Laddock Pariſh, v. the Pariſh of St. Ennſdore 783
Lane v. Sir Robert Cotton 787
Lazier v. Dyer 797
Lamine v. Dorrell 303
Lamplugh v. Shottorell 805
Lamego v. Gould 816
Lamb v. Archer 820
Lanſdown, Lord, Caſe of 824
Lawrence, St. in Reading, Inhabitant's Caſe 779
Law v. Davis 826
Lade, Baronet, v. Holford, Eſq; and Wife and others 832
Lanquit v. Jones 837
Lancaſter v. Thornton 830
Langthorn v. Taylor 836
Lambert v. Branthwaite 245
Lamb v. Williams 835
Lett v. Mills 4
Legliſe v. Champante 8
Lee v. Barnes 11
Lepiot v. Browne 11
Lewis v. Jones 35
Leuknor v. Plant 37
Leveridge v. Hoſkins 38
Lewis v. Farrel 40
Lewis v. Lewis 41
Le Noyer's Caſe 60
Leehill v. Sir Thomas Reynell 71
Leward and Wife v. Baſely 119
Lett v. Mills 141
Leger, St. v. Pope 149
Leving, Sir Richard, v. Lady Calverley 253
Leeds v. Carlton 334
Leger, St. v. Pope 342
Leaves v. Bernard 363
Leg v. Stradwick 374
Lee v. Daniel 383
Leving, Sir Richard v. Lady Calvery 411
Leeds v. Power 416
Lewis v. Lewis 421
Leith v. Macferlan 426
Leieigh, or Lee, v. Brace 433
Leger, St. v. Adams 445
Leighton v. Leighton 456
—— v. —— 457
Lewis v. Fog 462
Lekeux v. Naſh 467
Lewis, on the Demiſe of the Earl of Derby, v. Witham 493
Lekeux v. Naſh 498
Leger, St. v. Pope 506
Leach v. Page 507
Lee, Hannah, v. John Pilmy 520
Lenox v. Bodington 521
Lewis and another v. Rucker 575
Le Sage v. Pere 598
Leighton v. Theed 607
Legg v. Strudwick Ibid.
Lekeux v. Naſh 610
Lee v. Oxenden 623
Lewis v. Lewis 636
Lethulier's Caſe 656
Lee v. Drake 668
Lewſly v. Budd 669
Leger, St. v. Pope 710
Le Sage v. Pere 712
Leaves v. Bernard 720
Levintz v. Randolf 723
Leuck v. Plant 727
Levat v. Reſbere 737
Leeds, Duke of, Caſe 751
Leighton v. Leighton 768
Leonard v. Stacy 771
Leg v. Stradwick Ibid.

Page.
Lee v. Brace 791
Leeds v. Power 798
Leigh, or Lee, v. Brace 805
Leving, Sir Richard, v. Lady Calverly 806
Lewis, on the Demiſe of the Earl of Derby, v. Withams 813
Lea v. Libb 819
Leigh, or Lee, v. Brace 821
Legar, St. v. Adams Ibid.
Levintz v. Randolph 271
Leonard, St. Shoreditch, Pariſh of, Caſe 673
Linch v. Hooke 5
Littleton v. Cole 21
Lidford v. Thomas 111
Linch v. Hook 163
—— v. Hooke 211
Liſter, Mr. Caſe 214
Lilly v. Hodges 324
Lidford v. Thomas 340
Little v. Heaton 393
Lindſey, Lady Dowager, v. Lord Lindſey 454
Linſey v. Clerk 486
Liſter, Mr. Caſe 508
Lilly's Caſe 548
—— v. Hodges 581
Liſter v. Baxter 649
Linch v. Coote 667
Little-Hire Pariſh, v. the Pariſh of, Woolfall 680
Little-Betham, Pariſh of, v. the Pariſh of Somerby 686
Lidney and Stroud, Pariſhes of, in Com. Glouceſter 783
Lincoln, late Biſhop of, &c. v. Wolfarſtan 389
Longviſt v. the Hundred of Thiſtleworth 4
Lowther and Wife v. Kelly 12
Love's Caſe 36
Lowder v. Screwdens 74
Lovilock v. Sorrel 130
Lorymer v. Holliſter 140
Long v. Buckeridge 148
Lockey v. Darby 149
Lock v. Major 196
Lomax, on the Demiſe of ——, v Holmden and others 223
London, City of, v. Wood 253
Lorwiere v. Laubray 231
Lockey v. Darby 247
Lock v. Wright 272
Lloyd v. Lee 275
London, City of, v. Vanacre 292
Lock v. Shermer. 310
London, City of, v. Wood 292
Lovlock v. Sorrel 324
Lock v. Wright Ibid.
London, City of, v. Vanacre 327
London, Biſhop of, v. the Mercer's Company 336
Lowfield v. Bancroft et al'. Ibid.
London, Chamberlain of, v. Lopes 346
Lock v. Wright 360
Long v. Buckeridge 365
London, City of, v. Wood 369
Long v. Buckeridge 371
Lockey v. Dangerfield 389
Longueville, Sir Edward, v. the Inhabitants of Thiſtleworth 412
Lloyd v. Vaughan 424
Lowfield v. Stoneham 467
Lloyd v. Evelin 488
—— v. Viſcount Say and Seal 491
—— v. Vaughan 493
London, City of, v. Vanacre 496
Longueville, Sir Edward, v. the Inhabitants of Thiſtleworth 522
Lowfield v. Bancroft et al'. 582
Lampton v. Collinwood 584
Lockwood v. Beaumont 595

Page.
Lowfield v. Bancroft and others 613
Lloyd v. Vaughan 617
London Cuſtoms, concerning Orphans and Freemen's Eſtates 618
Loveridge v. Whitrow 619
London, City of, v. Vanacre Ibid.
London, Chamberlain of, v. Lopes 621
London, Cuddon Chamberlain of v. Provoſt 619
Lover v. Salkeld 660
London, City of, v. Vanacre 662
Lodie v. Arnold 665
Lord v. Francis 628
Longueville, Sir Edward, v. the Hundred of Iſleworth 704
Loder v. Loder 715
Lode, or Loowder, v. Screwdens, or Snowden 716
Lord v. Bernard 732
London, Biſhop of, v. the Mercers Company 737
Long v. Miller 740
Lockey v. Dangerfield 765
Long v. Nixon 808
Love v. Dr. Bently 815
London, Chamberlain of, v. Godman 301
Lowfield v. Stoneham, Executrix 329
Loving v. Avery 839
Lord v. Francis 228
Lovelace's Caſe 327
Lupart v. Wilſon 104
Lucas, on the Demiſe of Dr. Markham and others, v. Dr. Wilſon 109
Luxtin v. Benin 112
Lumney v. Quaree, or Quarry 162
Ludlow v. Browning 193
Lumley v. Palmer 237
Luxtin v. Benin 243
Lucas v. Haynes 230
Lucking v. Denning 318
Luke v. Helmer 354
Luttin v. Benin 359
Lug v. Godwin 363
—— v. —— 368
Lutton v. King 383
Ludlow, Eſq; v. Leonard 414
Luttin v. Benin 429
Lucas v. Haynes 451
Lure v. Reſt 591
Luckington v. St. Auſtin's Pariſh 678
Lugg v. Godwin 775
Lumly v. Quarry, Judge of the Admiralty of Penſilvania 803
Lucy v. the Biſhop of St. David's 834
Lyell v. the Bail of Galletly 160
Lydlynch, Pariſh of, v. the Pariſh of Hilton 224
Lylly's Caſe 322
Lyne v. Moody 355
Lynne v. —— 376
Lynch v. Clerke 442
Lyndſey, or Linſey, v. Clerke 584
Lydſton v. the Mayor and Bailiff's of Exeter 626
Lydlynch, Pariſh of, v. the Pariſh of Hilton 691
Lymington, Conſtables of, Caſe 280
Lynton, or Linton, v. —— 834

M.

MASON v. Buſhell, or Buſſell 7
Mayor of Wincheſter v. Wilks 29
Martin v. Gell 33
May v. King 17
Martin v. Monke 57
Mayhoe v. Archer 67
Marlborough, Duke, Executors of, v. Widmore 71
Marſhall v. Riggs 73
Matthew v. Ollerton 96

Page.
Mandamus to the Lord Mayor of London 105
Mattueoſ, Andrew Artermonowitz, the Ruſſian Ambaſſador, Caſe of 113
Maſters v Lewis 131
Matthews v. Carey 148
Maſon v. White, Marks et al'. 150
Manning v. Turner 169
Maſon v. March 151
Martin v. Moore 171
Marriot's Caſe 176
Mayhew v. Mayhew 187
Matthews v. Carew 188
Mayhoe v. Archer 195
Maylin et al'. v. Elee 196
Macarty v. Barrow 198
Marſh and others, Aſſignees of May, a Bankrupt, v. Chambers 199
Machell and Wife v. Garrett 207
Maddox v. Wynne Ibid.
Manwairing v. Sands 214
Marder and Wife v. Lee 218
Maſters v. Child 219
Manwaring v. Harriſon 233
Macleod, Angus, v. J. Snee and others 235
Marſh et al'. Aſſignees of May, a Bankrupt, v. Chambers 239
Martin v. Chauntry Ibid.
May v. King 242
Mary, St. Pariſh of, in the Devizes, Caſe 254
May and Parſon's Caſe 257
Mayor of Winton v. Wilks 268
—— of Thetford's Caſe 293
—— of Wincheſter v. Wilks 293
—— &c. of Wokingham, in Berks, Caſe 251
—— of Portſmouth, Whitehorn, Caſe of 294
Manners v. Sterm 307
Marret v Gardiner 309
Maxwell v. Mayer, Eſq; 313
Marder and Wife v. Lee 314
Maſon v. White, Marks et al'. 316
Maſters v. Lewis 327
Mayor of Wincheſter v. Wilks 328
Maddox, William, and Robert Godfrey, v. Taylor et al'. 341
Matthews v. Spicer 341
Maddiſon v. Shore 343
Marle v. Flake 344
Marsfield, or Blainfield, v. Marſh 349
Madox, W. and R. Godfrey, Taylor et al'. 354
Martin v. Henrickſon 350
Mayor of Wincheſter v. Wilks Ibid.
Matthews v. Spicer 355
Mayor of Yarmouth v. Eaton 358
Maſon v. Hanſon 362
Mansfield v. Richman 365
Market v. Johnſon 371
Martin v. Wyvill Ibid.
Maſters v. Lewis 381
Machin v. Moulton 383
Martin v. Davis 398
Machell v. Nevinſon, Mayor of Appleby 404
Mayo v. Parſons 417
Martin v. Budgell 419
Marſhall v. Cope 422
Machil v. Clerk 435
Martin, on the Demiſe of Henry Weſton, v. Mowlin 439
Marsfield, or Blainfield, v. March, or Marſh 450
Martyn v. Kendrickſon 450
Maſon v. Hogſden 453
Martin et al'. v. Horrel 461
May v. May 465
Manning v. Napp 470
Maſon v. Hanſon Ibid.
Marsfield, or Blainfield, v. Marſh 475

Manor

Page.
Manor of Hampſtead, Caſe of 485
Marſh v. Yellowly 482
Mayor, &c. of Northampton, v. T. Ward 483
Machel v. Clerk 490
Martin, on the Demiſe of John Tregonwell, Eſq: v. Strachan and others 492
——— v. ————— 514
Mallory v. Jennings 521
Mayor of Portſmouth, Whitehorn, Caſe 556
Markham v. Middleton 571
Maddox and Godfrey v. Taylor et al'. 582
Marckar v. Harris Ibid.
——— v. Pollard 584
Martin v. Henriques 592
Marder and Wife v. Lee 597
Mackdonnel v. Wilder 608
Mayor of Northampton's Caſe 612
Matthews v. Phillips 616
Maſters v. Lewis 619
Mayor of Coventry's Caſe 626
Maddox v. ——— 647
Mariner's Caſe 649
Mayor of Yarmouth v. Eaton 651
Martin v. Crump 657
Mayor, &c of London, v. Wilks 657
Maſon v. Keeling 662
Mayor of Portſmouth, Whitehorn, Caſe of 668
Mary Le More, St. Pariſh of, v. the Pariſh of Heavy Tree, in Devonſhire 671
Mayfield v. Heathfield 676
Maidſtone, Pariſh of, v. the Pariſh of Dething 687
Maidſtone, Pariſh of, v. the Pariſh of Hedcome in Kent 692
Matthews v. Erbo 701
Martin v. Pritchard 713
Marley v. Blunt 722
Marle v. Make 723
Marfield, or Blainfield, v. March, or Marſh 725
Markett v. Johnſon 726
Mayor of Portſmouth, Whitehorn, Caſe of 728
Martin v. Wyvill 732
Moſſe v. Bennet 732
Wackdonnel v. Welder Ibid.
Martin v. Pritchard 734
Marſhall v. Carter 737
Marſham v. Gibbs 739
Marſhal v. Riggs 740
Maſters v. Butcher 746
Mayne, John, v. Daniel Harvey 748
Maud v. Branthwaite 749
Market Boſworth, the Churchwardens of, v. the Rector of Market Boſworth 756
Mauchin v Moulton 757
May v. Hodge 761
Mariner's Caſe 763
Margaret's, St Weſtminſter, Pariſh of, v. St. Martin's, Ludgate 783
Mary, St. of Reading, Pariſh of, v. the Pariſh of St. Lawrence of Reading 779
Martin v. Crompe 791
Machil v. Clark Ibid.
Mayor and Aldermen of Briſtol's Caſe 797
Mattiſon qui tam v. Allanſon 801
Marsfield, or Blainfield, v. Marſh 803
Mayor of Pool v. Bennet 809
Maſon v. Hanſon 810
Mayhoe v. Archer 811
Martin v. Jenkin 812
Maſon v. Abdy 815
Maſſa v. Dauling 816
Maſters v. Butcher 817

Page.
Maundy v. Maundy 827
Martin, on the Demiſe of Henry Weſton, v. Mowlin 830
Mayor of Thetford's Caſe 834
Malden, Pariſh of, v. the Inhabitants of Fletwick 680
Mary Cole-church v. Ratcliff 684
Meredith v. Chute 26
Medley v. Stokes 72
Merryman v. Carpenter 187
Meggot, Aſſignee of Watſon, a Bankrupt v. Mills and Waine 192
Mendez v. Carreroon 229
Meredith v. Alleyn 246
Merryfield v. Berry 260
Merrit v. Rane 272
Meredith v. Chute 275
Medhurſt v. Waite 280
Meredith v. Davies 414
Merryfield v. Berry 421
Merril v. Joſſelyne 582
——— v. ——— 591
Mead v. Hammond 656
Meggadow v. Holt Ibid.
Mereſley, or Murſley, and Granborough, between the Inhabitants of 685
Meggot, Aſſignee of Watſon, a Bankrupt, v. Wills and Waine 711
Medina v. Houghton 723
Merril v. Joſſelyn 728
Meritt v. Rane 731
Meard v. Philips 737
Medhurſt v. Waite 789
Mead v. Hamond 804
Meggot, Aſſignee of Wilſon, a Bankrupt, v. Mills and others 497
Miles v. William 7
Middleton and Wife v. Croft 8
Mitchell v. Reynolds 90
——— v. Harris 99
Miles v. Williams 129
Mitchell v. Broughton 151
Milner v. Petit 161
Mills, Aſſignee of the Sheriff, v. Bond 186
Miles v. Williams 194
Mitford v. Walcot 228
Mitchell v. Reynolds 244
Middleton and Wife v. Croft 312
Midgleys v Lovelace 320
Mitchell v. Reynolds 329
Miles v. Williams 345
——— v. ——— 360
——— v. ——— 365
Miller v. Bradley 372
Miles v. Williams 387
Middleton and Wife v. Croft Ibid.
Middleton v. Fowler et al'. 444
Miles v. Williams 478
——— v. ——— 491
Mitchell v. Reynolds 503
——— v. ——— 549
Miller v. Bradley 593
Michell v. Cue and Wife 596
Middleton and Wife v. Croft 653
Michael, St. Pariſh of, in Bath, v. the Pariſh of Nunny in the County of Somerſet 687
Mills, Aſſignee, of the Sheriff, v. Bond 731
Middleton and Wife v. Croft 764
Mitchell v. Cue and Wife 778
Millar v. Yerraway 779
Mitchell v. Reynolds 787
Miles v. Williams 805
Milwood v. Leech 810
Mikes v. Caly 25
Miffin, Henry, alias Peters and others, v. Sir William Morgan 187
Minchamp's Caſe 678
Michael, St. Coſlany, Pariſh of, in Norwich, v. the Pariſh of St. Matthews, in Ipſwich 782

Page.
Morgan v. Luckup 45
Moſes v. Macfarlan 48
Moor v. Watts 83
Morris v. Sir Richard Reynolds 100
Morſe v. Surry 105
Morice v. Green 121
Moor v. Watts 161
Moulthy v. Richardſon 174
Mohun, Lord's Caſe 176
Moore v. Watts 177
Morris v. Spencer 181
Morris v. Martin 214
Moore v. Warren, or Holmes v. Barry 233
Morris v. Lee 234
Moor v. Paine 237
Moreland v. Bennet, before Raymond, Chief Juſtice, in Middleſex 245
Moverley v. Lee 275
Moore v. Goodwright 282
Modely and Wife, Executors, v. York 307
Moravia's Caſe 319
Monk v. Cooper 325
Moor v. Thompſon 335
Morgan v. Luckup 356
Moore v. Jones 360
Moor v. Green 368
Morley v. ——— 369
——— v. Stacker 375
Mordant v. Thorold, Bart. 378
Moſely v. Warburton 383
Moore v. Goodright 397
Morris, Bart. v. Barry 400
Moorfoot v. Chivers 420
Moore v. Goodright 422
Moor v. the Mayor and Jurats of Haſtings 439
Moody v. Thurſton 456
——— v. ——— 458
Moſſe v. Bennet Ibid.
Morris v. Pugh and Harwood 468
Montgomery's Caſe 504
Morley v. Vivian 519
Moravia's Caſe 559
Moſely v. Warburton 585
Morrice v. Green 586
Moor v. Thompſon 599
Morſe, or Mors, v. Braxton, or Bruerton 614
Montague, Wortley, v. Lord Sandwich 615
More v. Rowbothom 648
Moorfoot v. Chivers 664
Money and others v. Leach 669
Morgan v. Tomkins 702
Morris's Caſe 704
Morley v. Vivian 717
Moor v. Riſdell 721
Molloy v. Lork, or Johns v. Bromfield 725
Moſſe v. Bennet 732
Moorfoot v. Chivers and Wife 735
Morgan v. Luckup 739
——— v. ——— Ibid.
Moor v. the Bail of Garret 466
Morris v. Gilder, &c. 769
Moor v. Watts 770
Molſworth v. the Pariſh of Goring 782
Moore v. Fernyhouth 809
Moriſſet v. King 817
Moor v. Watts 834
Morris v. Pugh and Harwood 358
Montague, Wortley, v. Lord Sandwich 512
Moor v. Anderſon 839
Muriel v. Tracy, Jenkins, Chamberlain, and Cornwall 33
Muttit v. Denny 70
Muſgrave v. Bovey 338
——— Sir Chriſtopher, v. Nevinſon 405
Murray v. Thornhill 461

Page.
Muſicians, Company of, v. Green 621
Muſgrave v. Eſcourt 660
Much Waltham, Pariſh of, v. the Pariſh of Peram in Eſſex 671
Muſton v. Yateman 729
Mulſo v. Shere 777
Muſgrave, Sir Chriſtopher, v. Nevinſon 799
Muſton v. Yateman 811
Muſgrave, Sir Chriſtopher, v. Nevinſon 296
Mytton v. Cock 190
Mynot v. Bridge et al'. 356
Mynton Pariſh v. Stony Stratford, or the King v. the Pariſh of Minton 677
Mylock v. Saladine 809
Myer v. Yellop and others 787

N.

NASH v. Battersby 54
Nailor's Caſe 505
Nailor, or Taylor, qui tam, &c. v. Scott 329
Newcombe v. Green 73
Newton v. Rowland 2
—— v. —— 140
Neat, Aſſignee of the Sheriff of Middleſex, v Mills 187
Newton v. Trigg 191
Nelthrop and Wife v. Anderſon 204
Newton and Wife v. Hatter 211
Neſſon v. Finch 241
Neal v. Goulſton 242
Nehuff's Caſe 256
Newton v. Travers 290
—— or Newport, v. Godfrey 341
Newnham v. Lunn 343
Nevil v. Soper 348
Newman v. Holdmyfaſt 395
Nelſon v. Collins 415
Newell v. Pidgeon 416
Newgate Market, Leſſees of, v. the Dean and Chapter of St. Paul's 447
Neal, on the Demiſe of the Duke of Athol, v. Wilding 466
Newport v. Godfrey 469
Newton v. Richards 470
Neſſon v. Finch 496
Nelſon v. Collins 591
Newcomb v. Higgs 708
Nelſon v. Finch 711
Newſon v. Bawldry 725
Newman v. Chandler 736
Nedriffe v. Hogan 743
Newton v. Rowland 750
Newcomb v. Higgs 764
Needham, Dr.'s Caſe 774
New Elm, Inhabitants of, Oxford, Caſe 799
Newcomb v. Green 813
Neall v. Ovington. Idem v. Waller 236
Newſon v. Bauldry 835
Newark, Pariſh of, v. the Pariſh of Workſworth, in the County of Derby 684
Nicholas, St. and St. Peter in Ipſwich, between the Pariſhes 92
Nicholas's Caſe 193
Nicols v. Bride Bridge 242
Nicholls v. Tirret 262
Nicholas, St. Pariſh of, v. the Pariſh of St. Helen's 670
—— St. Pariſh of, Guildford, in Surry, v. the Pariſh of Killington, in Suſſex 674
—— St. Pariſh of, in Harwich, v. the Pariſh of Woolverſtone, in Suffolk 691
Nichols v. Pawlet 727

Page.
Nicholſon v. Simpſon 730
Nicholas, St. Pariſh of, v. the Pariſh of St. Peter in Ipſwich 745
Nichols v. Bride Bridge 122
Nicholſon v. Simpſon 155
Nickſon v. Brohan 231
Nicholſon, Sarah, v. Stephen Croft 357
Nickſon v. Brohan 656
Nott v. Long 107
North v. Wiggins 139
Noell v. Gray 163
Nott v. Stephens 186
Normand v. Mills 277
Norris v. Mawditt 343
Noke v. Windham 396
—— v. Coldecot 418
Norfolk, Duke of, Caſe 588
Noaks, or Nokes, v. Watts 744
Noell v. Gray 747
Norfolk, Duke of, v. Alderton 806
Norman and others v. —— 817
Noke v. Caldecott 818
Nottingham v. Jennings 821
Northcote v. Underhill 321
Norris v. Napper 450
Nutt v. Mills 11
Nutton v. Crow 54
—— v. —— 415
—— v. —— 478
—— v. Crow 836
Nurſe v. Frampton 359
Nympfield, Pariſh of, v. the Pariſh of Woodcheſter, in Glouceſter 691

O.

OATES v. Shepherd 73
—— v. Bromel, Bromil, or Bromhill 102
Oades, or Odes, v. Woodward 141
Oates v. Bromel, Bromil, or Bromhill 242
Oakham and Whittleſea, between the Pariſhes of 256
Oates v. Shepherd 400
—— on the Demiſe of Wigſall, v. Bryden and others 403
—— v. —— 494
—— v. Robinſon 592
—— v. Machen 734
Oades, or Odes, v Woodward 817
Oates, on the Demiſe of Elizabeth Katterley, v. Jackſon 828
Obin v. Knott 157
Obrian v. Frazier 838
Ode v. Norcliffe 3
Odes v. Clerk 150
Ode v. Norcliff 254
Odes v. Clark 428
Odes v. Woodward 490
Odes, or Oades, v. Woodward 587
Ode v. Norcliffe 680
—— v. Norcliff 725
Odes v. Clark, or Clerk 833
Ogden v. Turner 210
Ogle v. Norcliffe 328
Ogburn v. Berrington 416
Ogle v. Norcliffe 751
Oldham v. Pickering 122
Olmius v. Delany 173
Oldknow v. Wainwright, or the King v. Foxcroft 383
Oldiſon, or Olderoon, v. Pickering 378
Oliver v. Hunning 411
Oliver v. Lawrence 659
Oldknow v. Wainwright, or the King v. Foxcroft 402
Oldham v. Righton 757
Onſlow v. Orchard 334
Onſlow v. —— 731
Onſlow v. Booth 735
Ongly v. Peed 834
Oppenham qui tam v. Harriſon 146

Page.
Opinion of the Court 254
Opy v. Child and others 644
Orbet v. Ward 74
Ormond, Duke of, v. Brierly 159
—— v. —— 241
Orchard v. Ireland 242
Ormſton v. —— 503
—— v. —— 569
—— v. —— 658
Ord v. Howard 720
Ormſton v. —— 232
Ormond, Duke of, v. Ireland 241
Oſborn v. the Governors of Guy's Hoſpital 276
Oſbourne v. Hoſier 451
Oſgood v. Lyon 664
Oſbaſton v. Stanhope 514
Oſgathorpe, Pariſh of, v. the Pariſh of Diſeworth 692
Offulſton, Lord's Caſe 792
Otway v. Ramſay 595
Ovingdon, Pariſh of, v. Northoram, in Yorkſhire 93
Oviat v. Vyner 583
Overton, Pariſh of, v. the Pariſh of Steventon 673
Overſeers of Weebly Pariſh, Caſe 709
Owen v. Butler 2
—— and others v. Reynolds 367
—— v. Hughes 763
—— v. Atkinſon 60

P.

PARKIN v. Wilſon 166
Parker v. Langley 11
—— v. Webb 15
Paine v. Maſters 16
Page v. Barns 18
Payne v. Partridge et al'. 19
Palmer v. Stavely 26
Pantam v. Iſkam Ibid.
Paulhill v. Powell Ibid.
Parker v. Langly 38
Patiſon v. Milton 55
Parry v. Villars 59
Parker v. Collins 66
Palmer v. —— 98
Parſon, Sir John, v. Gill 61
—— v. —— 100
Parker v. Langley 113
—— v. Lilly 129
Palmer v. Hooke, or Gouche 132
Parſons, Sir John, v. Gill 141
Palmer v. Stavely 162
Parkins v. Wollaſton 163
Page v. Price 165
Palmer v. Needham 174
Paterſon v. Taſh 190
Parkins v. Wollaſton 193
Parkin et al'. v. Godin 196
Parker v. Thoroton 262
Page v. Hayward 271
Park v. Bourne 280
Parkhouſe, or Parkhurſt, v. Forſter, or Foſter 332
Parr v. Niblett 335
Paterſon v. Scot 347
Parker v. Langley 351
—— v. Crook 352
Parkins v. Woollaſton 367
Palmer v. the Biſhop of Exeter 387
Parker v. Harris 407
Parry v. Villars Ibid.
Parkins v. Woolaſton 413
Parker v. Stanton 420
—— v. Sir William Moore, or More 428
Parks v. Crawford 430
Page v. Smith 433
Parker v. Kett 435
—— v. —— 473
—— v. Atfeild, or Atfield v. Parker Ibid.

	Page.
Palgrave v. Windham	479
Parker v. Winch	485
Page v. Hayward	490
Paulhill v. Powell	505
Parker v. Flint	566
Parkhouſe v. Forſter	Ibid.
Pagett v. Preſton	568
Parr v. Niblett	570
—— v. Purbeck	570
Pariſh v. Crawford	573
Parſons v. Gill	587
Parker v. Woollaſton	590
Paterſon v. Dyer	593
Parker v. Thoroton	599
Pancras, Pariſh of, v. the Pariſh of Rumbald in Suſſex	602
Page v. Hayward	616
Paterſon v. Taſh	658
Pawlet, Pariſh of, v. the Pariſh of Burnham	684
Pancras, Pariſh of, v. the Pariſh of Rumbald in Suſſex	684
Parker v. Clerk	707
Paulſbury, Inhabitants of, v. the Inhabitants of Wooden, or Woodend, in Com. Northampton	689
Pawlett v. Heatfield	710
Parker v. Harris	716
Paramour v. Johnſon	722
Parker v. Collins	724
Paine v. Maſters	734
Palmer v. Ekins	736
——— v. Wadbrooke	737
Payne v. Fry	752
Partridge's Caſe	760
Parker v. Clerk	761
Paxton v. Knight	765
Parker v. Meller	769
Panton v. Hall	774
Parkhouſe v. Forſter	788
Parker v. Thoroton, or Thornton	799
Paterſon v. Scott	808
Palmer v. Stavely	810
Parker v. Langly	811
Parker v. Kett	817
Parſons v. Peacock	825
Palmet v. Price	833
Paterſon v. Dyer	837
Parry v. Berry	170
Parr v. Niblett	837
Parkhouſe v. Forſter	270
Parker v. Sir William Moore, or More	340
Partridge v. Ball	390
Peake, or Peate, v. Bourne, or Birr	388
Peaſe v. Parſons	2
Pearſon v. Garrett	20
Perry v. Nicholſon	109
Peedle v. Chriſtmas	186
Pendrell v. Pendrell	222
Pearſon v. Garrett	225
Perry v. Edwards	324
Petit v. Smith	378
Pett v. Pett; or the King v. Raines	378
Peckey v. Harriſon	408
Peters v. Benning	411
Petit v. Smith	471
Petre, Lord, v. Heneage	511
Pees v. the Mayor, &c. of Leeds	635
Peyton v. Burdus	664
Peake, or Peate, v. Bourne, or Birr	708
Peart, and another, v. Weſtgarth and another	710
Pierce v. Packſton	724
Petworth, Pariſh of, Caſe	683
Peedle, Aſſignee of the Sheriff, v. Chriſtmas	735
Peter, St. and Paul, Pariſhes of, in Marlborough, Caſe	745
Petit v. Smith	756
Pentrye v. Treppott	776
Pepper-Harrow and Frencham Pariſhes, Inhabitants of, Caſe	780
Peter, St. Pariſh of, in Sandwich, v. the Pariſh of Goolſton, in Kent	784
Perry v. Kirk	838
Peters v. Morehead	819
Pembroke, Lord, v. Lord Jefferies; Reference from the Lords	664
Peat's Caſe	630
Pepys v. Sir John Lambert	235
Pew v. Creſwell et al'. Churchwardens of St. Mary, Rotherhithe	389
Pelly the Younger v. the Governor and Company of the Royal Exchange Aſſurance	575
Phillibrown v. Ryland and others	40
Philips v. Smith	66
——— v. Knightly	166
——— v. ———	156
Philip v. Fiſh	308
Phillibrown v. Ryland	354
———— v. ———	365
Philer v. Boſon	368
Phillips v. Doelittle	396
Philips v. Berry	407
——— v. Fiſh	460
——— v. Biron et al'.	581
——— v. Berry	591
Phillips v. Doelittle	593
——— v. Berry	597
——— v. Doelittle	713
Phipps v. Jackſon	727
Phillibrown v. Ryland	735
Phillips v. Wood and others	738
Phips v. Jackſon	752
Philips v. Crab	775
——— v. the Biſhop of Sarum	833
Phyſicians v. Roſe	30
Phips v. Jackſon	153
Phyſicians v. Salmon	292
Phyſicians, College of, v. Buſh	341
———— v. Baſſet	347
Phillips v. Biron and others	732
Pie v. Cooper	11
Pitcher v. Tovey	13
Pillan and Roſe v. Van Mierop and Hopkins	15
Pitts v. Gainee and Foreſight	25
Pitcher v. Tovey	128
Pitt v. Coney	182
Pickering's Caſe	183
Pitts v. Miller and Wife	217
Pinkney v. Hull	226
Pillon and Roſe v. Van Mierop and Hopkins	240
Pierce v. Hutcheſon	241
——— v. ———	247
Pitcher v. Tovey	319
Pierceſon v. Hiels	369
Pierce v. Packſon	Ibid.
——— v. Henriques	370
——— or Price, et al'. v. Prouſe, or Rouſe	381
Pitt v. Coney	418
Pitman v. Maddox	446
Pitton v. Walter	456
Pillan and Roſe v. Van Merop and Hopkins	658
Pitcher v. Tovy	662
Pitman v. Biddlecombe	Ibid.
Pierce v. Blake	718
Pitts v. Polehampton	722
Pink v. Rudge	724
Pierce v. Henriques	Ibid.
Pickering v. Simonds	737
Pickering's Caſe	787
Pie v. Cooper	807
Piper v. Dennis	291
Pierſe, Eſq; v. Lord Fauconbery	801
Player v. Bandy	307
Plumer, Spinſter, v. W. Marchant, Adminiſtrator of Peter Marchant	468
——— v. ———	482
Plummer v. Bentham	622
Player v. Bandy	712
Pleddal v. Freak	718
Plummer v. Lea	774
Powers v. Jones	67
Poulter v. Cornwall	17
Poitvin v. Tregeagle	60
Poſt Denning v. Cloſe	111
Powell v. Ball	112
Poſtlethwaite v. Parks	122
Pomp v. Ludvigſon	174
Powell v. Main	210
Potter v. Pearſon	229
Popplewell v. Wilſon	232
Pollard v. Gerrard	265
Potter v. Jones	274
Portman v. Cane	309
Pocklington v. Peck	Ibid.
Pool, Mrs. Caſe	329
Powell v. Hord	336
Prideaux v. Morris	403
Power v. Jones	417
Powell v. Hord	461
Powers, or Bowers, v. Coot, or Cook	471
Portman v. Cane	480
Pollard, or Ballard, v. Gerard	485
Popley v. Aſhly	498
Poſt Denning v. Cloſe	569
Potter v. Pinkney	608
Poultney v. Holmes	608
Pollard, or Ballard, v. Gerrard	629
Pond v. Underwood	712
Porter, Elderton, and others, Caſe of	751
Pool v. Gardner	757
Pollard v. Awker	Ibid.
Pollard v. Gerrard	759
Powell v. Gay	773
Powell v. Herds	838
Pocock v. Thornicroft	554
Powell v. Gay	774
Preſgrave v. Saunders	3
Prince v. Maſon	6
Price v. Neale	52
——— v. Bawd	76
Pride v. the Earls of Bath and Montague	218
Price v. Neale	240
Prince v. Molton	331
Pratt v. Rutleis	333
Primer v. Phillips	366
Price v. Parker	368
Prinn v. Edwards	408
Price v. the Earl of Torrington	451
——— v. Brown	460
——— v. Langford	487
Precinct of Bridewell v. the Pariſh of Clerkenwell	674
Price v. Kenrick	728
Prior v. Lord Hay	738
Pratt v. Rutleis	770
Preſtgrave v. Saunders	Ibid.
Proctor v. Johnſon	775
Prime v. Maſon	777
Preſton v. Lingen	798
Price v. Brown	799
Preſgrave v. the Churchwardens of Shrewſbury	386
Prideaux v. Morris	403
Puliſton v. Warburton et al'.	58
Punting's Caſe	87
Pullen v. White	175
Pullerton v. Agnew	271
Pullen v. Benſon	338
Pullien v. Benſon	359
——— v. Benſon	363
Puliſton v. Warburton et al'.	390
Pullen v. Purbeck, or Birbeck	585
——— v. Benſon	721
——— v. Benſon	746
——— v. Palmer	790
——— v. ———	833
Pyle v. Grant	81
——— v. ———	179
Pyke v. Crouch	443
——— v. ———	821

Q.

Page.
QUARM v. Rowe 147
Queen v. Criſp 17
—— v. the Mayor of Thetford 30
—— v. Beſt et al'. 33
—— v. Franklin 54
—— v. Hannon 44
—— v. Hoſkins 54
—— v. Carter 62
—— v. Tutchin Ibid.
—— v. Stedman 65
—— v. Green 84
—— v. Simpſon Ibid.
—— v. Gould 88
—— v. Collingwood, or Collinwood 89
—— v. the Mayor of Carliſle 100
—— v. Darby 115
—— v. Deman Ibid.
—— v. Coleſworth 121
—— v. the Mayor, &c. of Carliſle 133
—— v. Chaffey 134
—— v. Pugh and others 134
—— v. Ogden 141
—— v. Criſp 142
Queen v. Beſt 154
—— v. Wyatt Ibid.
—— v. Foxby 162
—— v. Bothell 177
—— v. Layton Ibid.
—— v. Derby Ibid.
—— v. Ridpath Ibid
—— v. Buckbridge 208
—— v. Bradford Ibid.
—— v. Foxby 211
—— v. Morgan 213
—— v. Williams Ibid.
—— v. Daniel 219
—— v. Chaffey Ibid.
—— v. Murray 220
—— v. Weſt Ibid.
—— v. Weſton Ibid.
—— v. Simmons 221
—— v. Atkins Ibid.
—— v. Collins Ibid.
—— v. Odam Ibid.
—— v. Clerk 250
—— v. Whittle 254
—— v. Ewer Ibid.
—— v. Plint Ibid.
—— v. Knatchbull Ibid.
—— v. Potter et al'. Ibid.
—— v. George 255
—— v. Dixon Ibid.
—— v. Bothell, or Porter Ibid.
—— v. White Ibid.
—— v. Naſh 256
—— v. Bains Ibid.
—— v. Jay Ibid.
—— v. Layton, or Leighton Ibid.
—— v. Delme 262
—— v. Langley. 265
—— v. Weſt 266
—— v. Simmons Ibid.
—— v. Tooley et al'. Ibid.
—— v. Green Ibid.
—— v. Wiatt, or Wyatt 278
—— v. Jennings Ibid.
—— v. Tooley et al'. Ibid.
—— v. Dyer Ibid.
—— v. Croſſe 281
—— v. Barnaby 282
—— v. Bothell, or Porter 283
—— v. Dyer Ibid.
—— v. Highmore Ibid.
—— v. King et al'. Ibid.
—— v. Matthews Ibid.
—— v. Green Ibid.
—— v. Bradley Ibid.

Page.
Queen v. Simpſon 284
—— v. Clerk 289
—— v. the Bailiffs, Burgeſſes, and Commonalty of the Town of Ipſwich 293
—— v. Truebody 293
—— v. Lane 294
—— v. Sutton Ibid.
—— v. the Corporation of Durham Ibid.
—— v. the Borough of Alborough 295
—— v. the Corporation of Buckingham Ibid.
—— v. Clerk 305
—— v. Summers Ibid
—— v. Danvers 307
—— v. Hill et al'. 318
—— v. Rogers 327
—— v. Clerk 339
—— v. the Corporation of Helſton in Cornwall 365
—— v the Bailiffs, Burgeſſes, &c. of the Town of Ipſwich 373
—— v. Truebody Ibid.
—— v. Lane Ibid.
—— v. the Mayor and Burgeſſes of Pomfret Ibid.
—— v. Guy, or Guiſe 385
—— v. Foxby 413
—— v. Bains Ibid.
—— v. Ball 428
—— v. Belwood 429
—— v. Templeman 449
—— v. Sewell, alias Beans 450
—— v. Mead, an Attorney, &c. 451
—— v. Mackartny et al'. 451
—— v. Chapman, late Mayor of Bath 451
—— v. Sutton 454
—— v. the Inhabitants of Hornſey Ibid.
—— v. Muſcot, or Muſket 455
—— v. Summers 486
—— v. Templeman Ibid.
—— v. Wheeler Ibid.
—— v. Taylor and Griffith 494
—— v. —— —— 495
—— v. Baker et al'. Ibid.
—— v. Watſon Ibid.
—— v. Layton, or Leighton Ibid.
—— v. Goodenough Ibid.
—— v. Taylor 497
—— v. Depuke 495
—— v. Sturney 497
—— v. George 499
—— v. Dr. Watſon 506
—— v. Layton 507
—— v. Mickal Ibid.
—— v. Nichols Ibid.
—— v. Green Ibid.
—— v. Sir John Bucknal, or Bucknell 514
—— v. Watſon 515
—— v. Kime Ibid.
—— v. Watts Ibid.
—— v. the Dutcheſs of Buckleugh et al'. Ibid.
—— v. the Inhabitants of Cluworth Ibid.
—— v. the Inhabitants of the County of Wilts Ibid.
—— v. the Inhabitants of Stratford 516
—— v. Sainthill, or Saintiff Ibid
—— v. Brown Ibid
—— v. Brandling Ibid.
—— v. the Inhabitants of Hornſey Ibid.
—— v. Rawlins 522
—— v. King 529
—— v. Whiſtler Ibid.
—— v. Clerk Ibid.
—— v. Summers Ibid.
—— v. Langley Ibid.
—— v. Templeman Ibid.
—— v. Darby Ibid.
—— v. Swanſon, Baynton, Hartley, and Spur Ibid.

Page.
Queen v. Lilly 530
—— v. Sir John Bucknell Ibid.
—— v. Buckridge Ibid.
—— v. Speed Ibid.
—— v. Parker Ibid.
—— v. Smith Ibid.
—— v. Langley Ibid.
—— v. Daniel 531
—— v. Wyatt Ibid.
—— v. Dyer Ibid.
—— v. Cave Ibid.
—— v. Watſon Ibid.
—— v. Parry, Snelling, et al'. Ibid.
—— v. Carter Ibid.
—— v. Scott Ibid.
—— v. Goddard and Carlton Ibid.
—— v. Dixon 532
—— v. Browne Ibid.
—— v. Orbell Ibid.
—— v. George Ibid.
—— v. Bothell, or Porter Ibid.
—— v. Tracy Ibid.
—— v. Macartney, or Macarty et al'. 533
—— v. Harman Ibid.
—— v Gould Ibid.
—— v. Lane Ibid.
—— v. Carter Ibid.
—— v. Middlemore Ibid.
—— v. Wyatt Ibid.
—— v. Criſp Ibid.
—— v. Beſt et al'. Ibid.
—— v. Steer and others Ibid.
—— v. Coteſworth Ibid.
—— v. Branſworth 534
—— v. Buck and Hale Ibid.
—— v. Culliford Ibid.
—— v. Hannon Ibid.
—— v. Sir James Banks Ibid.
—— v. Saxfield Ibid.
—— v. Collingwood, or Callingwood Ibid.
—— v. Smith Ibid.
—— v. Wigg Ibid.
—— v. Peirſon Ibid.
—— v. Johnſon 535
—— v. Paſchal et al'. Ibid.
—— v. Pawlett Ibid.
—— v. Hickeringill Ibid.
—— v. Harris Ibid.
—— v. Templeman Ibid.
—— v. Lady Oglethorpe Ibid.
—— v. Hurſt Ibid.
—— v. Rudd, or Read Ibid.
—— v. Griffiths 536
—— v. Wrightſon Ibid.
—— v. Buſhier Ibid.
—— v. Dy Ibid.
—— v. Grantham Ibid.
—— v. Gennings Ibid.
—— v. Leighton Ibid.
—— v. Jennings Ibid.
—— v. Tooly et al'. Ibid.
—— v. Ingram and Wife Ibid.
—— v. Williams Ibid.
—— v. Cranage Ibid.
—— v. Bradley Ibid.
—— v. Muſcot, or Muſket 537
—— v. Clerk 554
—— v. Blacket and Robinſon Ibid.
—— v. Clerk Ibid.
—— v. Smith Ibid.
—— v. Chandler Ibid.
—— v. Norton 555
—— v. Holford, or Rhodes and Cole Ibid.
—— v. Taylor Ibid.
—— v. Soley et al' Ibid.
—— v. the Mayor of Thetford Ibid.
—— v. Hungerford Ibid.
—— v. Tyrrill and Barber Ibid.
—— v. Matthews Ibid.
—— v. the Borough of Aldborough 556

Page.
Queen v. Blagdon 556
—— v. Harris 557
—— v. Watton 569
—— v. Crofts Ibid.
—— v. Shepherd Ibid.
—— v. Baines 581
—— v. Sutton 682
—— v. Blagdon Ibid.
—— v. Ford et al'. 587
—— v. Fitzgerald 588
—— v. Lee Ibid.
—— v. Potter et al'. 589
—— v. Deman 590
—— v. Gunn Ibid.
—— v. Tyrril and Barber 591
—— v. Simpſon Ibid.
—— v. Layton, or Leighton 597
—— v. the Pariſh of Milverton 601
—— v. Bucknall, or Bucknell Ibid.
—— v. Langley 602
—— v. Corbet Ibid.
—— v. Chaffey Ibid.
—— v. Savil, or Savin Ibid.
—— v. Burnaby Ibid.
—— v. Gunn et al'. Ibid.
—— v. Weſt Ibid.
—— v. the Bailiffs, Burgeſſes, and Common-Council of the Town of Ipſwich Ibid.
—— v. Wiatt, or Wyatt Ibid.
—— v. Weſton 603
—— v. Bonnet Ibid.
—— v. Harris Ibid.
—— v. the Pariſh of St. Giles Ibid.
—— v. Yarrington Ibid.
—— v. Wooton Ibid.
—— v. Simpſon Ibid.
—— v. Brown 612
—— v. Drake Ibid.
—— v. Rudd, or Read Ibid.
—— v. Lane Ibid.
—— v. Derby Ibid.
—— v. Rogers 619
—— v. the Mayor and Aldermen of Norwich Ibid.
—— v. —— Fellows, M. D. 622
—— v. Twitty and Maddicot 629
—— v. the Inhabitants of Little-Port, or Tawney's Caſe Ibid.
—— v. Guy Ibid.
—— v. the Mayor of Thetford Ibid.
—— v. the Town of Clitheroe 630
—— v. Chapman, late Mayor of Bath Ibid.
—— v. the Mayor of Hereford Ibid.
—— v. Banes Ibid.
—— v. the Mayor and Aldermen of Norwich Ibid.
—— v. the Mayor, &c. of Derby Ibid.
—— v. Sir Richard Raines Ibid.
—— v. the Commiſſioners of the Land-Tax for Barnwell 631
—— v. the Corporation of Corn Ibid.
—— v. Dane Ibid.
—— v. the Corporation of Doncaſter Ibid.
—— v. Sir G. Heathcote, Lord Mayor of London Ibid.
—— v. the Corporation of Durham Ibid.
—— v. the Mayor and Burgeſſes of Pomfret Ibid.
—— v. the Borough of Aldborough 632
—— v. the Corporation of Buckingham Ibid.
—— v. Gouche, or Gouch 655
—— v. London Ibid.
—— v. Peach 659
—— v. Ride Ibid.
—— v. Parker 661
—— v. Ridpath Ibid.
—— v. Leich 665
—— v. the Bailiffs, Burgeſſes, and Commonalty of Ipſwich 663

Page.
Queen v. Wigg 666
—— v. Buck and Hale 668
—— v. the Mayor and Aldermen of Norwich Ibid.
—— v. Sutton Ibid.
—— v. the Mayor and Burgeſſes of Pomfret Ibid.
—— v. the Inhabitants of Caple in Surry 679
—— v. Harris 680
—— v. Gouche, or Gouch Ibid.
—— v. Aberford-Eaſt Ibid.
—— v. the Inhabitants of Little-Port, or Tawney's Caſe Ibid.
—— v. Corbet Ibid.
—— v. Savil, or Savin Ibid.
—— v. the Inhabitants of Newnham Murrey Ibid.
—— v. London Ibid.
—— v. Branworth 681
—— v. the Inhabitants of St George Ibid.
—— v. Whiten Ibid.
—— v. Hedges Ibid.
—— v. the Inhabitants of Barkin, and the Hamlets of Donneſdon and Needham in the ſame Pariſh Ibid.
—— v. the Inhabitants of Buckingham Ibid.
—— v. Simmons Ibid.
—— v. Atkins 682
—— v. Collins Ibid.
—— v. the Inhabitants of Puttenham Ibid.
—— v. Cecil Ibid.
—— v. the Inhabitants of Mancheſter 683
—— v. Dunn, or the Pariſh of Halifax v. the Pariſh of Overton, in the Weſt-Riding of Yorkſhire Ibid.
—— v. the Inhabitants of Riſborough Ibid.
—— v. Lord Griffin 702
—— v. Cope Ibid.
—— v. Stafford Ibid.
—— v. Simpſon 703
—— v. Ewer 704
—— v. the Inhabitants of Little-port 706
—— v. Guy, or Guiſe Ibid.
—— v. Dr. Wall 707
—— v. Dr. Thomas Watſon, Biſhop of St. David's 725
—— v. Coteſworth 726
—— v. Criſp Ibid.
—— v. Brown 727
—— v. Jennings 728
—— v. Blagdon 728
—— v. the Inhabitants of Gruelthorp Ibid.
—— v. the Corporation of Buckingham 729
—— v. the Inhabitants of Puttenham 744
—— v. the Pariſh of St. Giles Ibid.
—— v. Bellwood 747
—— v. Paty and others 751
—— v. Maſon 767
—— v. Wyat 768
—— v. Ford and others 776
—— v. Ewer Ibid.
—— v. the Inhabitants of Pennington 779
—— v. Doughton 780
—— v. Delme 787
—— v. the Inhabitants of Harrow and Edgware 779
—— v. the Commiſſioners of the Land Tax for Barnwell 789
—— v. Depuke 792
—— v. Sir J. Banks 797
—— v. the Inhabitants of the County of Wilts Ibid.
—— v. the Corporation of Helſton, in Cornwall 798

Page.
Queen v. Browne 803
—— v. the Inhabitants of Wilts 807
—— v. Wyat Ibid.
—— v. Sewell, alias Beaux 816
—— v. Dy Ibid.
—— v. Wiatt, or Wyatt 818
—— v. Weſton Ibid.
—— v. Derby Ibid.
—— v. Tutchin 835
—— v. Blower 836
—— v. Digg Ibid.
—— v. Haynes Ibid.

R.

RAYNERD v. Chace 95
Ramſden v. Ambroſe 213
Ratcliff v. Burton 423
Rains, Sir Richard, v. the Commiſſary of the Dioceſe of Canterbury 474
Rawlone v. Hickman 520
Ravenhill's Caſe 635
Ragg v. King 650
Rains, Sir Richard's Caſe 626
Ratcliff Culy, Pariſh of, v. the Pariſh of Exall in Coventry 686
Rattle v. Popham 818
Radley v. Rudge 355
Ratcliffe one, &c. v. Beſley 754
Radley v. Rudge 804
Raines, Sir Richard's Caſe 821
Reynolds v. Clarke 40
Reeve v. Trindal 178
Read v. Charnley 181
Reignolds v. Davis 207
Read v. Marſhall 213
Reynolds v. Oſborn 304
Real et al'. v. Macky 312
Read v. Marſhall 335
Reginold v. Taylor 412
Redham v. Walters 413
Reeves v. Symonds 455
Redſhaw v. Heſther 511
Reading v. Royſton 512
Reed v. Cole 578
Reeve v. Long 579
Redmond v. Joſeph 587
Read v. Tregeagle 589
Reignots v. Tipping 590
Reginold, or Reginol, v. Taylor 597
Reading v. Royſton or Rawſterne 614
Remington v. Stevens 617
Kees, Morgan, v. the Archdeacon of Cardigan, or the King v. Morgan Rice 625
Read v. Chapman 650
—— v. Tregeagle 661
—— v. Chambers 752
Reynolds v. Clerk 771
Read v. Tregeagle 776
Rench v. Britton 787
Reeve v. Long 820
Reading v. Royſton 822
Reynolds v. Gray 77
Redſhall v. Heſter 342
Rees, Morgan, v. the Archbiſhop of Cardigan, or the King v. Morgan Rice 384
Richards v. Hill 22
Rivet et al'. v. Cholmondeley et al' 73
Rice v. Kelly 172
Rios v. Belifante 173
Richardſon v. Jelly Ibid.
Rich v. Wilks 323
Ricards v. Corneforth 332
Riccards, or Richards, v. Corneforth, Cornforth, or Cornford 374
—— —— v. —— —— 409
Rich v. Doughty 429

Page.
Richardſon v. Williams 446
———— v. Seiſe 472
Right, on the Demiſe of Francis Buſſet, Eſq; v. Thomas and another 610
The ſame v. the ſame Ibid
Rigdon, or Rigden, v. Hedges 646
Record v Bottonham 652
Rice v. Milmer 663
Richards v. Williams 795
Richardſon v. Atkinſon 804
Rivet, and others, v. Cholmondley and others 809
Rigaſt v. Galliſard 121
Ritſon v. the Bail of Naſh 171
Rig v. Wilmer 196
Richards v. Squibb 267
Rice v. Oatfield 659
Roſiere v. Sawkins 2
Rogers v. Cook 20
Roſwell v. Prior 24
Robins v. Robins Ibid.
Robinſon v. Raley 74
Roſwell v. Prior 83
Robinſon v. Calwood 102
———— v. Taylor 186
———— v. Goſnold 210
———— v. Stone 239
Roe v. Needham 241
Robert v. Harnage 243
Robinſon v. Groeſcourt 290
———— v. Walker 322
———— Palmes, Eſq; v. Ann Bland, Spinſter, Adminiſtratrix de bonis non, of Sir John Bland, Bart. deceaſed 338
Rogers v. Rereſby 340
Roberts v. Withered 343
Roades v. Barnes 347
Rogers v. Gibbs 355
Robinſon v. Raley 366
Rogers v. Birkmire 376
Roſiere v Sawkins 409
Roſe v. Green 432
Robins v. Robins 446
Robinſon v. Davis 458
Rock v. Leighton, or Layton, Sheriff of Salop 472
Rouſe v. Etherington 474
Roſtington's Caſe 500
Robinſon, Palmes, Eſq; v. Ann Bland, Spinſter, Adminſtratrix de bonis non, of Sir John Bland, Bart. deceaſed 502
Roberts v. Witherhead 551
Robertſon v. Moor 585
Rochſhilt v. Leibman 617
Roſiere v. Sawkins 654
Robins v Sayward 659
Roſewell v. Prior 665
Roberts v. Arthur 704
Robinſon v. Stone 705
———— v. Smith 717
Robert v. John Villars, alias Danvers 722
Roſiere v. Sawkins 723
Rook v. the Sheriff of Saliſbury 723
Roberts v. Archer 724
Rowſton v. Combat 726
Robinſon v. Green 734
———— v. Raley 742
Roades v. Barnes Ibid.
Robinſon v Godſalve 756
Royal Exchange Aſſurance v. Vaughan 790
Roberts v. Witherall, or Withered 802
Roſewell v. Prior 810
Robinſon v. Robinſon 829
Roſe, on the Demiſe of Vere and and others, v. Hill 832
Rock v. Leighton, or Layton, Sheriff of Salop 834
Robinſon v. Nichols 172
Roſe v. Green 199

Page.
Roop v. Scritch 303
Roberts v. Cook 303
Robinſon, Palmes, Eſq; v. Ann Bland, Adminiſtratrix de bonis non, of Sir John Bland, Bart. deceaſed 653
Ruſh v. Seymour 65
Ruſſel v. Thorp 67
Rutter v. Redſtone 70
Rumball v. Ball 116
Rudge v. Onon 118
Ruſſell v. Corne 210
Rudge v. Onon 353
Rutter v. Redſtone 422
Ruding v. Newell 462
Ruſſel v. Boheme 465
Ruſh v. the Chancellor and Scholars of Oxford 497
Ruſſell v. Corne 581
Rule, General 594
Ruding v. Newel 637
Rutherford v. Scott 650
Rudd v. Foſter 705
Ruſh v. Seymour 728
Rutter v. Redſtone 768
Rule, General 774
Rudgwick, Chiddingfold, and Dunſfold, Inhabitants of, Caſe 779
Ruſh and others, Aſſignees of Ryland, v. Baker 804
Ryley v. Hicks 610
Rycroft v. Calcraft 735

S.

SAVAGE v. Robury 23
Savil v. Roberts Ibid.
Savage v. Walthew 36
Sanders v. Lentor 61
Sale v. Crompton 73
Savil v Roberts 110
Say, Lord, and Seals's Caſe 142
Sandridge, Inhabitants of, v. the Inhabitants of Luton 221
Sail v. Kitchingham 248
Savage v. Walthew 250
Sands, Dr.'s Caſe 252
Salter v. Groſvenor 297
Saitern v. Wynne 312
Sawyer v. Killigrew 319
Sail v. Kitchingham 324
Saviour's, St, Southwark, Churchwardens of, v. Smith 326
Saliſbury v. Proctor 368
Salter v. Brunſden 373
Sawyer v. Loggin 386
Saunders v. Melhuiſh 393
Savage v. Dent 398
Say, Lord, and Seals's Caſe 454
Savage and Haddon v. Field 463
Sands, Sir George's Caſe 474
Sadler v. Daniel 478
Saltern v. Wynne, Executor 487
Say, Lord, and Seals's Caſe 491
Salvador v. Hopkins. Heaton v. Rucker 578
Sands v. Child 580
Saladine v. Sir Jacob Jacobſon 593
Salter v. Groſvenor 610
Savage v. Walthew 656
Saunders, or Sanders, v. Owen 667
Sandridge, Pariſh of, v. the Pariſh of Luton 683
Saliſbury v. Williams 704
Savill v. Snell 713
Saunders v. ———— 724
Sawyer v. Mawgridge 728
Sargent v. Reed 740
Sadler v. Daniel 762
Savil and Wife v. Kirby 762
Sanderſon v. Clagget 763
Salter v. Groſvenor 787
Saliſbury v. Proctor 793

Page.
Sandwich Lord, Caſe of 795
Sands and Taſh v. Ledger 817
Schomberg v. Murrey 161
Scrimſhire v. Alderton 190
Screen v. Cockernutt 388
Scott v. Peacock 427
Score, or Corie, v. Bowles 548
Schriven and Turner's Caſe 636
Scarborough, Corporation of, Caſe 639
Scrimſhire v. Alderton 658
Serecold v. Hampſon, Bart. 703
Scawen v. Garret 752
———— v. ———— 798
———— v. ———— 807
Scrivenham Pariſh v. the Pariſh of St. Nicholas 678
Seers v. Turner 5
Selby v. Ruſſel 98
Seviniack v. Marſhall 126
Seſtern v. Cibber 154
Serra Gomez v. Munez 183
Seſtern v. Cibber 185
Selby v. Greene 243
Serle, or Searle, v. Barrington 245
Sewers, Commiſſioners of, Yorkſhire, Caſe 258
Seignorett v. Noquire et al'. 323
———— v. Noguire 340
Serle, or Searle, v. Barrington 346
Seſtern v. Cibber 352
Seymour, Sir Edward's Caſe 359
Serle, or Searle, v. Barrington 459
Seviniack v. Marſhall 480
Seaman v. Fonnereaux 572
Serle, or Searle, v. Barrington 661
———— v. ———— 713
Sea v. Taylor 726
Seviniack v. Marſhall 734
Seaford and Caſtle Church, between the Pariſhes of 783
Seafor, or Sheather, v. Holt and others 787
Seymour, Bart. qui tam v. Day 800
Seaman v. Ling 806
Selwyn, Eſq; v. Selwyn, Widow, and others 831
Selleck v. the Biſhop of Exon 838
Serle, or Searle, v. Barrington 244
Serecold v. Hampſon, Bart. 703
Shadford v. Houſtoun 308
Sherman v. Alvarez 8
Shore v. Brown 29
Shepherd v. Maidſtone 90
Shephard v. Brand 107
Sheriff of Middleſex, Caſe of 112
Shergold v. Holloway 114
Shepherd and Baily v. Orchard 141
Shales v. Seignoret 150
Shoot v. Higgs 181
Shuttle v. Wood 184
Shuttleworth v. Pilkington 187
Shales v. Seignoret 247
Shepherd v. Maidſtone 248
Shellington, the Inhabitants of, Caſe 256
Shepherd v. Taylor 316
Shubrick v. Salmund 326
Sherborn v. Boſtock 329
Sharp v. Lowther 330
Shore v. Madiſton 331
Shortridge v. Lamplugh 333
Sheriff of Middleſex v. Barnes 345
Shipton v. Hopton 346
Shadwell, Eſq; v. Angel, Eſq; 357
Shortridge v. Lamplugh 364
Sherwin v. Sir Walter Clayes 391
Short v. King 396
Shortridge v. Lamplugh 412
Shepherd and Baily v. Orchard 413
Shipley v. Shipley 415
Shirley v. Wright 428
Shreſbury, Goaler of, Caſe 431
Shaw v. Weigh et al'. 438
Sheawood v. Adderley 446
Shuttleworth v. Bravo 458

Page.
Shank qui tam v. Payne 460
Shelley's Caſe 470
Shardelow v. Naylor 474
Shepherd v. Shorthoſe 479
Sheepſhanks and Wife v. Lucas 493
Shipton v. Hopton 499
Shaw v. Weight et al'. 514
—— v. Weigh 520
Shortridge v. Lamplugh 569
Shuttleworth v. Paterſon Ibid.
Shipley v. Shipley 591
Shergold v. Holloway 604
Shortridge v. Lamplaugh 607
Sherborn v. Boſtock 622
Shepherd v. Shorthoſe 705
——— v. Taylor 720
Sheild v. Cliff 725
Shepherd and Bailey v. Orchard 726
Sheriff of Eſſex, Caſe of 746
Shotter v. Friend 754
Sharp v. Lowther 764
Shuttle v. Wood 776
Shuttleworth v. Paterſon 777
Sheepſhead Pariſh, in Leiceſter, v. the Pariſh of Melborne, in Derbyſhire 784
Sheriff of Cumberland's Caſe 787
——— Middleſex's Caſe 788
Sherwin v. Sir Walter Clarges 795
Shaw v. Weigh and others 825
Shirley v. Wright 834
Silk v. Rennet, one, &c. 147
Sim's Caſe 217
Siſney v. Nevinſon 347
Silk v. Hill 414
—— v. —— 569
Siſted v. Lee 590
Silk v. Hill 591
Sibbet v. Ruſſell 595
Silk v. Rennet, one, &c. 622
Silveſter, Pariſh of, v. the Pariſh of Aſhton 678
Silly v. Dally 721
Silk v. Rennet, one, &c. 754
Silveſter, Pariſh of, v. the Pariſh of Aſhton 678
Silly v. Dally 770
Simms v. Peters 836
Skinner v. Newton 11
——— v. ——— 415
——— v. Kilby 715
——— v. Rebow 337
——— v. Upſhaw 249
Slicer v. Thompſon 173
Slanney v. Slanney 100
——— v. ——— 162
——— v. ——— 369
Slabourne v. Bengo 391
Slaughter, or Slater, v. May 476
Slanney v. Slanney 724
Smith v. Villars 3
—— v. Bowen 6
—— v. Maſon 8
—— qui tam v. Gibſon Ibid.
—— v. Arnold 14
—— v. Ary 28
—— v. —— 35
—— v. Hickſon 43
—— qui tam v. Gibſon 46
—— v. Pelah 48
—— v. Maſon 54
—— v. Bowen 64
Small, on the Demiſe of Baker, v. Cole and Skinner 74
Smith v. Bowen 80
—— v. Angel 123
—— v. the Mayor and Aldermen of London 134
—— v. Graham 137
—— v. Oxbring 161
—— v. Graham 169
—— v. Dudley 172
—— v. Nicholſon 173

Page.
Smith v. Smith 190
—— v. Tracy 193
—— v. Hixon 215
Smalley v. Kerfoot and Wife 216
Smallwood v. Vernon 234
Smith v. Jarvis and Baily 236
—— v. Abbot 238
—— v. Sharp 247
—— v. Croſs 254
—— v. Bartlett 270
Smalt v. Whitmill 282
Smith, Sir James's Caſe 290
—— v. Walker and Nois 305
—— v. qui tam v. Dunce 311
—— v. Clerk et al'. 312
—— v. Sharp 320
Smithies v. Dr. Harriſon 333
Smith v. Angel 344
—— v. Ayrey Ibid.
—— v. Bromley 347
—— v. Milford 358
—— v. Angel 379
—— v. Waller 384
Smartly v. Henden 390
Smith v. Jones 395
—— v. Crabb 399
Small, on the Demiſe of Baker, v. Cole and Skinner 402
Smith and others v. Stoneard 413
—— v. Nicholſon 424
Smartle v. Penhallow 434
Smith v. Trigg 438
Smartle, on the Demiſe of Newport, v. Williams 441
Smith v. Veale 447
Small v. Whitmill 465
Smith v. Harman 476
Smith's Caſe 480
—— v. Angel 490
—— v. Tindal 491
—— v. Weſtall 497
—— v. Ary 501
Smartle v. Penhallow 503
Smith v. Trigg Ibid.
—— v. —— 513
—— Sir James, Caſe of 551
—— v. Goffe 580
Smallcomb v. Croſs and Buckingham 585
Smith v. Angel 588
—— v. Harman 590
—— v. Parks 608
Smith's Caſe 637
—— v. Croſby 646
—— qui tam v. Gibſon 651
—— v. Gould 655
Smith v. —— 663
—— v. Goff 763
—— v. Johnſon 711
—— v. Sharp 718
—— v. Dr. Bouchier and others 738
—— qui tam v. Gibſon 739
—— v. Bouchier and others 749
—— v. Wallet 758
—— v. Croſby 764
—— v. Harwood 764
—— qui tam v. Gibſon Ibid.
—— v. Langley 765
—— v. Croſs 767
—— v. Brampſton, or Frampton 793
—— v. Page 793
—— on the Demiſe of Dormer, v. Parkhurſt and others 801
Smartle v. Penhallow 811
Smith v. Milford, or Milford v. Smith 819
—— v. Tindal 823
—— v. Trigg 825
Snow v. Firebrace 349
Snell v. Timbrell 599
Snow v. Como 661
Snow v. the Bail of Firebraſs 725
Snow v. the Bail of Firebraſs 776

Page.
Snell v. Timbrell 799
Snow v. Firebraſs 810
Southwell, Inhabitants of, v. the Inhabitants of Sneedon in Nottingham 221
Soper v. Dible 226
South-Sea Company v. Duncomb 347
Somerſet, Duke of, v. France et al' 439
——————— v. France and other Tenants in Cumberland 460
Southerton v. Whitlock 549
Southwell, Inhabitants of, v. the Inhabitants of Sneedon in Nottingham 683
Soreſby v. Sparrow 705
South-Sea Company v. Duncomb 713
South v. Jones 731
Southwold, Pariſhes of, and Yoxford in Suffolk 783
Southhouſe v. Boak 809
South, or Buſh, v. Alleine, or Allen 820
South Cadbury, Pariſh of, v. the Pariſh of Braddon in Somerſetſhire 682
Somerſet, Duke of, v. France and other Tenants in Cumberland 329
Spurraway v. Rogers 17
Spackman v. Huſſey 18
Spencely v. Sutton 151
Spurraway v. Rogers 229
Spiller and Wife v. Adams, or Andrews 335
Springett v. Chadwick 346
Spark v. Jobber 355
Spiller and Wife v. Adams, or Andrews 380
Sprightly, on the Demiſe of John Collins, v. Dunch 402
Spencely v. Hutton 428
Sparks v. Crofts 471
Sparrow v. Caruthers 572
Spurraway v. Rogers 587
Sparks v. Wood 597
Spackman v. Huſſey Ibid.
Spencer's Caſe 670
Sparks v. Crofts 721
Spaller and Wife v. Adams and Andrews 732
Springett v. Chadwick 734
Sparks v. Keeble 735
—— v. Spicer 794
Spack v. Spicer Ibid.
Spiller and Wife v. Adams, or Andrews 549
Squire v. Grevell, or Grewett 101
—— v. Yendon 275
—— v. Grevell, or Grevett 712
Styrrup v. Stoakes 381
Staple v. Heydon 153
Staples v. Heydon 4
Strong v. How 369
Stroud v. Lady Gerrard 6
Stiles v. Mead 8
Strong v. Courtney 34
Stoughton v. Reynolds 45
Staple v. Heydon 62
Stephens v. the Bail of Hudſon 63
Stratton v. Burgis 66
Stroud v. Tilly 73
Stout v. Marſon and Cowper 76
—— v. Fowler 77
Stone v. Atwol 86
Stevens v. Matthews 97
Stafford v. Forcer, Adminiſtrator of William Moore 117
Starr v. Rookby 329
Stout v. Fowler 132
Stork v. Huggins and De Smith 138
Stephens v. Squire 139
Strong v. Howe 143
Stonehouſe v. Mullins 431
Stratton v. Burgis 144
Stanyon v. Davis 153
Steward v. Smith 171

Page.
Studley v. Sturt 186
Strutville v. ——— 213
Stocker v. Berny 391
Starke, or Starkey v. Cheeſeman 227
Stayner v. Baker 241
Stibbs v. Clough 244
——— v. ——— 248
Strong v. Courtney 275
Stoteſbury v. Smith 276
Stedman v Robiſon, or Robinſon 317
Stanmer v. Davers 318
Stagg v. Hind 247
Stannian, Stanion, or Stanyon, v. Davis, or Davies 318
Steer v Shalecroft 372
Stanhop v. Pemperton Ibid.
Story v. Atkins 329
Studley v. Sturt 341
Stafford v. Beneath 345
Stratford v. Neal 418
Stanyon v. Davis 350
Stacy v. Sutton. The ſame v. ——— 356
Staple v. Heydon 361
Strong v. How 360
Stafford v. Beneath 365
Styrrup v. Stoakes 381
Steed, or Stead v. Lateward 396
Stevenſon, junior, v. Nevinſon, Mayor of Appleby, and the Common Council of Appelby 405
Stoughton v. Reynolds 406
Stratford v. Neal 418
Street v. Hopkinſon 423
Stonehouſe v. Mullins 431
Stephenſon, Gent. v. Hill 440
Stainer v. the Burgeſſes of Droitwich 442
Stillingfleet v. Sir Harry Parker 451
Stanyon v. Davis 452
Stennil v. Brown 454
Stevenſon v. Nevinſon 459
Stockwell, or Stockhold, v. Colliſon, or Collington 484
Stephens v. Howard, or Houghton 487
Stokes v. Oliver 489
Stanhope v. Smith 500
Staples v. Heydon 515
Stead v. Lateward 570
Stokes v. Oliver 548
Stern v. Bern 550
Stone v. Atwell Ibid.
Stephen, Watſon's Caſe 566
Stead v. Lateward 570
Stamma v. Brown 572
Stevenſon v. Snow 576
Street v. Hopkinſon 583
Standford, or Standfaſt, v. Chamberlaine 584
Staples v. Heydon 589
Street v. Hopkinſon 595
Stanion, or Stanyon, v. Davis, or Davies 597
Stokes, or Stoker, v. Berry, or Berny 614
Story v. Atkins 616
Steward v. Eddy 629
Strutville v. ——— 653
Steed v. Lateward 664
——— v. Layner Ibid.
Stallamberg and Haney, between the Inhabitants of 685
Stibbs v Clough 705
Stoke Prior, Pariſh of, v. the Inhabitants of the Manor of Grafton 708
Stevens v. Evans and others 709
Staples v Heydon 723
——— v. ——— 726
——— v. ——— Ibid.
Stone v. Taverner 729
Street v. Hopkinſon 739
Stephens v. Arthur 750
Starkey v. the Churchwardens of Watlington in Suſſex 755

Page.
Starkup v. Dodderidge 761
Strafford v. Neal 763
Stephenſon v. Sands 764
Stedman v Bates 769
Stevens v. Houghton 771
Stennil v. Brown 773
Stead v Lateward 778
Stout v. Fowler 786
Steward v. Floyd Ibid
Stoteſbury v. Smith 788
Stevens v. Evans and others 790
Stedman v. Page 790
Starr v. Wade 794
Strut v. Hopkinſon 800
Stone v. Lingwood 804
Stroud v. Tilly 809
Strong, on the Demiſe of Cummin, v. Cummin and another 830
Stamper v. Hodſon 837
Stewart v. Smith 838
Stafford v. Beneath 836
Sutton v. Sparrow 75
Summer v. Ferryman 184
——— v. ——— 243
Surman v. Shellato 314
Sulſton v. Norton 357
Sullivan v. Seagrave 396
Sulſton v. Norton 406
Suſſex, Earl of, v. Temple, &c. 443
Sutton v. Moody 499
Surgeon's Company, Caſe of 553
Sutton's Caſe, Marſhal of the Court 607
——— 668
Suddleſcomb, Pariſh of, v. the Pariſh of Burwaſh 677
Sutton's Caſe 747
Suſſex, Earl of, v. Temple, &c. 791
Sutton v. Bryan 309
Sword-Blade Company v. Dempſey 71
Swayne et al'. v. Wallinger 196
——— v. De Mattos 199
Swinſtead v. Lydall 263
Swann v. Broome 341
Sword-Blade Company v. Dempſey 422
Sweetapple v. Goodfellow Ibid.
Swann v. Broome 493
——— v. ——— 597
Swanſcomb, Pariſh of, v. the Pariſh of Shensfield 679
Swinſted, or Swinſtead, v. Smith, or Lyddall 719
Swaine v. Stevens 727
Swales v. Lowther 755
Swann v. Broome 793
Symonds v. Cudmore 12
——— v. ——— 358
Symes v. Symes 389
Symonds v. Cudmore 487
Symſon, Pariſh of, v. the Pariſh of Woughton, in the County of Bucks 604
Symonds v. Cudmore 606
Symmons v. Bingee and Cook 702
Symonds v. Parmenter 741
Symes v. Symes 765

T.

TAYLOR v. Baker 15
Tate v. Whiting 37
Taunton, Borough of 81
Taylor v. Brudon 162
——— v. ——— Ibid.
——— v. Waſteneys 173
——— v. Rains 207
——— v. Jones 274
Tate v. Whiting 334
Taylor's Caſe 339
——— v. Jones 343
——— v. ——— 360
——— on the Demiſe of Atkyns, Eſq; v. Horde, Eſq; and others 361

Page.
Taylor v. Matthews 371
——— on the Demiſe of Atkins, Eſq; v. Horde, Eſq; and others 400
——— v. ——— 424
——— v. ——— 454
——— v. Rains 474
——— on the Demiſe of Atkins, Eſq; v. Hord. Eſq; and others 493
——— v. Reignolds 496
——— v. ——— 505
Taſhmaker v. the Hundred of Edmonton, in the County of Middleſex 518
Taylor v. Griffith 529
——— v. ——— 569
——— v. Matthews 591
Talbot v. Huddie 604
Taylor, on the Demiſe of Atkins, Eſq; v. Horde, and others 610
——— v. Rains 652
——— v. Tregottor 655
Talbot and Boſton, Inhabitants of, Caſe 670
Talbury, Pariſh of, v. the Hamlet of Folſton in Scropton 670
Tarrant v. Haxby 709
Taylor v Jones 720
——— v. Woollen 736
Tarlton v. Wragg 741
Taylor v. Lowe 745
Tarrant v. Haxby 765
Taylor v. Bruden 787
——— v. Jones 788
Taffil and Lee v. Lewis 225
Taylor v. Dobbins 233
——— v. ——— 249
Temple v. Killingworth 20
Tenant v. Golding 34
Templeman v. Caſe 38
Temple v. Killingworth 115
——— v. ——— 315
——— v. ——— 347
——— v. ——— 407
Tenant v. Golding 516
Terremoulin, or Shermoulin, v. Sandys, or Sands 645
Terberville v. Stampe 654
Temple v. Welds 661
Templeman v. Caſe 668
Teuxera, Demater, v. Hooper 719
Templeman v. Caſe 771
Thomas v. Biſhop 44
Thornborough v. Whitacre 34
Thonkin v. Crocker 59
Thornicroſt v. Barns 154
Thrale v. Vaughan 183
Thompſon v. Woods 211
Thompſon v. Pinchell Ibid.
Thomlinſon v. Dighton 212
Thomas v. Biſhop 237
Theed v. Lovell 238
Thornicraft v. Barnes 248
Thomas v. Howell 270
Thorpe v. Thorpe 271
——— v. ——— 275
Thornborough v. Whitacre Ibid.
Thomas v. Powell 313
Thwaits and Wife, &c, v. ——— 320
Theed v. Starkey 325
Thompſon v. Roberts 330
Thomſon v. Southwell 339
Thwaites and Wife, &c. v. ——— 343
Thwaites v. Lady Aſhfield 348
Thorneton v. Bernard 350
Thomas v. Howell 358
Thomlinſon v. Dighton 360
Thonkin v. Crocker 367
Thomas v. Batty 388
Throgmorton, on the Demiſe of Miller, v. Smith and others 397
Thruſtout, on the Demiſe of Turner, v. Gray 398

Page.

Thruſtout, on the Demiſe of Turner, v. Grey, and others 398
——— v. Troubleſome, on the Demiſe of Park and his Wife 399
Thatcher v. Stephenſon 416
Thomlinſon v Dighton 437
Thornley v. Fleetwood, otherwiſe the Dutcheſs of Hamilton's Caſe 437
Thompſon v Leach 443
Thuriſton v. Slatford 447
Thruſtout v. Peak and others 491
Thomlinſon v. Dighton 503
Thomas v. Batty 611
Thompſon v Leach 622
Thorold, Sir Charles, v. Smith 555
Thomas v. Biſhop and others 656
Thackham, Pariſh of, v. the Pariſh of Findon in Suſſex 675
Theobald v. Long 704
Thomee v. Lloyd 721
Thompſon v. Tiller 741
Thomee v. Lloyd 750
Thickboon v. Boat 753
Thompſon v. Leach 766
Theed v. Starkey 789
Thornby v. Fleetwood, otherwiſe the Dutcheſs of Hamilton's Caſe 792
Thermolin v. Cole 793
Thruſtout v. Peak and others 805
Thomas v. Howell 820
Thomlinſon v. Dighton 823
Thomkin v. Crocker 833
Tipping v. Smith 108
Tilly v. Richardſon 181
Tilſden v. Palfriman 350
Tilly v. Richardſon 411
Tilſden v. Palfriman, or Parfriman 429
Title v Grevett 450
Tilly's Caſe Ibid.
Tireman v. Henwell 463
Tilney v. Norris 472
Tipping v. Cozens 488
——— v. ——— 548
Timber v. Gardiner 712
Tindale v. Gwynne 809
Tottage v. Pettey 122
Toms et al'. v. Mytton 196
Tod v. Stokes, or Stoakes 205
Todd and Wife v. Radford 212
Tomkins v. Pincent 247
Toler's Caſe 281
Toms, or Thomas v. Lloyd 304
Toddard v. Middleton 321
Todd and Wife v. Redford 334
Tooker v. the Duke of Beaufort 468
Towers v. Sir John Oſborne 498
Tonge v. Watts 573
Tomkin v. Crocker 643
Tonge v. Watts 651
Topſham, Churchwarden's Caſe 673
Townſend v. Thorpe 707
Tomlin v. Purlis 740
Tomkins v. Hill 797
Townſend v. Duppa and others 808
Tomlinſon v. Dighton 818
Touchin's Caſe 834
Townſend v. Thorpe 763
——— v. ——— 388
Tooker v. the Duke of Beaufort 596
Trelawney, Sir John, Bart. v. the Biſhop of Winchester 504
Trevanion v. Tooker 59
Truſcott v. Carpenter and Man 120
Trevanion's Caſe 142
Trevilian v. Pyne 188
Tryon v. Carter 273
Tregany v. Fletcher 315
Truſcott v. Carpenter and Man 316
Tracy v. Talbot 376
Trinder v. Watſon and another 426
Truelock v. Hartfield 471
Trevilian v. Andrew 471
Trail v. Edwards 476

Page.

Trevivan, or Treviban, v. Lawrence and others 476
Trobridge, Pariſhioners of, v. Weſton 600
Trevillian v. Andrews 606
Tranſer, or Tranter, v. Watſon 648
Trelawney, Sir John, Bart. v. the Biſhop of Wincheſter 669
Trowbridge, Pariſh of, v. the Pariſh of Weſton 670
Tracy v. Talbot 680
Trevivan, or Treviban, v. Lawrence and others 727
Trepaud v. Mercer 742
Triquet and others v. Bath; Peach and another v. Bath 754
Trantor, or Tranbut, v. Duggan 756
——— v. Watſon 761
Trevivan, or Treviban, v. Lawrence and others 777
Tregany v. Fletcher 805
Trelawny, Sir John, v. the Biſhop of Wincheſter 389
Trial on the Cuſtom of the Manor of Bray 441
Turbervil v. Stamp 22
Turner v, Brent 23
Tuke, Sir George's Caſe 26
Tutty v. Alewin 37
Tulley v. the Bail of Vavaſor 64
Turvil v. Aynſworth 69
Turner v. Goodwin 129
Turton v. Prior 142
——— v. Hayes 166
Turner v. Warren 172
——— v. Schomberg 173
Tucker v. Goldburne 186
Tully, James, v. Francis Sparks and Christopher May, Executors of William Donaldſon 196
Tudway v. Bourn 201
Turner v. Goodwin 244
——— v. Hawkins Ibid.
Tully, James, v. Francis Sparks and Chriſtopher May, Executors of William Donaldſon 245
Turner v. Criſp Ibid.
——— v. Goodwin 272
Tuke, Sir George's Caſe 275
Turner v. Goodwin 324
——— v. Maine 344
Tucker v. Goldburne 353
Turner v. Turner 364
——— v. ——— 371
Turton v. Reignolds 384
Turner v. Barnaby 393
Tufton, Eſq; v. Nevinſon, Mayor of Appleby in Weſtmoreland 404
Turner v. Moſſe 420
——— v. Nurſe 451
——— v. Triſby 549
——— v. Moſſe 593
——— v. Burnaby 598
——— v. Maine 662
Tudy v. Padſtow 672
Tulby, Pariſh of, v. the Pariſh of Willerton 684
Turner v. Goodwin 729
——— v. Beale 747
Turton v. Reiner 759
Tucker v. Towell 764
Turner v. Barnaby 767
Tully's Caſe 774
Turner v. Turner 788
Tuckerman v. Jefferies 792
Turbervil v. Stamp 794
Turner v. Barnaby 796
——— v. Goodwin 805
——— v. Main 810
Tuckerman v. Jefferies 823
Turner v. Turner 825
——— et al'. v. Mead et al'. 233
Tuberville v. Stampe 654

Page.

Tyſon v. Hilliard 413
Tyley v. Cowling 449
Tybbald v. Tregott 454
Tyſon v. Paſke 485

U.

VANDEPUT v. Lord 147
Vaus v. Hall 187
Vaughan v. Fuller 239
Valentine v. Fawcett 337
Vaux v. Mainwaring 345
Vaſper, Vaſpor, or Jaſper, v. Eddows, Eddowes, or Edwards 375
Vaughan v. Brown 481
Vandeput v. Lord 520
Valentine v. Fawcett 570
Vaughan v. Lucking 580
——— v. Evans 598
——— v. the Company of Gunmakers in London 629
Vaſper v. Edwards 723
Vanhatton v. Monſe 724
Vaughan v. Evans 763
——— v. Norris 772
Valentine v. Fawcett 800
Veſey v. Smith 2
——— v. ——— 207
Vernon et al'. v. Jefferys 582
Verney v. Fox 737
Veſey v. Smith 807
Vergen, Peter, Bail of, Caſe 173
Ven v. Phillips 333
Vivian v. Campion 248
Vice v. Burton 355
Vintner's Company, Maſter, &c. of, v. Paſſey 300
Vivian v. Champion 334
Vintner's Company, Maſter, &c. of, v. Paſſey 357
Vivian v. Champion 359
Vintner's Company, Maſter, &c. of, v. Paſſey 365
Vincent v. Atwood 367
——— v. Beſton, or Preſton 369
Vinkeſtone, Vinkenſterne, or Winkeſline, v. Ebden 374
Victorin v. Cleeve 573
Vincent v. Preſton 586
Vintner's Company v. Clarke 618
——— Maſter, &c. of, v. Paſſey 664
Vincent v. Betſon, or Preſton 724
Vicars v. Worth 763
Underhill v. Durham 391
Unwin v. Kirchoffe 749
Underwood v. Parks 467
Uſher's Caſe 628
Uſury, Determinations thereon 816

W.

WALDEN v. Holman 4
Warner v. Sir Edward Irby 5
Wallis v. Wood 14
Walſmely v. Ruſſell 31
Walter v. Laughton 40
Walker v. Slackoe 57
——— qui tam v. Laughton 65
Walgrave v. Taylor 84
Waldron, Henry, a Clerk in the Crown Office, Caſe of 146
Wate, v. Briggs, Marſhal 149
Ward v. Bendall 159
Watts v. ——— 160
Waller's Caſe 168
Walrand, Sir John, v. Jacob, Henricus Van Moſes, ſenior 170
Walrand v. Franſham 173
Watſon's, Dr.'s Caſe 177
Watkins v. Parry 186

Page.
Watkins v. Marſh 186
——— v. Harris 187
Walton, Aſſignee, &c. v. Bent 188
Warr v. Huntley 210
Ward v. Sir Peter Evans 229
Walker v. Atwood 231
Wall v. Grovet 242
Wangford, Legatee of Shelly, v. Wangford, Debtor and Executor to Shelly Ibid.
Walker v. Perkins, Adminiſtrator, &c. 246
Watſon, Dr.'s Caſe 254
Walker v. Walker 274
Waters v. Glaſſop 274
Wallis v. Scott 275
Wannel v. the Chamberlaine, &c. of the City of London 297
Watſon, Dr 's Caſe 306
Walker v. Robinſon 312
——— v. Atwood 329
Watſon v. Huddleſton 339
Walgrave, or Hargrave, v. Taylor 339
Walker v. Walker 342
Wangford, Legatee of Shelly, v. Wangford, Debtor and Executor to Shelly 344
——— v. ——— 350
Walker qui tam v. Laughton 352
Wallis v. Smith 356
Walwin v. Smith 368
Walter, or Walker, v. Rumball, or Rumbald 374
Waples v. Baſſet 381
Waddy v. Newton 396
Walker v. Slackoe 408
Watſon v. Huddleſton 411
Waller's Caſe 419
Walmſley v. Roſon 424
Wate, or Waytes, v. Briggs 427
Watſon v. Sutton 428
Warſopp v. Abell 433
Watſon v. Sparks 452
Walrond, Sir John, v. Jacob, Henricus Van Moſes, ſenior 460
Wariner v Giles 462
Wakefield's Caſe 465
Warren, on the Demiſe of Webb and Greenville 466
Walker v. Kearney Ibid.
Wate v. Briggs 470
Wangford, Legatee of Shelly, v. Wangford, Debtor and Executor to Shelly 475
Wallis v. Lewis 476
Waring v. Duberry, or Newman 479
Warrington v. Moſeley 483
Warren, on the Demiſe of Webb, v. Greenville 492
Waddy v. Newton Ibid.
Watkins v. Perkins 497
Walker v. Walker 500
Warren v. Matthews 515
Walwin v Smith 519
Watſon, Stephen's Caſe 566
Waples v. Eames 573
Walwin v. Smith 583
Walker v. Humphry 587
Waller's Caſe 592
Watkins v. Hanbury 596
Walton, Pariſh of, v. the Pariſh of Cheſterfield 600
Wannel v. the Chamberlain of the City of London 622
Watſon, Dr.'s Caſe 629
Walker, Dr.'s Caſe 638
Warrington v. Moſeley 643
Wayland, Sir Robert's Caſe 654
Ward v. Evans 655
Ward v. Apprice 657
Ware, Inhabitants of, v. the Pariſh of Stanſtead Mount-Fitchet 676
Watford, Pariſh of, v. the Pariſh of Wendover 677

Page.
Warminſter, Inhabitants of, v. Leiceſter 663
Ware, Inhabitants of, Caſe 683
Wainwright v. Bagſhaw 708
Ward v. Evans 712
Waytes v. Briggs 717
Watts, or Weſt, v. Weſt 722
Watts v. Roſewell 725
Watkins v. Parry 731
Warren v. Confett 733
——— v. Ivie 737
Watkins v. Hanbury 749
Wate v. Briggs, Marſhal 766
Ward v. Everard, or Everets 769
Watts v. ——— 773
Warminſter and Leiceſter, Inhabitants of, Caſe 781
Ward v. Everard, or Everits 791
Waterman v. Soper 792
Watſon v. Sutton 796
Warren v. Fuzz 797
Way v. Yally Ibid.
——— v. ——— 807
Wall v. Dukes 810
Warneford v. Warneford 826
Walter v. Warren 116
Weſt v. Sutton 11
Wentworth, Sir William, v. the Counteſs of Strafford 57
Weſt v. Weſt 59
Wegerſoffe v. Keene 233
Weldon v. Buckler 68
Weſton v. Maſon, and Weſton v. Chapman 119
——— v. Pool 146
Wells v. Oſmond 163
Webſter v. Gearing 168
Weddal v. the Bail of Jocar 182
Weſtbury, Pariſh of, and Coſtham, or Corſham 220
Wegerſloffe v. Keene 223
Welſh v. Craig 235
Wells v. Ferguſon 272
Weddal v. the Bail of Jocar Ibid.
Weſt v. Cole 274
Weſtminſter, Coroner of, Caſe 289
Weavers' Company, qui tam, &c. v. Forreſt and four others, on ſeparate Actions 300
Welden v. Buckler 309
Weſt v. Cole 331
Welſh v Craig 347
Weſt v. Troles 348
Webſter v. Gearing 354
Weldon v. Buckler 365
Webly v. Palmer 366
Weeks v. Peach 370
Webb v. Thompſon 431
Weſt v. Chamberlain 448
Wetſon v. James 478
Weldon v. Buckler, or Buckland 520
Weddall v. the Bail of Jocar 582
Weſterne v. Creſwick 583
Weſtbrook et al'. v. Andrews 589
Weddall v. the Bail of Jocar 591
Weſton v. Maſon, and Weſton v. Chapman 597
Wells v. Oſman, or Oſmond 648
Weller v. Goyton and Walker 661
Weſtbury, Pariſh of, v. Coſton 680
Weſtwood, Inhabitants of, v. ——— 684
Weſtwood-Hay, Inhabitants of, Caſe 685
Weavers' Company, qui tam, v. Forreſt, and four others, on ſeparate Actions 705
Weobly, Overſeers of, Caſe 709
Weſt v. Sutton 725
Weltale v. Glover 729
Weddal v. the Bail of Jocar 729
Weſton v. Eales 739
Webb v. Holt 741
——— v. Turner 739

Page.
Weavers' Company qui tam, &c. v. Forreſt and four others, on ſeparate Actions 741
Weſton v. Maſon. The ſame v. Chapman 743
Weſtbury Pariſh, Inhabitants of, in the County of Wilts, v. the Inhabitants of Coſtham 744
Weymouth v. Collins 760
Weldon v. Buckler 771
Weddal v. the Bail of Jocar 777
Weſton v. Maſon. The ſame v. Chapman 788
Weddall v. the Bail of Jocar 836
Weavers' Company qui tam v. Forreſt 839
Wells v. Ferguſon 243
Weaver v. Boroughs 276
Weſtham, Pariſh of, v. the Pariſh of Chiddingſtone 688
White v. Mullony 54
White v. England 86
Whitley, Inhabitants of, v. Theerſlay 88
Whitley v. Loftus 91
Whetherborn v. Wright 166
White v. Eldridge and his wife 207
Wharton, Lord, v. Sir John Robinſon 242
Whitley v. Loftus 245
White Waltham, Pariſh of, v. the Pariſh of New Windſor 250
White v. Cleaver 273
——— v. Bodinam 323
Whitley v. Loftus 325
White v. Martin 338
Whitlock v. Humphreys 341
White v. Graham 355
Wilkins v. Perry and Salter, Sheriffs of London 356
Whilkard, Aſſignee, &c. v. Wildon 357
White v. Cleaver 365
Whittingham v. Andrews 390
Wharod v. Smart 403
Wharton, Lord, v. Sir John Robinſon 450
Whitehal v. Squire 469
White v. Haugh 485
——— v. England 522
Whywall v. Champion 550
Wharton v. Richardſon 595
White's Caſe 629
Wheeler v. Thompſon 650
Whitlock v. Humphries 664
White Waltham, Pariſh of, v. the Pariſh of New Windſor 685
Whaddington, Pariſh of, v. the Pariſh of Tedford, in Lincolnſhire 690
White v. the Earl of Montgomery 705
——— v. Cleaver 735
Wheely v. Richards 750
Wharton v. Pitts 755
——— v. Richardſon, widow 778
White v. Graham 804
Wharton, Lord, v. Sir John Robinſon 815
White v. Clever 367
Wharod v. Smart 426
Whitehead v. Barber 663
Whelpdale v. Atkinſon 736
Williams v. Drury 2
Wickett and Foot v. Cremer 12
Williams v. Farrow 14
Wilkin v. Wilkin 16
Williams v. Hoſkins 63
Wilmot v. the Chancellor of Worceſter 64
Wilſon v. Gary 32
Withers v. Baker 64
Wilkinſon v. Mayer 68
Willer v. Handy 73
Wilſon v. Law 75
Wilmott v. Tyler 78

Page.
Widdrington v. Charleton 80
Wilſon v. Law 83
Winter v. Garlick 102
Wilſon v. Tucker 110
——— v. Gary 112
Williams v. Jones and others 114
——— v. ——— 121
——— v. Lyons 137
Withers v. Harris 141
Wigg v. Rook and Wife 142
Wiar v. Smith 144
Williams v. Williams 158
——— v. Carey 20
——— v. Batter 159
Wild v. Harding 168
Wilbraham v. Doley 181
Wilſon v. Poulton 188
——— v. ——— 197
Wickes v. Strahan 199
Wilſon v. Day 201
Wittingham v. Broderick 208
Withers v. Kelſey 211
Windham, Eſq; v. Chetwynd, Eſq. 218
Williams v. Field 225
Windham v. Wither. Idem v. Trill 234
Wilkinſon v. Lutwidge 235
Willett v. Tiddy 303
Wilkins v. Mitchell 316
Wilkinſon v. Meyer 324
Windle v. the Hundred of Chelmsford 332
Wilſon v. Guttery 338
Wilkinſon v. Kitchin 343
Wingfield v. Jefferys 348
Wiat qui tam v. Ayland 350
Willet v. Boſcomb 351
Withers v. Baker Ibid.
Windham v. Palgrave 353
Wilkinſon v. Mere Ibid.
Wiat, or Wyat, v. Effington 355
Winchelſea, County of, v. Lady Maidſtone 358
Wilſon v. Law 363
Widdrington v. Charleton 365
White v. Clever 367
Widdrington v. Charleton 371
Wilmot v. Tiler 384
Withers v. Harris 392
Williams v. Hoſkins 394
Wilſon v. Law 408
Winchurſt v. Maſely Ibid.
Wicket and Foot v. Cremer 409
Wilbraham v. Doyley 410
Wilſon v. Ingoldſon 414
Wilkinſon v. Tireman Ibid.
——— v. Meyer 419
Williams v. Cray 427
Wilkinſon v. Matthews 431
Witting v. Goad Ibid.
Wilkinſon v. Salter and Perry, Sheriffs of London Ibid.
Wightman v. Mullens 432
Winter v. Lovedore, Lovedure, or Loveden; or Loveday v. Winter 434
Wilkinſon v. Tireman 549
Wilſon v. Gary 451
——— v Poulter 461
Witherington v. Buckland 463
Wilſon v. Rogers et al'. 467
Williams v. Crey, or Carey 470
Winchurch v. Belwood 487
Winchurſt v. Maſeley 488
Wilbraham v Poley 496
——— v. Lownds Ibid.
Williams v. Saliſbury 519
——— v. Harriſon 548
Wigmore v. Alvarez 550
Wilſon v. Ducket 577
Wilſon and another v. Smith 578
Wittingham v. Broderick 589
Withers v. Harris Ibid
Winter v. Lightbound 591

Page.
Windham v. Wither 592
Wilſon v Machin 593
Wild v. Sands 594
Wilford v. Berkeley 599
Winter v. Lovedore, Lovedurr, or Loveden; or Loveday v. Winter 606
Williams v. Gunn 616
Wilcock, or Wilcox, v. Huggins 617
Withers v. Warner 620
Wilkins v Mitchell 627
Wigan, Rector of, Caſe 639
Winter v. Lovedore, Lovedure, or Loveden; or Loveday v. Winter 643
Wilſon v. Bird 645
Wiggan v. Branthwaite 646
Wiggins v. Ingleton 648
Wigmore's Caſe 653
Williams v. Jackſon 663
Wingham, Pariſh of, v. the Pariſh of Sellindge in Kent 692
Winter v. Slow 744
Wilbraham v. Doyley, or Doley 701
——— v Doyley 702
Wigmore v. Veal 718
Wilkins v. Brown 740
Winter v. Slow 745
Willimot v. the Chancellor of Worceſter 744
Willing v. Goad 748
Willis v. Batterſhell 750
Wilbraham v. Lownds Ibid.
Windmil v. Cuthing 752
Wigmore v Alvariz 753
Wigley v. Morgan, one, &c. 754
Wickham v Hobart Ibid.
Wilſon, Clerk, v Greaves 765
Wilcocks, the Attorney's Caſe 773
Withers v Harris 776
Wiſport and Brentford, Wilts, Inhabitants of, Caſe 779
Williams, Executor of Melliſh, v. Cary, Under-Sheriff of Wilts 786
Wilſon v Aldridge 787
Wiat v. Winkford 799
Wits v. Polehampton 794
Wilkinſon v Poole 799
Wilſon v. Law 806
Wigly v. Morgan, one, &c. 809
Wilford v. Berkeley 813
Wilſon v. Law 815
Winter v. Lovedore, Lovedurr, or Loveden; or Loveday v. Winter 817
Windham, Eſq; v. Chetwynd, Eſq; 830
Wilſon v. Law 833
Witty v. Polehampton Ibid.
Wilmot v. Taylor 834
Williams v. Jackſon 835
Widdrington v. Charleton 836
Williams v. Green 346
Wilkins v. Perry and Salter, Sheriffs of London 351
Wincheſter, Biſhop of, v. Cook 736
William v. Browne 827
Wilkinſon v. Meyer 837
Wilſon v. Aldridge 838
Worceſter, Biſhop of, Caſe 56
Wood v. Branford 60
——— v. Shepherd 115
Woodward v. Marſhall 128
Woodin v. Colledge 138
Wood v. Shepherd 163
Woolley and others v. Cobbe and others, Bail of Cobbe, a Bankrupt 173
Worſeley and another, Aſſignees of Richard Slader, a Bankrupt, v. De Mattos and Slader 319
Woodyer v. Greſham 205
Wood's Caſe 219
Woolvil v. Young et al'. 226
Woodcock v. Morgan 243
Woolſton v. Slater 267

Page.
Woadſon v. Nawton 268
Woodford v. Eades et al'. 334
Wood v. Branford 364
Woodward v. Robinſon 372
Wood v. Branford 379
Worral v. Bent and others 397
Wooldridge v. Cloberry 406
Wood v. Branford 412
Worral v. Bent and others 421
Wolfe v. Daviſon 427
Wood v. Drury 449
Woolaſton v. Walker 481
Worſeley and another, Aſſignees of Richard Slader, a Bankrupt, v. De Mattos and Slader 498
Woodright, or Goodright, v. Wright 513
Woodford v. Eades et al'. 569
Woolmer and another v. Muilman 577
Wolfe v. Daviſon 584
Worley v. ——— 586
Wood v. Shepherd 590
Wolverton, Pariſh of, v. Salden 677
Wolfe v. Daviſon 701
Worley v ——— 715
Woodward v. Cliff Ibid.
Worley v. ——— 722
Wood v. Sutton 725
Woolley v. Briſcoe 733
Worley v. ——— 767
Wookey, Pariſh of, v. the Pariſh of Hinton Blewet 781
Woodright, or Goodright, v. Wright 824
Worley v. Glover 838
Woodward v. Makepeace 380
Wood v. Ridge and others 738
Wright v. Crump 133
Wrotham Pariſh v. the Pariſh of St. Olave 137
Wright v. Maſon 144
——— v. Kitchingman 166
——— v. Crump 317
Wray v. Liſter 337
Wright, on the Demiſe of Plowden, Eſq; v. Cartwright 361
——— v. Sharp 452
——— on the Demiſe of William Clymer, v. Littler and others 468
——— v. Sharpe 631
——— v. Penn 737
——— v. Wilſon 706
Wray v. Liſter 769
Wrotham Pariſh v. the Pariſh of St. Olave 782
Wright v. Hammond 824
Wyvil v Stapleton. Shelburne v. Eundem 16
Wynne v. Middleton 73
Wyat v. Effington 118
——— v. Winkford 137
Wyatt v. Evans 158
Wyat v. Winkford, or Winkworth 282
Wyvil v. Stapleton 309
——— v. ——— Shelburne v. Eundem 325
——— v. ——— 354
——— v. ——— 420
Wyatt v. Winkworth 461
Wyvil v. Stapleton. Shelburne v. Eundem 504
Wyvil v. Stapleton 735
Wyat v. Winkford 799
Wyatt qui tam v. Eyland 61

Y.

YARMOUTH, Earl of, v. Ruſſell 142
Yard v. Bllard, or Eland 274
Yates v. Boen 465

Page.
Yates v. Herlakender 719
Yarmouth, Earl of, v. Ruſſell 835
Yard v. Ellard, or Eland 205
Yates v. Boen 624
Yeoman v. Bradſhaw 226
——— v. Bradſhaw 471
Yea, Sir William, v. Fouraker 618
Yeo v. Leman 789
Young v. Rudd 15
Yoxen v. Burnet 27
Young v. Slaughterford 38
—— v. ——— 80

Page.
Young v. Slaughterford 116
—— v. ——— 121
Yeoman v. Bradſhaw 226
Young v. Slaughterford 453
—— v. Holmes 479
Yoxley's Caſe 505
Young v. ——— 514
York v. Grindſtone, or Greenough 567
—— v. Grenaugh 589
Young v. Rudd 718
—— v. Holmes 824
York v. Greenough 249

Page.
Z.

ZOUCH, on the Demiſe of Abbott and Hallet, v. Parſons 361
Zouch, on the Demiſe of Abbott and Hallet, v Parſons 551
—— on the Demiſe of Abbott and Hallet, v. Parſons 743

FINIS.

THE Proprietors of this Work beg leave to inform their Subſcribers, that from the very great Encouragement they have met with, they have been induced to prepare a *Digeſt of Adjudged Caſes in the Common Pleas*, and alſo *in the High Court of Chancery*, on the ſame Plan and Manner as that in the *King's Bench*, which will be publiſhed with all poſſible Expedition.

LINCOLN'S INN,
June 1ſt, 1775.